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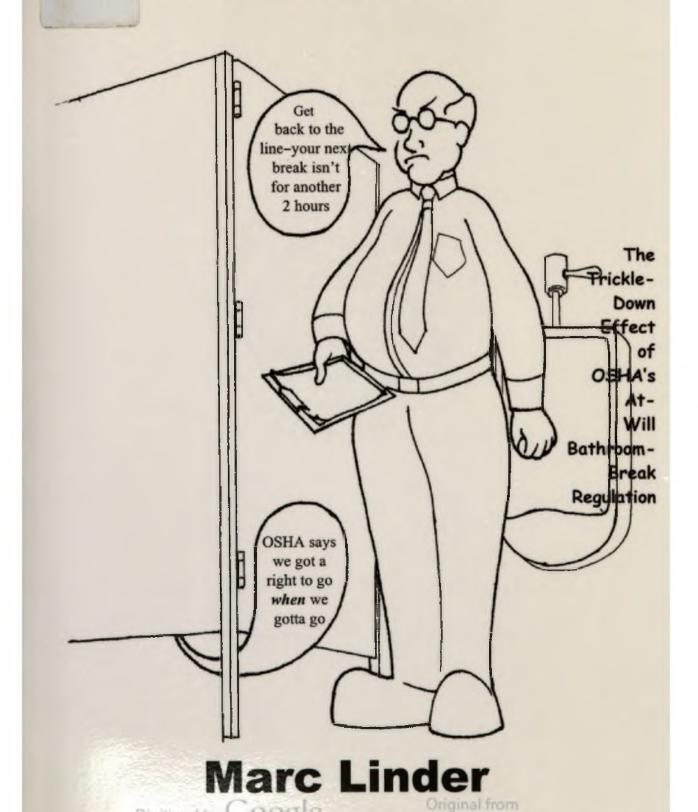


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1 Where Prohibited Revisited



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Void Where Prohibited Revisited





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The

Trickle-

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of

OSHA's

At-

Will

Bathroom-

Break

Regulation

Marc Linder

Fănpihuà Press Iowa City 2003

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Over the past several months we have noticed an increase of time spent off the floor and away from work stations.... This can no longer be tolerated. ... You will be excused to go to the restroom in an emergency situation only—daily is not an emergency, but a habit which you will need to break.¹

Human beings have a longstanding practice of excessive breaks.²

How does a practice end with a signed piece of paper? No it didn't: it did not end at that time.³

In the Soviet enterprises we should carry on a resolute and uncompromising struggle against violations of labour discipline, breaking factory rules, stealing of public property, waste of materials, slowdowns and unauthorized breaks. We should have the names of the worst offenders written on a blackboard, or even have them dismissed or imprisoned, because they purposely destroy public property which should be sacred. These acts make them enemies of the people.⁴

⁴Liu Shaoqi, "A New Form of Labour Demands a New Attitude," in *Selected Works of Liu Shaoqi* 1:30-33 at 32 (1981 [Mar. 20, 1934]).



¹Written policy at Excel Corporation slaughterhouse in Friona, Texas (which was obtained through discovery during litigation and furnished by attorney Philip Russ on Dec. 10, 1999): "It was prepared by the supervisors and posted on the bulletin board for a time and I retrieved several copies from individual personnel files. It seems when someone was disciplined for wanting to relieve themselves (apparently when it wasn't an emergency) this memo would be placed in their file. I do not have a definite date but there was some discussion of it in the deposition of either the HR manager or the plant manager at Friona.... The pages were not numbered just a two page memorandum." Email from Philip Russ to Marc Linder (Sept. 12, 2002).

²Carlos Tejada, "Work Week," *Wall Street Journal*, Aug. 28, 2002, at B3, col. 1 (quoting Jack Allen, human resources director, Jim Beam Clermont, KY plant).

