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*REST BREAKS AND
THE RIGHT TO URINATE
ON COMPANY TIME*

Marc Linder and Ingrid Nygaard

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Bringing Incontinence Out of the (Water) Closet

In the eyes of Henry Ford the human alimentary canal is a “disassembly line” which in every man should perform a given operation in a standard length of time.

Jonathan Leonard, *The Tragedy of Henry Ford* (1932)

It is easy to underestimate how disturbing it must be to have the time at which one passes water or empties one's bowels determined by others. Perhaps the audience at every seminar on incontinence should be kept sitting for an unspecified length of time before they are allowed to go to the toilet, to bring this message home. . . . They might have a more sensitive appreciation of the feelings of dread and apprehension of those people who are at risk of being incontinent because they are trapped . . . until released by other people over whom they have little authority.

J. A. Muir Gray, “Incontinence in the Community,”
in *Incontinence and Its Management* (1986)

A profound irony attaches to the fact that at the same time that some employers are preoccupied with firing employees who insist on urinating outside of official rest pauses, they are also systematically engaged in forcing workers to urinate. The message “Your Urine or Your Job” takes on a second meaning as a large and increasing proportion of large employers subject their workers to urinalysis.¹ As one supervisor said, “if you don't piss in the bottle now, you will be terminated for . . . not following a direct order.” Although in some instances courts find that workers' privacy interest in not urinating on command from the employer may outweigh employers' rights to the higher productivity they perceive to flow from a drug-free workplace, they have not yet generally recognized a worker's right to urinate in the face of employer opposition.²

Since employers are obligated, not only as a matter of local public health and building code law or state health or labor law but also, and more importantly, by mandate of the national Occupational Safety and Health Act (OSHAct), to furnish toilet facilities to their employees, common sense suggests that firms must have an implied duty to afford workers a reasonable opportunity to use those facilities. Why else would the sanitation standard issued by the Occupational Safety and Health Administration (OSHA) command that “toilet facilities . . . shall be provided in all places of employment . . . based on the number of employees” if not to enable workers to void? After all, the central and guiding commandment of the OSHAct is that “Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause . . . serious physical harm to his employees.” Why, moreover, would the United States government give thousands of employees the afternoon off when an inadvertent cutoff of water pressure rendered all of the Pentagon’s toilets unworkable—unless better employers acknowledged that employees had a natural and therefore a legal right to use those facilities and their sudden unavailability made even a few hours’ work unreasonable?³

Ample evidence has existed for decades about the deleterious effects of a break-free day on both worker efficiency and happiness. Indeed, at the very time that state rest-period laws for women were being repealed, physicians were publicizing the negative medical consequences of staving off the call of nature. In the late 1960s one of this century’s most renowned urologists, Jack Lapides, called on the medical profession to mount an educational campaign to inform the public about the dangers of bladder overdistension. He warned that schools and jobs, by denying students and workers adequate rest periods, were creating “infrequent voiders syndrome,” and he identified a constellation of avoidable medical problems caused by not urinating frequently enough. Unfortunately, physicians’ cries were largely relegated to medical journals, and now Lapides’s term is gaining synonyms rather than the syndrome being relegated to the history of conquered diseases. We now hear of “hairdresser’s bladder” or “line-worker’s bladder,” and A. L. Bendtsen coined the term “nurse’s bladder” when he found that 70 percent of nurses in a Danish study suppressed the desire to void during working hours.⁴

To understand why the right to void in the workplace is not merely an issue of personal dignity and comfort, it is helpful to review how the bladder normally works and why, in fact, ignoring the bladder’s call to empty can be perilous. All humans are born incontinent—that is, a baby’s

bladder simply contracts as soon as a small volume of urine empties into it. Over time, the bladder holds greater volumes and the spinal cord and brain mature to start coordinating the processes needed for continence. Despite Freud's obsessive thoughts on the subject, most children become "toilet trained" with surprisingly little effort. The child trades incontinence for continence—that is, the ability to void at will at a socially acceptable time and in a socially acceptable place. Thus, when an adult sits on the toilet, she initiates one of the body's most complex yet least respected actions. Voiding is a finely tuned activity, with input from several centers in the brain, spinal cord, bladder, urethra, and pelvic muscles. The typical adult woman urinates six to ten times during waking hours; it follows that she would urinate three to five times during her working day—if she were able, as many workers are not, to void at her own discretion.⁵ Indeed infrequent voiders syndrome is particularly widespread among powerless assembly-line workers as well as such service-sector employees as elementary school teachers, hairdressers, and nursing-home workers (whose heavy work in lifting patients puts an additional stress on their bladder).

Once trained, children rarely have difficulty voiding or maintaining continence—until they reach school, only the first of many institutions that strive to break the habit of responding appropriately to the bladder's call. Lapedes called attention to these institutional obstacles several decades ago, noting that "particular attention should be given to school teachers and employers since they are in a position to control the urinary habits of many individuals and are averse to having their pupils or employees visit the restroom more often than once in 4 hours."⁶

The body has, of course, many intricate functions over which we have little to no control. This lack of control is probably fortunate. Otherwise, one could envision a bleak factory where workers are instructed not to breathe to avoid contaminating the microchips—perhaps some workers, like pearl divers or swimmers, would develop the capacity to desist from breathing for minutes, while others would become blue or unconscious or seize, or even die. Silly scenario, one might think, but the analogy to the bladder is apt. Today we instruct workers not to perform a basic bodily function. Some learn to hold greater and greater quantities of urine safely, just as some swimmers hold their breath for long periods without obvious consequences. More often, however, that finely tuned system that we so proudly mastered as children goes haywire. A complication is childbirth, a process quite destructive to the pelvic floor and bladder. Thus many women, faced with a decree not to void, lose control of continence once again.

