15

Freeing Speech at Work

Journalists' Unions, Workplace Democracy and Political Democracy

Charlotte Garden

15.1 INTRODUCTION

The 'marketplace of ideas' metaphor tends to dominate US discourse about the First Amendment and free speech more generally. The metaphor is often deployed to argue that the remedy for harmful speech ought to be counterspeech, not censorship; listeners are to be trusted to sort the wheat from the chaff. This deep skepticism about the regulation of even harmful speech in the USA raises several follow-on questions, including: How will trustworthy sources of information fare in the marketplace of ideas? And how will participants know whom to trust? Both questions implicate non-regulatory, civil-society responses to mis- and disinformation.[1] This chapter takes on these questions, considering groups and institutions that deal with information and misinformation. Civil society groups cannot stop the creation of misinformation – but they can decrease its potential to proliferate and to do harm. For example, advocacy groups might be directly involved with fact-checking and debunking misinformation, or with advancing truthful or properly contextualized counter-narratives. And civil society groups can also help strengthen social solidarity and reduce the social divisions that often serve as fodder for and drivers of misinformation.

In this chapter, I focus specifically on the role of labor unions in countering misinformation in the US context. US labor unions negotiate on behalf of groups of workers, and also advance workers' interests writ large in political contexts. Both roles can involve countering mis- or disinformation in various forms. First, misinformation is a common weapon in employers' arsenals during union-organizing drives. Among other misleading messages, employers often try to paint union organizers as outside agitators, isolated malcontents, or incompetents looking for protection from

[1] The remainder of the chapter uses the term 'misinformation' as an umbrella term to capture various kinds of untruthful or misleading statements, images, and narratives, whether or not they were deliberately propagated.

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rightful accountability. This sort of messaging is so routine as to have become unremarkable – though it can also be difficult to counter effectively, given that employers have vastly more access to employees than do union organizers.[2] Second, employers can be a source of misleading political claims. As political scientists have documented, it is relatively common for US employers to urge employees to adopt the employer's preferred political views, sometimes by creating the impression that the future of the company (and the employees' jobs) is on the line.[3] But would workers be likely to know if their employer lied (or stretched the truth) in making political pitches? The answer is more likely to be 'yes' if the workers are unionized.[4]

The foregoing is true for US workers in general – but some workers, such as journalists, teachers and librarians, have jobs that inherently involve countering (or spreading) misinformation. Here, labor unions can play more specific roles in strengthening the organizations for which their members work. As an illustration, this chapter considers journalists' unions. At one level, these unions fight for the same working conditions as any other union, such as better pay and benefits, stronger worker autonomy and freedom from arbitrary discipline, and the preservation of bargaining-unit work.[5] But in the context of news organizations, these terms can take on special significance. For example, a more diverse set of people will pursue careers in journalism if they can earn a decent living while doing so, which is important because varied perspectives and knowledge within a newsroom can lead to better and more thorough reporting. And protections against arbitrary or inconsistent discipline are important to workers whose jobs involve 'speaking truth to power' – ultimately benefiting both covered workers and the integrity of organizations themselves against individual failings of managers or owners.

In addition, journalists' unions are often able to negotiate contract protections that specifically relate to journalists' integrity.[6] For example, some collective bargaining agreements provide for a degree of independence in the editing process, such as by allowing reporters to withhold their bylines from stories that they believe

[2] There are two things to notice about how this sort of anti-union message relates to the larger misinformation picture. First, this playbook, honed in part in the labor context, is frequently deployed in other contexts, such as when governments portray civil rights protesters as destructive outside agitators. Second, one reason employers often succeed at convincing workers to vote against unionization is their ability to exclude the union and its counter-messaging from the workplace – capturing in microcosm the intersection between speech rights and property rights that repeats in countless other US contexts, including speech on social media and the regulation of campaign spending.

[3] Alex Hertel-Fernandez, *Politics at Work: How Companies Turn Their Workers into Lobbyists* (New York: Oxford University Press, 2018).

[4] John S. Ahlquist, 'Labor Unions, Political Representation, and Economic Inequality' (2017) 20(1) *Annual Review of Political Science* 409–32; David Macdonald, 'How Labor Unions Increase Political Knowledge: Evidence from the United States' (2021) 43(1) *Political Behavior* 1–24.

[5] E.g., Pro Publica Guild, 'Our Mission', www.propublicaguild.org (discussing the union's goals, including 'pay transparency and a raise pool that stays ahead of inflation').

[6] Section 15.3.2.

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have been edited in an inaccurate or misleading fashion. Others guarantee that reporters will have input and an opportunity to respond if the accuracy of their reporting is challenged by the subject of that reporting and promise that the news organization will pay for legal representation if a journalist is sued. And still others implement general codes of ethical conduct as part of the collective bargaining agreement (CBA) itself, creating protections for journalists who insubordinately refuse to engage in unethical conduct.

My argument is that journalists' unions (and, similarly, unions of other groups of information workers) can protect free speech values – and the most specific way they do this is by giving workers leverage to demand that their employers live up to their institutional values. Ironically, though, the First Amendment weakens unions' abilities to do this. Although the Supreme Court has held since 1937 that the National Labor Relations Act of 1935 (NLRA) applies to employers that are in the speech business, news organizations have successfully argued to US Courts of Appeals that they cannot be compelled to bargain over editorial policies.[7] This is so even though unions themselves are not state entities, and even though US labor law includes no mechanism to compel a private-sector employer to reach an agreement.[8] In other words, although the First Amendment is crucial to journalists' abilities to do their jobs, it can also benefit employers when journalists exercise collective power to protect the integrity of their work.

The chapter begins with a brief discussion of social scientists' findings on the kinds of traits that make individuals and societies vulnerable to mis- and disinformation. These findings background the chapter's discussion of why strong unions can harden American society against misinformation, including by decreasing social cleavages, increasing government's responsiveness to poor and working class citizens' concerns, and connecting unionized workers to the political process. Then, the chapter turns to unions of information workers, particularly teachers and journalists, and argues that unionization allows these workers to pressure their employers to stay true to their institutional missions. Finally, it shows that already weak labor law is further weakened by courts' understanding of how the First Amendment interacts with labor law in this context.

15.2 CIVIL SOCIETY AND MISINFORMATION

Misinformation researchers have focused primarily on questions such as how to identify and map misinformation, and whether or how to regulate the spread of misinformation by government officials or on social media platforms. But there is

[7] Section 15.3.3.

[8] *H. K. Porter Co.* v. *NLRB*, 397 US 99 (1970) (holding that NLRB does not have power to order contract concessions as a remedy for bad-faith bargaining); see also *Noah's Ark Processors*, LLC, 372 NLRB No. 80 (2023) (discussing remedies for failure to bargain in good faith).

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less research focused on civil society's role in fighting misinformation. Still, these groups have a role to play. First, civil society groups will often be trusted by their own members as sources of accurate information.[9] Further, they can bring people together, engaging them on social and political issues and building social connections; this function is important because engaged and connected communities are better able to resist misinformation than more atomized communities.[10] Second, civil society groups can pressure social media platforms or news outlets to take down misinformation without triggering government censorship concerns. Third, they can advance accurate narratives in the press. For example, a news outlet might seek comment from a local civil rights group before publishing a story on a school board candidate's untrue claim that critical race theory is taught in elementary schools.[11]

Civil society groups have a range of purposes and goals, and of course they are also differently situated with respect to political disinformation. Some groups view fighting disinformation – either in general or on a specific topic or platform – as a central purpose; on the other end of the spectrum, others avoid all discussion of political or divisive topics. But many groups fall in between, including labor unions – this chapter's focus. Unions generally have explicit political priorities, but they do not exist only to participate in electoral politics, or specifically to fight misinformation. And while they sometimes address misinformation head-on, they likely also have more indirect effects. Accordingly, this chapter begins with a generalized

[9] See, e.g., Myrto Pantazi, Scott Hale and Olivier Klein, 'Social and Cognitive Aspects of the Vulnerability to Political Misinformation' (2021) 42(1) *Political Psychology* 267–304; Ullrich K. H. Ecker et al., 'The Psychological Drivers of Misinformation Belief and Its Resistance to Correction' (2022) 1(1) *Nature Reviews Psychology* 13–29 (explaining that for information sources other than media outlets, 'source credibility' and trustworthiness affect acceptance of misinformation or corrections).

