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

**Marc Linder and Ingrid Nygaard**

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## Judicial and Legislative Struggles: Repeal or Extension of Gendered Rest Periods?

Why not a rest period for men—don't they get tired, too?

Aileen Hernandez, EEOC commissioner, in *Progress and Prospects: A Report of the Second National Conference of Governors' Commissions on the Status of Women* (1965)

Although mandatory rest periods have not disappeared, the net effect of Title VII has been a significant contraction of the universe of effectively protected workers. This chapter discusses the political struggles over the fate of statutory rest periods as conducted in the courts and state legislatures.

By the mid-1970s the Women's Bureau could write of the "considerable effort to extend to men—through legislation or administrative or judicial decision— . . . protective laws that conferred benefits only on women." But however considerable that effort may have been, it bore very little judicial fruit. With one significant exception, which was quickly made irrelevant, state and federal judges conformed to Paul Freund's expectations by rejecting the extension of benefits to men on the ground that it would amount to judicial usurpation of powers that had been committed exclusively to state legislatures. Yet the Senate Judiciary Committee claimed as late as 1972, when the legislative and judicial repeal juggernaut was already in full swing, that state laws, such as the ones providing rest periods, that "confer a real benefit . . . will, it is expected, be extended to . . . men [who] are now sometimes denied the very real benefits these laws offer": the senators' favorable report on the ERA revealed the atmosphere of political unreality that pervaded its passage. For although in one case a court could plausibly point to the state legislature's recent attempt and failure to implement legislative extension as a ground for its refusal to extend coverage, other judges conceded that less formalistic decision rules were at stake—namely, that extension "would impose a sizeable economic burden on employers."<sup>1</sup>

Rest periods fared somewhat better in the state legislatures, but to little effect. Although a handful did extend the reach of existing gendered statutes to men, enforcement has been weak. States without a tradition of rest periods for women failed to enact universal mandates.

### Judicial Interpretation of Gendered Protective Statutes under Title VII

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.

*Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969)

Quietly, in the high-ceilinged chambers of the American judicial system, protective laws for women simply disappeared. . . . And although more than four out of five employed women told pollsters throughout the 1970s that they did not want to work longer hours even if doing so brought more pay, their views were ignored.

Rosalind Rosenberg, *Divided Lives: American Women in the Twentieth Century* (1992)

The most prominent case in which a court authorized extension of benefits to men arose as a federal action brought by an employer to enjoin the Arkansas labor commissioner from enforcing an Arkansas statute that required employers to pay their female workers time and a half for all hours in excess of eight per day on the ground that it had been superseded by Title VII. *Potlatch Forests, Inc.*, the plaintiff, conceding that Title VII required it to pay the same daily overtime to men, argued that enforcement of the state law frustrated the nationally uniform operation of Title VII, which therefore preempted it. After rejecting Potlatch's erroneous claim of preemption, referring to Title VII's express disclaimer of such an intent, the district court held that the state law also did not conflict with Title VII; although the latter was not designed to "raise wages generally, it certainly does not . . . 'frustrate' the purpose of the Act to require an Arkansas employer to eliminate discrimination by paying its male employees more than it would pay them ordinarily in order to equalize their pay with that of women." The financial consequences for Potlatch might be "onerous, but federal labor legislation . . . has placed many onerous burdens on employers." Moreover, Potlatch could have avoided this burden by ensuring that its employees did not work more than eight hours daily until after they had worked forty hours in the week.<sup>2</sup>

The federal appeals court affirmed on the ground that there was “ample support for the position that any discrimination resulting from the Arkansas statute is to be cured by extending the benefits of that statute to male employees rather than holding it invalid.” The appellate court rested that conclusion chiefly on the argument that such extension was in accord with the Equal Pay Act, which prohibits both wage discrimination between men and women performing equal work and any methods of compliance that reduce any employee’s wage. Although the lower court had found it unnecessary to reach the claim raised by the EEOC as amicus that the Equal Pay Act required the employer to pay daily overtime to men, a leading treatise suggested that the case for extension could and should have been disposed of on that much more straightforward basis.<sup>3</sup> That extension was in principle permissible is made clear by later U.S. Supreme Court Title VII precedent. Within that jurisprudential framework, rest-period disputes would not have qualified as ones in which “‘compliance with both federal and state regulations is a physical impossibility.’ . . . Employers are free to give comparable benefits to other . . . employees, thereby treating ‘women . . .’ no better than ‘other persons.’”<sup>4</sup>