Even those who, either by nature of gender, fate, or desire, escape the ravages of childbirth must face age, which may also play havoc with bladder control. With age, the capacity of the bladder decreases, as does the interval between acts of voiding. More people have medical problems or take medications that adversely affect bladder control. Other physiological changes occur: prostates enlarge, urethras shorten, bladders drop—all resulting in the need to urinate more frequently. In addition, 10 to 30 percent of adults develop varying degrees of urinary incontinence or accidental urinary leakage. In a consensus conference on urinary incontinence, the National Institutes of Health recognized that a mainstay of treatment for an incontinent person is ready and easy access to a bathroom—that is, a person plagued by incontinence is much less likely to lose urine if he can reach the toilet in a timely fashion.⁷

What happens when we are not able to void on desire? As the pressure in the bladder rises with increasing volumes of urine, one of two things often follows: either the urethra acts as an escape valve, releasing enough urine to bring the bladder pressure back down, thus resulting in incontinence; or the urethra, ever socially conscious, resists and the pressure in the bladder continues to rise. The pressure looks for another way out. In some instances, urine begins backing up into the ureters, the tubes that deliver urine to the bladder. This condition, reflux, ultimately causes kidney damage, and in extreme cases, just as in our breath-holding analogy, even death. In other instances, the persistent bladder dilation decreases the blood flow to the bladder wall, which, in turn, decreases a person's resistance to infection. Thus, one study found that 61 percent of female college students with recurrent urinary tract infections reported voiding infrequently compared with only 11 percent of controls without bladder infections. Similarly, Lapidès found that 60 percent of urinary tract infections in a series of 112 women were associated with infrequent voiding (defined as urinating once every five to ten hours) and enlarged bladders. Reasons women gave for infrequent voiding included being too busy with their occupation, bosses' displeasure with trips to the restroom during working hours, and too few toilets for the number of workers.⁸ It is shameful that most of these women needlessly suffered the pain and sometimes long-term morbidity of a bladder or kidney infection, simply because society has succeeded in taking away our basic physiological right to micturate. Lapidès found that preventing further recurrence of infection was easy: the women simply voided every two hours.

To determine the prevalence of infrequent voiders syndrome in women in the general population (that is, not simply those seeking treatment

or suffering infections), one group of researchers queried 1,613 randomly selected women about their voiding habits. Overall, 7.7 percent voided three times per day or less. Consistent with research mentioned above, significantly more women in this group had urinary tract (bladder) infections than women who voided more frequently.⁹

The U.S. Public Health Service may be right that as a biological matter “the problem of incontinence crosses all social, economic, racial, and gender lines,” but the ready and easy access to the toilet that is a crucial component of treatment is far from uniformly or randomly distributed between classes, races, and sexes. Even the strongest labor union in Europe, the German Metalworkers, which managed to negotiate time for “personal needs,” had to put up with employers’ using stopwatches to determine how much time each individual worker needed for voiding—until 1973, when it demanded, with predictable results, that this “degrading” practice either be extended to top management or replaced by an across-the-board three minutes for all workers. In the United States, union organizers attest that workers’ intense discontent with what they perceive to be barbarically restrictive rest-period policies is one of their most frequently and vehemently voiced complaints.¹⁰

Many blue-collar workers, including some covered by collective bargaining agreements, face precisely the urinary risks outlined above when they are put to the choice of subjecting themselves to discipline for committing the “Class I” offense of leaving their post without their supervisor’s permission or declaring, “Your rules are stupid,” responding to nature’s call, and losing their employment and income. One high-ranking state labor standards official, who recommends to workers who inquire about their right to use the toilet that they just go and lock the door behind them, promptly conceded: if the employer fires them for having exercised their natural right to void, “there’s not a lot of recourse there.”¹¹ At a (then-unorganized) poultry plant in Arkansas, for example, management imposed a system under which absence, lateness, or a visit to the bathroom outside of official breaks generates an “occurrence,” six of which trigger dismissal. “Unsurprisingly, people are constantly being fired; some are then rehired, and treated as new hires with no benefits for months and no vacation time.” At another chicken processing plant, in Mississippi, where a union has been able to secure workers two thirty-minute but unpaid rest periods daily, workers are still “written up” for leaving the line if their supervisor fails to grant them permission to go to the bathroom. Where unions do organize poultry processing plants, one of their most urgent negotiating demands is rest periods, which they have generally succeeded in attaining.¹²

Unemployment compensation tribunals frequently hear cases of production workers whose employers contest their entitlement to benefits on the ground that they were fired for good cause—namely, leaving the assembly line without permission to use the toilet. Even where workers have a formal entitlement to rest breaks, whether contractual or statutory, the built-in compulsions of piece-rate systems often make it economically infeasible for them to exercise that right. A Canadian clock factory manager, for example, frankly explained that his firm promoted piecework in the 1950s because it “prevents people from loafing off, going to the wash-room.” In the U.S. clothing industry, women working on piece rates commonly refrain from voiding for fear that the lost time will prevent them from earning a living.¹³

At a Nabisco plant in Oxnard, California, which manufactured A-1 steak sauce, the world’s supply of Grey Poupon mustard, and Ortega salsas, female workers filed suit in 1995, complaining that they had developed “bladder and urinary tract infections . . . from being forced to wait hours for permission to use the restrooms.” When confronted with a supervisory ukase “to urinate in their clothes while working on the production line” or face three-day suspensions for using the toilet—a practice that the *Los Angeles Times* editorially branded “inhuman”—they “finally resorted to wearing diapers.” Those unable to spend \$41 per week on incontinence pads and laundry “wor[e] Kotex and toilet paper,” although such make-shift protection is harmful when drenched in urine. A right-wing journalist, hearing of the suit but apparently unaware of the workers’ humiliating self-help measures, thoughtfully counseled them to avail themselves of the special diapers that owners of Central Park’s horse-drawn carriages had used for their horses.¹⁴

