...And if Not Now, When?†


reviewed by Rebecca A. Schleifer††

“We never timed employees and we never said they couldn’t use the bathroom,” recalled [Kevin] Kevelson, owner of Ideal Bias Binding Inc., a maker of baby bibs. “All we said was ‘You have to come in the office and get the key to go.’” He said he locked the bathroom and put the key in the office because he wanted to catch the culprits who were smoking in the loo, littering the facility with cigarette butts, and violating fire code regulations barring smoking in some sections of the factory. But 60 textile workers didn’t see it that way.1

A worker at a meatpacking plant in the 1930s 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.”2

If you are reading this review, the greatest, and perhaps, sole concern you have regarding going to the bathroom at work has to do with an employer who forces you (or your client) to urinate—not with an employer who prevents you from doing so.3 Although U.S. employers might force

†† Staff Attorney, Migrant Farmworker Justice Project, Belle Glade, Florida; J.D. 1993, University of California, Berkeley (Boalt Hall); M.P.H. University of California, Berkeley; A.B. 1984, Harvard-Radcliffe College.
3. See, e.g., MARK A. DE BERNARDO & NANCY N. DELOGU, GUIDE TO STATE AND FEDERAL DRUG-TESTING LAWS (1999) (summarizing state and federal drug testing laws); see also LINDER & NYGAARD, supra note 2, at 44 & 187-88 nn. 1-2 (noting “profound irony” that attaches to fact that employers at once preoccupied with firing workers who
workers to void when they thought it to be in the employer's interest, until recently, most workers had no corresponding right to insist that they go to the bathroom when necessary. Since 1971, federal regulations promulgated by the Occupational Safety and Health Administration (OSHA) have required most employers to provide toilets, but, according to OSHA policy-making and enforcement officials, these regulations did not require employers to permit workers to use them. Many workers, such as assembly line workers, teachers, pharmacists, and telemarketers have thus resorted to relieving themselves into adult diapers, the shop floor or, in the case of some teachers, bringing their entire class with them to the bathroom. Others refrain from drinking and from voiding during the workday, inviting a host of physiological problems such as urinary tract infections, perinatal complications, and, in extreme cases, renal damage.

It is a rare scholarly work that can arouse a slumbering agency to act, but Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time did just that, on both the state and federal level. The authors' comprehensive review of the legislative history of OSHA's toilet standard brought this regulatory breakdown to OSHA's attention and instructed the Agency as to the proper interpretation of its own regulations, leading OSHA to issue its first citation for denying workers' "necessary use of bathroom facilities," in violation of 29 C.F.R. 1910.141(c)(1)(i), in July 1997. And, in April 1998, OSHA issued an interpretive memorandum instructing that the standard requiring employers to make toilet facilities available also requires that employers provide reasonable access to these facilities so that employees "can use them when they need to do so." The

4. See 29 C.F.R. § 1910.141(c) (1999); see also 29 C.F.R. § 1928.110(c)(2) (1999) (toilet standard for agricultural workers). The toilet standards for agricultural workers were promulgated by OSHA in 1987, and only after a "14-year struggle to compel the Secretary of Labor under the Occupational Safety and Health Act (OSH Act)" to issue a standard, a counterpart to which was "already in place for every other OSHA-covered type of employment." Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 614 (D.C. Cir. 1987). 5. See LINDER & NYGAARD, supra note 2, at 55-56, 62-63. 6. See LINDER & NYGAARD, supra note 2, at 2-3, 8, 47-50, 65-66; see also Ingrid Nygaard & Marc Linder, Thirst at Work—An Occupational Hazard?, 8 INT. UROGYNECOL. J. 340-43 (1997). The health hazards resulting from inadequate water intake and infrequent voiding may be exacerbated for workers who are exposed to toxic chemicals and who work in hot and humid weather. See 49 Fed. Reg. 7589, 7593 (1984) (to be codified at 29 C.F.R. § 1928.110) (proposed Mar. 1, 1984) (and sources cited therein). 7. See Citation and Notification of Penalty, Inspection No. 300002250, issued July 22, 1997 (citing Hudson Foods, Inc., Noel, MO, for "not allow[ing] workers relief from the production line in order to use the toilets, in effect, locking them out of or failing to provide bathroom facilities"). The United Food and Commercial Workers (UFCW) requested that OSHA investigate this problem. 8. Memorandum from John B. Miles, Jr., Directorate of Compliance Programs,
authors' work also prompted Iowa OSHA to issue an interpretive memorandum which spelled out, in detail more specific than federal OSHA's, workers' rights to use the bathroom when necessary, joining Minnesota as the second state in the nation with a law or regulation that specifically addresses bathroom access.9

But Void Where Prohibited is more than an advocacy piece. It is also a beautifully written and compelling history of labor-management struggles over rest periods, examining the rise and decline of rest periods in the U.S. in both historical and international perspectives.

