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THE CRIMINAL LIABILITY OF AVIATORS AND RELATED ISSUES OF MIXED CRIMINAL-CIVIL LITIGATION: "A VENTURE IN THE TWILIGHT ZONE"

Phillip J. Kolczynski

I. The "Twilight Zone" Accident

On July 23, 1982, at approximately 2:20 A.M. PDT, a Bell UH-1B helicopter crashed in Valencia, California, just north of the San Fernando Valley.1 Actor Vic Morrow and two child actors died in the accident.2 The crash occurred during the filming of the Warner Brothers production of "Twilight Zone: The Movie," directed by John

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1. N.T.S.B. Aircraft Accident Report (AAR-84/02) 1.
2. Id. at 5.
Landis, Steven Spielberg, George Miller, and Joe Dante.\textsuperscript{3}

The movie, a cinematic statement against bigotry, included a scene recreating a nighttime heavy ordnance attack against a Vietnamese village.\textsuperscript{4} The crash occurred during the filming of this scene. The “Huey” was being used as a camera, machine gun, and spotlight platform as well as playing an active role in the film. The pilot, Dorcey Wingo, Director of Operations for Western Helicopter Corp., in Rialto, California, had been hired by the movie production staff to fly these sequences.\textsuperscript{5}

The story line called for Morrow, in the role of a drunken bigot, to wander into a different “dimension of sight, sound and mind” where he experienced himself being hunted as a jew by Nazis, as a black man by the Ku Klux Klan, and in the accident scene, as an American soldier in Vietnam mistaken for a Viet Cong during a nighttime helicopter strafing attack on a village. The accident scene involved a helicopter flying along a river and slowing to a hover approximately twenty-five feet over the river adjacent to the village while a machine gunner shot into the village.\textsuperscript{6} As the scene unfolded, Vic Morrow waved to the Huey, as if he initially believed it to be friendly. When he realized that those aboard the helicopter had mistaken him for a Viet Cong, he picked up two Vietnamese children, played by a six year old Chinese girl and a seven year old Vietnamese boy, and attempted to flee across the river carrying the children.\textsuperscript{7} As the actor waded into the river, simulated explosions started to go off in the village and the hovering helicopter performed a slow pedal turn, allowing the film unit production coordinator to keep the spotlight focused on the fleeing actor.

The accident occurred when a special-effects device made up of a mixture of gasoline and sawdust failed to
detonate on the ground, but was propelled instead into the air where it erupted into a fireball and engulfed the tail section of the helicopter. The National Transportation Safety Board ("NTSB") determined that heat from the fireball or the debris from the explosion caused the tail rotor assembly to separate from the tail boom, and caused the Huey to go into wild gyrations as it descended out of control. The special-effects technician who detonated the accident-causing charge told the NTSB and the grand jury, while testifying under a grant of immunity, that he paid attention only to the location of the actors and not the helicopter when he fired the charges.

The death of Vic Morrow and the involvement of well-known director John Landis contributed to the accident becoming a media event. Criminal charges of involuntary manslaughter have been filed against the director, assistant director, unit production coordinator, special-effects coordinator, and the pilot. Additional charges of child endangerment and conspiracy have focused solely on the movie production people.

The FAA has begun an administrative enforcement action to revoke the pilot's license. The Occupational Safety and Health Agency (OSHA) for the State of California has filed charges against the organizations involved. Wrongful death actions have been filed against all parties on behalf of the decedents and insurance companies are trying to unravel the complicated coverage provided to Warner Brothers and Western Helicopters. Against this backdrop of overlapping criminal-civil-ad-
ministrative litigation, this article will analyze the standards by which aviators may be held criminally liable and the cross-over issues involved in such multi-faceted litigation.

II. THE TREND TO PROSECUTE AVIATORS

Over the past several years, a growing trend to prosecute aviators for criminal offenses has become apparent. The trend is part of a greater movement to hold professionals and corporations criminally accountable for their unintentional but allegedly criminal conduct. Professionals and corporations have never been immune from criminal culpability based on their status alone, and the willingness of society to assess criminal penalties is on the rise.

The most famous criminal prosecution of a corporation may have been *Indiana v. Ford Motor Co.*, where the state prosecuted the car company for the unintentional deaths of three girls who were killed while riding in a Ford Pinto. The girls died when the gasoline tank in their car exploded after a van, which sustained virtually no damage, struck the rear of the Pinto. Documents in the custody of Ford supposedly indicated that company management knew of the possibility that Pintos might explode if struck from behind, but chose to forego the necessary corrections and expenditures that would have made the car safer. Ford Motor Corporation was prosecuted for reckless homicide, but the state could not persuade the jury and Ford was acquitted.

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16 No. 11-431 (Ind. Sup. Ct. 1980).
17 Id. The state sought indictments against Ford executives as well as the corporation itself, but the grand jury returned only the single indictment against Ford. Id.
The Indiana v. Ford case illustrates a growing willingness of the state to prosecute corporations and professionals. This willingness has been recognized by legal scholars,\(^ {19}\) by the general public,\(^ {20}\) and by executives and professionals themselves.\(^ {21}\) Legislators, by enacting laws which hold corporate officials strictly liable for a variety of wrongs, further reflect this trend.\(^ {22}\) With respect to aviation professionals, the willingness of governments to prosecute after an accident has increased more rapidly abroad than it has domestically.\(^ {23}\)


\(^{21}\) See, e.g., How Lawless Are Big Companies?, FORTUNE, Dec. 1, 1980, at 56. A survey of 1,043 corporations revealed that 117 companies were held criminally liable for committing 168 offenses in areas such as bribery, including kickbacks and illegal rebates, criminal fraud, illegal political contributions, tax evasion, and criminal anti-trust violations. Each of the cases were disposed of by guilty verdicts, guilty or nolo contendere pleas, or consent decrees. Id.

\(^{22}\) Brickey, Criminal Liability of Corporate Officers for Strict Liability Offenses - Another View, 35 VAND. L. REV. 1337, 1338 (1982).

\(^{23}\) In 1956, a French DC-6 crashed prior to its scheduled landing at Cairo Airport, and fifty-two persons were killed. Despite his resulting conviction for involuntary homicide, the pilot was fined only 5,000 francs.

In 1964, the pilot of a TWA Boeing 707 was charged with criminal negligence when his plane overshot a runway in Rome after an aborted takeoff which killed forty-five people. The defendant pilot was eventually exonerated.

A Boeing 727 crashed on approach to the Taipei International Airport, Taiwan in 1968, killing twenty-four people. Taiwanese authorities charged the pilot and a crew member with manslaughter, and charged the pilot alone with professional negligence. An accident board concluded that the accident had resulted from the negligence of the pilot and a crew member. They were committed to prison, but a criminal court later acquitted them and they were released from custody.

In 1976, a British Airways Trident 3 and an Inex-Adria McDonnell-Douglas DC-9 were involved in a mid-air collision which killed 176 people. Eight Yugoslavian air traffic controllers were tried for criminal negligence. One was found guilty and served two and a half years in prison.

In 1983, a Swissair first officer and captain were sentenced to two years and four years, respectively, for manslaughter, criminal negligence, and interruption of air traffic following a 1979 accident in Athens, Greece, in which fourteen people died. The crash occurred when a DC-8 jetliner went off the runway and caught fire during a tricky night landing in the rain. Despite extenuating circumstances suggesting contributory fault by the airport, the airmen were sentenced to prison. Recently, each man's punishment was reduced from imprisonment to a fine. See Van Wijk, Criminal Liability of Pilots Following an Airline Accident: A History of the Issue Within the International Federation of Air Line Pilots' Associations (IFALPA), 9 AIR L. 66,
In the United States, there is a dearth of reported cases of criminal prosecutions of aviators.\textsuperscript{24} Of the cases reported, all but one involved at least one death and were prosecuted under state manslaughter or negligent homicide laws. Although most states have some statute that prohibits reckless flying,\textsuperscript{25} there are few reported cases re-

\textsuperscript{24} Perhaps there are few reported homicide prosecutions of pilots because, when one considers their seating positions, pilots are usually the first ones to pay for their mistakes.

\textsuperscript{25} Most states have either adopted the language of the Uniform State Law for Aeronautics or some comparable variation thereof. Arizona’s statute is representative:

\begin{itemize}
\item[A.] An aeronaut or passenger who, while in flight over a densely inhabited area or over a public gathering within this state, engages in trick or acrobatic flying, or in any acrobatic feat, or, except while in landing or taking off, flies at such a low level as to endanger persons on the surface beneath, or drops any object except loose water, loose sand ballast or loose sheets of paper, is guilty of a class 1 misdemeanor.
\item[B.] No person may operate an aircraft in the air, or on the ground or water while under the influence of intoxicating liquor, narcotics or other drug, nor operate an aircraft in the air, or on the ground or water in a careless or reckless manner so as to endanger the life or property of another. In determining whether the operation was careless or reckless, the court shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. Any person violating any provision of this subsection is guilty of a class 1 misdemeanor.
\end{itemize}

\textsuperscript{66-68} (1984); Jones, Criminal Prosecution of Civil Airmen Following Aircraft Accident: A Dangerous Trend, 1 AIR & SPACE LAW. 8 (1984) [hereinafter “Jones”].
flecting prosecution of a pilot under such a law.\textsuperscript{26}

The first reported case of the prosecution of an aviator was the 1927 case of \textit{People v. Crossan}.\textsuperscript{27} The defendant was convicted of involuntary manslaughter when the airplane that he operated struck and killed two girls.\textsuperscript{28} Crossan flew along a California beach at an altitude estimated to be between forty and one hundred fifty feet.\textsuperscript{29} When his engine quit, he initially tried to land on the sand, but there were too many people in the area. When he attempted to turn toward the ocean, he lost control in the brisk onshore wind and came down on the sunbathers. The appellate court reversed Crossan’s conviction because the trial court improperly admitted evidence that the defendant had previously been involved in several instances of dangerous low-altitude flying.\textsuperscript{30} In addition to creating unfair prejudice, the prior conduct evidence was unnecessary since eyewitnesses testified about the conduct of the defendant at the time of the accident.\textsuperscript{31} Although the appellate court overturned the defendant’s conviction, it expressly approved the jury instruction which recited the statutory requirements for manslaughter.\textsuperscript{32}

\textsuperscript{26} \textit{Jones}, \textit{supra} note 23, at 9.


