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

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## “Go to the Bathroom, Please. . . . We’ll Wait for You”: From At-Will Employment to At-Will Voiding

The tendency to make use of the toilets . . . during rest periods should not be interpreted as lax discipline but rather as an encouraging sign of the cultivation of regular habits among employees.

Reynold Spaeth, “The Prevention of Fatigue in Manufacturing Industries,”  
*Journal of Industrial Hygiene* (1920)

For an auto worker nothing could be so grimly serious, so brutally basic, as the guaranteed right to relief time to go to the toilet.

Patricia Sexton, “The Auto Assembly Line: An Inside View,” *Harper’s* (1962)

Some revolutions have started with empty bellies—this one may have begun with full bladders.

Sally Olds, “Lavatory Liberty—Separate But Equal for Women,” *Newsday* (1990)

In his critique of antiauthoritarian socialists of the 1870s, Friedrich Engels drew an analogy between factories and Dante’s hell: “The mechanical self-acting machinery of a large factory is much more tyrannical than the small capitalists who employ workers have ever been. At least as far as hours of labor are concerned, one can write above the gates of these factories: *Abandon all autonomy, ye who enter!*” Despite the advent of flex-time, Engels’ stricture remains valid—at least as far as starting and stopping times are concerned. Even management-oriented advocates of new work schedules concede that on continuous-process, assembly-line, and shift work, “it is surely not possible to have individual workers coming and going as they please.”<sup>1</sup>

Whenever the working day begins and ends, however, there is no in-

superable logic of capital that workers could not challenge by asserting their autonomy either collectively, in shifts, or individually to rest and eliminate waste at reasonable times during that day. In assembly-line production, where one worker's leaving the line outside of formal break periods would cause undue disruption and impose undue burdens on the remaining workers, it may be true, as a German unionist observed, that "stopping the line just isn't possible; after all, everyone can't go pee at once." But many employers have agreed, and others should be required, to employ sufficient relief workers ("piddle breakers") to permit employees to void when necessary so that they are not forced to relieve themselves "furtively behind a big press" to avoid losing piece-rate bonuses. The additional wage costs associated with employing these relief workers should be passed on to consumers as a cost of doing business, just as the cost of industrial injuries and the rehabilitative workers compensation system was originally conceived of as the "blood tax" of industry, which had to be paid for out of the price of the product.<sup>2</sup>

Placing the initial financial liability on employers for this "urine tax" gives them the incentive to provide sufficient and accessible toilet facilities so that voiding does not mean involuntarily avoiding work. As two workers in a tuna fish-packing plant glossed the incentive structure: "If they had to pay you to clean up they'd put in more sinks.' 'Aw no. . . . If it was on their time, they'd invent a hose to spray you down as you walked out the door. Spritz, spritz, spritz.'" Where, as in the IG Metall agreements, scheduled rest periods are provided for in addition to individual time for personal needs, it is possible to shut down the lines.<sup>3</sup>

The systemic obstacles that U.S. firms—international leaders in supervisory intensity—have placed in the way of their employees' responses to the call of nature seem almost comical in contrast with the quasi-industrial Prussian efficiency that German firms developed in the 1920s to enable assembly-line workers to leave the line to empty their bladders or bowels. Although firms did employ relief people (*Einspringer*) to jump in to replace voiders, they also established pauses every hour or two in order to avoid the necessity of holding too many relief workers in readiness:

On the other hand, one would need all too large lavatory installations if all male and female workers wanted to relieve themselves at the same time. One therefore has the work pause migrate through the plant so that the individual working parties forming each assembly line interrupt the work one after the other. It typifies the spirit of rationalization that one has ascertained on the basis of statistical inquiries how many toilets are required per 100 female

workers so that they can relieve themselves in a work pause of five to ten minutes so that no “relief workers” have to be held in readiness during their work. The evacuation of the bladder and of the bowels is rationalized when, as a result of the migration of the work pause through the plant, the toilets remain just as continuously occupied as the workplaces are continuously occupied outside of the work pauses.<sup>4</sup>

