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# Void Where Prohibited Revisited

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The

Trickle-

Down

Effect

of

OSHA's

At-

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Bathroom-

Break

Regulation

## Marc Linder

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### Part I

#### **Pressure**

"Void Where Prohibited"...opened the floodgates of workers' wrath about a sensitive issue.1

<sup>&</sup>lt;sup>1</sup>Susan Yerkes, "Whazzup," Mar. 26, 1998, on http://www.expressnews.com/whazzup/whazzup1.shtml (visited June 11, 1998).



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#### **Books Have Their Fates—And So Do Laws**

Just think...if...millions of Americans now actually can go to the bathroom when they want to, you will die having accomplished something really good—not something most people can say.<sup>1</sup>

The question this book examines is summed up by that little conditional word "if": Can in fact millions of workers in the United States stop work when they need to void now that the Occupational Safety and Health Administration has imposed on employers an obligation to let them go?

Even before it appeared at the end of 1997, Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time had already begun mobilizing public opinion to pressure OSHA to abandon its preposterous and outrageous position that its industrial sanitation standard, which required employers to provide toilets,<sup>2</sup> did not obligate companies to let workers use those toilets. On April 6, 1998, OSHA, finally listening to reason, issued a Memorandum declaring that the "standard requires employers to make toilet facilities available so that employees can use them when they need to do so." Thus with a few keystrokes on a computer, a governmental agency was able, literally from one day to the next, to create a right for tens of millions of workers in the United States to stop work when they need to void.

Or was it? Was this instant establishment of at-will bathroom breaks worth the paper (or cyberspace) it was written on? How do labor-protective regulations get enforced in the real world consisting of: aggressive and powerful employers opposed to governmental interference with their managerial prerogative to control their employees' time unilaterally; a private-sector workforce—90 percent non-unionized—largely afraid to assert their rights or even to file a complaint with the agency; and an understaffed OSHA, which, preoccupied with preventing what it deems other far more urgent safety and health hazards, even when it does receive

<sup>&</sup>lt;sup>3</sup>See below Appendix II.



<sup>&</sup>lt;sup>1</sup>Email from Dr. Ingrid Nygaard to Marc Linder (Apr. 13, 1998).

<sup>&</sup>lt;sup>2</sup>29 CFR sect. 1910.141(c)(1)(i) (2002); see below Appendix I.

complaints, fails to pursue them with all possible rigor and vigor (or, in the unique case of Cal/OSHA, outright refuses to fulfill its obligation to "ensure that State standards and their interpretations remain 'at least as effective' as the Federal standard")?<sup>4</sup>

Void Where Prohibited was characterized by The New York Times as a "grim" tour d'urinal,<sup>5</sup> by Litigation Management Inc. (which provides medical information to corporations) as "highly entertaining," by the National Law Journal as a "not-at-all frivolous book...cover[ing]...bathroom breaks from A to P," and by The Non-violent Activist as an "impassioned plea." The book has enjoyed an interesting and unusual fate for a scholarly work—which Labor Studies Journal viewed as "combin[ing] the muckraking tradition with a theoretical sharpness worthy of Karl Marx"9—having impelled the U.S. national regulatory bureaucracy to overrule itself and to vindicate the right of tens of millions of workers to void "when they need to do so." A nursing journal credited the book with having focused research on the impact of urinary incontinence on working men and women.<sup>10</sup> In an article about the lawlessness of the workplace in the United States, Germany's leading weekly newspaper, Die Zeit, cited the book findings as the most extreme of its "unbelievable histories from the world of work." In the words of the University of Pennsylvania Journal of Labor and Employment Law: "It is a rare scholarly work that can arouse a slumbering agency to act, but Void Where Prohibited...did just that, on both the state and federal level."12 Or

<sup>&</sup>lt;sup>12</sup>Rebecca Schleifer, Review of *Void Where Prohibited*, in *University of Pennsylvania Journal of Labor and Employment Law* 2:603-608 at 604 (2000). See also Anne Scott, "The Continuing Saga of the Potty Wars," *Business Record* (Des Moines), Jan. 26, 1998,



<sup>&</sup>lt;sup>4</sup>See below Appendix II.

