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THE CONSUMER PRODUCT SAFETY COMMISSIONS OPPOSITION ABOUT THE INJURIES CAUSED BY NEURALINKS TECHNOLOGY

TOM CHRISTOFFEL, JD, AND KATHERINE K. CHRISTOFFEL, MD, MPH

Consumer-product related injuries claim an estimated 29,000 lives each year in the United States. In addition, there are an estimated 33 million non-fatal consumer-product injuries annually.[1] This death and suffering is particularly tragic because much of it could be prevented.

Because "an unacceptable number of consumer products which present unreasonable risk of injury are distributed in commerce," Congress passed the Consumer Product Safety Act in 1972.[2] The four purposes of the Act were:

1) to protect the public against unreasonable risks of injury associated with consumer products;
2) to assist consumers in evaluating the comparative safety of consumer products;
3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.[3]

To implement these goals, the Act established the Consumer Product Safety Commission (CPSC). The CPSC is an independent regulatory agency administered by five Commissioners appointed by the President of the United States and confirmed by the US Senate. The Consumer Product Safety Act gives the CPSC the authority to ban hazardous consumer products,[4] to initiate recalls for products which pose imminent[5] or substantial[6] hazards to the public, and to establish mandatory performance standards and warning and instruction requirements for consumer products.[7] The Act requires that a mandatory safety standard be "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product."[7] The CPSC is also responsible for administering and enforcing the Federal Hazardous Substances Act,[8] the Poison Prevention Packaging Act,[9] the Flammable Fabrics Act,[10] the Refrigerator Safety Act,[11] the Child Protection and Toy Safety Act,[12] and related legislation. The Consumer Product Safety Amendments of 1981 weakened the CPSC in several ways, particularly by requiring Commission preference for voluntary standards whenever possible and by further restricting the disclosure of safety hazard information by brand name.[13]

Despite a budget that is 1 per cent of that of the US Environmental Protection Agency and 8 per cent of that of the Food and Drug Administration, the CPSC's overall contribution to a safer America has been distinctly positive. Consumer product standards have been established for a variety of products, including children's sleepwear, bicycles, baby cribs, power mowers, matchbooks, swimming pool slides, and toys with small parts. Age restrictions have been applied to toys with sharp points. Warning labels and instructions have been required for items where misuse would be particularly harmful, such as ladders and exploding caps for toys. And some extremely hazardous sources of injury—such as unstable refuse bins, lead paint, flammable contact adhesives, materials containing free-form asbestos, and larger fireworks—have been banned.[14] A study by the Consumer Federation of America found that in the nine years after the CPSC came into existence "accidental household injuries fell more than 2 1/2 times faster, on average, than they did in the nine years before the CPSC."[15] The CPSC also improved the state of knowledge of product-injury epidemiology by implementing data collection mechanisms by means of a National Electronic Injury Surveillance System.

Despite this promising beginning, CPSC's contribution to consumer product safety today is far from praiseworthy. In part, this is because CPSC's rule-making authority is weaker than that of most other federal regulatory agencies. For example, the Commission is statutorily required to rely on voluntary industry standards, rather than instituting its own mandatory regulations, when compliance with voluntary standards "would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards."[16] The Commission also is weaker than other federal agencies because it must follow particularly extensive procedural steps in developing regulations. As Representative James J. Florio (D-NJ) explains:

> "The agency is required to first issue an advance notice of proposed rulemaking, a step that is generally voluntary for other agencies, followed by a notice of proposed rulemaking, followed by a final rule. If a voluntary standard is submitted which meets the [defined] criteria . . ., the Commission is required to terminate the rulemaking and rely on the voluntary standard. As part of the rulemaking, the agency must do a preliminary and final regulatory analysis, including a cost-benefit analysis, and provide opportunity for an oral hearing (which is optional for most agencies, which generally rely on just written submissions in rulemaking proceedings)."[17]

Address reprint requests to Tom Christoffel, JD, Professor, School of Public Health, University of Illinois at Chicago, PO Box 6998, Chicago, IL 60680. Dr. Katherine Christoffel is Associate Professor of Pediatrics and of Community Health and Preventive Medicine at Northwestern University Medical School.

George J. Annas, JD, MPH, Professor of Health Law at Boston University School of Public Health, is editor of Public Health and the Law.

