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Union Salts as Administrative Private Attorneys General

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I. INTRODUCTION

Throughout the last two decades the labor law community has debated, at times bitterly, the legitimacy of union salting campaigns.¹ Salts, the agents of these campaigns, are professional union organizers who apply for and sometimes obtain—often surreptitiously—employment with non-union employers for, among other reasons, the purpose of persuading the employer’s employees to unionize. This article argues that salts have served a legitimate function that is often overlooked: by exposing unlawful, anti-union employment practices—especially unlawful hiring practices—salts facilitate the implementation of federal labor law policies designed to maintain industrial peace and to equalize employee bargaining power.² Salts play this role by acting as administrative private attorneys general when they file and pursue charges at the National Labor Relations Board (NLRB), the federal administrative agency regulating labor relations in the private sector of the United States.

From the outset, I want to make clear that I am not speaking of a “private attorney general” in the narrowest sense. The most common discussion respecting private attorneys general centers on issues of whether

1. See Stuart R. Buttrick & Brian R. Garrison, *Cut Back on Your Salt: Recent Developments Regarding Union Salts—Toering Electric Co. and Oil Capitol Sheet Metal, Inc.*, 24 LAB. LAW. 71 (2008); R. Wayne Estes & Andrea E. Joseph, *Missing Analytical Link in Supreme Court’s Salting Decision Disturbs Balance of Union-Management Rights: A Critical Analysis of NLRB v. Town & Country Electric*, 30 IND. L. REV. 445 (1997); Pamela A. Howlett, “Salt” in the Wound? *Making a Case and Formulating a Remedy When an Employer Refuses to Hire Union Organizers*, 81 WASH. U. L.Q. 201 (2003); Victor J. Van Bourg & Ellyn Moscovitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer’s Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1 (1998); Philip M. Berger, Case Note, *Hold the Salt: Should Non-Genuine Applicants Be Treated as Employees Under the NLRA?*—*Toering Electric Co.*, 351 N.L.R.B. No. 18, 2007 WL 2899733 (September 29, 2007), 77 U. CIN. L. REV. 1247 (2009); Gregory C. Kloeppel, Note, *Salt Anyone? The United States Supreme Court Holds that Paid Union Organizers Qualify as Employees Under the NLRA in NLRB v. Town & Country Electric, Inc.*, 42 ST. LOUIS U. L.J. 243 (1998); Note, *Organizing Worth its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995).

2. See the National Labor Relations Act § 1 (codified as amended at 29 U.S.C. § 151 (2006)), which states in relevant part:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Congress has designated private parties to bring *court suits* in the public interest under particular statutory regimes and, if it has, whether those designees have standing to sue or are entitled to attorneys fees.³ Here, more broadly, I follow Professor William Rubenstein in conceiving a private attorney general as “a placeholder for any person who mixes private and public features in the adjudicative arena.”⁴ This expanded conception appropriately frames the private attorney general discussion and licenses me to speak sensibly of an “administrative” private attorney general.⁵ Salts act for private ends but their actions serve public law objectives. Thus, they mix private and public features, but in an administrative rather than judicial adjudicative arena. Accordingly, I make no claim herein that Congress has authorized private enforcement of the National Labor Relations Act (NLRA).⁶ Rather, my argument is that the NLRB can justify the utilization of the private charge filing and investigative activities of salts, particularly in light of the U.S. Supreme Court’s conclusion that salts are bona fide NLRA employees.⁷

Salts have the potential to function as private attorneys general in labor relations by stimulating enforcement of NLRA provisions forbidding unlawful refusals to hire, a notoriously difficult violation of law to police.⁸ In the hiring context where job applicants are less likely to pursue legal action than established employees fired for unlawful reasons, private attorneys general are particularly useful for achieving enforcement of legal

3. The ‘private attorney general’ doctrine is “[t]he equitable principle that allows the recovery of attorney’s fees to a party who brings a lawsuit that benefits a significant number of people, requires private enforcement, and is important to society as a whole.” BLACK’S LAW DICTIONARY 1315 (9th ed. 2009).

4. William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2131 (2004) (positing a broad definition of private attorney general and mapping varieties of private attorneys general according to the mixes of public and private functions performed).

5. Professor Kim has taken a similar approach in arguing that the law should extend support to undocumented workers on a private attorney general theory. See Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247 (2009).

6. Courts are unwilling to imply a private right of action in the National Labor Relations Act. See, e.g., *United Parcel Serv. v. Int’l Bhd. of Teamsters*, 859 F. Supp. 590, 595 n.5 (D. D. C. 1994) (rejecting union’s argument that court could apply “judicial inventiveness” to confer on union a private right of action); *Mobilab Union v. Johansen*, 600 F. Supp. 826, 828 (D. N. J. 1985) (rejecting flatly the union’s argument that it had a private right of action to challenge the NLRB’s refusal to issue an administrative complaint).

7. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90-98 (1995) (upholding NLRB’s determination that salts fall within statutory definition of employee).

8. Professor Michael Yelnosky has described the phenomenon of under-enforcement in connection with unlawful refusals to hire as “the enforcement void.” Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403 (1993). Salts have helped to fill this void in the context of the NLRA.

protections.⁹ Job applicants who are unlawfully discriminated against often have a diminished sense of grievance relative to employees who are unlawfully discharged because these applicants have not yet invested time and emotion in an employment relationship.¹⁰ Further, unless applicants are unusually sophisticated they will not suspect discrimination: their dealings with an offending employer will have been brief; they will be unfamiliar with the employer's hiring processes and applicant pools; and they are unlikely to be met with *overt* discrimination.¹¹ Applicants who are out of work obviously must move on with their job searches.¹² Even if they harbor suspicions of discrimination, they may not have time to act on them.¹³ If an applicant quickly procures a job with a different employer, that very success will mitigate backpay to the point where pursuing a claim is not worthwhile.¹⁴ Meager backpay, operating in tandem with administrative delay and the eventual need for court enforcement in the case of doggedly recalcitrant employers, discourages traditional claimants.¹⁵

Taking up the problem of under-enforcement of refusal to hire violations under the NLRA, Part II provides some background and context for the salting debate, and introduces and expands upon the NLRB's first discussion of salts as private attorneys general. Part III explores the private attorney general concept more expansively, discusses the NLRB's limited understanding of it, and explores the legal contours of the private attorney general mechanism in administrative agency enforcement. Part IV considers whether salts should be stripped of the protections of the NLRA because their actions are "indefensible," even assuming, as I will argue, that they otherwise serve useful and even essential enforcement purposes by functioning as administrative private attorneys general. The Article's ultimate conclusion is that salts permissibly assist unions, and thereby the public, in preventing¹⁶ unfair practices prohibited by the NLRA.

9. See *id.* at 412; Mark A. Rothstein, *Wrongful Refusal to Hire: Attaching the Other Half of the Employment-At-Will Rule*, 24 CONN. L. REV. 97, 133-35 (1991) (discussing similar problems in the context of common law actions).

10. Yelnosky, *supra* note 8, at 412.

11. *Id.*

12. Rothstein, *supra* note 9, at 134.

13. Yelnosky, *supra* note 8, at 412.

14. *Id.*

15. For a general discussion of delays inherent in the NLRB process see William B. Gould IV., *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309, 317 (2005).

16. Section 10 of the NLRA, 29 U.S.C. § 160, broadly authorizes the NLRB both to prevent unfair labor practices and to remedy those practices after they have been committed. Despite possession of this broad authority, the NLRB is not empowered to impose "punitive" remedies. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). The weakness of NLRA remedies has been created by the courts' strategically slavish refusal to impose "punitive" remedies, see Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579 (2005), and the Supreme Court authorized this disregard of

II. SALTING

Before considering the private attorney general argument, a preliminary general discussion of salting is in order. To that end, this Part will explore the background, context and policy surrounding salting and consider in detail the NLRB's most recent substantial discussion of salting in the *Toering Electric* case.

A. Background, Context, Policy

Salting activities may be either “overt”—the salt reveals his or her union affiliation at the time of job application, or at some point in time during the ensuing employment, or “covert”—union affiliation is never disclosed but is ultimately discovered by the employer.¹⁷ In either instance, the disclosed or discovered union affiliation is eventually alleged as the motive for an adverse employment action—a discharge or a refusal to hire—subsequently taken against the salt, who is either a job applicant or a hired employee, depending on the circumstances.

Salting fact scenarios are usually fairly simple. For example, an individual applies for a job by filling out a standard form in the lobby of a small business. If the individual is an overt salt, he or she may wear union insignia, or communicate in some other manner a union affiliation, placing the employer on immediate notice of some union objective.¹⁸ The employer thereafter refuses employment, sometimes in a strikingly obvious fashion.¹⁹ In some instances, overt applicants and non-union affiliated applicants with similar skill sets apply for the same job opening. The basis for arguing that the law has been violated is established when only the non-

congressional mandate by choosing “to avoid entering into the bog of logomachy . . . by debate about what is ‘remedial’ and what is ‘punitive’ . . . [and] to stick closely to the direction of the Act by considering what order does . . . and what order does not, bear appropriate relation to the policies of the [NLRA].” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 389 (1953). In the absence of a bona fide remedial regime, unions will continue to have no choice but to develop innovative strategies for implementing the original intent of labor law. Compare Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 223-25 (2005) (“The NLRA itself and its policies embody values that were intended to, and still can, transform our workplaces and our society.”) with Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 517 (2006) (“No matter how many resources unions pour into organizing, or how creative their tactics, unions will continue to decline as long as they remain within the constraints of the law.”).

17. For a discussion of the modern design and tactical objectives of salting campaigns by one of the strategy’s progenitors, see generally Michael D. Lucas, *Salting and Other Union Tactics: A Unionist’s Perspective*, 18 J. LAB. RES. 55 (1997).

18. See, e.g., *Fluor Daniel*, 311 N.L.R.B. 498 (1993) (finding violation in connection with applicants describing themselves on job applications as “voluntary union organizers”).

19. See, e.g., *HVAC Mechanical Services*, 333 N.L.R.B. 206 (2001) (finding violation because employer unambiguously based decision not to consider applicants for hire on applicants’ orally expressed intent to organize employer).

affiliated applicant is contacted for an interview.²⁰ In other cases, an employer with substantial hiring needs fails to contact openly union-affiliated applicants whose applications have been tendered *en masse* by their union. In these circumstances, the NLRB has found violations of law even though the involved applicants never personally appeared at the employer's facility.²¹ Sometimes an employer refuses to accept an application because of alleged "disrespectful" behavior by salt-applicants.²² Finally, in some scenarios salts obtain employment but are subsequently discharged—often abruptly—when their union affiliation becomes known to the employer.²³

As a general proposition, the union activities of salts are protected under the NLRA. That is, if salts are discriminated against with regard to hire or tenure of employment, for the purpose of discouraging membership in a labor organization,²⁴ nothing with respect to applicants' or employees' status as salts should impact the finding of a violation of law.²⁵ Union salts who are motivated—in part or in whole—by a desire to inflict "injury" on the employer are controversial within the community of labor law scholars and practitioners, as they have objectives beyond obtaining employment with a targeted employer for the purpose of persuading employees to join a union.²⁶ For example, some courts have concluded that salting "may be found to be unprotected if the purported organizational activity is a subterfuge used to further purposes unrelated to organizing, undertaken in bad faith, designed to result in sabotage, or designed to drive the employer

20. See, e.g., FES, 331 N.L.R.B. 9, 33 (2000).

21. See, e.g., Fluor Daniel, *supra* note 18, at 498.

22. See, e.g., Exterior Systems, 338 N.L.R.B. 677, 678 (2002) (upholding ALJ's crediting of employer's testimony that it had refused to hire salts because they "came onto my jobsite, and was basically ordering us around" and engaging in behavior that was not "appropriate").

23. See, e.g., M.J. Mechanical Services, 324 N.L.R.B. 812, 825 (1997) (finding that the employer discharged two covert salts on the same day it learned of their union affiliation).

24. This in apparent violation of section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), which states in relevant part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

25. NLRB v. Town & Country Elccc., Inc., 516 U.S. 85, 90-98 (1995) (upholding NLRB's determination that salts fall within statutory definition of employeec).

26. The definition of injury has been hotly in dispute. Employers have argued that they are injured when, during the course of a salting campaign, they are required to obtain legal counsel to defend against charges of unlawful conduct under the NLRA or other statutes. See e.g., *Examining Union "Salting" Abuses & Organizing Tactics That Harm the U.S. Econ.: Field Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Educ. & the Workforce*, 108th Cong. 2 (2004) (Statement of Sam Johnson, Chairman, Subcomm. on Employer-Employee Relations, H. Comm. on Education and the Workforce) ("Certain unions use 'salts' to cause deliberate harm to businesses by increasing their costs and forcing them to spend time, energy, and money to defend themselves against frivolous charges, and sometimes, to run employers out of business."). But, as I will discuss further in Section IV.D. *infra*, clearly non-meritorious charges will probably be dismissed and "injuries" resulting from violating the law are entirely appropriate.

out of the area or out of business.”²⁷ Nevertheless, most courts appear resigned to the now established rule that “[a]n employee does not lose his protected status merely because he is a salt.”²⁸

Salts have clearly achieved protection in judicial doctrine. But the protection cannot be realized unless the NLRB follows up with adequate enforcement action. To a significant degree, however, the NLRB has not devoted adequate resources to the task, rendering salts’ nominal coverage under the statute largely chimerical.²⁹ The erosion of the protection is not exclusively attributable to the NLRB, however, and is part of a larger phenomenon.