[10] Joan Donovan, 'How Civil Society Can Combat Misinformation and Hate Speech without Making It Worse', *The Media Manipulation Casebook* 2020, https://mediamanipulation.org/sites/default/files/media-files/TSC002_HateSpeech_TS_fnl.pdf. Many of the chapters in this volume consider the proliferation of misinformation via social media platforms. However, social media can also be a source of community and meaningful discussion that can counter the effectiveness of misinformation.

[11] While this chapter focuses on civil society's role in fighting misinformation, I also acknowledge that these groups can be vectors of misinformation. For example, during protests against police violence in Philadelphia, Pennsylvania, the Fraternal Order of Police posted on Twitter and Facebook a photograph of a White police officer holding a Black toddler. The accompanying text read 'This child was lost during the violent riots in Philadelphia, wandering around barefoot in an area that was experiencing complete lawlessness. The only thing this Philadelphia police officer cared about in that moment was protecting this child.' But the boy's mother filed a lawsuit alleging that this was a lie. She credibly asserted that she was driving home with her children when she took a wrong turn onto a street where police and protesters were confronting each other. Then, she alleged, police surrounded her car, breaking its windows and pulling the mother, her teenage nephew and her toddler son from the car – injuring and terrorizing them, and then separating the family for hours. Katie Shepherd, 'Police Took a Black Toddler from His Family's SUV. Then, the Union Used His Photo as "Propaganda", Attorneys Say', *The Washington Post*, 30 October 2020, www.washingtonpost.com/nation/2020/10/30/philadelphia-fop-posts-toddler.

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discussion of how labor unions can strengthen democracy and make US society more resistant to disinformation, before turning to an important subset of unions: those that are comprised of information workers, particularly journalists.

Why focus on labor unions rather than media literacy organizations, civil rights organizations, political parties or advocacy groups? To be clear, my answer is not that unions are more important than these other groups. Instead, it is that unions are *also* important, but frequently overlooked. Most of the remainder of this chapter explains why that is, beginning with unions in general, and then turning to unions of information workers.

15.3 UNIONS AND MISINFORMATION

One reason unions are an important part of this story is that – perhaps counter-intuitively – workplaces can offer opportunities for sustained cooperation and the development of social ties between people of different backgrounds, which can have positive spillover effects for democratic life.[12] Moreover, because three-quarters of US adults aged 25–54 work,[13] and workplaces tend to be more diverse than other American institutions, these opportunities may be more likely to arise at work than in other (relatively segregated) spaces in which people regularly spend time.[14] For that reason, Cynthia Estlund argued more than twenty years ago that the workplace is 'a uniquely important site within a diverse democratic society that aspires to achieve integration and equality among the citizens but that recognizes limitations on the proper scope of regulation'.[15]

But, as Estlund also observed, the story is not entirely rosy, and workplaces' potential to give rise to social bonds that help protect communities from misinformation can easily go unfulfilled. First, as in many other US contexts, racial diversity has been declining in US workplaces over recent decades,[16] and the US Supreme Court's growing hostility towards remedial affirmative action increases the likelihood that this trend will continue.[17] Moreover, most workplaces are autocratic; the philosopher Elizabeth Anderson rightly calls most workplaces 'dictatorships … in

[12] Cynthia L. Estlund, 'Working Together: The Workplace, Civil Society, and the Law' (2000) 89 *Georgetown Law Journal* 1–96.

[13] David H. Montgomery, 'Who's Not Working in the U.S.? Learn the Basics', Federal Reserve Bank of Minneapolis, 1 September 2022, www.minneapolisfed.org/article/2022/whos-not-working-in-the-us-learn-the-basics.

[14] Estlund, 'Working Together' (n 12).

[15] Ibid.

[16] Although the population of the USA, and by extension the labor pool as a whole, has become more racially diverse over the decades, a recent study found that individual workplaces were becoming less racially diverse. John-Paul Ferguson and Rembrand Koning, 'Firm Turnover and the Return of Racial Establishment Segregation', SocArXiv, 8 January 2018, https://osf.io/preprints/socarxiv/c6hsd.

[17] See, e.g., *Students for Fair Admissions* v. *President and Fellows of Harvard College*, 143 S.Ct. 2141 (2023) (imposing new limits on the use of race in higher-education admissions).

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which bosses govern in ways that are largely unaccountable to those who are governed'.[18] This means that even though workplaces can facilitate or require respectful interactions among employees, US employers are also generally free to insist on a pace of work that precludes community-building interactions among workers.[19] Employers may also rely on pools of high-turnover contingent workers.[20] And whereas yesterday's employers may have been unable to monitor their workforces closely enough to notice short breaks or side conversations, today's employers have increasingly sophisticated workplace surveillance technology that monitors workers' precise activities, including whether they are 'on task' at any given moment.[21] In addition, many low-wage workers need multiple jobs to make ends meet – leaving little or no time for civil or political engagement outside of work.[22]

Rather than giving up on workplaces' potential to strengthen our social ties, it is worth considering whether there are institutions or practices that can make work more democratic. One obvious candidate: labor unions, which may bargain on behalf of a bargaining unit of workers only if democratically elected.[23] In turn, a successful union election compels employers to come to the table to attempt to hash out an agreement on wages and working conditions, rather than setting working conditions autocratically.[24]

Collective bargaining (and workplace collective action more generally) allows workers to push back against some of the workplace trends discussed above. For example, pay, scheduling, the pace of work and workplace discipline are the bread-and-butter of collective bargaining agreements.[25] (This is also one reason that unionized workers vote and otherwise participate in politics at greater rates than

[18] Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton, NJ: Princeton University Press, 2017).

[19] For example, Amazon warehouses famously use surveillance technology to track workers' 'time-off-task', a metric that includes time spent traversing long distances in search of a bathroom, see Emily Guendelsberger, *On the Clock: What Low-Wage Work Did to Me and How It Drives America Insane* (Boston: Little, Brown, 2019).

[20] See generally David Weil, *The Fissured Workplace: Why Work became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2017).

[21] See, e.g., Jodi Kantor and Arya Sundaram, 'The Rise of the Worker Productivity Score', *The New York Times*, 14 August 2022, www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html.

[22] This dynamic's significance is underscored in new workplace ethnographies that emphasize time – both that low-wage workplaces can be Taylorist nightmares, and that workers have less time outside of work, and less control over the time they do have. E.g., ibid.; Jamie McCallum, *Worked Over: How Round-the-Clock Work Is Killing the American Dream* (New York: Basic Books, 2020).

[23] 29 U.S.C. § 159 (setting forth the standard union election process for private sector workplaces that are covered by the National Labor Relations Act).

[24] 29 U.S.C. §§ 158(a)(5) and 158(d) (establishing the obligation to engage in good-faith collective bargaining).

[25] 29 U.S.C. § 159(d).

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their non-union counterparts.)[26] Beyond that, unions are also active in politics in ways that range from member-to-member conversations, to programs that help union members run for office, to candidate endorsements and related spending. Much of this advocacy involves union leaders or members conveying their own affirmative messages about which party or candidate will be better for workers – but, of relevance to this chapter, it can also involve rebutting misinformation from other sources, including workers' own employers.

Private-sector employers in the USA are mostly free to 'talk politics' to their employees, and a large number of them take advantage of their captive audiences.[27] Some stick to non-partisan messages, such as reminders about when Election Day is or how to register to vote – but others actively advocate for candidates or political parties in ways that can pressure workers, and that can involve misinformation.[28] For example, an employer may 'nudge … people away from thinking about issues in particular ways',[29] or falsely or misleadingly blame government policies as the cause of its own unpopular decisions. More alarmingly, some employers have said or implied if the employer's disfavored candidate wins, it could be forced to cut jobs.[30] When this happens – or even when misinformation circulates in a workplace on a more ad hoc basis – unions may be a trusted source for both facts and alternative policy viewpoints. Thus, researchers have found that unionized workers are rela-

[26] Tova Wang, 'Union Impact on Voter Participation – and How to Expand It', Ash Center for Democratic Governance and Innovation, 2020 (surveying literature), https://ash.harvard.edu/files/ash/files/300871_hvd_ash_union_impact_v2.pdf.