Male workers, too, have gender-specific urinary problems, which cause them to spend additional time voiding. With age the prostate hardens and “projects more . . . deeply into the urethral canal. The urinary stream becomes dismayingly slow. . . . That which was once an arc of liquid glory for which any transom was an easy hurdle becomes a pathetic intermittent dribbling that yields more nostalgia than results.” Nevertheless, even long-term workers with prostatitis have been discharged for voiding prematurely, and those whose “urge to urinate” is caused by kidney problems serious enough to require surgery to remove kidney stones have been suspended for violating a company rule that prohibits “unnecessarily leaving work station during working hours without permission to engage in matters not pertaining to job duties.”¹⁵

Factory workers’ run-of-the-mill experience of “earning” disciplinary points for venturing to the toilet outside of official rest periods and

highly publicized incidents of workers' having to urinate on themselves because supervisors forbid them to leave the production line support the only seemingly counterintuitive claim that workers at the Krupp works in mid-nineteenth-century Germany enjoyed greater "unofficial time-sovereignty" to void. Even for that authoritarian management it was "out of the question" that individual trips to the toilet could be *verboten*; instead, the firm had recourse to the more humane practice of hiring a man exclusively to "drive" out those who tarried too long. The Krupp tradition survived at a Mississippi catfish plant, where, until it was unionized, supervisors banged on the door when women exceeded their allotted five minutes (including the walk).¹⁶

Some early-twentieth-century U.S. employers required outside assistance to recognize the virtue of a cost-benefit approach to the toilet. As part of the Russell Sage Foundation's large-scale *Pittsburgh Survey*, the industrial hygiene of representative manufacturing establishments in 1910 was studied. The description was mordant:

Apparently the usual method of handling water-closets on the premises of industrial plants was as follows: First, select the most remote part of the shop Then put in the cheapest apparatus and one that will be inconvenient and uncomfortable so that men will not be inclined to come often or stay long. Then when it is found that the men take home the toilet paper, stop supplying it. The men will then take in newspapers and read them. Remove the lights to prevent reading. The condition of the place will then become insanitary because the men can not see the condition of the seats and no longer use them as intended.¹⁷

Such firms were unwilling to follow Krupp's lead in paying for an attendant, although "they would have saved more than his salary by lessening the time wasted . . . by the men, reading, smoking, and loafing in the toilets." The survey collaborator estimated that if even only half of the 1,200 men in a small plant used the water closet daily, taking ten minutes of the company's time, the total of 6,000 minutes meant \$6,000 in lost time. But the firms "did not realize how much their badly managed water-closets were costing them. If this item of expense had been embraced in their cost system it would soon have come to their attention." The proffered solution to such "loafing" was devised by a large company in another city: managers instructed the bathroom attendant to "take the check number of each man and the time of his entrance and exit and this record was sent daily to the cost accountant's office. The men were admonished if they

spent too much time in the toilet rooms, and when their time overran a definite maximum they were actually charged for it.”¹⁸

Other employers were more partial to a combination of administrative-command and architectural-structural prohibitions. Thus in late-nineteenth-century New York City department stores, “Doors were taken down toilets, and not even a curtain was put up to replace them, the explanation being that if the saleswomen were concealed, they might remain away from their work an inordinately long time.” (As late as the 1960s, there were no doors on any of the johns in the women’s room at the Dodge Main Plant in Detroit.)¹⁹ A 1912 Sage Foundation study of saleswomen in Baltimore found that the custom in some stores of limiting to five to twelve minutes the amount of time during which an employee was permitted to absent herself from the selling floor was “in practice prohibitory” in a six-story building or one where bathrooms were crowded. In addition to stores that forbade leaving the floor during certain periods (such as between 4:30 P.M. and 6:00 P.M. closing), some required employees to obtain a pass: “Needless to say, many of the girls prefer to stay at their posts indefinitely rather than ask the floor walker . . . for a pass. His injunction to ‘hurry back’ or to ‘be quick’ adds not a little to the unpleasantness of a rule which wears heavily upon even the less sensitive girls. When this rule is linked with a time limit and with inconvenient location of toilet rooms, conditions are prejudicial to health no less than if sanitation were actually defective.”²⁰ Modern management has devised more impersonal technical solutions to what it perceives as technical problems. As long ago as the 1920s, an anatomy professor and former New York City commissioner of health, who frowned on “the habit of suppressing urine, which may easily be acquired if too long a time is required from work to seek relief,” strategically urged employers to install “more urinals than . . . toilets . . . in large industrial plants” because “urinals do not, like toilets, offer a place in which to loaf and waste time.”²¹

Since 10 to 25 percent of women and 1.5 to 5 percent of men between the ages of fifteen and sixty-four suffer from urinary incontinence, no wonder that the problem of lack of rest periods is not confined to manufacturing plants.²² Restaurant workers, unorganized health care workers in nursing homes, teachers in elementary schools without aides to watch their pupils, and even fashion models frequently complain that they receive no bathroom breaks. Even some workers with freedom of movement and outdoor employment are subject to the same constraints: taxicab drivers in New York City who, instead of being paid a wage, are compelled to lease cabs are so pressed to earn enough to pay for the daily lease fee and gasoline

that they cannot spare fifteen minutes to look for an indoor bathroom and must instead urinate in public.²³

Specialists in industrial medicine in Britain and the United States early on both recognized the links between excessively long hours and impediments to voiding at work and urged reform. As early as 1873, a British parliamentary report noted that among female factory workers “derangements of the digestive organs are common, e.g., pyrosis, sickness, constipation, vertigo, and headache, generated by neglect of the calls of nature through the early hours of work, the short intervals at meals, the eating and drinking of easily prepared foods.” When a nineteenth-century Massachusetts physician, Azel Ames, Jr., observed that shorter working hours would alleviate the interconnected problems of “neglect of nature’s calls, hurried passage to the place of employ, and a disturbed, dissatisfied, and fermenting body and mind, stomach and brain,” his plea tacitly assumed that workers were also unable to eat, drink, and void properly at work.²⁴ Almost a half century later, Dr. Harry Mock—a medical professor, chief surgeon to Sears, Roebuck & Company, and a lieutenant colonel in the Army Medical Corps—still had to explain that

When employees are engaged on piece work, and especially in the case of girls, one often finds that insufficient water is consumed and the requirements of nature are neglected. The girls will simply not lose the money involved by taking time off for these things.

