



Are public officials' lies unsustainable or do they have far reaching effects?

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A study on the obligations of the government and its officials to prevent the proliferation of disinformation¹

Executive Summary

- State responses to the recent “crisis” caused by misinformation in social media have mainly aimed at penalizing its authors or establishing liability for those who facilitate its dissemination. Internet companies, especially large platforms, have deployed numerous techniques, measures, and instruments to address the phenomenon.
- However, little has been done to identify the origin of misinformation and evaluate the phenomenon in light of specific obligations from certain sectors.
- In this paper we presume that: 1) it would be wrong to attribute to social media an exclusive role in the new disinformation crisis that impacts the information ecosystem, and 2) disinformation has different impacts depending on who promotes it — public vs. private —, and public officials have special responsibilities regarding their speech. The last point is the central object of this study.
- The research looks into some of the obligations of public officials (and other public persons as candidates for public office) to tell the truth, and/or take measures to avoid errors in the information they disseminate in the exercise of their office. Thus, the information provided by officials when publicly speaking has ethical and legal obligations.

¹ This research was developed by the Regional Office for South America of the Inter-American Institute of Human Rights (IIHR) - and directed and coordinated by Centro de Estudios en Libertad de Expresión y Acceso a la Información [Center for Studies on Freedom of Expression and Access to Information] (CELE) of Universidad de Palermo, Argentina for AI Sur. The IIHR was created in 1980 through an agreement between the Inter-American Court of Human Rights and the Republic of Costa Rica, to be an autonomous international entity of an academic nature for the teaching, research and promotion of human rights and all disciplines related to them. The IIHR links its activities with the action of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights since, due to its origin and mandate, it is obliged to disseminate the doctrine emanating from the existence and operation of the Inter-American System for the Protection of Human Rights of individuals and communities. The Regional Office for South America covers issues in that area without prejudice to the coordination with the Institute's headquarters located in Costa Rica. This document is a contribution for AI Sur's work and aims to capitalize on their regional resources: much of the data included here was compiled by the consortium of organizations that make up AI Sur, to whom the authors are grateful for their contributions and comments.

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- We conclude that public officials have a duty to tell the truth regarding their speech and expressions. Following the logic of these obligations, we could look into new possible lines of investigation in the search for solutions to the dissemination of disinformation and the harm to public debate.

1. Introduction

State responses to the recent “crisis” caused by misinformation in social media have mainly aimed at penalizing its authors or establishing liability for those who facilitate its dissemination.² Internet companies, especially large platforms, have deployed numerous techniques, measures, and instruments to address the phenomenon.³ However, little has been done to identify the origin of disinformation and evaluate the phenomenon in light of the specific obligations from certain sectors.⁴

This research presumes that 1) it would be wrong to attribute to social media a central or exclusive role in the new disinformation crisis that impacts the information ecosystem, and 2) disinformation has different impacts depending on who promotes it — public vs. private person —, and public officials have special responsibilities regarding their speech. The last point is the central object of this study.

On this point 1): in a study conducted by Yochai Benkler, Robert Faris, and Hal Roberts, the authors address, among other things, the influence of false claims that circulated on social media during the electoral campaign that ended with the election of former President Donald Trump.⁵ Starting with the hypothesis that technology has been popularly identified as the main cause of the current crisis in the information ecosystem, the authors conclude that “[t]hese putative risks are, for the

² See Del Campo, *¿La desinformación en democracia o la democracia de la desinformación?* [Disinformation in democracy or the democracy of disinformation?], Asuntos del Sur (2020), retrieved from https://www.palermo.edu/Archivos_content/2020/derecho/agosto/nueva-investigacion-agustina-del-campo/desinformacion-en-democracia.pdf.