During the first third of the century, industries and employers began to reorganize their production to compress the workday so that it was both shorter and more intensified, and in the process, reduced or eliminated rest and break periods for many workers.10 In the U.S. and in Europe, management experts argued that periodic rests during this shorter workday were important to ward off fatigue, thereby increasing workers' efficiency and productivity. More recently, ergonomic studies have demonstrated the relationship between fatigue and inefficiency, concluding that rest breaks were necessary to curtail fatigue and maximize productivity. Empirical evidence of the benefits of rest breaks to employers notwithstanding, many employers have continued to refuse to authorize rest breaks, or enforce them with military precision, thus discouraging workers from taking them.

Nor did the state successfully intervene to legislate rest breaks for all workers. By 1962, over half the states, plus the District of Columbia and Puerto Rico, mandated meal periods for women in some or all industries; four of these states' provisions also included men. Twelve states also


10. Speed-up and intensification of work remain a contemporary problem, notably in poultry processing factories. See Marc Linder, I Gave My Employer a Chicken that Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries, 46 CASE WESTERN L. REV. 33 (1995); Chicken Processor, Union Locked in War of Words; Cage's Says UFCW Only Seeking Dues, CINCINNATI ENQUIRER, Aug. 30, 1999, at B01 (stating that a union organizer says that the company keeps cranking up line speeds, even though high turnover has caused a labor shortage at the chicken processing plant); see also Suzanne Daley, A French Paradox: 35-Hour Week May Turn out to Be Best for Employers, NEW YORK TIMES, Nov. 11, 1999 at C1 (noting that for some workers, France's shorter workweek means more intensified work and increased stress).
provided rest periods for women. With the passage of Title VII of the Civil Rights Act of 1964, which proscribed discrimination based on sex, many of these statutes were invalidated by state and federal administrative rulings, court decisions, or by amendment or repeal. Only eight states now have gender-neutral legislation mandating rest periods for workers.

This situation was not inevitable: state legislatures as well as state and federal courts could have expanded women-only rest period laws to include men, which the Equal Employment Opportunity Commission itself advised a few years after the passage of Title VII. The authors also suggest that if trade unionists and middle class feminists had resolved their decades-long dispute regarding gender-specific labor standards legislation, they might have forged a successful campaign for the universalization of rest breaks by, for example, combining their efforts to support a ban on sex discrimination with an amendment to the Fair Labor Standards Act creating gender-free rest periods.

Although relatively few U.S. workers have a statutory right to rest breaks, many workers nonetheless receive such breaks, either through collective bargaining agreements, or because of employer policy. Yet the provision of rest breaks has never been universal, and has declined over the past two decades. By contrast, most of the European countries that are the U.S.' world market competitors, some Latin American and Eastern European countries, as well as Israel, Japan, and all the Canadian provinces and territories except Nova Scotia, have statutorily mandated rest periods, many of which were first enacted, in some form, over a century ago.

In 1999, one year after OSHA issued its interpretive memorandum regarding reasonable access to toilets, a national OSHA spokesman reported that the standard appeared to be effective, presumably due to the lack of complaints, and stated that "either there was enough information out there that employers know they have to give them access, or workers aren’t complaining." There is evidence, however, that any paucity of