Because industrial hygiene experts in Weimar Germany regarded rest and voiding periods as efficiency-promoting measures that primarily benefited employers, they found it self-explanatory to treat these pauses as paid working time. Even during the Nazi years, the world’s largest Taylorist organization, the Reichsausschuß für Arbeitszeitermittlung (which later became the Verband für Arbeitsstudien), while including within “loss time” the time spent in attending to personal “needs,” deemed it compensable along with such activities as conversations with supervisors.<sup>5</sup>

The unhealthfully restrictive regime controlling workers’ access to the toilet in the United States may be juxtaposed to the recent wave of enactments of so-called potty parity laws, which mandate more water closets for women than for men in public buildings. This movement recognized that it is a “serious inequity . . . transcend[ing] into socioeconomics” when even once a year long lines at the rest room cause a woman attending a concert or ball game to wait and thus to miss a few minutes of the event. With alacrity state legislatures rushed to rectify “this inadequacy of sanitary facilities” on the ground that it is “not only a gender-specific inconvenience, but a threat to public health, safety and comfort.”<sup>6</sup> Remarkably, outside the context of capital-labor relations, it seems obvious even to the men who write the national model plumbing code that because biological “logistics” require women to take thirty-four to ninety-six seconds longer to use the bathroom than men, “equality sometimes isn’t equal.” In the literal public arena, formal gender equality suddenly became passé, creating virtual unanimity that a one-to-one ratio in toilet facilities between men and women “has the effect of discriminating against women.”<sup>7</sup>

Ironically, when the needs of middle-class women as consumers are at stake, the formal inequality that some strenuously denounced, combated, and ultimately had taken away from working-class women suddenly becomes “a matter of equity, . . . of good common sense.” After a doctoral dissertation found that women spent 39 percent to 123 percent more time than men in bathrooms in various public buildings, Virginia state legislators were willing to recognize that women’s longer bathroom stays were caused in large part by their menstruation, higher incidence of uri-

nary tract infections, and reduced bladder capacity following pregnancy. Thus whereas gender-biased public toilet legislation presumably passes muster as nondiscriminatory, rest-period laws for women who must void at work several times daily, 250 days a year, have been almost universally invalidated despite the fact that 85 percent of the eleven million adult incontinents in the United States are women. Yet if the legal “principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group,” it is unclear why every woman should be treated as if she urinates as slowly as the average woman and more slowly than every man. After all, even if this principle “does not preclude legislation . . . which . . . takes into account . . . a physical characteristic unique to one sex,” such a law “does not ignore individual characteristics found in both sexes in favor of an average based on one sex” only if it “deals only with a characteristic found in all (or some) women but no men, or in all (or some) men but no women.”<sup>8</sup>

The whole point of Title VII is to force employers to base their practices on workers’ individual capacities and incapacities by eliminating “subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work.” Moreover, the antidiscrimination principle is concededly “limited to physical characteristics and does not extend to psychological, social or other characteristics of the sexes” because only the physical ones “can be said with any assurance to be unique to one sex.” Thus, if women’s longer voiding times were, for example, in part a socially constructed result of the clothes they wear, then legislation based on such a nonanatomical characteristic would be impermissible. In the employment setting, however, some employers require female employees in certain occupations to wear uniforms or other types of clothing that necessitate removal of many layers before the women can use the bathroom. Parity under these situations would require either that men wear pantyhose, slippers, and other encumbrances or that women receive the extra minutes needed to void and still fulfill this (unequal) job requirement.<sup>9</sup>

Conversely, if all women were in fact slower voiders than all men, and if it is also the case that many women but no men menstruate and become pregnant, it is unclear why it was self-explanatory that women’s break laws had to be invalidated. After all, as feminist legal scholars point out, “women, due to biological and cultural differences, need more toilets than men do. . . . [F]ormal equality fails to recognize that parity would require that facilities be constructed to accommodate equally the real, but differ-

ent, needs of each sex.” And a federal appeals court has agreed that because “women are more vulnerable to urinary tract infections than are men,” a female employee made out a disparate impact claim under Title VII, arguing that “because of ‘anatomical differences between the sexes,’” unsanitary toilets adversely affected her without burdening male employees. Even as rest periods specially mandated for women were being repealed in the late 1960s, influential urologists not only warned that infrequent voiding can lead to bladder and kidney damage, but specifically noted that many women explained their potentially harmful urinary behavior by declaring that their “boss frowned on trips to the restroom during working hours.” Moreover, if the feminist claim is that treating all women as if they were in need of special benefits makes them less attractive employees, that obstacle to equal employment opportunities can be removed by prohibiting employers, as the EEOC did early on, from refusing to employ a woman “in order to avoid providing a benefit for her required by law”; enforcement can be strengthened by means of disparate impact investigations.<sup>10</sup>