³ See, for example, Cortes & Isaza, *Noticias falsas en Internet: la estrategia para combatir la desinformación* [Fake news on the Internet: the strategy to battle misinformation], CELE (2017), retrieved from <https://www.palermo.edu/cele/pdf/FakeNews.pdf>; see also Cortes & Isaza, *¿La nueva normalidad? Desinformación y control de contenidos en las redes sociales con ocasión del covid-19* [The new normal? Disinformation and content control on social media during COVID-19], CELE (2021), retrieved from https://www.palermo.edu/Archivos_content/2021/cele/papers/Moderacion-Covid-19.pdf; Álvarez Ugarte & Del Campo, *Noticias falsas en Internet: acciones y reacciones de tres plataformas* [Fake news on the Internet: actions and reactions of three platforms], CELE (2021), retrieved from https://www.palermo.edu/Archivos_content/2021/cele/papers/Desinformacion-y-acciones-de-plataformas-2021.pdf.

⁴ Among the few initiatives in this regard, in 2018 a bill was presented in the Chilean Congress aimed at incorporating a reform to articles 27, 60, and 15 of the Chilean National Constitution to determine the cessation of the office of president, parliamentarians, and other officials (respectively) when they have been convicted as perpetrators, accomplices or abettors in the dissemination, promotion or financing of false news about their election opponents during the campaign from the moment of the final judgment of the electoral court that decides in this regard. The clauses of the law establish the principles of freedom of expression concerning public officials and candidates in electoral periods, and provide real malice as the applicable standard in the case. Retrieved from <https://observatoriolegislativocele.com/chile-proyecto-de-ley-cesacion-de-cargo-por-difusion-de-noticias-falsas-2018/>

⁵ Benkler, Faris & Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*, Oxford University Press (2018). This work (hereinafter Network Propaganda) addresses many more issues than what concerns us for this research. Here we only dwell on the questions that are relevant in this work.

*near future, not the major causes of disruption. We have argued throughout this book that none of these actors—Russians, fake news entrepreneurs, Cambridge Analytica, Facebook itself, or symmetric partisan echo chambers—were the major cause of the epistemic crisis experienced within the U.S. media ecosystem during the 2016 election or since. Instead of these technologically driven dynamics, which are novel but ultimately less important, we see longer-term dynamics of political economy: ideology and institutions interacting with technological adoption as the primary drivers of the present epistemic crisis.”*⁶

This research does not pretend to deny the impact of fake news, although it does question whether their dissemination through social media platforms such as Facebook has the impact that is often attributed to them.⁷ Other studies developed from 2016 to date have reached similar conclusions. Although we do not rule out that disinformation in social media may constitute a problem, the dedicated bibliography suggests that the problem exceeds regulations or self-regulation of the tech media through which the expressions circulate.⁸

⁶ *Network Propaganda*, op. cit., p. 351. In its original wording: “But our studies have led us to the conclusion that these putative risks are, for the near future, not the major causes of disruption. We have argued throughout this book that none of these actors—Russians, fake news entrepreneurs, Cambridge Analytica, Facebook itself, or symmetric partisan echo chambers—were the major cause of the epistemic crisis experienced within the U.S. media ecosystem during the 2016 election or since. Instead of these technologically driven dynamics, which are novel but ultimately less important, we see longer-term dynamics of political economy: ideology and institutions interacting with technological adoption as the primary drivers of the present epistemic crisis”.

⁷ Similarly, see *Network Propaganda*, op. cit., p. 367.

