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BABIES HAVE A RIGHT TO A SAFE SEAT WITH  
PROPER RESTRAINTS – THE INFANT SEAT  
EXCEPTION SHOULD BE ABANDONED

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# Babies Have a Right to a Safe Seat with Proper Restraints – The Infant Seat Exception Should be Abandoned

by David E. Rapoport,\* Jan Brown,\*\* and  
Lindsey A. Epstein\*\*\*

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\*\* Ms. Brown is a retired flight attendant who spent most of her career with United Airlines. She was the first flight attendant on United Airlines flight 232. Before the crash, as she had been trained to do, Jan Brown told the mother of a 23-month-old baby to put her baby on the floor. While the mother survived, the baby did not, instead flying out of control and unrestrained toward the back of the aircraft during the crash, into an area of the wreckage where the baby and others died of smoke inhalation. If that child had been assigned a seat and provided age-appropriate restraints instead of riding on his mother's lap he would have survived the crash. Since that day Jan Brown has worked tirelessly to do away with the regulations that allow babies to fly on a parent's lap, proposing instead that all passengers need a seat and age-appropriate restraints. In the early 1960s, Jan served as a flight attendant on the *Caroline*, the Kennedy family airplane.

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## I. Introduction

In 1964 Hugh DeHaven, described as the Father of Crash Survivability,<sup>1</sup> wrote that riding in an automobile without safety belts was “on a par with shipping fragile valuable objects loose inside a container.”<sup>2</sup> Simple common sense leads people not to “ship a fragile object loose inside a barrel,”<sup>3</sup> just as it should lead governments to forbid transporting unrestrained<sup>4</sup> babies inside an airplane.<sup>5</sup>

The world’s aviation regulators and airlines have known for years what many parents do not – that it is dangerous for babies to be unrestrained or held on a parent’s lap when taking off, landing, in turbulence, or in an emergency.<sup>6</sup> Air disaster investigations have repeatedly revealed babies have been killed in otherwise survivable<sup>7</sup> accidents because they were not given the seats

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Her practice is dedicated exclusively to representing victims and their families in personal injury and wrongful death cases, including lawsuits arising out of aviation accidents. Ms. Epstein graduated from Illinois Institute of Technology Chicago-Kent College of Law on the Dean’s Honor List. She graduated Cum Laude from the University of Illinois at Urbana-Champaign. Lindsey currently serves as Vice Chair of the Women in the Law Committee of the Chicago Bar Association’s Young Lawyers Section.

<sup>1</sup> Schalk Willem van der Merwe Meintjes, Comparative Study into Occupant Support Concept with Respect to Crash Response 22 (Oct. 2003) (unpublished M.E. dissertation, University of Pretoria), available at <http://upetd.up.ac.za/thesis/available/etd-01112005-124913/unrestricted/00dissertation.pdf>.

<sup>2</sup> Hugh DeHaven, *Accident Survival—Airplane and Passenger Automobile*, in ACCIDENT RESEARCH: METHODS AND APPROACHES 564 (William Haddon, Jr. et al. eds., 1964).

<sup>3</sup> *Id.*

<sup>4</sup> No one considers a baby in a parent’s lap to be properly restrained because foreseeable G-forces in an emergency can overwhelm a parent’s ability to hold on to the baby.

<sup>5</sup> DeHaven, *supra* note 2, at 564.

<sup>6</sup> See, e.g., Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-10-121 through -123 (2010) [hereinafter NTSB Safety Recommendation A-10-121 through -123] (status open), available at <http://www.ntsb.gov/doclib/reclatters/2010/A-10-121-123.pdf>; Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-95-051 (1995) [hereinafter NTSB Safety Recommendation A-95-051] (status “Closed – Unacceptable Action” by FAA), available at [http://www.ntsb.gov/doclib/reclatters/1995/A95\\_40\\_51.pdf](http://www.ntsb.gov/doclib/reclatters/1995/A95_40_51.pdf); Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-90-78 (1990) [hereinafter NTSB Safety Recommendation A-90-78] (status “Closed – Unacceptable Action” by FAA), available at [http://www.ntsb.gov/doclib/reclatters/1990/A90\\_78\\_79.pdf](http://www.ntsb.gov/doclib/reclatters/1990/A90_78_79.pdf).

<sup>7</sup> Statistics reveal 96 percent of people in air-carrier accidents survive. See, e.g., Anthony T. Brickhouse, Ass’t Professor, Embry-Riddle Aeronautical

and proper safety restraints they required.<sup>8</sup> Enabling these deaths are regulations allowing children under two to fly without seats and restraints on both commercial<sup>9</sup> and general<sup>10</sup> aviation aircraft, *even though the same laws require seats and restraints for everyone else*. This infant seat exception has been sharply criticized by many experts including a Presidential Commission,<sup>11</sup> the National Transportation Safety Board (NTSB),<sup>12</sup> pediatricians,<sup>13</sup> and flight attendants.<sup>14</sup>

This paper begins by showing some of the avoidable harm current regulations and airline practices have failed to prevent. It then reviews what the world's aviation regulatory authorities, safety authorities, and airlines have done so far to help – and also what they have not done. Following this background the authors reveal why the FAA and other regulators' unwillingness to mandate seats and age-appropriate restraints for children under two is out of step with modern science and unacceptable, calling for governments to legislatively override any aviation regulators who persist in their outmoded and unscientific approach. Finally, if the stalemate between aviation safety authorities and aviation

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University, The Science of Survivability, Presentation at 2011 FedFleet, available at [http://www.oma.noaa.gov/aviationsafety/pdf/\(Brickhouse\)The%20Science%20of%20Survivability-1.pdf](http://www.oma.noaa.gov/aviationsafety/pdf/(Brickhouse)The%20Science%20of%20Survivability-1.pdf).

- <sup>8</sup> See, e.g., NAT'L TRANSP. SAFETY BD., ACCIDENT REPORT, FLIGHT INTO TERRAIN DURING MISSED APPROACH, USAIR FLIGHT 1016, DC-9-31, N954VJ, Charlotte/Douglas Int'l Airport, July 2, 1994, Report No. AAR-95/03 (1995) [hereinafter NTSB ACCIDENT REPORT, USAIR FLIGHT 1016]; NAT'L TRANSP. SAFETY BD., ACCIDENT REPORT, UNITED AIRLINES FLIGHT 232, McDONNELL DOUGLAS 10-10, SIOUX GATEWAY AIRPORT, SIOUX CITY, IOWA, July 19, 1989, Report No. AAR-90/06 (1990) [hereinafter NTSB ACCIDENT REPORT, UNITED AIRLINES FLIGHT 232]. See also NTSB Safety Recommendation A-10-121 through -123, *supra* note 6.
- <sup>9</sup> See, e.g., 14 C.F.R. § 121.311; 14 C.F.R. § 135.128 (2012).
- <sup>10</sup> See, e.g., 14 C.F.R. § 91.107(a)(3) (2012).
- <sup>11</sup> WHITE HOUSE COMM'N ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON, § 1.13 (1997).
- <sup>12</sup> See, e.g., NTSB Safety Recommendation A-10-121 through -123, *supra* note 6; NTSB Safety Recommendation A-95-051, *supra* note 6; NTSB Safety Recommendation A-90-78, *supra* note 6.
- <sup>13</sup> Marilyn J. Bull, et al., *Restraint Use on Aircraft*, 108 PEDIATRICS 1218 (2001), available at <http://pediatrics.aappublications.org/content/108/5/1218.full>.
- <sup>14</sup> Ass'n of Flight Attendants, Child Restraint Systems, <http://www.afanet.org/kidscrs.htm> ("Association of Flight Attendants, AFL-CIO, the largest flight attendant union in the United States representing more than 43,000 flight attendants at 27 airlines, strongly supports requiring child restraint seats.").

regulatory authorities on this issue continues, possible new legal avenues to move the issue forward are discussed, including constitutional challenges to the current regime and punitive damages claims against the airlines.