This potentially significant vindication of extension, however, proved to be short-lived. Four years later, the Arkansas Supreme Court put an end to extension by exercising its authority as the definitive interpreter of Arkansas state law. This second case was brought by the state director of labor on behalf of female employees whose employer had failed to pay them overtime on the ground that Title VII had preempted the state statute. The Arkansas Supreme Court rejected the federal court’s approach in *Potlatch* because it had “oversimplif[ied]” by construing the state statute merely as an overtime law instead of giving controlling weight to the provisions oriented toward women’s health and welfare. Because there was, under recent U.S. Supreme Court precedent, no longer any “sound reason” to pay overtime only to women, the court held the statute invalid. It then tacked on this non sequitur, substituting that flimsy rhetorical bridge, “Of course,” for logic: “Of course, it follows that if the Arkansas act is now invalid, its benefits cannot simply be extended to male employees under the *Potlatch* rationale.”<sup>5</sup>

In opting for a prohibition on so-called judicial exercise of legislative power, the Arkansas Supreme Court failed to engage the fundamental issue in repeal-versus-extension cases: had the Arkansas legislature been able to foresee that the statute’s gender bias would one day cause it to violate federal law by virtue of the supremacy clause, would it have chosen to abolish mandatory daily overtime for all workers or to extend it to men,

as the Arkansas State AFL-CIO urged in its amicus brief? The most plausible basis for concluding that the state legislature in Arkansas (as elsewhere back in the *Lochner-Muller* era) would have preferred extension is that women-only protective legislation had not been driven by principle but rather by tactical accommodation of judicial hostility to government intervention into the labor market encompassing adult men.<sup>6</sup> Ironically, then, latter-day judicial refusal to encroach on legislative power was in reality a refusal to liberate legislatures from the market-knows-best cage in which the judiciary had trapped them a century earlier. By choosing repeal rather than extension, the Title VII-era courts reinstated their late-nineteenth-century predecessors' prejudice in favor of formal "‘freedom of contract,’ which, in this context, is the term the law uses for the subjection of the worker to the power of management," and against legislation that protects the worker from "oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will."<sup>7</sup> The federal and state courts that in the 1960s and 1970s chose repeal over extension were thus able to restore a labor market that was unencumbered by the gendered protections that even dogmatic free-marketeer *Lochnerite* judges had been willing to tolerate.

Two federal cases from the early 1970s also dealt with the issue of extension specifically with regard to rest-period laws; both refused to extend the rest-period provision to men, making the by then stock argument that to do so would usurp exclusive legislative power. The leading case, *Burns v. Rohr Corp.*, arose out of a complaint by a male employee that his employer, which granted "personal time privilege" to all its employees, had complied with the California rest-period regulation, which required ten-minute rest breaks every four hours for women. The plaintiff argued for extension on the ground that rest periods, like minimum wages, were "‘beneficial’ type regulations," which, unlike "‘restrictive’ type regulations" such as weight-lifting limits and maximum hours, "do not inherently conflict with the objectives of Title VII." Although the district court was not open to extension on any grounds because it would have amounted to "usurpation of the legislative power," it called into question the plaintiff's mutually exclusive binary classification of protective legislation: "Since the net effect of the regulation is to reduce the number of work hours for women by one hundred minutes per forty-hour week, it would appear that it could equally well be characterized as ‘restrictive.’"<sup>8</sup>

The court was correct about the similarity between maximum hours and rest-period laws in the sense that "the only difference is that . . . the mandatory shortening of the workday is applied in the middle of the day,

instead of at the end.” The problem with the plaintiff’s categorization, however, was that it was unfaithful to the social meaning of (gender-neutral) protective legislation because it acquiesced in the negative connotations attached to “restrictive.” All protective legislation—regardless of whether it mandates minimum wages, maximum hours, rest periods, or seats—is, and is supposed to be, restrictive insofar as it restricts capital’s prerogative to exploit workers in various ways. The relevant question is not whether a regulation is restrictive—if it were not restrictive it would not be protective—but whether it both promotes workers’ physical and mental health and well-being and does not restrict production (and hence employment and income) so massively that the protection becomes worse than the danger against which it guards.<sup>9</sup> Once extension and universalization are on the agenda, the traditional feminist/antipaternalist argument that rest-period laws must be “contrary to the objectives of Title VII” because they assume that “women as a class are inherently weaker physically than men” becomes irrelevant.<sup>10</sup>

The second federal case, *Doctors Hospital, Inc. v. Recio*, presented a novel interpretive twist. A hospital sued the commonwealth secretary of labor both for a declaration that Puerto Rico’s statute regulating women’s hours of work was invalid as conflicting with Title VII and for an injunction against its enforcement. Although male and female employees were statutorily entitled to a one-hour meal period, women were entitled to that meal period after four hours of work unless the employer granted them a twenty-minute rest period during those four hours, in which case the meal period could be inserted after the fifth hour; if the employer failed to grant the twenty-minute rest period, it was required to pay the affected women double time for the time they worked between the end of the fourth hour and the beginning of the meal period. Innovative here was the judge’s conclusion that the statutory regime discriminated both against women, because the special accommodations made them less desirable employees from an employer’s perspective and thus restricted their employment opportunities, and against men, because they were not beneficiaries of the rest-period or double-time provisions. Yet despite having given himself the opportunity to eliminate this dual discrimination by making protection universal, the judge refused to extend the provision to men, on the ground that such a step “would be keeping in effect the restrictions on the working hours of female employees . . . and would be imposing said restrictions on the male employees that are not subject to said restrictions.”<sup>11</sup>

