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### The Misuse of Product Misuse: Victim Blaming at Its Worst

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# THE MISUSE OF PRODUCT MISUSE: VICTIM BLAMING AT ITS WORST

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## ABSTRACT

*This paper addresses the legal consequences that surface when a consumer uses a product in a manner not specifically intended by that product's designer or manufacturer. If a product is used in a reasonably foreseeable manner, the fact that the use is at odds with a manufacturer's intention should not be a basis to deny tort liability or limit the regulatory options of the Consumer Product Safety Commission. If a product proves to be unsafe, defective, dangerous, or otherwise hazardous to users and consumers, use patterns should not be the primary determinant in assessing regulatory and common law sanctions or consequences. While producers may wish to limit tort liability or regulatory impact by characterizing as wrongful all uses not fully consistent with specified instructions, limiting tort liability or regulatory impact is indefensible, inhumane, and at odds with common law tort principles and the clear purposes of the Consumer Product Safety Act. Penalizing consumers for uses that are reasonable but not expressly intended is little more than victim blaming. A legal culture that scapegoats consumers is justly seen as pathological regulatory capture. Ramped up consumer misuse standards reward those who create risks and punish those who are harmed. That cannot possibly be the goal of the common law or the legacy anticipated when the Consumer Product Safety Commission was formed nearly a half-century ago.*

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## INTRODUCTION

The 50-50-90 rule: anytime you have a 50-50 chance of getting something right, there's a 90 [percent] probability you'll get it wrong.

—Andy Rooney, *60 Minutes*<sup>1</sup>

Even monkeys fall from trees.

—Chris Bradford, *The Ring of Earth*<sup>2</sup>

Everyone makes mistakes,<sup>3</sup> which means that all of us, as consumers, will undoubtedly be guilty of misusing products at some time in our lives. Fortunately, most of our mistakes will result in inconvenience and embarrassment rather than broken bones or worse. However, there are times when a slight loss of

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<sup>1</sup> *Andy Rooney Quotes*, BRAINYQUOTE, [https://www.brainyquote.com/quotes/andy\\_rooney\\_194055](https://www.brainyquote.com/quotes/andy_rooney_194055) [<https://perma.cc/WW9M-CS5Y>].

<sup>2</sup> CHRIS BRADFORD, *YOUNG SAMURAI: THE RING OF EARTH* 200 (2010).

<sup>3</sup> There is a large body of literature on how and why we make mistakes, most predicated on the fact that being hard-wired as humans makes it inevitable that we will err. *See e.g.*, JOSEPH T. HALLINAN, *WHY WE MAKE MISTAKES: HOW WE LOOK WITHOUT SEEING, FORGET THINGS IN SECONDS, AND ARE ALL PRETTY SURE WE ARE WAY ABOVE AVERAGE* 2–3 (2009) (studying human error and scientific reasons why it exists through real-life stories); Olga Khazan, *Why Mistakes Are Often Repeated*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/science/archive/2016/02/why-mistakes-are-often-repeated/470778/> [<http://perma.cc/Y28T-PM4D>] (discussing neurological reasons why failure to learn from past mistakes causes people to repeatedly make the same mistakes); Sophie Morris, *Oops, We Did it Again—Why We Make Mistakes*, INDEPENDENT (Mar. 16, 2009), <http://www.independent.co.uk/artsentertainment/books/features/oops-we-did-it-again-why-we-make-mistakes-1645571.html> [<http://perma.cc/5A4C-SCFZ>] (looking at ways to avoid the simple errors humans inevitably make every day); *Why Clever People Make More Mistakes Than Most*, BBC CAPITAL (Nov. 20, 2015), <http://www.bbc.com/capital/story/20151119-why-clever-people-make-more-stupid-mistakes-than-everyone-else> [<http://perma.cc/A58X-PPU4>] (distinguishing intelligence from rational thinking and reasoning that the most successful people often make mistakes others do not because of certain personality traits); *Why Making Mistakes Is What Makes Us Human*, KQED (Sept. 2, 2015), <https://ww2.kqed.org/mindshift/2015/09/02/making-mistakes-is-what-makes-us-human/> [<http://perma.cc/S4WJ-6TLR>] (describing Kathryn Shultz's TED Talk on seeing the value in being wrong).

attention, a distraction, or a failure to heed warnings or follow instructions can mean disaster.

No rational actor seeks injury—but there are times when product misuse (mistakes in attentiveness, care, or judgment in the use of a product) results in the loss of life or limb.<sup>4</sup> No one is perfect. Stated another way, the one thing that is inevitable is that we will err. Those who work in the field of product safety know this and, accordingly, strive to articulate, implement, and enforce appropriate standards and measures to prevent tragedies that arise from product misuse before those harms occur.<sup>5</sup>

Product misuse has commanded the attention of various observers, commentators, and policymakers over the years.<sup>6</sup> The debate has revolved around the extent to which a health and safety agency like the Consumer Product Safety Commission (CPSC) should regulate when consumers have been injured or killed using products in ways not intended or sanctioned by manufacturers, but in ways readily foreseeable.<sup>7</sup>

When consumers are injured through misuse of a product, the regulatory approach and the common law model follow two different policy paths.<sup>8</sup> In a product liability action, the conventional approach for the last three decades has been to limit<sup>9</sup> or

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<sup>4</sup> See Robert Adler, *Redesigning People Versus Redesigning Products: The Consumer Product Safety Commission Addresses Product Misuse*, 11 J.L. & POL'Y 79, 79 (1995).

<sup>5</sup> See *id.* at 80.

<sup>6</sup> “Product misuse” has been defined in many different ways. At the Consumer Product Safety Commission (CPSC), it ranges from the involuntary or unknowing departure from manufacturer’s instructions to deliberate risk taking in contravention of known safety norms. The policy implications of product misuse have been around as long as health and safety regulation has existed. As long-time observers of CPSC, we have focused our comments on the issue at CPSC. However, this discussion is applicable to other health and safety agencies like FDA, OSHA, and EPA. It is a topic that Commissioner Adler first explored almost a quarter century ago. See *id.* at 81. Sadly, from our perspective, it is an issue that never goes away.

<sup>7</sup> See *id.* at 81, 86.

<sup>8</sup> See *id.* at 80.

<sup>9</sup> See *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 9 (1st Cir. 2001) (affirming lower court’s reduction of damages based on misuse of sauna equipment making the user thirty-five percent negligent); See generally Randy Koenders, *Products Liability: Product Misuse Defense*, 65 A.L.R.4TH 263, 270–

deny<sup>10</sup> recovery if the cause of an injury is the unforeseeable misuse<sup>11</sup> of that product. A foreseeable, but unreasonable use, in contrast, does not necessarily cut off liability: “Unforeseeable” and “unreasonable” are not synonyms.<sup>12</sup> “Therefore, unreasonable misuse is not a defense to a strict liability defective product claim.”<sup>13</sup> Thus, an unreasonable use may well be a reasonably foreseeable misuse and does not necessarily bar liability.<sup>14</sup>

The factors in play regarding the debate between unreasonable use and unforeseeable misuse are part of the tort reform

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84 (1988) (discussing misuse as a defense generally and how individual states approach the product misuse defense).

<sup>10</sup> A complete denial of recovery occurs in those states that apply contributory negligence to cases. A reduction of damages occurs where states apply comparative negligence to cases. Most states today follow the latter approach. *See e.g.*, *Bd. of Cty. Comm’rs of Garrett Cty. v. Bell Atl.*, 695 A.2d 171, 181 (Md. 1997); *John Cowley & Bros., Inc. v. Brown*, 569 So.2d 375, 376 (Ala. 1990); *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504, 504 (N.C. 1980); *Wingfield v. Peoples Drug Store Inc.*, 379 A.2d 685, 687 (D.C. 1977); *Basket v. Banks*, 45 S.E.2d 173, 177 (Va. 1947); *Comparative & Contributory Negligence*, JUSTIA, <https://www.justia.com/injury/negligence-theory/comparative-contributory-negligence/> [<http://perma.cc/7K6C-KDSX>] (stating that Alabama, Maryland, North Carolina, Virginia and Washington, D.C. are the only jurisdictions that still apply pure contributory negligence, which bars a plaintiff from recovering if he or she acted negligently and contributed to the accident in any way); *see also* William L. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 4 (1953) (explaining the origin of the comparative negligence doctrine).

<sup>11</sup> In this Paper, we distinguish between unforeseeable misuse of a product, a common bar to tort liability, and unreasonable uses that reflect a lack of due care but are foreseeable that are not necessarily a bar, e.g., using a power lawn mower to trim tall weeds or low-lying brush, are not intended uses from a manufacturer’s perspective, but are foreseeable. *See* DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 890–91 (2d ed. 2008); *RESTATEMENT (THIRD) OF TORTS: PROD. LIAB.* § 2 cmt. at p (AM. LAW INST. 1998) (endorsing the “unforeseeable misuse” standard).