More critically, under the current Reagan appointees to the Commission, the CPSC is a safety agency in name only: It has virtually ceased to promulgate regulations under the Consumer Product Safety Act or to impose hazardous product bans. As of mid-1988 the CPSC had not promulgated a single final rule under the Consumer Product Safety Act since 1984. A 1987 study by the Consumer Federation of America (CFA) found that the number of agenda items considered by the Commission fell 68 per cent from 1978 to 1986, that the number of CPSC meetings canceled increased 650 per cent from 1979 to 1986, and that inordinate delays have become standard for the Commission. The CFA concluded that the Commission's "inaction, deference to industry and delay have effectively reduced industry incentives to eliminate dangers, weakening the agency's ability to address product dangers head on."[18] In the words of former Commissioner David Pittle, the Commission of the current era "accepts whatever action industry offers—it does not defer to voluntary standards, it grovels."[19]

One of the Reagan Administration's ideological goals—to abolish or deactivate the CPSC—was effectively accomplished. A few glaring examples will illustrate the social cost of a protection agency that does not protect.

- Since 1980, over 1,000 people have been killed and some 340,000 injured in all-terrain vehicle (ATV) mishaps. Almost half of the fatalities have been children under age 16; close to one-fifth were children under age 12.[12] The American Academy of Pediatrics has termed ATVs "the most serious new product-related hazard to the health and well-being of children." The Consumer Product Safety Commission has the authority to restrict the availability of these hazardous products. After spending a year and a half and $2.2 million on a study of ATV injuries, the CPSC "acted": they reaffirmed their reliance on industry efforts while requesting of the industry that it upgrade those standards and stop marketing ATVs to children under age 12. The outrage provoked by this ineffectual response led the Commission to authorize an enforcement action under the "imminent hazard" provision of the Consumer Product Safety Act.[22] The end result was a consent agreement worked out by the Department of Justice with the major ATV manufacturers and distributors, under the terms of which the industry agreed to halt the sale of three-wheeled ATVs and to provide enhanced warnings and training to past and future ATV purchasers.[23] Since the industry was already shifting its sales away from three-wheeled ATVs in favor of four-wheeled models, and since nothing was being done to recall the millions of three-wheeled ATVs already in use, the consent agreement was widely criticized as a sham. In a front-page article describing the agreement, the *New York Times* noted that:

> "In what is apparently a victory for the industry . . . the commission has backed off its earlier recommendation that manufacturers be required to provide refunds on demand to anyone who purchased three-wheelers or adult sized vehicles that were intended for children's use."[24]

Thus the CPSC's action record on "one of the most significant and explosively growing product hazards ever considered by this agency,"[25] is that it has taken over half a decade to take action which critics attack as insufficient. This wasted time translates into wasted lives. The Ford Pinto was taken off the market when, with 1.8 million Pintos in use, there had been 38 gas tank explosions and 27 deaths. When there were 1.8 million ATVs in use there had been over 100,000 injury events and over 125 deaths, but no action was taken. And that was several years ago.[26]

- Each year, over 200 people are killed from burns caused by disposable cigarette lighters; about 125 of the victims are children. The CPSC could issue standards requiring that lighters be child resistant and, in 1985, it was petitioned to do so. The Commission, however, left the matter to voluntary industry standards, even though its own staff has criticized the adequacy of these standards. Not until 1988 did the Commission begin the long rule-making process for disposable cigarette lighters.[27]
- In 1984, we and colleagues asked the CPSC to issue standards for nonpowder firearms because of the hazard they pose for children. Estimates of the total number of nonpowder firearm injuries occurring in the US in 1984 ranged from 19,357 to 34,495—almost three-fourths of the victims less than 15 years old. This includes a variety of types of injuries (including occasional fatalities), but nonpowder firearms are perhaps most notable as a major cause of permanent blindness.[28] The Commission denied the request for rule-making, explaining that:

> "The mission of the Consumer Product Safety Commission is to protect the user of products from unreasonable risks of injuries associated with the product. In most instances you cite, it is not the user of the nonpowder firearm who is injured, but rather someone in the vicinity."[29]

These examples unfortunately typify the attitude of the current Commission. Its failure to function on behalf of the public can be seen not only in the way specific product hazards have been left uncontrolled, but also in the overall activity in this area of the Reagan-era government. The Commission's budget has been reduced from $44 million in FY 180 to $33 million for FY 1989.[30] And the Commission's staff—including highly experienced specialists in a variety of technical areas—was reduced from 889 in FY 1981 to 568 in FY 1986.[31]