³Commonwealth of Kentucky, Occupational Safety and Health Review Commission, Administrative Action No. 02-KOSH-0015, Secretary of Labor, Commonwealth of Kentucky v. Jim Beam Brands Co., KOSH 3681-01, "Transcript of Hearing" at 202 (Aug. 29, 2002) (Jeff Conder, plant manager, Jim Beam Brands Co., Clermont, KY plant).

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Preface

The Inaccessible Abode of Elimination Within the No Longer Hidden Abode of Production

[I]n today's workplace, as Linder and Nygaard show, the spirit...of the old regime persists.

The ruckus caused by the appearance of *Void Where Prohibited* at the end of 1997 prompted the Occupational Safety and Health Administration—which, incredible as it may seem, during the first quarter-century of its existence had not recognized workers' right to use the toilets that companies were obligated to provide—to issue a Memorandum on April 6, 1998, announcing that in the future employers would be required to make those toilets available so that workers can use them "when they need to do so." *Void Where Prohibited Revisited* is an attempt, five years later, to assess the real-world impact of OSHA's issuance of that new interpretation of its sanitation standard.

The market ("the sphere of circulation") was regarded by Karl Marx as a noisy realm dwelling on the surface of events and accessible to everyone, but one where the seeming freedom and equality of sellers and buyers (especially of labor power) inverted social reality. In contrast, "the hidden abode of production," on whose threshold hung the sign, "No admittance except on business," was the place where the secret of surplus value production would finally have to be revealed. One secret of the hidden abode of production that Marx did not study enshrouds the inaccessible abode of elimination on whose threshold today hangs the sign: No admittance except on scheduled breaks. Workplace toilets have not yet been turned into profit centers, but some employers presumably believe that preventing workers from stopping work to go there does increase profits.

Exposing the hidden abode of production together with its secret of surplus

³Karl Marx, Das Kapital: Kritik der politischen Oekonomie, Vol. 1: Book I: Der Produktionsprocess des Kapitals 140 (1867).



¹Corey Robin, "Lavatory and Liberty: The Secret History of the Bathroom Break," *Boston Globe*, Sept. 29, 2002, at D1.

²See below Appendix II.

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value has not toppled capitalism. The taboo that Marx broke may have been more profound and central to the inner workings of society, but, as the French daily *Le Monde* recently observed, each era has the seminal conflict it deserves, and today's may be the struggle for the right of free access to workplace toilets. Emblematically, the authors of a recent book on the living-wage movement seemed to be referring to a select honor roll when they praised a high-wage poultry-slaughter firm with a progressive management "ethos" "whose workers may use the rest room at any time they please," in contrast to a low-wage animal-slaughter company whose employees are "generally bothered by supervisors for their occasional need to use the rest room." And a labor arbitrator (who was also the director of personnel at Harvard University), as if applying Marx's analysis of the contradiction between the right of the capitalist as buyer of labor power to make the workday as long as possible and the right of the worker as seller to limit the day to a normal length—between which only force or government regulation decides —observed of a dispute over bathroom access at a Massachusetts manufacturing plant:

We might, perhaps, learn from our French cousins who refer to the personal requirements of people as "les petits besoins," or the *little* needs of the employees, which adjective carries with it the implication that there is no real conflict, or should be none, between these little needs and the major purposes of a company or enterprise. In this case, however, we do have a conflict...between the management's running of its business and the employee's management of himself. Each basically would appear to have a clear right...and these rights should not be in conflict, but in fact, are.⁷

Workers who have themselves been painfully initiated into the secret history of the inaccessible abode of elimination have often felt constrained by embarrassment to help keep the secret, but *Void Where Prohibited* revealed that many employers restrict their employees' access to the toilet. Now that the secret is out and OSHA has had five years to enforce compliance with its new-found understanding of one of the foundations of workplace sanitation, hygiene, and health, the time has come to determine the extent to which the Memorandum has empowered workers to gain unilateral control over their bladders and colons.

⁷Gremar Mfg. Co., 46 Labor Arbitration Reports (BNA) 215, 218 (1965). The arbitrator, John W. Teele, was director of personnel at Harvard University from 1949 to 1969. Telephone interview with his successor, John Butler, Lexington, MA (Jan 27, 2003).