[27] Alex Hertel-Fernandez, *Politics at Work: How Companies Turn Their Workers into Lobbyists* (New York: Oxford University Press, 2018). Government employers, by contrast, are constrained by the First Amendment. They may not, for example, reserve non-policy-making jobs for members of a preferred political party. See *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 US 712 (1996); see also *Heffernan* v. *City of Paterson, NJ*, 578 US 266 (2016). Further, governmental employers often go beyond constitutional requirements, limiting their employees' abilities to engage in certain kinds of political advocacy to avoid public concern about political favoritism in the provision of public services, e.g., 5 U.S.C. § 7323.

[28] Ibid.

[29] Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policymaking*, Council of Europe, 2017, https://edoc.coe.int/en/media/7495-information-disorder-toward-an-interdisciplinary-framework-for-research-and-policy-making.html, p. 10.

[30] Mitt Romney famously told business owners to 'make it very clear to your employees what you believe is in the best interest of your enterprise and therefore their job and their future in the upcoming elections'. He noted that there was 'nothing illegal about you talking to your employees about what you believe is best for the business, because I think that will figure into their election decision, their voting decision, and of course doing that with your family and your kids as well'. Harry Bradford, 'Murray Energy Miners Allege They Had to Give Up Pay to Attend "Mandatory" Romney Rally', *HuffPost*, 6 December 2017, www.huffpost.com/entry/century-mine-romney-ohio-mandatory_n_1836674.

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tively well-informed about politics,[31] and that this is especially true for workers with the least formal education.[32]

In addition, social inequality seems to play a role in making societies susceptible to misinformation, and unions reduce various forms of inequality. To be clear, the premise – that more unequal societies are more vulnerable to misinformation – seems intuitive, but the supporting research is sparse, especially compared to research on characteristics that make individuals vulnerable to misinformation.[33] Still, good reasons exist to believe high levels of social inequality are an important part of the puzzle. For example, one group of researchers has posited that it will be relatively easy to manipulate members of socially segregated societies in which an advantaged group hoards knowledge resources from a disadvantaged group, though the less advantaged group is especially likely to be harmed.[34] Other research specifically focused on public-health messaging in the USA has identified 'inequality-driven mistrust' as an important reason that members of historically and currently oppressed groups may be willing to accept misinformation.[35] Moreover, the content of concerted misinformation campaigns often exploits and attempts to heighten existing social divisions and prejudices, such as racism and/or sexism in the USA;[36] it stands to reason that this material would be less effective in more solidaristic societies.

If this is right, then more widespread unionization would help 'harden' a society against the effects of misinformation because unions both strengthen American democracy and, relatedly, decrease inequality. For example, because US unions are required to operate in a democratic fashion, they can be a kind of training ground (and source of material support) for their members' greater participation in electoral politics. And, in addition to reducing economic inequality (including the

[31] Ahlquist, 'Labor Unions, Political Representation, and Economic Inequality' (n 4); Macdonald, 'How Labor Unions Increase Political Knowledge' (n 4).

[32] Macdonald, 'How Labor Unions Increase Political Knowledge' (n 4), at 120.

[33] For example, a substantial body of work discusses psychological states that might make an individual more or less susceptible to believing misinformation, or that might make a source of information seem more or less trustworthy (e.g., Ecker, 'The Psychological Drivers' (n 9)). Other work focuses on social-psychological factors, explaining that misinformation can be particularly difficult to combat when it successfully taps into the consumer's moral beliefs of worldview (e.g., Wardle and Derakhshan, *Information Disorder* (n 29)).

[34] Mohamed Mostagir and James Siderius, 'Social Inequality and the Spread of Misinformation' (2023) 69(2) *Management Science* 968–95.

[35] Jessica Jaiswal, Caleb LoSchiavo, and David C. Perlman, 'Disinformation, Misinformation and Inequality-Driven Mistrust in the Time of COVID-19: Lessons Unlearned from AIDS Denialism' (2020) 24(10) *AIDS and Behavior* 2776–80.

[36] Craig Timberg and Isaac Stanley-Becker, 'Fake Twitter Accounts Posing as Black Trump Supporters Appear, Reach Thousands, Then Vanish', *The Washington Post*, 20 October 2020 www.washingtonpost.com/technology/2020/10/13/black-fake-twitter-accounts-for-trump; Rachelle Hampton, 'The Black Feminists Who Saw the Alt-Right Threat Coming', SLATE, 23 April 2019, https://slate.com/technology/2019/04/black-feminists-alt-right-twitter-gamergate.html.

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racial wage gap),[37] there is also evidence that today's unions reduce racial resentment among their white members – a finding that makes sense when one considers that, to be successful in racially diverse workforces, unions will often have to convince workers to unite to achieve shared goals.[38]

This section has argued that unions in general have a salutary effect on members' vulnerability to misinformation. The next section turns to a subset of unions: those comprised of workers whose jobs involve informing or educating the public.

15.3 INFORMATION WORKPLACES AND WORKERS

Some workplaces have special relationships to information and misinformation.[39] Many news outlets, libraries and schools would reasonably characterize themselves as carrying out a public-facing mission – producing knowledge, educating and informing segments of the public, and inculcating skills to help protect their audiences against misinformation.[40] (Social media companies might also characterize themselves this way, but the major platforms have at best a complicated relationship to information and misinformation that is beyond the scope of this chapter.)

[37] Ahlquist, 'Labor Unions' (n 4).

[38] Paul Frymer and Jacob M. Grumbach, 'Labor Unions and White Racial Politics' (2021) 65(1) *American Journal of Political Science* 225–40.

[39] See Vicki Jackson, 'Knowledge Institutions and Resisting "Truth Decay"', Chapter 14 in this volume. Jackson defines knowledge institutions as 'entities that have, as a central purpose, the dissemination, preservation, or production of knowledge'. Perhaps unions of knowledge workers – including teachers, librarians, journalists and university faculty – could qualify as knowledge institutions under this definition if they conceive of their role broadly. At a minimum, though, unions of knowledge workers often protect and strengthen knowledge workers' (and, by extension, knowledge institutions') abilities to carry out their roles. For example, a key function of the American Association of University Professors has been to define and protect academic freedom. See 'History of the AAUP', www.aaup.org/about/history-aaup (discussing AAUP's 'major contributions to the establishment of academic freedom and tenure throughout higher education in the United States'). Similarly, teachers' unions often frame their advocacy around topics such as staffing levels and teacher training using the pithy phrase 'students' learning conditions are educators working conditions'. '9 Ways to Improve Educator Working Conditions', National Education Association, 30 September 2022, www.nea.org/resource-library/9-ways-improve-educator-working-conditions#:~:text=Students'%20learning%20conditions%20are%20educators'%20working%20conditions.&text=Studies%20have%20found%20that%20the,leave%20and%20impact%20student%20learning.

[40] This chapter's focus is on institutions that would agree their mission is to accurately inform the public, and that genuinely aim to achieve that mission by acting consistently with ethical guidelines and other parameters that are generally accepted within the industry. It does not discuss entities that have other stated or unstated goals, such as organizations that present themselves as news outlets, but that are actually disguised entertainers, manipulators or propagandists. With respect to this latter group, it is perhaps conceivable that empowered workers could exert a counterweight – fighting to bring balance to a propagandist network, for example – but I see no reason to believe this is likely to happen. Instead, it strikes me as at least equally likely that these entities successfully hire employees who share their 'true' mission, even if that mission is unstated.

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But organizations that genuinely try to fulfill this mission-driven role can become targets for misinformation spreaders, meaning that both the organization as a whole and its various employees and managers may need to contend with mis- and disinformation. Specifically, they may need to resist targeted campaigns intended to manipulate or coerce them into spreading misinformation, while also retaining their credibility with the public.[41]

How well these institutions resist cooptation by spreaders of misinformation will depend on a range of factors. But I argue that one important factor is the extent to which their workforces are organized and empowered to defend themselves (and, by extension, the institution as a whole) against misinformation. The basic argument is intuitive: most people who become journalists or teachers or professors do so at least in part for mission-driven reasons,[42] and they are singularly well-placed to know how well their employers are doing at carrying out their stated missions and stewarding their institutions.[43] This makes organized and empowered employees a potential first line of defense against organizational decisions or practices that open the door to misinformation, or that erode earned public trust.