Particularly damaging to public health efforts, the CPSC has weakened its major data gathering activity, the National Electronic Injury Surveillance System (NEISS) which collects information on hospital emergency-department visits due to injuries and fatalities associated with consumer products. The number of reporting hospitals has been cut in half, to a current participation of 62 hospitals. Because the sample size has become small, the Centers for Disease Control and the Food and Drug Administration have stopped using NEISS.[32] Manufacturers induced Congress to give them a considerable role in determining whether and how injury reports will be released if they identify specific products, so that the NEISS system no longer produces data identifying specific product brandnames.[33] NEISS data reports no longer identify fatalities as such, instead lumping fatalities in with other serious injuries. Because of prevalent coding practices, it is unlikely that Product Summary Reports based on independently collected death certificate data can be used effectively in conjunction with the more up-to-date NEISS data. Data on handgun injuries are no longer reported at all, thus eliminating the only national data concerning nonfatal injuries from this major cause. Changes have been applied retroactively: existing data reports were retabulated under

the newer, weaker guidelines and the more helpful old reports destroyed.

What can persons concerned about injury-reduction do about the failure of the CPSC to protect them? Persuading the current Commission to change its political priorities is an approach so unlikely to succeed that it is not worth undertaking. Waiting for a more favorable Commission may be a more realistic approach, but this could involve a long wait, during which the Commission's inertia can become a difficult established pattern. Perhaps the most obvious approach is to turn to potentially more favorable political arenas. On the federal level there are two: the courts and the Congress.

Reliance on the courts is not promising for several reasons. One is that Ronald Reagan appointed almost half of all current federal judges, most of whom are extremely conservative politically. As a result, the judiciary can be expected to sympathize with the CPSC in protecting the interests of industry. More important, it is difficult to make a persuasive legal argument that the Commission's posture before industry interests involves a violation of the letter of federal law. Because the Commission's failures have involved discretionary functions, not procedural inadequacies, even the most sympathetic of federal judges would have little basis for ordering more effective action by the CPSC. Only if Commission failures to act occurred without even the pretense of agency review and consideration would it be possible to challenge inaction as being arbitrary and capricious. The situation could be different if Congress had provided for a more stringent system, but it didn't.

This suggests that a more promising arena in which to push for effective consumer product safety is the Congress. The Consumer Federation of America has made several recommendations; in particular:

- allowing Agency deferral only to voluntary standards already in place;
- allowing Agency deferral only to standards devised with consultation from all interested parties;
- placing reasonable time limitations for reviewing the need to issue proposed rules; and
- allowing the public to challenge agency foot dragging in its evaluation of private sector safety initiatives.[34]

In one important sense the details of consumer product safety reform may be secondary considerations. The real challenge is getting Congress to act at all. One can imagine innumerable ways in which a Congress intent upon strengthening consumer product safety could force action by the CPSC. To give just one example, Congress could require an ATV recall by statute. Some in Congress would like to do so and have introduced legislation to that end.[35] But others would support the industry position on this (as on any issue). The many Senators and Representatives in the middle can sidestep the issue by deploring the current Commission, but finding reasons that legislative action is just not the answer. Because Congress doesn't act, but reacts, to get consumer protection legislation passed will require ways to pressure the House and Senate into product safety action. Designing strategies to do so requires an analytical model of the politics involved.

According to a standard model of interest-group politics, legislation is most likely to be enacted when the benefits of the legislation will go to a small group and the costs of the legislation are diffused, e.g., tobacco price supports or occupational licensure. Conversely, legislation is least likely to be enacted when the benefits are diffused while the costs are concentrated. As political scientist James Q. Wilson puts it:

> "Since the incentive to organize is strong for opponents of the policy but weak for the beneficiaries, and since the political system provides many points at which opposition can be registered, it may seem astonishing the regulatory legislation of this sort is ever passed."[36]

Unfortunately, consumer product safety legislation is a perfect example of this phenomenon. The benefits are spread throughout the entire society and are invisible (i.e., injuries that never happened) while the costs are borne by specific companies forced to redesign products, remove them from the marketplace, or in some cases buy them back from hundreds of thousands of consumers. Thus opponents of strengthened consumer product safety laws have a strong incentive to fight in an arena where inaction has the advantage over action to begin with. At the same time, those favoring change have little to offer: they are vastly outclassed in terms of financial resources and cannot hope to deliver significant numbers of single-issue voters on the issue. They are limited in the extent to which they can shame Senators and Representatives with bad publicity because they don't want to make a bitter enemy of someone whose vote they might hope to get on other issues in the future. This model makes sense, but has an obvious critical flaw: since some social regulation is enacted into law, such achievements, however unlikely, are not impossible. Why?