\textsuperscript{28} 261 P. at 532.

\textsuperscript{29} \textit{Id}. at 534.

\textsuperscript{30} \textit{Id}. at 534-36.

\textsuperscript{31} \textit{Id}. at 532-33. California’s manslaughter statute in effect at the time provided that one could be guilty of manslaughter from “the commission of a lawful act
In 1929, New York City authorities charged a pilot with manslaughter when he ran out of fuel and attempted a forced water landing near Coney Island.\(^3\) Despite the efforts of the pilot, the plane ran up on the beach where it struck and killed a young girl. The court granted the defendant's motion to dismiss the complaint because the prosecution had failed to make out a prima facie case of culpable negligence.\(^4\)

The holding in the 1951 case of *Maryland v. Chapman*\(^5\) raises questions about prosecutorial discretion. The defendant, an Air Force officer\(^6\) and experienced pilot, was flying a B-25 normally used for training flights. The pilot and flight engineer were responsible for testing an aircraft that had just been repaired to correct faulty landing gear. During the flight, the pilot discovered that the landing gear would not extend despite several attempts to lower it. After ruling out an attempt to crash land the plane, the pilot's superiors instructed him to pass over the air field

\[\text{CAL. PENAL CODE § 192 (2) (1872) (amended 1945).}\]

The court approved the trial court's instruction which charged the jury that if it found that operating an airplane might produce death, and that the defendant operated the airplane without due caution and circumspection, the defendant must be found guilty. The court held that the instruction was proper even though the trial court did not define the term "due caution and circumspection." 261 P. at 533.

At least four states have reckless flying statutes which can convict an aviator for operation of an aircraft "without due caution and circumspection." See, e.g., *Mich. Comp. Laws Ann. § 259.180* (West 1977).

\[\text{People v. Alexander, 1929 U.S. Av. Rep. 56 (City Magistrate's Ct. of N.Y. 1929).}\]

The trial judge granted the defendant's motion to dismiss after listening to the testimony of the defendant and taking a demonstration flight during which the episode was recreated. The defendant's testimony tended to show that everything possible was done to avoid the accident. The judge seemed to be impressed both with the good faith of the defendant and with the flight demonstration, and concluded that a finding of culpable negligence was not warranted where the pilot did his best to avoid the accident.

\[\text{Id.}\]

\[\text{101 F. Supp. 335 (D. Md. 1951).}\]

\[\text{After indictment by the Prince George's County, Maryland grand jury, the case was removed to federal district court because the defendant was an Air Force officer acting in the course and scope of his employment at the time of the incident. Id. at 337.}\]
CRIMINAL LIABILITY

(Andrews Field) and have the co-pilot and engineer bail out. Pursuant to instructions, the pilot made a final pass over the airfield headed in the direction of the Chesapeake Bay and bailed out while over the field. Jet planes were to follow the unmanned B-25 to the bay where they would shoot it down. Shortly after the pilot bailed out, however, the plane unexpectedly circled to the left and crashed into a house killing three people.\(^\text{37}\)

In the ensuing trial, the court determined that the only applicable manslaughter statute dealt with vehicular manslaughter and found the defendant not guilty.\(^\text{38}\) The prosecutor failed to prove criminal negligence which required a showing of gross negligence beyond a reasonable doubt.\(^\text{39}\) The court distinguished simple negligence, which could support a civil verdict, from the gross negligence required for a criminal conviction.\(^\text{40}\)

In \textit{State v. Bahl}\(^\text{41}\) the defendant pilot and his passenger decided to go for an airplane ride after spending the afternoon visiting taverns.\(^\text{42}\) The pilot made several low altitude passes over an industrial plant, eventually hitting high wires. The resulting crash killed his passenger. The court accepted the argument of the prosecution that violation of the Iowa reckless flying statute\(^\text{43}\) sufficiently paralleled a violation of the state’s reckless driving statute to support a manslaughter conviction.\(^\text{44}\) The conviction was affirmed on appeal.\(^\text{45}\)

\(^{37}\) \textit{Id.} at 338-39.

\(^{38}\) \textit{Id.} at 341.

\(^{39}\) \textit{Id.}

\(^{40}\) \textit{Id.} “[T]he law is reasonably clear that a charge of manslaughter by negligence is not made out by proof of ordinary simple negligence that would constitute civil liability. . . . [T]he amount or degree or character of the negligence to be proven in a criminal case is gross negligence. . . .” \textit{Id.}

\(^{41}\) 242 N.W.2d 298 (Iowa 1976).

\(^{42}\) \textit{Id.} at 300. The defendant was apparently not aware of an unwritten cardinal rule of aviation - “Eight hours from bottle to throttle.”

\(^{43}\) \textit{IOWA CODE ANN.} § 328.41 (West Supp. 1985) prohibits “careless or reckless” flying.

\(^{44}\) \textit{State v. Bahl}, 242 N.W.2d at 303-04.

\(^{45}\) The court accepted the common law definition for manslaughter: “The unlawful killing of another without malice expressed or implied.” \textit{Id.} at 300.
In Ward v. State\textsuperscript{46} police arrested the defendant, a solo student pilot, following a flight in which he "buzzed" apartment buildings. A blood-alcohol test established the pilot's blood-alcohol level at 0.17 percent.\textsuperscript{47} The State of Maryland prosecuted him and obtained a conviction for violation of its reckless flying statute.\textsuperscript{48} Because there is no double jeopardy for a subsequent federal prosecution, the Federal Aviation Administration suspended his license.\textsuperscript{49}

Ward is important because it is the only reported criminal decision which discusses federal preemption of state law. In the state court proceeding, the defendant argued that the Federal Aviation Act of 1958\textsuperscript{50} preempted the state statute. The court rejected the argument, holding that no actual conflict between state and federal law existed.\textsuperscript{51} Congress had not acted to control the entire field of aeronautics, the court concluded, but had instead left room for some state regulation.\textsuperscript{52} The legislative history of the Federal Aviation Act of 1958 revealed a lack of congressional interest in eclipsing state laws prescribing punishable offenses, the court noted.\textsuperscript{53} The Federal Aviation

\textsuperscript{47} 374 A.2d at 1120. When driving a motor vehicle, a blood alcohol level of 0.13 percent or greater is \textit{prima facie} evidence of intoxication in Maryland. Md. CTS. & JUD. PROC. CODE ANN. § 10-307(e) (1984).
\textsuperscript{48} Ward, 374 A.2d at 1118-19. Maryland's reckless flying statute is currently codified in Md. TRANSP. CODE ANN. § 5-1006 (1977). It prohibits both reckless flying and operating an aircraft while under the influence of alcohol or drugs. \textit{Id}.
\textsuperscript{49} Ward, 374 A.2d at 1120. In the subsequent FAA enforcement action, Ward was found to be in violation of Federal Aviation Regulation 91.9, which provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.9 (1984). His license was suspended, subject to re-issuance after six months. \textit{Ward}, 374 A.2d at 1120.
\textsuperscript{50} 49 U.S.C. §§ 1301-1501 (1982).
\textsuperscript{51} Ward, 374 A.2d at 1120-25.
\textsuperscript{52} \textit{Id.} at 1123-24. The leading preemption case in the aviation field is City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (federal law which controls noise levels and is governed by the FAA in conjunction with the Environmental Protection Agency preempts local noise ordinance).
\textsuperscript{53} Ward, 374 A.2d at 1124. "The offenses punishable under this legislation would not replace any State jurisdiction but would, where both Federal and State law provided for punishment for the same act, be in addition to the State criminal
Act set criminal penalties for only selected crimes, the court pointed out, whereas the state retained police power to penalize aviation related crimes.

In *Pritchett v. State* a passenger in the plane piloted by the defendant died in a crash following the pilot's repeated "buzzing" of a populated motel which caused people on the ground to dive for cover. The defendant claimed that he had experienced mechanical difficulties at the time of the incident, but his conviction for manslaughter was affirmed on appeal. The court found the conduct of the pilot so egregious that it described his behavior to be of "'a gross and flagrant character, evincing reckless disregard of human life.'"

The foregoing examination of cases illustrates that prosecutors are occasionally justified but not always consistent in seeking retribution for greater than negligent conduct. Unfortunately, states sometimes react to the nature of the tragedy and the spectacular circumstances of an aviation accident rather than the conduct involved. The gravity of harm done should not govern the determination of a defendant's culpability. Aircraft accidents by their nature often lead to tragic consequences. Independent of the level of tragedy attending a particular incident, the question must be asked whether simple or gross negligence should be treated in the same manner as reckless, willful, or wanton behavior merely because an actor is involved in an activity with such potential for disaster of enormous proportions.

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55 See Ward, 374 A.2d at 1122-25. See also Md. Transp. Code Ann. § 5-103(a) (1977) which provides that "[t]he law of this State defines and governs all crimes, torts, and other wrongs committed in flights over this State."
56 Id. at 3.
57 Id. (quoting Filmon v. State, 336 So. 2d 586, 589 (Fla. 1976), appeal dismissed, 430 U.S. 980 (1977), reh'g denied, 431 U.S. 960 (1977)).
58 See supra notes 35-58 and accompanying text.
III. Standards of Liability

The levels of culpability under which a party may be held criminally liable range from simple negligence to deliberate, intentional acts. Gross negligence and wanton, reckless conduct lie somewhere between. Instead of definite intermediate levels of culpable conduct clearly delineated by specific tests, the distinctions are undefined. This leads to a lack of uniformity in the application of criminal laws and unjust results.

Aviation clients may suffer quasi-criminal sanctions for conduct which is merely negligent and which would otherwise merit only civil damages. Such conduct may be construed as a more serious form of negligence, possibly giving rise to "extraordinary" damages. Furthermore, such conduct, particularly that giving rise to punitive damages, may be the basis for criminal charges and criminal penalties. Practitioners should recognize the potential for criminal actions against aviators in situations where punitive damages may be assessed. As will be demonstrated below, considerable confusion and uncertainty dominate the area of the law governing requisite levels of culpability. A more uniform approach for determining when to bring criminal charges is needed, and a few recommendations will also follow.