The infant seat exception defies common sense and modern crash survival science. Changing the rules so that *every* human being is required to have a seat and age-appropriate safety restraint when flying is long overdue and will eliminate a category of needless and senseless deaths and injuries affecting the most vulnerable among us.

## II. *Stories of Infant Deaths and Injuries that Could Have Been Avoided*

Sadly, no one knows worldwide how many lap babies have lost their lives, been injured, or injured others because there is no one database anywhere that collects all of this information. Nevertheless, substantial evidence has been collected about some of this bloodshed, and some of this evidence is presented in this section. The reader is forewarned about the graphic nature of the descriptions that follow. These images are necessary for a full appreciation of the issues.

### A. *United Airlines Flight 232*

On July 19, 1989, a young mother accompanied by her 23-month-old son were passengers on United Airlines flight 232, scheduled DC-10 service from Denver to Philadelphia with an intermediate stop in Chicago.<sup>15</sup> This child's parents easily could have afforded a ticket for their son, and would have obtained one and also made sure he was seated in his car safety seat, if they only knew the truth. But they did not understand there was anything dangerous about their son flying on his mother's lap, and why would they? Their government and airline not only allowed the practice, but their airline encouraged it, making it free of charge.

There were 296 people on board when the jumbo jet took off, a total of 285 passengers and an eleven-member crew. The flight proceeded normally for just over an hour when "the flight crew heard a loud bang or an explosion, followed by vibration and a

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<sup>15</sup> NTSB ACCIDENT REPORT, UNITED AIRLINES FLIGHT 232, *supra* note 8.

shuddering of the airframe. After checking the engine instruments, the flight crew determined that the No. 2 aft (tail-mounted) engine had failed.”<sup>16</sup> This failure was uncontained, with fragments of the disintegrated fan disc severing the hydraulic lines leading to loss of use of all control surfaces including the ailerons, flaps, slats, elevator, and rudder.

The young mother and her son, whose name was Evan, were seated together in seat 22E, which was situated mid-wing in the center of the cabin. As the flight attendants prepared everyone on board for an emergency landing during the 44 minutes of remaining flight, the young mother in 22E continued to worry about and question the flight attendant’s instruction to place her son at her feet on the floor.<sup>17</sup> She “was crouched in a brace position, her nose in Evan’s hair, knees gripping his shoulders, hands grasping his ankles.”<sup>18</sup> The child “was nestled at her feet, right hand holding one of the many pillows she had carefully placed around him.”<sup>19</sup>

Meanwhile, the pilots maneuvered the aircraft using differential thrust on the two wing engines and then attempted an emergency landing at Sioux City, Iowa. Evan’s father later published what happened next:

[A] jarring impact. The next instant is etched forever into her memory: For a fleeting moment, she is looking up, rather than down, at an object in the aisle to her right that is moving extremely quickly toward the rear of the plane. Even in the near darkness, she can tell from its outline that it is Evan and that it is unlikely he will survive the coming impact. He is actually floating several feet off the ground . . . Suddenly, silence, except for scattered voices shouting “Don’t push” and “Don’t open that exit; there’s fire out there.” . . . She somehow unbuckles herself and begins to crawl toward the voices, shouting hysterically for Evan. . . . The aisle that Evan hurtled down is impassably dense

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<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 40. United trained their flight attendants at the time to instruct parents with lap babies to place their babies on the floor during emergencies.

<sup>18</sup> Jeffrey Y. Tsao, *A Tragedy in Sioux City*, PARENTS, Sept. 1991, at 102.

<sup>19</sup> *Id.*

with debris and smoke, seemingly ready to explode. "My baby is back there," she screams as she is guided out of the plane by other survivors. "You can't go back there; it's too dangerous. . . ." In the cornfield just outside, . . . [the mother] cries to a flight attendant, "But you told me to put him on the floor! My little boy is dead!"<sup>20</sup>

She last saw her son "in the aisle to her right . . . moving extremely quickly toward the rear of the plane."<sup>21</sup> The aisle to the right led backward toward an area beginning at row 26 and proceeding aft for several rows where people died of smoke inhalation, followed by rows 29 through 36, where everyone either died or was severely injured.<sup>22</sup> In contrast, everyone in the five rows in front of 22E, the people seated in 22F, G, H, and J, and the people seated in 23E, F, G, H, and J all survived the crash. It was later determined Evan died of asphyxia secondary to smoke inhalation.<sup>23</sup> Had Evan been properly restrained in a child safety seat, it is likely he would have survived the crash, like his mother and 184 other passengers.

Remarkably, another unrestrained baby on flight 232 was hurtling through the air at the same time Evan was himself hurtling through the air toward the smoke. As the NTSB summarized the situation:

The mothers of the infants in seats 11F and 22E were unable to hold onto their infants and were unable to find them after the airplane impacted the ground. The infant originally located at 11F was rescued from the fuselage by a passenger who heard her cries and reentered the fuselage. The infant held on the floor in front of seat 22E died of asphyxia secondary to smoke inhalation.<sup>24</sup>

The baby originally located at seat 11F ended up flying into an overhead storage compartment 15 rows behind her mother's seat; and the bin door closed shutting her in. She may have died too if not for the efforts of another passenger:

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<sup>20</sup> *Id.* Co-author Jan Brown was the flight attendant.

<sup>21</sup> Tsao, *supra* note 18, at 102.

<sup>22</sup> NTSB ACCIDENT REPORT, UNITED AIRLINES FLIGHT 232, *supra* note 8, at 36.

<sup>23</sup> *Id.* at 40.

<sup>24</sup> *Id.*

After the plane came to a stop upside-down, the cabin began to fill with smoke. As survivors scrambled from the wreckage, a passenger who had been sitting near Evan and was searching for him heard a child crying inside a closed overhead bin. The passenger reached down and rescued the child, who turned out to be another lap baby who had been thrown 15 rows behind her mother's seat. That child survived. Evan was found dead in the back of the plane.<sup>25</sup>

It is not surprising these two young mothers were unable to hold on to their babies during the crash sequence. The G-forces involved in an otherwise survivable crash can greatly multiply the weight of a child. Writing for *USA Today*, Bill McGee explains:

#### **Cruel laws of physics**

I know what you may be thinking. You're the child's caregiver. You love that little one more than anything in the world. You'd stand in front of an on-rushing locomotive or walk through fire for that child. So of course you would hold on for dear life in an airborne emergency.

Well, unless you're from the planet Krypton, the simple fact is you can't.