⁴Maurus Veronique, "La course à la productivité au coeur du conflit des Bigard," Le Monde, Aug. 14, 1995 (Lexis).

⁵Robert Pollin and Stephanie Luce, *The Living Wage: Building a Fair Economy* 151, 155, 156, 157-58 (rev. ed. 2000 [1998]).

⁶Marx, *Das Kapital* at 202, 280-81.

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The book is largely structured chronologically, punctuated by several historical and comparative excursions. Part I is devoted to the pressure that was mobilized in 1997-98 to force OSHA to abandon its preposterous position that its toilet standard did not require employers to let workers use the toilets. Following general and specific remarks in Chapter 1 on how the words in a law get translated into real-world effects, Chapter 2 examines the impact of Void Where Prohibited on Federal OSHA's decision to reverse itself. The prelude to that reversal that took place in Iowa, also under the influence of Void Where Prohibited, is related in Chapter 3. Part II interrupts the narrative to interpolate two crucial background facts. Chapter 4 tells the ironic tale of how during the Carter administration, OSHA, under its most prolabor Administrator, tried and almost managed to delete its toilet standard altogether; had that deletion project succeeded, no norm would have been available two decades later from which to derive a right to go to the bathroom. Although the reach of OSHA's toilet standard is very broad, Chapter 5 explains which sectors of the economy are not covered by the agency's right-tovoid standard. Part III is devoted to the actual promulgation of the Memorandum. Following analysis of the text of the Memorandum in Chapter 6, its status and validity from the perspective of possible challenges under administrative law are discussed in Chapter 7. Initial reactions from various groups to the Memorandum form the subject of Chapter 8. Part IV then interrupts the chronology again, this time to insert two international comparative studies—of a surprisingly backward fee-to-pee regime in Canada (Chapter 9) and the radical fundamental human right to void at work in France (Chapter 10). Part V shifts to OSHA's enforcement of its new right-to-void standard. Based on a unique collection of unpublished enforcement documents, Chapter 11 provides a detailed statistical and descriptive account of all the relevant citations issued by Federal OSHA and state OSHA agencies. The next four chapters deal with four state OSHA programs whose enforcement efforts merit special attention: Iowa's citations against animal slaughter plants (Chapter 12); the high-profile Jim Beam dispute in Kentucky (Chapter 13); Washington's unique adoption of the right to void with regard to bus drivers before 1998 (Chapter 14); and California's unique refusal to enforce Federal OSHA's new standard (Chapter 15). Finally, Part VI tries to assess the progress that has been achieved. Chapter 16, in an attempt to develop a broad qualitative picture of the extent to which OSHA and labor unions have been able to vindicate the right to void, offers the results of a large number of interviews with officials in various organizations, while Chapter 17 analyzes the state of the law, devoting special attention to the possible legal ramifications of employers' efforts to discipline workers for "abusing" bathroom breaks.

For readers' convenience, the full texts of the relevant OSHA standards have been assembled in the Appendices.



Acknowledgments

A large number of workers in scores of Federal and State OSHA offices made this study possible by furnishing copies of the hundreds of public-record citations and redacted inspector worksheets and narratives that form the basis of the book's analysis of OSHA's enforcement of its Memorandum of April 6, 1998. Several of them deserve special gratitude for expediting the processing of Freedom of Information Act requests and/or persistence in locating hard-to-find files: Elizabeth Slatten (Austin), Mary Bryant (Iowa), Margaret Miles (Kentucky), Laurie Lorish (Michigan), Tamra Larue (Mobile), Grace Kropp (North Carolina), Cheryl Gray and Bonita Winningham (Omaha), Chris Ottoson (Oregon), Ronnie Bilczewski (Parsippany), Luis Mireles (San Diego), Lisa Tilley (Savannah), Mike Maenza (Tennessee), Jule Jones (Toledo), Susana Freund (Ventura), Jay Withrow (Virginia), and Barbara Harris-William (Washington). Andrea Howard of the California Occupational Safety and Health Standards Board performed almost instantaneous regulatory history searches and faxed the material almost faster than the recipient could run to the fax machine.