The utopian workplace in which workers gain autonomy over their resting and voiding requirements remains far from legal and societal reality. For example, in 1992 courts struck down as beyond the enacting bodies’ authority (*ultra vires*) legislation by Suffolk County, New York, and San Francisco that would have prescribed fifteen-minute rest periods or at least alternative work every two hours for those working at video display terminals (VDTs). The courts voided the only such mandates in the United States, even though over a decade earlier the National Institute for Occupational Safety and Health had recommended a fifteen-minute rest break after two hours of continuous VDT work under moderate work loads and every hour for operators who had high work loads or engaged in repetitive tasks.<sup>11</sup>

Nevertheless, existing law could potentially accommodate the health needs of employees who have to void or, because of exposure to repetitive stress, rest more frequently than employers permit. Such a right might be statutorily anchored for one subset of employees—those suffering from a “disability” within the meaning of the Americans with Disabilities Act (ADA). Under that federal protective law, a “‘disability’ means . . . a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual”; the term embraces one who is “significantly restricted as to the . . . duration” for which she can work vis-à-vis that of “the average person in the general population.”<sup>12</sup>

The ADA prohibits firms from discriminating against a “qualified per-

son with a disability”—that is, “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”—“because of the disability of such individual in regard to . . . the . . . terms, conditions and privileges of employment.” Discrimination specifically includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business.” The “reasonable accommodations” that employers are required to make for those who are otherwise qualified as employees include “making existing facilities used by employees readily accessible to and usable by individuals with disabilities” as well as “job restructuring . . . or modified work schedules.” The “undue hardship” to the firm that must be balanced against the required “reasonable accommodation” encompasses measures “requiring significant difficulty or expense” considered in light of such factors as the type and cost of the accommodation as well as the financial resources of, number of employees at, and impact of the accommodation on the operation of, the facility involved and the entire employing entity.<sup>13</sup>

Requiring firms to make “existing facilities used by employees readily accessible to and usable by” workers with disabilities would reinstate for a part of the working population the late-nineteenth-century state law mandate that employers provide employees with “reasonable use” of the toilets that they were also required to provide. Since the EEOC’s “Interpretive Guidance” on the ADA expressly mentions rest rooms as one of the already “existing facilities” that employers may be obligated to make available as a reasonable accommodation, the cost of the physical facilities themselves could not qualify as an offsetting “undue hardship.” The only potential offsetting factors would be wages—both for the time of the workers who were urinating while other workers continued to work and for the time of additional relief workers who might be needed in some settings.<sup>14</sup>

Here it is crucial that “Congress fully expected that the duty of reasonable accommodation would require employers to assume more than a de minimis cost.” Consequently “an accommodation is not unreasonable simply because it would be more efficient, in the narrow sense of less costly for a given level of performance, to hire a non-disabled employee.” By the same token, providing relief people, whose work enables the disabled worker’s production to meet the required standard without “requir[ing] employers to lower such standards,” may constitute a reasonable accommodation if the place of employment is large enough that the

cost of such relief workers does not become an undue hardship, and if the relief also does not run afoul of the legislative dictum that the act “does not entitle the individual with a disability to more paid leave time than non-disabled employees.” Providing a reader to a visually impaired worker is “an accommodation that does not remove an essential function of the job from the disabled employee” where that essential function is not the ability to read as such but to process information, and providing an attendant “during parts of the workday may be a reasonable accommodation.”<sup>15</sup> Therefore, providing relief workers who spell the more in addition to the less frequent voiders on an assembly line should also qualify as a statutorily required accommodation.