The NTSB stated as much in its 2004 analysis: "Both laboratory testing and real-world accidents have proven that under high load force events when restraint is most important, arm strength is not sufficient to protect even a small child." That's because commercial aircraft are designed to withstand tremendous g-forces, but humans are not. And therefore a 25-pound baby could easily weigh three or four times that amount when you're struggling to hold onto it during an emergency, let alone dealing with impact, smoke or fire. You wouldn't climb the side of a sheer mountain with your baby in one arm and a pick ax in the other,

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<sup>25</sup> Carri Karuhn, *Ex-Attendant, Crash Survivor Lobbies for Child-Safety Seats*, CHIC. TRIB., Feb. 12, 1999, at 1 (Metro), available at [http://articles.chicagotribune.com/1999-02-12/news/9902120412\\_1\\_brown-lohr-child-safety-seats-parents-laps](http://articles.chicagotribune.com/1999-02-12/news/9902120412_1_brown-lohr-child-safety-seats-parents-laps).



yet the G-forces in that situation are many times less than in a pressurized airplane moving at .82 mach, or four-fifths the speed of sound. In addition, a baby strapped inside your own seat belt can easily be crushed by your weight during an emergency.<sup>26</sup>

### B. *USAir Flight 1016*

Another infant's life was lost in the USAir flight 1016 crash at Charlotte, North Carolina on July 2, 1994.<sup>27</sup> This time, a 9-month-old girl was sitting unrestrained on her mother's lap as the DC-9 crashed while on final approach due to an inadvertent low altitude encounter with microburst wind shear. During the crash sequence the mother was unable to hold onto her baby.<sup>28</sup> The NTSB determined "if the child had been properly restrained in a child restraint system, she probably would not have sustained fatal injuries."<sup>29</sup>

### C. *Continental Flight 267*

On June 25, 1995, Continental Airlines flight 267 was scheduled passenger service from Newark, New Jersey to San Juan, Puerto Rico. Over the Atlantic Ocean the aircraft experienced severe turbulence and one mother lost hold of her baby, who was riding on the mother's lap.<sup>30</sup> The baby survived the experience, but was injured due to impact with the aircraft interior.<sup>31</sup>

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<sup>26</sup> Bill McGee, *Why You Should Never Fly with a Child in Your Lap*, USA TODAY, July 30, 2008, [http://usatoday30.usatoday.com/travel/columnist/mcgee/2008-07-29-lap-children\\_N.htm](http://usatoday30.usatoday.com/travel/columnist/mcgee/2008-07-29-lap-children_N.htm).

<sup>27</sup> NTSB ACCIDENT REPORT, USAIR FLIGHT 1016, *supra* note 8, at 2, 38.

<sup>28</sup> *Id.* at 38.

<sup>29</sup> *Id.* at 114.

<sup>30</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT – AVIATION, INCIDENT, CONTINENTAL AIRLINES FLIGHT 267, AIRBUS 300-B4-103, N13983, ATLANTIC OCEAN, June 25, 1995, Report No. MIA95IA157 (1995).

<sup>31</sup> *Id.* In 1997, the Australian magazine *New Idea* reported that an unrestrained lap baby, 20-month-old Leah Wilsley, was killed as a result of injuries she suffered on a flight from New York to Los Angeles the preceding August when, due to an air pocket, the baby flew from her mother's knee upwards striking her head on the cabin ceiling. It is reported the baby fractured her skull and later died; and that television star Lisa Kudrow and her son Julian were also on the flight. The authors believe this report may be accurate but, so far, have been unable to verify it in the NTSB's accident database. Therefore, it is being included in this footnote only at this time.

#### D. *American Airlines Flight 903*

In a strange incident aboard American Airlines flight 903 on May 12, 1997, as the plane was in the vicinity of West Palm Beach, Florida en route to Miami, it stalled, banking left and right and losing over three thousand feet of altitude before the crew reestablished control. Passenger “Melanie Joison was sitting with her two children holding her 18-month-old daughter in her lap. The child flew from her lap back over three rows of seats where she was caught by another passenger.” This miraculous catch did not leave everyone in the Joison family unharmed, however, as Ms. Joison suffered five broken ribs, most likely trying to hold on to her daughter.<sup>32</sup> Of course, if the passenger making the catch had been bashed in the head by the baby instead, the baby and the passenger each may have been injured or killed.

#### E. *Southwest Airlines Flight 2809*

On February 24, 2008, a Boeing 737 operated as Southwest Airlines flight 2809 encountered severe turbulence during descent for landing at McCarran International Airport in Las Vegas, Nevada.<sup>33</sup> One flight attendant explained when the severe turbulence was encountered: “She observed a baby seated on his mother’s lap in seat 23F and recalled witnessing the baby hit the ceiling during the turbulence.”<sup>34</sup> The child’s mother described what happened in more detail: “She was holding her son on her left shoulder, as he had fallen asleep. The airplane felt as if it had suddenly dropped and as her son was launched upward, she reached for his legs. Her arm hit the metal part of the armrest between the seats. . . . A FA quickly examined her son and found a gash on top of his head.”<sup>35</sup>

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<sup>32</sup> <http://transcripts.cnn.com/transcripts/0305/27/se.07.html>.

<sup>33</sup> NAT’L TRANSP. SAFETY BD., FACTUAL REPORT – AVIATION, SOUTHWEST AIRLINES FLIGHT 2809, BOEING 737-300, N648SW, LAS VEGAS, NEVADA, Feb. 24, 2008, Report No. LAX08IA065 (2009).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

### F. *Butte, Montana General Aviation Disaster*

Another illustrative case involves a general aviation crash that took place in Butte, Montana on March 22, 2009.<sup>36</sup> Remarkably, an 11-seat aircraft had 14 people aboard when it crashed.

Among the 13 passengers were six adults and seven children (ages 1 through 9 years). Because the flight was a single-pilot operation, eight seats in the cabin and one seat in the cockpit were available to the 13 passengers. Thus, the number of passengers exceeded the number of available seats. Except for the pilot and the occupant of the right front seat, the National Transportation Safety Board (NTSB) was unable to determine the original seating position for the occupants, but the bodies of four children, ages 3 to 9 years, were found farthest from the impact site, indicating that these children were likely thrown from the airplane because they were unrestrained or improperly restrained. The investigation of this accident is ongoing, and evidence indicates that the accident was not survivable. However, *the NTSB notes that, if the accident had been less severe and the impact had been survivable, any unrestrained occupants or occupants sharing a single restraint system would have been at a much greater risk of injury or death.*<sup>37</sup>

Even though the crash was not survivable, if the law had prohibited flying without a seat and proper restraints for every person on board, at least four people's lives would have been saved because it would have been unlawful to fly with more passengers than seats.

### III. *What Has and Has Not Been Done on the Infant Seat Issue*

In the United States, for more than twenty years, the NTSB and the FAA have had a legendary disagreement about the need for rules mandating seats and restraints for babies under age two,

<sup>36</sup> NTSB Safety Recommendation A-10-121 through -123, *supra* note 6.

<sup>37</sup> *Id.* (emphasis added).

which is unfortunate because all of the regulatory power belongs to the FAA and the agency opposes a seat and restraint mandate.