Courts have more broadly signaled that it is acceptable to deny NLRA remedies to unpopular claimants.³⁰ In perhaps the most recent celebrated example of this tendency, the U.S. Supreme Court decided, for dubious policy reasons, to deny remedies to unauthorized immigrant workers who are victims of anti-union discrimination, despite its threshold determination that their lack of lawful citizenship did not render them non-employees under the NLRA.³¹ That unpersuasive judicial accommodation of labor law to purported immigration policy, not law, has had profound, anarchistic

27. *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 553 (D.C. Cir. 2006) (quoting *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1198 (D.C. Cir. 2003)). The D.C. Circuit has tended to include all of these activities under the category “disabling conflict.” *Id.* at 552-53. The NLRB’s original explication of the category, however, was merely that an employer was not required to hire a salt who was also a member of a union engaged in a strike against the employer. Absent that narrow limitation salting activity would *not* be considered a disabling conflict. *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1230-31 (1992). Contrary to the D.C. Circuit’s discussion of the “disabling conflict” defense in *Casino Ready Mix*, 321 F.3d at 1198, the NLRB had *not* at the time that case was decided expanded the defense to include “organizational activity [that] is a subterfuge used to further purposes unrelated to organizing, undertaken in bad faith, designed to result in sabotage, or designed to drive the employer out of the area or out of business.” *Id.* The NLRB cases the court cited for the proposition either never discussed the issue, *Braun Electric Co.*, 324 N.L.R.B. 1 (1997), or discussed the issue in terms of rejecting various factual contentions raised by an employer arguing that the disabling conflict defense *should* be expanded. *M. J. Mech. Servs. Inc.*, 324 N.L.R.B. 812, 813-14 (1997).

28. *Contractors’ Labor Pool, Inc., v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003).

29. Michael J. Hilkin, Note, *The NLRB’s Oil Capitol and Tarring Decisions and Their Effects on Unionization and American Labor Law*, 94 IOWA L. REV. 1051, 1067 (2009) (“[B]ecause the NLRB’s legal protections are now virtually worthless to unions and salts, ULP charges of union-salting discrimination will probably decrease.”).

30. Of course, judicial erosion of labor law is not new, nor is it a novelty to level this accusation. For general critiques of the judiciary in this regard, see JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 24 (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

31. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). In *Hoffman Plastics*, the Court held that an unauthorized worker found by the NLRB to have been unlawfully laid off was not entitled to back pay, the only significant remedy available in the circumstances. See Ellen Dannin, *Hoffman Plastics as Labor Law—Equality at Last for Immigrant Workers?* 44 U.S.F. L. REV. 393, 394 (2009) (“However, the sad truth is, rather than creating an injury unique to immigrants, *Hoffman Plastics* is better seen as part of the long American tradition of judicial hostility toward unions and labor law.”).

aftershocks.³² Among the aftershocks of the judiciary's movement away from enforcing NLRA protections of unpopular groups is the NLRB's recent negative treatment of salts. Rather than resisting the judicial anarchy, the NLRB, on the contrary, has needlessly exacerbated it through a self-imposed scaling back of salting remedies and through unnecessary prolongation of the investigation of salting cases.³³ The result of these unfortunate administrative innovations has been to create an agency culture of death by delay.³⁴

Opponents of salting obviously applaud these developments.³⁵ But supporters of a vibrant labor relations regime should hesitate before

32. By my use of the term "anarchistic aftershocks" I mean to draw on Professor Cameron's conception of the Hoffman Plastic Compounds case as a general invitation to violate labor law. It is my contention that the invitation has been broadly and repeatedly accepted. See Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 U.C.L.A. L. REV. 1, 32-34 (2003) (arguing that *Hoffman Plastic* represents a form of anarchism because it acts as a general invitation to ignore the law).

33. Oil Capitol Sheet Metal, Inc., 349 N.L.R.B. 1348 (2007) (solely with respect to salts, eliminating the presumption that an applicant discriminated against is owed backpay from the date of unlawful refusal to hire until valid offer of reinstatement made, thereby significantly reducing backpay award in most cases); Toering Elec. Co., 351 N.L.R.B. 225 (2007) (holding that a salt must be "genuinely interested" in seeking to establish an employment relationship in order to qualify as an employee protected by the NLRA against anti-union hiring discrimination). It is true, however, that even prior to *Hoffman Plastic*, the NLRB's preliminary administrative investigations afforded higher priority to discharges and "permanent loss of employment cases," than to refusal-to-hire cases, which include the typical salting case. For the most recent articulation of the policy, see NAT'L LABOR RELATIONS BD., CASEHANDLING MANUAL, PART ONE, UNFAIR LABOR PRACTICE PROCEEDINGS, § 11740 (Dec. 2009), available at http://www.nlr.gov/sites/default/files/documents/44/chm_ulp_2011.pdf. An increasing variety of cases are being squeezed into higher priority Category III cases, and I would argue that this has had the effect of banishing non-Category III cases—including salting cases—to an even more remote investigative hinterland. See NAT'L LABOR RELATIONS BD., OFFICE OF THE INSPECTOR GEN., IMPACT ANALYSIS, REPORT NO. OIG-AMR-54-07-01 (Mar. 2007), available at <http://www.nlr.gov/sites/default/files/documents/200/oig-amr-54-07-01.pdf>. Many of these developments were the products of the Board dominated by appointees of George W. Bush, and the most egregious of them may be overturned in the near future by the newly-constituted Board dominated by appointees of Democrat Barack Obama. It is difficult, however, to characterize the NLRB's view of salting during Democrat Bill Clinton's tenure as favorable, so it is far from clear what the new Board will do.

34. See *Bishop v. NLRB*, 502 F.2d 1024, 1026 (5th Cir. 1974) ("If the apothegm that justice delayed is justice denied is applicable to labor disputes, then this bout of administrative and judicial sparring cannot have a very salutary conclusion. . . .").

35. See, e.g., U.S. CHAMBER OF COMMERCE, LABOR, IMMIGRATION & EMPLOYEE BENEFITS DIV., THE NAT'L LABOR RELATIONS BD. IN THE OBAMA ADMIN.: WHAT CHANGES TO EXPECT 27 (Sept. 2009), available at http://www.uschamber.com/sites/default/files/reports/090915_nlr_report.pdf. ("By requiring the General Counsel to adduce proof that the salts have a genuine interest in employment, *Toering Electric* has reduced such abusive tactics as batched applications, improper forms of conduct at job interviews and past employment records which clearly demonstrate that the salts are not interested in, and would not accept, employment if offered, but simply want to organize the employer or foster litigation.") It is of course lawful—indeed it is protected—for any employee to "simply want to organize the employer." Furthermore, an applicant not accepting a job offer would not be able to argue that an unlawful refusal to hire had transpired.

celebrating because salts have aggressively pursued refusal to hire cases. It is doubtful that anyone else would be willing to root out unlawful hiring practices systematically, the prevention of which the Supreme Court long ago identified as critical to the process of union organization:

Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which . . . is recognized as basic to the attainment of industrial peace.³⁶

In the most basic sense, if employers may with impunity discriminate against union salts because of their union affiliation, or because they seek to assist unions,³⁷ the right of all employees to be free from anti-union discrimination is substantially undermined.³⁸

In litigation, the nature of an inquiry into salts' organizational objectives is a function of burden shifting.³⁹ In the NLRB's customary approach to salting cases, initial focus is placed on an employer's motivation for refusing to hire a union affiliated applicant. When the union establishes an anti-union motive, the burden shifts to the employer to prove that it would not have hired the applicant notwithstanding union affiliation.⁴⁰ The applicant's motivation for applying is irrelevant because the employer has already been established as a wrongdoer.⁴¹

36. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

37. *See NLRB v. City Disposal Sys.*, 465 U.S. 822, 832 (1984) (“[T]he acts of joining *and assisting* a labor organization, which § 7 [of the NLRA] explicitly recognizes as concerted, are related to collective action in essentially the same way that the invocation of a collectively bargained right is related to collective action.”) (emphasis added).

38. Although salting discussions are customarily focused on refusal-to-hire issues, a common situation involves the covert salt, who is—in the typical scenario—promptly fired upon discovery. The longer the duration of a covert salt's acceptable pre-discharge employment, the easier the analysis of the case, for the inherent justification for not employing salts is that they will not perform as “bona fide” employees, a justification that could not be reasonably maintained in an instance of sustained adequate employment.

39. The NLRB's prosecutor is known as the “General Counsel.” If an administrative investigation persuades a local regional office that a violation of the NLRA has occurred, the General Counsel tries the case, absent settlement, to an administrative law judge (“ALJ”). Either party to the administrative adjudication may appeal the decision of the ALJ to the NLRB's full five-member Board in Washington D.C. *See NLRA* § 3(d), 29 U.S.C. § 153 (2006); 29 C.F.R. § 101.11 (2011).

40. This had been the NLRB's approach prior to its adventures in reaction to successful union salting campaigns. *Compare C & R Coal Co.*, 266 N.L.R.B. 208, 214-15 (1983) (shifting burden to employer once it was shown that refusal to hire was motivated by anti-union animus and at least one job was available to applicant) *with FES*, *supra* note 20, at 12 (shifting to General Counsel the employer's historical burden of establishing hiring plans and applicant's qualifications for employment).

41. *See Merit Elec. Co.*, 328 N.L.R.B. 212, 212 (1999) (affirming that after establishment of unlawful motive for refusal to hire burden shifted to employer to prove it would not have hired applicant notwithstanding union affiliation). In the former approach the employer was able to argue that the applicant would not have accepted a job if offered, was not qualified to perform a job, or that no job continued to exist, but it had the burden of establishing those propositions. *See, e.g.*, *M.J. Mech. Servs.*,

Over the last decade, however, probably in response to political pressure,⁴² the NLRB has required preliminarily proof of the bona fides of a job applicant in order to establish a refusal to hire violation.⁴³ This backwards analysis circumvents the Supreme Court's *Town & Country* opinion.⁴⁴ The question of whether a salt is a "genuine" applicant is a circumlocution of the question of whether a salt is "really" a statutory employee, a question that the Court has already answered in the affirmative.⁴⁵ No preliminary, elevated proof of employee status should be required to make out a prima facie case.⁴⁶ The NLRB's self-inflicted maneuvering revealed an alignment of the George W. Bush Labor Board with hostile circuit courts.⁴⁷ These circuit courts equate labor tactics found repugnant on moral grounds with conduct that is unprotected for articulable statutory reasons.⁴⁸

Despite the NLRB's apparent contempt for salting, sound policy reasons support relentless focus on employers' motivations in refusal to hire cases. An employers' unlawful refusal to hire, whatever a particular

Inc., 324 N.L.R.B. 812, 816 (1997) (entertaining but rejecting claim, following establishment of anti-union animus, that applicants were not "impressive" and were "not really seeking employment").

42. See, e.g., *Union Salting—Organizing Against Small Business: Hearing Before the Subcomm. on Workforce, Empowerment & Government Programs of the H. Comm. on Small Business*, 109th Cong. (2005).

43. See *infra* at Section II.B.

44. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90-98 (1995) (upholding NLRB's determination that salts fall within statutory definition of employee).

45. *Id.*

46. For a useful analysis of this development, see Member Fox's partial dissent in *FES*:

[W]hat is at stake in the allocation of burdens under [the NLRB's traditional burden shifting mechanism] is which side bears the risk that the influence of legal and illegal motives cannot be separated. Under *Wright Line* [the NLRB's seminal case on burden allocation], that risk is properly placed on the employer, because he has been shown to have acted with an unlawful motive. If he is unable to come forward with evidence sufficient to persuade the factfinder that he would have taken the same action for lawful reasons, he cannot escape liability. Under the majority's formulation for refusal-to-hire cases, at least part of the risk of nonpersuasion is on the General Counsel rather than the employer. I see no reason for such a departure from the basic principles of *Wright Line* in refusal-to-hire cases.

FES note20, at 31 (internal citations and quotations omitted).

47. Until 2007, the circuit courts have decided the bona fide applicant issue unevenly. Compare *NLRB v. D.S.E. Concrete Forms, Inc.*, No. 93-4871, 1994 WL 171689, at *2 (5th Cir. Apr. 28, 1994) (upholding NLRB's pre-*Town and Country* conclusion that applicants were bona fide despite union's changing employment rules for its members and submission of applications en masse) and *NLRB v. Smucker Co.*, 130 F. App'x 596 (3d Cir. 2005) ("Thus, although in applying for the job, [the applicants] were working as salts with the 'ulterior motive of trying to organize [the employer] from the inside,' . . . such a fact, in-and-of-itself, is of no moment.") with *NLRB v. Leading Edge Aviation Servs.*, 212 F. App'x 193, 199 (4th Cir. 2007) (reaffirming circuit court's requirement that NLRB establish the bona fides of applicants for purposes of court enforcement of NLRB orders respecting refusal to hire violations).