<sup>12</sup> *See Cigna Ins. Co.*, 241 F.3d at 16–18.

<sup>13</sup> *See Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 476 (1991).

<sup>14</sup> *Asay v. Kolberg-Pioneer*, No. 2:08-CV-01242-LRH-PAL, 2010 WL 32390006 (D. Nev. Aug. 13, 2010) (stating that “[a] plaintiff’s misuse of a product, which is not reasonably foreseeable, is ... a defense to strict products liability,” and citing *Crown Controls Corp. v. Corella*, 98 Nev. 35, 37 (1982) (*per curiam*) which goes on to hold that “use of a product that the manufacturer should reasonably anticipate is not misuse or abuse.”).

discourse.<sup>15</sup> They involve the potential of significant money damages and broader questions underlying strict liability in tort.<sup>16</sup> They are more focused on remedy for an injured person than on the broader public safety goals extant in the regulatory domain.<sup>17</sup>

Unlike the common law model, Congress and federal agencies have generally adopted a broader approach in the regulatory product safety context.<sup>18</sup> Here, the legislature has directed agencies like CPSC to protect even careless consumers from dangerous products so long as the protective measures do not unduly raise the price or affect the utility of a product.<sup>19</sup> This is made clear in the Consumer Product Safety Act where the agency is directed to make specific findings about the impact of a rule on a product's utility, cost, or availability, but is fully authorized to act in instances where consumer misuse is likely or present.<sup>20</sup> The theory is that dangerous products that can be rendered safe at minimal cost should be made so even when consumers do not act as manufacturers intend.<sup>21</sup> As a humane society, we want to reduce unnecessary pain and suffering especially when the cost of doing so

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<sup>15</sup> See ANDREW F. POPPER, MATERIALS ON TORT REFORM 16 (2d ed. 2017).

<sup>16</sup> See RESTATEMENT (SECOND) OF TORTS § 402A ch. 14 (AM. LAW INST. 1965).

<sup>17</sup> See *id.*

<sup>18</sup> See Adler, *supra* note 4, at 80.

<sup>19</sup> Consumer Product Safety Act, 15 U.S.C. §§ 2051–89 (2012); see *Guide 51: Safety aspects—Guidelines for their inclusion in standards*, INT'L ORG. STANDARDIZATION & INT'L ELECTROTECHNICAL COMM'N i, v (Jan. 3, 2014) [hereinafter ISO Safety Guidelines] (making recommendations for how to draft safety standards in compliance with international requirements and standards).

<sup>20</sup> § 2058(f)(1) (“Prior to promulgating a consumer product safety rule, the Commission shall consider, and make appropriate findings for inclusion for such rule with respect to ... the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need.”).

<sup>21</sup> While the primary focus of this Paper is on the CPSC and the regulatory environment, the question posed regarding the baseline standard for assessing the use of a product by a consumer (intended use vs. reasonably foreseeable use) is also one of the core issues in the tort reform discourse as it pertains to tort liability in the civil justice system. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. m (AM. LAW. INST. 1998) (attempting to limit liability to intended uses rather than reasonably foreseeable uses); ANDREW F. POPPER, MATERIALS ON TORT REFORM 16 (2d ed. 2017) (identifying this topic as a tort reform issue); Martin A. Kotler, *The Myth of Individualism and the Appeal of*

is reasonable. Moreover, despite the temptation to invoke moral judgments about product misuse (“they deserve what they got”) or to insist that harsh treatment of those who blunder will convince consumers to take greater care (“teach them a lesson they won’t soon forget”), a significant body of research demonstrates that “most accidents are truly accidents, not the result of gambles that turn out badly.”<sup>22</sup> What is termed “misuse” by producers often turns out not to be blatant risk-taking or mindless carelessness, but instead is predictable and utterly human behavior such as forgetfulness, lack of knowledge, momentary losses of concentration, impulsiveness, or unforeseen distractions.<sup>23</sup>

Quite simply, while the doctrine of unforeseeable misuse can play a definitive role in certain product liability cases, it is of little or no consequence in the regulatory context where the primary focus must be on the product itself and not on the misuse of the product by a consumer.<sup>24</sup> This in no way diminishes the complementary role tort law plays in the quest for safer products.

Tort liability can and does achieve the dual goals of personal remedy and deterrence, sending a powerful and cautionary message to *producers* of the same or similar products.<sup>25</sup> For product *users*, as opposed to producers, tort law embodies a very different type of deterrence by limiting civil liability in those instances where a consumer’s misuse of a product is “so highly

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*Tort Reform*, 59 RUTGERS L. REV. 779, 823 (2007) (mentioning the misuse vs. reasonably foreseeable use debate).

<sup>22</sup> Howard Latin, *Good Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1200 (1994). According to Professor Latin’s research, “[m]ost accidents are truly accidents, not the result of deliberate gambles that turn out badly.” *Id.* A court may assume that serious injury due to failure to read warnings was due to “unusually careless or deliberately risky behavior,” but in reality, there are avoidable and reasonable explanations for why warnings—even good warnings—are not being read. *Id.* at 1207.

<sup>23</sup> See Michael S. Wogalter et al., *Risk Perception of Common Consumer Products: Judgments of Accident Frequency and Precautionary Intent*, 24 J. SAFETY RES. 97, 100 (1993) (reporting that individuals overestimate low-probability product risks and underestimate high-probability product risks).

<sup>24</sup> Adler, *supra* note 4, at 115.

<sup>25</sup> Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 191 (2012).

extraordinary as to be unforeseeable ....”<sup>26</sup> In such cases, unforeseeable misuse can be considered a “superseding cause” and limits or cuts off the defendant’s liability.<sup>27</sup>

The Mississippi Supreme Court noted recently: “[I]f the end user could always recover damages from a manufacturer, regardless of the misuse of the product, customers, beyond concerns of self-preservation ... would have little incentive to ensure they used the product properly.”<sup>28</sup> The tort doctrine of unforeseeable misuse, “promotes the social goal of both manufacturers and customers exercising due care.”<sup>29</sup> However, that unforeseeable misuse of a product can limit or bar tort liability in the civil justice system is entirely separate from the regulatory goals of product safety at the CPSC.<sup>30</sup>

Merely because a consumer unforeseeably misuses a product and by doing so is unable to succeed in a cause of action in tort is often unrelated to the question of whether a product is unsafe.<sup>31</sup> Consider that this limitation on recovery is in play when the consumer’s “unforeseeable misuse of the product substantially change[s] the condition of the product, and that change, and not the alleged defect, is the proximate cause of the alleged injury ....”<sup>32</sup>

From a broader perspective: the safety of consumer goods is an inarguable public interest. If a product is unsafe because of its design, manufacture, or lack of an appropriate warning, the way in which one person used—or misused—or unforeseeably misused—the product is rarely relevant. It is the product itself, not the coincidental misuse that must be the focus of agency action. We strongly disagree with those who would bar a health and safety agency like CPSC from protecting consumers where misuse has played a part in a product’s risk. Our reason is clear: Were CPSC and other agencies limited to instances in which injuries,

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<sup>26</sup> *Perez v. VAS S.p.A.*, 115 Cal. Rptr. 3d 590, 607 (Ct. App. 2010); see *Mine Safety Appliance Co. v. Holmes*, 171 So. 3d 442, 454 (Miss. 2015).

<sup>27</sup> *Mine Safety Appliance Co.*, 171 So. 3d at 454; *Perez*, 115 Cal. Rptr. 3d at 607–08.

<sup>28</sup> *Mine Safety Appliance Co.*, 171 So. 3d at 454.

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

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

illness, or death occurred only during the “proper” or “intended” use of a product, many of the agency’s rules and regulations would be rendered invalid, exposing consumers to great danger from hazardous products.<sup>33</sup>

For example, most ingestions of poisons and toxic chemicals that the Poison Prevention Packaging Act<sup>34</sup> guards against occur because caregivers inappropriately leave such products free for children to access.<sup>35</sup> Similarly, the ghastly fire injuries and fatalities from flammable fabrics that have triggered CPSC safety rules typically result from careless smokers or from unsupervised children playing with matches or lighters.<sup>36</sup> Furthermore, CPSC can and does take action to address injuries from products like lawn mowers that result from consumers’ risky—but completely predictable—actions, such as putting their hands under the housing of a mower to clear debris.<sup>37</sup>

In these and similar instances, the Commission has traditionally adopted Congress’s basic notion that it is far easier to redesign hazardous products than to reconfigure careless consumers. Of course, as with any broad policy, there are limits. Where

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<sup>33</sup> See, e.g., 16 C.F.R. § 1120.3(b)(1) (2015) (categorizing children’s upper outerwear with one or more drawstrings as “substantial product hazards”); 16 C.F.R. § 1511.7 (1977) (“[P]acifiers shall be labelled with the statement: “Warning—Do Not Tie Pacifier Around Child’s Neck as it Presents a Strangulation Danger.”); 16 C.F.R. § 1500.83(a)(38)(iv) (2010) (requiring writing instruments containing more than three grams of ink to be labeled as “toxic.”).