The remainder of this section turns to one industry – journalism – as an illustration of the thesis. It begins by briefly describing some of the pressures bearing down on US media outlets, emphasizing that one possible response is for outlets to fall back on practices that tend to erode trust in media. Next, it describes how journalists have unionized and otherwise acted collectively in response, fighting with varying degrees of success to preserve institution-sustaining employment conditions and standards. To be clear, I am not arguing that unionization is 'one weird trick' that will solve the industry's various problems – but unionizing allows journalists to push back with more force than they could muster individually.

[41] Joel R. Malin and Christopher Lubienski, 'Information Pollution in an Age of Populist Politics' (2022) 30 *Education Policy Analysis Archives* 1–23. Malin and Lubienski focus on this phenomenon in the context of US education, but note its existence across the 'modern information landscape' (at 4).

[42] This chapter focuses on journalists in the USA, and a 2022 Pew poll bears out that they mostly feel passionate about and committed to their work, and very concerned about their and their industry's ability to get the facts right and meaningfully inform the public, see Sara Atske, 'Journalists Sense Turmoil in Their Industry amid Continued Passion for Their Work. Report', Pew Research Center, 14 June 2022, www.pewresearch.org/journalism/2022/06/14/journalists-sense-turmoil-in-their-industry-amid-continued-passion-for-their-work. In addition, nearly all of the journalists surveyed said that 'made-up news and information' was either a 'very big' or 'moderately big' problem. Finally, majorities expressed concern about both the industry's ability to handle misinformation, and the degree of public trust in the industry generally.

[43] Analogously, the US Supreme Court has grounded public employees' limited First Amendment right to be protected against termination when they speak on a matter of public concern in institutional governance concerns. *Pickering* v. *Board of Education*, 391 US 563 (1968) (writing that 'Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal').

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15.3.1 *The Changing Media Environment*

As Shannon Poulson and Dannagal Young have described, '[t]he quality of journalism and the pursuit of truth depend largely on the commercial, social, and technological changes of the times'.[44] Financialization, the rise of 'both-sides' journalism following a prolonged campaign to label certain kinds of (accurate) reporting as having 'liberal bias', the increasing popularity of 'fake news' or 'alternative facts' rhetoric on the political right,[45] and the shift to online news consumption (especially on social media platforms) all pose significant threats to 'mainstream' journalism and journalists. This subsection briefly (and necessarily incompletely) surveys these trends.[46]

Technological evolution has presented a series of challenges to traditional newsrooms.[47] Widespread adoption of the Internet left print newspapers scrambling to compete with online entertainment of all sorts, and to convince the public to pay for online news content. Then, the rise of platforms like Facebook again changed the way many individuals consumed news, diverting them from news organizations' homepages and towards stories that appear individually in their content feeds. One large, international survey recently found that nearly 80 percent of respondents preferred to access news via a platform or other aggregator (and that Facebook is now being supplanted by other platforms) – but also that fewer people are consuming news at all.[48] This shift has created several misinformation-related problems. Some of these challenges are content-moderation problems, over which platforms have control. For example, legitimate news outlets can report on the existence of sham stories formatted by malevolent actors to closely resemble real news sites – but only platforms can take these posts down and ban their originators, or at least try to.

Similarly, news outlets have had to adapt to the role of algorithmic amplification in determining the reach of individual stories or an organization's collective output.

[44] Shannon Poulsen and Dannagal G. Young, 'A History of Fact Checking in U.S. Politics and Election Contexts' in Brian G. Southwell, Emily A. Thorson and Laura Sheble (eds.), *Misinformation and Mass Audiences* (Austin: University of Texas Press, 2018) pp. 232–48, p. 244.

[45] Eric Bradner, 'Conway: Trump White House Offered "Alternative Facts" on Crowd Size', CNN, 23 January 2017, www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html.

[46] For further discussion of these topics see, e.g., Martha Minow, *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech* (New York: Oxford University Press, 2021).

[47] Nic Newman et al., 'Digital News Report 2023', Reuters Institute, 2023, https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2023; Erin C Carroll, 'Promoting Journalism as a Method' (2020) 12 *Drexel Law Review* 691.

[48] The same survey reflected that the public's interest in consuming any news is higher during times of crisis or political turmoil, such as the COVID-19 pandemic or (in the USA) the election of Trump. Although 67 percent of US respondents said they were 'very' or 'extremely' interested in news in 2015, that number had fallen to 49 per cent in 2023, see Newman, 'Digital News Report 2023' (n 47) p. 21.

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This would be challenging and at least potentially harmful even if the algorithms were unchanging and publicly well-understood, because algorithmic amplification often rewards 'clickbait'[49] or 'infotainment'.[50] But the reality is that platforms change their algorithms unpredictably and often without notice. Worse, platforms may provide incorrect information about their own algorithms. The leading example is Facebook's significant overestimation of the amount of time individual users spent viewing video content, leading many news organizations to undertake a doomed 'pivot to video' – sometimes laying off print journalists in the process.[51]

These and other technological changes have led to plummeting advertising revenue, particularly for local newspapers.[52] This has been catastrophic: 'Since 2005, the [United States] has lost more than a fourth of its newspapers (2,500) and is on track to lose a third by 2025.'[53] The result is a growing number of 'news deserts' where no credible local newspaper exists.[54] And although people living in news deserts may be able to access some kinds of local information from other sources,[55] they lose the benefits of reporting by journalists with the skills and deep local expertise required to unearth information that has been deliberately concealed or that is simply difficult to access or understand.[56] Further, local news outlets enjoy considerably more public trust than do national news organizations, especially among Republicans and independents[57] – suggesting that news deserts may leave

[49] Clickbait refers to stories accompanied by headlines written to arouse readers' interest, often by provoking a strong emotional reaction.

[50] Keach Hagey and Jeff Horowitz, 'Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead', *The Wall Street Journal*, 15 September 2021; see also Helen L. Norton, 'Getting to Trustworthiness (But Not Necessarily to Trust)' (2023) 3 *Journal of Free Speech Law* 7 (discussing how the 'media's need to do whatever it takes to survive financially' can dampen readers' trust).

[51] Laura Hazard Owen, 'Facebook's Pivot to Video Didn't Just Burn Publishers. It Didn't Even Work for Facebook', Nieman Lab, 15 September 2021, www.niemanlab.org/2021/09/well-this-puts-a-nail-in-the-news-video-on-facebook-coffin.

[52] Sara Fischer, 'U.S. Digital Newspaper Ad Revenue Expected to Surpass Print by 2026', Axios, 21 June 2022, www.axios.com/2022/06/21/digital-newspaper-ad-revenue-print.

[53] Penny Abernathy, 'The State of Local News. Report', Local News Initiative, 29 June 2022, https://localnewsinitiative.northwestern.edu/research/state-of-local-news/report.

[54] Troublingly, news deserts tend to have lower median household income, graduation rates and broadband access than the national average, and a higher poverty rate. 'Life in a News Desert', *Columbia Journalism Review*, 2019, www.cjr.org/special_report/life-in-a-news-desert.php.

[55] Jessica Collier and Emily Graham, 'Even in "News Deserts" People Still Get News', Center for Media Engagement, 14 December 2022, https://mediaengagement.org/research/people-still-get-news-in-news-deserts; but see Nick Mathews, 'Life in a News Desert: The Perceived Impact of a Newspaper Closure on Community Members' (2022) 23(6) *Journalism* 1250–65, (concluding based on nineteen in-depth interviews with residents of a news desert in rural Virginia that loss of a local paper harmed their sense of community and left them uninformed about local events).

[56] Lili Levi, 'Social Media and the Press' (2012) 90 *North Carolina Law Review* 1531.

[57] Jeffrey Gottfried and Jacob Liedke, 'Partisan Divides in Media Trust Widen, Driven by a Decline among Republicans', Pew Research Center, 30 August 2021, www.pewresearch.org/

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large numbers of disproportionately right-leaning Americans with few news sources that are credible and that they also trust.