48. The Supreme Court observed in *NLRB v. Ins. Agents Int'l Union* that the NLRA neither imposes a standard of "properly balanced" bargaining power upon a union nor distinguishes between "proper" and "abusive" economic weapons utilized in labor disputes. *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 497 (1960).

applicant's motivation for applying, would reasonably tend to "interfere with, restrain, [or] coerce"⁴⁹ other employees (who knew of the employer's motivation) in the exercise of their statutory rights.⁵⁰ When an employer may act openly with an unlawful motivation, the fact that an applicant had a "nontraditional" motivation is not likely the lesson that employees observing surrounding events are likely to draw. On the contrary, non-union employees will see that their employer may discriminate against union-affiliated employees without legal consequence. Thus, not only will union-affiliated applicants suffer actual and immediate anti-union discrimination, non-union employees may be discouraged from exercising *their* rights to join or support a union. Ultimately, the lawlessness may have an expansively corrosive impact. In the words of the *Phelps Dodge* Court, blatantly unlawful refusals to hire "inevitably operate[] against the whole idea of the legitimacy of organization."⁵¹ Additionally, focus on employers' motivations in the salting context would aid the woefully under-resourced NLRB in *preventing* unfair labor practices⁵² through modestly creative use of the typically limited statutory remedies of reinstatement and backpay.⁵³

Having discussed in broad strokes the NLRB's recent shifts in position on salting cases, the discussion will now focus more closely on the case representing the culmination of the change in the NLRB's perspective on salting.

49. Section 8(a)(1) of the NLRA, 29 U.S.C. section 158(a)(1) (2006), states: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7 of the NLRA]. . . ." Section 7, 29 U.S.C. section 157, states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from . . . such activities. . . ."

50. See *Tradesmen Int'l*, 351 N.L.R.B. 399, 404 (2007) (imposing enhanced remedy because employer unlawfully disseminated to non-union employees that purpose of facially neutral hiring practices was in fact to discriminate against salts).

51. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

52. Although the NLRA clearly authorizes the NLRB to prevent unfair labor practices, the authority of the agency to effectively deter unlawful conduct has been severely circumscribed by the courts. See *Weiner*, *supra* note 16, at 1619 ("While the case law attempting to delineate the Board's remedial power is terribly inconsistent, the legislative history of the Act makes clear that Congress aimed to create a statutory scheme that would deter unfair labor practices.").

53. Under the NLRA, the NLRB does not investigate alleged unfair labor practices *sua sponte*. Rather, the agency investigates allegations made by "charging parties." Any person may file a charge. 29 C.F.R. § 102.9 (2011). Once the NLRB issues a complaint in connection with a charge deemed meritorious at the administrative level, "[a]ny person aggrieved" by the subsequent decision of the agency may obtain court review of the administrative determination. 29 U.S.C. § 160(f) (2006). But the fact remains that nothing will happen without a charging party.

B. Toering Electric

In *Toering Electric Company*,⁵⁴ the NLRB took up its most substantial revisiting of the salting issue since its *FES* decision in 2000, a case refining the NLRB's allocation of proof in salting cases.⁵⁵ Perhaps the outcome of *Toering* was never in doubt; it was one of sixty-one decisions handed down in a single month that were adverse to the interests of organized labor.⁵⁶ Simply put, the case severely limited the ability of the NLRB's General Counsel to prevail in salting cases. In the course of dealing that blow to salting campaigns, however, the NLRB's politically divided factions explicitly took on the issue explored here: whether salts serve a private attorney general role in a manner that is permissible under the NLRA. In the ensuing subsections, I first take up a general exposition of the case followed by a narrower consideration of the NLRB's discussion of the analogy of salts to anti-discrimination "testers" utilized in other statutory regimes. The tester analogy brings to the forefront the question of salts' utilization as private attorneys general.

1. The Case

The central issue in *Toering* amounted to an only slightly modified rehashing of the statutory employee question considered in the Supreme Court's 1995 *Town and Country* opinion. In *Town and Country*, the most important salting case to date, the Court held that a salt could be both an employer's employee and a professional union organizer seeking to organize that employer's employees.⁵⁷ In *Toering*, the NLRB held that its General Counsel had the burden of proving that a job applicant was "genuinely interested" in an "employment relationship" with an employer to establish entitlement to statutory protection against hiring discrimination.⁵⁸ A corollary of the holding is that an applicant seeking employment merely for the purpose of exposing an employer's unlawful

54. 351 N.L.R.B. 225 (2007).

55. 331 N.L.R.B. 9 (2000); see *supra* note 46 and accompanying text.

56. *Toering* arose in the context of the "September Massacre," a term coined by organized labor for the group of roughly sixty-one cases decided in management's favor during September 2007 by the "Bush Board." See Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, AM. CONST. SOC'Y, (2008), <http://www.acslaw.org/files/ACS%20September%20Massacre.pdf>.

57. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 94-95 (1995).

58. As a practical litigation matter, the burden of proof question will decide many cases. Placing the burden on the government to establish in the first instance an applicant's genuine interest in employment, as the Board majority did in *Toering*, leaves the agency prosecutor, the NLRB General Counsel, in the position of having to guess what inferences may ripen into "defenses" that must be disproven, since the employer has free rein to litter the record with suggestions of the "non-genuine." Although the NLRB majority described methods by which the General Counsel might meet the initial burden of genuineness, it is evident that vague contours of illegitimacy have opened broad vistas of opportunity for even marginally adroit defense counsel.

hiring practices or obtaining a backpay award is entitled to statutory protection only under unusual circumstances.

To consider the difficulty with the rule one need only think of a discharge case. Imagine an employee who has been hired but who has no genuine interest in remaining with an employer for more than a day (for whatever reason). Imagine further that the employee is discovered by the employer discussing unionization with fellow employees and that the subject employee is promptly discharged for that reason. There is no rule that would require the NLRB to prove that the employee was genuinely interested in continuing employment at the time of the discharge to make out a violation. Stated somewhat differently, I am unaware of a rule that would deny the employee the protection of the NLRA if the NLRB could not prove such genuine interest.⁵⁹

Leaving substance aside momentarily, the parrying in *Toering* may have left casual observers of the NLRB wondering why salting has continued to provoke litigation. Two reasons predominate. First, prior to the NLRB's recent decision in *Oil Capitol Sheet Metal, Inc.*,⁶⁰ the prospect of comparatively large back pay awards prompted litigation of many salting cases that had become relatively expensive to settle.⁶¹ Second, and probably more importantly, salting provides a fertile battleground in which aggressive union agents come directly into contact with equally resistant employers. The visceral encounters between these front line emissaries is symbolic and serves as a showcase for the public of the untidy reality that labor-management conflict is alive and well, and that unions remain willing to combat anti-union employers aggressively.⁶²

Well before the recent salting controversies, the Supreme Court acknowledged that employers' refusals to hire job applicants because of union affiliation were a major impediment to union organizing and a threat

59. The NLRB *has*, however, placed the burden on the General Counsel to prove, after a successful adjudication, that salts unlawfully *discharged* from employment have continuing entitlement to backpay. See *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348 (2007) (reversing the previous longstanding rule); *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001) ("The principle that the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages has as much force in a case involving salts as in any other.").

60. 349 N.L.R.B. 1348 (2007).

61. Under the then existing "moonlighting doctrine," wages paid to a salt by his union were earnings from secondary employment which, consistent with the NLRB's general moonlighting rule, were not offset against the salt's gross backpay. *Ferguson Elec. Co.*, 330 N.L.R.B. 514, 517 (2000). A union salt discriminatorily not hired, or discharged after hire, could limit a post-discrimination work search (necessary to establish continued eligibility for gross backpay) to non-union employers. These employers would often refuse to hire the now loudly overt union salt, creating the possibility of additional unfair labor practice charge filings, and the opportunity for multiple, often concurrent, backpay awards. In some NLRB regions this practice was honed to a fine art. This writer has spent many an afternoon dutifully attempting to calculate backpay awards in such tangled circumstances.

62. As the late musical legend Frank Zappa said with respect to jazz, "[it] is not dead it just smells funny." FRANK ZAPPA, *BE-BOP TANGO (OF THE OLD JAZZMEN'S CHURCH)*, (DiscReet Records, 1974).

to industrial peace.⁶³ However, *Toering* and the NLRB's "impact analysis" categorizations,⁶⁴ which provide explicit directions to NLRB investigators about which cases are deemed most important at each investigative stage, reveal the NLRB's predilection to view salting as a vaguely illegitimate union exercise in inflicting economic injury on non-union employers.⁶⁵ The ameliorative aspects of salting campaigns which courts have recognized are, however, much more subtle.

Salting campaigns are in important respects an unintended consequence of courts' dramatic abrogation of prior labor policy by denying unions' access to employees' workplaces. The Supreme Court's 1992 opinion in *Lechmere v. NLRB* eliminated access by non-employee union organizers to employers' property except in the very rare cases where no reasonable alternatives exist.⁶⁶ Most commentators agree that as a practical matter the opinion banished unions from most workplaces.⁶⁷ If experienced, professional union organizers have no access to employers' property during traditional organizing campaigns, the opportunities for unions to organize are almost by definition severely circumscribed.⁶⁸ And the denial of access has gone even further. One court (as of this writing) has concluded that unions are forbidden from attempting to identify unorganized employees by viewing their license plates as they enter their

63. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

64. Nat'l Labor Relations Bd., Office of the Gen. Counsel, Memorandum 02-02, Impact Analysis Program Modifications (Dec. 6, 2001) (concluding that allegations of unlawful refusals to hire should be given lower investigative priority than charges alleging unlawful discharges because the necessary evidence in refusal to hire cases "is generally peculiarly within the knowledge or possession of the employer, and thus not readily available. Therefore, investigations of such issues necessarily are often more time consuming and difficult than most discharge cases.").

65. According to the *Toering* plurality, "[salting] applicants have been accorded statutory employee status and have been alleged as 8(a)(3) discriminatees even when they have engaged in conduct clearly intended to provoke a decision *not* to hire them, or have engaged in antagonistic behavior toward the employer that is wholly at odds with an intent to be hired." 351 N.L.R.B. 225, 230 (2007). This dicta must be kept in perspective, however, since close scrutiny of some of the cases cited will reveal that many of the most colorful "antagonistic behavior" allegations were only ambiguously credited, see, for example, *Smucker Co.*, 341 N.L.R.B. 35, 36 (2004), a case in which I appeared as trial counsel. From my vantage point in that case, the administrative law judge, Benjamin Schlesinger, did not appear to believe any witness in the case beyond what was absolutely necessary to resolve the convoluted issues presented.

66. 502 U.S. 527, 537 (1992).

67. For a careful consideration of the *Lechmere* opinion, see Cynthia L. Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305 (1994). See also Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1066-70 (1996) (explaining how *Lechmere* encouraged broadened salting, and seeing in both the *Lechmere* and *Gilmer* cases the Supreme Court's "growing inclination against interpreting civil rights laws broadly in the public interest as it once did").

68. This is to take nothing from the view that a traditional organizing campaign can be achieved with a strong core of "inside" employees. It is merely to point out the diminished likelihood that such a core could obtain adequate direction—especially in the early stages of an organizing campaign—without the aid of professional organizers who have "seen it all before."

employers' facilities,⁶⁹ further diminishing unions' opportunities to gain access to and communicate with employees.⁷⁰

The arrival of the Twenty-First Century does not compel the conclusion that unions denied workplace access by courts will never regain it.⁷¹ On the contrary, salting might best be thought of as a very early glimmer of unions' Twenty-First Century responses to judicial denial of their physical access to employees during traditional organizing campaigns.⁷²

A different and in some respects even more interesting question than the protection of union salting activity during traditional organizing campaigns is whether salting activity with no organizational objective in the traditional sense is unprotected by the NLRA.⁷³ The premise underlying such a case is that a union undertakes salting activity solely because of suspicions that an employer will commit unfair labor practices, and thus filing an unfair labor practices charge will lead to backpay liability and payment of attorneys' fees. Assuming the premise to be correct, holding an employer accountable for unlawful discrimination has a fundamental organizational objective because an unfair labor practices charge could remove an illegitimate obstacle to union organization in unorganized workplaces. Removal of such obstacles facilitates any union's ultimate

69. *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008) (holding that union's recording of license plate numbers in employee parking lot and using them to obtain employees' addresses from motor vehicle records during organizing drive violated Driver's Privacy Protection Act).

70. On the critical relationship between employees' ability to organize and their ability to communicate with each other and with others, see Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1553031>.

71. *Cf. Vegelahn v. Gunter*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting) ("One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return.")

72. The construction industry—where salts have primarily operated—may simply have been a precursor to the broader "new" economy as Professor Jim Pope describes it:

It seems clear that there has already been a paradigm shift in business organization. The old model of geographically fixed, bureaucratic, industrial companies operating primarily in national markets no longer prevails. There is uncertainty about what has replaced it, but some elements seem fairly clear. Flexibility and mobility—including mobility across national boundaries—have replaced predictability and stability as core values in business organization. Corporations increasingly resist long-term attachments of all types. Large-scale bureaucracies, which assign functions to internal divisions, are giving way to core firms that assign functions to "independent" contractors. In employment, the old imperative of retaining experienced workers is now less of a concern than the capacity to shed excess workers or recruit new ones in response to fluctuating market conditions.

Pope, *supra* note 16, at 515-16. Salting campaigns, in addition to being a reaction to denial of access, might also be thought of as early reactions to the new volatile economy.