The latest round in the debate began on August 11, 2010, when the NTSB once again issued Safety Recommendations to the FAA requesting regulations for commercial and general aviation operations that “require each person who is less than 2 years of age to be restrained in a separate seat position by an appropriate child restraint system during takeoff, landing, and turbulence”<sup>38</sup> These Safety Recommendations came on the heels of, and were directly related to, the Butte, Montana air crash. The FAA, once again, refused to change the rules. Not surprisingly, the NTSB categorized the FAA’s response to its latest seat and restraint mandate “unacceptable.”<sup>39</sup>

In later reporting its refusal to mandate seats and restraints for everyone to Congress<sup>40</sup> instead of explaining *why* it refused to follow the Safety Board’s Safety Recommendations, the FAA focused instead on what it is doing – trying to improve communication with parents about the danger in order to encourage them to purchase seats for their babies.<sup>41</sup> This demonstrates how out of touch the FAA is with the main message its regulations send: that it must be safe for babies to fly without seats or restraints because if it was *not* safe, then surely the practice would *not* be allowed.

Evan Tsao’s father taught this lesson to the FAA more than twenty years ago in a published article:

Perhaps the greatest irony of our tragedy is that in nearly every other aspect of Evan’s life, we were so careful. Sylvia and I were zealously safety-conscious and watched over him like hawks. Somehow, though, it never occurred to us that Sylvia should bring an infant-safety carrier on board.

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<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g., id.*; NTSB Safety Recommendation A-95-051, *supra* note 6; NTSB Safety Recommendation A-90-78, *supra* note 6.

<sup>40</sup> DEP’T OF TRANSP., FED. AVIATION ADMIN., ANNUAL REPORT ON AIR CARRIER SAFETY RECOMMENDATIONS: RESPONSE TO PUBLIC LAW 111-216, SECTION 202, CALENDAR YEAR 2010, at 113 (2011). The FAA has previously stated its rationale for not mandating safety seats is that families will be diverted from aircraft to driving and this is more dangerous than allowing babies to fly without seats or restraints. A more detailed discussion of this rationale and its flaws appears *infra*.

<sup>41</sup> *Id.*

Like most, we didn't expect our plane to crash; nor did we even realize that plane crashes are often survivable. To us it was just another trip, Sylvia and Evan were on their way to visit her parents in New Jersey while I attended a conference in Michigan.

Indeed one part of me desperately wants to blame the airlines for not recommending the use of child-safety seats more widely. If they had, we would certainly have brought a seat on board, and Evan would not have become a loose projectile in the plane. Another part of me suffers, though, knowing that we share in the blame. Evan was always in a child-safety carrier while in our car; how could we have thought he would be safe without one on the plane?<sup>42</sup>

The FAA should have understood from the start that Mr. Tsao, who lost so much, didn't know what the FAA knew. So, while it is understandable how this father might have believed he and his wife shared in the blame, the FAA had to know that these parents did nothing wrong. On the contrary, they were misled into thinking their child was safe because most people would infer that if babies needed seats and restraints for safety, then the aviation regulators and airlines would not allow lap babies to fly. In other words, what was totally unforeseeable to Evan's parents was completely foreseeable to the aviation regulators and the airlines.<sup>43</sup>

The truth is that a false message that lap babies are safe will continue to resonate for as long as the law permits babies to fly without seats and age-appropriate restraints because, without regard to how strong the FAA's communication efforts may be-

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<sup>42</sup> Tsao, *supra* note 18, at 102.

<sup>43</sup> On the other hand, there are also documented incidences where harm has been avoided because babies under two years of age were strapped into safety seats instead of simply being held on a parent's lap. For example, on July 6, 1996, Delta flight 1288 suffered an uncontained engine failure just after take-off that sheared into the cabin, killing two passengers and injuring several others. Seated at the back of the MD-88, next to the engines in the area of the cabin that had been sheared were 14-month-old Emma Tourtelotte and her parents. The Tourtelottes had purchased a seat for Emma and strapped her into that seat in her car safety seat. Even though two people seated nearby lost their lives, she was saved by the car seat.

come, at least some parents will continue to believe that if it was not safe it would not be allowed.

The FAA's history of mostly inaction has occurred despite repeated attempts by other United States government agencies to encourage the FAA to mandate the use of child safety seats. All the way back in 1972, at a time when there were no laws in the United States requiring the use of seatbelts in automobiles, the General Accounting Office called for mandating child restraint devices for infants in aircraft.<sup>44</sup> However, it was not until 1990 that the issue truly gained traction. This occurred when the United States House of Representatives Aviation Subcommittee held hearings on a bill to mandate child restraints, which was prompted by Evan Tsao's death in the flight 232 tragedy.<sup>45</sup> The FAA strongly opposed the bill, which never made it out of committee.<sup>46</sup>

On February 12, 1997, the White House Commission on Aviation Safety and Security issued a Final Report to President Clinton.<sup>47</sup> Recommendation 1.13 was that "[t]he FAA should eliminate the exemptions in the Federal Aviation Regulations that allow passengers under the age of two to travel without the benefit of FAA-approved restraints."<sup>48</sup> As the Commission explained, "it is inappropriate for infants to be afforded a lesser degree of protection than older passengers."<sup>49</sup> The Commission also made clear when these restraints must be used:

The FAA should revise its regulations to require that all occupants be restrained during takeoff, landing and turbulent conditions, and that all infants and small children below the weight of 40 pounds and under the height of 40 inches be re-

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<sup>44</sup> Nat'l Air Disaster Alliance/Found., Safer Children, [http://www.planesafe.org/?page\\_id=189](http://www.planesafe.org/?page_id=189) (last visited Nov. 1, 2012).

<sup>45</sup> Christopher J. Witkowski, Director of Air Safety, Health and Security, Association of Flight Attendants, Statement at the NTSB Advocacy Briefing on Child Restraints on Aircraft (Feb. 26, 2004).

<sup>46</sup> *Id.* Ten similar bills were introduced in Congress through 1998, with none of them making it out of committee. Suzanne E. Thompson, *Why, After All this Time, Is the FAA Just Now Taking Steps to Mandate Child Restraint Systems on Aircraft?*, 37 GONZ. L. REV. 533, 550 (2002), available at <http://blogs.gonzaga.edu/gulawreview/files/2011/02/Thompson.pdf>.

<sup>47</sup> WHITE HOUSE COMM'N ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON (Feb. 12, 1997).

<sup>48</sup> *Id.* at 20.

<sup>49</sup> *Id.*

strained in an appropriate child restraint system, such as child safety seats, appropriate to their height and weight.<sup>50</sup>

However, these suggestions were resisted by the FAA.<sup>51</sup>

National and international organizations have had more success in bringing the issue of infant seats to the forefront, though their efforts have waned in recent years after little success creating real change. For example, in addition to issuing the reports following the Sioux City and Charlotte crashes, the NTSB has long promoted mandating child safety seats for infants under age two during takeoff, landing, and turbulence.<sup>52</sup> The first NTSB Safety Recommendation letter was sent to FAA Administrator James B. Busey on May 30, 1990.<sup>53</sup> As the NTSB explained, “[i]nfants and small children should be afforded equal or greater protection from death and injury during crash impacts and turbulence as afforded other persons on board commercial and general aviation aircraft.”<sup>54</sup>

Three more NTSB Safety Recommendations to the FAA followed on August 31, 1993, May 16, 1995 (in the aftermath of the lap baby death on flight 1016), and August 11, 2010 (in the aftermath of the Butte, Montana tragedy).<sup>55</sup> The NTSB also held a Child Restraint in Aircraft symposium in December 1999,<sup>56</sup> a Child Passenger Safety forum in December 2010,<sup>57</sup> and continually offers speeches and testimony on the infant seat issue.<sup>58</sup> The necessity of mandating the use of child safety seats was continually present on the NTSB’s “Most Wanted” list for 15 years until

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<sup>50</sup> *Id.*

<sup>51</sup> Fed. Aviation Admin., Child Safety on Airplanes, [http://www.faa.gov/passengers/fly\\_children/crs/](http://www.faa.gov/passengers/fly_children/crs/) (last visited Nov. 1, 2012).