Outlets that have managed to avoid closure still face budget pressures, which can lead to layoffs of journalists and editors, and create incentives for news organizations to underinvest both in time-consuming accountability or investigative journalism, and in critical behind-the-scenes functions like fact-checking and copy-editing. Outlets may substitute access journalism or stories that simply rehash prepackaged material; in the future, outlets may even turn to stories generated in whole or part by predictive-text applications.[58] Local control of newspapers has also become less common in recent years: as of 2021, 'half of all daily newspapers in the U.S. [were] controlled by financial firms'[59] – often 'vulture' funds that, in the words of writer McKay Coppins, aim to '[g]ut the staff, sell the real estate, jack up subscription prices, and wring as much cash as possible out of the enterprise until eventually enough readers cancel their subscriptions that the paper folds, or is reduced to a desiccated husk of its former self'.[60]

Finally, news organizations have to decide how to deal with misinformation. This might seem straightforward: every credible news outlet strives to uncover the truth, and publicly getting it wrong – especially on a high-profile story – is the stuff of nightmares. But the topic quickly becomes knotty, especially when misinformation and accusations of newsroom bias intersect. For example, consider a journalist who reports the overwhelming scientific consensus that climate change is occurring, that it is caused by human activity, and that it will lead to devastating consequences.[61] In response, powerful industry groups and aligned politicians vociferously accuse the reporter and the outlet for which they work of bias. When this scenario replays itself enough times, the effect can be to pressure editors and reporters to adopt 'both sides' or 'false balance' reporting. In this example, that might look like producing stories that wrongly imply the existence of meaningful scientific doubt about climate change.[62] In other words, news outlets legitimately strive for (some version of) neutrality, but also of its appearance – and so when it comes to hotly contested

short-reads/2021/08/30/partisan-divides-in-media-trust-widen-driven-by-a-decline-among-republicans.

[58] Benjamin Mullin and Nico Grant, 'Google Tests A.I. Tool That Is Able to Write News Articles', *The New York Times*, 20 July 2023, www.nytimes.com/2023/07/19/business/google-artificial-intelligence-news-articles.html.

[59] McKay Coppins, 'A Secretive Hedge Fund Is Gutting Newsrooms', *The Atlantic*, 14 October 2021, www.theatlantic.com/magazine/archive/2021/11/alden-global-capital-killing-americas-newspapers/620171.

[60] Ibid.

[61] See Scientific Consensus: Earth's Climate Is Warming. Climate Change: Vital Signs of the Planet, https://climate.nasa.gov/scientific-consensus.

[62] Maxwell T. Boykoff and S. Ravi Rajan, 'Signals and Noise. Mass-Media Coverage of Climate Change in the USA and the UK' (2007) 8(3) *EMBO Reports*, 207–11. As the authors of the article describe, this dynamic is exacerbated when 'generalist' journalists have difficulty getting their arms around scientific literature while also working to a tight timeline.

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policy and political issues, they may decide to repeat misinformation in order to appear 'fair'.[63]

As the climate change example illustrates, this dynamic long predates Donald Trump, but Trump's candidacy and presidency presented an especially acute challenge. Trump coupled a disregard for the truth with near-constant accusations of media bias ('fake news'), and he frequently characterized the mainstream media as the 'Enemy of the People', sometimes even celebrating violence against reporters.[64] This left reporters and news outlets with a dilemma – how to handle statements that are false, but also newsworthy because of their source? Early in Trump's presidency, outlets seemed to struggle with this question. For example, many outlets were at least initially reluctant to use the word 'lie' to describe Trump's statements.[65] Similarly, journalists and academics alike grappled with how to report on the propagation of disinformation without inadvertently serving the purposes of its creators.[66]

Whether or not news organizations succumb to the bad incentives created by the confluence of these pressures has consequences for the organizations' public legitimacy. In turn, public trust in media plays a role in determining a society's susceptibility to misinformation. Unsurprisingly, researchers studying the European context found that journalism scandals decrease trust in mainstream media, as does public perception that media is pervasively biased, clickbait-y or of poor quality.[67] And, one might add, if this perception is accurate, this loss of legitimacy is deserved – media that suffers from these flaws is failing to convey useful and accurate information to the public.

Misinformation may fill the void left by an absence of trusted news organizations, though the picture is complex: Carlos Rodríguez-Pérez and María Canel also found that countries characterized by *lower* public trust in media tended to have greater resilience to misinformation. But the finding that healthy skepticism is better than blind trust is not a vindication of poor-quality journalism. Instead, the researchers recommend a two-pronged approach in which government warns the public of the risk of misinformation and develops media literacy through education, while media

[63] See Yochai Bencher, Robert Paris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (New York: Oxford University Press, 2018), pp. 358–59.

[64] 'Donald Trump Celebrates Violence against Journalists', *The New Yorker*, 19 October 2018, www.newyorker.com/news/current/donald-trump-celebrates-violence-against-journalists.

[65] Paul Farhi, 'Lies? The News Media Is Starting to Describe Trump's "Falsehoods" That Way', *The Washington Post*, 6 June 2019, www.washingtonpost.com/lifestyle/style/lies-the-news-media-is-starting-to-describe-trumps-falsehoods-that-way/2019/06/05/413cc2a0-8626-11e9-a491-25df61c78dc4_story.html.

[66] Wardle and Derakhshan, *Information Disorder* (n 29) p. 13 ('getting the mainstream media to amplify rumour and disinformation is the ultimate goal of those who seek to manipulate').

[67] Carlos Rodríguez-Pérez and María J. Canel, 'Exploring European Citizens' Resilience to Misinformation: Media Legitimacy and Media Trust as Predictive Variables' (2023) 11(2) *Media and Communication* 30–41.

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outlets foster their own legitimacy through transparency, accuracy and fact-checking, and stepped-up 'watchdog' journalism[68] – precisely the functions that are most at risk in today's media environment. The challenges confronting news outlets and journalists today are shaping the news and reporting available to the public, and journalists' working conditions. The next subsection discusses how journalists' unions can respond.

15.3.2 *Journalism Unions and Misinformation*

The dynamics discussed in the previous section have propelled a recent wave of successful union drives at US news organizations. Beginning with the unionization of Gawker Media in 2015, union drives quickly sprang up at other web outlets, legacy newspapers, magazines and public radio stations.[69] Steven Greenhouse, a highly regarded journalist who spent three decades at the *New York Times*, including twenty years covering labor,[70] explained that '[t]wo major forces have propelled the unionization wave: the industry's financial crisis and the wave of acquisitions, wiping out thousands of jobs and clamping down on salaries'.[71] In addition, Greenhouse saw the COVID-19 pandemic as a factor, both because increased remote work led to a desire to build community, and because the pandemic prompted new questions about working conditions, such as COVID-related workplace safety protocols and work-from-home policies.[72]

As Greenhouse explained, union drives are often precipitated by planned acquisitions, as journalists see an acute need for negotiated contractual protections against downgrading of their working conditions. For example, *Los Angeles Times* journalists decided to unionize after the paper was purchased by a news conglomerate, which then unilaterally changed working conditions for the worse and fired newsroom leadership.[73] It turns out this was a smart move: the union successfully negotiated a three-year contract guaranteeing raises each year, as well as instituting

[68] Ibid.; see also Wardle and Derakhshan, *Information Disorder* (n 29) making similar recommendations; Bencher, Paris and Roberts, *Network Propaganda* (n 63) p. 359.

[69] Still, most journalists are not unionized – though a majority of non-union journalists in a 2022 poll said they would join a union if they could. Atske, 'Journalists Sense Turmoil' (n 42).

[70] Michael Calderone, 'Steven Greenhouse Leaves the *New York Times*, as Newspapers' Labor Beat Keeps Shrinking', *HuffPost*, 3 December 2014, www.huffpost.com/entry/steven-greenhouse-labor-beat_n_6262046.

[71] Steven Greenhouse, 'Newsrooms are Unionizing Pretty Much "Nonstop". Here's Why', Nieman Reports, 19 January 2022, https://niemanreports.org/articles/newsrooms-labor-unions; see also Steven Greenhouse, 'More Secure Jobs, Bigger Paychecks', *Columbia Journalism Review*, 2018, www.cjr.org/special_report/media-unions-history.php.

[72] Greenhouse, 'Newsrooms are Unionizing'; Greenhouse, 'More Secure Jobs, Bigger Paychecks'.

[73] Sydney Ember, '*Los Angeles Times* Newsroom, Challenging Tronc, Goes Public with Union Push', *The New York Times*, 4 October 2017, www.nytimes.com/2017/10/04/business/media/los-angeles-times-tronc-union.html.