1. Simple Negligence

Simple negligence is the least culpable level of criminal conduct, and is usually defined as the failure to exercise ordinary care. In order to be actionable, the culpable conduct must be that "which falls below a standard estab-

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60 Throughout the article, the terms "punitive damages" and "extraordinary damages" will be used interchangeably. In either case, the terms are used to describe damages assessed against a defendant for the purpose of punishment.
61 However, strict liability (without negligence) can serve as the basis for both civil and criminal liability. See United States v. Park, 421 U.S. 658 (1975). Although strict liability is outside the scope of this article, an excellent treatment can be found in Brickey, supra note 22.
lished by the law for the protection of others against unreasonable risk of harm." Important elements of negligence include foreseeability of the risk and unreasonable conduct.

In the aviation context, violations of regulations, operating procedures, or customs and practices of the industry usually constitute a breach of the duty to exercise ordinary care. Ordinarily, common carriers are held to the highest degree of care. Private carriers, on the other hand, are generally held only to the exercise of ordinary care.

2. *Gross Negligence*

A consideration of cases involving aggravated forms of negligence makes clear that no fine demarcation point distinguishing various levels and degrees of negligence exists. Courts use a variety of descriptive terms seemingly without apparent consideration for the precise kind of conduct being condemned. Such lack of clarity and precision is particularly troublesome since this area of the law already suffers from great confusion when distinguishing aggravated civil liability from criminal culpability.

Gross negligence has been defined by Professor Prosser as "failure to exercise even that care which a careless person would use." Gross negligence, although more culpable than simple negligence, falls short of reckless disregard and differs from ordinary negligence only in degree. Some states have attempted to define gross negli-
gence by statute,69 but much of the law in this area was created in response to automobile guest statutes, which permit gratuitous passengers to recover damages from drivers only in cases of gross negligence or some other form of aggravated misconduct.70 Due to the varied responses of courts to guest statues,71 applications of the gross negligence standard have been inconsistent.

The states are split over when and whether to allow an award of punitive damages to accompany a finding of gross negligence. Some jurisdictions allow the imposition of punitive damages for gross negligence.72 Others require conduct which is willful, wanton, reckless, or malicious.73 Although a great number of states require some form of malicious conduct before awarding punitive damages,74 courts will often infer malice where willful, wan-

71 See Note, The Case Against the Guest Statute, 7 WM. & MARY L. REV. 321, 328-29 (1966); Prosser & Keeton, supra note 62, at 216.
73 See, e.g., Ebaugh v. Rafiu, 22 Cal. App. 3d 891, 894, 99 Cal. Rptr. 706, 708 (Cal. Ct. App. 1972) ("mere negligence, even gross negligence is not sufficient to justify an award of punitive damages"); Stern v. Abramson, 150 N.J. Super. 571, 574, 376 A.2d 221, 223 (1977) ("Although gross negligence may approach the realm of an aggravated intentional act, it fails to reach this nadir. A distinction exists between gross negligence and willful and wanton behavior. And even where negligence is so extreme in degree as to be characterized as gross, punitive damages are not recoverable.").; Cal. Civ. Code § 3294 (West Supp. 1984) ("In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."). But see, e.g., Newton v. Hornblower, Inc., 224 Kan. 506, 525, 582 P.2d 1136, 1150 (1978); Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975).
74 See, e.g., Silberg v. Calif. Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 113 Cal. Rptr. 711, 718 (1974) ("defendant must be guilty of oppression, fraud or malice"); Wackenhut Corp. v. Canty, 359 So. 2d 430, 435-36 (Fla. 1978) (act "committed in an outrageous manner or with fraud, malice, wantonness or oppression"); General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810, 817
ton, or reckless conduct is involved. It is in the twilight zone between civil and criminal liability that the question must be asked whether gross negligence should result in criminal prosecution. If the answer is in the negative, the question for decision becomes how to differentiate between gross negligence and wanton, reckless conduct.

The Model Penal Code divides unintentional killings into two sub-classes. The first, manslaughter, is an unintentional homicide committed recklessly. To support a conviction for manslaughter, there must have existed a substantial and unjustifiable risk of homicide, and the actor must have perceived the risk yet ignored it. A finding of negligent homicide requires only that the actor disregarded a risk of which he should have been aware. The actor need not have actually perceived a risk of harm; if he or she should have perceived the risk of death, then a guilty verdict may result. Note that the Model Penal Code defines criminal negligence as a "gross deviation from the standard of care." Whether the drafters of the Model Penal Code intended to equate gross negligence and criminal negligence is uncertain, but the likelihood that some courts will reach such an inference is real.

3. Willful, Wanton, and Reckless Conduct

As the level of culpability increases, the standards describing forms of negligence become increasingly mudd-
Although the conduct so described sounds egregious, and despite the suggestion of malice conveyed by the word "wanton", many in the law have lumped these types of conduct together with gross negligence.

Three sources or kinds of sources offer guidance for the determination of what constitutes willful, wanton, or reckless conduct in the aviation context: 1) aviation guest statutes, 2) tort liability recovery limitations for international flights imposed by the Warsaw Convention, and 3) NTSB decisions affirming FAA enforcement of "the careless and reckless" rule — FAR 91.9.

Some states have aviation guest statutes similar to automobile guest statutes. Where such a statute exists, a guest passenger must prove some form of aggravated negligence in order to recover. Some statutes require a showing of gross negligence, while others require that the passenger prove willful, wanton, or reckless conduct. Although there have been relatively few cases interpreting such statutes, there is a trend to hold them

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83 57 AM. JUR. 2D Negligence § 102 (1971).
84 "[T]here is often no clear distinction between [reckless, willful, or wanton] conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence . . . ." PROSSER & KEETON, supra note 62, at 214.
86 Federal Aviation Regulation 91.9, 14 C.F.R. § 91.9 (1984) [hereinafter cited as FAR 91.9]. FAR 91.9 provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."
87 See, e.g., OR. REV. STAT. ANN. 30.115 ("No person transported by the owner or operator of an aircraft or a watercraft as his guest without payment for such transportation, shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication.").
88 See id.
89 S. SPEISER & C. KRAUSE, 2 AVIATION TORT LAW § 12:8 (1979) [hereinafter cited as SPEISER & KRAUSE].
unconstitutional.\textsuperscript{90}

On international flights, if an aviator is guilty of willful misconduct, provisions of the Warsaw Convention limiting tort liability will not apply.\textsuperscript{91} A finding of willful misconduct requires a showing of conscious intent to commit an act which harms another, or an intentional omission to perform a manifest duty.\textsuperscript{92} Generally, such conduct involves a conscious disregard of the consequences of an act coupled with a realization of the probability that injury will result.\textsuperscript{93} This level of misconduct was found under the Warsaw Convention in one case where an airliner flew in violation of altitude regulations,\textsuperscript{94} and in another case where airline employees failed to instruct passengers on the location of life vests, neglected to broadcast an emergency message after the plane became imperiled, were unaware of a loss of radio transmission, and failed to initiate a prompt search after the plane went down.\textsuperscript{95}

FAA enforcement of the federal “careless and reckless” flying regulation (FAR 91.9),\textsuperscript{96} offers only questionable guidance on what may constitute “reckless” behavior in an aviation setting. Unfortunately, NTSB decisions reviewing FAA enforcement actions sometimes produce the suggestion that aviators found to be “reckless” within the meaning of FAR 91.9 may be little more than ordinarily negligent or perhaps grossly negligent. For example, a


\textsuperscript{91} Warsaw Convention, supra note 85, at § 25(1).

\textsuperscript{92} SPEISER & KRAUSE, supra note 89, at § 11:37.

\textsuperscript{93} E.g., Berner v. British Commonwealth Pac. Airlines, Ltd. 346 F.2d 532 (2d Cir.), cert. denied, 382 U.S. 983 (1965).

\textsuperscript{94} American Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949).

\textsuperscript{95} Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775, 779-82 (D.C. Cir. 1961).

\textsuperscript{96} See supra note 86.
Western Airlines pilot was found to have violated FAR 91.9 when his aircraft landed in Buffalo, Wyoming instead of Sheridan, Wyoming as scheduled. Neither the pilot nor first officer had ever flown into Sheridan before, although each of them believed that the other had. When the plane approached the Buffalo airport, which lay directly in its flight path, the pilot and first officer thought they had arrived at Sheridan, and landed the plane. The NTSB affirmed the suspension of the pilot by the FAA for reckless flying and the United States Court of Appeals for the Ninth Circuit affirmed the decision of the NTSB. The FAA decided that the pilot exhibited gross disregard for the safety of others, and accused him of reckless conduct. Enforcement of the federal reckless flying regulations demonstrates how federal regulations designed to punish reckless conduct are often used as a catch-all to punish simple or ordinary negligence.

4. Criminal Negligence

Just as forms of civil negligence, particularly aggravated negligence, are often nebulous and poorly defined, various forms of criminal negligence are also difficult to discern. Few jurisdictions specifically define liability for negligent homicide. Instead, states often punish negligent homicide as a form of manslaughter. Some juris-

97 Ferguson v. Fed. Aviation Admin., 678 F.2d 821 (9th Cir. 1982).
98 In addition to mistaking one airport for another, the pilot failed to use navigational aids available to him. Id. at 824-25, 829. The term "reckless", for FAR 91.9 purposes means conduct demonstrating "a gross disregard for safety when coupled with the creation of actual danger to life and property", the court wrote. Id. at 829 (quoting Administrator v. Understein, NTSB Order EA-1644 (1981) (emphasis added)).
99 Ferguson, 678 F.2d at 823-24.
100 See Daily v. Bond, 623 F.2d 624 (9th Cir. 1980). In Daily, a plane caught fire after the pilot tried to start it, knowing that the generator had been removed and that certain wires were loose. The court said that there was adequate proof of negligence, and that a prudent pilot would have known that fire could develop. Id. at 626. This was arguably ordinary negligence but the pilot was penalized for a violation of the careless and reckless rule. Id.
dictions define negligent homicide as conduct committed "without due caution or circumspection of a lawful act which might produce death." Other states merely use the terms culpable negligence or criminal negligence without attempting to further define them. A few other states prescribe by statute their own unique definitions of the culpability that will support a finding of criminally negligent behavior.