Here the bifurcated view of different types of gendered protective statutes as restrictions or benefits—such as, respectively, occupational bans



or weight-lifting limits on the one hand and rest periods on the other— which in some contexts is useful, was turned on its head by being applied to the impact of one type of statute on women and men. Thus the very same provision that as a benefit withheld from men had sufficed to invalidate the statute was transmogrified into an imposed restriction that precluded the court from extending it to the formerly deprived men. Even though Title VII has nothing to do with absolute levels of protectiveness but solely with whether whatever protection is offered is conferred equally on men and women, the judge in *Doctors Hospital* managed to transform Title VII into an antiregulatory regime designed to protect all workers from the imposition of “restrictions.”<sup>12</sup>

A rare glimpse into the very thin justification for extension of protective legislation to male workers that courts required of administrative agencies is provided by the many, ultimately unsuccessful, judicial challenges that employers’ associations mounted against the validity of the California Industrial Welfare Commission’s procedures in issuing new gender-free industry and occupation wage, hours, and working conditions orders pursuant to the state legislature’s directive.<sup>13</sup> In analyzing the relevant legislative directive, a California appellate court observed:

It seems obvious in the light of the legislative history that this mandate imposed upon the commission the primary obligation to make a policy decision to either extend protections to men or eliminate them for women.

. . . The factual burden of demonstrating that prior protections are no longer appropriate for employees in a modern society should be on the party who contends that conditions have changed. . . .

. . . Absent a showing of a bona fide basis for discriminating between men and women, or that the health of and welfare of women no longer demand the standard conditions contained in the order, the commission could justifiably resolve the conflicting interests by extending the terms of the order to apply to men. . . .

The association objects . . . that it [the commission’s statement in support of its order] does not describe evidence that proves that the health and welfare of male employees demand that they be included in the standard conditions of labor contained in the order.

. . . Surely as to general applicability it is sufficient to state the legal necessity for including men in the commission’s order.

. . . Because of this fundamental change in the law, there is justification for including men in the orders without a separate finding that the health and welfare of just male employees require it. That justification is to insure

that women would continue to be protected where the statement reflects the factual basis that the health and welfare of women employees require it.<sup>14</sup>

The court believed, in other words, that because Title VII requires that men and women be treated equally, even where they are (allegedly) not physiologically or psychologically equal—for example, with regard to the stresses associated with long working hours—the extension of superfluous protection to men was made necessary by women’s continuing need for it. If such blatant instrumentalization of male workers for the sake of women sufficed to save extension in California, in many other states it may tacitly have undergirded the decision to repeal. In accepting at face value precisely the prejudice toward women that Title VII was designed to nullify, the court conjured up an image of indestructible men champ-ing at the bit to get back into the industrial fray but now being dragged down to the level of weak-bodied and weak-willed women and children by inappropriate rules such as those mandatory rest periods. Arguably, therefore, the court erred in not having required the commission to make the requisite finding that—as even Frederick Taylor and his followers had been asserting since the turn of the century—indeed men too need rest periods.<sup>15</sup> Extension, then, would have appeared as a universal elevation of standards and repeal as universal deterioration.

At the other extreme, two states, whether for reasons of legislative inertia or orneriness, have kept their invalid discriminatory statutes confer-ring rest periods only on women on the books. The Wyoming legislature has not repealed its law, going back to 1923, providing that all females employed in manufacturing, mechanical, or mercantile establishments, laundries, hotels, apartment houses, places of amusement, or restaurants “who are required to be on their feet continuously during their employ-ment shall have” a fifteen-minute rest period before and after lunch. In-deed, as late as 1990, the Wyoming attorney general took the position that at least some women’s protective legislation, including this provision, remained valid. Pennsylvania, too, has left on the books its 1913 meal-period/rest-period statute for women.<sup>16</sup> Moreover, in the unreconstructed states, firms employing fewer than Title VII’s coverage threshold of fifteen employees would remain liable for violations of the otherwise invalid gen-dered statutes, which for these small employers would not be preempted by federal law.<sup>17</sup>

### A Few State Legislatures Universalize Rest Periods

[N]othing could have been further from the collective consciousness of Congress at the time of enacting Title VII than forcing employers to increase the number of rest periods of their male employees.