⁸ It would seem then that, on the one hand, platforms are, at best, part of a much bigger problem when it comes to spreading fake news in the United States. However, we understand that this research focuses on another issue that, although not the main object of our research, must be addressed: the impact of false statements on social media. That social media platforms do not have the impact that is often attributed to them does not mean, for instance, that false expressions are innocuous. In other words, focus on regulating social media to control the spread of false claims, especially from public officials, rather than focusing on the, to put it mildly, irregular attitude of the official when knowingly asserting a false statement is, as it is vulgarly said, to put the See also Allcott, Hunt, & Gentzkow, *Social Media and Fake News in the 2016 Election*, *Journal of Economic Perspectives* (2017), 31 (2): 211-36, retrieved from <https://www.aeaweb.org/articles?id=10.1257%2Fjep.31.2.211&fbclid=IwAR04My3aiy-cypMJKSI58e84gDvdrodsB9fqCycH9YfepWDDDWt-fZnVPvo;%20https://www.nyu.edu/about/news-publications/news/2019/january/fake-news-shared-by-very-few--but-those-over-65-more-likely-to-p.html> (last access 21/04/2021); see also Guess, Nyhan & Reifler, *Exposure to untrustworthy websites in the 2016 US election*, *Nature Human Behaviour*, Vol 4, May 2020, 472-480, retrieved from https://www.nature.com/articles/s41562-020-0833-x.epdf?sharing_token=oDQHN8b4oLGNk8eB7qIXm9RgN0jAjWel9jnR3ZoTv0MSqVwVNQWYD-7ScS8YYGbmTmFmCUk8q9_-83jlgdBI9o2QFvNfWzq2i4J3OK5knxV-TQuAN-tLxSCDTKXrYAx7dMat9hKXTTAVeVCNnvLOIYx2fWebwK1y3VQ7A0b6wpr0IWgjnP7vuhp_GG6LMCPbqUKBY0rDOGV6RU-vO6fhA05f69V8B05m4n8LPQmM4KlscfZA_m0iKiRIG-WxCOVfd-cVdnDC241FzSsqZMSKiNJ2GuO1SxIwPHtW3QNxPvh-fAAyy-ZYwHjRgxPtRnPdBZmVUfQalBfWHYL9G5b82-A%3D%3D&tracking_referrer=www.scientificamerican.com.

Studies in other jurisdictions reach similar conclusions. For example, another paper referring to elections in Italy concludes that: “During the last decade, the erosion of trust in public institutions and the traditional media has been taking place at the same time. As recent developments in media consumption have led to a proliferation of politically charged online misinformation, it is no wonder that many have been questioning whether the spread of fake news has affected recent election results, contributing to the growth of platforms of populist parties. In this work, our objective is to quantify this impact by focusing on the causal effect of the spread of disinformation on the electoral results in the 2018 Italian general elections. (...) The results indicate

Of course, citing these studies could be considered arbitrary, and the objective of this research is not to make a detailed study of the situation from an empirical point of view. This may be an unresolved issue for us. We only state, as a starting point, that the magnitude of the role of social media as a central element of the new disinformation crisis is questioned, at least concerning election results.

This study hypothesizes that 2) and is part of an investigation carried out by Al Sur, a consortium of eleven civil society and academic organizations from Latin America⁹ that jointly seek to strengthen human rights in the digital environment of the region. The general objective consisted of mapping out and analyzing the existing legal instruments and other types of solutions applicable to the study of disinformation to identify, where appropriate, if there are new angles or specific to this field that allow progress in more effective solutions and less disruptive to freedom of expression. For this study, we established a new approach and a different vision in the current state of technology where we find an overly-discussed analysis of “disinformation.”

This investigation fundamentally delves into the obligations of public officials — and electoral candidates — regarding falsehoods that contribute to the problems of disinformation and misinformation. The investigation raises the questions of the ethical and legal obligations that loom over officials when expressing themselves in the exercise of their office. To this end, the first section offers a “taxonomy” of falsehoods, a useful tool for the analysis that follows the development of the research. The third section investigates the reception of this discussion in the Inter-American System, paying particular attention to the distinctions that the System makes between expressions of public officials and other subjects. The fourth section addresses the regulation of the false expressions of public officials from the perspective of criminal law, administrative law, and regulations on the ethics of the actions of officials.