Case law has been only slightly more successful than statutory efforts in satisfactorily describing negligent homicide. Typically, courts describe negligent homicide in any of three ways. They may define negligent homicide by using cliches, by focusing on some objective standard to determine culpability, or by focusing on the subjective perception of the defendant.

It is instructive to look at the Model Penal Code for the drafters' approach in setting standards for criminal negli-

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104 See, e.g., LA. REV. STAT. ANN. § 14.12 (West 1974) ("Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."); WIS. STAT. ANN. § 940.06(2) (West 1982) ("Reckless conduct consists of an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and which demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetuating an injury.").

105 State v. Hamilton, 149 Me. 218, 239, 100 A.2d 234, 244 (1953) ("reckless disregard for life and safety of others"); People v. Barnes, 182 Mich. 179, 198, 148 N.W. 400, 406 (1914) ("wanton and reckless disregard in indifference to safety of others"); State v. Adams, 359 Mo. 845, 851, 224 S.W.2d 54, 57 (1949) ("such reckless character as to indicate an utter indifference for human life").

106 Commonwealth v. Welansky, 316 Mass. 383, 398, 55 N.E.2d 902, 910 (1944) (defendant held to have knowledge of facts that a reasonable man would have known); Palmer v. State, 223 Md. 341, 347, 164 A.2d 467, 469 (1960) (wanton or reckless disregard for human life such that the defendant did not foresee victim's death when a reasonable person would have).

gence. The Code rejects any subjective standard for determining criminal negligence. Instead, subjectivity is considered under the definition of recklessness when defining the separate and more serious crime of manslaughter. Some would argue that a subjective notion of culpability is required for all forms of criminal responsibility. The drafters of the Code urge, however, that a substantial degree of fault must be shown, even to find negligent homicide; the state must show a "gross deviation from ordinary standards of conduct."

Another view, adopted by several states, is to draw a distinction between negligent homicide (including vehicular homicide) and reckless homicide (manslaughter). This standard, found in a number of modern codes, would mean that negligent homicide occurs when the actor creates an unreasonable risk of which he was not aware, but should have been, and manslaughter occurs when an actor creates an unreasonable risk of harm, but

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108 Model Penal Code §210.4 ("Criminal homicide constitutes negligent homicide when it is committed negligently.").
109 Id. at 210.3. (recklessness defined as a "conscious disregard of a substantial and unjustifiable risk that will be caused by the actor's conduct"). Id. at § 2.02.(2)(c).
110 Id. at § 210.4, comment at 85-87.
112 See, e.g., the Texas Penal Code, which defines the offense of criminally negligent homicide (§ 1907 (Vernon 1974)), and defines criminal negligence as follows:

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's viewpoint.

Tex. Penal Code §6.03(d) (Vernon 1974). See also N.Y. Penal Law §§ 125.10, 15.05(4) (McKinney 1975) (criminally negligent homicide and definition of criminal negligence respectively).
5. Proposed Test

In light of the confusion and uncertainty evidenced by the reported cases, it is necessary that some standard be adopted by which any person, including an aviator, who unintentionally causes the death of another, can be judged. Moreover, that behavior which starts out as negligence in the sky should not be converted to recklessness by the time it is considered in court.

The author disagrees with the Model Penal Code, which disregards the defendant's state of mind when defining criminal negligence. Before criminalizing negligent conduct, society should be able to point to some mens rea. Whatever theory of criminal justice one subscribes to, the standards applied should enable the trier of fact to focus on the conduct which is to be criminalized. Furthermore, given the fact that our criminal courts are presently unable to process "criminals" due to congestion, some restraint must be exercised in criminalizing and prosecuting what may be more appropriately handled in civil courts.

The author proposes that two elements must be present before an aviator can be held criminally responsible for the unintentional death of another: 1) a reckless state of mind exhibiting a conscious disregard for the safety of others (subjective), and 2) the creation of an unreasonable risk of grievous bodily harm (objective). An objective test alone, wherein the proverbial reasonable man is asked to assess conduct in terms of whether it creates an unreasonable risk of harm, is particularly susceptible to abuse in aviation cases. Many people (potential jurors) still consider flying to be an extradangerous activity by comparison to driving. This leads to unfairness because the criminal negligence law which has developed, and the jury instructions derived therefrom, have come from driv-

ing accidents which are not always a good metaphor with aviation accidents.

With regard to the subjective test, the fact that an actor should have been aware of the consequences of his conduct should not alone, it is submitted, subject him to criminal liability for negligent homicide. Criminal prosecution may have some deterrent effect in preventing pilots from consciously creating unreasonable risks of grievous bodily harm, but will have little or no utilitarian value in preventing the inadvertent creation of an unreasonable risk of the same harm.

Finally, there is the moral argument that our society tends to measure personal accountability in terms of an individual's willingness to consciously violate clearly established societal norms. If the individual does not subjectively perceive these serious risks due to his inadvertence, he has not descended to the moral level of one who consciously runs a serious risk despite society's norms.

IV. CROSS-OVER PROBLEMS IN CRIMINAL-CIVIL-ADMINISTRATIVE LITIGATION

The practitioner representing an aviation client will likely find his client under attack on several levels, all of which may demand concurrent consideration. These may include civil litigation, criminal prosecution, and administrative proceedings. Activity in each area will likely continue to some degree regardless of the status of the others. Five areas of concern should take on special importance to persons involved in such multi-faceted litigation: investigations, discovery problems, evidentiary estoppel, collateral estoppel, and insurance considerations.

1. Investigations

The first evidence-gathering activity after a serious airplane accident is the Field Investigation. The powers

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of a Field Investigator and the scope of his investigation are broad. Much of the essential testimonial, documentary, and tangible evidence will already have been uncovered by the Field Investigator before litigation commences. Investigations of serious accidents almost always result in a report replete with factual findings, technical data, statements, and expert analyses.

Compared to medical malpractice, toxic tort, products liability, or commercial litigation, aviation accident litigation is unique in that an independent government body of experts conducts an investigation of almost every serious accident in the aviation industry. Accordingly, civil litigants, administrative enforcement officials, and criminal prosecutors are quick to use such reports as a template or substitute for case preparation. Additionally, if admitted into evidence, the factual findings and expert analysis contained in a report will have greater than normal persuasive value in any type of proceeding.

The NTSB investigates aviation accidents and records its findings in a computer format entitled "Briefs of Accidents", which breaks down the investigator's analysis into probable causes and factors. The NTSB also maintains in its public docket section a "Factual Report" for each accident. The Factual Report contains data, statements, diagrams, and investigator analyses and opinions. Opinions as to the probable cause of an accident are not a part of the Factual Report, however. It is the material in this docket that many courts allow into evidence, whether it be factual material, analysis, or opinion, as long as the probable cause determination is not revealed. Courts seldom admit Briefs of Accidents into evidence, however, since they contain opinion about the cause of an accident. For major accidents, the determination by the NTSB of

120 See infra notes 122-127 and accompanying text.
probable cause and its report of facts are contained in a narrative known as a “Blue Cover” report.121 Those portions of the “Blue Cover” report not inextricably intertwined with the probable cause determination found therein may also be admissible evidence. A great deal of factual data within NTSB reports has frequently been held admissible where not otherwise excluded by the rules of evidence.122 Such information may include weather data, traffic patterns and runway information, pilot biographies, wreckage descriptions, “black box” data, log book entries, and photographs.

Evaluative and analytical documents based on factual data but involving some processing and application of expertise by the investigator and his staff lie in the gray area between factual data and opinion. Examples of such analytical documents may include flight or ground-track diagrams, altitude profiles, wreckage layout charts, pilot flight time summaries, and weather summaries. For the most part, these documents have been admitted into evidence123 under one of the exceptions to the hearsay rule124 because of the neutral and trustworthy status and

121 49 C.F.R. § 801.35(b) (1984). “Blue Cover” report is a term used by lawyers and government officials who work in this area of the law.
122 See Travelers Ins. Co. v. Riggs, 671 F.2d 810, 816 (4th Cir. 1982) (trial court admission of factual portion of NTSB report but refusal to permit use of NTSB conclusions was proper); Benna v. Resser Flying Service, Inc., 578 F.2d 269 (9th Cir. 1978) (allowing jury to view NTSB report was erroneous violation of 49 U.S.C. § 1441(e), but error not prejudicial because report contained only cumulative factual data and not official Board conclusion on probable cause); American Airlines, Inc. v. United States, 418 F.2d 180, 195-96 (5th Cir. 1969) (factual data upon which NTSB based probable cause opinion not admissible); Berguido v. Eastern Airlines, Inc., 317 F.2d 628 (3d Cir. 1963) (factual data in NTSB report is admissible only if otherwise admissible pursuant to Federal Rules of Evidence); Fidelity and Cas. Co. v. Frank, 227 F. Supp. 948 (D. Conn. 1964) (factual testimony by NTSB investigators admissible); Todd v. Weikle, 36 Md. App. 663, 376 A.2d 104 (1977) (factual portion of NTSB report admissible; only the opinions regarding cause of accident not admissible).
123 E.g., Beech Aircraft Corp. v. Harvey, 558 P.2d 879, 882-83 (Alaska 1976) (all investigator analyses and opinions are admissible except those going to ultimate determination of probable cause determined by Board as expressed in Board report). Accord American Airlines, Inc. v. United States, 418 F.2d 180, 196 (5th Cir. 1969).
124 Fed. R. Evid. 803(6), 803(8), 803(24).
expert capabilities of the investigator.

Even outright opinions of NTSB investigators have been admitted into evidence when they have not included opinions as to the ultimate issue of probable cause, and where exclusion of such opinions was not otherwise required by the evidence rules.\textsuperscript{125} Such opinions may include the opinion as to whether a pilot was qualified for the flight, whether he complied with good operating practices, and whether the position of levers in the cockpit or needles on the instruments retrieved from wreckage were indicative of their pre-impact status.