<sup>3</sup> Lex Larson, *Employment Discrimination* § 44.05 at 44-34 (1995)

The first state to convert its rest period for women into a gender-neutral regime was Oregon. Beginning in the 1930s, Oregon had, through orders of its State Welfare Commission and later of its Wage and Hour Commission, provided for rest periods for women in an increasing number of industries. In response to Title VII and judicial decisions holding Oregon's women's labor regulations invalid, the Oregon Wage and Hour Commission eliminated mandatory rest periods and overtime payments for women during the 1970–71 biennium. This regulatory repeal prompted the Oregon legislature in June 1971 to amend the statute that had empowered the Wage and Hour Commission to issue regulations to protect the health of female employees; it now gave the authority to issue rules prescribing minimum meal periods and rest periods for all employees. When the commission then exercised this authority by requiring a ten-minute rest period every four hours for all workers, "Oregon became the first state to require rest periods for all covered workers. . . . [T]his is the first time such coverage has been extended to adult men."<sup>18</sup>

Two states, Kentucky and Nevada, legislatively transformed their gender-biased statutes into comprehensive ones. The course of legal change in Kentucky, which in 1958 had become the first state outside the Far West to enact a universal statutory rest-period right for all female employees, was instructive. When the legislature that year prohibited employers from "requir[ing] any female to work for more than four . . . hours without rest periods for at least ten . . . minutes . . . in addition to the regularly scheduled lunch period," it meant the word "require" literally: "The rest period shall be optional with all employees." Thus despite the mandatory imposition of a \$10 to \$50 fine for violations, this weak provision in principle exposed vulnerable employees to employer pressure not to avail themselves of the right to paid rest. This potential for importuning may have prompted a request (presumably from a female employee) for an opinion from the Kentucky attorney general in 1962 as to whether female employees were entitled to the breaks without having their pay docked. In affirming the right, the opinion emphasized that "the employee has absolute discretion in determining whether she shall take the rest period

or not” and that, where her wages were docked, she could “exercise her remedies under law to recover the lost wages.”<sup>19</sup>

Five years after enactment of Title VII, the regional employee relations manager of Frito-Lay requested an opinion from the attorney general as to its effect on Kentucky’s statutes limiting women’s hours of work. Admitting that the question was not an easy one to answer, the attorney general’s office reformulated it to address whether the federal enactment preempted state laws that “appear to give [women] special privileges involving rest periods.” The commonwealth also conceded that “the employer appears to be caught between two conflicting jurisdictional statutes,” giving it the Hobson’s choice of either obeying state law by discriminating against men in violation of federal law (making them work longer hours than women) or permitting women to work the same hours as men in violation of Kentucky law. The attorney general was in effect—though not in so many words—asking whether employers should continue to deprive men of rest periods as they were privileged to do under Kentucky law or deprive women of the rest to which state law entitled them. Rather than recommending that employers create multiple best worlds by conferring rest periods on men, thus establishing compliance with both statutes and better working conditions for all, the attorney general took hope from a “case closer to home,” a federal case argued in Indiana that “recognized that, unlike the problem of race, there are significant and meaningful biological and psychological differences between the sexes which justify employment practices which recognize those differences.” The attorney general thus opined that “until the Supreme Court of the United States rules otherwise, Kentucky statutes, which limit the number of hours . . . of women . . . for reasons of health and safety, serve a legitimate purpose and . . . do not conflict with or violate” Title VII because they constituted bona fide occupational qualifications. The attorney general then closed with an opaque warning to Frito-Lay that the laws were designed as a “shield” to protect women and not “to be used as a sword by the employer to subvert and otherwise discriminate against women.”<sup>20</sup>

A turning point in the development of rest-period rights in Kentucky occurred in 1971 when a federal district court ruled in favor of the General Electric Company and the intervening International Union of Electrical Workers (IUE) in their suit against the commissioner of the Kentucky Department of Labor for declaratory and injunctive relief based on the claim that Title VII had invalidated the state’s women’s hours law as applied to them. GE employed almost 25,000 workers in Kentucky, one-quarter of them women and most of them at its Appliance Park plant in Louisville.