The only solution for this is that the employer will give ample time, without loss to the employee, to attend to these essentials. Bubbling fountains should be located near the working places and every employee should be thoroughly educated in the importance of water drinking. No better remedy is at hand for the prevention of fatigue than frequent flushings of the body organs by water.²⁵

There was even a time when the U.S. government took a similar position. During the Depression, for example, the U.S. Women’s Bureau devoted an entire bulletin to *The Installation and Maintenance of Toilet Facilities in Places of Employment*. It expressed concern that employers’ failure to provide adequate toilets “would foster a tendency to forego the relief demanded by the normal processes of the body, with the attendant evils of auto-intoxication and the formation of constipation.” Physicians at the time believed that “a worker who delays having a movement of the bowels absorbs a large amount of toxins . . . which reduces muscular efficiency to a very marked degree [because] fatigue is often dependent upon the ab-

sorption of toxins from the intestinal tract and toxins are generated by retained accretions in the bowels.” Even if such causal connections are, from the vantage point of late-twentieth-century medical science, untenable, the observed relationship between workplace-induced stool retention and reduced worker “efficiency” should have been of interest to employers.²⁶

In the early 1880s the leading sanitary engineering trade journal noted that decent toilet accommodations were “too often lacking in our manufacturing establishments.” In response to such conditions, not only had numerous states by the beginning of the twentieth century enacted labor legislation requiring employers to provide toilets to female and male factory workers, but at least seven—Missouri (1891), Michigan (1895), Iowa (1902), Wisconsin (1903), Louisiana (1906), Nebraska (1911), and Colorado (1911)—had already mandated “reasonable use” of them by the employees. Many other states, only slightly less unambiguously, required that the toilets be “within reasonable access,” “readily” or “easily accessible,” or “convenient.” That the toilet requirement was meant as an actual access provision was revealed by a 1932 California regulation, which required employers to give employees relief periods where the agency determined that a toilet could not be provided.²⁷

To be sure, where the law was less stringently worded, employers readily took advantage of the vagueness. In Connecticut, for example, where the statute merely prescribed “suitable water closet accommodations for the use of” employees, a significant number of employers apparently provided toilets at locations that suited their profits more than their workers. The extent of such opportunistic behavior can be gauged by the fact that in 1914 the state commissioner of the Bureau of Labor Statistics was forced to recommend to the legislature that the statute be amended: “That every store be compelled by law to have a toilet for women on the premises and that no woman be obliged to cross outside premises, go to another building or descend into a cellar by means of a trap door in the floor to such a convenience.”²⁸

The course of legislation in Iowa during the twentieth century offers much insight into the rise and fall of protective standards. In 1901, the Iowa Bureau of Labor Statistics issued a report highly critical of conditions in the state’s factories, declaring:

One of the most urgent needs in Iowa factories . . . is the provision for suitable facilities in the way of water-closets and urinals. The Commissioner found in his investigation that nearly thirty-seven per cent of the establishments visited were without decent closets or even places wherein men could

properly attend to their physical needs. . . . Another proprietor, employing fifty men, had closets that were not used by his men on account of their filth. The men told me that they suffered all sorts of distress and inconvenience rather than frequent the place. When I notified the proprietor of this condition . . . he expressed surprise and promptly stated that he would keep the closets clean, and furthermore personally inspect them himself, and he gave as a reason that he could not afford to have his men distressed, because in that condition they could not render him a satisfactory service.²⁹

Of greatest interest here is not only the employer's admission that good toilet facilities benefited the firm, but the discovery that there was once a time when unhygienic toilets could repel even male manual workers.

The Iowa commissioner of labor statistics was able to bolster his claims with a letter from the secretary of the Iowa State Board of Health, Dr. J. F. Kennedy, who observed that

an habitual neglect to promptly attend to the demand of nature in the way of the evacuation of the bladder and the bowels is always dangerous to the health of the individual practicing such neglect.

Not only in such cases do the bowels whose benificent [sic] demands are thus spurned cease in time to sound, as it were, the warning, and constipation occur [sic] as a result, but the retention of this worthless and poisonous matter in the system results in more or less absorption of it and blood-poisoning is a result. . . .

One of the reasons that lead many of the laboring classes to neglect such demands is the lack of proper opportunities in the way of outhouses and water-closets. When these conveniences exist they are often in such a filthy and uninviting a [sic] condition that a person will long hesitate before resorting to them.

With every factory, workshop, storeroom; with every place . . . where people are employed; facilities for a prompt response to the demands of nature should not only be provided but these resorts should be as comfortable and inviting as possible.³⁰

The next year the legislature acted. The Iowa statute of 1902, styled "An Act to provide for the safety and comfort of laborers and other persons assembled in factories and buildings," stated that "Every manufacturing establishment, workshop or hotel in which five or more persons are employed, shall be provided with a sufficient number of water closets, earth

closets or privies, for the reasonable use of the persons employed therein.” Charging the commissioner of the Bureau of Labor and the mayor and police chief of every town with enforcement, the state legislature imposed punishment of a maximum fine of \$100 and maximum imprisonment of thirty days on noncomplying employers.³¹ This gender-neutral labor-protective statute remained in effect for seventy years until the legislature, unaware of the retromingent consequences, repealed it at the time of enactment of the state OSHAct. But OSHA failed expressly to mandate reasonable use, and thus the result was retrograde—even though the Iowa enactment expressly stated that it was state “policy . . . to assure so far as possible every working man and woman . . . safe and healthful working conditions.” Of the seven states that inserted the unambiguous “reasonable use” standard into their toilet statutes beginning a century ago, only one has retained the provision on the books. So lost to contemporary policy concerns is the older approach that when a longtime Iowa state OSHA compliance officer confirmed that employers had a duty to provide toilets but not reasonable use of them, he found it only natural to ask rhetorically, “Why is that an OSHA function?”³²