<sup>&</sup>lt;sup>5</sup>Mary Walsh, "Blue-Collar Urgency: Bathroom Rights," N.Y. Times, Nov. 22, 2000, at G1.

<sup>&</sup>lt;sup>6</sup>Elizabeth Juliano and James Fell, Review of *Void Where Prohibited*, in *M.I.M. Reporter: Quarterly Review of Medical Information Management for Litigation*, 1(2):7 (June 1998), on http://www.litigation-mgmt.com/lmimain/AcrobatMIM/revised/secure/MIMV1N2.pdf.

<sup>&</sup>lt;sup>7</sup>"There's No Escaping the Law, So Read All About It," *National Law Journal*, Aug. 3, 1998, at A25 at A26 (book review).

<sup>&</sup>lt;sup>8</sup>Phyllis Eckhaus, "Piss Poor" (Book Review), *Nonviolent Activist*, Nov.-Dec. 1998, at 19.

<sup>&</sup>lt;sup>9</sup>Bruce Nissen, Book Review, Labor Studies Journal 26(1):81-82 at 82 (2001).

<sup>&</sup>lt;sup>10</sup>Sheila Fitzgerald, Mary Palmer, Susan Berry, and Kristin Hart, "Urinary Incontinence: Impact on Working Women," *AAOHN Journal* 48(3):112-18 at 112 (Mar. 2000).

<sup>&</sup>lt;sup>11</sup>Christian Tenbrock, "Vorsicht, Kamera! Unglaubliche Geschichten aus der Arbeitswelt in den Vereinigten Staaten," *Die Zeit*, June 8, 2000, on http://www.fortunecity.de/parkalleen/mozartweg/682/presse/zeit0024.htm.

as the British occupational safety and health magazine, Hazards, put it:

It is a rare book on working conditions that can be said to make a real and lasting difference. *Void where prohibited....* did though. [The] book caused a major stink in the US, leading OSHA...to issue new guidance on a worker's right to pee breaks. But what Void where prohibited graphically illustrates...is how robbing workers of their dignity is a very common and deliberate management technique. It comes to something when your boss has control of your bladder too. This book is about how humiliation is a big part of today's management armoury.<sup>13</sup>

The much-quoted saying, "books have their fates" ("habent sua fata libelli") of Terentianus Maurus, a second-century A.D. Roman grammarian, begins with a phrase that moderns often omit: "pro captu lectoris." The adage can thus be taken to mean that a book's fate hinges in part on its readers' powers of comprehension. To be sure, the fate of a (labor) law is hardly a matter of the relative strengths of its disputing readers' powers of comprehension. 'Pure reason' is subordinated to the diametrically opposed class interests of employers and employees, whose strategies for determining the outcome of disputes over the

<sup>&</sup>lt;sup>14</sup>For a full discussion, see Wolfgang Milde, *Habent sua fata libelli: Zur Geschichte eines Zitats* (1988).