<sup>52</sup> See, e.g., NTSB Safety Recommendation A-90-78, *supra* note 6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> NTSB, Child and Youth Transportation Safety, <http://www.nts.gov/safety/children.html> (last visited Nov. 1, 2012).

<sup>56</sup> NTSB, Child Restraint in Aircraft Meeting, Dec. 15–16, 1999, *agenda available at* [http://www.beta.nts.gov/events/1999/meet\\_airchild/presentations.htm](http://www.beta.nts.gov/events/1999/meet_airchild/presentations.htm).

<sup>57</sup> Elisa R. Braver & Jana M. Price, Presentation at the 2011 Transportation Research Board Annual Meeting: Highlights of the 2010 NTSB Child Passenger Safety Forum (Jan. 24, 2011), *available at* [http://www.nts.gov/news/events/2010/child\\_safety/presentations/NTSB\\_child\\_forum\\_TRB\\_012411.pdf](http://www.nts.gov/news/events/2010/child_safety/presentations/NTSB_child_forum_TRB_012411.pdf).

<sup>58</sup> See generally NTSB, Speeches and Testimony, <http://www.nts.gov/news/speeches.html>.

August 2005 when it was removed.<sup>59</sup> While so far the issue has not returned to the Most Wanted list and, although the reasons for this have never been made publicly clear,<sup>60</sup> the NTSB has been unwavering in its commitment to establish a mandate that everyone have a seat and restraint available to them when flying. One part of the NTSB's work in this area has been to prepare and disseminate an outstanding three and one-half minute video explaining the danger.<sup>61</sup>

The American Academy of Pediatrics (AAP) "is a professional membership organization of 60,000 primary care pediatricians, pediatric medical sub-specialists and pediatric surgical specialists dedicated to the health, safety, and well being of infants, children, adolescents and young adults."<sup>62</sup> Fellows of the AAP are pediatricians who have obtained board certification.

This well respected organization has had a clear policy on aviation safety for babies for more than a decade:

Occupant protection policies for children younger than 2 years on aircraft are inconsistent with all other national policies on safe transportation. Children younger than 2 years are not required to be restrained or secured on aircraft during takeoff, landing, and conditions of turbulence. They are permitted to be held on the lap of an adult. Preventable injuries and deaths have occurred in children younger than 2 years who were unrestrained in aircraft during survivable crashes and conditions of turbulence. The American Academy of Pediatrics recommends a mandatory federal requirement for restraint use for children on aircraft. The Academy further recommends that parents ensure that a seat is available for all children during aircraft transport and follow current recom-

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<sup>59</sup> Nat'l Air Disaster Alliance/Found., *supra* note 44.

<sup>60</sup> *Id.*

<sup>61</sup> Video recording: Autopilot – Your Child's Safety Up in the Air (NTSB), <http://www.youtube.com/watch?v=spYWuO20fCM&feature=plcp>. At the time of publication, this video has been viewed just over 12,000 times. Viewing this video should be part of the educational curriculum for every expectant parent.

<sup>62</sup> American Academy of Pediatrics, AAP Facts, <http://www.aap.org/en-us/about-the-aap/aap-facts/Pages/AAP-Facts.aspx#Membership> (last visited Nov. 1, 2012).



mendations for restraint use for all children. Physicians play a significant role in counseling families, advocating for public policy mandates, and encouraging technologic research that will improve protection of children in aircraft.<sup>63</sup>

The AAP position on the issue has recently been reiterated and remains unchanged: “regulations [must] be promulgated to ensure that all passengers, including those younger than 2 years, are afforded optimal protection” during flights.<sup>64</sup>

Other than calling for a seat and restraint mandate, the AAP advises:

- When traveling on an airplane, a child is best protected when properly restrained in a car safety seat appropriate for the age, weight and height of the child until the child weighs more than 40 lbs. and can use the aircraft seat belt.
- The car safety seat should have a label noting that it is FAA-approved. Belt-positioning booster seats cannot be used on airplanes, but they can be checked as luggage (usually without baggage fees) for use in rental cars and taxis.
- Although the FAA allows children under age 2 to be held on an adult’s lap, the AAP recommends that families explore options to ensure that each child has her own seat. If it is not feasible to purchase a ticket for a small child, try to select a flight that is likely to have empty seats.<sup>65</sup>

The Association of Flight Attendants (AFA-CWA) is a labor union representing “nearly 60,000 flight attendants at 21 airlines, serving as a voice for flight attendants at their workplace, in the industry, in the media and on Capitol Hill.”<sup>66</sup> “AFA-CWA is a

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<sup>63</sup> Bull, *supra* note 13, at 1218.

<sup>64</sup> *Id.* at 1220; See Dennis R. Durbin, *Technical Report – Child Passenger Safety*, 127 PEDIATRICS 1050, 1060–61 (2011).

<sup>65</sup> Am. Acad. of Pediatrics, Travel Tips, <http://www.aap.org/en-us/about-the-aap/aap-press-room/news-features-and-safety-tips/pages/Travel-Safety-Tips.aspx?nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token> (last visited Nov. 1, 2012).

<sup>66</sup> Ass’n of Flight Attendants–CWA, About the Association of Flight Attendants, <http://www.afanet.org/default.asp?id=2> (last visited Nov. 1, 2012).

democratic union representing flight attendants at every type of carrier. All AFA-CWA officers are flight attendants who solicit member input on policy and financial decisions. . . . [It] shares information and strategies, working in solidarity with flight attendant unions around the world through the International Transport Workers Federation (ITF).<sup>67</sup>

The AFA-CWA has been a strong advocate for mandatory child safety seats for many years:

“As flight attendants, we are required to secure all items in the cabin, galley and lavatories; from carry-on bags to coffee pots. We do this because we are trained that in an emergency loose items can be dangerous if flying through the cabin. A lap child has the potential to be one of those ‘loose items’ that may not only suffer serious injury themselves but also injure others,” said [AFA-CWA International President Pat] Friend.

For over 20 years, AFA-CWA has advocated for the mandatory use of child restraints in aircraft and supported the NTSB’s recommendations that the Federal Aviation Administration require all infants and small children use safety seats during takeoff, landing and turbulence. Unfortunately, the FAA’s decision to continue allowing children under the age of two to be held on a parent’s lap gives many parents the false impression that this practice is safe.

“To achieve one level of safety for our most vulnerable travelers, we must develop a strong regulation and couple it with adequate monitoring and enforcement. It is through agencies like the NTSB making recommendations aimed at protecting children from death and injury in transportation-related crashes that the traveling public has a slightly increased awareness regarding the need to protect infants and small children,” said Friend.<sup>68</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> Press Release, Ass’n of Flight Attendants, AFA-CWA Pushes for Mandatory Use of Child Restraint Devices on All Passenger Aircraft (Dec. 9, 2010), *available at* <http://www.afanet.org/default.asp?id=1332>.

