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Void Where Prohibited Revisited

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**The
Trickle-
Down
Effect
of
OSHA's
At-
Will
Bathroom-
Break
Regulation**

Marc Linder

**Fānpìhuà Press
Iowa City
2003**

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***Void Where Prohibited* and Its Impact on OSHA's Interpretive About-Face**

This book reads like a thriller. It's hard to put down. It could easily be a sequel to George Orwell's 1984. I can imagine a creative writing teacher telling his or her students that it doesn't seem believable. The only trouble is that the book is non-fiction. Every chilling word is true, incredible though it may be.¹

Paving the path to provide presidential poop patrol protection, we have a heroic prophetic prince promoting propaganda to prevent persecution of plentiful poopers. Professor Marc Linder, of the University of Iowa College of Law recently published a book entitled *Void Where Prohibited*, portraying the plight of the oppressed people plundered of plentiful poop time in the potty.²

The origins of *Void Where Prohibited* go back to 1995 when the author received a telephone call from a migrant farmworker legal services lawyer in New Mexico concerning the complaints of workers at a dairy, whose employer permitted them no breaks of any kind during their 12-hour shifts—not to rest, not to eat, and not to void: “When they have to relieve themselves, the boss tells them to try not to take a break.”³ Initial research uncovered the surprising fact that no federal or state labor standards law mandated any such breaks for run-of-the-mill workers.

¹Susan Lippman, Book Review of *Void Where Prohibited*, *NY Hard Hat News*, Apr. 2001, at 7.

²Joe Murray, “The Presidential Potty Patrol,” on <http://www.sodbuster.com/Opinions/joe/OPI031898JM.htm>.

³Letter from Kay Drought, Texas Rural Legal Aid, Plainview, TX, to Olga Pedroza, Centro Legal Campesino, Las Cruces, NM (Sept. 19, 1995) (faxed to author Sept. 22, 1995). See also Stephen Franklin, “Gimme a Break: A Minute or Two to Go to the Bathroom Isn't Necessarily a Worker's Right,” *Chicago Tribune*, Feb. 8, 1998, sect. 6, at 5. Contrary to Heather Newman, “Workers Have a Right to Visit Bathroom,” *Detroit Free Press*, Apr. 18, 1998, on <http://www.freep.com/business/qpotty18.htm>, the author did not work at the dairy.

According to a 1976 study of time-use at work, the dairy workers in New Mexico were hardly unique. That survey revealed that no coffee or other scheduled breaks were reported by 26 percent of clerical, 29 percent of craftsman, 8 percent of operative, and 40 percent of unskilled respondents; among those who reported such breaks, they averaged 17, 20, 24, and 14 minutes per eight-hour day, respectively. Among the same groups no unscheduled breaks (including informal breaks, socializing, personal business, and lunch hours beyond 60 minutes) were reported by 32, 29, 34, and 42 percent, respectively; among those who reported such breaks, they averaged 28, 39, 29, and 19 minutes daily, respectively. Thus overall these four groups reported total daily break time of 46, 58, 53, and 33 minutes, amounting to 10.0, 12.2, 10.9, and 8.2 percent of their average daily time at work (excluding lunch) of 466, 491, 486, and 438 minutes, respectively.⁴

If hours and rest period laws offered no relief, a more promising approach was opened by an OSHA regulation (or “standard”), 29 Code of Federal Regulations section 1910.141(c)(1)(i), under which “toilet facilities, in toilet rooms separate for each sex shall be provided in all places of employment in accordance with Table J-1 of this section,” which requires employers to provide 1 toilet in workplaces with 1 to 15 employees, 2 toilets in workplaces with 16 to 35 employees, and so on.⁵

However, when contacted, officials at OSHA took the position that this regulation did not require employers actually to let workers use those toilets that had to be “provided” or confer a right on workers to use them.⁶ Nor is it clear that

⁴Frank Stafford and Greg Duncan, “The Use of Time and Technology by Households in the United States,” in *Time, Goods, and Well Being* 245-88, tab. 10.3 at 256 (F. Juster and Frank Stafford eds. 1985 [1980]). The data showing that 84 percent of union members reported scheduled breaks compared with 60 percent of nonunionists were unfortunately not disaggregated by occupation.

⁵29 CFR sect. 1910.141(c)(1)(i) (2002).