The ADA’s reach, however, may not be broad enough to accommodate workers prone to bladder or musculoskeletal problems in certain kinds of work settings. For although “an accommodation may not be considered unreasonable merely because it . . . will cost the employer more overall to obtain the same level of performance from the disabled employee,” the law does not mandate reasonable accommodations associated with a lower level of performance. This conclusion follows from one of the underlying policies of the ADA—“to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.”<sup>16</sup>

The ADA’s limitation in this regard is clear. After all, if a firm accommodated employees’ need to go to the bathroom with above-average frequency only on condition that they drive themselves at an above-average pace when they resumed work so that their overall output equaled that of nonaccommodated employees, it would not have accommodated them. Viewed from another perspective, if the rest room is an already existing facility, the only accommodation that the employer would have made would be to give the worker the time to use it; if the worker were still required to produce the same output as workers who do not suffer from the urinary disability, the employer would not have given the worker any accommodation at all. Nevertheless, that same employer might be required to make the reasonable accommodation of providing a relief worker who would enable the disabled worker to meet the production standard, although at least one appellate court has ruled that “an accommodation that would result in other employees having to work harder or longer hours is not required.”<sup>17</sup>

Such outcomes may be socioeconomically irrational, but they may also be inherent in a statute that was intended to accommodate firms’ opposition to requirements that they acquiesce in lower microeconomic

production standards merely in order to promote the macroeconomic elimination of “unnecessary expenses resulting from dependency and nonproductivity.” Consequently only those disabled workers who in this limited sense are able “to compete on an equal basis” will be helped in their efforts “to pursue those opportunities for which our free society is justifiably famous.”<sup>18</sup>

Even if legal recourse were available to vindicate excretory rights for workers prepared to overcome the medical and legal obstacles to acquire the label of “disability,” is it not ludicrous to single out as a disability the inability to suppress a normal physiological function that was never meant to be suppressed? In a more rational world, would not workers be able to void when necessary? That world may already exist—at least in France. There a labor court ruled in 1996, in a case filed by deboners on a conveyor belt at a large packinghouse, that going to the toilet “meets a physiological need which only the individual is in a position to judge.” As “a fundamental freedom of a human being,” the tribunal wrote, “the right to go to the toilet cannot be subject to authorization by a third party” or conditioned on the employer’s finding a replacement. Consequently, employees are at liberty to respond to their needs outside of collective breaks so long as they inform their supervisors. Although workers do not need permission to void, the court held that abuses could be punished.<sup>19</sup>

Another feasible method for entitling workers would be the adoption to urinary needs of the notion of “universal design,” which has gained ground in recent years as a strategy for restructuring houses and public buildings so as to be barrier-free yet useful to all, without any stigma of special treatment. Just as universal-design features such as automatic door openers can benefit the entire workforce, so the line between urinary normality and abnormality is sufficiently hazy that normal voiders could also benefit from a policy that permitted frequent voiders to use the toilet when necessary. In addition to a legislatively enacted entitlement to void, workers need information about the physiological importance of voiding. A certain machismo still attaches to the ability to “hold it forever.” The example of a group of Danish nurses, 70 percent of whom were found to void infrequently at work despite the presence of a very strong labor movement, underscores the dual need to legislate and educate.<sup>20</sup>

Employers’ most plausible objection to a right to void is that trusting workers to use their own judgment as to when they need to void would promote the shirking that perpetually lurks in human nature. If workers were free to heed nature’s call whenever they claimed to hear it, so the argument goes, many would abuse the privilege by “socialising” in the

bathroom or reading the newspaper in the privacy of a stall. Setting aside the question of why upper management is self-authorized to read the business pages in luxuriously appointed \$20,000 executive bathrooms—which “also protect executives from being buttonholed by disgruntled employees”—while workers, the length of whose bathroom visits may be monitored by hand-held computer scanners, can be fired for reading union news on less fastidiously furnished and maintained toilet seats, it is certainly not unthinkable that the introduction of an at-will voiding regime, unaccompanied by any other changes, might prompt some workers to dissimulate. But if workers were driven to seek refuge from their alienating work because their niche in the division of labor offers no opportunity for self-development, the product that they make does not leave them with a sense of having made a useful contribution to a better world, and their subordinate status denies them self-control and democratic participation in significant decision-making processes, then these societal voids would have to be addressed rather than the superficial symptom of finding respite perched on a toilet seat. If workers overuse bathroom rights to reappropriate the time and energy that they perceive employers as illegitimately appropriating through speedups, mandatory overtime, and other techniques of entrepreneurial control, then such pseudo-excretory guerrilla warfare would suggest that the antagonists may need to create new overall norms for working time and rest periods.<sup>21</sup>