<sup>34</sup> Poison Prevention Packaging Act of 1970, 15 U.S.C. §§ 1471–75, § 1471 (2012).

<sup>35</sup> See Eileen M. McDonald et al., *Primary Care Opportunities to Prevent Unintentional Home Injuries: A Focus on Children and Older Adults*, 12 AM. J. LIFESTYLE MED. 96, 97 (2018) (urging primary care doctors to play a more central role in patient safety to prevent unintentional home injuries).

<sup>36</sup> See 16 C.F.R. § 1602.1(a)–(e) (2012) (Flammable Fabrics Act); see also Upholstered Furniture, Advanced Notice of Proposed Rulemaking, 59 Fed. Reg. 114, 30735 (June 15, 1994) (to be codified at 16 C.F.R. § 1640) (proposing a flammability standard for furniture fabrics associated with fires due to small open flames, such as cigarettes).

<sup>37</sup> See 16 C.F.R. § 1205.5(a) (implementing blade control systems and a blade stopping test for walk-behind power mowers); *Lawn Mower Safety*, U. S. CONSUMER PROD. SAFETY COMM’N (June 4, 1987), <https://www.cpsc.gov/content/lawn-mower-safety> [<http://perma.cc/ZG5D-GSUM>] (discussing how new safety features on mowers will reduce accidents like injury from contact with the blade).

consumer misbehavior is highly reckless and constitutes unforeseeable misuse, the kinds of precautions that companies should have to take to safeguard consumers would generally be beyond the duty of care to which a manufacturer should be held.<sup>38</sup>

One final point: the notion that protecting careless consumers is generally futile because people will simply take more risks when products are made safer.<sup>39</sup> The idea that people will blindly take calculated or even unreasonable chances—and that tendency explains the harms that befall them—is victim blaming.<sup>40</sup>

### I. A BRIEF SNAPSHOT OF VICTIM BLAMING

It is neither within our professional expertise nor our primary purpose to delve deeply into the psychology of victim blaming. Defenses in civil actions or explanations of seeming product failures predicated on consumer use, reasonably foreseeable misuse, and use that is at odds with the producer's intentions, focus on and blame consumers for the harm they sustained.<sup>41</sup> Contributory negligence and comparative fault (victim blaming doctrines) are central to understanding tort law and are predicated

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<sup>38</sup> A good illustration of the distinction made can be found in a recent article, Lindsey Bever, *Teens are daring each other to eat Tide Pods. We don't need to tell you that's a bad idea*, WASH. POST (Jan. 17, 2018), [https://www.washingtonpost.com/news/to-your-health/wp/2018/01/13/teens-are-daring-each-other-to-eat-tide-pods-we-dont-need-to-tell-you-thats-a-bad-idea/?noredirect=on&utm\\_term=.7397b6834d72](https://www.washingtonpost.com/news/to-your-health/wp/2018/01/13/teens-are-daring-each-other-to-eat-tide-pods-we-dont-need-to-tell-you-thats-a-bad-idea/?noredirect=on&utm_term=.7397b6834d72) [http://perma.cc/C964-53FG]. According to the article, a number of teenagers on social media have developed a fad of intentionally biting into brightly colored, highly toxic liquid laundry packets. In contrast, thousands of children under age five have innocently bitten into the packets believing them to be candy. *Id.* The latter group is the one that most deserves societal protection.

<sup>39</sup> This school of thought, often called Risk Compensation Theory ("RCT") (or, sometimes, "moral hazard"), posits that safety measures are almost always offset by consumers taking more risks and, therefore, are useless and counterproductive. Although occasionally persuasive, RCT has been increasingly debunked as more evidence accumulates that safety measures have resulted in a "marked decline in injury deaths in most of the world over the last 50 years." See Barry Pless, *Risk Compensation: Revisited and Rebutted*, 2 SAFETY 1, 6 (2016).

<sup>40</sup> See *id.*

<sup>41</sup> See *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 17 (1st Cir. 2001).

on the assumption that the actions (or inactions) of product users must be a central part of assessing civil liability.<sup>42</sup>

There are many explanations for victim blaming. We will mention just two: (1) the hope of avoiding tort liability or regulatory sanction, and (2) the heartfelt need to trust the safety of the world around us.<sup>43</sup> In assessing this aspect of our regulatory and civil justice systems, we have no difficulty assessing the liability avoidance rationale.<sup>44</sup> The second rationale requires a brief explanation.

It is our observation that after learning of an unexpected and horrifying incident or accident, there seems to be an impulse (or even unstated hope) that somehow, the victim is at fault.<sup>45</sup> This may well emanate from an understandable need to distance oneself from hazard.<sup>46</sup>

We think it self-evident that the closer we get to catastrophe, the more relatable and frightening catastrophe becomes. We neither sought verification nor believe it necessary to borrow from

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<sup>42</sup> See Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 791, 806 (1990) (discussing victim blaming and other perils of tort law); Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103, 1104–105 (2002); Frank L. Maraist et al., *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On*, 70 LA. L. REV. 1105, 1105 (2010) (overview of comparative fault and “foolhardy” plaintiffs); William L. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 15 (1953) (on the jurisprudence of comparative fault and the challenge of addressing alleged misconduct of victims); David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175, 188 (1998) (advocating the use of comparative fault and not contributory negligence); Victor E. Schwartz & Christopher E. Appel, *Two Wrongs Do Not Make a Right: Reconsidering the Application of Comparative Fault to Punitive Damage Awards*, 78 MO. L. REV. 133, 134–35 (2013) (nuanced discussion of comparative fault and punitive damages).

<sup>43</sup> See Popper, *supra* note 25, at 186, 190.

<sup>44</sup> See generally POPPER, *supra* note 15 (exploring the arguments of those who seek to limit or change civil liability and those who oppose those limitations).

<sup>45</sup> Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1393 (2003) (explanations of unexpected harm are not always premised on fact: “We blame the fight on the bully, the accident on the klutz.”)

<sup>46</sup> See Popper, *supra* note 25, at 201.

other disciplines to support this observation. However, we did test the premise (admittedly unscientifically).<sup>47</sup> For this exercise, we invented and then told our “subjects” (law students, law school administrators, and law faculty) two stories. Both stories started as follows: “Did you see that piece in the paper this morning about ...?”

The first story finished the sentence by describing a particularly violent crime and waiting to see the response. Over and over, we heard sympathy for the victim and a question about *where* the crime took place. Different answers regarding location produced different results—but consistently, when we said the crime occurred in some far-flung part of the city, the discussion would end within a minute or two. Once distanced from the threat, the incident became less frightening.

The second story finished the sentence by describing a severe and deadly product failure (we used both consumer goods and pharmaceuticals). Again, after sympathy, we heard a different type of distancing. It came in the form of a suggestion from our subjects that something so unexpected may well have been the result of the user/victim not paying attention, not reading instructions, i.e., that the victim facilitated, invited, and was responsible for the catastrophe.<sup>48</sup> Distancing and victim blaming<sup>49</sup> are benign fantasies<sup>50</sup> that support the hope that we live in a

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<sup>47</sup> We apologize to those social scientists and empiricists who find our methods unconvincing and primitive. We accept your criticism. We also believe that this insight is beyond question.

<sup>48</sup> Michael L. Rustad, *Heart of Stone: What is Revealed About the Attitude of Compassionate Conservatives Towards Nursing Home Practices, Tort Reform, and Noneconomic Damages*, 35 N.M. L. REV. 337, 360 (2005) (“Few themes resonate more with the American public than ‘blaming the victim.’”).

<sup>49</sup> Victim blaming is nothing particularly new. Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281, 318 (1994) (tracing victim blaming back to ancient Rome: “Just as twentieth century defendants seek to blame the victim, the Romans commonly looked to the plaintiff’s conduct (or the conduct of the plaintiff’s slave) as a means of avoiding liability.” [footnote omitted]).

<sup>50</sup> That illusion can be shattered when something awful happens to a loved one who, in fact, was paying attention, attentive, doing everything “right”—and yet, is a victim. While it may seem odd in an article of this nature, we share with you the following vignette. On January 11, 1982, Professor Popper’s oldest son, then just under the age of four, was in a supermarket with his mother

world where harm befalls those who fail to exercise due care, fail to protect themselves in ways that we, the “careful” people, would not let happen.<sup>51</sup> We do not put these thoughts forward as an excuse for the general tendency to blame victims—but rather as an explanation of one force driving victim blaming at a personal level. After all, who wants to think we live in a world where the most innocent among us, for no reason whatsoever, can suddenly fall victim to something so terrifying and inexplicable?<sup>52</sup> This may explain why our civil justice system—tort law generally and particularly product liability law—tilts in favor of victim blaming.<sup>53</sup>

To be clear, our premise is not that people who are harmed are universally and uniformly faultless. There are instances where people misuse products or use products in ways that are not just unforeseeable but are at odds with common sense, times when people assume risks and contribute to their own harm(s).<sup>54</sup>

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when, without warning, a vending machine fell on him and nearly killed him. It was a freak accident—terrifying at every level. After extensive analysis, it turned out that the actual cause of the accident was faulty design of the machine—but for months—and even still today—whenever that unthinkable and life-changing event came up, people first asked, “What was he doing? Maybe he was pulling on the machine? Climbing on it?”