This counterintuitively narrow and irrational interpretation of the law stands in sharp contrast to the ease with which, as Sidney and Beatrice Webb reported, Victorian “middle-class public opinion . . . cordially approve[d] any proposal for . . . improving the sanitation of workplaces. The alacrity with which capitalist Parliaments met these requests came as a surprise to the Trade Union officials.” One of the reasons, the Webbs speculated, that might have actuated government to “compel . . . employers to provide . . . costly sanitary conveniences” was that whereas the upper classes nourished “a certain skepticism as to whether the wage-earner is capable of wisely expending any larger wages than will keep body and soul together[,] . . . water-closets cannot be spent in drink or wasted in betting. Mingled with this economic consideration there is even a subtle element of Puritanism—the vicarious asceticism of a luxurious class—which prefers to give the poor ‘what is good for them,’ rather than that in which they can find active enjoyment.” In this British tradition, perhaps, India’s Factories Act provides that “sufficient latrine and urinal accommodation . . . shall be conveniently situated and accessible to workers at all times while they are at the factory.”³³

Despite all the medical evidence, in a display of choplogic astonishing even for lawyers, federal and state OSHA policy-making and enforcement officials have denied that employers’ duty to provide toilets implies the duty to permit employees to use them. Because OSHA’s recent field sani-

tation standard for farmworkers expressly states that employers must not only provide toilets but also give employees reasonable access to them, the OSHA national solicitor's office has asserted that it would be difficult to enforce such access under the general sanitation standard, which is silent on the issue. Although OSHA concedes that it might prevail in an enforcement action against firms that permanently locked the toilets that they "provided," it has refused to enforce its regulation in a less extreme case. The state OSHA administrator and deputy employment commissioner in Iowa confirm that their agency has, in response to the numerous inquiries it has received from workers, articulated the policy that OSHA provides no remedy: employers' undisputed duty to provide toilets, they assert, does not imply the duty to permit workers to use them.³⁴

Such timidity should be contrasted with claims by the pre-Reagan administration OSHA that an employer that failed to provide partitions between toilets violated the statute "because some employees might be unable to urinate or defecate without complete privacy" or that "the dexterity of female employees boning meat with sharp knives would be negatively impacted if they could not satisfy a biological urge at their convenience."³⁵ Although OSHA has, during the last quarter century, failed to promulgate a regulation imposing on employers a duty to provide employees with reasonable use of toilet facilities, in 1997 it reportedly indicated a willingness to issue an interpretation to that effect. Whether, in the face of employer opposition and a congressional Right that has threatened the agency's very existence, it possesses the determination to issue that interpretation and give force to it by citing employers for violating the regulation remains to be seen. But on July 22, 1997, federal OSHA finally issued a citation to an employer for denying its employees "necessary use of bathroom facilities." OSHA concluded that "toilet facilities were not provided in accordance with" the agency's regulations at the Noel, Missouri, poultry processing plant of Hudson Foods, Inc., because supervisors "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." The company has contested the citation.³⁶

A review of the origins of the current version of OSHA's toilet regulations shows why a cramped interpretation is inappropriate. When OSHA issued its first workplace toilet regulations in 1971, it availed itself of its statutory authority to adopt, within the first two years of the act without being subject to the notice and hearing requirements of the Administrative Procedure Act, a "national consensus standard" that had been promulgated by "a nationally recognized standards-producing organiza-

tion.”³⁷ Adopting word for word the toilet facilities provision of the “USA Standard Requirements for Sanitation in Places of Employment” of the American National Standards Institute (ANSI), OSHA set forth a precise quantitative standard of accessibility. In addition to prescribing the number of water closets that employers had to provide for each sex (one for one to nine workers, two for ten to twenty-four workers, and so on),³⁸ OSHA mandated that

Every place of employment shall be provided with toilet facilities. . . .

Toilet facilities shall be provided so as to be readily accessible to all employees. Toilet facilities so located that employees must use more than one floor-to-floor flight of stairs to or from them are not considered as readily accessible. As far as is practicable, toilet facilities should be located within 200 feet of all locations at which workers are regularly employed.³⁹

ANSI had, under its previous names, the American Standards Association (ASA) and the United States of America Standards Institute, been committed to the “readily accessible” standard since 1935 and introduced the 200-foot standard as early as 1955. Indeed, ANSI has continued to promulgate these standards, which are identical with the OSHA standard of 1971. Significantly, the National Safety Council, within the scope of its industrial “accident prevention” efforts, has also long recommended that “toilets should be placed not more than 200 ft from any work place.”⁴⁰ The federal government had also associated itself with the ANSI standard long before the OSHA Act. As early as 1934—that is, even before the ASA had officially published the standard—the New Deal National Recovery Administration approved the ASA sanitation standard for inclusion as minimum safety and health standards in manufacturing industry codes adopted under the National Industrial Recovery Act. The U.S. Public Health Service in the 1930s also adopted the “readily accessible” standard as a component of its basic principles of industrial sanitation for disease prevention.⁴¹

Key to understanding the fate of the ANSI standard under OSHA is that by the time it became the “principal health and safety standard-setting organization in the country,” ANSI, like its predecessors, was “dominated by the companies and trade associations that helped to organize and finance it.” In other words, when OSHA adopted the “readily accessible” and 200-foot standards in 1971, they had already been accepted by the “corporate interests” that dominated ANSI for many years.⁴²

Although in May 1972 OSHA announced proposed revisions of its sanitation standard, the new provision was very similar to the ANSI standard:

“Toilet facilities shall be readily accessible to all employees, and in no case more than one floor-to-floor flight of stairs, or more than 200 feet from any place where employees regularly work.” The most prominent difference between the two was the deletion of the qualifying phrase “[a]s far as practicable.” The new wording thus expressly incorporated a distance element into the definition of accessibility and, presumably, precluded employers from successfully defending themselves against citations for violations, as they could under the initial consensus standard, on the grounds that financial hardship rendered construction of toilets within 200 feet not practicable.⁴³ The comments that employers submitted in response to the proposed revision and the statements that they made at the hearing that OSHA held in November 1972 make it as clear for observers today as it was to participants then that employers, large and small, objected merely to a rigid distance requirement and were, at least verbally, committed to providing ready access. In a phrase that would later become one of the hallmarks of business’s antiregulatory campaign, some employers pleaded for a “performance standard.” But whereas in the late 1970s and 1980s employers pushed for performance standards on the grounds that they would permit firms to achieve the act’s health and safety goals without interfering with managerial prerogatives to structure the workplace, in 1972 some employers called for a performance standard that would have required them to reorganize production in order to enforce their obligation to accommodate workers’ right to void at work.