⁶Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* 55-56 (1998). Seven years after the author began questioning OSHA officials about its interpretation of sect. 1910.141(c)(1)(i), OSHA’s Assistant Regional Administrator for Compliance Programs in the Atlanta Region stated that in the period before OSHA changed its interpretation, he had considered citing a Tyson poultry slaughter plant for its refusal to permit a worker to go to the bathroom (until the supervisor furnished relief) who then defecated on himself on the grounds that it violated OSHA’s general housekeeping standard: “All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.” 29 CFR sect. 1910.22(a)(1) (2002). However, when it could not verify that the worker had actually defecated at the workstation, OSHA dropped the matter. Since this subpart is titled, “Walking-Working Surfaces,” unless fecal matter or urine dripped out of the

unions during the preceding quarter-century of OSHA's existence had urged OSHA to take a different position. A number of arbitration decisions suggest that union themselves had not considered the issue as subject to government regulation. Thus in a 1974 case involving assembly-line workers, the United Steelworkers filed a grievance alleging that the company had failed to provide adequate relief for workers "tied to the line," who "frequently...had to wait as long as 30 and 45 minutes...." Although the arbitrator upheld the grievance on another basis, one contract provision on which the union unsuccessfully sought to ground its grievance read: "The Company will accept and consider safety and health recommendations made by the Union Safety Committee in order that all legal safety and health requirements established by the law will be followed." The arbitrator rejected appeal to this provision because: "There was no evidence as to what such legal requirements are nor any allegation that the Company had violated them. If the Union believes that the Company's relief practice or its bathroom facilities do not meet legal requirements, the Union is free to complain to the U.S. Department of Labor or the Tennessee Department of Labor."⁷

Similarly, in 1980, a cabinet-manufacturing company, which was "merely attacking the problem of too much time lost in loitering in the washrooms," posted a rule requiring workers to punch out and back in when going to and from the bathroom outside of scheduled breaks and warning that "[e]xcessive trips or too long trips may cause disciplinary action to be taken." The United Brotherhood of Carpenters immediately filed a grievance, alleging, inter alia, that the terms "excessive" and "too long" were too vague to be fairly enforceable. In addition, women workers complained that they "wasted" time in the bathroom waiting for the only one of three stalls that "insured privacy," one being furnished with a curtain only and the other with nothing at all to shut it off. Because the employer claimed that its toilet facilities had been approved by Indiana OSHA, the arbitrator himself contacted the agency and discovered that workers were entitled to stalls with doors and walls to insure privacy.⁸ But neither the arbitrator nor the union apparently thought to ask or file a complaint with OSHA about the lawfulness of the employer's rule limiting the frequency and length of bathroom breaks.

Recognizing that neither mere professorial reason nor even common sense

worker's pants onto the floor, such an interpretation would, as the official himself conceded, probably not have been upheld by an Administrative Law Judge. Telephone interview with Benjamin Ross (Dec. 18, 2002); email from Benjamin Ross to Marc Linder (Dec. 20, 2002). In any event, the housekeeping standard would have been inapplicable to the vastly larger number of workers who were denied access but did not defecate or urinate on themselves.

⁷Mor-Flo Industries, Inc., 62 Labor Arbitration Reports (BNA) 398, 399-400 (1974).

⁸Schmidt Cabinet Co., 75 Labor Arbitration Reports (BNA) 397, 398-99 (1980).

would suffice to impel so benighted a bureaucracy to change its position, the author decided to try to involve the labor movement. Since food processing firms were among the worst oppressors of working-class bladders, the chief organizer of the industry's workers, the United Food and Commercial Workers, appeared to be the most credible leader of the struggle to clear the path to factory bathrooms. The author ultimately persuaded Deborah Berkowitz, the director of the Office of Occupational Safety and Health of the Field Services Department of the UFCW, to commit her considerable personal and organizational energy, resources, and political influence with a Democratic administration to an OSHA lobbying campaign for vindication of workplace voiding rights,⁹ despite the fact that the union's legal department was skeptical of the strategy of seeking a clarification from OSHA lest the interpretation turn out to be more restrictive than the standard.¹⁰ Then in connection with numerous conversations that Berkowitz and the author had with OSHA, on April 18, 1997, Berkowitz sent a letter to John Miles, Director of OSHA's Directorate of Compliance Programs,¹¹ requesting "a clarification of OSHA standard 1910.141, which requires employers to provide toilet facilities, regarding "employee rights to use those facilities as necessary." Berkowitz alerted Miles to the fact that:

We have recently been made aware of situations in general industry where supervisors have denied employee requests to use the bathroom at work, except during scheduled breaks. In the food processing and packing industry, for example, scheduled breaks can be few and far between. As you know, there is no requirement in the Fair Labor Standards Act that employers provide regularly scheduled breaks, and there is no uniform practice under state law. Even where employers in the industry do afford breaks, it is not uncommon for employees to work over four hours—and in many cases much longer—without such a break.