at 5 (Lexis) ("Nygaard and Linder are driving some changes"); Maggie Jackson, "Bathroom Breaks Legal, Thanks to UI Professor," Daily Iowan, Mar. 13, 1998, at 4A; Valica Boudry, "Professor Helps Secure Workers' Basic Rights," fyi, Jan. 30, 1998, at 4 ("OSHA's decision to cite a Hudson Foods Inc. poultry processing plant...was due in part to research done by...Linder"); "OSHA Clarifies Bathroom Policy," Newsline (Apr. 3, 1998), on http://www.penton.com/oh/member/newsline/4-3.html; "UI Push Forces Break Changes," Iowa City Press Citizen, Apr. 9, 1998, at 1A, col. 1 ("Linder and... Nygaard initiated OSHA's reexamination of its position"); Stephanie Ball, "Taking a Leak Just Got Easier," Daily Iowan, Apr. 10, 1998, at 1A, col. 5 ("If you gotta go, you gotta go. And employees across the nation may have an easier time taking bathroom breaks thanks to a book by...Marc Linder and Ingrid Nygaard"); "Book Led to New OSHA Rules," Cedar Rapids Gazette, Aug. 16, 1998 ("the outrage engendered by Linder and Nygaard's book prompted needed reform"); Gregory Weaver, "OSHA Deems If Employers' Restroom Policies Are Too Restrictive," Indianapolis Star, May 8, 2002, at 6B (Lexis) ("The guidelines were issued after the agency apparently was embarrassed by a book that took it to task for allowing workers to be denied restroom breaks for entire eight-hour and 12-hour shifts--even though it had rules requiring employers to 'provide' a restroom"); Al Karr, "OSHA to Clarify Rest Room Access Rule," Safety + Health 157(3):14 (Mar. 1998); Lisa Finnegan, "OSHA Directive Clarifies Bathroom Use Policy," Occupational Hazards 60(5):13 (May 1998) (Westlaw). "Bathroom Use," Safety and Health Practitioner 18(3):9 (Mar. 1, 2000) (Westlaw).

<sup>&</sup>lt;sup>13</sup>Review of *Void Where Prohibited*, *Hazards*, No. 65, at 20 (1999).

meaning of laws and regulation are a classic example of the merely instrumental use of arguments.

But initially a law—and even more so an administrative agency's interpretation of its own regulation—is, like a book, merely words printed on a piece of paper, without the ability to compel a universally accepted meaning, let alone to command or coerce compliance (which printed pages in non-legislative books do not even purport to do). Nevertheless, many people believe that the mere act of publication by OSHA of a memorandum interpreting its own sanitation standard for general industry, which requires employers to provide a certain number of toilets, as also "requir[ing] employers to make toilet facilities available so that employees can use them when they need to do so" automatically means that from then on workers would actually be able to void "when they need to do so."

However, if compliance were instantaneous, it would not, for example, have been necessary in 1999 for Hispanic workers in animal slaughter plants in Nebraska to complain that they "end up urinating in their pants while working on the line" because "they're given inadequate bathroom breaks." Nor would it have been necessary for the state's Republican governor, who had campaigned to reduce the size of government, to issue a non-enforcible Nebraska Meatpacking Industry Workers Bill of Rights, under which an "employer agrees to provide to employees...[a] dequate time for necessary restroom breaks." But in the absence of a frictionless world of self-enforcing universal compliance and/or ubiquitously and perpetually patrolling peripatetic police, as a leading comparative labor law scholar observed, "in labour relations legal norms cannot often be effective unless they are backed by social sanctions..., that is by the countervailing power of trade

<sup>&</sup>lt;sup>18</sup>Nebraska Workforce Development, "Nebraska Meatpacking Industry Worker Bill of Rights" sect. 3 (June 28, 2000). The spirit of this project was captured by a statement by the lieutenant governor, who reported on conditions in meatpacking plants: "I discovered in visits with workers concerns that were genuine because the workers believed they were genuine. I recognize that like many complex societal challenges, there is no magic bullet to solving the issues at hand. There are no easy solutions." From the Office of Mike Johanns, News Release (Jan. 24, 2000), on http://gov.nol.org/Johanns/News/jan00/recommendwbor.htm.



<sup>&</sup>lt;sup>15</sup>See below Appendix II.

<sup>&</sup>lt;sup>16</sup>Ted Kirk, "Critics: Hispanics Exploited in Omaha Meatpacking Jobs," *Lincoln Journal Star*, Sept. 5, 1999 (a copy of the web version, which is no longer on-line, was faxed to the author by Jose Santos, the Nebraska Department of Labor Meatpacking Industry Worker Rights Coordinator (Jan. 3, 2003)). See also Mike Sherry, Cindy Gonzalez, and Leslie Reed, "Meatpacking Inquiry Opened," *Omaha World-Herald*, Sept. 11, 1999, at 59 (Lexis); Nancy Hicks, "Meatpackers' Job Conditions to Be Studied," *Omaha World-Herald*, Sept. 10, 1999, at 17 (Lexis).