At least one court allowed a NTSB investigator to testify to statements made by parties to the investigation or their employees.\textsuperscript{126} Although that ruling permitted the investigator to become a conduit for hearsay, it finds support in the Federal Rules of Evidence, which allow an expert to give hearsay testimony if it is the type of information reasonably relied on by experts in his field.\textsuperscript{127} Indeed, since it is the \textit{modus operandi} for NTSB investigators to rely on statements by technical people and eyewitnesses, investigators can arguably testify about information received from all of their sources so long as they do not usurp the prerogatives of the court by stating their ultimate opinions as to probable cause. If permitted, this could lead to the admission of the entire Factual Re-

\textsuperscript{125} Murphy v. Colorado Aviation, Inc., 41 Colo. App. 237, 588 P.2d 877, 881-82 (1978) (NTSB investigator was properly allowed to give his opinions based upon factual data in the NTSB report when his testimony, though leading to such a conclusion, did not state that the accident was caused by pilot negligence). \textit{See} Kline v. Martin, 345 F. Supp. 31, 32-33 (E.D. Va. 1972) (Investigator opinions may be inquired into during deposition so long as they do not embrace the ultimate cause of the accident).

\textsuperscript{126} Swett v. Schenk, 18 Av. L. Rep. (CCH) 17,106 (L.A. Super. Ct. March 31, 1983). An NTSB investigator may testify as to facts and opinions solicited from parties to an aircraft accident investigation, who are parties of litigation, or employees of party defendants and who are acting in the course and scope of their employment, so long as the testimony does not involve the opinion of the Board or of the investigator as to the ultimate cause of the accident involved. \textit{Id.} Statements made to an investigator do not become privileged, nor can an investigator confer the cloak of his privilege to party defendants or their employees. \textit{Id.}

\textsuperscript{127} \textit{Fed. R. Evid. 703.}
port and everything in the Blue Cover report except the ultimate opinion as to probable cause.

In addition to the NTSB, the FAA regularly investigates aviation accidents. Indeed, various federal agencies such as the FBI,\(^\text{128}\) Forestry Service,\(^\text{129}\) Coast Guard,\(^\text{130}\) Army,\(^\text{131}\) Navy,\(^\text{132}\) Air Force,\(^\text{133}\) Army National Guard,\(^\text{134}\) Air Force National Guard,\(^\text{135}\) National Oceanographic and Atmospheric Administration (NOAA),\(^\text{136}\) Department of Agriculture,\(^\text{137}\) and NASA\(^\text{138}\) frequently have occasion to conduct aircrash accident investigations. State agencies and associations, and various state and local law enforcement officers also perform investigations as a result of aircraft accidents. With the exception of the military, which prohibits the release of their “safety” reports, and the F.B.I., which restricts the release of their “confidential” reports, the various government agency reports will generally be admissible if they satisfy the rules of evidence.\(^\text{139}\)

Counsel involved in multi-faceted litigation cannot always anticipate where an investigative report will have its greatest impact. It would be a mistake, however, to fail to anticipate the use and admissibility of NTSB reports in complex litigation. Accordingly, counsel for parties to aviation accident litigation should use all legitimate and ethical means to prepare their clients and those witnesses within their clients’ sphere of influence before interrogation by investigators and testimony before the NTSB or other government agencies.\(^\text{140}\)


\(^{133}\) See 32 C.F.R. § 809a.5(a) (1984).


\(^{138}\) See 14 C.F.R. § 1204.1406(b) (1985).

\(^{139}\) See 49 U.S.C. § 831.6 (1984) provides:
2. Unique Discovery in Mixed Criminal-Civil Litigation

When overlapping litigation arises from an incident, counsel representing any involved party should be aware of the unique opportunities and problems that will be encountered. For example, counsel may uncover information during the discovery phase of an administrative proceeding that will have great impact on the criminal prosecution of his client. An examination of some of those opportunities and problems is appropriate at this point.

In most jurisdictions, civil discovery is very broad.\textsuperscript{141} Discovery by a criminal defendant is broader in scope than that granted to the prosecutor, but not as liberal as that enjoyed by parties to civil litigation.\textsuperscript{142} A civil litigant facing criminal prosecution may want to prepare his interrogatories and requests for production with an eye towards his defense of the criminal charges. Many jurisdictions either deny a criminal defendant the right to take depositions or grant criminal defendants the right to take depositions only for purposes of preserving testimony and not for discovery.\textsuperscript{143} Thus, counsel for a criminal defendant who is also involved in civil litigation, may be able legitimately to notice the discovery deposition of important witnesses in the civil case in the hope of discovering valuable information for the defense of the criminal case.\textsuperscript{144} The discovery deposition testimony taken and documents produced may be admitted as substantive evi-

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\textsuperscript{144} A caveat to the availability of this tactic is the potential situation where a deponent who is also an "accused" or a potential accused may assert the fifth amendment rather than answer many of the questions that may be put to him. Faced with this obstruction, a civil litigant may try to seek an immunity order compelling the witness to testify so long as his constitutional rights are protected. See Daly v. Superior Court, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977).
dence in other proceedings or at least used for impeachment purposes.

Since criminal, civil, and administrative litigation have different procedural rules, burdens of proof, discovery timetables, etc., generalized advice cannot be given on the timing of discovery. However, certain aspects of practice in a uni-dimensional case take on greater importance in multi-faceted aviation litigation, regardless of the order in which litigation proceeds. For example, because important percipient witnesses will normally be interviewed by parties to all proceedings, the "early bird may catch the worm" in the sense of gaining early cooperation from the witness. This is particularly true where the early bird is a prosecutor. Witnesses in awe or fear of the powers of a prosecutor can be amazingly reticent after meeting with him. Although a witness can refuse to talk with the defense unless he has been subpoenaed, the prosecution cannot order witnesses to refrain from talking with defense counsel. Imagine, too, a witness' reluctance to repeat testimony as the number of would be interviewers increases.

Another issue which should be considered in multi-faceted litigation is whether it is desirable to permit the civil or administrative case to proceed while criminal prosecution is in progress. Where criminal prosecution has begun, even as early as the grand jury investigation, counsel may be able to obtain a stay of civil litigation and administrative enforcement proceedings pending the outcome of

145 FED. R. EVID. 801(d)(1).

146 FED. R. EVID. 613.


149 See, e.g., United States v. Amrep Corp., 405 F.Supp. 1053 (S.D.N.Y. 1976), where the district court granted a criminal defendant's motion for a stay of civil proceedings until after entry of a verdict in the criminal trial.
criminal prosecution. Although different sovereigns may have the right to hear civil, administrative, and criminal matters concurrently, it would be unfair to do so in many cases. For example, a suspect may refuse to answer pointed questions in civil discovery for fear of incrimination. Also, a stay may be appropriate when prosecutors and law enforcement officials have subpoenaed tangible and documentary evidence for their exclusive use in prosecution. Similarly, it may be argued that a party should not be forced to reveal defenses in a civil proceeding that will be critical to his criminal defense.

If a stay of civil discovery cannot be obtained, counsel should seek an order granting access to the evidence in the hands of the prosecutor, or protecting against destructive testing of tangible evidence without the participation or observation of experts. Similarly, if depositions are ongoing in a related action before a different sovereign, permission to participate may be sought from the court with jurisdiction over the deposition on the grounds that involvement will avoid subjecting witnesses to repetitive depositions.

Another problem involves the discoverability of grand jury testimony that usually is in the form of a transcript. Since those who appear before a grand jury must do so without counsel in most jurisdictions, it is unlikely that

151 See infra notes 152-182 and accompanying text.
153 See, e.g., Fed R. Crim. P. 6(d), which provides an exclusive list of persons who may be present while a federal grand jury is in session — the only attorneys who may be present are government attorneys. Several states have followed a recent and controversial trend to allow witnesses who are targets of grand jury investigations to be assisted by counsel in the grand jury room, and at least one state allows such counsel to make objections on the clients' behalf. W. LaFave & J. Israel, Criminal Procedure § 8:13(b) (1984) [hereinafter cited as LaFave & Israel].

Since no criminal proceedings have yet commenced against a person at the grand jury investigation level, the sixth amendment right to counsel is not implicated. Kirby v. Illinois, 406 U.S. 682 (1972). Accordingly, except where allowed
their testimony could ever be introduced as substantive evidence against them, although it could be used for impeachment. Witnesses whom an attorney may wish to call on behalf of his client in subsequent civil proceedings should be advised of the ultimate potential use of their grand jury testimony if it is discoverable. In some jurisdictions, a transcript of grand jury proceedings is protected from disclosure unless a showing can be made that the disclosure is necessary to prevent injustices in a civil action. In jurisdictions that allow the disclosure of grand jury transcripts, such transcripts should be obtained as part of the discovery practice.

3. Evidentiary Estoppel

Just as one can be collaterally estopped as a matter of law from trying certain issues already litigated in a prior proceeding, evidence adduced in one proceeding can have the practical effect of estopping a party from effectively or persuasively offering evidence in a later proceeding. Such a situation can be described as “evidentiary estoppel”, that is, a party may be effectively prevented from introducing contrary evidence in a later proceeding in much the same manner as a prior inconsistent statement may effectively prevent him from making a contrary statement in a subsequent proceeding. Moreover, rules of evidence may operate to estop an aviator from denying that persuasive - and sometimes conclusive - evidence has been admitted in prior criminal or administrative proceedings.

by statute, a witness may not insist upon the presence of his attorney in the grand jury room. United States v. Mandujano, 425 U.S. 564 (1976).

154 E.g., Fed. R. Evid. 613.


156 Approximately one third of the jurisdictions allow disclosures of grand jury testimony along with the prosecution witness' recorded statements; one-third of the jurisdictions give the court authority to grant disclosure with a showing of “particularized need”; and the other third, which refuse to disclose prior recorded prosecution witness' statements, also refuse to disclose grand jury transcripts. LaFave & Israel, supra note 153, at § 19.3(g) n. 95 (1984).
Rule 804(b)(1) of the Federal Rules of Evidence codifies a common law rule that generally permits the use of former testimony in a subsequent proceeding as an exception to the hearsay rule.\(^{157}\) As long as all of the requirements for use of the former testimony exception are met, the nature of the proceedings from which the testimony was obtained is immaterial.\(^{158}\) The federal rules deem former testimony to be reliable, \(^{159}\) although testimony from a live, in court witness receives greater preference.\(^{160}\)

Certain requirements must be met before former testimony will be admitted. First, the witness providing the former testimony must be unavailable to testify in person in the current proceeding.\(^{161}\) Second, the former testimony must have been given in an earlier proceeding.\(^{162}\) Third, the party against whom the testimony is offered must have had the opportunity to develop the earlier testimony.\(^{163}\) Fourth, the party against whom it is offered must have had a similar motive to develop the testimony.\(^{164}\)


\(^{158}\) Id. at 769.