In response to a recent inquiry on this issue, Iowa OSHA responded that they believe they lack the power to require employers to allow workers to use the bathroom and therefore they could not cite any employer for refusing such employee requests. While we trust this is not the position of the National Office, we are requesting this clarification to make express that OSHA standard 1910.141 requires employers to allow workers to use the toilets when necessary.

For your reference, I have enclosed a summary of industry comments taken from

⁹After spending a morning in November 1998 with Berkowitz's successor, Jackie Nowell, the editor of *Hazards Magazine*, the British occupational safety and health periodical, wrote the author: "I now know your work triggered all the activity in the US on this issue." Email from Rory O'Neill to Marc Linder (Dec. 9, 1998).

¹⁰Telephone interview with Jackie Nowell, director of safety and health, UFCW, Washington, D.C. (Oct. 18, 2002).

¹¹Brian Tumulty, "Teachers Wrestle With Issue of Bathroom Breaks: OSHA Might Come to Rescue," Gannett News Service, Apr. 1, 1998 (Westlaw).

OSHA hearings held in 1972 on a related issue to the above question (prepared by Marc Linder, Professor of Law at the University of Iowa). Significantly, a number of employer representatives in making their comments on toilet distance requirements, not only believed that OSHA standard 1910.141 provided workers with the right to use a bathroom when needed, but also recommended that OSHA establish a system whereby employees on assembly lines could signal the need for relief.¹²

Although the UFCW never received an official reply to this letter from OSHA, Berkowitz, on the eve of OSHA's issuance of its new standard interpretation, correctly observed that the citation that the agency had issued on July 22, 1997 was "already an answer...."¹³ On that date OSHA cited the Hudson Foods, Inc. chicken slaughter and processing plant in Noel, Missouri—where, despite having organized the workers and achieved a collective bargaining agreement, the UFCW, unable to resolve this or numerous other safety and health matters, had filed a complaint with OSHA—because "employees were denied necessary use of bathroom facilities. In isolated areas throughout the production plant, supervisors and/or leads do not allow workers relief from the production line in order to use the toilets, in effect, locking them out of or failing to provide bathroom facilities."¹⁴ It is noteworthy that OSHA, whose national enforcement office, under UFCW's prodding, had been instrumental in deciding to cite this standard, tied the violation as closely as possible to the absence of the physical hardware called for by the standard; by analogizing an employer's oral-disciplinary denial of permission to stop working in order to go to the bathroom to placing a real lock on the door or failure to provide the proper number of toilets, OSHA sought to create as little discontinuity as possible with its previous policy, which grudgingly conceded that locking a toilet was tantamount to not providing it.¹⁵ At this point OSHA apparently deemed it neither necessary nor prudent to elaborate on the health and safety basis of the standard or even to mention that workers had a right to stop work when they had to urinate or defecate.

The press erroneously reported that OSHA had fined Hudson Foods for the violation of section 1910.141(c)(1)(i),¹⁶ but in fact it had imposed no monetary penalty for that particular ("other-than-serious") violation,¹⁷ although OSHA did

¹²Letter from Deborah Berkowitz to John Miles (Apr. 18, 1997).

¹³Tumulty, "Teachers Wrestle With Issue of Bathroom Breaks."

¹⁴Hudson Foods, Inc., Inspection No. 300002250, Citation and Notification of Penalty (July 22, 1997), on <http://155.103.6.10/cgi-bin/est/est1xp?i=300002250>.

¹⁵Linder and Nygaard, *Void Where Prohibited* at 56.

¹⁶Frank Greve, "In an OSHA First, Agency Fines Plant for Inadequate Toilet Breaks," *Austin American-Statesman*, Aug. 23, 1997, at A1 (Lexis).