IUE, which was the collective bargaining representative at Appliance Park, was impelled to intervene in part because it was prohibited under Title VII from classifying its membership so as to affect adversely any individual's status as an employee "because of such individual's . . . sex." IUE's participation in the suit was also a function of its policy of advocating the rights of women workers, which was promoted by its activist general counsel (and one-time EEOC assistant executive director) Winn Newman and associate general counsel (and later EEOC counsel) Ruth Weyand, and of its belief that the cap on women's hours was unfair.<sup>21</sup>

In analyzing the GE case it is crucial to bear in mind the unusual set of labor relations that prevailed between the company and its unions. During the post-World War II period GE engaged in take-it-or-leave-it bargaining ("Boulwarism"), which committed the company to applying its "highly successful consumer product merchandising techniques to the employment relations field" in an effort "to deal with the Union through the employees, rather than the employees through the Union."<sup>22</sup> Because of what one of its own senior counsel characterizes as GE's historically "restrictive view" of collective bargaining, the company did not include any meal- or rest-period provisions in its national agreement with IUE. Nor were there any written local understandings pertaining to this issue. Although IUE was strong enough to ensure that GE agreed de facto to meal and rest breaks for the workers at the Louisville plant, GE took the position not only that it could unilaterally revoke them (which the union's strength would nevertheless have constrained it from doing), but that such a step would not even have been subject to arbitration, to which GE was "bitterly opposed."<sup>23</sup>

The statutes to which GE was subject, according to the court, provided that "no female may work more than 4 hours without minimal 10 minute rest periods . . . which shall be optional with all employees," and that no factory could employ a woman more than ten hours per day or sixty hours per week. After having set forth the applicable statutory scheme in this manner, the court never returned to the rest-period provision, focusing exclusively on GE's complaints as to the hours provision. The undifferentiated juxtaposition of the two statutes is curious, since the court expressly conceded that women could waive their rights to the rest period, whereas women were not entitled to waive their rights to a shorter workday and workweek. Consequently, no woman could complain that she had been deprived of an employment opportunity based on GE's having been compelled by the Kentucky rest-period statute to assign work to men who were not required to take breaks: any interested woman could have saved her

employer from violating the state or the federal law simply by refraining from availing herself of the paternalistic benefit that allegedly prevented her from proving that she was “equally as [sic] qualified as men to work excess hours.” The court thus may have been too quick to strike down the rest-period statute, especially since men received the same rest periods as women and in fact believed at the time that the reason they received breaks was precisely that GE was legally required to give women breaks.<sup>24</sup>

One argument that the court could have used to buttress its decision would have run as follows: Although the legislature expressly gave female employees the option not to use the rest periods, so that they might appear to GE as unencumbered as their male coworkers, women would have been forced to sign a waiver at the time of hire (or at the time they applied for transfer to the—nonexistent—jobs that precluded breaks) renouncing their statutory entitlement in perpetuity. If on some future day(s), however, they had decided that they did want to take a ten-minute rest, a conflict would have arisen between their statutory right and private contractual waiver, which presumably would have been resolved in favor of the statute. In that sense, GE might have argued, the threat of discriminatory treatment always hung over the employment relationship. But in fact both male and female employees received breaks, even though GE was not contractually obligated to provide them, a circumstance that would have weakened this argument. Moreover, even if men had not been receiving the same rest periods, GE could have complied with both federal and state laws by voluntarily offering men the statutory rest periods. Although these ambiguities may not be completely resolvable, they do suggest that the halfhearted paternalism of the Kentucky statute that gave women the right to extricate themselves from the clutches of a patronizing state was not an optimal vehicle for addressing whether a rest-period statute was protective or restrictive within the framework set out by the EEOC guidelines.

The infirmity in the hours law, on the other hand, was clear. Because the court found that GE’s operations often required “the scheduling of work hours in excess of the limitations imposed by these Kentucky statutes” and that the jobs in question could generally “be filled interchangeably by male and female employees,” GE would have violated Title VII by complying with the Kentucky laws and assigning “either work hours in excess of those limits, or jobs regularly requiring work hours in excess of those limits, solely to males.”<sup>25</sup>

The sole basis on which the court could have granted the Department of Labor commissioner’s motion for summary judgment on the ground that there was no conflict between Title VII and the state’s women’s protective

legislation would have been a finding that "Sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." But the court quickly rejected this argument because "A bona fide occupational qualification is not established by the assumption or class characterization that very few women can or some women cannot work . . . a particular number of hours. Women cannot be categorized in a single class and denied opportunities of employment and hours of work irrespective of their individual qualifications." Kentucky's statutes thus "directly conflict with and frustrate that principle and policy in that [they] on their face operate to deny females employment opportunities extended to men on the basis of general characteristics attributable to females as a group."<sup>26</sup>

After having already granted GE's motion for a preliminary injunction in 1970, the court ruled in 1971 that the statutes regulating women's hours "discriminate against females as a class, and deny them employment opportunities extended to men solely on the basis of their sex, and not on the basis of . . . their individual capabilities." Correlatively, the statutes forced GE to classify its employees "solely on the basis of a stereotyped characterization of the sexes . . . in violation of Title VII" and were, therefore, by the operation of the supremacy clause of the U.S. Constitution, "unlawful, null and void and unenforceable" as to GE.<sup>27</sup> That the claim of unfairness underlying GE's challenge of the validity of Kentucky's gender-biased time statute succeeded revealed the sea change in labor-protective regimes that had taken place since the 1930s, when General Motors unsuccessfully sought to defend against the claim that it had violated the Michigan equal pay law by paying female workers lower wages by arguing that because women received statutory rest periods, they in fact worked less than men.<sup>28</sup>