\(^{160}\) Fed. R. Evid. 804(b) advisory committee note.

\(^{161}\) Fed. R. Evid. 804(b)(1). The witness is unavailable if he is exempted by the court because a privilege is asserted, if he refuses to testify despite a court order, if he testifies to a lack of memory concerning the subject matter, if he has died or is physically or mentally unable, or if the proponent of the evidence is unable to secure his presence in court. Id. at 804(a)(1)-(5). The prosecution in a criminal proceeding may introduce the former testimony of an unavailable witness only if the prosecution has made a good faith effort to secure the attendance of such witness at trial. Barber v. Page, 390 U.S. 719, 724-25 (1968).

\(^{162}\) See Fed. R. Evid. 804(b)(1). Testimony is considered to be a statement that is sworn, subject to penalty of perjury, on the record, and pursuant to legally authorized routine. D. Louisell & C. Miller, Federal Evidence § 487 (1980) (hereinafter cited as Louisell AND Miller). Broadly stated, a proceeding is a previous trial, administrative hearing, deposition, preliminary hearing, or grand jury inquest. Id.

\(^{163}\) Id. See also J. Moore, 11 Moore's Federal Practice § 804.04[2] (1976) [hereinafter cited as Moore's Federal Practice].

\(^{164}\) Fed. R. Evid. 804(b)(1). See also Barber v. Page, 390 U.S. at 725 (1968); 11 Moore's Federal Practice § 804.04[3] (1976). Even though the ultimate issue may be different in the preceding matter, the motive to address a particular issue may be evident and the defendant will be held to have had the opportunity to
In criminal cases, an additional element requires the former testimony to have been originally offered against the defendant against whom it is later offered. The defendant must also have had an opportunity to cross-examine the witness. Testimony admitted in a criminal proceeding can be used in a subsequent civil proceeding, and, although the occurrence would be a rare one, testimony from a civil action can be used in a later criminal proceeding. Testimony offered before administrative bodies such as the NTSB can also be admitted in subsequent litigation. The exception to the hearsay rule has even been applied so as to allow the admission in an American court of testimony given before an administrative agency of a foreign government.

4. Collateral Estoppel

Under the doctrine of collateral estoppel, an issue which has been actually litigated before a court of competent jurisdiction cannot be relitigated by the same parties or their privies. The doctrine of collateral estoppel applies in both civil and criminal litigation. Collateral estoppel...
Criminal Liability

A litigant may be used defensively (employed by a defendant against a plaintiff who lost an issue in an earlier case), or offensively (employed by a plaintiff against a defendant who earlier lost the issue), and can be asserted in many instances by a litigant who was not a party to the earlier litigation. Obviously, the ability to estop an opponent from contesting an issue or factual allegation is a great advantage. An attorney facing multi-faceted litigation must be careful to vigorously litigate issues that are of minor significance in one proceeding, but which could be of major import in a later proceeding. The importance of giving careful consideration to potential collateral estoppel situations becomes apparent when viewed in light of the courts' increasing willingness to permit the use of collateral estoppel. The courts recognize the substantial reduction in their workloads when parties cannot relitigate issues already decided.

In order for a litigant to collaterally estop another party from relitigating an issue, the issue must be the same as that litigated in the prior action, the issue must have been actually litigated, there must have been a valid and final judgment, and the issue must have been essential to the prior judgment. Historically, courts required mutuality of parties (or their privies) as a condition precedent to the application of collateral estoppel. Parties not involved in the litigation of the initial action could not rely on the issues determined in that action in subsequent proceedings. However, that requirement has been re-

174 Id. at 327-28.
176 Parklane Hosiery Co. v. Shore, 439 U.S. at 327.
177 Haize v. Hanover Ins. Co., 536 F.2d 576, 579 (3rd Cir. 1976). See also Thau, supra note 175, at 1082.
178 1B Moore's Federal Practice ¶ 0.441 [3.-2] (2d ed. 1983).
The abandonment of the mutuality requirement has not only made it easier to use collateral estoppel generally, it has made it easier to apply the findings from one kind of proceeding (e.g., civil, criminal, administrative) to another.\(^{179}\)

Generally, criminal matters are adjudicated more rapidly than civil matters. Attorneys representing aviators should be wary of the potential collateral estoppel impact of a criminal conviction - even if only for a misdemeanor - in related civil litigation. This is particularly true where a possibility for a substantial adverse civil judgment exists, or where the single conviction of a corporate agent could be used against the corporation in separate civil actions.

Ordinarily, the collateral estoppel effect of criminal court findings is dependent upon an issue having been actually litigated, and a guilty verdict returned against the defendant.\(^{180}\) Some courts have granted collateral estoppel effect to guilty pleas.\(^{182}\) Such a result has been criticized, however, since no issues are actually litigated in a plea bargain situation.\(^{183}\)

There exist many sound policy justifications for collateral estopping a civil litigant from relitigating an issue which he lost in a criminal trial. Criminal defendants usu-

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\(^{180}\) Since a criminal action involves the state as the prosecuting "plaintiff," abolition of the mutuality rule allows private parties to benefit from determinations of the criminal court by simply waiting for the state to prove its case.

\(^{181}\) Thau, supra note 175, at 1109-1111.


\(^{183}\) See Thau, supra note 175, at 1109-111. See also Proise v. Haring, 667 F.2d 1133, 1140-41 (4th Cir. 1981), aff'd, 462 U.S. 306 (1983). Similarly, convictions of "lesser offenses" may be unreliable because they are not fiercely litigated. See Gilbert v. Barieri, 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981). Of course, a criminal defendant could plead nolo contendere in the criminal action and be assured that there will be no collateral estoppel effect since such a plea is inadmissible in subsequent actions. Fed. R. Evid. 410(2); Cleary & McCormick, supra note 157, at 783.
ally receive greater procedural safeguards than do civil litigants. A prosecutor must prove his case beyond a reasonable doubt, not just by a preponderance of the evidence. Criminal defendants are afforded one appeal as a matter of right. Criminal defendants also enjoy an advantage in discovery: prosecutors ordinarily must turn over most of the evidence they have upon request by the defendant.

The application of administrative findings to civil actions has also been firmly accepted. The same restrictions in the use of collateral estoppel from one court to another apply with equal force to the use of administrative findings in civil proceedings. However, the collateral estoppel effect may not be honored where a party subject to the administrative procedure did not have an incentive to vigorously litigate the matter before the administrative agency.

Some commentators argue that the granting of collateral estoppel effect to administrative findings in civil matters should be severely restricted or disallowed. They argue that permitting the use of administrative determinations in civil actions may have the effect of shifting the burden of proof for some issues to the defendant, who normally would not be saddled with that burden. Civil

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187 See, e.g., Hicks v. Quaker Oats Co., 662 F.2d 1158, 1170 (5th Cir. 1981).
188 See Hicks v. Quaker Oats Co., 662 F.2d at 1168; Bowen v. United States, 570 F.2d 1311, 1322 (7th Cir. 1978).
190 Maines, supra note 189, at 179. Maines suggests that in many administrative proceedings, the burden of proof is effectively on the defendant, vis-a-vis the agency. Failure of the defendant to prove his case before the agency may give a later civil litigant grounds to seek collateral estoppel effect. If a plaintiff in a civil action who would ordinarily have the burden is allowed collateral estoppel on the issue, the burden of proof has effectively shifted.
litigants seeking to use collateral estoppel against a party who was unsuccessful in an administrative matter may also benefit from the lower standards of proof that apply in many administrative proceedings,\textsuperscript{191} as well as from looser evidentiary standards. Moreover, administrative litigants may have less opportunity to compel discovery than their counterparts in civil litigation\textsuperscript{192} and overall procedural changes may create unfairness to a party, making it unfair to apply collateral estoppel.\textsuperscript{193}

The collateral estoppel effect of an administrative proceeding in the aviation context was most notably applied in \textit{Bowen v. United States.}\textsuperscript{194} In that case, a private pilot brought suit against the United States under the Federal Tort Claims Act for the alleged negligence of government air traffic controllers. The plaintiff alleged that air traffic controllers had failed to warn him of the icing conditions that ultimately caused him to crash in Indiana. In an earlier NTSB proceeding, that agency found that the plaintiff had violated FAR 91.9 (careless or reckless operation of an aircraft) and had failed to live up to his pilot responsibilities under FAR 91.3(a),\textsuperscript{195} by entering clouds when there was a known possibility of icing in an aircraft not equipped for in-flight icing.\textsuperscript{196} Although no Indiana decisions existed on the application of administrative agency findings to civil actions, the \textit{Bowen} court examined the policy and history of the collateral estoppel effects of administrative findings and determined that Indiana courts would have permitted collateral estoppel to attach to the


\textsuperscript{192} Silverman v. Commodity Futures Trading Comm., 549 F.2d 28 (7th Cir. 1977); United States v. Allis-Chalmers Corp., 498 F. Supp. 1027 (E.D. Wis. 1980).


\textsuperscript{194} 570 F.2d 1311 (7th Cir. 1978).

\textsuperscript{195} Federal Aviation Regulation 91.3(a), 14 C.F.R. § 91.3(a) (1980) provides that “[t]he pilot in command of an aircraft is directly responsible for, and is the final authority to, the operation of that aircraft”.

\textsuperscript{196} \textit{Bowen}, 570 F.2d at 1314, 1323.
Criminal Liability

The United States successfully asserted the contributory negligence of the pilot as a bar to recovery.

5. Insurance Considerations

Aviation counsel involved in litigation with insured parties, as well as those who represent the insured, should be aware of insurance considerations that might affect coverage in cases of aggravated negligence and potential criminal liability. Generally, there is a strong public policy against insuring against intentional criminal acts, but this policy does not apply to indemnification of innocent employers for the unauthorized illegal acts of employees. Additionally, the policy against insuring against criminal acts may be circumvented when an innocent third party sustains injury. In keeping with this public policy, insurers often include in their policies an “unlawful purpose” exclusion which purports to allow an insurer to escape coverage when an aircraft is used for unlawful purposes. Courts have generally recognized these exceptions and allowed the denial of coverage for the clearly unlawful use of airplanes.