Some employers or their representatives, such as U.S. Steel Corporation and the American Meat Institute, suggested simply eliminating the 200-foot rule but retaining the “readily accessible” standard, while Swift, the large meatpacker, was content with the existing ANSI standard. AT&T, the largest of all corporations, urged OSHA to consider that since it owned 30,000 buildings, just trying to measure the distance of all its toilets from the employees in those buildings “would be an expensive and burdensome undertaking,” let alone building new toilets where existing ones were 210 feet away from workers’ regular worksites. Instead of such an “arbitrary and inflexible” rule, AT&T proposed that toilets “shall be convenient and accessible to all employees.” Another large employer, PPG Industries, agreed that the 200-foot rule was too restrictive but added the important consideration that “if the employer is willing to pay employees for the time required to travel three or four hundred feet, that should be his prerogative.” Much smaller companies forcefully echoed this sentiment. As Hickory Tavern Furniture Company of Conover, North Carolina, observed: “As long as an adequate number of toilet facilities are furnished, the distance . . . seems irrelevant [sic]. The employer, after all, is

paying his employees for the time spent working or walking to the toilet: hence it should be at the employer's discretion as to how he wants to utilize an employee's time." The thirty-employee Johnson sawmill had "no objection to paying the employees wages to travel back and forth to our present facilities." The Iowa Manufacturers Association, too, argued that employers should be permitted to suffer the consequences of their decision to locate toilets farther away and, thus, of having to pay workers for the "non-productive time involved in transit to and from" them. So convinced of this logic was the American Iron and Steel Institute that it argued: "Practically, no employer will place a toilet . . . so far from the workplace that an employee must leave for an extensive period."⁴⁴

Other employers urged OSHA to focus on time rather than distance. Fleetwood Enterprises, for example, proposed that as long as the employer "gives the employees sufficient time to permit utilization" of more distant toilets, the distance requirement should be flexible. The Iowa Manufacturers Association was more specific, proposing as a more realistic requirement the time required by an average person to walk a certain distance; in a manufacturing plant that might be one and one-half minutes, "while on a construction site allowing for a five minute walk would not be unduly demanding of employees." After calculating that without hurrying a person could walk 200 feet in 40 seconds, the Ford Motor Company recommended a maximum of 500 feet, which would take one minute and forty seconds to walk: "It is hard to conceive that any safety or health hazard could result from this time." All of these time-centered proposals unambiguously presupposed that employers would ensure that their employees were given the time to reach the toilet whenever necessary. Indeed, the Motor Vehicle Manufacturers Association seemed to go much farther by envisioning an astoundingly democratic approach. In focusing on the "readily accessible [sic]" standard stripped of the 200-foot rule, it argued that the time required by a worker to reach a toilet was "a factor in work management," which in turn varied according to the "self-supervision exercised by employees."⁴⁵

As remarkable as were all these proposals, which ultimately assumed that profit-seeking employers would provide access, they were surpassed in radicalness by some employers' call for direct intervention in the way factories are run. For example, Rohm & Haas, a large chemical firm, proposed a "performance standard" according to which "employees on continuous operations shall be provided a relief operator or allowed to leave the work place for the time necessary." A. E. Staley Manufacturing agreed that toilet location was not so much a function of distance as of the "availability of relief to the employee under certain operation conditions." In

contrast, the “arbitrary” 200-foot rule “seems to be designed only to make it easier for the compliance officer to measure compliance” while neglecting “the real needs of the employee.”⁴⁶

This line of reasoning culminated at the OSHA hearing on November 10, 1972, in the testimony of Harold Beard, a vice president for production at Flint Company and the representative of the Gypsum Association, whose membership included such large firms as American Gypsum, Flinkote, Georgia Pacific, and Kaiser:

The Association respectfully submits that the mandatory horizontal and vertical tape measure parameter of the proposed standard bears little relationship to the safety and health of employees.

In its place, we propose the following language: “Toilet facilities shall be readily accessible to all employees. Provision for relief of employees shall be made and a method for such employees to signal the need for relief shall be established.”

The Association believes that its general suggestion for relief and signaling is much more meaningful to employees and reasonable for employers particularly in plants with continuous line operations where the lack of readily available temporary replacements of line employees at their stations is more inhibiting to employees than the distance to the facilities themselves.⁴⁷

The federal government’s principal representative at the hearing, Eric Feirtag, a lawyer in the Department of Labor’s Office of the Solicitor, then replied to Beard: “I think you may have brought to our attention a problem which we have overlooked, a problem which exists, particularly in our assembly lines . . . that there is a great need for some specified program or some specified procedure to be provided so the employees can signal and be provided relief from their position on the assembly lines so they can use a toilet facility.” After Beard confirmed the government counsel’s understanding and Feirtag thanked him for his testimony, the association’s attorney, Bruce Jackson, furnished by the law firm of Baker and Mackenzie, inserted himself into the colloquy. Despite Beard’s express proposal, Jackson, apparently flustered, insisted that the association was not proposing that the signaling system “be added in addition to what is already provided,” but merely that it was “a better standard and a more reasonable standard . . . much more realistic in terms of the health and the safety of the employee” than the 200-foot rule. Legal counsel’s intervention did not faze Beard, who put in the final word on the subject by emphasizing that the highly automated gypsum industry had over many years found “the

signal system . . . and the relief of the employees, per se” to be “very satisfactory.” As he had noted earlier, in his twenty-five years in the business he had “never been aware of an accident having occurred, so to speak.”⁴⁸