73. I will have more to say about this *infra* at IV.D.

organizational objective of organizing all unorganized employers in a given industry.⁷⁴

Even in the narrowest sense of “organizational objective,” however—an organizational objective most commonly reflected in the “hot shop” workplace-by-workplace model now so widely disfavored by contemporary unions⁷⁵—*Toering* in effect holds that because the filing of unfair labor practice charges *may* be motivated by “non-organizational” objectives in *some* salting cases, the General Counsel carries the prima facie burden of proving the bona fides of *all* salts in *all* salting cases.⁷⁶ This rule is in severe tension with *Town & Country*. In that case the Court never doubted that an employee’s organizational objectives might come into conflict with employment duties. But, “[a] company faced with unlawful (or possibly unlawful) [worker] activity can discipline or dismiss the worker.”⁷⁷ The critical point of *Town & Country* is that employees are presumed to be employees until they have done something to remove themselves from the protection of the NLRA. “After all, the employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity.”⁷⁸ But *Toering* insists tenaciously on a presumption that a paid union organizer applicant—an acknowledged statutory employee⁷⁹—is “non-genuine,”⁸⁰ and requires the General Counsel to prove otherwise as part of her case-in-chief.⁸¹

2. *The Tester Digression*

Both the majority and the dissent in *Toering* recognized that a salt applying to a nonunion employer to obtain evidence of discriminatory hiring practices was analogous to a tester applicant in Title VII and civil rights contexts.⁸² Not surprisingly, the two sides applied the tester analogy quite differently.

The majority, consisting of Board members Battista, Schaumber and Kirsanow, carefully confined the question of testers to the Title VII context, and asserted that Title VII and the NLRA, while possessing some similarities, “have distinct purposes and significantly different statutory schemes to accomplish them.”⁸³ For example, the majority argued, “Title

74. *Infra*, Section IV.D.

75. See *infra* note 212 and accompanying text.

76. *Toering Elec. Co.*, 351 N.L.R.B. 225, 239 (2007) (Liebman & Walsh, dissenting).

77. *NLRB v. Town & Country Elcc., Inc.*, 516 U.S. 85, 97 (1995).

78. *Id.* at 96.

79. *Toering*, 351 N.L.R.B. at 232.

80. *Id.* at 228.

81. *Id.* at 233.

82. *Id.* at 231, 240.

83. *Id.* at 231.

VII protects ‘individuals’ from discrimination, while only those individuals who are statutory ‘employees’ are entitled to the protections of the Act.”⁸⁴ Further,

under Title VII, Congress authorized an aggrieved individual to act as a “private attorney general” and to pursue claims of employment discrimination by filing a charge with the Equal Employment Opportunity Commission and a civil action in court. No equivalent provision exists in the Act, which vests exclusive prosecutorial authority in the office of the General Counsel.⁸⁵

The majority also argued that, “Title VII sweeps far more broadly than the [NLRA], prohibiting not only acts of discrimination, such as discriminatory refusals to hire, but also the *segregation or classification* of any individual on the basis of impermissible criteria.”⁸⁶ Quoting the Seventh Circuit’s opinion in *Kyles v. J.K. Guardian Security Services*,⁸⁷ the majority contended,

[T]esters have standing to sue [because] Title VII “created a broad substantive right that extends far beyond the simple refusal or failure to hire.” The Act contains no comparably broad right. Hiring discrimination under the Act simply cannot occur unless the individual actually was seeking an employment opportunity with the employer. Thus, even assuming the Seventh Circuit has correctly interpreted Title VII, the same interpretation of antidiscrimination protection under the Act is not warranted.⁸⁸

Noting that the *Kyles* opinion had addressed testers’ standing and not the underlying merits of the suit, the majority explained that the potential injuries supporting standing in a Title VII suit: “‘humiliation, embarrassment, and like injuries . . . do not constitute discrimination in regard to hire under Section 8(a)(3), which requires proof that an employee’s *employment conditions* were adversely affected by his or her engaging in union or other protected activities.”⁸⁹

The *Toering* dissent, comprised of Board members Liebman and Walsh, countered by arguing that “there is a compelling statutory interest in uncovering, redressing, and deterring hiring discrimination under the National Labor Relations Act, as under Title VII of the Civil Rights of 1964, where ‘tester’ applicants have been held to have standing to bring

84. *Id.*

85. *Id.* at 231-32.

86. *Id.* at 232

87. 222 F.3d 289, 300 (7th Cir. 2000) (holding that testers posing as job applicants to gather evidence of discriminatory hiring practices have standing to sue).

88. *Toering*, 351 N.L.R.B. at 232.

89. *Id.* (quoting *Wright Linc*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)) (internal quotations and emphasis omitted).

[hiring discrimination] claims.”⁹⁰ The dissent argued that the NLRB’s prior standard for analyzing refusal-to-hire cases adequately addressed the issue of an applicant’s genuine desire to obtain employment.⁹¹ It noted that the Seventh Circuit in *Kyles* rejected the claim that Title VII, in order to establish a prima facie case of employment discrimination, required job applicants to have a bona fide interest in working for the employer to which they applied.⁹² The dissent additionally observed that the federal Equal Employment Opportunity Commission had adopted the position at the agency level that testers have standing.⁹³ The dissent also squarely disagreed with the majority concerning the scope of the NLRA, arguing both that the broad employee definition of the NLRA paralleled the protection of “individuals” under Title VII and that the proscribed conduct under Sections 8(a)(1) and (3) of the NLRA reached all conduct, however characterized, tending “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”⁹⁴

3. Broader Assessment of the Tester Digression

To fully assess the competing arguments at play in *Toering*, a broader perspective respecting testers is required. The important question is not simply whether tester cases have primarily concerned standing, as the *Toering* majority concluded blithely. The use of testers reflects the general difficulty of uncovering the unlawful discriminatory practices of even marginally sophisticated actors, which is necessarily one policy goal of any anti-discrimination statute. By implication, if testers are useful to eradicate discrimination in some statutory regimes, it is difficult to understand why testers would not be useful in others. Even more broadly, the private party facilitation of statutory enforcement policy directly implicates the private attorney general role of union salts.

The use of testers originated in the housing discrimination context, and the Supreme Court implicitly upheld the practice in *Havens Realty Corp. v. Coleman*.⁹⁵ In *Havens*, it was alleged that two testers had been provided conflicting information regarding the availability of apartments in two

90. *Id.* at 240 (Liebman & Walsh, Members, dissenting).

91. *Id.* at 240-41.

92. *Id.* at 240 (citing *Kyles*, 222 F.3d at 300).

93. *Id.* at 245 n.12 (citing EQUAL EMPLOYMENT OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: WHETHER “TESTERS” CAN FILE CHARGES & LITIGATE CLAIMS OF EMPLOYMENT DISCRIMINATION, (May 22, 1996), available at <http://www.eeoc.gov/policy/docs/testers.html>).

94. *Id.* (quoting *Waumbec Mills, Inc.*, 15 N.L.R.B. 37, 46 (1939), enforced as modified by 114 F.2d 226 (1st Cir. 1940) (holding that discriminatory refusals to hire violated statutory precursor to NLRA § 8(a)(1))).

95. 455 U.S. 363 (1982).

separate apartment complexes in Henrico County, Virginia.⁹⁶ It was further claimed that the defendant realty company deliberately provided the differing information because it wanted to steer black renters away from the complexes: a black tester was informed that no apartments were available, while a white tester was informed that the complexes had vacancies.⁹⁷ The Fair Housing Act made it unlawful to refuse to rent a dwelling to any person on the basis of race, but a threshold requirement for the finding of a violation was that the putative renter must have made a bona fide offer to rent.⁹⁸ Another section of the Act, however, made it flatly unlawful for any entity covered by the Act “[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.”⁹⁹ Thus, assuming the testers in the case had not made a bona fide offer to rent an apartment, arguably removing them from coverage by § 3604(a) of the Act, their receipt of unlawful misrepresentations appeared to bring them within the purview of § 3604(d).

Still, the fact remained that the testers had not had any intention of actually renting an apartment. The trial court summarily dismissed the complaint, holding that the testers had no standing to sue under the Act because they had not suffered a concrete injury.¹⁰⁰ Speaking to this contention, the Supreme Court opined,

A tester who has been the object of a misrepresentation made unlawful under § [3604](d) [of the Fair Housing Act] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act’s provisions. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § [3604](d).¹⁰¹

In other words, the Supreme Court concluded that the statute itself defined an injury that the plaintiffs had in fact suffered. While Congress might have limited statutory beneficiaries under § 3604(d) to “genuine” apartment seekers, as it had done in §3604(a), the Court was not willing to read a genuineness requirement into an additional subsection, particularly since Congress had demonstrated in the same section that it knew how to impose such a limitation.¹⁰²

96. *Id.* at 368.

97. *Id.* at 368-69.

98. *Id.* at 374 (citing Fair Housing Act, 42 U.S.C. § 3604(a) (2006)).

99. *Id.* at 373 (quoting 42 U.S.C. § 3604(d)).

100. *Id.* at 369.

101. *Id.* at 373-74.

102. 42 U.S.C. § 3604 states:

The *Havens* Court did not discuss in explicit terms the policy underlying the use of testers in statutory discrimination cases, focusing instead on the narrower threshold question of tester standing. The Fourth Circuit Court of Appeals, however, in the underlying opinion, explicitly considered the policy implications of the use of testers.¹⁰³ Noting their use in earlier civil rights cases,¹⁰⁴ the court remarked,

The basic appropriateness of affording [the testers] standing to litigate today's issues of fair housing parallels the importance of the right to litigate the crucial issues decided in [the earlier civil rights cases]. . . . There are, of course, distinctions in the cases, but the binding similarity is that they all treat the right of testers to challenge actions frustrating vital public policy where in most instances no other effective challenge could be mounted.¹⁰⁵

Following the *Havens* litigation, the Seventh Circuit, in *Richardson v. Howard*, cogently summarized the rationale for judicial approval of testers in housing discrimination cases:

It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.¹⁰⁶

[I]t shall be unlawful [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a).

103. *Coles v. Havens Realty Corp.*, 633 F.2d 384, 387 (4th Cir. 1980).

104. The court cited *Pierson v. Ray*, 386 U.S. 547 (1967), and *Evers v. Dwyer*, 358 U.S. 202 (1958). The term "testers" was not used in the cited cases. The plaintiffs in *Pierson* "actively sought integrated admission to the 'whites only' section of a bus station." *Coles*, 633 F.2d at 387. In *Evers* the plaintiffs "occupied seats in the forbidden section of a bus." *Id.* In *Evers* the Court wrote, per curiam:

A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability. That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant.

Evers, 358 U.S. at 204, quoted in *Coles*, 633 F.2d at 387.

In *Pierson*, a group of clergymen traveled to Jackson, Mississippi, for the sole purpose of testing their rights to nonsegregated public accommodations. The *Coles* court, quoting *Pierson* with approval, stated, "(t)he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under section 1983." *Coles*, 633 F.2d at 387-88 (quoting *Pierson*, 386 U.S. at 558).

105. *Coles*, 633 F.2d at 387.

106. 712 F.2d 319, 321 (7th Cir.1983).

The limits of the standing concept announced in *Havens* are still unfolding, but courts have extended the principle to employment discrimination cases.

In *Tandy v. City of Wichita*,¹⁰⁷ the Tenth Circuit held that testers had standing to sue under Title II of the Americans with Disabilities Act. As previously noted, the NLRB observed in *Toering* that the Seventh Circuit had approved tester standing in Title VII cases in *Kyles*. Relying expressly on *Kyles*, the Eighth Circuit, in *Shaver v. Independent Stave Co.*, joined the Tenth Circuit in conferring tester standing on a Title II ADA plaintiff.¹⁰⁸ The *Shaver* court rejected objections that the case before it should not be allowed to proceed because the underlying claims by testers had been artificially manufactured. The court agreed with the argument that the mere fact of discrimination offended the dignitary interest that the ADA was designed to protect irrespective of actual harm done to the plaintiffs in the case.¹⁰⁹ The court secondarily noted that tester cases had been allowed to proceed on a “private attorney general” theory.¹¹⁰

Thus, the majority’s claim in *Toering*—that the tester principle is narrowly limited to Title VII cases differing materially from cases implicating NLRA policies—is an oversimplification. In reality, various courts have agreed *across statutory regimes* with the necessity of utilizing testers to remedy discrimination. While the arguments in tester cases have centered on standing, there has been little policy disagreement on the need to develop mechanisms to ferret out discrimination that is otherwise difficult to reach.¹¹¹ Moreover, the claim that testers do not have standing if their objectives are merely to generate litigation has gained almost no traction in the courts.¹¹² In any event, because standing questions are essentially irrelevant in administrative enforcement contexts,¹¹³ a conclusion by the NLRA that salts are entitled to protection on a private

107. 380 F.3d 1277, 1287 (10th Cir. 2004).

108. 350 F.3d 716, 723-24 (8th Cir. 2003).

109. *Id.* at 724-25.

110. *Id.*

111. So well established does the principle appear to have become that it was not even argued by defendants, on appeal in *Paschal v. Flagstar Bank*, 295 F.3d 565 (6th Cir. 2002), that the testers involved in that case lacked standing or that testers did not represent an effective tool for uncovering discrimination. The narrow tester-related issue in *Paschal* was whether evidence uncovered by testers—tending to show that a loan officer was a racist—should be excluded from jurors because of the danger of unfair prejudice. *Id.* at 579.

112. *See, e.g.*, *U.S. v. Balistrieri*, 981 F.2d 916, 929 (7th Cir.1992). In that case the Attorney General litigated a pattern and practice Fair Housing Act case supported solely by evidence that discrimination had been perpetrated against testers who had attempted to rent apartments. *Id.* at 924-25. The Seventh Circuit rejected with little discussion the defendant apartment complex’s argument that no violation of the Act could be found because the tester-applicants were not actually seeking apartments. *Id.* at 929

113. *See infra* at Section II.

attorney general theory is defensible on substantive grounds and could not justifiably be defeated by standing objections.