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protections against arbitrary terminations and measures to increase newsroom diversity.[74]

Of course, unions do not always win improvements, and they cannot usually forestall closures of news outlets. The NLRA does not require employers to negotiate with unionized employees over decisions to shut down an entire enterprise – but it does require bargaining with unionized employees over the effects of decisions to shut down, including on topics such as severance payments and the timing of layoffs.[75] This means that even in a worst-case scenario, unionizing gives journalists a better shot at a good outcome, or at least at the best outcome available under the circumstances. For example, after writers working at The Appeal, a web-based outlet devoted to covering the criminal justice system, announced they were unionizing, the site's owner announced a decision to shut the site down altogether.[76] But the union was first able to negotiate severance packages – and better yet, the unionized employees then announced their intention to relaunch The Appeal as a worker cooperative. Today, the outlet still exists as a 'worker-led nonprofit newsroom'.[77]

Unions such as the NewsGuild advocate against harmful acquisitions in other ways as well. For example, the NewsGuild launched a project called 'SaveLocalNews' as a hub for reporting on hedge fund acquisitions of newsrooms,[78] as well as a place to coordinate political, shareholder- and public-facing advocacy when a new acquisition is in the works.[79] Journalists' unions also advocate for regulatory bodies to halt acquisitions of news outlets,[80] and for legislatures to pass

[74] Meg James, '*Los Angeles Times* Reaches Historic Agreement with Its Newsroom Union', *Los Angeles Times*, 16 October 2019, www.latimes.com/california/story/2019-10-16/los-angeles-times-first-guild-contract.

[75] *First National Maintenance Corp.* v. *NLRB*, 452 US 666, 681–82 (1981).

[76] Sally Davidow, 'Good News/Bad News: The Appeal Shuts Down, Staffers Relaunch It as a "Worker-Led News Outlet"', The NewsGuild, 1 July 2021, https://newsguild.org/good-news-bad-news-the-appeal-shuts-down-staffers-relaunch-it-as-a-worker-led-news-outlet-2.

[77] See https://theappeal.org/about-us.

[78] For example, the project published a report showing that Alden-acquired outlets downsized twice as fast as the national rate; this statistic has been cited in other coverage of Alden's acquisition of news outlets. Julie Reynolds, 'Working under a Hedge Fund: How Billionaires Made the Crisis at America's Newspapers Even Worse', #Save Local News, https://dfmworkers.org/working-under-a-hedge-fund-how-billionaires-made-the-crisis-at-americas-newspapers-even-worse.

[79] See generally, #SaveLocalNews at https://dfmworkers.org.

[80] For example, Sally Davidow, 'Guild Calls on Biden to Stop TEGNA Merger and Save Journalism Jobs', The NewsGuild, 2 June 2022, https://newsguild.org/guild-calls-on-biden-to-stop-tegna-merger-and-save-journalism-jobs; 'CWA, NewsGuild-CWA, NABET-CWA Recommit to Fighting Hedge Fund Takeover of Local News', Communication Workers of America, 28 February 2022, https://cwa-union.org/news/releases/cwa-newsguild-cwa-nabet-cwa-recommit-fighting-hedge-fund-takeover-local-news; Date Hayes, 'CWA Leads Guilds' FCC Petition Seeking to Block Sinclair–Tribune Merger', *Deadline*, 20 June 2018, https://deadline.com/2018/06/communications-workers-of-america-fcc-petition-seeks-to-block-sinclair-tribune-merger-1202414599; Dan Papscun, 'NewsGuild Asks DOJ to Probe Block's Pittsburgh City Paper Deal', *BloombergLaw*, 25 January 2023, https://news.bloomberglaw.com/antitrust/newsguild-asks-doj-to-probe-blocks-pittsburgh-city-paper-deal.

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laws aimed at preserving local news.[81] One important function of this advocacy is to point out where the interests of news organizations' owners diverge from those of journalists. For example, the NewsGuild has warned that iterations of the Journalism Competition and Preservation Act, a bill that would allow news companies to bargain collectively with platforms like Google and Facebook, will be counterproductive if it is not packaged with measures designed to channel increased revenues towards employing more journalists.[82]

Other US newsrooms have unionized precisely because they see a negotiated CBA as a way to protect the integrity of their work. For example, when ProPublica journalists unionized in 2023, they signed a mission statement focused primarily on journalistic standards and workplace equity: 'We want to maintain the organization's focus on ambitious, impact-focused journalism. We want to strengthen existing internal efforts, like those of the diversity committee, that address inequities within our own staff and across our industry.'[83] (As of when this chapter went to print, ProPublica and its journalists had not yet negotiated a CBA, although ProPublica agreed to voluntarily recognize the union as the collective bargaining representative of its employees.[84])

Collective bargaining agreements covering journalists at other outlets reflect a range of terms that help protect journalists' professional integrity. Some of these are terms that are common to collective bargaining agreements across industries. For example, CBAs that cover journalists usually contain protections against termination or other discipline without 'just cause'[85] – an important backstop for journalists who, for example, report on or otherwise criticize their own employers, or who become targets of coordinated, bad-faith attacks.[86] Importantly, just-cause protections typically

[81] For example, Sally Davidow, 'NewsGuild Applauds Local Journalism Sustainability Act', The NewsGuild, 22 July 2021, https://newsguild.org/newsguild-applauds-local-journalism-sustainability-act (listing organizations belonging to 'Rebuild Local News' coalition); Diane Kennedy and Jon Schleuss, 'Commentary: How New York Can Save Local News', Times Union, 19 March 2023, www.timesunion.com/opinion/article/commentary-new-york-save-local-news-17844068.php.

[82] For example, Sally Davidow, 'Bargaining Bill for News Companies Still Needs Improvements', The NewsGuild, 23 August 2022, https://newsguild.org/bargaining-bill-for-news-companies-still-needs-improvements.

[83] 'Our Mission', ProPublica Guild, www.propublicaguild.org.

[84] Jon Schleuss, 'ProPublica Guild Wins Voluntary Recognition', The NewsGuild, 4 August 2023, https://newsguild.org/propublica-guild-wins-voluntary-recognition.

[85] The CBA negotiated between Gawker Media and its employees' union was a notable exception; the union chose not to seek just-cause protections. Noah Kulwin, 'Gawker Media's Union Officially Has a Contract. Now What?', Vox, 29 February 2016, www.vox.com/2016/2/29/11588348/gawker-medias-union-officially-has-a-contract-now-what.

[86] For example, after *The Washington Post* fired reporter Felicia Sonmez for tweeting criticism of a colleague and then of *Post* management, her union filed a grievance seeking reinstatement, and then later a charge with the National Labor Relations Board. Corbin Bolies, 'Felicia Sonmez Takes Her WaPo Fight to the Feds', *The Daily Beast*, 29 September 2022, www.thedailybeast.com/felicia-sonmez-takes-her-washington-post-fight-to-the-national-labor-relations-board. Previously, the union had pressured *The Post* to both provide Sonmez a personal

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put the burden on the employer to prove it had a sufficient reason to impose discipline or termination; moreover, the union litigates the grievance on behalf of the employee, meaning that the employee need not pay a lawyer themselves. Thus, unionized journalists typically have workplace protections that are much closer to academic tenure than to the presumption of at-will employment that otherwise applies to most private sector workers in the USA.

Additionally, journalists' unions often negotiate contract terms that are either aimed at increasing the diversity of their newsrooms, or that can have that effect; this can increase public trust in reporting by those outlets, especially among marginalized communities.[87] For example, some contracts require news outlets to interview at least one or two members of underrepresented groups for each open position.[88] And CBAs that reflect new pay floors, coupled with predictable raises for more senior journalists, can make careers in reporting more feasible for members of marginalized communities. Finally, journalists' unions have pressured a list of high-profile outlets to respond to racial disparities in hiring, pay or performance evaluations by conducting and releasing surveys of newsroom staff.[89]

Next, many news outlet CBAs contain provisions that are specifically aimed at protecting and operationalizing journalistic standards. For example, the contract that covers US journalists working at *The Guardian* provides for employee representation on 'any editorial boards or internal news committee teams by a Guild-appointed employee', and also states that employees cannot be required to undertake 'any practice which in the employee's judgment compromises the employee's integrity', including by writing in a way that distorts facts or creates wrong impressions[90] – a provision that a journalist could rely on if pressured to imply the existence of a scientific debate over a matter that was actually settled.[91] This CBA also specifically protects covered employees against discipline based on 'the communications of another person on social media' – which means that journalists cannot be

security detail, and reverse its decision to suspend her, after she tweeted about the sexual assault charge that had previously been filed against Kobe Bryant shortly after his death, https://docs.google.com/document/d/1ErQ7bN352jQZoKa8kCzAW8CWr2zEnUIvm5BG2KdtiE/edit.