What was OSHA’s regulatory response to these mind-bogglingly radical proposals by employers? At first blush, it seemed, in its own way, as incomprehensible as the employers’ initiatives. Concluding that “the basic criticism running through all the relevant comments” was the arbitrariness of the 200-foot rule, OSHA dropped the fixed distance criterion altogether. But then, instead of replacing it with any of the employers’ numerous positive proposals, OSHA, without mentioning let alone explaining this step, also deleted the “readily accessible” language. As a result, the new standard, still in effect today, required employers to provide a certain number of toilets according to the size of their workforce.⁴⁹

The explanation for this unexpected turn of linguistic events was not OSHA’s intent to restrict, let alone eliminate, workers’ right to void at work. After all, not only did no employer in its comments or testimony in 1972 ever suggest that workers did not have a right to use the toilet at work, but many employers proposed expanding workers’ real access to the bathroom. Although elimination of the fixed-distance rule was expressly designed to propitiate employers, no other provisions were added in its stead precisely because no one believed that access was a general problem; certainly, at least, no one believed that employers were preventing workers from voiding. The core of the regulatory standard itself had always been the requirement that employers “provide” toilet facilities to their employees; the proximity language was merely micromanagement of the details, which OSHA decided to delete in order to free employers from arbitrary rules and to enhance their capacity to provide workers with real access. That the regulation required employers to “provide” rather than merely (say) “construct” toilet facilities underscores the central regulatory intent—to enable workers to use the facilities.

Robert Manware, an industrial hygienist and perhaps the sole surviving member of the group in OSHA’s Office of Standards who rewrote the regulations in 1972–73, notes that he and his colleagues considered requiring a certain number of breaks but decided that they could not formulate a generally applicable number to cover all places of employment. Since unions did not weigh in on the issue, the officials assumed that labor-management negotiations could be relied on to take care of any problems; the drafters’ overwhelming impression, however, was that employers were not acting obstructively.⁵⁰

The requirement that employers must provide a certain number of water

closets (e.g., six for 111 to 150 workers) suffices by itself to generate an obligation to permit workers to use them when necessary. After all, as the Department of Labor itself observed in the 1930s, “it is essential, in order to prevent crowding and delay, that an adequate number of toilets in relation to the number of workers should be provided. . . . Failure to make such provision not only affects the comfort of workers but may have a direct bearing on their health and efficiency.” The crowding and delay resulting from an inadequate number of toilets would, manifestly, be irrelevant if employers could lawfully prevent their employees from using them in the first place. Nor has proximity itself become irrelevant despite the deletion of the 200-foot rule. Even during the Reagan administration, OSHA adhered to the position that in the absence of a specific distance or location requirement, employers are nevertheless “expected to use reasonable judgment in evaluating the proximity” of the sanitary facilities to which they must provide employees “unobstructed free access.” Again, such a reasonableness and access standard would make no sense if employers were free to bar workers from using toilets.⁵¹

The medical testimony that scientifically undergirded OSHA’s issuance of regulations for farmworkers, precisely because of its general applicability, makes a mockery of the agency’s hesitation to extend humane treatment to all workers:

Urine retention leads to distension of the bladder wall. Prolonged distension leads to a disturbance of the elastic components of the wall, causing flaccidity and consequently weakening the evacuation power of the bladder. When the bladder is unable to empty completely, residual urine remains. Urine . . . is a good culture medium for bacteria. . . . Frequent, complete voiding of the bladder greatly reduces the concentration of bacteria.⁵²

In light of both what the D.C. Circuit Court of Appeals characterized as OSHA’s “disgraceful chapter of legal neglect”—its fourteen years of “intractable . . . resistance to issuing” the field sanitation standard—and OSHA’s subsequent shoddy enforcement record, the agency’s attempt to justify its inaction in one area by reference to its shameless performance in requiring sanitary facilities for farmworkers ranges between cynical and deceitful.⁵³ Ironically, then, on paper at least, some farmworkers, the group most commonly excluded from statutory labor protections, enjoy greater on-the-job urination rights than other workers—even if they have to walk a quarter mile to vindicate those rights. Employers of the estimated one-third of all farmworkers who are engaged in hand-labor operations in

establishments with at least eleven employees must not only provide one toilet facility for every twenty workers, but “shall allow each employee reasonable opportunities during the workday to use them. The employer also shall inform each employee of the importance of the following good hygiene practices to minimize exposure to the hazards . . . of . . . retention of urine . . . : Use the . . . facilities provided for . . . elimination; drink water frequently and . . . *urinate as frequently as necessary.*”⁵⁴ Such a urologically enlightened standard underscores the extent to which workers’ entitlement to protection of their bodily integrity may have shrunk during the twentieth century.

Thus far, however, no state has seen fit to follow the measure enacted by Minnesota in 1988 requiring all employers to “allow each employee adequate time from work within each four consecutive hours of work to utilize the nearest convenient restroom.” The legislative history of the Minnesota mandatory micturition break demonstrates how serendipitous the enactment of public policy can be. The legislator who single-handedly formulated and proposed the bill, State Senator Marilyn Lantry, was wont to visit high schools, periodically asking students what they would want to change if they were legislators. Once, when a student responded that she would like to be able to go to the bathroom, Senator Lantry was nonplussed. When the student explained that she worked at a Fotomat where she was not permitted to go to the bathroom during her six-hour shift, Lantry expressed disbelief. But after the student confirmed the rule, she decided to submit a bill. The members of the Senate Labor Committee at first viewed her proposal as a joke, but when she related her story, they relented. Having determined that the business lobby did not oppose her bill because it did not seem to be a major issue, Lantry did not even try to discover how other states had dealt with the matter.⁵⁵