Turning again to substance, Professor Yelnosky has advanced a straightforward and compelling theory of why testers are necessary to prevent unlawful employment hiring discrimination.¹¹⁴ Yelnosky notes that “[i]f victims of [employment discrimination] do not sue, employers have less economic incentive to comply with the [relevant employment] statute.”¹¹⁵ A typical employment applicant may become discouraged by subtly disparate conduct not easily recognized as potentially unlawful. An employer may claim that it does not possess job application forms, may interview an applicant in a manner suggesting at the outset that it is not serious about the applicant’s candidacy, or may attempt to steer the applicant to undesirable jobs.¹¹⁶ While an unsophisticated applicant might not recognize the potential unlawfulness of such conduct, testers are typically trained to detect a wide range of possible illegality.¹¹⁷

Much like testers within the Title VII and civil rights arenas, salts are well positioned to prevent employment discrimination in the NLRA context. Indeed, salts are better positioned than testers in other anti-discrimination contexts precisely because they are not limited by the standing doctrine.¹¹⁸ Accepting that the NLRA and Title VII have differing policies and statutory beneficiaries, each statute nevertheless prohibits refusals to hire for proscribed statutory motivations. The *Toering* majority’s silence regarding similarities in the enforcement objectives of the two statutory regimes represents a failure to address seriously the dissent’s private attorney general argument. One reason for the failure may be that the majority simply did not have a persuasive response. Another reason for the failure may be that the majority’s conception of private attorneys general was too narrow, and for that reason it is worth considering more

114. Yelnosky, *supra* note 8

115. *Id.* at 413

116. *Id.*

117. For a discussion of how certain employers have structured job application processes to encourage applications from vulnerable Latino employees, see Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 973-74 (2006). In reaction to salts’ significant successes in defeating union avoidance techniques, employers went about the business of developing hiring practices that had the practical effect of screening out union applicants. For example, employers have successfully claimed that they only accepted applications from referred applicants, or from applicants with no history of having earned wages in excess of the rate of a presently available job opening. In one notable case, an employer claimed, and the Seventh Circuit accepted, that it only accepted applications from “unknown” job seekers “on Mondays.” *Local 150 v. NLRB*, 325 F.3d 818, 820 (7th Cir. 2003). The “Bush Board” was inclined to accept many questionable “neutral hiring policies.” See, e.g., *Tradesmen Int’l*, 351 N.L.R.B. 399, 401 (2007) (upholding temporary service employer’s preexisting policy that it only accepted applications from employees who called ahead to arrange for an interview).

118. See *infra* at Section III.

fully the nature of private attorneys general in order to critique more precisely the majority's analysis.

III. PRIVATE ATTORNEYS GENERAL

To consider the tester argument in the context of the NLRA properly, private attorneys general must be conceived in terms broader than those the *Toering* majority was prepared to recognize. As I will discuss presently, the essential private attorney general rationale requires little explanation. The sticking point in many of the tester cases discussed in the previous Part has been the standing of private attorney general plaintiffs. Indeed, it is for that reason that the *Toering* majority could claim that the tester cases were “about” standing. *Toering*'s private attorney general digression failed to take into account that administrative enforcement allows the use of private attorneys general in a manner unencumbered by standing and attorneys fee issues. I first discuss the private attorney general in broad contours and then move on to consideration of its changed features in an administrative enforcement context.

The majority's discussion of the applicability of testers and private attorneys general to the NLRA implicitly accepts some first principles in a standard private attorneys general analysis. That analysis must always begin with the observation that an under-enforced statute is of little worth in accomplishing the intent of its drafters.¹¹⁹ Despite this truism, however, federal regulatory agencies' decisions not to enforce statutes that they have been entrusted to implement are largely unreviewable in courts.¹²⁰ Some of these decisions have more to do with the agency's dearth of resources than with a substantive determination that a potential enforcement option is meritless.¹²¹ For this reason Congress, in enacting various statutory schemes, has from time to time provided for “private attorney general” mechanisms. That is, provisions broadening the class of persons or entities authorized to bring court actions, often styled as “citizen suits,” to

119. Obviously, visionary objectives of the original conceivers of legislation are not consistently reflected in the resulting statutory sausage. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1405-06 (1998) (explaining, in the course of a broader discussion on government enforcement priorities, how the absence of meaningful remedies under an early version of the Fair Housing Act resulted in unacceptably limited enforcement litigation). For an analysis of the intent of the drafters of prototypical provisions of the NLRA relying on early drafts of statutory language, see Kenneth Casebeer, 11 INDUS. REL. L. J. 73 (1989).

120. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

121. *Id.* Agencies may lawfully, if disappointingly, decline to bring enforcement actions for a variety of reasons, some of which are not obvious. For example, enforcement decisions may be driven by the private, career eccentricities of agency attorneys. See Selmi, *supra* note 119, at 1442-47. Ultimately, however, the actions of agency attorneys are governed by the overall enforcement priorities of their employing agencies.

effectuate enforcement, often by paying their attorneys' fees, thereby facilitating implementation of the policies of the underlying statutes without the need for agency action.¹²² In effect, the provisions authorize private actors to pursue public statutory policies.

One threshold problem associated with private attorney general provisions is the standing of a congressionally-broadened plaintiff class to bring court cases. Regardless of the intended breadth of such provisions, plaintiffs must have constitutional standing to bring court actions.¹²³ Standing obstacles to court actions may also arise by virtue of "prudential" standing considerations. Plaintiffs possessing constitutional standing may nonetheless be barred from bringing court actions if their claims do not fall within the "zone of interests" of an underlying statute, raise generalized grievances, or seek to vindicate the interests or claims of third parties not before the court.¹²⁴

Accordingly, locating plaintiffs with sufficiently "concrete" claims to bring statutory enforcement actions in the public interest may prove more difficult than the drafters of private attorney general provisions had originally anticipated. One facile explanation for the difficulty is that real injuries do not occur for a private attorney general. The enactment of private attorney general provisions, however, has demonstrated Congress's conviction that elusive societal injuries may best be remedied by private action.¹²⁵

Statutory enforcement actions brought by administrative agencies significantly alter the standing dynamic. Agency prosecutors, by virtue of enabling statutes, have authority to litigate matters within the agency's statutory mandate.¹²⁶ But situations may arise in which agencies deciding *not* to pursue individually filed administrative claims in court—either

122. "Since 1970, Congress has included provisions authorizing . . . citizen suits in almost all of the environmental statutes it has passed." Robin Kundis Craig, *Will Separation of Powers Challenge "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons From Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 93 (2001). For a discussion of the Administrative Procedure Act's embrace of the private attorney general concept, see Cass R. Sunstein, *What's Standing After Lujan—Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 181-82 (1992).

123. Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 297 (1988).

124. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *see also* *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

125. *See* Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442-43 (2007) (discussing the initial development of the private attorney general mechanism as a progressive legal stratagem in aid of civil rights statutory enforcement); *but see* Selmi, *supra* note 119, at 1454-55 (arguing that in reality, Fair Housing Act and Title VII enforcement mechanisms were deliberately limited by Congress in a manner suggesting that it was primarily concerned with over-enforcement rather than with under-enforcement).

126. *See, e.g.*, NLRA § 10(c), 29 U.S.C. § 160(c) (2006) ("The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of [its] order. . . .").

because of a lack of resources or because of a finding that a claim lacks merit—nonetheless authorize administrative claimants to pursue court actions by, for example, issuing “right to sue” letters.¹²⁷ Similarly, administrative claimants who would arguably possess problematic standing if their claims could initially be pursued in a court, might have enforcement aims that agencies deem valuable on policy grounds.

The second situation, involving administrative claimants with theoretically problematic court standing, is relevant to a discussion of union salts. A frequently raised argument in the salting debate is whether a salt without traditional organizational objectives can be injured within the meaning of the NLRA.¹²⁸ This argument improperly focuses on individual injury to the exclusion of the broader public injury that the NLRA was meant to remedy.¹²⁹ Viewing salts within a larger public remediation context changes the contours of the debate; and an evaluation of salts’ function as private attorneys general leads to expanded public law considerations.

Professor Rubenstein has argued that there is a matrix of forms of private attorneys general. He maps the variety of private attorneys general under three headings: substitute attorney general, supplemental law enforcer, and simulated attorney general.¹³⁰ The first and third of these forms are not relevant to this discussion; substitute attorneys general “literally perform the exact functions of the attorney general’s office,”¹³¹ while simulated attorneys general act on behalf of a class of persons but are “not substituting for the attorney general, nor [are they] generally rewarded because [their] actions contribute to a public good.”¹³² Neither salts nor their tester analogues perform the exact functions of the attorney general’s office, and are therefore not “substitutes” within Rubenstein’s scheme. Salts, moreover, seek to vindicate the broad policies of the NLRA, a statute enacted for the public good, not by simulating the action of a prosecutor but

127. The Civil Rights Act of 1964, for example, instructs the Equal Employment Opportunity Commission to follow this procedure. *See* 42 U.S.C. § 2000c-5(f) (2006).

128. *See* *Toering Elec. Co.*, 351 N.L.R.B. 225, 232 (2007) (arguing that injuries cognizable in certain areas of employment discrimination law are not similarly cognizable under the NLRA).

129. The NLRA explicitly defines its underlying policy as an attempt to remedy a public injury:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (2006).

130. Rubenstein, *supra* note 4, at 2143-55.

131. *Id.* at 2143.

132. *Id.* at 2155.

by seeking its aid, in this context the NLRB, the public prosecutor of the NLRA.

The supplemental form of private attorney general identified by Professor Rubenstein, on the other hand, appears to capture the activity of salts more closely. Supplemental private attorneys general are not paid for their services by a government salary, but by their adversaries;¹³³ they are clearly not representing the government, but pursue both public and private interests.¹³⁴ While the existence of any private interest may call into question the bona fides of the public interest, many cases have relatively little at stake,¹³⁵ and pursuit of their scant interests is ultimately justified by a broad deterrent impact in the public interest.¹³⁶

As Rubenstein further notes, despite the apparent disfavor with which courts have greeted the private attorney general model in recent years, “supplemental attorneys general continue to play significant detection and pursuit functions.”¹³⁷ As examples of these functions, Rubenstein includes *qui tam* relators, “who [are] authorized, in the first place, precisely because it is believed that private parties (whistle blowers) will be in a better situation to uncover fraud,”¹³⁸ citizen groups in environmental enforcement, and the pursuit of mass torts.¹³⁹

Regardless of the undeveloped contours of the private attorney general debate at the National Labor Relations Board,¹⁴⁰ the question of whether private attorneys general will be utilized should not be encumbered by standing analysis, for reasons explained in the Supreme Court’s opinion in *EEOC v. Waffle House*.¹⁴¹ The issue in *Waffle House* was whether an agreement between an employer and an employee to arbitrate employment disputes defeated the EEOC’s statutory jurisdiction to pursue “victim-specific judicial relief” in an enforcement action under the ADA.¹⁴² The employee had signed a job application that broadly recited that employment disputes would be resolved in arbitration.¹⁴³ When the employee suffered a

133. *Id.* at 2153.

134. *Id.*

135. *See infra* at IV.C. for a discussion of backpay recovery by salts in comparison with other schemes of “bounty” recoveries.

136. Rubenstein, *supra* note 4, at 2153.

137. *Id.* at 2152.

138. *Id.* A *qui tam* relator is a plaintiff authorized by statute to sue on behalf of the Government. *See Craig, supra* note 122, at 141-42.

139. Rubenstein, *supra* note 4, at 2152.

140. *See supra* at Section II.B.2.

141. 534 U.S. 279 (2002).

142. *Id.* at 282.

143. *Id.* at 282-83.

seizure fourteen days after employment, and was discharged thereafter, he filed an ADA claim with the EEOC, but never sought arbitration.¹⁴⁴

After an investigation, the EEOC filed an enforcement action in a Federal District Court.¹⁴⁵ The employee was not a party to the case.¹⁴⁶ The EEOC's complaint alleged that Waffle House "engaged in employment practices that violated the ADA," and requested injunctive relief to "eradicate the effects of [the employer's] past and present unlawful employment practices," and also sought backpay, reinstatement, and compensatory and punitive damages for the employee.¹⁴⁷ Waffle House filed a petition under the Federal Arbitration Act to stay the EEOC's suit and compel arbitration, or to dismiss the action.¹⁴⁸

The District Court denied Waffle House's petition to stay on the theory that an agreement to arbitrate had not in reality been included in the employment contract between Waffle House and the employee.¹⁴⁹ On appeal, the Second Circuit held that the EEOC was not precluded from challenging in court Waffle House's employment practices, but was precluded from pursuing victim specific relief on the employee's behalf, because such an action would contravene a valid agreement to arbitrate, impugning the pro-arbitration policies of the FAA.¹⁵⁰

Taking the case up on certiorari, the Supreme Court agreed with the proposition that the EEOC could continue to pursue an enforcement action in connection with Waffle House's employment practices and, contrary to the Second Circuit's conclusion, found that the agency was not precluded from pursuing victim-specific relief. According to the Court, an individual's administrative claim was subsumed in the EEOC's public prosecution of an alleged violation of law and once the agency had made the decision to litigate in the courts it was the complete master of its own case in the judicial forum.¹⁵¹ The Court did not discuss issues of standing, and the silence in that regard is noteworthy because the standing arose in the context of EEOC's stated position that it was authorized to pursue a claim even when the original administrative claimant declined to continue with his or her case, leaving *no* individual claimant for a victim-specific remedy.

Unlike the EEOC, the NLRB's enabling statute, the NLRA, affords no private right of action, and the agency at all times pursues a public mandate.