¹⁷According to OSHA, an other-than-serious violation "shall be cited in situations where the most serious injury or illness that would be likely to result from a hazardous

propose an initial penalty of \$322,500 for many other violations that six months of inspection had unearthed; to be sure, after Tyson Foods announced a merger with Hudson on September 4, 1997, it achieved a reduction of this penalty by an administrative law judge to \$57,000 in July 1999.¹⁸ Nevertheless, OSHA itself, through its chief spokesman, characterized the action as “the first time the agency has punished anyone for denying workers toilet breaks.” After having identified “the first alleged violator” in the 26 years since the toilet standard had gone into effect, OSHA inspectors were reported also to “have shown interest in toilet breaks at a Tyson Foods poultry processing plant in Jackson, Miss.” And having quickly adopted a new-found appreciation of common sense, Chuck Adkins, OSHA’s regional administrator in Kansas City explained to the press: “‘If the standard requires toilets, it’s implicit that you let people use them.’”¹⁹ (Five years later, the Assistant Regional Administrator for Federal and State Operations in Adkins’ office stated that although the Memorandum had not been issued until 1998, that interpretation had “always been there intuitively.”)²⁰ Informally, however, OSHA inspectors appeared to apply a much looser subjective test. As one OSHA official in Missouri put it “on condition of anonymity,” the case was “‘surprising. It did engender a sense of outrage, or we probably wouldn’t have addressed the issue.’”²¹

condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health.” OSHA, Field Inspection Reference Manual, CPL 2.03, ch. III, sect. C.2.a., on http://www.osha.gov/Firm_osh_data/100007.html. The statute itself states that “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” 29 USC sect. 666(k) (2000). The statute requires that an employer cited for a “serious violation” of a standard “shall be assessed a civil penalty of up to \$7,000 for each such violation,” whereas an employer cited for a violation “specifically determined not to be of a serious nature...may be assessed a civil penalty of up to \$7,000 for each such violation.” 29 USC sect. 666(b) and (c).

¹⁸Hudson Foods, Inc., Inspection No. 300002250. Tyson also succeeded in securing a reduction of another Hudson Noel penalty from \$840,000 to \$143,000 in 1997. Hudson Foods, Inc., Insp. No. 300002243 (Dec. 18, 1997). See also <http://www.tysonfoodsinc.com/IR/newsinfo/viewNews.asp?article=238>; http://www.sierraclub.org/factoryfarms/rapsheets/missouri/hudson_noel.asp.

¹⁹Greve, “In an OSHA First, Agency Fines Plant for Inadequate Toilet Breaks.”

²⁰Telephone interview with Steve Carmichael, Kansas City (Nov. 27, 2002).

²¹Philip Dine, “Missouri Plant Cited Over Access,” *St. Louis Post-Dispatch*, Oct. 10, 1997, at 21C (Lexis).

Demonstrating that the vindication of voiding rights depends on the vigor with which unions fight for them, on August 19, 1997, just four weeks after OSHA had cited Hudson Foods, the UFCW announced that it was launching its own compliance program, including a survey of workers and filing of complaints with OSHA, in its organizing campaign among food processing workers in North Carolina. As Willie Baker, the union's southeastern regional director, put it: "The UFCW charge that brought the OSHA citation breaks new ground for worker rights. We will use the OSHA ruling to protect the rights of North Carolina Workers."²²

By early December 1997, the well-informed Bureau of National Affairs *Daily Labor Report* was reporting that OSHA's communications director had informed it that the citation issued to Hudson Foods had necessitated a standard interpretation, which the agency was planning to issue "shortly" and "soon." The spokesman stated that the interpretation "'clarifies this situation"; even though it would "not discuss the issue of restroom breaks," he noted that the "'basis for the interpretation and implicit [in the standard] is that employees must be able to use the restroom."²³

The summer of 1997 brought another highly publicized case of bathroom denial to public attention. This time the employer was the City of New York, which was sued in state court by a class of public assistance recipients assigned to clean streets and remove debris as part of the Work Experience Program. The plaintiffs alleged that in violation of OSHA's toilet standard for mobile crews, the City failed to make "transportation immediately available to nearby toilet facilities."²⁴ Instead, the workers "must rely on the lucky event that there is a public toilet near the assigned route, perhaps get driven at a supervisor's whim to a bath-

²²UFCW News, Press Release (Aug. 19, 1997); also available in part as "UFCW Wins OSHA Charge on Worker Bathroom Rights," U.S. Newswire, Aug. 19, 1997 (Lexis). The organizing campaign at Carolina Food Processors, the world's biggest hog slaughterhouse (and owned by Smithfield) was thwarted by numerous employer unfair labor practices. "UFCW Vows 'Smithfield Won't Get Away with Stealing' Hotly-Contested Election," U.S. Newswire, Aug. 22, 1997 (Lexis); Bob Williams, "Labor Struggle: Who Has the Muscle?" *News and Observer* (Raleigh), Aug. 31, 1997, at A23 (Lexis). Nevertheless, the UFCW is once again trying to organize Smithfield, where it is certain bathroom breaks are still being denied. Email from Jackie Nowell, UFCW, to Marc Linder (Jan. 13, 2003).