Had she done that research, she recognized in retrospect, she would have been astounded to hear that her measure was unique. Totally unaware of the unprecedented nature of the legislation as well as of the serious and widespread character of the deprivation it was remedying, both the chief sponsor—who, even after her retirement, explained her failure to keep any of the file on the grounds that she “considered this one of my ‘minor’ pieces of legislation”—and the Minnesota legislature as a whole remained unaware of the significance of their action, which went virtually unnoticed even in the Twin Cities press. What sparse reporting there was remained on the humorous side, asking, for example, “How in the name of lawmaking does such a bill come to be?” Citing a study that 90 percent of businesses in Minneapolis–St. Paul “already give their employees

time to visit the powder room” twice a day, another newspaper relegated the measure to the status of merely formalizing an existing practice. The legislature has, however, taken the mandate seriously enough to penalize as a separate misdemeanor the “refus[al] to allow adequate time from work as required by” this provision.⁵⁶

The need for workplace urination rights is underscored by the fact that “the problem of urinary incontinence is one of the oldest known to man yet can be one of life’s best kept secrets, making the problem appear uncommon and trivial. In reality, however, urinary incontinence is quite common.” Weimar Germany’s leading work scientist noted that if pauses were too short to permit workers to leave their work station or too infrequent, the resulting urine retention or constipation (or both) could not only injure workers’ health but also reduce their readiness to perform. Little wonder, then, that as long ago as the 1920s, German industrial medical councillors recommended that workers be given ten-minute rest breaks every two hours, “especially with regard to evacuation of bladder and bowel.”⁵⁷

A practical guidebook for labor negotiators from the 1970s offered as an example of a rest-period clause from a collective bargaining agreement the following protection (in addition to specification of two ten-minute breaks): “Nothing in this provision shall interfere with the right of employees to take time off from work to meet the ordinary needs of personal hygiene.” The authors’ gloss explains, “it is correct to state that in modern collective bargaining unions usually, if not always, request clauses of the type set out above especially in industrial plants.” If industrial unions have been pressing such claims, few have vindicated such a right. In fact, practicing urogynecologists have observed that large numbers of women, even in organized auto plants in Michigan, are forced to wear diaperlike incontinence pads because they are too embarrassed to ask male supervisors for permission to go to the bathroom. In this regard, little has changed since late Victorian England, when a Royal Commission on Labor report on women workers delicately revealed that since men were supervisors, “there is much greater hesitation in applying for leave to take necessary rest during temporary illnesses.”⁵⁸

Typical of the strongest bathroom-break provisions of this type is the following language from a 1979 collective bargaining agreement between the United Food and Commercial Workers Union (UFCW) and Oscar Mayer at its Perry, Iowa, plant, where workers were granted a single twenty-minute morning rest period: “An employee is expected to satisfy all his personal needs during the scheduled rest period(s). An emergency

relief period will be granted when necessary.”⁵⁹ More recently, the UFCW succeeded in inserting into the rest-period provision of its collective bargaining agreement with one of the largest chicken processing firms an understanding that “The Company will allow employees to take emergency breaks, provided these breaks are not abused.”⁶⁰ By the same token, however, the UFCW also has contracts stating that “the employer and the Union committee shall work out a relief schedule so as to provide the least interference with plant operations”—but not so as to provide the least interference with bladder operations. The mere existence of a relief provision in a collective bargaining agreement does not, however, make it self-enforcing: often unions have had to engage in job actions to force employers to stop using relief and utility workers at tasks that conflict with their function of replacing production workers who have to use the bathroom.⁶¹

Even at organized plants, workers have been fired for leaving the line to go to the bathroom after they have repeatedly requested relief and have been ignored by supervisors.⁶² In addition to the physical and emotional indignities associated with urinating in public places, the affected workers suffer the very real material loss of their livelihood and unemployment benefits when state agents determine that they were fired for good cause. Even a worker who succeeds, if not in regaining her employment, then at least in vindicating her right to unemployment insurance benefits after she was fired for having “left her post without permission in order to go to the bathroom,” may have to prove not only that “she was physically unable to take the time to get permission,” but also that she had undergone surgery increasing “the frequency and urgency of her need to urinate.” Even where an employee had not used his official break period and was appropriately in a locker area fetching supplies, the Diamond Shamrock Corporation dismissed the urinator for “loafing while on duty” and being “absent from his work station without authority or excuse.” And even an employee with thirteen years’ seniority and an almost unblemished record who was suffering from prostatitis and other urinary tract problems was fired for micturating outside the bathroom.⁶³

At an Iowa Beef Processors (IBP) slaughtering plant in Kansas a worker was fired for having breached a duty he reasonably owed his employer. While working on the killing floor in the area processing cattle heads, Gerald Derritt “had to go to the rest room and couldn’t wait until they decided to let me go. . . . I knew I couldn’t wait so stepped over to the side and relieved myself. . . . I don’t believe this is a breach of duty. Management just wouldn’t let me go to the restroom.” Because “some heads do go

on the floor and parts of them ultimately are used for human consumption," the judges, in finding Derritt ineligible for unemployment benefits, were impressed that Derritt had acted in contravention of posted written instructions announcing that urinating on the kill floor was grounds for termination.⁶⁴

Although Derritt's makeshift method may not have redounded to the benefit of consumers of cattle heads, it is hardly out of place to point out that the firm was acting unlawfully in returning meat that had fallen on the floor to the production line. More pertinent, however, is the question why the industrial world is so arranged that workers are confronted with the Hobson's choice of their urine or their livelihood. Why, for example, was there no written instruction posted by OSHA, the U.S. Department of Labor, or the Food Safety and Inspection Service announcing that employers who refuse to permit their workers to urinate in the bathroom in timely fashion would be subject to sanctions? Why, moreover, is the workplace so structured that whereas the employer can lawfully and authoritatively implement a self-help solution, ultimately by calling on the police to escort the worker from the premises, no worker has such self-enforcing powers at her disposal in the quest to void without jeopardizing her source of income? As long as employers can succeed in manipulating judges into casting the dispositive question in terms of "whether or not claimant was guilty of masturbating on company time," worker control will be reduced to self-control.⁶⁵