Internationally, numerous organizations have also criticized policies permitting children under two to sit aboard an aircraft on an adult's lap, and attempted to change the rules which result in senseless deaths. For example, the European Aviation Safety Agency (EASA), under the auspices of the European Commission, recognizes that “[c]hildren under two years are too small to sit alone in a standard airline passenger seat [and] must be secured by an approved ‘child restraint device’ on EU airlines.”<sup>69</sup> The EASA even issued draft regulations, including one, NCO.IDE.A.140, that would require airplanes to be equipped with child restraint devices for every infant on board the aircraft.<sup>70</sup> However, the mandate was never enacted into law, and EU-OPS 1.320 still permits infants to ride on an adult's lap so long as a loop belt or other restraint system is utilized.<sup>71</sup> This requirement is problematic, because loop belts create a “jack-knife effect” of an adult over the infant and fail to provide the infant with any safety.<sup>72</sup> The United States expressly forbids their use.<sup>73</sup>

The International Air Transport Association's (IATA) Operational Safety Audit (IOSA) has also issued guidelines for airlines to follow.<sup>74</sup> The guidelines include “cabin crew procedures that ensure all passengers are seated with their seat belts (or harness or other restraint provided) fastened” during critical phases of the flight, in CAB 3.4.4, and “procedures in accordance with applicable regulations to ensure a means of infant restraint is utilized,” in CAB 3.4.5.<sup>75</sup> Nonetheless, the recommendations fall short of an absolute mandate requiring child safety seats.<sup>76</sup>

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<sup>69</sup> Eur. Aviation Safety Agency, *Flying with Small Children*, <http://easa.europa.eu/communications/flying-with-small-children.php>.

<sup>70</sup> EUR. AVIATION SAFETY AGENCY, ANNEX VII THE DRAFT COMMISSION REGULATION ON ‘AIR OPERATIONS — OPS’: PART-NCO — IR, at 28 (2012), *available at* <http://easa.europa.eu/agency-measures/docs/opinions/2012/01/Part-NCO%20IR.pdf>.

<sup>71</sup> TÜV RHEINLAND KRAFTFAHRT GMBH, TEAM AVIATION, *STUDY ON CHILD RESTRAINT SYSTEMS: CONTRACT NUMBER: EASA.2007.C.28, FINAL REPORT 35* (2008), *available at* <http://easa.europa.eu/rulemaking/docs/research/Final%20Report%20EASA%202007.C.28.pdf>.

<sup>72</sup> *Id.* at 5.

<sup>73</sup> *Id.* at 36.

<sup>74</sup> IATA, *IOSA STANDARDS MANUAL*, at CAB 31 (6th ed. effective Sept. 1, 2012), *available at* <http://www.iata.org/ps/certification/iosa/Documents/IOSAStandardsManualEd%206.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

Despite the efforts by all of these organizations and others,<sup>77</sup> infants under age two are still not required to have their own seat and be restrained with a child safety device.<sup>78</sup> The International Civil Aviation Organization (ICAO) appears, so far, not to be participating in the debate. While the world's governments have taken some steps in the right direction to protect the lives of infants, none have yet mandated seats and age-appropriate restraints. Needless and senseless deaths continue to occur as a result.

#### IV. *The Argument against Mandating Seats and Restraints for Babies*

In a 1995 report to Congress entitled *Child Restraint Systems*,<sup>79</sup> the FAA stated that their analysis of the economic and safety effects of requiring infant restraints assumed five premises:

1. Mandatory use of child restraint systems . . . will require the use of passenger seats that will then be unavailable for other passengers.
2. There will be costs associated with a CRS requirement, and those costs will either be absorbed or shared by air carriers and/or passengers.
3. Increased air travel charges for families with infants will cause some families to divert to other modes of transportation or forego travel.

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<sup>77</sup> Many other organizations have assisted in the effort to obtain a safety seat mandate, such as The National Air Disaster Alliance/Foundation and Safe Seats for Every Air Traveler (SSEAT). See PlaneSafe.org, *How We Do It*, available at [http://www.planesafe.org/?page\\_id=343](http://www.planesafe.org/?page_id=343); Press Release, SSEAT, New Air Safety Group Aims for Child Seat Mandate; Applauds NTSB Efforts (Dec. 8, 2010), available at <http://www.safe-skies.com/files/SSEAT/SSEATNewsReleasePreNTSBEventonChildSafety.pdf>. The sole mission of the latter organization is to establish an FAA mandate and "clear, immediate and enforceable directive that on commercial flights parents must place children under age 2 in child restraint seats like those used in cars." *Id.*

<sup>78</sup> 14 C.F.R. § 91.107(3)(i) (2012).

<sup>79</sup> DEP'T OF TRANSP., FED. AVIATION ADMIN., REPORT TO CONGRESS: CHILD RESTRAINT SYSTEMS: REPORT OF THE SECRETARY OF TRANSPORTATION TO THE UNITED STATES CONGRESS PURSUANT TO SECTION 522 OF THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT OF 1994, PUB. L. NO. 103-305 (1995).

4. Increased costs and/or lost revenue affects the profits of air carriers.
5. Air travelers who divert to other modes of transportation will be exposed to the higher injury and mortality rates associated with those modes.<sup>80</sup>

Nearly a decade later, the NTSB confirmed the argument had not changed: “the principle [sic] argument against requiring child restraints has used statistical and economic models to predict diversion from air to highway travel. Such diversions can result in the additional risk of highway crash injuries and/or fatalities.”<sup>81</sup> And as mentioned *supra*, the latest efforts for change, made in 2010, generated no new arguments from the FAA.

#### V. *Flaws in the Argument against Mandating Seats and Restraints for Babies*

In its 2004 *Analysis of Diversion to Automobile in Regard to the Disposition of Safety Recommendation A-95-51*,<sup>82</sup> the NTSB Office of Research and Engineering Safety Studies and Statistical Analysis Division took issue with most of the FAA’s published assumptions:

1. [T]here is no reason to suggest that a significant number of adult seat fares would be “lost” even if discounted or free travel were granted to children under 2.
2. [M]any of the approved safety restraints now used to transport infants to and from airports end up flying as checked baggage while those infants ride in the cabin unprotected.
3. Since the FAA first raised the diversion issue in 1985, those arguing for and against an infant restraint requirement have repeatedly disagreed over the various assumptions used in the prediction model. [NTSB] staff has stated on several occasions that because of the lack of empirical data to

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<sup>80</sup> *Id.*

<sup>81</sup> NTSB, *Analysis of Diversion to Automobile in Regard to the Disposition of Safety Recommendation A-95-51*, at 1 (Aug. 3, 2004), available at <http://www.ntsb.gov/doclib/reports/2004/SRA9551.pdf>.

<sup>82</sup> *Id.*

characterize passenger diversion behavior and thresholds, and the statistical problems of predictions based on small numbers, it believes the diversion argument to be flawed.