²³"OSHA Interpretation of Standard on Bathroom Breaks Expected Shortly," *Daily Labor Report*, Dec. 9, 1997, at 236 D14.

²⁴"The requirements of paragraph (c)(1)(i) of this section do not apply to mobile crews or to normally unattended work locations so long as employees working at these locations have transportation immediately available to nearby toilet facilities which meet the other requirements of this subparagraph." 29 CFR sect. 1910.141(c)(1)(ii).

room, go in the street, or ‘hold it.’”²⁵ The named plaintiff filed an affidavit stating: “If we need to urinate or move our bowels, we have to squat behind a tree or bush or ask one of our co-workers to hold up a plastic bag to shield us from the passing cars. ... During my menstrual period, there is no place to go to change my pad. I have to wait until the end of our shift and by then my clothes are soaked with blood.”²⁶ In August 1997 the state Supreme Court trial judge issued a preliminary injunction, ruling that the country’s largest workfare program could not continue to employ recipients outdoors as long as the City failed to provide toilets.²⁷ However, the City appealed the decision, the injunction was held in abeyance during the appeal process, and by the following April—exactly one week after OSHA issued its long awaited ruling—*The New York Times* reported that some workers sometimes still had to wait until the end of their six-hour shift to use a bathroom. One supervisor told the newspaper “that senior managers had issued orders not to permit workers to leave to find toilets but that supervisors routinely ignored the orders.”²⁸

Half a year before the book was published, the right-wing *American Spectator* devoted almost a full column to reproducing the blurb from Cornell University Press’s fall catalog, snidely calling the authors “prophets of the Golden Shower.”²⁹ In October 1997, the magazine *American Health for Women* printed an article on incontinence, citing the as yet unpublished *Void Where Prohibited* for evidence that social conditions can exacerbate the condition and discussing it at some length in connection with workplace-related incontinence.³⁰

The impact of *Void Where Prohibited* became international even before it appeared at the very end of 1997. As a result of a 13-page pre-publication condensation of the book in the November-December 1997 issue of the union-affiliated magazine *Working USA*,³¹ the safety and health researcher for the Brit-

²⁵Capers v. Giuliani at 8 (No. 97-402894, Sup. Ct. N.Y. County, 1997).

²⁶Capers v. Giuliani, Affidavit of Tamika Capers at 3-4 (July 7, 1997).

²⁷David Firestone, “Judge Orders Health and Safety Items for 5,000 in Workfare,” *N.Y. Times*, Aug. 19, 1997, at B2, col. 1 (Lexis).

²⁸Alan Finder, “City Slowly Improves Some Working Conditions,” *N.Y. Times*, Apr. 13, 1998, B6, at 1 (Lexis). Although there was no formal adjudication, the City of New York acknowledged during litigation that it has an obligation to comply with the Public Employee Safety and Health Act with regard to these workers, and ultimately their working conditions improved. Email from National Employment Law Project to Marc Linder (Nov. 4-5, 2002).

²⁹*The American Spectator* 30(7):85 (July 1997).

³⁰Ronni Sandroff, “Urgent Matters: Incontinence Is Treatable, If Only Women Would Talk About It,” *American Health for Women* 8(16):28 (Oct. 1997) (Lexis).

³¹Marc Linder and Ingrid Nygaard, “Void Where Prohibited,” *Working USA*, Nov.-Dec. 1997, at 21-29, 68-71. Don Stillman, the editor, who did the condensing, was also

ish Transport and General Workers Union (TGWU), whose bus-driver and poultry-industry members had called the union about toilet access problems, was “prompted” by reading the article in the autumn to write to the Director General of the Health and Safety Executive, which is the British government agency charged with responsibility for occupational safety and health.³² The controlling law in Britain merely states:

(1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.

(2) [S]anitary conveniences shall not be suitable unless—...