<sup>51</sup> Tess Wilkinson-Ryan, *Essay: A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1767–68 (2014) (“We prefer to believe that things happen for a reason, and thus that victims of harms deserve their fate .... [This] may help explain how jurors determine causation in torts cases.” [footnote omitted]).

<sup>52</sup> Incidents of sexual assault can bring out one of the most disturbing and infuriating sides of this response set—blaming the victim of the assault. Dripps, *supra* note 45, at 1389 (“In rape cases, the jury may be encouraged to blame the victim for sexual activity. This may very well translate into an irrational inference of consent from the victim’s character.”); Kristen M. Klein et al., *Attributions of Blame and Responsibility in Sexual Harassment: Reexamining a Psychological Model*, 35 L. & HUM. BEHAV. 92, 94 (2011).

<sup>53</sup> David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 2 (2000) (regarding consumer responsibility for harm: “When a person is injured while using a product, the accident may be attributable to some defect in the product. But even if a product is defective in some respect, most product accidents are caused more by the consumer’s risky behavior in using the product than by the product’s defective condition.”).

<sup>54</sup> Barring a plaintiff who contributes to his or her harm has been part of the tort law discourse for centuries. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809) (holding one who causes harm to themselves cannot recover in tort).

Our premise, however, is that such incidents are not the norm. Our concern is that ramped up regulatory standards for product misuse envision a world of reckless actors, a world at odds with reality.<sup>55</sup>

Victim blaming on an institutional level, however, has an entirely different rationale. Institutional or corporate victim blaming is a very profitable strategy.<sup>56</sup> When successful, victim blaming capitalizes on the aforementioned human tendencies and allows those who cause harm to avoid the cost of accountability.<sup>57</sup> However, in the regulatory domain, where compensatory and punitive damages are not in play and the only real question is the safety of the products that surround us, the same constructs regarding victim blaming should not be relevant. Whether the user of a product exercised optimal care, ordinary care, or less than optimal care should not bar effective remedial actions.

How someone may have used, misused, or unreasonably misused a product in the past should play little role in determining whether that product is sufficiently dangerous to merit CPSC action.<sup>58</sup> At CPSC, the focus should be on the safety and utility of the product, taking into account all reasonably foreseeable uses—and nothing more.

## II. REASONABLY FORESEEABLE MISUSE AND CPSC'S STATUTORY MANDATES

CPSC enforces a number of acts in addition to the Consumer Product Safety Act, including the Federal Hazardous Substances Act,<sup>59</sup> the Flammable Fabrics Act,<sup>60</sup> the Poison Prevention Packaging Act,<sup>61</sup> and the Refrigerator Safety Act.<sup>62</sup> Although these acts use somewhat different language in defining their

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<sup>55</sup> See, e.g., *infra* notes 145–149 and accompanying text.

<sup>56</sup> Rustad, *supra* note 48, at 360 (“Victim’s talk’ in the tort arena is used ... to disavow responsibility for defective products, bad medicine, and unsafe practices ....”).

<sup>57</sup> *Id.*

<sup>58</sup> Adler, *supra* note 4, at 85.

<sup>59</sup> 15 U.S.C. §§ 1261–78 (2012).

<sup>60</sup> *Id.* §§ 1191–1204.

<sup>61</sup> *Id.* §§ 1471–77.

<sup>62</sup> *Id.* §§ 1211–14.

scope, we believe it to be beyond question that all provide the authority and responsibility for these agencies to act in instances of reasonably foreseeable product misuse.<sup>63</sup> Here is a brief summary:

*Consumer Product Safety Act:* In 1968, Congress established a study commission, the National Commission on Product Safety (NCPS), to determine whether the nation's consumer product safety protections were sufficient to safeguard the public from unreasonable risks of injury.<sup>64</sup> NCPS found that an independent safety agency dedicated to addressing consumer products was essential.<sup>65</sup> Congress largely followed NCPS's blueprint for such an agency two years later when it enacted the Consumer Product Safety Act.<sup>66</sup>

Without question, the NCPS called for the new agency to have the authority to act in cases of product misuse so long as manufacturers could reasonably have foreseen such misuse: "the manufacturer or seller ought not be absolved merely because the consumer used the product in a manner different from that intended. A manufacturer should be responsible for injury to consumers from use or certain types of misuse which could reasonably have been anticipated."<sup>67</sup>

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<sup>63</sup> See ISO Safety Guidelines, *supra* note 19, at 2 (defining "reasonably foreseeable misuse" as "use of a product or system in a way not intended by the supplier, but which can result from readily predictable human behaviour"). The Guidelines further provide that "[r]eadily predictable human behaviour" is meant to include all users including "the elderly, children and persons with disabilities." See also *infra* notes 135–140.

<sup>64</sup> See S.J. Res. 33, *Joint resolution to establish a National Commission on Product Safety*, Pub. L. No. 90-146, 81 Stat. 466–67 (1967).

<sup>65</sup> See NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 5 (1970) [hereinafter NCPS].

<sup>66</sup> See 15 U.S.C. §§ 2053–54 (2012).

<sup>67</sup> NCPS, *supra* note 65, at 75. The Report further stated, "[m]anufacturers must take all practical steps systematically to prevent foreseeable misuse of products." *Id.* at 62. See generally BRUCE K. MULOCK, CONGRESSIONAL RESEARCH SERVICE, CONSUMER PRODUCT SAFETY COMMISSION: CPSIA IMPLEMENTATION (2009), <https://www.everycrsreport.com/reports/RS22821.html> [<http://perma.cc/9JTV-JZQ4>].

Consistent with this theme, Congress made clear its intention that the agency be authorized to act in instances of reasonably foreseeable product misuse.<sup>68</sup> As Senator Frank Moss, one of the key architects of the CPSA, stated:

It is ... my hope that [the courts] will take notice of the fact that the word "associated" was chosen so as to convey the fact that the risk of injury did not have to result from "normal use" of the consumer product but could also result from such things as "exposure to or reasonable foreseeable misuse of the consumer product."<sup>69</sup>

We note that the Senate version of the Act included a definition of the term "use," which explicitly included a reference to "reasonably foreseeable misuse."<sup>70</sup> The House-Senate Conference Committee that met to work out the differences between the two bodies, however, adopted the House version of the Act, which did not contain this language.<sup>71</sup>

One might ask whether this means that Congress rejected the Senate's version that consumer misuse be included in the agency's authority. The answer is clearly, no. Such an interpretation would misread the dynamic between the two houses in working out their statutory differences. What actually happened was that the Senate broadly conceded to the House on most provisions of the Act because the Senate would have placed regulatory authority over almost all consumer products in the new agency: a proposition to which the House strongly objected.<sup>72</sup> No profound—

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<sup>68</sup> The definition of the word "use" in the Senate Report accompanying the CPSA confirms this proposition: "The definition of 'use' includes exposure to and any normal use. In addition, it includes reasonably foreseeable misuse. The ambit of risk, then, extends beyond exposure and normal use to those risks presented by consumer products being misused if such misuse is 'reasonably foreseeable.'" S. REP. NO. 92-749, at 15 (1972).

<sup>69</sup> 118 CONG. REC. 36197, 36198 (daily ed. Oct. 14, 1972) (statement of Sen. Moss).

<sup>70</sup> S. REP. NO. 92-749, at 15 (1972).

<sup>71</sup> See H.R. REP. NO. 92-1593 (1972). Although the House bill did not specifically define "unreasonable hazard" (which was selected to serve as the term analogous to the Senate's "unreasonable risk"), it did define "hazard" as "substantial risk of injury." *Id.* at 16-17.

<sup>72</sup> See BUREAU OF NAT'L AFFAIRS, THE CONSUMER PRODUCT SAFETY ACT: TEXT, ANALYSIS, LEGISLATIVE HISTORY 32 (1973) ("It is general practice with

or even minor—disagreement over the role of consumer misuse was ever raised or discussed between the two bodies.<sup>73</sup>

Moreover, if Congress had wished to exclude consumer misuse from CPSC jurisdiction, one wonders why it did not do so in a much more explicit fashion given how expansive the legislature had been in extending the scope of the other acts enforced by the agency to include product misuse.<sup>74</sup>

Finally, if there were any lingering doubts about the authority of the agency to protect consumers injured through reasonably foreseeable product misuse, they were put to rest in *Southland Mower Co. v. Consumer Product Safety Commission*.<sup>75</sup> In that case, a lawn mower manufacturer argued that CPSC could not regulate its product because consumers assumed the risk of injury.<sup>76</sup> The U.S. Court of Appeals rejected this argument, noting that neither consumer misuse nor assumption of risk limited CPSC's regulatory authority:

Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risk .... This principle, and not the tort liability concept of "assumption of risk," governs the Commission's authority to treat consumers' foreseeable action of removing safety shields as creating an unreasonable risk of injury and to issue rules addressing that danger.<sup>77</sup>

*Federal Hazardous Substances Act (FHSA)*: The language and legislative history of the FHSA similarly make clear that Congress intended the Act to extend to instances of foreseeable

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congressional conferences for each side to give up something in order to gain approval of something else, but with the consumer product safety bill, the Senate came out with very little of its bill intact. The major hurdle for House acceptance was the Senate's inclusion of broad regulatory authority over almost all consumer products, including food, drugs, cosmetics, medical devices, and veterinary medicine.").