Therefore, the investigation covers topics of discussions that are common today, such as the need to regulate media platforms to avoid the spread of false messages, to put forth an alternative and parallel point of view, and to investigate the obligations of truthfulness in those who hold public offices when they

that disinformation had a negligible impact and a non-significant effect on the populist vote in Trentino and South Tyrol during the 2018 general elections.” (Emphasis added). See Cantarella, Fraccaroli & Volpe, *Does fake news affect voting behaviour?* Dipartimento di Economia Marco Biagi, Università Degli Studi di Modena e Reggio Emilia, June 2019, Paper Series No. 146, retrieved from <http://155.185.68.2/wpdemb/0146.pdf> (last access 21/04/2021).

⁹ See <https://www.alsur.lat/quienes-somos>

express themselves. This analysis delves into the dissemination of false statements in specific sectors related to the information circulating during electoral campaigns and the information disseminated for the fight against the current pandemic caused by COVID-19 that affects the world. The research concludes by trying to clarify the role and obligations of the state and its officials to avoid the proliferation of disinformation in general and specific contexts such as those mentioned above: health and the pandemic, and electoral campaigns.

2. “Taxonomy” on “false expressions” to justify their rejection.

This research adopts the conceptual framework presented by Benkler, Faris, and Roberts in their work “Network Propaganda.” In the following chapters, we will refer to these defined concepts as follows¹⁰

1. “Propaganda” and “disinformation”: manipulating and misleading people intentionally to achieve political ends.
2. “Network propaganda”: how the architecture of a media ecosystem makes it more or less susceptible to disseminating these kinds of manipulations and lies.
3. “Bullshit”: communications of outlets that do not care whether their statements are true or false, and usually not what their political effect is, as long as they make a buck.
4. “Misinformation”: publishing wrong information without meaning to be wrong or having a political purpose in communicating false information.
5. “Disorientation”: a condition that some propaganda seeks to induce, in which the target population simply loses the ability to tell truth from falsehood or where to go for help in distinguishing between the two.”

In this classification, 1 and 4 may have points in common, so here we will conceptually refer to either of these two categories. Both categories include what in

¹⁰ *Network Propaganda*, cit. “Propaganda” and “disinformation”: manipulating and misleading people intentionally to achieve political ends. “Network propaganda”: how the architecture of a media ecosystem makes it more or less susceptible to disseminating these kinds of manipulations and lies. “Bullshit”: communications of outlets that don’t care whether their statements are true or false, and usually not what their political effect is, as long as they make a buck. “Misinformation”: publishing wrong information without meaning to be wrong or having a political purpose in communicating false information. “Disorientation”: a condition that some propaganda seeks to induce, in which the target population simply loses the ability to tell truth from falsehood or where to go for help in distinguishing between the two.”

recent times has been called “disinformation.” The above classification is possible because, as stated in her report “Disinformation and freedom of opinion and expression,” the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Irene Khan: “There is no universally accepted definition of disinformation. While the lack of agreement makes a global response challenging, the lack of consensus underlines the complex, intrinsically political and contested nature of the concept.”¹¹

A question that must be conceptually clear for this research is related to the reasons why a false expression may be a) socially accepted; b) socially rejected; c) considered an action without value (anti-value) that only deserves moral reproach; d) considered an anti-value that deserves a legal reproach. There may be other issues that we should take into account, but we understand that these are sufficient.

In the first place, it is useful to elaborate on a kind of taxonomy of false expressions. In his recent work, Cass Sunstein dealt with these issues in a simple but extensive way.¹² Many of the considerations that follow have been inspired by that work.

Following Sunstein’s example, to establish this taxonomy we must first attend to four relevant factors:

1. The state of mind of the person who is expressing themselves. By stating something false, whoever does so may be aware that: a) they are lying; b) they doubt and do not bother to corroborate (reckless); c) they are negligent; or d) they consider that what they say is reasonable (they do not doubt, but they are wrong). In general, the difference between “a” and the rest of the options will be clear. Regarding the remaining three, it may be difficult to differentiate in some cases.
2. The magnitude of the harm caused by their false expression, if it were quantifiable. Here, also following Sunstein, we can make a sort of gradation of the harm it causes: a) grave; b) moderate; c) minor; d) nonexistent.