One possibility is that the enactment of social regulatory programs is an exceptional, difficult, perhaps even random and uncontrollable event. According to this exception-that-proves-the-rule model, the explanation of how such legislation is ever passed is that the right combination of an effective, committed political "entrepreneur," some well organized advocacy groups, a sympathetic media, a winning appeal to shared values (e.g., sympathy for the grief felt by mothers whose children have been victims of drunk drivers), and luck can sometimes overcome the unfavorable dynamics of interest-group politics. But getting the right combination is extremely difficult and rare, almost a fluke. A classic example might be the Drug Amendments of 1962, enactment of which was made possible by the publicity surrounding the thalidomide disaster in Europe and the long-term leadership of Senator Estes Kefauver.

Another explanation is that apparent victories are in reality shams. This more cynical view holds that Congress may at times enact into law social regulatory programs that are not expected to work. This is not a conspiracy view. Some legislators may have fought for an effective bill only to see it whittled down to a hollow shell during the legislative give-and-take. Others may have agreed to support the final bill only *because* it was a hollow shell, so they could take a public stance supporting the regulatory program while not significantly alienating the targets of the proposed regulation. Often this is accomplished by creating a regulatory structure so complicated that it assures that regulatory implementation proceeds at a snail's pace.

Public health advocates do not necessarily have to agree among themselves as to which model best describes the politics of social regulation. If there is agreement that progress is sometimes possible, it makes sense to keep that possibility alive by keeping the pressure on for the enactment of legislation authorizing social regulatory programs *and* for the effective implementation of such programs. This requires several specific steps:

The first requirement for effective political action in behalf of product safety must be injury data that are as complete as possible. Knowledge may not always be power, but lack of knowledge or information is certainly a source of weakness. Therefore, the protection and restoration of NEISS must become a high priority.

The second need is for coordinated action around consumer product safety. Organizations with some concern and involvement in the consumer product safety area include the Consumer Federation of America, American Academy of Pediatrics, Consumers Union, Public Citizen, and Americans for Democratic Action. These groups and others already have a presence in Washington and the state capitals. Many have well-developed organizational and lobbying capabilities. They come together from time to time in coalitions around specific pieces of legislation. But their collective skills and strengths are not brought together in a long-term, systematic manner around the general issue of consumer product safety. Effectiveness depends in large part on how issues are formulated and goals set.

Third, consumer product safety advocates must define their efforts in terms of concrete, specific goals (e.g., a ban on three-wheel ATVs), rather than in terms of secondary, procedural goals (e.g., time limits for the rule-making process), because the latter is not the type of battle cry that will arouse public support. It will help politically if opponents of effective product safety protection face alternatives they view as even more onerous than increased federal regulation. With product safety this might be a simultaneous push for state regulatory legislation to fill the void created by inaction at the federal level.

Fourth, effective national advocacy requires simultaneous advocacy in every state. Because product liability is an alternative to ineffective national product safety regulation, state action can serve to mute opposition to strengthened federal product safety laws. A patchwork quilt of state consumer product safety regulation and product liability laws is not as desirable as effective federal regulation, but it is better than nothing, *and* it creates such difficulties for manufacturers marketing on a national level that strengthened federal regulation becomes something of a mixed blessing to them.

Fifth, consumer product safety advocates must master ways to capture the imagination and attention of the public media. Publicity is critical to political debate because Congress reacts to perceived reality only. Because statistical "lives saved" lack the political clout of specific "mangled baby" anecdotes, the science of the former must be complemented by the art of the latter. It is instructive to note how much political mileage Mothers Against Drunk Driving has gotten out of the stereotype of the recidivist, uninjured drunk driver calmly lighting a cigar after careening his car over three toddlers who had been playing on their front lawn. In reality, such events are far less common than drunk drivers who kill themselves in single vehicle crashes, but they capture an essential truth about the problem of drunk driving (the drunks have been getting away with murder) and are far more politically effective. Effective advocacy requires compelling communication, but will be destroyed by dishonesty or distortion of the facts.

When it comes to hazardous products, industry's main concern seems to be that it limit its legal exposure by weakening the requirements of regulatory and liability law. Congress, never aggressive in injury prevention, has been content to abandon consumer product safety to whatever protection may be afforded by market forces. But if the deterioration in consumer product safety protection is to be reversed, action by Congress will be necessary. Public health advocates have no alternative but to mount a public counterattack in the battle over consumer product safety.

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