11. See LINDER & NYGAARD, supra note 2, at 95-96.
13. See id. app. I.
14. See id. at 95 & n. 42, 96-106.
15. See id. at 107-09.
16. See id. at 128-37, app. II.
17. See id. at 138-51.
18. RuthAnn Hogue, No Relief in Sight. Despite Law, Restroom Breaks Still Hard to Get, ARIZ. DAILY STAR, Apr. 11, 1999, at 1D. Within six months of issuing its interpretive memorandum, OSHA cited at least three employers for failure to provide reasonable access to toilet facilities. See Citation and Notification of Penalty, Inspection No. 302241682, issued July 20, 1998 (citing Ree's Contract Service, Kansas City, MO, for denial of necessary use of facilities where employees could not leave posts 4-5.5 hours into their shifts; serious violation); Citation and Notification of Penalty, Inspection No. 300974300, issued Aug. 14, 1998 (citing Seaboard Farms of Athens, Athens, GA for denying employees
complaints is a result of both workers’ lack of knowledge about their right to void when necessary, and their legitimate fear of retaliation if they attempt to exercise this right. The article reporting OSHA’s sanguine attitude toward bathroom access itself prompted a “flurry of phone calls to federal regulators from [workers] who say they’ve been denied access to restrooms at work.” And, employers have continued to impose policies that restrict workers’ access to the bathroom and punished workers for violating such policies, or even questioning these restrictions.

As such, bathroom access remains a serious problem for many workers, and a galvanizing organizing issue among industrial and agricultural workers alike. Recently, for example, workers at Cagle’s-Keystone Foods poultry processing plant in Albany, Kentucky have been told that if they need to void outside of their allotted break times, they should “carry a cup with you to the [dissassembly] line,” and are written up if they take extra bathroom breaks. Bathroom access has thus become a major issue in the UFCW’s organizing drive at this plant, as it has been in other poultry processing plants that the UFCW has worked to organize. Bathroom access was also an issue in the United Farm Workers’ recent organizing drive at Quincy Farms, a mushroom farm in Quincy, Florida, where workers were required to seek permission from their supervisors to go to the bathroom, and workers’ bathroom breaks were tallied each week.

necessary use of bathroom facilities where no relief person available to allow employees to break from work to go to the bathroom); Citation and Notification of Penalty, Inspection No. 300460292, issued Sept. 30, 1998 (citing Steel of West Virginia, Huntington, WV, for not permitting employee with intestinal problems to use rest room; serious violation).

20. See id.; see also Hogue, supra note 18, at 1D.
21. Telephone interview with Jackie Nowell, Director, Safety and Health Office, UFCW (Nov. 9, 1999); see also Bathroom Breaks: When You Gotta Go, You Have the Right to Go (flyer passed out to workers at Albany plant citing toilet standard) (on file with author).
22. See Bill Maxwell, Contract Offers Model and Hope, ST. PETERSBURG TIMES, July 25, 1999, at 1D; Jan Pudlow, From Fire in the Pulpit to Heat in the Street: Quincy Labor Strife Mushrooms. New York City Hospital Workers, Atlanta Bus Drivers and a Cleveland Minister Took to the Streets in Protest Against Quincy Mushroom Farms, TALLAHASSEE DEMOCRAT, June 29, 1997, at 1B; Diane Rado, In Tiny Quincy, Unions Fight Mushrooms, ST. PETERSBURG TIMES, June 27, 1997, at 1A. The bathroom policy was instituted during the United Farm Workers’ organizing campaign as part of a disciplinary policy intended to dissuade workers from supporting the United Farm Workers. See Telephone interview with Frank Curiel, Florida Regional Director, United Farm Workers (Dec. 20, 1999). Quincy Farms signed a contract with the United Farm Workers on July 20, 1999. See Bill Cotterell, Bitter Fight Now a Party at Quincy Farms, TALLAHASSEE DEMOCRAT, July 21, 1999, at 1C.

A recent study of compliance with the field sanitation regulations for farmworkers found that of the worksites surveyed, only 50% of the camps in New Jersey, and 76% of the farms in Florida, had toilets. See FARMWORKER HEALTH AND SAFETY INSTITUTE,
By focusing on the question of rest breaks, *Void Where Prohibited* teaches us a basic lesson about labor-capital relations in the United States. By denying workers the fundamental right to go to the toilet when necessary, American businesses, especially in the low-wage sector, have treated workers with a level of disrespect—and acted with a level of disdain for the law—that has not been tolerated in other advanced capitalist societies. In the absence of more aggressive government intervention, U.S. workers might only hope for the recognition granted workers by a French tribunal that as "a fundamental freedom of a human being . . . the right to go to the toilet cannot be subject to authorization by a third party."\(^{23}\)