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

<sup>74</sup> See *supra* notes 15–38 and accompanying text.

<sup>75</sup> *Southland Mower Co. v. Consumer Product Safety Comm'n*, 619 F.2d 499, 499 (5th Cir. 1980).

<sup>76</sup> *Id.* at 503–04, 513 (challenging the regulation for going beyond its scope by including "nonconsumer products").

<sup>77</sup> *Id.* at 513.

misuse.<sup>78</sup> Specifically, in section 2(f)(1)(A), Congress defined a “hazardous substance” as including “injuries ... or ... illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.”<sup>79</sup>

Even more telling: In 1966, Congress modified the FHSA to expand it from a purely labeling act to one that authorized standards and bans.<sup>80</sup> In the 1969 amendments, Congress expanded the definition of “hazardous substance” to include “toy[s] and other article[s] intended for use by children” if they present a mechanical, electrical, or thermal hazard.<sup>81</sup> In doing so, Congress explicitly included reasonably foreseeable misuse as part of the Act’s jurisdiction.<sup>82</sup> Consistent with the Act’s direction, the Commission has long maintained a set of test methods for simulating use and *abuse* of toys and other articles intended for children to determine whether they present electrical, mechanical, or thermal hazards.<sup>83</sup>

*Flammable Fabrics Act, Poison Prevention Packaging Act, and Refrigerator Safety Act:* Briefly stated, the Flammable Fabrics Act authorizes the CPSC to establish flammability standards

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<sup>78</sup> See 15 U.S.C. § 1261(f)(1)(A) (2012).

<sup>79</sup> *Id.*

<sup>80</sup> Technically, the 1966 amendments authorized only bans, but the distinction between standards and bans is semantic only, since most standards effectively ban non-complying products and most bans prohibit only a subset of regulated products.

<sup>81</sup> Pub. L. No. 91-113, 83 Stat. 187, 187 (1969) (codified as amended at 15 U.S.C. §§ 1261–74 (2012)).

<sup>82</sup> 15 U.S.C. § 1261(r)–(t). As stated in the Senate Report: “Common to each of the definitions [of electrical, mechanical, and thermal hazards] is the phrase, ‘in normal use or when subjected to reasonably foreseeable damage or abuse.’ The phrase places a significant duty upon the manufacturer of any toy or article intended for use by children. Not only must he consider the safety of the product in normal use, he must also consider the safety of the article after damage or abuse—after predicting what the child using the toy will reasonably do to it or with it.” S. REP. NO. 237, at 6 (1969)

<sup>83</sup> 16 C.F.R. §§ 1500.50–1500.53 (1975). Once a toy or article intended for use by children is subjected to the appropriate use and abuse test, the Commission will then examine it to see whether it presents an electrical, mechanical, or thermal hazard, and thus constitutes a banned hazardous toy. *See id.* § 1500.18 (listing banned toys determined to present mechanical, electrical, or thermal hazards).

for furniture, sleepwear, general wearing apparel, and related materials “to protect the public against [the] unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage.”<sup>84</sup>

“The Poison Prevention Packaging Act ... directs the CPSC to mandate ‘special packaging’ to protect children who might handle or ingest dangerous household substances.”<sup>85</sup> Typically, this means that the agency requires child resistant closures on products at a cost of pennies per container.<sup>86</sup>

Finally, the Refrigerator Safety Act requires that refrigerator doors be easily opened from within to prevent child suffocations.<sup>87</sup> This Act has proven to be one of the most successful pieces of safety regulation ever enacted virtually eliminating childhood fatalities while almost certainly reducing the cost of making refrigerators.<sup>88</sup>

What is common among these statutes is that they are all strict liability laws, i.e., their requirements apply irrespective of proper or improper consumer use.<sup>89</sup> In other words, a product

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<sup>84</sup> 15 U.S.C. § 1193(a).

<sup>85</sup> Adler, *supra* note 6, at 90.

<sup>86</sup> Requiring child-resistant packaging on over thirty household items has significantly decreased the number of child fatalities per year. Stefan Hellbardt et al., *Packaging: Child-Resistant Features for Container Closure Systems*, 18 DRUG DEV. & DELIVERY 57, 58 (2018), <http://drug-dev.com/packaging-child-resistant-features-for-container-closure-systems/> [<https://perma.cc/S82G-N9FA>]; see K.A. Mack et al., *Preventing Unintentional Injuries in the Home Using the Health Impact Pyramid*, 42(IS) HEALTH ED. & BEHAV. 115S, 119S (2015) (noting that “[s]tudies show clear declines in poisonings after the passing of the Poison Prevention Packaging Act (PPPA) in 1970” due to the Act requiring various household substances be securely packaged in child-resistant packaging) (further adding that data from the Centers for Disease Control and Prevention (CDC) showed that only forty-two fatal unintentional poisonings were reported for children aged 0 to 4 years in 2012); see also Angie Qin, *Consumer Product Safety Commission, Pediatric Poisoning Fatalities from 1972 Through 2013*, U.S. CONSUMER PROD. SAFETY COMMISSION 3 (2016), <https://www.cpsc.gov/s3fs-public/PPAMortality2013.pdf> [<https://perma.cc/4ZST-BVXB>].

<sup>87</sup> 15 U.S.C. §§ 1211–14 (2012).

<sup>88</sup> Adler, *supra* note 6, at 90.

<sup>89</sup> See generally Coulter Boesch, *Strict Product Liability Laws*, ALLLAW, <http://www.alllaw.com/articles/nolo/personal-injury/strict-product-liability-laws.html> [<https://perma.cc/P5XB-UNZQ>] (explaining that unlike proving fault

must comply with CPSC safety rules despite consumer misuse if it is to be sold to the public.<sup>90</sup> In this regard, the regulatory and common law mandates regarding safety are indistinguishable.<sup>91</sup> If a consumer is injured or killed because of the product's failure to comply with a CPSC rule, the manufacturer may be held liable in tort notwithstanding the consumer's carelessness.<sup>92</sup>

### III. WHETHER PRODUCT MISUSE IS TREATED DIFFERENTLY IN PRODUCT RECALLS THAN IN SAFETY STANDARDS

Health and safety agencies encounter product misuse both in recalling products and in crafting safety standards.<sup>93</sup> One might ask whether the two contexts call for different approaches, but such a notion finds no support either in law or in public policy.<sup>94</sup>

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in an ordinary injury case, “strict liability rules—like the one applied to strict products liability cases—does away with the analysis of whether the defendant’s conduct met a certain standard.”).

<sup>90</sup> *See id.*

<sup>91</sup> In most jurisdictions, a failure to comply with a safety rule is considered *per se* negligence if a consumer is injured as a result of the manufacturer’s noncompliance. *See, e.g.,* Kaltman v. All Am. Pest Control, 706 S.E.2d 864, 866 (Va. Ct. App. 2011) (opining on whether the defendant’s use of a pesticide not approved for residential use on plaintiff’s home constituted negligence *per se*); Supreme Beef Packers, Inc., v. Maddox, 67 S.W.3d 453, 455 (Tex. Ct. App. 2002) (alleging negligence *per se* for violations of the Occupational Safety and Health Act); Nettleton v. Thompson, 787 P.2d 294, 294 (Idaho Ct. App. 1990) (vacating and remanding case alleging negligence *per se* for a fall on an unsafe stairway in violation of building code standards); *see also Negligence Per Se*, JUSTIA, <https://www.justia.com/injury/negligence-theory/negligence-per-se/> [<https://perma.cc/R3UB-WJCX>].

<sup>92</sup> *See e.g.,* Nettleton, 787 P.2d at 294.

<sup>93</sup> *See infra* notes 108–114 and accompanying text.