(b) they and the rooms containing them are kept in a clean and orderly condition; and

(c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside.³³

Nevertheless, in conformity with the logic of *Void Where Prohibited*, the official replied: “I believe that the requirements of the Workplace (Health, Safety and Welfare) Regulations 1992 to provide suitable and sufficient sanitary conveniences includes [sic] by implication reasonable opportunity to use these facilities.”³⁴ Because “no systematic work” had previously been done on toilet access, the TGWU, according to the editor of *Hazards*, the British occupational health and safety magazine, began “pressing the health and safety authorities to do this research. All of this activity was stimulated by your US campaign.”³⁵ Unfortunately for bus drivers, however, who sometimes, like their counterparts in the United States,³⁶ work five hours without a bathroom break on account of tight running times and lack of toilets on the road—16 percent of respondents surveyed by the union had to wait four hours or more—a definitional gap in the regulation left them for the time being uncovered because neither buses nor roads qualified

Director of Governmental and International Affairs of the UAW.

³²Email from Kim Sunley to Marc Linder (Dec. 16, 1998).

³³Workplace (Health, Safety and Welfare) Regulations 1992, sect. 20 (Stat. Instruments No. 3004).

³⁴Email from Kim Sunley to Marc Linder (Dec. 16, 1998). The Director General was Jenny Bacon. The general duty clause provides: “It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare of all his employees.” Health and Safety at Work Act 1974, ch. 37, sect. 2(1).

³⁵Email from Rory O’Neill to Marc Linder (Dec. 10, 1998). However, because the government failed to close the “loophole” that OSHA closed in 1998, U.K. unions began a campaign to force it to entitle workers to go when they need to. Kevin Maguire, “Let People Go for Time Off in Loo, Says TUC,” *The Guardian*, Feb. 21, 2003, at 6 (Lexis).

³⁶See below chap. 14.

as workplaces,³⁷ and by the end of 2002, little progress had been made.³⁸

The attention that the media paid both to the book and to the problem intensified in the beginning of 1998. To be sure, some initial press accounts failed to capture the subtlety of one of the book's central legal claims. In early January, for example, the *Wall Street Journal*, reporting on OSHA's plans to issue a standard interpretation mandating a reasonable time to use the toilet, asserted that the book "says no federal law assures time off to use restrooms."³⁹ The author corrected this mischaracterization in a letter to the editor:

[T]he book explains that the Occupational Safety and Health Administration's 25-year-old sanitation standard requiring employers to "provide" toilets to their employees makes no sense whatsoever unless it is interpreted to include the obligation to let workers use those toilets. In other words, employers that do not let their employees use the toilet violate the regulation by failing to "provide" toilets. Unfortunately, although the law may theoretically give workers the right to use the bathroom, the agency that administers the law did not, until confronted with the information in this book, choose to enforce it.⁴⁰

Later that month, Doug Henwood, the editor of the *Left Business Observer*, interviewed the authors on "Behind the News," his WBAI radio program broadcast in New York City. In early February the *Chicago Tribune* labor reporter published a long and sympathetic article about the problem and the book in the Sunday edition,⁴¹ which was widely syndicated.⁴² The author's op-ed pieces,

³⁷Email Kim Sunley to Marc Linder (June 7, 1999) enclosing "Report on Toilet Facilities for Bus Drivers and Results of Survey."

³⁸Email from Martin Mayer, TGWU national representative for UK bus drivers, to Marc Linder (Oct. 6, 2002).

³⁹Al Karr, "Work Week," *Wall Street Journal*, Jan. 13, 1998, at 1, col. 5. See also Alis Valencia, "Facing Hard Truths: In Search of Dignity and Respect on the Job," *At Work—Creating a More Enlightened World of Business & Work*, July-Aug. 1998, at 21 ("companies have no legal obligation to let employees use the bathroom when they need to") (book review).

⁴⁰Marc Linder, "The Commode and the Law," *Wall Street Journal*, Jan. 22, 1998, at A19, col. 1. A separate correction was published in the *Salt Lake Tribune*: "Author Marc Linder says employers that do not let their employees use the toilet violate an Occupational Safety and Health Administration regulation requiring employers to provide toilets. A Wall Street Journal item published in The Salt Lake Tribune implied otherwise." "Corrections and Clarifications," *Salt Lake Tribune*, Jan. 24, 1998, at B6 (Westlaw).

⁴¹Stephen Franklin, "Gimme a Break: A Minute or Two to Go to the Bathroom Isn't Necessarily a Worker's Right," *Chicago Tribune*, Feb. 8, 1998, sect. 6, at 5.