To be distinguished from the “unlawful purpose” exception, many aviation policies have an exclusion for violation of specific federal air regulations. Coverage has successfully been avoided when insurance policy provisions were written narrowly and unambiguously, and disclaimed coverage for the results of violations of specified regulations. On the other hand, courts have generally refused to allow insurers to escape payment of

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197 See id. at 1313, 1322.

198 Id. at 1323.


benefits by invoking the "unlawful purpose" exception — generally applicable to criminal acts — when a pilot may merely have been in violation of a federal aviation regulation.

Insurance policy terms disclaiming coverage for intentional illegal acts have not allowed insurers to escape coverage for acts committed through gross negligence. Individual policies usually do not exclude gross negligence from coverage, but instead impliedly provide coverage since the language is typically couched in terms of covering "occurrences" without conditions such as the degree of negligence involved. Thus, payment of benefits will generally be required where the policy insures against accidents — even if it results from aggravated negligence.

Circumstances may create situations where courts want to permit coverage, such as when an act was willful, but the resulting injury was not, or when no intent to injure existed, even though the act was wanton or willful. Even when a court deems conduct to be willful and wanton, coverage may be afforded as long as the conduct was not intentional.

207 E.g., Northwestern Nat'l. Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); General Cas. Co. v. Woodby, 238 F.2d 452, 452-58 (6th Cir. 1956); Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964).

202 See, e.g., Continental Ins. Co. v. Hancock, 507 S.W.2d 146 (Ky. 1974).
less consistent, however, and frequently turn upon the courts' construction of the language of each policy.\textsuperscript{208}

Finally, the issue of punitive damages arises in cases involving exposure to risk due to greater than ordinary negligence. This issue is beyond the scope of this article, however. Other commentators have treated this matter thoroughly, and have found that slightly more than half of the jurisdictions do not recognize insurance coverage for punitive damages.\textsuperscript{209}

V. CONSTITUTIONAL ISSUES

1. The Self-Incrimination Dilemma

The most difficult constitutional issues that arise early in mixed civil-criminal litigation involve entitlement to \textit{Miranda} warnings\textsuperscript{210} and the assertion of the fifth amendment privilege against self-incrimination.\textsuperscript{211} The \textit{Miranda} warnings are required when a person is in police custody or "deprived of his freedom by the authorities in any significant way" and the civil or criminal investigation in which he is involved may result in criminal prosecution.\textsuperscript{212} The privilege applies in any proceeding wherein the government tries to compel testimony.\textsuperscript{213}

In the aviation context, the need for \textit{Miranda} warnings may arise when the FAA investigates alleged violations of the federal aviation regulations (FARs) or when the NTSB investigates accidents. The typical witness is unaware of the morass of federal laws and rules of which his statements unwittingly may reveal a violation. In that the

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\item 208 \textit{Set, e.g., Tison v. Fidelity & Cas. Co.}, 181 So.2d 835, 840 (La. Ct. App. 1965).
\item 209 For an excellent article on the subject, see Kenney, Punitive Damages in Aviation Cases: Solving the Insurance Coverage Dilemma, 48 J. Air. L. & Com. 753 (1983).
\item 211 "[N]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V. This privilege has been imposed on the states through the due process clause of the Fourteenth Amendment. \textit{See} \textit{Griffin} v. California, 380 U.S. 609 (1965).
\item 213 \textit{See infra} note 224 and accompanying text.
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\end{footnotesize}
NTSB and FAA enjoy excellent reputations as the guardians of aviation safety, the uncounseled interviewee is tempted to speak freely to an investigator who assures him that the purpose of the questioning is solely to prevent accidents. These informal verbal assurances, albeit genuine, may be dismissed as having no legal weight when other branches of the FAA desire to use the statements in enforcement proceedings, or when the NTSB statements fall into the hands of zealous prosecutors.

Attempts have been made to establish a requirement that *Miranda* warnings be given in investigations leading to FAA enforcement hearings in which a pilot can lose his license. The NTSB, however, has a rule that such warnings are unnecessary since they are made in non-custodial investigations.\(^{214}\) Moreover, in the non-aviation context, the Supreme Court has held that *Miranda* rights are not required in non-custodial civil investigations except in special situations where the conduct of an official borders on a custodial interrogation.\(^{215}\) Thus, in the whole spectrum of administrative investigations, state and federal hearings, and grand jury proceedings, a witness does not enjoy the same protection as a suspect whose apparent criminality gives rise to police custody. One protection a witness does have lies in the privilege against self-incrimination. Of course, the efficacy of this right depends upon whether the person to be questioned is sophisticated enough to know his rights, or is able to confer with counsel before an interview so that he can judiciously assert his privilege against self-incrimination.

Although corporations can be convicted of crimes, only natural persons may claim the privilege.\(^{216}\) However, where a corporation would be criminally liable through its employees or agents, the claim of privilege by that person


\(^{216}\) *Cleary & McCormick*, *supra* note 157, at 128.
will in most cases protect the corporation.\textsuperscript{217}

The privilege applies only to compelled \textit{testimonial} incrimination; a suspect may not refuse to comply with a subpoena ordering him to produce papers, books, tapes, and the like which may incriminate him, but which will not constitute compelled testimony.\textsuperscript{218} A subpoena may not even be necessary. In order to hold certain licenses, one must maintain or furnish certain records.\textsuperscript{219} For example, pilot logbooks, airman records, operator certification data, and an operator’s report of accident are potentially incriminating records which the FAA requires to be created, maintained, and made available for inspection.\textsuperscript{220} Although compliance with these FAA rules is compulsory, they serve regulatory purposes and are not intended to compel incrimination. Therefore, the privilege does not apply. It should be noted, however, that although governmental prosecution, enforcement, and investigative agencies can obtain these records from the FAA and NTSB for official use, federal law may prevent the disclosure of certain records to private parties where an unwarranted invasion of privacy would result.\textsuperscript{221}

A further factor for consideration is whether the privilege is being asserted on behalf of an “accused” or one who is merely a “witness.” A person becomes an “accused” when placed in custody, usually a readily discernible event. If an aviator becomes an “accused” in a criminal proceeding, his rights are clear. He has the privilege not to testify. If he takes the stand in his defense, he waives his privilege not to testify. However, it has been held that in grand jury investigations and in preliminary hearings, a suspect is not yet an “accused.” He may take

\textsuperscript{217} But see Curcio v. United States, 354 U.S. 118, 125 (1957).

\textsuperscript{218} Andresen v. Maryland, 427 U.S. 463, 472-77 (1976).

\textsuperscript{219} See, e.g., Shapiro v. United States, 335 U.S. 1 (1948).


the stand, but he cannot be forced to testify. A person who is merely a witness — not yet an accused — may also claim the freedom from compulsion to disclose self-incriminatory matters. The witness privilege applies in any judicial, official, investigatory, legislative, or arbitral proceeding during which persons may be compelled to give testimony or statements.

The privilege to refrain from self-incrimination should apply to NTSB public hearings where witnesses may be forced to testify under compulsion of a subpoena. It also should apply to any FAA enforcement proceeding in which a certificate holder is required to appear before the FAA to protect his license or to face certificate action by the Administrator, and in which revocation of his license may result. Arguably, an NTSB field investigator who enjoys certain authority to interrogate persons with relevant knowledge of an aircraft accident or incident under investigation could be met by a refusal to give a statement on the ground that it might tend to be incriminating.

The risk of incrimination need not be great for a person to invoke the privilege. The statements need only furnish a link in the chain of circumstantial evidence necessary for conviction. Indeed, the witness need not anticipate that his words will be used to incriminate him; it

\[^{222}\text{United States v. Winter, 348 F.2d 204, 207-08 (2d Cir. 1965), cert. denied, 382 U.S. 955.}\]
\[^{223}\text{Malloy v. Hogan, 378 U.S. 1, 11 (1964).}\]
\[^{225}\text{The former Assistant General Counsel of the FAA in charge of litigation wrote, while in office, that:}\]
\[^{227}\text{See 49 C.F.R. § 831.8 (1984).}\]
\[^{228}\text{Blau v. United States, 340 U.S. 159, 161 (1950).}\]
\[^{229}\text{Id.}\]
is enough that the statement will lead to incriminating evidence.\textsuperscript{229}

Failure to assert the privilege in a timely fashion may result in a waiver of the privilege.\textsuperscript{230} Whether a waiver exposes a witness to self-incrimination only during the pending proceeding, or whether the waiver carries over into an eventual or subsequent trial is open to some dispute.\textsuperscript{231} Thus, a witness has the right to terminate an interview if he fears that by making innocent partial disclosures he will waive his right to avoid giving potentially incriminating testimony regarding the same incident in a later proceeding.\textsuperscript{232}

A pilot probably cannot refuse to answer an FAA investigator's question if he does not expect criminal prosecution to result, but fears only an enforcement action against his certificate. The FAA does not have authority to punish the violation of FARs with criminal sanctions.\textsuperscript{233} Accordingly, the ultimate sanction of license revocation may not be sufficiently incriminating to justify the privilege.\textsuperscript{234} An analogous situation exists in disciplinary proceedings conducted to revoke the license of an attorney. In such proceedings, the courts have held the privilege to be inapplicable.\textsuperscript{235}

Some would argue that, since an aviator's livelihood may depend on his license, that license constitutes a prop-

\textsuperscript{229} Counselman v. Hitchcock, 142 U.S. 546, 565 (1892); Hashagen v. United States, 283 F.2d 345, 348 (9th Cir. 1960).


\textsuperscript{231} See Ellis v. United States, 416 F.2d 791, 800 (D.C. Cir. 1969).


\textsuperscript{233} 49 U.S.C.A. §§ 1429(b), 1471(a) (West Supp. 1985) (FAA limited to civil penalties not to exceed $1,000.00 and certificate actions). But see id. at § 1472 (1982) (list of specific violations of federal aviation laws for which criminal sanctions are authorized).