144. *Id.* at 283.

145. *Id.*

146. *Id.*

147. *Id.* at 283-84.

148. *Id.* at 284.

149. *Id.*

150. *Id.* at 284-85.

151. *Id.* at 291-92.

Under the NLRA, the NLRB prosecutor, the labor board's General Counsel, has exclusive control over pursuit of NLRA court litigation, aligning NLRA enforcement with the EEOC's claimant-less pursuit of cases.¹⁵² Additionally, the NLRB's authority to prevent unfair labor practices, with very limited exceptions, "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."¹⁵³ Thus, even more than is the case with the EEOC's procedures, it is the NLRB's province—not that of a court—to determine whether public resources should be committed to the recovery of victim-specific relief.¹⁵⁴ *Waffle House* teaches that once the determination of resource expenditure has been made, the standing of original administrative claimants—which by extension includes salts—is irrelevant to subsequent court litigation. Victim-specific relief may be pursued even in the absence of a victim.

Accordingly, the private attorney general question is significantly simplified in administrative contexts. If the enabling statute authorizes the agency to proceed in a judicial forum standing concerns are nonexistent, and it can take its victims—provided they are employees, which is the question *Town & Country* resolved—as it finds them. Furthermore, entitlement of salts to attorneys' fees, the other ground of the private attorney general battle in the courts, is not of significance. The Government, by statute, is the attorney in administrative enforcement actions.

Thus, it is this "administrative" aspect of the private attorney general conception that the *Toering* majority appears never to have considered. The majority failed to explain why the NLRB is without authorization to ensure statutory protection of patterned and strategic charge filing by private beneficiaries because the filing has the effect of bringing into relief unlawful hiring practices. To dismiss such a theory merely because it is vaguely dissimilar from private attorney general litigation transpiring in court-based litigation, as the *Toering* majority appeared to do, at best glosses the point.

However, what an agency may do is not the same thing as what it should do. Part III will now consider whether and when the NLRB has legitimate reasons for not affording the NLRA protection at its disposal.

152. NLRA § 3(d), 29 U.S.C. § 153(d) (2006).

153. NLRA § 10(a), 29 U.S.C. § 160(a) (2006).

154. See *Waffle House*, 534 U.S. at 291.

IV.
THE “INDEFENSIBILITY” CANARD

As I have shown in the previous Part, no “administrative standing” impediment to salts or their claims exists, so the problems typically present in court-based private attorney general litigation are conspicuously absent.¹⁵⁵ Under an administrative private attorney general theory, the NLRB *may* take advantage of salts’ privately motivated union activity to identify and root out unlawful hiring practices. The question remains, however, as to whether the NLRB should nevertheless refuse—within the limits of its discretion—to pursue certain types of salting claims because they are “indefensible”? Historically, the NLRB has not been clear about why certain types of apparently protected conduct are “indefensible,” so the question warrants exploration.¹⁵⁶

It should be borne in mind that the NLRB need not—indeed, may not under *Town & Country*—deny protection to salts in absolute terms to neutralize them. The agency through its own devices can make salting cases so difficult to prove that NLRB regions become discouraged from issuing administrative complaints, rendering it effectively fruitless for unions to file salting charges. The NLRB’s recent course suggests it is taking this approach, apparently on the view that certain forms of salting are inherently indefensible.¹⁵⁷ The contours of the agency’s indefensibility

155. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 166 (1997) (observing that the operation of private attorney general provisions depends on textual evidence of a statutory scheme to rely on private litigation). The analysis I am positing here requires no resort to such textual evidence because private actors merely prompt public enforcement.

156. A very early example is *Harnischfeger Corp.*, 9 N.L.R.B. 676 (1938) (finding an employee slowdown in production “indefensible,” though nothing in statute defined the term). Nor, indeed, have the courts been clear. In a major case, *NLRB v. Local Union No. 1229*, known to labor lawyers as the “Jefferson Standard” case, the NLRB and the Supreme Court approved the discharge of employees who, without calling a strike, distributed handbills to the public that disparaged the quality of an employer’s product and business policies. 346 U.S. 464, 471 (1953). The employees’ action was found to be a deliberate undertaking, beyond the protection of Section 7, to alienate the employer’s customers by impugning the technical quality of its product. *Id.* at 477. According to the NLRB, these tactics were not related to the employees’ interest as employees in their bargaining dispute with the employer, and were “hardly less indefensible than acts of physical sabotage.” *Id.* (internal citation and quotations omitted). The Supreme Court upheld the Board by answering a different question than had been raised in the proceedings below, *viz.* whether the discharges were “for cause” within the meaning of Section 10 of the NLRA. Below, the District of Columbia Circuit was of the view that, in employing the term indefensible, “The Board, with the exception of one of its own decisions, draws only upon cases involving such unlawful means as ‘sit-down strikes, sabotage, violence or similar conduct.’” *Local Union No. 1229 v. NLRB*, 202 F.2d 186, 188-89 n.17 (D.C. Cir. 1953) (citing cases). Thus, the Supreme Court allowed the NLRB to expand an already vague term to deny statutory protection to conduct that was never declared unlawful or explicitly removed from the protection of the NLRA. For additional discussion of the *Jefferson Standard*, see *infra* note 206 and accompanying text.

157. See, e.g., *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348, 1357 (2007) (dissenting opinion) (“The majority’s new approach in contrast, not only violates the well-established principle of resolving remedial uncertainties against the wrongdoer, but also treats salts as a uniquely disfavored class of

instincts are murky. To the extent that these outlines can be articulated, they probably involve equitable considerations evoked when certain categories¹⁵⁸ of salting suggest general theories of entrapment, fraud, and unjust enrichment, or when salting campaigns fail to reveal a traditional organizational objective. The following subsections further examine each of these potentially “indefensible” categories.

A. Entrapment

The NLRB has thus far not accepted entrapment defenses raised by employers in salting cases. Nevertheless, because the argument that salting is tantamount to entrapment has surface appeal sufficient to cause the NLRB to revisit the defense in the future, I explore it here. To restate a classical formulation of the entrapment defense, a law enforcement official, or an undercover agent acting in cooperation with such an official, perpetrates an entrapment when, for the purpose of obtaining evidence of a crime, he originates the idea of the crime and then induces another person to engage in conduct constituting such a crime when the other person is not otherwise disposed to do so.¹⁵⁹

Typically cognizable only in criminal proceedings, some argue that the entrapment defense has incrementally been extended to civil cases, though I disagree.¹⁶⁰ Assuming for argument’s sake its applicability to civil cases, however, the entrapment defense has been raised at the NLRB when a job application has so prominently reflected an applicant’s union affiliation that it may reasonably be inferred that the applicant anticipated an adverse action by the employer.¹⁶¹ In one of the several iterations of litigation involving the Sunland Construction Company in the 1990s, for example, applicants applied for work on a construction site and prominently reflected on their job applications that they were union organizers.¹⁶² Sunland argued that the applicants had an ulterior purpose for applying and that, “[t]he placement of the term ‘voluntary union organizer’ on the applications, and

discriminatees, notwithstanding the Supreme Court’s ruling that salts are protected employees under the National Labor Relations Act.”)

158. For what I mean by “categories” of salting, see *infra* at Section IV.D.

159. See, e.g., *Sorrells v. U.S.*, 287 U.S. 435, 441-42 (1932).

160. See *Yelnosky*, *supra* note 8, at 476 n.343 (citing three civil cases in which courts entertained an entrapment defense). The clear majority rule seems to be that “[e]ntrapment is not a civil cause of action; entrapment is only a defense to a criminal action.” See, e.g., *Kondrat v. O’Neill*, No. 86-3263, 1987 WL 36390, at *1 (6th Cir. Feb. 17, 1987).

161. Unambiguous revelation of union affiliation would tend to defeat in advance any contention that an employer did not know of or suspect the affiliation, thereby buttressing a refusal-to-hire prima facie case. It has been argued, however, that the applicant’s interest in litigation reflects lack of a genuine interest in actual employment. See, e.g., *Sunland Constr. Co.*, 311 N.L.R.B. 685, 696 (1993) (discussing employer’s argument that overt union organizers “attempted to get hired at the [job] site merely to be fired almost immediately, in order to file charges against [the employer]”).

162. *Id.* at 700-01.

the fact that some were already employed, further demonstrates that employment was not really desired.”¹⁶³ In response to this argument, administrative law judge replied,

If the ulterior purpose was based on a belief that the Respondent would discriminatorily deny the applications, then the Company by its actions confirmed this belief. Respondent’s position amounts to an argument that an employee’s suspicion that an employer is unlawfully motivated constitutes a defense to an unfair labor practice charge. This has no support in Board law.¹⁶⁴

But under classical doctrine there is a more telling response to the entrapment argument. Because unions, and not the NLRB, engage in salting activity, employers raising the entrapment defense would have to demonstrate that union applicants are the agents of the NLRB.¹⁶⁵ There are no cases in which an employer seriously undertook such a daunting showing. To the extent entrapment troubles the agency’s thinking about salting cases, even if on a subliminal level, it is unwarranted.

B.Fraud

The argument that an applicant’s concealment of union organizational objectives is “indefensible” because fraudulent has superficial appeal but is likely foreclosed under present NLRB law. “A lie about . . . union status or unionizing objective is not material, because . . . an employer cannot turn down a job applicant just because he’s a salt or some other type of union organizer or supporter.”¹⁶⁶ Still, the NLRB might attempt to reverse the course of labor law in this respect and has the authority to do so providing it explains itself.¹⁶⁷

Outside of labor law environs, the question of whether employment application misrepresentations are fraudulent under state law has arisen in the context of investigative journalism. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,¹⁶⁸ undercover television reporters working for the ABC

163. *Id.* at 701-02.

164. *Id.* at 703.

165. See *United States v. McClernon*, 746 F.2d 1098, 1108-09 (6th Cir. 1984) (rejecting “indirect entrapment” defense because assuming it applied in circuit at all, there was no evidence that alleged entrapper was following actual or implied instructions of the government).

166. *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002). See also *Am. Residential Servs. of Indiana*, 345 N.L.R.B. 995, 1004 (2005).

167. After all, NLRB findings of indefensibility are baffling. See *supra* note 157 and accompanying text. For an explanation of the latitude given agencies changing position for policy reasons, see Michael C. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 229-30 (“In some cases . . . a Board’s modification or development of law or policy can turn almost fully on a discretionary policy balance rather than on the particular accuracy of different assumptions about the current reality of labor relations.”).

168. 194 F.3d 505 (4th Cir. 1999).

television program *PrimeTime Live*, “after using false resumes to get jobs at Food Lion, Inc. Supermarkets, secretly videotaped what appeared to be unwholesome food handling practices. Some of the video footage was used by ABC in a *PrimeTime Live* broadcast that was sharply critical of Food Lion.”¹⁶⁹ One argument raised in the ensuing litigation was that the undercover reporters had engaged in fraud, within the meaning of North Carolina law,¹⁷⁰ by making misrepresentations on their resumes.¹⁷¹ In response to the argument, the *Food Lion* court, relying on the “employment-at-will” doctrine,¹⁷² argued that it was unreasonable for either the employee or the employer to assume that the employment would last for any particular period of time in the absence of an explicit agreement.¹⁷³ Thus, while the investigators obviously had misrepresented aspects of their background, they had not made any representations about how long they would work for the employer. Consistent with the employment-at-will doctrine, the employer had not requested any specifics about the anticipated duration of their employment.¹⁷⁴ For this reason the court concluded that even if Food Lion had suffered injury through reliance on the investigators’ misrepresentations,¹⁷⁵ fraud could not be established because any reliance on assumptions respecting the duration of employment was not reasonable.¹⁷⁶ Just as in *Food Lion*, an employer’s reliance on the misrepresentations of salts could be injurious only if it were reasonable. To the extent that indefensibility is premised on the notion that salts

169. *Id.* at 510.

170. *Id.* at 512 (“To prove fraud under North Carolina law, the plaintiff must establish that the defendant (1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation.”).

171. *Id.* The investigators submitted applications with falsified identities, references, and addresses. They also omitted reference to their simultaneous employment with ABC, and misrepresented educational and employment credentials. *Id.* at 510. While state fraud theories are not precisely applicable to a salting discussion because of principles of field preemption, see *Hartman Bros.*, 280 F.3d at 1113 (“[I]f interpreted to entitle an employer to turn down a job application on the basis of a lie about salt status, the [Indiana] statute would be preempted by the National Labor Relations Act because it would interfere with union organizing activity without any justification consistent with the Act.”). The manner in which the *Food Lion* court disposed of the state claims is nevertheless broadly instructive.

172. Employment at will is “[e]mployment that is [usually] undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.” BLACK’S LAW DICTIONARY 604 (9th ed. 2009).

173. *Food Lion*, 194 F.3d at 513.

174. *Id.*

175. Food Lion purportedly incurred administrative costs of \$1,944.62 by employing the investigators. The costs stemmed from routine hiring expenses such as “screening applications, interviewing, completing forms, and entering data into the payroll system,” but included extraordinary costs allegedly resulting from the misrepresentations, including “lower productivity and customer dissatisfaction.” *Id.* at 512.

176. *Id.* at 513.

misrepresent their genuine interest to be a longer-term employee—which appears to be the thrust of the *Toering* majority¹⁷⁷—the argument is at variance with the at-will doctrine. In the absence of contractual duties to the contrary, salts are at liberty to leave employment at any time as is any other employee.