<sup>94</sup> To be clear, we do not claim that the test for declaring a product to be a substantial product hazard is the same as finding that a product presents an unreasonable risk for purposes of promulgating a safety standard. In the former case, the Commission seeks to remove an otherwise legal product from the marketplace due to its particularly hazardous nature whereas a safety standard never touches products currently in inventory or in distribution. A “substantial product hazard” determination focuses almost exclusively on the risk of a product for which a recall is sought and imposes a higher standard of proof

To explain this point, we start with the obligation of firms under the Consumer Product Safety Act to report potentially dangerous products to CPSC.<sup>95</sup> One might hypothesize—unpersuasively to us—that consumer misuse should not trigger a reporting obligation under the Commission’s Substantial Product Hazard Reporting Rule because no defect would be present.<sup>96</sup> The only time a firm would be obligated to report a potentially defective product to CPSC would be when a serious hazard arose from the “expected” or “proper” use of a product, i.e., when a consumer used a product in a manner recommended or approved by the manufacturer.<sup>97</sup> In this interpretation, even if a consumer used a product in a reasonably foreseeable manner, no reporting obligation would arise if the consumer did not follow the warnings and instructions for the product (i.e., the producer’s intention) or that the consumer otherwise “misused” the product.<sup>98</sup> And, if a firm need not report a potential safety problem about a product to the agency, *a fortiori*, the firm would not need to recall it.<sup>99</sup>

Aside from the fact that this interpretation of the agency’s Substantial Product Hazard Reporting Rule would leave many serious hazards undiscovered and unaddressed, it finds no support in the words of the rule.<sup>100</sup> We believe that it stems from a tortured reading of the reporting rule that goes back to 2006, when the Commission amended the rule to add several factors for firms

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than that for setting a safety standard. These differences, however, are irrelevant when it comes to determining whether the CPSC has different authority for recalls than for standards in instances of consumer misuse.

<sup>95</sup> 16 C.F.R. § 1115.12 (2018). Under the Consumer Product Safety Act, firms that distribute products and determine that one of their products contains a defect which could create a substantial product hazard must immediately inform CPSC of this determination. *See also* 15 USC § 2064(b)(3) (2012).

<sup>96</sup> *See* 16 C.F.R. § 1115.12(a) (obligating the reporting of noncompliance, a defect, or an unreasonable risk of serious injury or death).

<sup>97</sup> *See id.* § 1115.12(b) (noting that a “[f]irm must report information indicating that a consumer product which it has distributed in commerce does not comply with an applicable consumer product safety standard or ban issued under the CPSA”).

<sup>98</sup> *Id.* § 1115.12(c).

<sup>99</sup> *See* 15 U.S.C. § 2064.

<sup>100</sup> *See* 16 C.F.R. § 1115.12.

to consider when deciding whether to report potentially hazardous products to CPSC.<sup>101</sup> The additional factors in the amendment: obviousness of the risk; the adequacy of warnings and instructions to mitigate such risk; the role of consumer misuse of the product and the foreseeability of such misuse.<sup>102</sup>

When the amendment to the reporting rule was added, several consumer groups objected on the grounds that it might be interpreted as limiting the scope of reports that needed to be submitted to the agency.<sup>103</sup> Not being privy to the thinking of the members of the Commission at that time, we pass no judgment on any subjective or unspoken motives that led to the amendment. What we can judge, however, is CPSC's stated rationale as set forth in the Federal Register at the time of publication.<sup>104</sup> There is no hint of an intent to narrow the scope of the reporting rule. To the contrary, the Commission stated:

These revisions are not intended to reduce the number of reports to the Office of Compliance, to reduce or change the types of information reported, or to suggest a diminished need to report.<sup>105</sup>

Later, the Commission made the same point by arguing that the added words merely clarified how the Commission had been interpreting its rule for many years:

The Commission staff already considers the proposed factors in making decisions about potential defects .... Thus, the regulation only makes explicit what was already implicit in the Commission's regulation.<sup>106</sup>

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<sup>101</sup> See Substantial Product Hazard Reports, 71 Fed. Reg. 42028, 42029 (July 25, 2006) (codified at 16 C.F.R. § 1115 (2018)).

<sup>102</sup> *Id.* (noting that the Commission and staff may consider some or all of the factors set forth in paragraph (f)(1) in reaching the substantial product hazard determination).

<sup>103</sup> *Id.* at 42029. Consumers Union, Consumer Federation of America, Kids in Danger, and U.S. PIRG (Public Interest Research Group) raised this concern.

<sup>104</sup> See *id.*

<sup>105</sup> *Id.* at 42029.

<sup>106</sup> *Id.* at 42030.

Accordingly, the most that can be said about this added language is that it made no substantive change whatsoever in the reporting rule. It merely put in writing that which had been the practice for many years and has been and continues to be the agency's practice: to require firms to report where a hazard arises from foreseeable consumer misuse.<sup>107</sup> Moreover, a plain reading of the text of the reporting rule leads to a similar conclusion. As amended, section 1115.4 now reads in part:

In determining whether the risk of injury associated with a product is the type of risk which will render the product defective, the Commission and staff will consider, as appropriate: The utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the obviousness of such risk; the adequacy of warnings and instructions to mitigate such risk; the role of consumer misuse of the product and the foreseeability of such misuse; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination.<sup>108</sup>

The import of this language is obvious. When deciding whether a company should report a potentially dangerous product, the Commission will look at virtually every aspect of the product's risk to determine whether there is a defect, i.e., "a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function."<sup>109</sup> If anything, the words constitute a checklist for firms deciding whether to report.<sup>110</sup> They serve as reminders, not limiters.<sup>111</sup>

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<sup>107</sup> See 16 C.F.R. § 1115.12(g)(1)(iii) (2018) (the Commission "[w]ill consider the ... reasonably foreseeable use or misuse of the product, and the population group exposed to the product" when determining if the risk to the consumer is substantial).

<sup>108</sup> *Id.* § 1115.4.

<sup>109</sup> *Id.*

<sup>110</sup> See Substantial Product Hazard Reports, 71 Fed. Reg. at 42029 ("The Commission's intent in adopting this provision is to give further guidance to firms about reporting defects in their products").

<sup>111</sup> See 16 C.F.R. § 1115.12(g)(1)(iii) (2018) (the Commission "[w]ill consider the ... reasonably foreseeable use or misuse of the product, and the population

Finally, keeping in mind that the Substantial Product Hazard Reporting Rule is an interpretive rule promulgated by CPSC to provide guidance to the public,<sup>112</sup> one wonders why the agency would limit the instances in which firms otherwise obligated to report should not do so. The illogic of such an approach lends credence to the notion that the agency's very broad reporting rule remains broad.<sup>113</sup> If CPSC's reporting rule has not been narrowed, there is no basis for assuming that its recall authority has been narrowed either.<sup>114</sup> In short, consumer misuse remains as strong a basis for CPSC recalls as it does for safety standards.<sup>115</sup>

#### IV. PRODUCT MISUSE AND HAZARD WARNINGS

If one were to let manufacturers define what constitutes consumer misuse of their products, it would be easy to identify misuse. One would simply look to the instructions regarding proper use and any deviation from these instructions would be misuse. Fortunately, agencies and the courts have consistently rejected this approach because it would encourage manufacturers to unreasonably limit appropriate consumer uses of their products.<sup>116</sup> As one court put it: "a product is not 'misused' merely because the manufacturer intended that it be used in a different manner; the manufacturer must show that the use which caused

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group exposed to the product" when determining if the risk to the consumer is substantial).

<sup>112</sup> *See id.* § 1115.1 (1978).

<sup>113</sup> The Commission's guidance to the public—repeated time and again—is when in doubt, report. *See, e.g., id.* § 1115.4 ("[F]irms are urged to report if in doubt as to whether a defect could present a substantial product hazard.").

<sup>114</sup> Manufacturer reporting is a prerequisite to the CPSC exerting its recall authority. *See generally id.* § 1115.2.

<sup>115</sup> *See id.* § 1115.12(g)(1)(ii). For example, the CPSC has distinctly recognized that the number of products remaining with consumers is a relevant consideration, because a few defective products with little to no likelihood of causing an injury (even in a minor way) will not typically meet the threshold required for a substantial product hazard determination.

<sup>116</sup> *See, e.g.,* MICH. COMP. LAWS SERV. § 600.2945 (LexisNexis 2018) ("Misuse means ... uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances"); *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 856 (Tex. Civ. App. 1977) (holding that deviation from manufacturer-intended use is not necessarily misuse). *See generally supra* notes 61–70 and accompanying text.

the injury was not reasonably foreseeable.”<sup>117</sup> In short, in the product safety context, a manufacturer may not avoid responsibility for making its defective products safe merely because it classifies perfectly predictable and completely human behavior as misuse and then warns against it.<sup>118</sup> Interestingly, even in the product liability context, a number of courts have held that liability for defective designs cannot be offset by warnings—including those determined to be accurate, clear, and unambiguous.<sup>119</sup>

There is an equally compelling reason for caution in delegating too much authority to manufacturers to use warnings and instructions to decide what constitutes product misuse.<sup>120</sup> Study after study has confirmed that consumers often do not read and heed warnings.<sup>121</sup> The reasons for this are many and complex, ranging from poorly crafted and placed warnings to consumer resistance to lengthy and unreadable instructions.<sup>122</sup> For example:

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<sup>117</sup> *Magic Chef*, 546 S.W.2d at 856.