⁴²E.g., Stephen Franklin, "Rest Breaks for U.S. Workers Are Not Guaranteed," *Kansas City Star*, Feb. 23, 1998; Stephen Franklin, "Forget Coffee...Some Don't Get Bathroom Break," (Fort Lauderdale) *Sun-Sentinel*, Feb. 23, 1998.

which presented very compressed versions of the book, published later in February in *The National Law Journal*⁴³ and the business section of the Sunday *New York Times*,⁴⁴ were calculated to create maximum public embarrassment for OSHA for its absurd interpretation of its toilet standard and thus to put pressure on the agency finally to issue its new interpretation.

Public awareness of the scandal of lack of workplace toilet access swelled on March 13, 1998, when a huge number of newspapers carried a lengthy Associated Press article released the previous day as "Relief Is on the Way for Workers Who Need to Use the Bathroom."⁴⁵ While the most straightforwardly optimistic headline appeared in the *Chicago Tribune*: "U.S. to Order Worker Right to Use Toilet,"⁴⁶ a Canadian newspaper added the element of pathos: "U.S. Changing Humiliating Toilet-Break Regulations."⁴⁷ Written by Maggie Jackson, who had relied heavily on the author for her structure, orientation, and sources, the article noted that "for teachers, factory workers, telemarketers, farmworkers and others,

⁴³Marc Linder, "'Let My People Go,' Cries Labor Union," *National Law Journal*, Feb. 2, 1998, at A19, col. 1-4. Bizarrely, Barbara Repa, "When the Boss Doubles as a Bathroom Monitor," http://www.nolo.com/Edit_Art/peepatrol.html (May, 29, 1998), characterized this article as a "glib jibe" in reaction to OSHA's citation of Hudson Foods.

⁴⁴Marc Linder, "A Fight for Restroom Rights," *N.Y. Times*, Feb. 22, 1998, sect. 3, at 13, col. 4-5.

⁴⁵Among the U.S. and Canadian newspapers publishing the article (under various titles) beginning on March 13 were: (Cedar Rapids) *Gazette*, *Detroit News*, (Riverside, California) *Press-Enterprise*, (Bergen County, NJ) *Record*, *Hartford Courant*, (Marshalltown, IA) *Times-Republican*, *Oelwein Register*, *Orange County Register*, *Toronto Star*, (Oklahoma City) *Journal Record*, *Times-Picayune*, *Chicago Tribune*, *San Francisco Chronicle*, *Fort Worth Star-Telegram*, *San Antonio Express-News*, *Richmond Times-Dispatch*, (Cleveland) *Plain Dealer*, *Roanoke Times*, *Vancouver Sun*, (Worcester, MA) *Telegram & Gazette*, *Calgary Herald*, (Allentown, PA) *Morning Call*, *Indianapolis Star*, *Columbus Dispatch*, (Spokane) *Spokesman-Review*, *Seattle Times*, *Des Moines Register*, *Salt Lake Tribune*, *Greensboro News & Record*, *San Diego Union and Tribune*, *Florida Times Union*, *Albany Times Union*, *Charleston Gazette & Daily Mail*, (Quincy, MA) *Patriot Ledger*, (Springfield, IL) *State Journal-Register*, *Fresno Bee*, *Cincinnati Enquirer*, *Houston Chronicle*, *Florida Today*, *Grand Rapids Press*, *Fort Dodge Messenger*, *Muscatine Journal.*, *Waterloo Courier*, *Sioux City Journal*, *Mason City Globe-Gazette*. See also Mike Augspurger, "Bathroom Breaks Will Be Enforced by New Law," *Burlington Hawk Eye*, Mar. 15, 1998 (stating that local employers in Burlington, Iowa, let workers go to the bathroom "'as needed'"). Also the website of CNN Interactive carried the article.

⁴⁶"U.S. to Order Worker Right to Use Toilet," *Chicago Tribune*, Mar. 15, 1998, sect. 1, at 18.