\textsuperscript{235} E.g., Mississippi State Bar v. Attorney-Respondent in Disciplinary Proceeding, 367 So. 2d 179 (Miss. 1979).
erty right to the degree that the sanction of revocation is quasi-criminal in nature. However, only meager support for the proposition exists. A better approach may be to argue that a witness' answer could subject him to both civil and criminal liability - a risk he cannot be forced to undertake.

Because aviation safety is the primary concern of FAA and NTSB investigators, immunity should be sought and granted when fifth amendment issues arise. The hearing officer or investigator should be petitioned for this protection. However, the power to grant federal immunity lies with the Department of Justice. An attorney negotiating immunity for a client who will be questioned by the FAA or NTSB should seek "use" immunity from prosecution for any actions about which he has testified. Counsel should be aware, however, that in some cases only "transactional" immunity may be granted if the witness enjoys protection against incrimination in other jurisdictions.

Risks attend the assertion of the privilege. Generally, neither prosecutor nor judge may comment on the assertion of the privilege, nor in many states can a negative inference be drawn in civil litigation. In some jurisdictions, however, a jury in conventional civil litigation can be told to consider a party's invocation of the privilege.

Probably the greatest practical concern of most witnesses and their counsel, when they consider whether to assert the privilege, is the reaction of federal officials to that assertion. Some officials may see it as an obstruction of their efforts to discover information which will aid in investigations designed to promote aviation safety. They

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239 See Griffin v. California, 380 U.S. 609, 611-14 (1965). See also Supreme Court Draft of Fed. R. Evid. 513(a) (forbidding negative inference to be drawn); Unif. R. Evid. 512 (adopted in a number of states) (no negative inference).
may even perceive the assertion of the privilege as an indication that the witness feels guilty. However, the FAA has a good reputation for not resorting to regulatory backlash, and the individual aviator should consider the risk of incurring the disfavor of the FAA, which is mild compared to criminal prosecution. Arguments both pro and con about the risks of asserting the privilege have been the subject of in depth debate by commentators.241

2. Search and Seizure

Not infrequently, local law enforcement agents or federal regulatory officials seek to search an airplane, hangar, or pilot’s bag. The constitution requires essentially that government agents have probable cause to search a person or place and have a warrant.242 Under certain circumstances - consent searches, searches incident to arrest, hot pursuit, vehicle searches, and emergency searches due to exigent circumstances - authorities may be able to search without a warrant, but the probable cause requirement remains.243

A search or seizure takes place when a government agent or official infringes on a person’s reasonable expectation of privacy.244 In the aviation context, this may include a pilot’s flight bag, and may include the airplane cockpit. If, by an objective standard, a person has no reasonable expectation of privacy, examination by the government does not constitute a search.245 The same rule applies to corporations and other business enterprises who also enjoy the same protections against unreasonable search and seizure.246

When government agents conduct a valid search, virtu-

244 Id. at 361 (Douglas, J., concurring).
245 See id.
ally any tangible or intangible item to which a nexus with
criminal activity can be established may be seized.\textsuperscript{247} Such
evidence includes fruits of crime, instrumentalities for
committing crime, weapons, contraband, and evidentiary
material related to criminal activity.\textsuperscript{248}

There are certain general limitations placed on officials
searching with a warrant and on the scope of their search.
Probable cause to search must exist at the time the search
is conducted, not just when the warrant is obtained.\textsuperscript{249} Any federal nighttime search must be conducted pursuant
to rule 41 (c) of the Federal Rules of Criminal Procedure,
which require a showing of special circumstances.\textsuperscript{250} Unless exigent circumstances exist, the officer or agent must
knock and announce his presence before entering.\textsuperscript{251}
“Pretext searches,” where officers pretend to search for a
legally sufficient reason, but in fact search for other rea-
sons, are disfavored.\textsuperscript{252} No time limit restricts the dura-
tion of a search; unless government agents complete or
abandon their search, it may be resumed within a reason-
able time.\textsuperscript{253} These rules will presumably apply to
searches of fixed base operators, hangars, and baggage
rooms.

Special rules will usually apply with respect to searches
of aircraft. Generally, where time pressures and emer-
gency situations exist, such exigent circumstances may ob-
viate the search warrant requirement.\textsuperscript{254} The exigent

\begin{footnotes}
\item[249] Sgro v. United States, 287 U.S. 206, 210-11 (1932).
\item[250] Fed. R. Crim. P. 41(c)(1) provides in part: “The warrant shall be served in
the daytime, unless the issuing authority, by appropriate provision in the warrant,
and for reasonable cause shown, authorizes its execution at times other than
daytime.”
\item[251] Miller v. United States, 357 U.S. 301, 309 (1958).
government of an administrative warrant for the purpose of gathering evidence in
a criminal case must meet stern resistance by the courts.” \textit{Id.}
\item[253] See United States v. Bowling, 351 F.2d 236, 241 (6th Cir. 1965), \textit{cert. denied},
\end{footnotes}
CIRCUMSTANCES DOCTRINE has been applied most frequently to searches of vehicles; the inherent mobility of automobiles makes it practically impossible to obtain a search warrant and still maintain control over the vehicle. This argument would seem to apply *a fortiori* to aircraft. Although the United States Supreme Court has not specifically stated that the automobile search exception covers aircraft, some lower courts have held that the "exigent circumstances" doctrine does so apply. Government agents have authority to search the entire passenger compartment of a car when arresting a driver or occupant. They can also search any area or compartment of the vehicle which they have probable cause to believe contains contraband or any other seizable material.

Electronic devices used to track moving objects ("beepers") are a favorite tool of law enforcement officers, particularly when aircraft are involved. Courts have split on whether the use of beepers to track vehicles constitutes a search requiring a warrant. There may be a developing trend to hold that the use of beepers attached to the exterior of an airplane does not require a search warrant. The Supreme Court has reasoned that the exterior of a vehicle is subject to a greatly reduced expectation of privacy. However, to enter the interior of an aircraft and place electronic surveillance equipment therein requires a search warrant because of the greater privacy ex-

257 New York v. Belton, 453 U.S. 454, 460 (1981). This is commonly seen as an outgrowth of the *Chimel* doctrine. Under Chimel v. California, 395 U.S. 752, 762-63 (1969), police are allowed to seize anything in the "grabbing radius" of the arrestee at the time of his arrest. If *Belton* is not an expansion, but only an application of *Chimel*, searches of larger vehicles — and airplane interiors — will probably not be allowed beyond that area within the "grabbing radius" of the person arrested. However, if *Belton* is to be applied to the entire interior of an aircraft there may be serious ramifications for aviators.
260 E.g., United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976).
The use of beepers has been permitted for detecting the location of rented aircraft when the device is installed with the consent of the owner.\textsuperscript{263}

The practitioner representing aviation clients should be aware of the special treatment given to searches conducted by administrative agencies. Although fourth amendment protections do apply to administrative searches,\textsuperscript{264} such searches are not restricted by the same rigid probable cause requirements that apply to searches conducted by more typical law enforcement agencies. Technically, probable cause is required for administrative searches, but a more liberal "balancing test" is used to weigh the need to search against the risk of invasion of privacy.\textsuperscript{265} Administrative agencies can also subpoena business records, but such a demand for records must be limited in scope and may not be unreasonably burdensome.\textsuperscript{266}

In the realm of administrative searches, an exception exists which may be important to aviators and their counsel. "Pervasively regulated" industries do not enjoy probable cause protection, even for an administrative search. Participants in such pervasively regulated industries are subject to a "long tradition of close governmental supervision" and therefore have a diminished expectation of


\textsuperscript{265} See \textit{id.} at 538. The probable cause needed is a "reasonable legislative or administrative standard for conducting an area inspection." \textit{Id.}

\textsuperscript{266} See v. Seattle, 387 U.S. 541, 544-45 (1967). An agency may issue a demand to inspect records, but if a subject company wishes a judicial determination of the propriety of a subpoena, the subpoena may not be enforced on the business site. \textit{Id.}
CRIMINAL LIABILITY

privacy. Thus far, the Supreme Court has limited the "pervasively regulated business doctrine" to sales of liquor and firearms, and to a more limited extent, to underground and surface mining safety inspections. However, lower courts have applied the doctrine to other heavily regulated industries. The concept has not yet been directly applied to the aviation industry. This is a sensitive area for operators and manufacturers that may be subjected to invasions of privacy since aviation is certainly an industry subject to pervasive federal regulation.

CONCLUSION

Traditionally, when attorneys representing clients employed in the aviation industry learned that a serious accident had occurred in which their client might be implicated, they became concerned about a lawsuit or an FAA Enforcement Action. Now there is a trend for prosecutors to scrutinize accidents involving multiple deaths or mass disasters, aggravated circumstances, and parties who are the focus of media interest. Thus, conduct which was only negligent when committed in the air may be treated as manslaughter by the courts. When this happens, coun-

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271 Businesses which have been included in the pervasively regulated category include pharmacies (United States ex rel. Terraciano v. Montanye, 493 F. 2d 682 (2d Cir.), cert. denied, 419 U.S. 875 (1974)); massage parlors (Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978)); and insurance companies (United States v. Gordon, 655 F.2d 478 (2d Cir. 1981)). However, the fact that a business is in interstate commerce and subject to health, safety, and wage regulations will not necessarily mean that it is pervasively regulated and subject to warrantless searches. Marshall v. Barlow's, Inc., 436 U.S. at 313-14.
272 The court in Civil Aeronautics Bd. v. United Airlines, Inc., 542 F.2d 394, 396-401 (7th Cir. 1976), held that 49 U.S.C. § 1377(e) (1982) did not give the C.A.B. inspection powers equal to that of a continuing search warrant. The court reasoned that the evils inherent in the gun and liquor industries, which justify warrantless searches, do not exist in the field of public transportation. Id. at 399.
sel may be faced with ambiguously worded standards of criminal negligence, which may criminalize conduct that would otherwise be aggravated civil negligence. He may also face multi-faceted litigation, in which developments in one proceeding may permanently affect the rights of his client in another. The foregoing, then, has raised some of the major issues that may confront counsel should he find himself in this different dimension of practice — the "Twilight Zone" between civil, criminal, and administrative litigation.