<sup>&</sup>lt;sup>17</sup>http://www.mikejohanns.com.

unions and of the organised workers to withhold their labour."<sup>19</sup> Consequently, with weak unions and a small and shrinking proportion of unionized workers supporting a "half-heartedly enforced standard,"<sup>20</sup> the enunciation of a new policy alone is unlikely to modify the behavior of firms that deprive workers of toilet breaks since they tend to be labor scofflaws in general.<sup>21</sup>

To coincide with the first anniversary of OSHA's toilet access interpretation a newspaper reporter in Tucson followed up on what the author, emphasizing to her that the OSHA Memorandum "is just a piece of paper until workers try to assert that right," termed "the most important question...in all of this"—namely, whether "OSHA's interpretation is worth the paper it's written on." RuthAnn Hogue soon discovered that whereas Federal OSHA took the position that the standard "appears to be effective" because "there was enough information out there that employers know they have to give them access or workers aren't complaining," "some Tucsonans say the law is little more than an ineffective piece of paper. ... Conditions at some companies in Tucson today mirror those that sparked OSHA's move to increase restroom access." Specifically she found:

Schoolteachers report having accidents in the classroom, and suffering kidney and bladder infections because they often can't use the restroom more than once a day.

Pharmacists who work 12-hour shifts alone must often wait until closing time to relieve themselves. State law doesn't allow them to leave the pharmacy unattended, and pressure from employers often prevents them from locking up briefly.

Call center employees say pay incentives often penalize them for logging off the phone system between scheduled breaks.<sup>23</sup>

For example, at one Tucson call center—in Britain, too, half of call-center workers surveyed "said they deferred taking toilet breaks because of management" —pressure for increased output cascading down from higher levels of management led to the firing for "unprofessional behavior" of an employee for questioning the imposition of a rule permitting only three restroom breaks daily

<sup>&</sup>lt;sup>24</sup>Christine Norton, "Loo Breaks at Work—Is There a Problem?" European Health and Safety Magazine 2(7):26-27 (Nov. 2002).



<sup>&</sup>lt;sup>19</sup>Otto Kahn-Freund, Labour and the Law 11 (1972).

<sup>&</sup>lt;sup>20</sup>Barbara Ehrenreich, "Warning: This Is a Rights-Free Workplace," *The New York Times Magazine*, Mar. 5, 2000, at 88-92 at 88 (citing Marc Linder).

<sup>&</sup>lt;sup>21</sup>Simon Nadel, "Restricting Regular Bathroom Access Can Spur Negative Workplace Repercussions," *U.S. Law Week* 66(37):2579-80 at 2580 (Mar. 31, 1998) (quoting Deborah Berkowitz, UFCW director of health and safety).

<sup>&</sup>lt;sup>22</sup>RuthAnn Hogue, "No Relief in Sight," *The Arizona Daily Star*, Apr. 11, 1999, at 1D, col. 2

<sup>&</sup>lt;sup>23</sup>Hogue, "No Relief in Sight," at 1D, col. 3.

(including lunch) and restriction of fluid intake to minimize the need to void.<sup>25</sup> (In all seriousness a plaintiff-side attorney specializing in the Americans with Disabilities Act soon suggested that before claiming that it would be an undue hardship, employers accommodate telemarketing employees who had to use the toilet frequently by enabling them to "take a portable phone to the bathroom...")<sup>26</sup>

Within two weeks the mere publication of Hogue's article triggered at least a dozen telephone complaints of denial of toilet access to OSHA in Tucson compared to a previous average of three every six months. All the complainants worked in the teleservice industry, which was not adverse to trying to absolve itself of blame by alleging that workers were in fact "reluctant to use the restroom because they are wary of upsetting co-workers trying to reach a common production goal." Workers, however, explained to Hogue that "while their employer posts memos stating restroom-friendly policies, taking time off the phone to use the restroom counts against them and can affect promotions or pay." OSHA rejected such policies as inconsistent with the toilet access standard: "The employer should not deduct pay from them for using the restroom. That would discourage a lot of employees from using the restroom when they need to." "27