Despite industrial engineers' advice that “postponed rest is not so good as distributed rest,” some workers, in the United States and elsewhere, “have preferred ‘doing away with the breaks altogether’ and getting off one-half hour earlier.”<sup>22</sup> Ergonomics studies reveal that in particular workers paid according to piece-rate or other incentive wage systems, who are also at risk for cumulative trauma disorders, frequently “forego regular work breaks in order to increase earnings.” This built-in compulsion internalized by pieceworkers has always been cited by employers as proof that it is “difficult to persuade them to take rest periods.” The process that leads to making rest periods universal attains its full development where firms adopt the advanced Tayloristic position that leaving the length and scheduling of rest periods to the discretion of the individual worker inevitably permits some workers to engage in acts of wastefully self-predatory exhaustion of their labor power because they fail to observe the onset of fatigue until it is too late.<sup>23</sup> Other workers, recognizing this dynamic, have resisted the conversion of their rest periods into shorter workdays. Thus where the employer of organized workers who negotiated rest periods sought to shift the last break period to the end of the day so that effectively

they are paid for leaving work fifteen minutes early, the union protested on the ground that a break that no longer constitutes an interruption between two periods of work has lost its function of permitting workers to rest, use the bathroom, or make telephone calls to check on children home from school. And at least one economist who advocates shortening the work-week by increasing the pace of work and reducing the number of breaks concedes that where that pace is “already too demanding,” the proposal would merely “transform time off the job into necessary recuperation.”<sup>24</sup>

As rational sellers of their labor power, workers must be interested in setting limits to the working day that make it possible for them to calculate how high their daily wage must be to secure their ability to work over a lifetime consisting of an actuarially predictable number of workdays, such as 10,000 (40 years x 250 days). If the length, intensity, or unbroken length of the working day is so demanding that significantly more than 1/10,000 of their labor power is used up each day, then their working lives will be both shortened and undercompensated—if money can ever compensate for a shorter and less healthy life.<sup>25</sup> It does not require the paternalistic contempt of a Frederick Taylor to recognize that some, especially younger, workers may lack not only the luxury of looking beyond their immediate economic needs but also the actuary’s dispassionate and depersonalized professional commitment to the law of large numbers.

At the same time that workers may not be willing or able to demand the rest periods they need, many employers are loath to offer them. Crucial to understanding why workers cannot rely on the labor market to generate rest breaks is determining whether they cost an employer anything. In fact, as already noted, very few firms or industries are even willing to study rest periods scientifically, limiting research instead to arenas guaranteed not to affect short-run profits.<sup>26</sup> Such an approach is shortsighted in addressing only how quickly the finished product can come off the assembly line and ignoring larger long-term costs caused by workers’ absenteeism, turnover, and impaired physical and mental health.

It is possible that if workplace rest were expanded, as Taylorites and some worker advocates have urged, workers might be able to produce more during less working time because they would be less fatigued. Only a foolishly rigid management that insisted on a narrow, ideological notion of “discipline” would resist such a change that it knew would both be profitable and potentially make the workforce less alienated. But it is also possible that newly introduced or extended rest periods would, at least in the short run, benefit only the workers—although less fatigued, they might not be able to make up for this “unproductively” spent time. It has,

in any event, been difficult for some employers operating under normal conditions of efficiency, “harassed by the rush and urgency of the production schedule[,] . . . to believe that by losing ten minutes’ work [they] will more than make it up,” despite the frequent demonstrations of the cost effectiveness of rest periods.<sup>27</sup> Depending on many macro- and microeconomic variables, such workplace recuperative and rehabilitative leisure would constitute social costs of production that might have to be financed by consumers, if the products they desire are excessively fatiguing to produce.