4. [S]tatistical analysis covering 1980–2002 reveals in the three major downturns in air passenger plane enplanements during this period, infant fatalities in traffic accidents did not go up; probably due to the beneficent effect of the very child safety seats that are not required on aircraft even though the foreseeable forces on aircraft are much greater than in vehicles.<sup>83</sup>

The NTSB staff made two additional important points rebutting the FAA's approach: 1) "Although ludicrous, exempting children under 2 is not functionally different from exempting passengers over 80 from a restraint requirement;" and 2) "passengers are now required to securely stow all carry-on baggage during takeoff and landing because of the potential risk of injury to other passengers in the event of an unexpected hazard encounter. However, the same passengers are permitted to hold a child of equal size and weight in their lap. When children under 2 are not required to be restrained for their own safety, the safety of their fellow passengers also becomes an issue."

In 2004, the NTSB staff concluded:

After considerable analysis of real-world air and road vehicle data, staff has found that in extreme cases, diversion from air travel may result in increased risk of fatality or injury for some specific vehicle, trip, and driver types, but this accident risk is not evenly distributed and no evidence was found to suggest an increased risk for children under 5 years old. In total, there does not appear to be a clearly defined relationship between diversion from air travel and highway accidents or injury. In fact, despite the acknowledged difference in relative risk between road and commercial airline travel in the United States, and the largest diversion from air travel in U.S. history during recent years [referring to the immediate post 9/11 period], road fatalities

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<sup>83</sup> *Id.*

and injuries for children under 5 years old have continued to decrease.

Moreover, the diversion argument “overlooks the fact that every lap-held child traveler lacks adequate protection. Both laboratory testing and real-world accidents have proven that under high load force events when restraint is most important, arm strength is not sufficient to protect even a small child. Unlike aircraft components that can be evaluated based on the mean time between failure and criticality to maintaining safe flight should they fail, passenger restraints are part of an invaluable last line of defense because they help protect occupants in the event of any failure or unexpected hazard encountered.”<sup>84</sup>

The AFA-CWA has joined in the NTSB’s criticisms of the FAA’s position: “FAA has argued that requiring CRS will lead to increases in costs, which will lead families to divert to more dangerous modes, resulting in more deaths and injuries. However, a recent NTSB report clearly refutes this argument. AFA has also consistently refuted this diversion argument because it was based on a speculative assumption of behavior. Until the FAA mandates the use of child restraint systems on airplanes, many parents will continue to have a false sense of security that holding their child is adequate.”<sup>85</sup>

The diversion argument may itself be a diversion. The authors suspect an impediment to regulators mandating seats and restraints for babies could be political fear of a public backlash. Moreover, competitive concerns may be contributing to individual airlines’ failures to require seats and restraints for everyone on their own. While government regulators and airlines have not articulated either of these rationales for their inaction, the diversion argument is so weak that it is reasonable to question what the true motivations may be.

The diversion rationale pales when compared to the first scene in the NTSB’s 2010 movie *Autopilot, Your Child’s Safety Up in*

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<sup>84</sup> *Id.* at 3.

<sup>85</sup> Ass’n of Flight Attendants–CWA, Child Restraint Seats, [http://ashsd.afacwa.org/index.cfm?zone=/unionactive/view\\_article.cfm&HomeID=2777&page=AirSafetyIssues](http://ashsd.afacwa.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=2777&page=AirSafetyIssues).

*the Air*,<sup>86</sup> which begins with an airliner on the ground before take-off and a young couple happily playing with their one-year-old as a flight attendant is seen and heard providing the familiar FAA required pre-takeoff instructions. The baby is seated on his mom's lap while his dad is taking photos. Everyone is smiling and happy. But right after the flight attendant said "make sure that all carry-on items are properly stowed" the mood darkens as the flight attendant warned: "Now that everything else on the plane is secured, have you thought about the child on your lap? In the event of turbulence or other emergency your baby could substantially shift during flight. In fact he or she may hit the ceiling, or be thrown several rows away from your seat, due to your failure to provide a proper seat restraint system."

As fear creeps across both parents' faces the scene changes to the NTSB Aviation Survival Factors Chief Nora Marshall explaining in plain language the danger and today's current ridiculous regulatory situation. The film concludes with the parents happy once again, back in time at the gate, boarding the aircraft with the child safety seat they already own and a ticket for the baby.

An important underlying issue, recently raised by NTSB Vice Chairman Christopher A. Hart, involves what scientific basis, if there is any, supports not mandating seats and restraints for children under age two while requiring them for everyone else:

[I]nfant car seats have improved tremendously since the FAA first promulgated its regulatory exception that allows passengers under the age of 2 not to be restrained – indeed, car seats for children that age may not even have existed when the exception was first created. Given these car seat improvements, perhaps it is time to revisit whether there is still a scientific basis for an exception for children under 2. Thus, I think we should recommend that the FAA revisit, in light of current infant car seat technology, whether there is a scientific basis for excepting children under age 2 from the restraint requirements . . . and if there is no scientific basis for the exception, then the exception is arbi-

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<sup>86</sup> See *supra* note 61.



trary, by definition, and **SHOULD BE RESCINDED.**

. . . Irrespective of whether, as the FAA contends, eliminating the age 2 exception would cause diversion of more traffic to the (less safe) highways, the question still remains as to why the FAA drew the line for the exception at the age of 2. If there is diversion to the highways for not wanting to buy an extra seat for a 1 year old, there is no reason why that same diversion argument would not also apply to 5 year olds or 10 year olds. . . .<sup>87</sup>

## VI. *Call for Action*

If the world's aviation regulators or airlines will not heed the advice of the world's aviation safety community, then the legislative bodies or top executives should step in and mandate that every person must have a seat and age-appropriate safety restraint during takeoffs, landings, turbulence, and emergencies. The most fragile among us, our babies under two years of age, must no longer be allowed to fly without safety seats.

## VII. *Possible New Legal Avenues if the Stalemate Continues*

If the stalemate between the NTSB and FAA continues over the child safety seat issue, at least in the United States, there are other potential legal avenues that have not yet been pursued. For example, one possibility is a lawsuit challenging the constitutionality of the infant seat exception and another involves claims for punitive damages against the airlines. While it is beyond the scope of this paper to thoroughly explore these legal options or predict their likely result, they will be briefly evaluated, mainly to illustrate that it would be far better for the government to do away with the infant seat rule than continue to cling to it.

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<sup>87</sup> NTSB Safety Recommendation A-10-121 through -123, *supra* note 6 (Vice Chairman Christopher A. Hart, dissenting).

### A. *Constitutionality*

Famously, Justice Thurgood Marshall remarked: “The Constitution does not prohibit legislatures from enacting stupid laws.”<sup>88</sup> If it were otherwise, the infant seat exception probably would have been declared unconstitutional long ago.

Since a federal law is involved, at issue is whether the Due Process Clause of the Fifth Amendment, including the equal protection component it incorporates, renders the infant seat exception unconstitutional.

The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>89</sup>

In a contested constitutional challenge to the infant seat exception it is unlikely the parties will agree on the degree of deference the FAA is entitled to. This can be an important issue because in general the greater the degree of deference applied, the less likely the law will be found unconstitutional.<sup>90</sup>

It can be anticipated, *if* the government elects to defend the infant seat exception at all, that it will argue for application of “rational basis review” – the most deferential standard – whereas the challengers can be expected to fight for strict or intermediate scrutiny – less deferential forms of review.

At times, the degree of deference applied has determined the outcome in constitutional litigation. For example, strict scrutiny

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<sup>88</sup> *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209, 128 S. Ct. 791, 801, 169 L. Ed. 2d 665 (2008) (Stevens, J., concurring).