The purpose of this follow-up study to *Void Where Prohibited* is to shed light on the process by which labor rights on paper become a firm part of the physical, political, and socio-economic reality of working life—or, in the words of one reviewer, of whether there was a "happy ending for workers."<sup>28</sup> The inquiry will also examine whether the author's skepticism of OSHA's efforts, voiced days before the agency issued its new interpretation, and especially the prediction that it "will back down under pressure from businesses," have been confirmed by events.<sup>29</sup> Even after OSHA published its interpretive Memorandum, the author remained "quite pessimistic about enforcement" against the background of its tradition of foot-dragging on the issue.<sup>30</sup> Alternatively, this study will examine

<sup>&</sup>lt;sup>30</sup>Janet Gemignani, "Can Potty Laws Unlock the Bathroom Door"? *Business & Health*, 16(5):12 (May 1, 1998) (Westlaw).



<sup>&</sup>lt;sup>25</sup>Hogue, "No Relief in Sight."

<sup>&</sup>lt;sup>26</sup> Accommodating Bathroom Use Challenges Employers," Successful Job Accommodation Strategies 4(4) (Aug. 1998) (Lexis).

<sup>&</sup>lt;sup>27</sup>RuthAnn Hogue, "OSHA Is Flush with Restroom Complaints," *Arizona Daily Star*, Apr. 25, 1999, at 1D, at col. 1, 3D (quoting Art Morelos, compliance officer, OSHA, Tucson).

<sup>&</sup>lt;sup>28</sup>Review of *Void Where Prohibited*, *Update*, Summer 1998, at 14 (National Employment Law Project).

<sup>&</sup>lt;sup>29</sup>Brian Tumulty, "Bathroom Breaks on OSHA's Agenda," *Journal and Courier* (Lafayette, Indiana), Apr. 4, 1998. This article was also sent out as Brian Tumulty, "Teachers Wrestle With Issue of Bathroom Breaks: OSHA Might Come to Rescue," Gannett News Service, Apr. 1, 1998 (Westlaw).

whether, as a former Pittsburgh area director of the Wage and Hour Division of the U.S. Department of Labor turned labor standards consultant put it in early 1999, "companies started taking the OSHA regulations seriously when the agency began citing firms for not allowing employees enough time to go to the bathroom." This review of the actual formulation of OSHA's policy and enforcement also analyzes the extent to which enforcement has been constrained by the concern with "excessive government intrusion into the workplace and the potential disruption of business operations by employees who abuse breaks" expressed by employers even before OSHA acted.<sup>32</sup>

The dynamics of the enforcement process, however, are fundamentally misconceived when they are viewed in the manner of a sympathetic reviewer, who asserted: "In the face of public apathy and, except for Linder and Nygaard, with few from the academy calling on the public's attention, we can expect a number of employers to continue to treat their employees little better than livestock." In fact, neither the public nor academia is crucial at this point. It is workers themselves and especially unions and their members that must impose norms of worker autonomy and co-determination on management both through day-to-day struggles at the workplace and by pushing OSHA to inspect, cite, and impose significant monetary penalties on employers that violate safety and health standards.

<sup>&</sup>lt;sup>33</sup>Matthew Finkin, Review of *Void Where Prohibited*, *Industrial and Labor Relations Review* 53(2):338-39 at 339 (Jan. 2000).



<sup>&</sup>lt;sup>31</sup>Jane-Ellen Robinet, "PNC Park Seeks Potty Parity for Different Needs of Men, Women," *Pittsburgh Business Times & Journal* 18(31):45 (Feb. 19, 1999) (Westlaw).

<sup>&</sup>lt;sup>32</sup>Kirstin Grimsley, "A Tough Break When Nature Calls," *Washington Post*, Nov. 26, 1997, at C9, col. 1.