In both cases—that is, where the break is and is not self-financing—insertion of a rest period is analogous to instituting a shorter workday or workweek, which can have the same impact on productivity-cost relations. Thus the reason why workers cannot freely contract for longer rest periods is similar to why freedom of contract does not operate to bring about shorter hours—or any other “costly” benefit, for that matter, including higher wages and less dangerous or more hygienic working conditions. Some employees, especially if they can take advantage of a favorable supply-demand constellation because they are skilled or organized in strong unions, may indeed be able to bargain for rest periods. Historically, groups of collectively self-directing autonomous craftsmen who controlled the flow of work without significant interference by employers retained the freedom to structure their workday. Others have also managed to assert such freedom. During World War I, when the federal government assumed control over the railways, women working in railroad offices “used their rest rooms as a refuge from the pressure of their daily routine and as a place to socialize briefly in relative privacy. When reprimanded for taking prolonged or too many rest room breaks, women openly defied their bosses and congregated privately with still greater urgency.”<sup>28</sup>

Similarly, it is not unheard of that office workers whose firms refuse to provide coffee breaks “simply rebel[] by taking their own break time in the washroom.” And even today some blue-collar women workers whose supervisors grudgingly grant them access to the bathroom, lest “the company’s image of itself as a progressive employer” be damaged, may be able to “take many breaks in the bathroom (when these are on the factory’s time . . .),” which they convert into a quasi-private zone for engaging in various “forms of resistance.” But the multitudes who would forfeit their employment if caught seeking unauthorized entry into washrooms can certainly not “take for granted the existence . . . of backstage areas . . . for solidarity.”<sup>29</sup>

Still other workers may lack the bargaining power to gain breaks, just

as some particularly vulnerable workers may lack the labor-market power to impel their employers to pay a living wage in the absence of a statutory floor. Because the consequences of low wages are more obvious and immediate than those associated with the lack of rest periods, it is also possible that some workers may attach a relatively low priority to providing for them, even though insufficient rest may insidiously be undermining their health. For these disparate reasons, government intervention is needed to step in where labor-market failure has left many workers without a vitally important standard.<sup>30</sup>

Despite his status as the philosophical fountainhead of prohibitions on societal interference with the self-regarding decisions of competent adults, John Stuart Mill explained 150 years ago why “there are matters in which the interference of law is required, not to overrule the judgment of individuals respecting their own interest, but to give effect . . . to their collective opinion of their own interest, by affording to every individual a guarantee that his competitors will pursue the same course, without which he cannot safely adopt it himself.” To illustrate the point, Mill chose the issue of reducing the length of the working day (from ten to nine hours) without a significant wage reduction. In opposition to the view that if workers generally preferred the shorter day it would “be adopted spontaneously,” Mill argued that it would “not be adopted unless the body of operatives bind themselves to one another to abide by it. A workman who refused to work more than nine hours while there were others who worked ten, would either not be employed at all, or if employed, must submit to lose one-tenth of his wages.” But even if the class of affected workers would benefit from honoring a nonstatutory agreement, “the immediate interest of every individual would lie in violating it . . . . If nearly all restricted themselves to nine hours, those who chose to work for ten would gain all the advantages of the restriction, together with the profit of infringing it; they would get ten hours’ wages for nine hours’ work, and an hour’s wages besides.” Although Mill himself would have preferred “short hours becoming, by spontaneous choice, the general practice,” he believed that “probably so many would prefer the ten hours’ work on the improved terms, that the limitation could not be maintained as a general practice: what some did from choice, others would soon be obliged to do from necessity, and those who had chosen long hours for the sake of increased wages, would be forced in the end to work long hours for no greater wages than before.” In order to avoid this race to the bottom, Mill concluded that the force of law would be necessary.<sup>31</sup> The same logic would apply to shortening the length of working day by means of rest breaks.

This type of market failure also underlay the original establishment of the national minimum wage and overtime statute, which was designed to force substandard employers to internalize the minimum social costs of maintaining their workforce, which until then they could shift onto the workers and their families or society. The Fair Labor Standards Act (FLSA) was, as the U.S. Supreme Court held, “a recognition of the fact that due to unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency.” Just as “the community is not bound to provide what is in effect a subsidy for unconscionable employers” who pay low wages for long hours, so society must also intervene to guarantee employees rest breaks that can reverse the clinical features of workplace overuse disorders caused by lack of such breaks in their early stages—before they develop into painful symptoms that incapacitate workers for years, both at and outside of work.<sup>32</sup>