In 1972, following the GE test case, when the public relations director of the state employers' association restated Frito-Lay's question, the Kentucky attorney general withdrew his 1969 opinion, taking the position that Title VII did preempt the state rest-period law for women. Again, however, he issued a warning, this time to the effect that until the legislature repealed or amended the statute, it would still apply to employers not covered by Title VII. Thus if an employer with fewer than fifteen employees, the threshold that defines coverage under Title VII, failed to provide rest periods to women, it would have continued to violate the Kentucky statute, which would not have been preempted by federal law.<sup>29</sup>

In the wake of *General Electric Co. v. Young*, the state legislature finally took action to bring its rest-period statute into compliance with Title VII.

The initiative and support for universalizing rather than repealing rest periods in the Kentucky legislature were not split along discernible party or political lines. The change came as part of a 1974 “Act relating to equal rights for men and women,” which degendered many state statutes. The motion to adopt a floor amendment to the house bill was made by State Representative Charles Holbrook, a Republican, who asked himself during the debates why, if other statutes were being universalized, the rest-period provision should be excluded. Without any prompting from constituents or lobbyists, Holbrook later recounted, he concluded that if women workers were more productive with rest periods, men would be too. In addition to considering productivity, however, he also recalled having liked the breaks he had gotten as a young man working at plants such as GE and Ashland Oil Company. Although his motion passed forty-two to eighteen in a state house dominated by Democrats eighty to twenty, on the role call Republicans voted fourteen to two in its favor while sixteen of forty-four Democrats voted against it. The provision does not appear to have generated much interest at the time; labor counsel at GE’s Appliance Park does not, in retrospect, remember the amendment as having been at all controversial.<sup>30</sup>

The Kentucky General Assembly in 1974 both substituted “employee” for “female” and deleted the provision that had made the entitlement optional. A significant weakness in the current rest-period statute is the lack of any effective enforcement. Although a \$100–\$1,000 civil penalty is available, the state Department of Labor does not commonly impose it. Where employers—the chief violators among which are fast-food restaurants—convert paid into unpaid rest periods, the agency does seek back wages; it engages in no enforcement action, however, when employers deprive workers of the rest period but pay them their normal wage.<sup>31</sup> Since the chief aim of rest periods is to permit workers to recuperate in a manner that money cannot buy, such nonenforcement defeats the whole purpose of the law—especially since workers would not be paid any additional amount to forgo their rest.

The year after Kentucky acted, Nevada also resisted the trend toward deregulation by converting its women-only meal- and rest-period statutes, which had been in effect since 1937 and 1947 respectively, into a universal protective statute. In degendering these provisions in 1975, the Nevada legislature prohibited virtually all employers from employing workers more than eight continuous hours without at least a thirty-minute meal period. With somewhat more ambiguity and less obligation, it also ordered that “Every employer shall authorize and permit all his em-



ployees to take rest periods, which, insofar as practicable, shall be in the middle of each work period." The legislature fixed the rest periods at ten minutes for each four hours. These provisions remain in effect, but the misdemeanor penalty for violations obviously has little deterrent value, as the labor commissioner insists that he has no power to impose it and states that, as far as he knows, no case has ever been referred to the prosecutor's office. Moreover, despite receiving several complaints a week, the labor commissioner engages in little enforcement: when he informs complainants that he cannot conduct anonymous investigations because complaints are public documents, and any named complainant would thus be easily identified by his or her employer, few workers are willing to risk dismissal in a state in which the courts enforce the at-will employment regime, which empowers employers to fire workers at will. Although even in such a jurisdiction workers who were fired for having asserted their right to a rest period might eventually prevail and win reinstatement with back wages, the labor commissioner astutely observed that the possibility of eventually succeeding offers little consolation to a worker who would have to hire a lawyer while unemployed.<sup>32</sup>

Two years after the Oregon legislature had authorized the state Wage and Hour Commission to issue gender-free regulations, neighboring Washington followed suit. In 1973 the legislature there expressly empowered the industrial welfare committee to issue regulations pertaining to rest and meal periods for the protection of the health, safety, and welfare of all employees. The state Department of Labor and Industries, however, failed to write the regulations with the same rigor that some other states displayed. Thus instead of expressly prohibiting the employment of workers for more than four consecutive hours without a ten-minute rest period, the regulations state merely that "employees shall be allowed a rest period of not less than ten minutes . . . for each 4 hours of working time." The wording has been judicially interpreted as "not requir[ing] . . . employees actually to take the rest breaks; only that they be allowed to do so."<sup>33</sup> This gloss suggests that the regulation places the burden on the individual worker affirmatively to request the employer's permission to take the time, and that only when the employer actually refuses permission has it violated the regulation. Given the potential for internalized intimidation in many at-will workplaces where workers fear losing their jobs for any number of uncatalogued reasons, this weak regulatory language may serve to deprive many employees of rest breaks who do not dare request them.