[87] See 'Hard News: Journalists and the Threat of Disinformation', PEN America, 2022, https://pen.org/report/hard-news-journalists-and-the-threat-of-disinformation.

[88] See 'Pay Equity', The NewsGuild, 2020, https://newsguild.org/pay-equity (listing example contracts that contain these terms).

[89] Ibid.

[90] Collective Bargaining Agreement between Guardian News and Media LLC and New Media Guild, Local 31222, Oct. 6, 2017–Oct. 5, 2020, at 13 and 26.

[91] In addition, US labor law protects unionized workers who refuse to follow a management directive because they reasonably believe that, under their CBA, they cannot be required to follow the directive. Thus, if *The Guardian* fired a journalist who reasonably believed they had a right to refuse a directive under this provision, it could be subject to both a grievance and an unfair labor practice charge. See *NLRB* v. *City Disposal Systems*, 465 US 822 (1984) (holding NLRA protects employees who reasonably stand on their rights under a CBA).

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suspended or terminated simply because they become a target of online criticism.[92] CBAs are not always this protective or detailed – but they often contain some degree of shared labor–management recognition of and protection for journalistic independence. Thus, some CBAs specify that journalists can withhold their bylines from stories to which they have editorial objections, and some create joint labor–management committees to deal with conflicts of interest of breaches of ethical standards.[93]

In the near future, journalists' unions might negotiate over the deployment of artificial intelligence (AI) in their newsrooms.[94] (The deployment of new workplace technology is typically a mandatory subject of bargaining.) This is an example of a larger issue over which unions negotiate frequently: how labor-saving technology will be used, and how the resulting cost savings will be distributed. Those questions can be existentially important for workers in any context – but this context will have consequences for the broader public as well. A best-case scenario might involve cautious deployment of AI for specific routine tasks, subject to careful checking by humans, in ways that free up journalists to concentrate on investigative reporting. But the worst-case scenario would involve increasing reliance on AI for substance, perhaps triggering a vicious cycle of poor-quality output and fall-offs in subscribers and advertisers.

US news outlets seem to be at an inflection point, and the danger is that publishers will continue to respond by prioritizing short-term fixes at the long-term cost of both public trust and public access to reliable news sources. Journalists may not be able to prevent this outcome – but their odds are better if they act collectively. But how does US labor law shape the leverage that journalists bring to bear on news outlets? The next section turns to that question.

15.3.3 *Labor Law, the First Amendment and Journalists' Unions*

The previous section made the case that journalists' unions can help resist misinformation, including because they provide a way for journalists to pressure news outlets to adopt and maintain strong journalistic standards, and to enforce those standards in individual situations. But one barrier to unions' effectiveness is the weakness of US labor law.[95] First, as I have described elsewhere, labor law preserves a very broad

[92] Ibid. at 13.

[93] See, e.g., Agreement between Foreign Policy and Washington-Baltimore New Guild, Local 32035, Oct. 18, 2017–Oct. 18, 2019, at 10; Collective Bargaining Agreement between The Real News Network and The NewsGuild-CWA, Aug. 1, 2021–July 31, 2023, at 30 and 34.

[94] 'AP Releases New Report on AI in Local News', Associated Press, 29 March 2022, www.ap.org/press-releases/2022/ap-releases-new-report-on-ai-in-local-news (summarizing findings, including that some news outlets are already using AI for certain functions).

[95] Charlotte Garden, 'Tactical Mismatch in Union Organizing Drives' in Richard Bales and Charlotte Garden (eds.), *The Cambridge Handbook of US Labor Law for the Twenty-First Century* (Cambridge: Cambridge University Press, 2020) pp. 199–207.

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scope for employers to fight organizing drives,[96] including by making serious 'misrepresentations' about the likely effects of unionization.[97] As a result, it can be very difficult for workers to unionize in the first place, making the recent string of successful union drives among journalists all the more remarkable. In addition, US labor law does very little to compel employers to agree a contract. The NLRA requires employers (and unions) to bargain in 'good faith', but provides no governmental mechanism to resolve bargaining impasses;[98] instead, it assumes that parties will use their 'economic weapons', such as strikes or lockouts, to pressure the other side to reach a deal. And although the NLRA confers legal protection on most strikes[99] – meaning that employers cannot retaliate against strikers by firing them – workers striking over economic issues can be 'permanently replaced'.[100] Moreover, labor law generally requires employers to hold working conditions constant while bargaining, but then allows them to make certain unilateral changes to working conditions upon reaching impasse.[101] This set of principles tends to give employers the upper hand during bargaining, no matter their industry. But at least two US Courts of Appeals, including the US Court of Appeals for the District of Columbia Circuit, have held that the rules should be even more employer-friendly when unions seek to bargain over issues of editorial policy.[102] This is because they see a bargaining requirement – even under these employer-friendly set of rules related to impasse and unilateral changes – as raising First Amendment concerns.

News outlets have been raising First Amendment objections to labor law since the NLRA was enacted in 1935, and the Supreme Court considered this argument in the 1937 case *Associated Press* v. *NLRB*.[103] This decision was issued as part of a trio of cases in which the Court upheld the NLRA as a valid exercise of Congress's

[96] Ibid.

[97] *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982) (holding that an employer's 'misrepresentations' do not provide cause to set aside the results of a union election). Interestingly, the National Labor Relations Board has at times applied the opposite rule, and held that one side's misrepresentations could merit a rerun election if the misrepresentation was highly salient, and if the other side did not have a meaningful opportunity to reply. Ibid. at 130.

[98] *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 US 99 (1970).

[99] 29 U.S.C. §§ 157 and 158(a)(1).

[100] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 US 333 (1938). There are some technical differences between being 'fired' and being 'permanently replaced', but these differences are very unlikely to be consequential for a replaced worker.

[101] *National Labor Relations Board* v. *Katz*, 369 US 736 (1962).

[102] *Ampersand Publishing* v. *National Labor Relations Board*, 702 F.3d 51, 54 (D.C. Cir. 2012); *McDermott* v. *Ampersand Publishing*, 593 F.3d 950 (9th Cir. 2010). The DC Circuit is especially important in this context because any NLRB decision may be appealed to that court. 29 U.S.C. § 160(f).

[103] *Associated Press* v. *National Labor Relations Board*, 301 US 103 (1937).

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Commerce Clause authority.[104] The case began when the Associated Press (AP) fired one of its reporters who was active with the American Newspaper Guild. Arguing that it could not be compelled to reinstate the reporter, the AP argued before the Supreme Court that '[t]o name the men who shall choose and write the news for publication is no different either in principle or in result from naming what shall be written or published. Here the author and the product are one and inseparable. If one is to be free, so must the other'.[105] In other words, because the AP had a First Amendment right to choose what to publish, it also had an absolute right to decide whom to (or not to) employ.[106] The Court rejected this argument, correctly observing that the NLRA 'does not compel the petitioner to employ any one; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice'.[107] However, the Court did not preclude the possibility of future First Amendment challenges to specific aspects of labor law.[108]

Subsequently, news outlets have had some success in arguing that certain applications of labor law infringe their First Amendment rights. For example, consider *Passaic Daily News* v. *NLRB*, in which the employer-newspaper cancelled a bureau chief's regular column in retaliation for his support for a unionization effort.[109] Normally, the remedy for this sort of anti-union retaliation would be an order for the employer to restore the status quo ante by reinstating the union supporter's duties – but in this case, the Court held that it would be inconsistent with the First Amendment to order the employer to publish the bureau chief's column.[110] Unfortunately, the discussion of the First Amendment issue was quite limited – rather than considering the government interests at stake and possible alternative ways to achieve them, the Court seemed to assume that because the order to

[104] See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 US 1 (1937); see also US Constitution, Art. I, § 8, cl. 3 (providing that '[t]he Congress shall have Power … [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes').