Let us introduce something central to our investigation: a false expression of a public official can cause a war, or that millions of people die as a result of a pandemic

¹¹ Khan, *La desinformación y la libertad de opinión y de expresión* [Disinformation and freedom of opinion and expression], A/HRC/47/25, April 13, 2021 (hereinafter “UN Special Rapporteur Report”), retrieved from <https://undocs.org/es/A/HRC/47/25> (last access 05/13/2021).

¹² Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception*, Oxford University Press (2021).

(grave harm). That is why the magnitude of the harm will be relevant when taking into account the obligations that officials may have when expressing themselves.

3. The likelihood that the harm- whatever its magnitude - will take place. Here too there can be a range of degrees of certainty: a) certain; b) probable; c) improbable; d) highly improbable.

Again, raising questions that will be developed later, the position and credibility of the public official will be relevant to determine the likelihood of harm from a false claim. A minister of health stating that drinking water with chlorine derivatives cures the disease caused by the COVID 19 virus is not the same as that statement being spread on social media by an unknown person who promotes their product, which is precisely a mixture of chlorine with water.¹³

4. The timing in which the harm will take place. This category assumes that there is harm that will occur, the question is when. To this end, the harm can: a) be imminent; b) in the near future; c) be reasonably soon; d) be in the distant future. Of course, being a continuum, there may be difficulty in distinguishing one situation from another, but we are not concerned with establishing clear boundaries between one and the other since we believe that it is simple enough to understand for the purposes of this chapter.

We will express this taxonomy in a useful table:¹⁴

Relevant factors	A	B	C	D
1.-State of Mind	Lie	Reckless	Negligent	Reasonable
2.-Magnitude of Harm	Grave	Moderate	Minor	Nonexistent
3.-Likelihood of Harm	Certain	Probable	Improbable	Highly Improbable
4.-Timing of Harm	Imminent	Near Future	Reasonably Soon	Distant Future

¹³ This example is not simply a hypothetical case, to the point that the Pan American Health Organization had to publicly clarify the situation. See “*La OPS advierte contra el uso de productos de cloro como tratamientos para COVID-19*”, [PAHO warns against the use of chlorine products as treatments for COVID-19], August 5, 2020, retrieved from <https://www.paho.org/es/noticias/5-8-2020-ops-advierete-contra-uso-productos-cloro-como-tratamientos-para-covid-19> (last access 4/8/21).

¹⁴ In this paper, we are adopting Sustain’s explanation unchanged, although an extra element could be suggested, which we will call the “fifth element.” It could be beneficial to include this element in the proposed taxonomy and it consists of adding the factor “speaker’s level of obligation.” General obligations can be established about speech (of public officials); specific obligations according to professions (like lawyers, doctors, etc.); ethical obligations (citizenship). In other words, the “fifth element” would tend to focus on assessing who is issuing the expression and what obligations they have.

Thanks to this table we can begin to visualize in which cases the false expressions deserve punishment, and what kind of punishment they deserve. We can already draw up some conclusions: it is not the same if the expression fulfills all the characteristics of column “a” than that of column “d.” However, in real situations, some combinations can make us doubt the answers to our concerns. For example, can a case of intentional lying that causes nonexistent harm be punished? Or in the case of intentional lying and grave harm but possibly occurring in the distant future. What will our response be?