In the wake of considerable litigation over the effect of Title VII on the validity of California's women-only labor-protective laws, employers asso-

ciations, which in an expanding labor market had supported protective legislation to ensure equal wage costs for all competitors, were impelled by the more favorable labor market brought on by the economic recession in the late 1960s and early 1970s to push for suspension or repeal of those regulations; they made their argument on a platform of equality for women. The opposing struggle for extension, which was organized by a unique coalition of the AFL-CIO, Union Women's Alliance to Gain Equality (Union W.A.G.E.), and NOW, was legislatively orchestrated by Assemblyman Willie Brown, Jr., who in 1972 alerted his colleagues to the fact that "under the guise of fighting sexual discrimination, employer groups are . . . abrogating a whole range of hard-won working hours and working condition statutes which now beneficially affect a major share of California's work force." To undercut that tactic, Brown introduced a bill that would have applied the provisions of the California Labor Code on wages, hours, and working conditions for women to men. Brown described the bill as "an appropriate method of fighting sexism in employment practices"; it ensured "that whatever protections now exist be made applicable to men as well as women, rather than to set up a situation in which all protections would be eliminated."<sup>34</sup>

After passing the bill in spite of employers' objections that covering men would cost them too much, the legislature failed to override the veto by Governor Ronald Reagan, who noted that "virtually every segment of the business community in California has advised me of their opposition to this bill." Despite his belief that "matters of wages, hours and conditions of labor for adult males should not be subject to further government intervention at this time," the next year Reagan approved the legislature's amendment of the state's Labor Code to require the Industrial Welfare Commission (IWC) "to provide adequate and reasonable wages, hours, and working conditions appropriate for all employees in modern society."<sup>35</sup>

After the IWC acquired this power in 1974, it began, under pressure from Union W.A.G.E. and other labor groups, to degender its many Industry and Occupation Orders, which had been in effect since 1932. They now mandate meal and rest breaks for virtually all employees. The failure to provide these breaks is a misdemeanor. The chief transgressors are convenience stores and kiosks, in which only one person is employed at a time, and whose owners have resisted making arrangements to permit workers to leave for any reason, including to void. Despite California's having the most comprehensive regulations and tightest enforcement of any state, in the more than two decades that the gender-neutral break

periods have been in effect the agency has never imposed a penalty; the chief counsel in the Division of Labor Standards Enforcement is unsure whether that record owes more to employers' general compliance or employees' ignorance of their rights.<sup>36</sup>

Several states have also either converted their gender-biased meal period laws into universal mandates or created brand-new comprehensive statutes. New York, the pioneer in this area, still has on the books—even if it has administratively diluted—its 110-year-old statute providing that “Every person employed in or in connection with a factory shall be allowed at least 60 minutes for the noon day meal.” And although anecdotal evidence suggests that some employers act as if the statute applied only to women, employees in mercantile or other establishments are entitled to a thirty-minute meal period. Several other states have enacted gender-neutral meal-period laws of varying liberality in recent years. In 1974, Illinois required employers to permit employees who are to work for at least seven and a half continuous hours twenty minutes for a meal period no later than five hours after work begins. In 1989 Connecticut mandated thirty-minute meal periods for some employees.<sup>37</sup> In the same year Minnesota established a more vague requirement that employers permit employees working more than eight consecutive hours “sufficient time to eat a meal.”<sup>38</sup> More recently, Tennessee imposed a thirty-minute meal period in 1993 except insofar as the nature of the business provides “ample opportunity to rest or take an appropriate break.”<sup>39</sup> As welcome as these belated interventions may be, they still fall short of the forty-five-minute midday lunch period that work physiologists regard as the minimum acceptable length.<sup>40</sup>

Finally, certain occupations that are merely unpleasant and dangerous to the workers themselves still enjoy the statutory protection they gained a century ago. Thus, as in 1899, Missouri still commands coal mine owners to “allow the laborers and miners . . . to come to the surface . . . for the purpose of eating their noonday meal” and requires that “at least one hour shall be allowed any miner or laborer for that purpose, and for rest after he reaches the surface.” Unfortunately, few underground coal miners remain in the state to enjoy the benefit. Since 1905 Missouri has also forbidden the employment of any person for more than eight hours in a day in a mill or plant engaged in crushing rocks or separating, refining, or smelting minerals. But even this limitation proved too much for a modern legislature, which in 1981 inserted the weasel words, “without their consent.”<sup>41</sup>