The *Food Lion* case is instructive additionally on the question of whether reliance on misrepresentations made during the hiring process rise to the level of actionable injury. It is commonly argued in the Title VII context that employment testers cause an employer to incur costs in reviewing and processing the applications of employees who have no interest in employment.¹⁷⁸ But, as the *Food Lion* court observed,

Our colleague . . . argues that the administrative costs attributable to [the investigative reporters] should be recoverable as fraud damages. To reach that result, the dissent would fundamentally alter the at-will employment doctrine by qualifying an employee's right to quit at any time. According to the dissent, [the reporters] induced Food Lion to hire them and spend money to train them by impliedly representing (as at-will job applicants) that (1) they intended to work indefinitely, until [there was] a change in circumstances and that (2) there was a possibility that they would become long-term employees. But these implied representations that the dissent would impute are in essence representations about the potential duration of employment, and here they would translate into an obligation to work longer than a week or two. Such an obligation is inconsistent with, and cannot be enforced under, the at-will employment doctrine. Thus, when Food Lion, as an at-will employer, incurred the administrative expenses, it took the full risk that the reporters might do what any at-will employee was free to do (and what many at Food Lion did)—quit within a very short time.¹⁷⁹

In other words, the argument proves too much.¹⁸⁰

Accordingly, a finding of salting indefensibility premised on a fraud theory hangs necessarily on a very slender reed, and the NLRB should not explicitly or implicitly take it seriously.

177. *Toering Elec. Co.*, 351 N.L.R.B. 225, 225 (2007) (“[W]e define an applicant entitled to statutory protection against hiring discrimination as someone genuinely interested in seeking to establish an employment *relationship* with the employer.”) (emphasis added).

178. See Yelnosky, *supra* note 8, at 446.

179. *Food Lion*, 194 F.3d at 514 n.2.

180. Justice Breyer advanced a similar argument in the *Town & Country* opinion in response to an argument that salts should not be treated as statutory employees because of the increased risk that they might quit:

If a paid union organizer might quit, leaving a company employer in the lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere . . . a company disturbed by legal but undesirable activity, such as quitting without notice, can offer its employees fixed-term contracts, rather than hiring them “at will” as in the case before us.

NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 96-97 (1995).

C. Unjust Enrichment

It seems obvious that effective private attorneys general, of whatever variety, must be compensated in some fashion to encourage them to pursue their implementing strategies.¹⁸¹ Union salts may, under present law, obtain both a backpay award and their pay from the union as professional organizers, and employers have argued that this is unjust enrichment.¹⁸² The NLRB, however, has not thus far agreed that it is unjust enrichment and has allowed arguable double recovery through operation of the “moonlighting doctrine,” though the reasons for that doctrine are unrelated to a theory of private attorney general compensation.¹⁸³ As previously noted,¹⁸⁴ the moonlighting doctrine has probably impacted the frequency with which salting cases are litigated because cases can become too expensive to settle.¹⁸⁵

181. For a discussion of how poorly the private attorney general provisions of the ADA have fared in the absence of predictable damage awards, see Waterstone, *supra* note 125, at 448.

182. At least one employer has attempted a state court challenge of a salting campaign premised on many of the indefensibility theories in this section, including unjust enrichment. See *Wright Elec., Inc.*, 327 N.L.R.B. 1194 (1999) (dismissing union’s unfair labor practice charges challenging this state law suit). The argument is usually cast, however, in terms of whether salts have adequately mitigated backpay liability. Because salting campaigns are directed against non-union companies, some have argued that the failure of salts to apply for employment with unionized companies represents a failure to mitigate, depriving the salts of the right to backpay during the period of the refusal. Former Board Member Hurtgen, in his influential dissent in *Ferguson Electric*, argued that, while it should not be presumed that union salting campaigns require salts to refuse employment in a disqualifying manner, the burden should be shifted to the union to prove mitigation, modifying the usual rule that employers bear both the burden of persuasion and production in the liability phase of an NLRB unfair labor practice proceeding. 330 N.L.R.B. 514, 519 (2000) (Hurtgen, Member, dissenting). But mitigation at its core means that the victim of the wrongdoing should not be unjustly enriched.

183. NAT’L LABOR RELATIONS BD., CASEHANDLING MANUAL, PART THREE, COMPLIANCE PROCEEDINGS, § 10554.4, available at <http://www.nlr.gov/sites/default/files/documents/44/compliancemanual.pdf>.

184. See *supra* note 61 and accompanying text.

185. After salts were determined to be employees in *Town & Country*, 516 U.S. at 90-98, there were really only two ways that backpay awards in salting cases could be limited. The NLRB could by agency rule deem the moonlighting doctrine not to apply to salts. That result was difficult to defend once the Supreme Court held salts to be statutory employees. Alternatively, the backpay period could be truncated, particularly in the construction industry, where employing contractors frequently are engaged in multiple jobs of short duration. See *Dean Gen. Contractors*, 285 N.L.R.B. 573, 573 (1987). Under prior law, the burden had been placed on the wrongdoing employer to establish that a discriminatee would *not* have continued in employment on one of the employer’s other jobs. *Id.* This burden was often difficult for employers to carry, and victims of discrimination often remained entitled to backpay for as long as an offending employer’s construction projects continued. *Ferguson*, 330 N.L.R.B. at 515-16. In *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348 (2007), the NLRB placed the burden of proving whether a salt’s employment would have continued on the General Counsel. Although the calculation of gross backpay occurs at the compliance stage in a case decided on the merits, see *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *pre*-decisional backpay calculation has a significant impact on whether a case will be tried. If the NLRB calculates backpay that is less than the cost to try the case, the employer will probably settle the case informally. Minimal review of these administrative backpay calculations is available, and Regional Directors have broad authority to accept such settlements over the objection of the union, with such acceptance obviously acting as a deterrent to the

In its traditional aspect the moonlighting doctrine is not controversial. Imagine a part-time cab driver who begins working full time at a factory after becoming a cab driver. Imagine further that the driver is subsequently unlawfully fired for engaging in union activity. In that situation (Situation 1) the earnings the driver would continue to earn as a driver are not charged against gross backpay owed because they are not “interim earnings,” i.e., earnings replacing those that were lost as a result of the discharge.¹⁸⁶ If the same employee had never held a driving job, was fired, and *then* obtained a driving job to replace earnings lost as a result of the unlawful discharge (Situation 2), the earnings *would* be charged to gross backpay because they *are* interim earnings, producing a lower net than in the first situation. The salary paid to a salt by the union for engaging in salting activities has been treated as Situation 1 earnings.¹⁸⁷ The notion that salts are unjustly enriched under even uncontroversial moonlighting scenarios derives from a limited conception of salts as individual employees suffering from discrete instances of discrimination that are adequately remedied in isolation. When salts are viewed as playing a broader role in the enforcement of the NLRA by engaging in strategic charge filing, the question of unjust enrichment is substantially altered.

Allowing remedies to salts who are actually discriminated against, but who serve the additional role of informing the NLRB of the existence of unlawful employment practices, is hardly morally repugnant, if widespread practice in other environments is to be one’s guide. Informant reward provisions have become commonplace in varied statutory enforcement regimes.¹⁸⁸ As Professor Thompson noted in the context of environmental enforcement, “[a]bsent informants government inspectors would find it hard to detect a vast collection of . . . opaque violations.”¹⁸⁹ Of course, society has a general repugnance for “snitches” and violations of privacy.¹⁹⁰ In the end, however, bounty schemes survive in spite of moral hazards because they work.¹⁹¹

In the salting context, any “bounty” is effectuated through the normal operation of the traditional backpay mechanism, and individual backpay awards are dwarfed when compared to sums potentially available under

filing of future salting charges. Further, if the NLRB accepts the claim that a job has “ended,” the employer may have no obligation to instate or reinstate a salt.

186. Pusey, *Maynes & Breish Co.*, 1 N.L.R.B. 482, 487 (1936).

187. NAT’L LABOR RELATIONS BD., CASEHANDLING MANUAL, PART THREE, *supra* note 183, § 10552.6.

188. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 226 (2000).

189. *Id.*

190. *Id.*

191. Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1143 (1999).

reward provisions in other regulatory regimes. The Internal Revenue Service, for example, will pay informants as much as \$10 million in various circumstances.¹⁹² Private sector corporations seeking enforcement of software licenses similarly understand the value of paying handsomely employee informants to reveal violations of the terms of the licenses. The Business Software Alliance¹⁹³ entices these employees to “nail your boss” by informing it about software piracy.¹⁹⁴ In 2005, the BSA offered \$50,000 rewards to employee informants in the United States, and raised the limit to \$1 million in 2007.¹⁹⁵ The treatment by the NLRB of backpay prior to *Toering* and *Oil Capitol*, while sufficiently provocative to agitate the employer community, was a far cry from being punitive, and was not nearly as large of an award existing in other public and private enforcement schemes.¹⁹⁶ Surely, the creative utilization of conservative backpay mechanisms should not be deemed so “unjust” as to justify an NLRB finding of indefensibility, particularly since they cannot come into play until an employer has been adjudicated a wrongdoer.

D. Purposes Unrelated to Organizing

Despite the fact that salting is protected activity, and should not be found indefensible on entrapment, fraud, or unjust enrichment rationales, the NLRB may come to think that salting is otherwise indefensible when it is “unrelated to organizing.” In the D.C. Circuit’s formulation of this theory, for example, salting may be rendered unprotected if it is an “organizational activity [that] is a subterfuge used to further purposes unrelated to organizing, undertaken in bad faith, designed to result in sabotage, or designed to drive the employer out of the area or out of business.”¹⁹⁷ Some of this language is difficult to assess, though other portions of the language are uncontroversial to most of the labor law community. No one questions that sabotage is unprotected under the NLRA. The balance of the D.C. Circuit’s formulation is more problematic. It is difficult to agree, for example, that all conduct meant to drive an

192. Internal Revenue Service, Whistleblower–Informant Award (last updated Mar. 16, 2011), <http://www.irs.gov/compliance/article/0,,id=180171,00.html>.

193. The members as of March 2011 are Adobe, Altium, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA, Cadence Design Systems, CNC Software - Mastercam, Corel, Dassault Systèmes SolidWorks Corporation, Dell, Intel, Intuit, Kaspersky, McAfee, Microsoft, Mindjet, Minitab, Progress Software, PTC, Quark, Quest, Rockwell Automation, Rosetta Stone, Siemens PLM Software, Inc., Sybase, Symantec, and The MathWorks.

194. Brian Bergstein, *Piracy Crackdown Targets Small Businesses: Business Software Alliance Offers \$1 Million Rewards to Whistleblowers*, ASSOC. PRESS (Nov. 26, 2007), available at <http://www.msnbc.msn.com/id/21981822/>.

195. *Id.*

196. To put things in perspective, as a nine-year NLRB attorney (1997-2006) I rarely encountered salting cases valued as much as \$25,000.

197. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1198 (D.C. Cir. 2003).

employer out of business is undeserving of NLRA protection.¹⁹⁸ Furthermore, the meaning of “bad faith” is elusive. The question of what activity is legitimately related to “organizing” also evades precision and relies heavily on preconceived ideas.

On the question of bad faith, George W. Bush’s NLRB plainly did not accept that salting activity meant to “provoke” an employer into committing an unfair labor practice could be legitimate organizing activity.¹⁹⁹ In fairness, this position is not new or limited to Republican-dominated panels of the NLRB. Indefensibility arguments premised on provocation are a logical extension of an earlier, Clinton-era NLRB concurring opinion,²⁰⁰ in *Aztech Electric Co.*,²⁰¹ authored by Board member John Truesdale, an opinion that is an unusually frank agency-level exposition of the salting issue.

Member Truesdale admitted that unions have an interest in organizing all non-union employers, and that such a goal is legal even where it would tend, for example, to reduce the competition unionized employers face from non-union employers.²⁰² Chief Justice Taft, writing in 1921, would have agreed with this somewhat obvious point, for in making it in his own way he said:

To render [a combination of employees] at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the

198. There is, after all, always a risk that union activity will put a company out of business. For example, in the context of strikes it has been observed that, “the strike is a legitimate weapon, designed to strip the employer of economic control. The labor laws recognize that a strike may drive an employer out of business.” *In re Crowe & Assocs., Inc.*, 713 F.2d 211, 216 (6th Cir. 1983).

199. Indeed, it is quite explicit in its intent to quash any argument along these lines:

The Board does not serve its intended statutory role as neutral arbiter of disputes if it must litigate hiring discrimination charges filed on behalf of disingenuous applicants who intend no service and loyalty to a common enterprise with a targeted employer. Instead, the Board becomes an involuntary foil for destructive partisan purposes. The Congressional goal of industrial peace through the “friendly adjustment of industrial disputes” is not furthered by extending the Act’s protections against hiring discrimination to such applicants.

We seek to discourage cases where unfair labor practice allegations of hiring discrimination are filed for this objective. We therefore believe that a change in law is warranted so as to better insure against it.

Toering Elec. Co., 351 N.L.R.B. 225, 231 (2007).

200. The opinion was decided in the early days of the G.W. Bush administration by remnants of the Clinton Board.

201. 335 N.L.R.B. 260, 272 (2001) (Truesdale, Member, concurring).

202. *Id.* at 275 *citing* *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975). To quote the critical language from *Connell* that Truesdale merely cited:

This record contains no evidence that the union’s goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms. *Id.* at 625.

standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propoganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.²⁰³

Thus, it has never really been in doubt that in order to survive, unions need to organize as broadly and as vigorously as possible. The difficult follow-up question is whether attempts by unions to eliminate low cost, non-union employers—an ultimate goal that sounds “bad”—is anything more than a defensive, ultimately organizational tactic aimed at preserving and improving union standards—an ultimate goal that sounds “good,” or at least familiar.