⁴⁷"U.S. Changing Humiliating Toilet-Break Regulations," *Vancouver Sun*, Mar. 14, 1998.

meeting this simple need can mean humiliating pleas for permission and even a risk of losing their job.” Jackson then quoted the author as being “‘horrified to learn that employers can get away with this’” and saying: “‘This isn’t a problem in every workplace, but it’s much more widespread than we had originally believed’”⁴⁸—and, as it turned out, than even he himself knew at the time.⁴⁹

Outraged at the author’s naivete, that very day, a reader of the Greenville (South Carolina) *News* wrote him that the fact that he had been “‘surprised’” that “‘employers can get away with refusing employees leave to use bathrooms’” suggested that “[t]he University of Iowa must be an ivory tower even farther removed from reality than the average Ivy League campus. Employers in the U.S. can get away with every goddamned thing they want to get away with.”⁵⁰

On March 15, the book (“It’s a pretty great title”), the phenomenon of access denied (“incredibly sexist”), and the possibility of government intervention (“The Bathroom Access Act of 1998”) were discussed seriously on the national television program “ABC Good Morning America Sunday,” by free-lance journalist Katherine Davis and others.⁵¹ The following morning the author was interviewed on a Phoenix news-talk radio station for the program “Wake Up Arizona”⁵² and on other radio stations. The following week the new national consciousness of employers’ autocratic denial of toilet access found its way into the “Dilbert” cartoon strip, which featured the evil human resources director announcing a new vacation policy to deal with the rule that all vacation time has to be used in the year it was earned: “I realize this is not always convenient. So I’ve decided to be flexible. From now on, any time you spend in the restroom will count as vacation.”⁵³ In the last week of March the author was interviewed about the book and the problem on “Employment & Labor Lawcast,” an audiotape legal news service listened to by thousands of lawyers largely while traveling or exercising.⁵⁴

More significantly, on April 2 the author appeared at noon for an hour on “The Tom Pope Show,” a radio program of the Dudley Broadcasting Network targeting a black audience, which was broadcast on stations from Columbia,

⁴⁸Maggie Jackson, “Relief Is in the Way for Workers Who Need to Use the Bathroom,” Associated Press, Mar. 12, 1998 (Westlaw).

⁴⁹See below ch. 8.

⁵⁰Letter from W.J.D. Wells, Greer, S.C., to Marc Linder (Mar. 13, 1998).

⁵¹“ABC Good Morning America Sunday” (Mar. 15, 1998, 10:00 am ET), Transcript # 98031508-J02 (Lexis). The editor-in-chief of the press that published the book called contributor Chris Cuomo’s comments “asinine.” Email from Fran Benson to Marc Linder (Mar. 16, 1998).

⁵²KFYI 910 AM, 8:20 a.m., Mar. 16, 1998.

⁵³“Dilbert,” *Des Moines Register*, Mar. 22, 1998.

⁵⁴“Employment & Labor Lawcast” 4(6) (week of Mar. 30, 1998).

South Carolina to Ontario, Canada.⁵⁵ During this live broadcast, workers from auto factories in the Detroit area called in to complain about lack of toilet access at work, symbolized by waits of upwards of an hour. When the author asked about the impact of the much-vaunted relief system that the United Automobile Workers had negotiated with the major automobile manufacturers over the years, a relief worker called in to protest that relief was the last thing he was allowed to give: because General Motors had done little or no hiring in years in order to increase productivity through attrition, relief workers had been assigned their own independent production tasks, which left them with little time to provide relief. The author also used the opportunity to give out the telephone number of and to urge listeners to call Emily Sheketoff, the Deputy Assistant Secretary of Labor for OSHA, the Clinton administration's political commissar at the agency, who was reputed to be the ultimate decisionmaker, demanding that OSHA issue a broad toilet standard interpretation.

A week before OSHA was moved to act, the agency's new head, Charles Jeffress, revealed to a reporter its failure to understand the extent of the problem it was seeking to eliminate: "Jeffress thinks bathroom breaks are not a widespread problem. 'Potentially it's an issue where you have an assembly line operation,' he said, adding the problem tends to occur when a supervisor is 'being too harsh.'" It was unclear whether Jeffress was merely ignorant or whether the claim was part of his strategy "to mend fences with the Republican majority in Congress that unsuccessfully tried to abolish the agency in 1995." His understatement may, after all, have been designed to mollify Representative Cass Ballenger, the North Carolina Republican who chaired the subcommittee with oversight over OSHA and had "wondered if OSHA would be interfering with business operations with a toilet rule that's too specific. 'You could really make it awful difficult to run an operation,' he said. Ballenger suggested that a public hearing or comment period be arranged before the toilet rule takes effect."⁵⁶

⁵⁵Letter from Gwen Pope, Dudley Broadcasting Network, to Marc Linder (Mar. 23, 1997 [should be 1998]).

⁵⁶Brian Tumulty, "OSHA Chief Works to Make Agency Relevant in Workplace," Gannett News Service, Apr. 1, 1998 (Westlaw).