Fair labor standards statutes are also designed as “Fair Labor Competition” laws to protect firms that maintain high standards from “the chiseler, the corner-cutter, and the downright unscrupulous . . . who drag down our business standards and make it harder for the overwhelming majority of . . . businessmen to compete on a decent basis.” This same consideration applies to ergonomic standards. As a congressman observed at a hearing addressing OSHA’s response to the dramatic rise in repetitive motion injuries, “If all the companies were required to provide the kind of relief that the workers need from their job and then it was required to hire that many people that added to the cost of their operation . . . they would all have to be competitive.”<sup>33</sup>

Workers’ needs for rest, nutrition, excretory autonomy and well-being, and, ultimately, free time for self-development and community activities should be addressed by a comprehensive reorientation of the national wage and hour statute. Nationally uniform norms are necessary because local regulation leads to the familiar tendency of states to refrain from intervening altogether for fear of causing capital to flee to jurisdictions with weaker or no standards at all. In addition to curbing employers’ coercive power to demand overtime work as a condition of employment, the FLSA should be amended to create a framework for setting minimum standards for the duration and scheduling of meal and rest periods and voiding breaks. Because the heterogeneity of physical and mental demands made on workers in the enormous range of workplaces may make it advisable to permit a degree of flexibility in implementing national rest

norms, employees and unions should be empowered to codetermine the structures adopted at each place of employment. The need for such regulation is heightened by the proliferation of Japanese-style “lean production,” which critics call “management by stress” and which, as even ardent proponents concede, necessitates a harder work pace.<sup>34</sup>

Grounded on the fundamental nonwaivable and nonpurchasable right of workers to restore their physical and mental powers through rest, the statute should at a minimum mandate a forty-five-minute meal period and the equivalent of six minutes of freedom from work per hour. Even apart from physiological reasons, thirty minutes are insufficient in many firms and industries where workers have so much protective clothing and equipment to doff and don and the cafeteria is so far away from their workplace that they may wind up with only ten minutes to eat.<sup>35</sup> The forty-eight minutes of rest per eight-hour workday could, for example, be taken as four twelve-minute blocks every two hours. Employers who failed to provide hourly rest breaks would be prohibited from disciplining any worker who had to use the toilet more frequently than during the scheduled breaks.

One possible approach to rest and toilet breaks would adapt the reasonableness standard that has been used in seating laws for more than a century. An 1894 New Zealand statute, for example, required shopkeepers to provide female shop assistants with sitting accommodations and prohibited them from requiring a protected worker “to be so continuously employed in an employment the course of which requires her to remain standing as that reasonable intervals are not allowed to her . . . during which she may use the sitting-accommodation provided.” Employers were also prohibited from dismissing employees or reducing their wages for using the seats unless they could prove that the women did so “for an unreasonably long time or an unreasonable number of times on any day.” In a variant, the current Florida statute, the only ungendered seat law in the pre-Title VII period, requires employers “to permit their . . . employees to make reasonable use of said seats during business hours, for purposes of necessary rest, and when such use will not interfere with humane or reasonable requirements of their employment.”<sup>36</sup>

As coordinated measures, the OSHA general sanitation regulations should also be amended to make express the employer’s duty to permit workers to urinate as often as necessary, while the ADA regulations should incorporate a threshold for urinary disability in terms of voiding frequency, and for musculoskeletal disability in terms of rest frequency. Indeed, the OSHAct is the single most plausible anchor for recreating in U.S. law the employer’s duty to look out for employees’ welfare that was

established in the German Civil Code and for applying it to necessary bodily functions.<sup>37</sup>

In the absence of such national policy-making, one promising conflictual model of asserting worker control if not self-control was forged by “Grandma” Zinninger, a fifty-six-year-old production-line worker at General Electric’s huge Appliance Park plant in Louisville, Kentucky, who in 1968 single-handedly vindicated the right of workers there to void when necessary. Virginia Zinninger drove ninety miles round-trip daily to the plant, where she had worked for fourteen years without receiving any disciplinary demerits, to support herself and her seventy-five-year-old husband. Zinninger, who had undergone bowel duct surgery and had just the day before the incident in question explained to the unit manager or general foreman, Donald Dietz, that she was having bowel problems, started her shift at 3:30 P.M. on September 13, 1968, and was not scheduled for her regular ten-minute break until 5:30 P.M. “While working at her job of cleaning refrigerators, which required leaning over and other physical exertions,” an arbitrator later found, “Zinninger’s work was interrupted at approximately 4:10 P.M. by a sudden and unexpected bowel movement. Her immediate supervisor was not close at hand; but Grandma spoke to a fellow employee . . . and asked him to get Tackett (the Union steward) . . . or . . . her immediate supervisor to get relief. After several minutes, Tackett appeared and relieved her. She started in the direction of the rest room.” Her route to the toilet took her past Dietz, who, having watched her approach from a distance of 150 feet, asked her why she was taking a break an hour before her first break, but “having explained her personal problem to him only the evening before, the grievant was in no mood to prolong the conversation.”<sup>38</sup> The manager nevertheless engaged her in the following conversation as reported in his testimony:

- A. At this time she said she was going to the restroom, that she had shit in her pants, and she was going to the restroom to change them.
- Q. Did you say anything at that point?
- A. Well, at first I laughed a little bit. I thought it to be a joke.
- Q. Why did you think it was a joke?
- A. I didn’t see anything unusual about her walking. It was unusual for somebody to tell me that they had shit in their pants and . . . I said, “You must be joking or pulling my leg.” “No,” she said, “No. I shit in my pants.”
- Q. Did you say anything else at that point?
- A. I told her it was a little early for her to be going to the restroom.<sup>39</sup>

On her way back from changing her undergarment in the bathroom, Zininger approached Dietz in the presence of two other supervisors. This denouement, again as reported by Dietz, then ensued:

- A. She said [sic], "Here, you Goddamn son of a bitch, I told you I shit in my pants."
- Q. Did she do anything as she said that?
- A. Well, at this time she threw an object at me.
- Q. And what did you do?
- A. I threw my arm up . . . my right arm.
- Q. Did the object hit your arm?
- A. Yes. . . . At that point she said, "There is my shitty pants to prove it."
- Q. Were you doing anything at that point?
- A. Well . . . I picked this object up . . . and immediately dropped it.
- Q. When did you immediately drop it?
- A. I dropped it when I felt the object was wet and soggy. . . .
- Q. Had you ever had anything like this happen before?
- A. Never before in my life or have I heard of anything like this happening.
- Q. What was your reaction . . . ?
- A. Well, my first reaction was to bust her in the mouth [but] I controlled myself.<sup>40</sup>

After suspending Zininger that evening, Dietz terminated her a few days later for her "extreme and indecent acts of misconduct." In defending its action, GE characterized Zininger's behavior as "beyond the pale [sic]" because "attempting to strike a supervisor with underpants saturated with human excrement is a far more serious affront to authority than attempting to strike a supervisor with one's fist." However, primarily because the supervisor had "openly ridiculed the woman, who by this time must have felt that she was being unduly harassed" and not taken seriously "until she attempted to throw the evidence in his face," fourteen months after the termination, an arbitrator reinstated Zininger with full seniority and back pay. As a result of this creative development of the common law of the plant, GE managers have never again contested the workers' right to use the toilets at Appliance Park.<sup>41</sup>

Other workers have reported that employers' refusal to permit them to respond to nature's call galvanized them into joining a union. A worker at a meatpacking plant in the 1930s, for example, recalled that when he asked for relief to go to the toilet, the foreman "asked me what I done

when I was a baby. That's the kind of stuff will make a union man out of you, you know."<sup>42</sup>

Another, more cooperative, model for accommodating physiological needs stems from outside the sphere of production. A group from a senior center once attended a morning rehearsal of the New York Philharmonic at Lincoln Center. Part of the way through Brahms's Fourth Symphony, a commotion arose as an elderly man apologetically squeezed his way past the other people in his row in order to respond to an urgent call of nature. Intuiting his mission, a number of other old men, infected, as it were, by his impulse, used the opportunity to follow him, adding to the din. Hearing the disturbance, the conductor, Leonard Bernstein, turned around to see what was happening. Annoyed by the interruption, the maestro stopped the rehearsal to discover the cause of the noisy exodus. After the lead would-be urinator's wordless gesticulation had decoded the natural basis of the walkout, Bernstein relented: "Everyone, anyone who has to go to the bathroom, please go now. We'll wait for you."<sup>43</sup>

Now, if even the New York Philharmonic in full swing can wait for nature to take its course, why can widget production not make the same accommodation?