A belated expression of gratitude is owed Elaine Bynum (now retired) of the Docket Office in OSHA's national office in Washington, D.C., who in 1997 made available copies of the transcript of the public hearings on toilets held on November 8-10, 1972 and of the comments submitted, analysis of which significantly enriched *Void Where Prohibited*, and other parts of which have been used here. One of her successors, Vanessa Reeves, undertook the heroic (though ultimately fruitless) task of trekking to the National Archives in Suitland, Maryland, to look through 67 boxes of totally disorganized material from Docket S-250 on OSHA's 1978 revocation project.

Elizabeth Slatten, the Assistant Area Director of Federal OSHA's Austin Area Office tirelessly and cheerfully responded to countless requests for information about various aspects of OSHA's operations, policies, and procedures.

The incredible speed with which Denise Partee, Deputy Clerk, U.S. District Court for the Middle District of Georgia, Macon Division, retrieved from the regional archive, copied, and sent off pleadings in *Bagley v. Cagle's* made it possible to discuss and analyze that important case.

In order to gain a better understanding of the conflicts that are often abstractly encapsulated in OSHA citations, as many persons as possible with direct knowledge of the events were interviewed. If more union officials and workers are



Acknowledgments

quoted than managers, the reason is that, unsurprisingly, whereas virtually no unionist declined to talk, many company officials refused to provide their version. Several labor union officials who were particularly helpful deserve special mention: Jo Anne Kelley, president of UFCW Local 111-D at the Jim Beam plant in Clermont, Kentucky; Jackie Nowell, director, and Robyn Robbins, assistant director, of the occupational safety and health office, and Peter Ford, assistant general counsel, of the UFCW; Jim Fredericks of the occupational safety and health department of the United Steelworkers; Dave LeGrande of the occupational safety and health department of the Communications Workers; Susan Stoner, general counsel of Amalgamated Transit Union, Division 757, in Portland, Oregon; Claude Grey, vice president, and Donny Brown, business agent, Teamsters Local 391, in Goldsboro and Winston-Salem, North Carolina; and Edgar Fields, international representative, Retail, Wholesale & Department Store Union, Atlanta.

At his own expense, attorney Jean Claude Richard of Marseille generously furnished a complete stranger a copy of the French labor tribunal decision discussed in chapter 10, while simultaneous interpreter Corinne Laloux of Jouy-en-Josas corrected some of the translations in the same chapter.

Dr. Ingrid Nygaard answered numerous questions about urination, while Larry Norton discussed several tricky legal issues.

Matt Stilwell expertly scanned in and adjusted the cover cartoon, which the noted Midwestern speed artist Schuyler Rahe-Dingbaum had sketched in a not-too-bad 11.5 minutes.

Note on Nomenclature and Sources

Throughout the text "OSHA" is used to refer both to the Occupational Safety and Health Administration and to the Occupational Safety and Health Act. The latter is intended very infrequently and the context always makes the reference clear. Similarly, for the sake of simplicity and uniformity, all federally approved state occupational safety and health agencies are referred to as "Kentucky OSHA," "Washington OSHA," and so on, even though they may have other formal designations (which are pointed out in the text or footnotes).

The vast bulk of the sources cited in this study of the development of work-place voiding rights during the past five years fall into the following categories: OSHA's unpublished and/or archival administrative and enforcement records; telephone interviews and email correspondence; administrative and judicial hearing transcripts; newspapers, magazines, and websites; and state and federal statutes, regulations, and judicial, administrative, and arbitral decisions. In contrast, relatively little use has been made of published sources such as books and journal articles. Although a bibliography, which would be of little practical value to readers, has therefore been dispensed with, the full bibliographical data of each source are given with its first citation in each chapter. In addition, Appendix V describes in detail the OSHA inspection reports that form the basis of the analysis of the agency's enforcement efforts.