<sup>118</sup> *See id.*

<sup>119</sup> *See, e.g.*, *Pinchinat v. Graco*, 390 F. Supp. 2d 1141, 1147, 1150 (M.D. Fla. 2005) (Court granted summary judgment on failure to warn claim where warnings were “accurate, clear and unambiguous” but remanded for further proceedings on defective design claim); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 336 (Tex. 1998) (“[W]hen a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks.”); *see also* *Ulroh v. Cty. Tank Corp.*, 384 N.E.2d 1188, 1192 (Mass. 1978) (“An adequate warning may reduce the likelihood of injury to the user of a product in some cases. We decline, however, to adopt any rule which permits a manufacturer or designer to discharge its total responsibility to workers by simply warning of the dangers of a product.”).

<sup>120</sup> *See* Eli P. Cox et al., *Do Product Warnings Increase Safe Behavior? A Meta-Analysis*, 16 J. OF PUB. POL’Y & MKTG. 195, 195 (1997).

<sup>121</sup> *See id.* (citing a review of approximately 400 published articles that concluded “no scientific evidence was found to support the contention that on-product warning labels measurably increase the safety of any product ....”).

<sup>122</sup> *See, e.g.*, Susan G. Hadden, *Regulating Product Risks Through Consumer Information*, 47 J. SOC. ISSUES 93, 98 (1991) (discussing problems of highly technical and complex warning language); Brad Mehlenbacher et al., *On the Reading of Product Owner’s Manuals: Perceptions and Product Complexity*, PROCEEDINGS OF THE HUMAN FACTORS AND ERGONOMICS SOCIETY, 46TH ANNUAL MEETING 730, 730 (2002), <http://journals.sagepub.com/doi/abs/10.1177/154193120204600610> [<https://perma.cc/UG5H-RSRK>] (discussing the negative impacts of important warning information being placed in owner’s manuals).

- Many consumers fail to read instruction manuals of products they believe to be safe or familiar.<sup>123</sup>
- Although consumers claim to like safety training videos, few watch them.<sup>124</sup>
- Manufacturers too often place warnings in instruction manuals rather than on the products themselves, resulting in safety warnings not being read.<sup>125</sup>

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<sup>123</sup> See Jennifer J. Argo & Kelley J. Main, *Meta-Analyses of the Effectiveness of Warning Labels*, 23 J. PUB. POL'Y & MKTG. 193, 195 (2004) (analyzing the effectiveness of warning labels); J. Paul Frantz et al., *Potential Problems Associated With Overusing Warnings*, PROCEEDINGS OF THE HUMAN FACTORS AND ERGONOMICS SOCIETY, 43RD ANNUAL MEETING 916 (1999) (looking at the use of warnings, particularly the overuse and the negative consequences to including them on products); S. Godfrey et al., *Warning Messages: Will the consumer bother to look?*, in HUMAN FACTORS PERSPECTIVES ON WARNINGS 53, 55 (1994) (providing studies on how consumers perceive household products and what factors cause them to look for warning labels). Hadden, *supra* note 122, at 97 (discussing the benefits of information provision for consumer protection, but also the downfalls and assumptions it relies on); David W. Stewart & Ingrid M. Martin, *Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research*, 13 J. OF PUB. POL'Y & MKTG. 1, 6 (1994) (noting that even when consumers are less familiar with a product, they are more likely to focus on information about product attributes and uses than warning information); Michael S. Wogalter et al., *Consumer Product Warnings: The Role of Hazard Perception*, 22 J. SAFETY RES. 71, 72 (1991) (researching how a consumer's perceived danger of a product relates to the willingness to read warning labels).

<sup>124</sup> See Mehlenbacher et al., *supra* note 122, at 733.

<sup>125</sup> See Argo & Main, *supra* note 123, at 195; Latin, *supra* note 22, at 1208–09; Mehlenbacher et al., *supra* note 122, at 733; Elizabeth Tebeaux, *Safety Warnings in Tractor Operation Manuals, 1920–1980: Manuals and Warnings Don't Always Work*, 40 J. TECH. WRITING & COMM. 3, 23 (2010) (discussing consequences, specifically the common fatalities resulting from tractor operators' failure to read safety warnings).

- Manufacturers too often write warnings or instructions in language that is so complex that many consumers simply do not understand them.<sup>126</sup> Regrettably, some risks can be explained only with words that are technical, long, or not in common use.<sup>127</sup>
- Merely because a consumer reads and understands a warning does not mean that the consumer will necessarily heed the warning.<sup>128</sup>
- Manufacturers too often place a multitude of warnings on products that overwhelm consumer attention.<sup>129</sup>
- Two groups—the poor and elderly—often require carefully crafted warnings that may be difficult to develop.<sup>130</sup>
- In a “Catch-22”-type syndrome, consumers will read warnings if they know that a product is potentially dangerous, but they may not know that a product is dangerous unless they read the warnings.<sup>131</sup>

These and other caveats about the efficacy of warnings and instructions remind us that those who rely on them as a safety strategy often do so cynically, seeking to avoid liability despite knowing that warnings alone do little to protect consumers from unreasonable harm. They also realize that other approaches, such

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<sup>126</sup> See Hadden, *supra* note 122, at 98.

<sup>127</sup> See *id.*; David R. Lenorovitz et al., *Mitigating Product Hazards via User Warnings Alone: When/Why ‘Warnings-Only’ Approaches Are Likely to Fail*, 24 HUM. FACTORS & ERGONOMICS MFG. & SERV. INDUS. 275, 295 (2012) (criticizing the sole use of inadequate product warnings on vehicles with known hazards).

<sup>128</sup> See, e.g., Christopher M. Heaps & Tracy B. Henley, *Language Matters: Wording Considerations in Hazard perception and Warning Comprehension*, 133 J. PSYCHOL. 341, 350 (May 1999) (testing the efficacy of warning labels on household cleaners); Stewart & Martin, *supra* note 123, at 10–13; A.G. Vredenburg & J. Helmick-Rich, *Extrinsic Nonwarning Factors*, in HANDBOOK OF WARNINGS 373, 380 (Michael S. Wogalter ed., 2006).

<sup>129</sup> See Frantz, *supra* note 123, at 917.

<sup>130</sup> See Argo & Main, *supra* note 123, at 195; Hadden, *supra* note 122, at 93.

<sup>131</sup> See Hadden, *supra* note 122, at 97.

as product redesign, are almost always more effective. In fact, the public health community has long promoted a safety hierarchy that prioritizes its approaches to product hazards as follows:

- Product redesign to eliminate the hazard.<sup>132</sup>
- Shielding to place the hazard safely away from the consumer.<sup>133</sup>
- Last resort: warnings if redesign and shielding are not feasible.<sup>134</sup>

## V. INTERNATIONAL PERSPECTIVES ON PRODUCT MISUSE

Although our focus has been on the United States, we feel it useful to broaden the discussion at this point to demonstrate the similarity of treatment of product misuse issues by the international community. We turn therefore to policy pronouncements from ISO, the International Organization for Standardization, an independent, non-governmental body of standards bodies headquartered in Geneva, Switzerland.<sup>135</sup> ISO is the world's largest developer of voluntary standards, having produced over twenty thousand standards covering everything from manufactured products to food safety, agriculture, and health care.<sup>136</sup>

In 2014, ISO issued a set of Safety Guidelines for ISO standards.<sup>137</sup> What is particularly compelling about ISO's guidelines is their insistence that safety standards address reasonably foreseeable misuse. The Guidelines do this by describing how producers and others should achieve what the Guidelines describe as

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<sup>132</sup> See Marc Green, *Safety Hierarchy: Design versus Warnings*, (2000), <http://www.visualexpert.com/Resources/safetyhierarchy.html> [<https://perma.cc/CU7X-F32L>].

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*; see also Lenorovitz et al., *supra* note 127, at 277; Michael S. Wogalter & Kenneth R. Laughery, *WARNING! Sign and Label Effectiveness*, 5 CURRENT DIRECTIONS IN PSYCHOL. SCI. 33, 36 (1996).

<sup>135</sup> See *About ISO*, INT'L ORG. FOR STANDARDIZATION, <https://www.iso.org/about-us.html> [<http://perma.cc/3MNZ-GERP>]. ISO was founded in 1926 as the International Federation of National Standardizing Associations. After World War II, in a coordinated move with the United Nations, it was reinstated as ISO. *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See ISO Safety Guidelines, *supra* note 19.

“tolerable risk.”<sup>138</sup> Below is an excerpt from the Guidelines’ description of the necessary considerations in achieving tolerable risk.

## 6.2 Tolerable Risk

*6.2.1* All products and systems include hazards and, therefore, some level of residual risk. However, the risk should be reduced to a tolerable level ....

*6.2.3* Drafters of standards shall consider safety aspects for the intended use and the reasonably foreseeable misuse of products and systems, and apply risk reduction measures to achieve a tolerable risk level.