Appendix 1 shows the states that currently have statutory rest or meal periods. What is most striking about this spectrum of labor-market inter-

vention is how few states offer rest periods at all, let alone rest periods and a meal period. Only six states—California, Kentucky, Minnesota, Nevada, Oregon, and Washington—have created virtually universal coverage for rest and meal breaks. Of these few states even mandating rest breaks on paper, all, with the possible exception of California, concede that they fail to enforce them at all, let alone vigorously. Oregon’s provisions, unsupported by sanctions, are not enforced by the Wage and Hour Division of the state’s Bureau of Labor and Industry beyond a notice letter to employers; therefore they are commonly ignored.<sup>42</sup> Kentucky enforces the worker’s right to be paid for the rest period but not the entitlement to the rest period itself. Nevada’s chief enforcement officer protests that he lacks any sanctions. The regulations in the state of Washington do not provide for a penalty, and the state Department of Labor has not tried to enforce workers’ entitlement to breaks. Minnesota, the last of the states to act, mandated not a rest period but an entitlement to use the rest room once every four hours. The state enforcement agency is therefore compelled to inform on average a dozen callers a day that employees have no right to a rest period apart from going to the bathroom. The agency reports that it has never imposed a penalty for noncompliance.<sup>43</sup>

The recent trend for states—such as Connecticut, Delaware, Rhode Island, Tennessee, and West Virginia—to enact meal-period laws for the first time may be a sign that worker unrest over breakless workdays is finally penetrating official consciousness. In Tennessee, for example, the director of the Division of Labor Standards of the state Department of Labor pushed for enactment because one-quarter of the 70,000 telephone calls that her agency received annually consisted of questions and complaints about the lack of breaks.<sup>44</sup> The need for such statutes, even where they create a right to breaks that last a token twenty minutes and are unpaid, suggests how antediluvian employment relationships remain in some sectors: significant numbers of employers either fail to grasp that famished workers are likely to perform less efficiently or have such quick, unlimited access to replacements that they can afford to overwork their current stock of employees.

States such as Minnesota, New Hampshire, and West Virginia, which countenance meal periods while employees are working, have succeeded in outdoing Karl Marx’s cynical distinction between workers and machines: “On average the worker consumes his food during the interruption of the immediate process of production, whereas the machine consumes its during its operation.” Such working meal breaks mimic some employers’ practice of requiring workers to stand while eating “on the as-

sumption that employees were more likely to loaf on the job if they sat down while eating." Moreover, state meal-period statutes not only fail to deal with the needs for intermittent rest and voiding, but inexorably exacerbate the latter. The North Dakota regulation, which the state labor standards supervisor correctly interprets as permitting workers to waive their right to a thirty-minute break, is not equipped with a penalty and none has ever been imposed. Such regulations contravene the first principle of rest breaks as recuperative devices, which industrial physiologists formulated during World War I: "such periods . . . in order to be effective, must be obligatory, and not discretionary on the part of the worker."<sup>45</sup>

New York, which has had a universal meal-period statute for more than a century, arguably presents the most blatant example of nonenforcement. Although its law unambiguously provides that "Every person employed in or in connection with a factory shall be allowed at least sixty minutes for the noonday meal," the New York State Department of Labor circulates to employers a handbill titled "Guidelines: Meal Periods," which, immediately following the full text of the statute, states: "In administering this statute, the Department applies the following interpretations and guidelines: . . . Shorter Meal Periods. The Department will permit a shorter meal period of not less than 30 minutes as a matter of course, without application by the employer, so long as there is no hardship to employees." The agency bases its reduction on a provision in the statute that authorizes the labor commissioner to "permit a shorter time to be fixed for meal periods than hereinbefore provided. The permit therefor shall be in writing and shall be conspicuously posted in the main entrance of the establishment. Such permit may be revoked at any time."<sup>46</sup> The department, however, does not require an employer to apply for such a permit or to explain any mitigating circumstances justifying the reduction; instead, it has issued statewide *carte blanche* to all employers. When asked whether the department would enforce the sixty-minute statutory period on behalf of an employee who complained that he or she wanted it, the director of the Division of Labor Standards stated that there was no straightforward answer. Enforcement officers are more frank. In addition to admitting that the department is "ignoring the letter of the law" and speculating that the legislature will soon bring the law into conformity with reality by reducing the meal period to thirty minutes, they note that workers' complaints that they do not receive their full sixty minutes have not been seriously investigated for decades.<sup>47</sup>