[105] '*Associated Press* v. *NLRB*', AP Brief at *102.

[106] US readers may recognize the parallel to the ministerial exception, which effectively exempts religious entities from the application of many aspects of employment law when they hire employees who qualify as 'ministerial'. See *Hosanna-Tabor Evangelical Lutheran Church* v. *EEOC*, 565 US 171 (2012).

[107] *Associated Press* v. *National Labor Relations Board* at 132. Four dissenting justices (who also thought Congress lacked the authority to enact the NLRA) agreed with the AP that the First Amendment barred the statute's application to the press. They accepted the premise that unionized journalists had a conflict of interest when they covered labor disputes, which they concluded meant that news organizations had to be able to fire journalists on the basis of their union affiliation. Ibid. at 138.

[108] Ibid. at 132–33.

[109] *Passaic Daily News* v. *National Labor Relations Board*, 736 F.2d 1543 (D.C. Cir. 1984).

[110] Ibid. at 1559 ('we find that the remedy mandating resumption of Stoddard's column must yield to the Company's First Amendment interest in retaining control over prospective editorial decisions').

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reinstate the column *implicated* the First Amendment, it also *violated* the First Amendment.[111]

The District of Columbia Circuit reached a similar conclusion in *Ampersand Publishing* v. *NLRB*, a case that arose after the owner and publisher of the Santa Barbara News-Press fired or otherwise disciplined several union supporters. Here, the core of the dispute centered on journalistic ethics: reporters and editors employed on the paper's news-gathering side became concerned about how the paper's owner, along with an editorial writer who was promoted to publisher, exercised influence over news-gathering and reporting. The reporters unionized, and sought to bargain over these issues as well as bread-and-butter topics.[112] When the paper's leadership resisted, the journalists held a rally calling for readers to cancel their subscriptions, and the paper responded by firing a group of journalists who supported the union.[113] The NLRB ordered the paper to reinstate the fired reporters, but the DC Circuit reversed on First Amendment grounds, writing that '[g]iven the publisher's First Amendment rights, issues of what is published and not published are not generally a "legitimate employee concern"', because 'The First Amendment affords a publisher – not a reporter – absolute authority to shape a newspaper's content'.[114]

Two important legal implications flow from this approach. The first is that editorial policies would be at most a 'permissive' subject of bargaining, meaning that employers would remain free to change those policies throughout the bargaining process, and they would not bear on whether impasse was reached. The second, more consequential, implication is that an employer could fire or otherwise discipline employees who struck over either a news outlet's refusal to bargain over editorial policies, or the substance of those policies. In other words, journalists could not rely on the NLRA's bargaining requirement or its anti-retaliation provision with respect to editorial policies. My view is that this approach is seriously flawed because it conflates labor law – a mechanism to provide limited protections for employees to exercise voice vis-á-vis their employers – with direct government control of the press.

[111] The DC Circuit analogized the case to the Supreme Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 US 241 (1971). But *Tornillo* concerned a 'right of reply' statute that would have required the *Herald* to run candidate rebuttals to the paper's criticism. In contrast, the order in this case would have required reinstatement of a column that the paper had already decided to run, and it would not have prohibited the paper from discontinuing the column for any reason other than an anti-union one.

[112] *Ampersand Publishing* v. *National Labor Relations Board* at 54; see also James Rainey, 'Santa Barbara News-Press Bankruptcy Brings Uneasy End to an Owner's Bitter Tenure', *Los Angeles Times*, 29 July 2023, www.latimes.com/california/story/2023-07-29/santa-barbara-news-press-bankruptcy-closure-newspaper-owner-wendy-mccaw (providing a more detailed account of the problems that led to the labor dispute).

[113] *Ampersand Publishing* v. *National Labor Relations Board* at 54.

[114] Ibid. at 56; see also *McDermott* v. *Ampersand Publishing*, 593 F.3d 950 (9th Cir. 2010) (refusing to issue injunction against an employer in the same labor dispute because of 'First Amendment right to editorial discretion').

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Unfortunately, the current Supreme Court's highly formalistic approach to First Amendment cases means that it would likely uphold the DC Circuit's approach, were it to decide a similar case.[115]

But even assuming that these courts' understanding of the First Amendment's interplay with labor law is doctrinally correct, journalists' unions will still likely succeed in influencing mainstream outlets' editorial policies. Unions that lack legal rights can still appeal to the public, and editorial integrity is an appealing message. Moreover, many individual journalists have substantial presences on social media platforms, making it relatively easy to reach both the public and other journalists, and news outlets within the same media market report on each other, as illustrated by coverage in the *Los Angeles Times* of labor conflicts at the Santa Barbara News-Press.[116] Finally, once an outlet commits to be bound by a CBA provision related to editorial integrity, that provision is likely to be enforceable through the usual channels without raising a First Amendment problem.[117]

As a result, journalists' unions will have greater prospects for success when they organize and seek to bargain over editorial integrity *before* there is an integrity problem at their outlet. Once the train has left the station – as was seemingly the case at the Santa Barbara News-Press – the outlet may simply double down and fire complaining journalists.[118] But in the absence of a current conflict, outlets should be willing to agree to general integrity commitments along with specific mechanisms to make them real, particularly because these provisions do not generally come with attached price-tags. Thus, although labor law's weakness is a drawback – and an especially significant one in this context – organizing and collective bargaining still have promise as mechanisms to protect journalistic integrity.

15.4 CONCLUSION

This chapter has argued that labor unions are important to the fight against misinformation, both in the near term and on a longer time horizon. Already, unions can inoculate their members against misinformation through member-to-member education, and counter-narratives advanced in the media. In the longer run, higher levels of unionization could decrease the social inequality and resentment that make a society more vulnerable to misinformation.

[115] For an insightful discussion of the Supreme Court's First Amendment formalism, see Genevieve Lakier, 'Imagining an Antisubordinating First Amendment' (2018) 118 *Columbia Law Review* 2117.

[116] See Rainey, 'Santa Barbara News-Press Bankruptcy' (n 112).

[117] See *Cohen* v. *Cowles Media Co.*, 501 US 663 (1991) (holding that generally applicable contract principles applied to newspaper's promise of confidentiality, and rejecting paper's First Amendment argument).

[118] Notes 112–114 and accompanying text.

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Further, unions of information workers can play an important role in maintaining the integrity of their own workplaces. (This chapter has focused on journalists, though similar arguments could be made about other groups, including teachers and librarians.) First, collective bargaining between journalists' unions and news outlets can improve bread-and-butter labor standards so that journalism will remain a realistic and attractive career option for people from a diverse range of backgrounds – an important predicate for public trust. Second, collective bargaining is an opportunity to establish meaningful protections for ethical journalistic practices, which unions can then monitor and enforce through grievance procedures. These labor standards and protections are likely to be especially important as news outlets continue to grapple with the serious challenges posed by technology, changing business models and financialization, and threats posed by authoritarian politics.

Unfortunately, union density in the USA has been declining since the mid-1950s.[119] Today, private sector union density hovers at around 6 percent; public sector union density is much higher, but it also varies tremendously among different regions of the country. Moreover, although labor unions enjoy widespread and relatively bipartisan public support,[120] the Republican Party is mostly hostile to organized labor, making pro-union labor law reform very unlikely, especially at the federal level. This means a resurgence in union strength will have to come despite labor law, not because of it. There is a ray of hope, however: young workers have a remarkably favorable view of unions and unionizing, and are driving a new wave of organizing, especially among service workers.[121] Whether young workers will be able to unionize in sufficient numbers to move the needle is unclear – but there is more reason for optimism on this topic today than at any point in the last three decades.

[119] 'Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022', US Bureau of Labor Statistics, 24 January 2023, www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm. In 2022, the private sector union density rate was 6 per cent, and the public sector union density rate was 33 per cent.

[120] Megan Brenan, 'Approval of Labor Unions at Highest Point since 1965', Gallup, 2 September 2021, https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx.

[121] Aurelia Glass, 'What You Need to Know about Gen Z's Support for Unions', Center for American Progress, 9 August 2023, www.americanprogress.org/article/what-you-need-to-know-about-gen-zs-support-for-unions.

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