*6.2.4* Drafters of standards shall also consider reasonably foreseeable uses of the product which, even if they are not intended uses are readily predictable based on the collective experience of the end user population. In particular, when determining the risk posed by consumer products, consideration should be given for products that are intended for, or are used by, vulnerable consumers<sup>139</sup> who are often unable to understand the hazard or the associated risk.

*6.2.5* To many suppliers, it might seem that the end user does not use the product for its intended purpose or in the manner intended. However, predictable, known human behavior should be considered in the design process.<sup>140</sup>

In short, despite the laments of some naysayers that product misuse ought not be the concern of producers, standards writers, or the government, we believe that an overwhelming international consensus exists that enlightened policymakers need to protect end users from harm arising from foreseeable product misuse.

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<sup>138</sup> *Id.* at 2 (defining tolerable risk as the “level of risk that is accepted in a given context based on the current values of society”).

<sup>139</sup> ISO’s Guidelines define a “vulnerable consumer” as one who is “at greater risk of harm from products or systems due to age, level of literacy, physical or mental condition of limitations, or inability to access product safety information.” *Id.*

<sup>140</sup> *Id.* at 5–6.

## CONCLUSION

There have been too many instances in which consumers, especially parents, have come before CPSC to urge the agency to take regulatory action against hazardous products that have harmed their families even though a finger of blame might be pointed at them for their carelessness or negligence.<sup>141</sup> A number of these individuals have confessed that they previously had been dismissive of what they referred to as “those stupid consumers.”<sup>142</sup> Yet, when tragedy hits, they suddenly see the wisdom of protecting even those who did not precisely follow the manufacturer’s instructions or whose attention momentarily strayed—especially when removing the hazard by redesigning the product would be extremely cost-effective.

To pick one poignant example, in 1992, the Commission was petitioned to regulate baby walkers, the cause of numerous serious injuries and deaths that occurred when infants tumbled

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<sup>141</sup> See, e.g., Complaint at 6, *In re Britax Child Safety Inc.*, Docket No. 18-1 (Consumer Product Safety Commission 2018), <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/2018-02-16-Complaint-In-re-Britax-Child-Safety-Inc.pdf?mQufi7GrG7MFQLoRkVvn8oH8e5cyCsDe> [<http://perma.cc/7M48-5HER>] (describing injuries to children as part of initial filing in CPSC adjudicative proceeding against stroller manufacturer); *In re Maxfield & Oberton Holdings, LLC*, Compl. at 5–6, CPSC Docket 12-1 (2012), [https://www.cpsc.gov/s3fs-public/pdfs/lawsuit\\_maxfield1a.pdf](https://www.cpsc.gov/s3fs-public/pdfs/lawsuit_maxfield1a.pdf) [<http://perma.cc/QW3G-PKZE>] (describing injuries to children as part of initial filing in CPSC adjudicative proceeding against magnet toy manufacturer); *Report #20180816-49B63-2147386132*, SAFERPRODUCTS.GOV (2018), <https://www.saferproducts.gov/ViewIncident/1784824> [<http://perma.cc/N4WP-T5QW>] (report from parent whose child was injured by a malfunctioning stroller); *Report #20120906-5E592-1270611*, SAFERPRODUCTS.GOV (2012), <https://www.saferproducts.gov/ViewIncident/1270611> [<http://perma.cc/VU9G-AKND>] (report from parent whose child was injured by a malfunctioning crib).

<sup>142</sup> See Elaine Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73, 77 (1966) (presenting the classic study showing that the worse the consequences of an accidental occurrence, the greater the tendency of others to assign responsibility to the accident victim and explicating the defensive attribution theory). See also Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, 612 (1997) (noting that bystanders not only blame the victim, but often try to distance themselves from the victim in effort to preserve their belief that they will not find themselves in a similar situation).

down stairs while using baby walkers.<sup>143</sup> At that time, one Commissioner condemned her colleagues for voting to undertake rule-making, arguing that irresponsible caregivers, not defective walkers, constituted the hazard.<sup>144</sup> Accordingly, she insisted that the only fix should be educating parents about the need to install gates at the top of stairs: “Babies who fall down stairs—in and out of walkers—are victims of the same hazard—unprotected stairs. THE SIMPLE ACT OF CLOSING A DOOR OR INSTALLING AND USING A GATE COULD ELIMINATE OVER 40,000 ACCIDENTS PER YEAR. Baby walkers do not present a mechanical hazard.”<sup>145</sup>

To us, the irresponsible party was the dissenting Commissioner, who was prepared to consign tens of thousands of innocent children to broken bones, shattered skulls, or even death simply because she felt that caregivers did not live up to her notion of responsible behavior. What makes her position so frustrating and unacceptable is that once the Commission turned its attention to the problem, manufacturers quickly developed a simple yet elegant solution: attaching plastic “skids” on the bottom of the walkers’ frames that acted as a brake when a wheel went off a step.<sup>146</sup> This inexpensive fix prevented the walker from tumbling down the stairs, virtually eliminating the hazard.<sup>147</sup>

We have seen numerous other situations in which objections have been raised to effective safety solutions, simply because consumers acted in perfectly human and predictable ways that could be classified as careless, even though safety solutions

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<sup>143</sup>Baby Walkers; Advance Notice of Proposed Rulemaking; Request for Comments and Information, 59 Fed. Reg. 39306, 39307 (Aug. 2, 1994).

<sup>144</sup> See Statement of Commissioner Mary Sheila Gall on Proposed Government Regulation of Baby Walkers (June 30, 1994).

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., *Chicco Walky-Talky Baby Walker*, AMAZON, [https://www.amazon.com/Chicco-Walky-Talky-Walker-Flora/dp/B01LPQ41HU/ref=sr\\_1\\_fkmr0\\_1\\_a\\_it?ie=UTF8&qid=1538331975&sr=8-1-fkmr0&key-words=Chicca%2BWalky%2BTalky%2BBaby%2BWalker%2C%2BFlora&th=1](https://www.amazon.com/Chicco-Walky-Talky-Walker-Flora/dp/B01LPQ41HU/ref=sr_1_fkmr0_1_a_it?ie=UTF8&qid=1538331975&sr=8-1-fkmr0&key-words=Chicca%2BWalky%2BTalky%2BBaby%2BWalker%2C%2BFlora&th=1) [<http://perma.cc/U4N5-H4EB>] (example of baby walker with brakes).

<sup>147</sup> *See id.*

existed that were non-intrusive and inexpensive.<sup>148</sup> The typical response is to offer warnings to consumers and then criticize and abandon them when they (predictably) do not follow the warnings—an approach we refer to as “warn and scorn.”<sup>149</sup>

We hope for and expect a more humane response from policymakers at health and safety agencies. Blaming consumers who used a product and were injured or killed as a result, simply because their reasonably foreseeable use was somehow at odds with the use intended by the producer or designer, is not just inhumane and reprehensible. It is truly bad public policy particularly when it is the basis to justify regulatory inaction. Using foreseeable consumer behavior—victim-blaming—to undercut regulatory goals is unacceptable. It deviates from the clear congressional mandate at CPSC and turns fundamental notions of accountability upside down.<sup>150</sup> A legal culture that scapegoats consumers is little more than a grotesque symptom of pathological regulatory capture.<sup>151</sup> It undermines the deterrent effect of both product safety regulation at CPSC and the broader deterrent effect of tort liability in the civil justice system.<sup>152</sup> Seen in that light, a ramped up consumer misuse standard rewards those who create risks and punishes those who are harmed.<sup>153</sup> That cannot possibly be the

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<sup>148</sup> See, e.g., 147 CONG. REC. S8452 (daily ed. July 31, 2001) (statement of Sen. Biden) (describing an instance of Commissioner Gall opposing simple fire safety solutions).

<sup>149</sup> There is a better way. Scholars such as William Askren, an industrial psychologist, have developed extremely helpful tools for assessing and minimizing risks arising from the reasonably foreseeable misuse of products. See William B. Askren, *Predicting and Evaluating Misuses of Products*, 13 ERGONOMICS IN DESIGN 15, 16–18 (2005), <http://journals.sagepub.com/doi/abs/10.1177/106480460501300105?journalCode=erga> [<http://perma.cc/CW6S-V7ZK>].

<sup>150</sup> See *supra* notes 19–22 and accompanying text.

<sup>151</sup> See generally Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495 (2005) (assessing the means by which business interests effectively insinuate their perspectives on regulatory action); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013).

<sup>152</sup> See *supra* notes 19–21 and accompanying text; *supra* note 25 and accompanying text.

<sup>153</sup> See *supra* notes 56–57 and accompanying text.

legacy anticipated when CPSC was formed nearly a half-century ago.<sup>154</sup>

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<sup>154</sup> The agency was created and first went into operation in 1972. *Who We Are – What We Do For You*, CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/Safety-Education/Safety-Guides/General-Information/Who-We-Are---What-We-Do-for-You> [<http://perma.cc/7M6X-LJPB>].