For Member Truesdale, the non-organizational (and thus illegitimate) nature of the salting activity in *Aztech Electric* was established because

[T]he avowed overarching objective of inflicting . . . economic injury on nonunion employers like [the employer] and its contractor clients [was that] they will go out of business or at least cease doing business within [the union’s] jurisdiction; and . . . as a principal tactic to achieve this objective, the [union] generat[ed] . . . as many unfair labor practices as possible, without regard to their merit, in order to impose heavy legal expenses on targeted employers.²⁰⁴

For this reason, Truesdale concluded “that these factors are separate from, and in some degree in conflict with [the union’s] organizational objectives.”²⁰⁵

But when moved to explain why the filing of unfair labor practice charges, even those eventually found meritless, evinced a non-organizational objective, Member Truesdale merely restated *Jefferson Standard’s* vague formulation that “even otherwise protected activity ceases to be protected if conducted in an excessive or indefensible manner.”²⁰⁶

203. *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921).

204. *Aztech Electric*, 335 N.L.R.B. at 274.

205. *Id.*

206. *Id.* at 275. Professor Finkin has captured the conceptual inappropriateness of applying *Jefferson Standard’s* insistence on employee loyalty to prospective employees. In *Five Star Transportation, Inc.*, 349 N.L.R.B. 42 (2007), the NLRB denied reinstatement to three school bus drivers previously employed by a school district’s predecessor busing subcontractor to the school district’s contemplated successor busing subcontractor. It was undisputed that the three drivers had complained to the school district regarding the claimed bad reputation of the successor. But the complaints occurred before the drivers had applied for employment with the successor; indeed, they occurred before the successor was even awarded the busing contract. In supporting the dissent’s argument that *Jefferson Standard’s* loyalty rationale could not apply in the absence of an existing employment relationship, Professor Finkin observed that it has never been law that an employee owed a duty of loyalty to a prospective employer, or, indeed, that any servant owed any duty to a “master” with whom there is no contractual relationship. It is difficult to evade Professor Finkin’s larger point that the law in accepting a rule of this kind sanctions a species of 21st century labor blacklisting. The reasoning appears equally applicable to salting contexts in the sense that one should not be able to argue, with Member Truesdale, that salt-applicants may be denied the protection of the NLRA because they are disloyal, for until they are hired there is no basis to speak of a duty of loyalty. Matthew W. Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541, 567-68 (2007)

But why is charge filing indefensible? Member Truesdale's ultimate conclusion was that "the [union's] goal of deliberately inflicting serious economic injury on nonunion employers is unnecessary to any of the union's legitimate interests."²⁰⁷ Serious economic injury occasioned by legal fees or from back pay liability, however, may result precisely because a substantial argument has been raised that an employer has violated the NLRA. Competent counsel should be able to procure expeditiously a dismissal of *clearly* non-meritorious charges.²⁰⁸ On the other hand, if it appears that an employer had mixed motives for not hiring, or for firing, a salt, a defense counsel's job becomes considerably more involved, and therefore expensive.²⁰⁹ In that event, however, it seems untenable to suggest that the filing of arguably meritorious unfair labor practice charges should deprive a discriminatee of the protections or of the evidentiary presumptions of the NLRA. This conclusion appears correct even before consideration of the D.C. Circuit's prior acceptance of the NLRB's *Pre-Toering* rule that salting activity unabashedly designed to provoke unfair labor practice charges is protected.²¹⁰

Rejection of the charge filing bad faith theory does not, of course, explain how salting is organizational. One might preliminarily object that, in light of *Town & Country*, a union should have no obligation to explain the organizational efficacy of salting, as it has no obligation to explain the "reasonableness" of any activity protected under the NLRA.²¹¹ Moving beyond that objection requires a bit more exploration of the categories salting assumes. At the first level of conceptualization, salting is either covert or overt. At the next level of conceptualization, salting is either shorter-term or longer-term.

207. *Aztech Electric*, 335 N.L.R.B. at 275.

208. The standard practice during investigations, with which I am intimately familiar by virtue of my previous employment with the NLRB, is for an employer to submit a brief written statement of position. It is not customary for charged employers to make witnesses available in these kinds of cases. Meritless cases are quickly dispatched. Even the lowest category cases must be resolved within 12 weeks or risk being assigned internally to the agency's "overage" list. Nat'l Labor Relations Bd., Office of the General Counsel, Memorandum 02-02, Impact Analysis Program Modifications (Dec. 6, 2001).

209. However the burden shifting mechanism is constructed, the ultimate task of counsel will be to demonstrate that the employer would not have hired (or would have fired) the applicant or employee even in the absence of union activity.

210. See, e.g., *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 552 (D.C. Cir. 2006); *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1197-98 (D.C. Cir. 2003) (citing *M.J. Mech. Servs., Inc.*, 324 N.L.R.B. 812, 813-14 (1997)); *Godsell Contracting, Inc.*, 320 N.L.R.B. 871, 874 (1996); accord, on slightly modified "entrapment" theory, *Bat-Jac Contracting, Inc. v. NLRB*, No. 96-4055, 1996 WL 606602 (2d Cir. Oct. 23, 1996) (rejecting on facts the claim that union agents induced employer to violate Act and questioning whether defense existed under NLRA).

211. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962) ("[T]he reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."). Historically, the NLRB has not imposed a "reasonable means" requirement on the exercise of concerted activity. *Accel, Inc.*, 339 N.L.R.B. 1052 (2003).

Longer-term, covert salting, transpiring over an extended period of time, most closely resembles the “hot shop” organizing with which the NLRB seems most comfortable.²¹² In these cases, which I shall term here Category I salting cases, clandestine salts after being hired in a workplace, make common cause with co-workers, and do not disclose their identities until and unless enough support has been garnered among employees to support the filing of an NLRB petition.²¹³ If an employer discharges a salt following disclosure in these circumstances, the cases are relatively easy for the NLRB’s General Counsel to prove because of the comparatively long duration of the employment. Attempts by an employer to prove that salts in this category were not “genuinely interested in employment” are generally unavailing because they had in fact been performing service sufficiently adequate to continue them in employment.²¹⁴ Furthermore, a sustained discussion to persuade employees in a discrete workplace to support the union seems classically organizational.

Overt salting cases, on the other hand, which I will term here Category II salting cases, seem least akin to traditional union organizing, for here the objective is to deliberately put employers on notice of applicants’ union affiliation in the hope that employment will be swiftly, clumsily, and unlawfully refused. The typical procedure will be for a salt to reveal prominently on the employment application that he or she is a “volunteer

212. Professor Janice Fine defines “hot shop” organizing as a reactive “approach in which unions respond to shops that reach out to them whether or not they fit within the union’s core industry, rather than sticking to a proactive strategy to increase density within their industry.” Janice Fine, *Low-Wage Workers, Faith-Based Organizing, Worker Centers and ‘One Big Movement’ in Dan Clawson’s The Next Upsurge*, 31 CRITICAL SOC. 401, 407 (2005). As Professor Fine further notes, many of the most aggressive and innovative unions have been eschewing this approach. *Id.* Professor Kenneth Dau-Schmidt has explained that the NLRA has worked best when jobs were “well-defined and long-term,” a situation not inhering in a new economy in which “employees have less long-term interest in the job and thus less incentive to organize a particular employer [and may not want to] incur the risks and costs of organizing a particular employer when they may well be working for a different employer next year[.]” Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 910, 916 (2007). See also Andrew W. Martin, *Resources for Success: Social Movements, Strategic Resource Allocation, and Union Organizing Outcomes*, 55 SOC. PROBS. 501, 505 (2008) (“Unlike NLRB elections, which have a clearly established ‘script’ that unions must follow, non-NLRB organizing varies dramatically depending upon the targeted firm. . . .”).

213. A petition must be supported by 30% of employees in a potential “bargaining unit.” The matter is complicated in the construction industry that is typically the setting of salting cases because employers and unions are authorized under section 8(f) of the NLRA to enter into pre-hire agreements. Ironically, it is precisely the most “organizational seeming” salting scenario that carries the greatest potential for bitterness and acrimony, for the salt will have practiced a longer running deception.

214. An illuminating example is *Allstate Power Vac, Inc.*, 354 N.L.R.B. No. 111 (2009), in which the NLRB dismissed all allegations involving a claimed unlawful refusal to hire seven overt salts, remanded allegations concerning discharges and discriminatory conduct directed at two shorter term covert salts that had been hired, and found violations in connection with two longer term discharged employees who may or may not have been covert salts. As I have mentioned, however, the NLRB has, for the first time, begun to impose on the General Counsel the burden of proving the discharged salt’s ongoing entitlement to backpay. See *supra* note 59.

union organizer,” or some similar formulation.²¹⁵ These are cases in which the General Counsel has a more difficult mission in trying to prove an applicant’s genuine interest in employment because, the argument goes, the applicant would not have revealed union affiliation if there was genuine interest in obtaining a job.

Falling in between Category I and II salting cases are shorter-term, covert cases, which I will denote here as Category III cases. In these cases, covert salts are successful in being clandestinely—one may say accidentally—hired. After quickly ascertaining the nature of an employer’s business dealings, these covert salts tactically reveal their union affiliation. In the prototypical case, deliberately or accidentally “outed” salts in this category are abruptly discharged after union affiliation disclosure.²¹⁶

The *Toering* majority in essence argues that Category II salting has no organizational objective because overt salts could not have a genuine interest in establishing an employment relationship—though, of course, one will never know because the possibility was preempted. I argue that Category II salting is organizational because it actively exposes and frustrates employers who remain non-union by unlawfully excluding union-affiliated applicants, an objective previously held paramount by the Supreme Court.²¹⁷ In truth, the NLRB should not even presume that Category II salts lack a traditional, hot shop organizing objective. While that may turn out to be true, it may not. As Administrative Law Judge Schlesinger stated regarding the Category II salts who were at issue in *Smucker*, “[the salts] truly wanted to work for [the employer], albeit with the ulterior motive of trying to organize it from the inside.”²¹⁸

In sum, no category of salting should be treated presumptively as non-genuine job seeking activity. Assuming employer knowledge of union activity, coupled with demonstrable anti-union animus, the burden should fall on the employer to establish that it would not have hired a salt notwithstanding union activity.

V.

CONCLUSION

The NLRB’s recent salting cases continue to treat “salts as a uniquely disfavored class of discriminatees, notwithstanding the Supreme Court’s

215. See, e.g., *J.O. Mory, Inc.*, 326 N.L.R.B. 604 (1998) (overturning ALJ’s finding of violation where union agents clearly and immediately revealed union affiliation on theory that single departure from employer’s purported practice of avoiding applicants with high wage history insufficient evidence of pretext).

216. See, e.g., *Jesco, Inc.*, 347 N.L.R.B. 903, 914 (2006) (finding violation in connection with two union salts fired within two days of revealing their union affiliation).

217. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

218. *Smucker Co.*, 341 N.L.R.B. 35, 40 (2004).

ruling that salts are protected employees under the National Labor Relations Act.”²¹⁹ Even assuming that the pronouncements by recent incarnations of the NLRB represent a permissible reading of the NLRA, the present Obama appointees would do well to recognize salting campaigns as beneficial enforcement catalysts. In light of the obvious under-deterrence of fully mitigated NLRA backpay awards,²²⁰ salting campaigns do no more than restore the potential, if limited, deterrent effect of backpay that is fully authorized by Section 10(c) of the NLRA.²²¹ Simply allowing the normal operation of relatively anemic statutory backpay awards in the context of salting campaigns has been enough to cause a decade-long backlash against salting. The backlash resulted precisely because salts were remarkably and unexpectedly successful in uncovering unlawful employment practices. The overheated response to salting, however, should be viewed in context as the protests of those objecting to *any* meaningful enforcement of the NLRA. After all, salting cannot harm an employer that has not violated the law.

Before the *Toering* case, salts had proven a unique form of private attorney general, fitting well within the supplemental attorney general categorization of Professor Rubenstein.²²² Unions in the Twenty-First Century will require nimble, adaptive strategies to organize creatively in ever-changing economic circumstances. To the extent the NLRB resists protection of mobile salting campaigns because they do not seek immediate organization of discrete workplaces in the outdated, hot-shop modality, it makes the mistake of clinging to the past instead of reasonably applying intentionally broad statutory language. Section 7 of the NLRA protects not only employees’ rights to engage in traditional collective bargaining, but also their rights to engage in “other concerted activities” for the purpose of other mutual aid or protection.²²³ Given the dizzying pace of change in the

219. *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348, 1357 (Liebman & Walsh, Members, dissenting).

220. See Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1790 (1983) (“If the backpay remedy were designed to deter the employer’s unlawful conduct, there would be no reason to deduct any wages that the employee earned, or could have earned, in another job. By minimizing the employer’s potential liability, such a deduction removes most of the deterrent effect of the backpay award.”).

221. The section states in relevant part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.

NLRA § 10(c); 29 U.S.C. § 160(c) (2006).

222. See generally Rubenstein, *supra* note 4.

223. The section states in relevant part:

workplace, the NLRB must read “other” back into the statute if it wishes to avoid slipping over the brink of irrelevance.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities for the purpose of collective bargaining *or other mutual aid or protection*.
NLRA § 7; 29 U.S.C. § 157 (emphasis added).