<sup>89</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

<sup>90</sup> *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267 (2007).

used to be described as “strict in theory and fatal in fact,”<sup>91</sup> while rational basis review has been called a “virtual rubber stamp”<sup>92</sup> or test that is “impossible to flunk.”<sup>93</sup> However, these extreme descriptions over-simplify the real situation, which is that laws both fail the easiest test and also pass the most difficult one.

Selecting the applicable standard of review for the infant seat exception turns on whether babies either have a fundamental right to a seat and age-appropriate restraints when flying, or are members of a suspect class. If the answer to either one of these questions is yes, then a higher degree of scrutiny than rational basis review will apply. On the other hand, if the answer to both questions is no, then the government will be afforded great deference.

Since the “right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment,”<sup>94</sup> and given that the “activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved,” there is an argument that everyone (including every baby) has a fundamental right to a seat and age-appropriate restraint when flying and strict scrutiny should be applied in reviewing the infant seat exception.<sup>95</sup>

Moreover, while the United States Supreme Court has not addressed whether babies fall into a suspect class for constitutional review purposes, it has explained:

A suspect class is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been dis-

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<sup>91</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>92</sup> Richard H. Fallon, Jr., *The Supreme Court, 1996 Term-Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997).

<sup>93</sup> Peter Irons, *Opticians and Abortion: The Constitutional Myopia of Justice Rehnquist*, 22 NOVA L. REV. 695, 697 (1998).

<sup>94</sup> *Kent v. Dulles*, 357 U.S. 116, 125, 78 S. Ct. 1113, 1118, 2 L. Ed. 2d 1204 (1958).

<sup>95</sup> *See, e.g., id.* at 129.

criminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.<sup>96</sup>

Applying these standards to babies under two years of age, it is clear they are saddled with a legal disability rendering them incompetent to make their own decisions on matters like whether to have a seat when flying, or whether to fly at all. While babies as a group may be unlike the victims of racial or national origin discrimination, when it comes to seats and restraints on aircraft, they *have* had a history of purposeful unequal treatment. While everyone else is required to have a seat of their own, this is routinely denied to babies solely because of their age, relegating them to a status below cargo, animals, and even carry-on items, all of which must be secured. What is more, babies are the epitome of political powerlessness and should command extraordinary protection from the majoritarian political process. For all of these reasons it is reasonable to conclude babies fall into a suspect class and strict or intermediate scrutiny should be applied in reviewing the infant seat exception.

Putting aside the interesting degree of deference issue, the central point may be that even if the most deferential standard of review is applied, there is no valid rational basis for the infant seat exception. This opinion finds support not only for all of the reasons stated throughout this paper but also in a recent study by the American Academy of Pediatrics, which found that "data fundamental to creating an evidence-based policy, including information on the number of children younger than 2 years of age who currently fly unrestrained, as well as data on the number of children who sustain injuries in turbulence, are not available."<sup>97</sup> Given this and other scientific data, the infant seat exception is arbitrary, has absolutely no rational scientific or other basis for discriminating against babies under two years of age, and should be declared unconstitutional.

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<sup>96</sup> Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313, 96 S. Ct. 2562, 2567, 49 L. Ed. 2d 520 (1976).

<sup>97</sup> Durbin, *supra* note 64, at 1060.

### B. *Punitive Damages Claims against Airlines*

In the United States, as a matter of federal law, it is the “duty of an air carrier to provide service with the highest possible degree of safety in the public interest.”<sup>98</sup> Violations of this duty (and parallel duties of care under state law) can lead to civil liability for both compensatory and punitive damages.<sup>99</sup>

In cases involving injuries or death to a lap baby because the child was not restrained, there will be evidence the airline knew this practice was dangerous for many years and had the power to stop babies from flying without seats and age-appropriate restraints yet chose not to use this power to end this absurd practice. The airline’s choice to allow babies to continue flying without a seat and age-appropriate restraint after Evan Tsao’s horrific death is a perfect example of a situation where the law of many states would allow a jury to award substantial punitive damages against the involved airline, which would be entirely in harmony with federal safety policies as well.

In such cases the airline may argue punitive damages are impermissible under state law because lap babies are allowed to fly unrestrained under federal law, and federal law is the supreme law of the land. However, a recent United States Supreme Court opinion virtually rules out this preemption defense in a punitive damages case against an airline for allowing a baby to fly without a seat and restraint and should send chills down the spines of those who manage risk at the nation’s airlines.

In *Williamson v. Mazda Motors of America*,<sup>100</sup> a lawsuit was brought in California state court against a van manufacturer for a wrongful death allegedly caused by the company’s choice, permitted by federal law, to provide a seat belt without a shoulder harness in the center back seat of a minivan, even though the law required all other seats to have shoulder restraints in addition to seat belts. The trial and appellate courts both dismissed the lawsuit on federal preemption grounds; however, the United States Supreme Court granted certiorari and reversed, finding that federal law does not preempt the lawsuit.

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<sup>98</sup> 49 U.S.C. §§ 44701(d)(1)(A) & 44702(b)(1)(A) (2006).

<sup>99</sup> See, e.g., *In re Air Crash Near Clarence Ctr., N.Y.*, on Feb. 12, 2009, 798 F. Supp. 2d 481, 494 (W.D.N.Y. 2011) (punitive damages available, but not in cases covered by the Montreal Convention).

<sup>100</sup> 131 S. Ct. 1131 (2011).

The holding in *Williamson* makes clear that punitive damages claims against airlines for allowing babies to fly unrestrained will not be preempted. Perhaps the desire to avoid exposure to potentially huge and possibly uninsured liability for punitive damages will encourage the airlines to change their policies and end the dangerous practice of babies flying unrestrained and without seats on a parent's lap.

### VIII. Conclusion

It is often said that history repeats itself. This being so, how the nearly universal laws now in effect requiring seat belt use in automobiles came into play may provide a roadmap for what must be done now to protect babies under two years of age on aircraft:

In 1966, Congress passed the Highway Safety Act and National Traffic and Motor Vehicle Safety Act, mandating – among other things – that front-seat safety belts must be fitted as standard in cars. Rear safety belts were made standard in 1968, but consumers were still not required to wear them.

In 1970, Victoria, Australia, passed the first law in that country to require the wearing of safety belts. Most European countries followed. The United Kingdom ran safety belt awareness ads starting in 1971 but did not pass its own law until 1983. Since the early 1970s, cars have included some kind of reminder to occupants to fasten their seatbelts.

In the U.S., New York passed the first law requiring passengers to wear safety belts in 1984, but not until the 2000s did other states introduce such laws. As of 2009, only New Hampshire had no safety belt law for adults.<sup>101</sup>

Victoria, Australia did the right thing in 1970 and through a snowball effect improved the world for everyone as a result.

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<sup>101</sup> Hazel Morgan, *The History of Safety Belts*, eHow.com, [http://www.ehow.com/about\\_5364820\\_history-safety-belts.html#ixzz29qI26Ri0](http://www.ehow.com/about_5364820_history-safety-belts.html#ixzz29qI26Ri0) (last visited Nov. 1, 2012).

Now is the time to change the laws so that babies under two years of age are required to have a seat and age-appropriate restraint when flying, just like everyone else. This will eliminate a category of needless and senseless deaths and injuries forever. What country will lead the way?