To keep our main objective in sight, we suggest looking into these different combinations when they are expressions that come from public officials only and, consequently, review what their obligations are or should be when expressing themselves. Certainly, these obligations may come from different mechanisms of social control. This is not the place to analyze the various mechanisms in depth. It should suffice to mention that the obligations when expressing oneself without falling, for example, in all the descriptors of column “a” may arise from informal obligations that regulate life in society, the consequence of which may simply be a moral reproach; or these obligations may come from formalized mechanisms such as those proposed by the legal system, where the consequences for non-compliance with these obligations will bring punishment from the state. A third source could be of contractual origin: social media platforms, for example, have an agreement, with informed consent (or not so informed), used by the platform to express what is generally known as the “Terms and Conditions” of service.¹⁵ These agreements include some rules on expression, and the consequence of non-compliance with these rules may not only have a moral or legal punishment but also a concrete punishment from the administrators of the social media platform, even instances of private sanctions that prevent users from continuing to use that platform to publish content.¹⁶

Note that this line of argument has a basis that until now we have accepted as firm and true. In plain terms, that foundation translates into “lying is wrong.” This statement has become a kind of “moral taboo.” Now, like all taboos, it is

¹⁵ This may also consist of confidentiality agreements, for example, or other contractual limitations.

¹⁶ The most obvious example is Facebook’s recent decision regarding former President Donald Trump. Nick Clegg, Vice President of Global Affairs at Facebook, said Trump’s actions “constituted a serious violation of our rules that deserve the highest penalty available under the new protocols.” For this reason, the account was suspended for two years. See “*Facebook anuncia que suspensión a Donald Trump será de dos años*” [Facebook announces that Donald Trump will be suspended for two years], France 24, June 4, 2021, retrieved from <https://www.france24.com/es/minuto-a-minuto/20210604-facebook-anuncia-que-suspensi%C3%B3n-a-donald-trump-ser%C3%A1-de-dos-a%C3%B1os> (last access 6/12/2021).

possible to try to deconstruct and question it. In other words, it is possible that the consequences of a false expression are anti-values, but on the contrary, they can be valued positively. We offer a brief review of this issue in the next section.

3. Do false statements always have negative consequences?

Let us go back for a moment to the aforementioned taxonomy. Consider the following expression said by a Minister of Education: “Students with good behavior in schools will surely receive a gift from an alien that will arrive from the planet Mars at the end of the year.” We can probably agree that this expression falls within (1.a) (intention to lie). Now, does it have a negative consequence regarding the harm it can cause? Or, in truth, does it produce non-existent harm (2.d), or at most, minor harm (2.c) if, for example, we believe that it may have some psychological consequence on those who receive that information? (Especially if at the end of the year they do not receive any gifts).

Let us assume that thanks to that false expression (there are no aliens), better behavior in schools is quantified. Would we continue to assert that “lying is wrong,” or will we instead begin to contextualize the false expression?

It is not lost on us that this conclusion can open a range of other possibilities for analyzing false expressions, although we believe that the proposed taxonomy is enough because often all the questions in column “d” will depend on the context. However, this question allows us to ask ourselves why it is deeply ingrained in the culture of our societies that lying is an anti-value. To answer this question, as Sunstein approaches it well in his work, we can look for an answer in the ethical intuitions that lead us to this thought and that come from the Utilitarian and Kantian schools of thought.

The father of utilitarianism, Jeremy Bentham, considers that there would be no objection to lying since what is generally sought is to maximize the utility — happiness — of society. To quote Bentham, “A falsehood, taken by itself, consider it as not being accompanied by any other material circumstances, can never, upon the principle of utility, constitute any offense at all.”¹⁷ However, it would be wrong to argue just by this statement that utilitarians approve of lying as an expression without reproach. On the contrary: since human relationships are

¹⁷ Bentham, *The Principles of Morals and Legislation* (1789), cited by Sunstein.

based on communicative interactions, falsehoods conspire against the happiness of those human relationships in certain circumstances, and therefore, although not in a general way, but by analyzing specific cases, it is inadmissible for a society not to react to false expressions. In other words, “lying is wrong.”

The obligation to communicate with true expressions was also approached and in a similar way by Günter Jakobs in a work that is already several decades old.¹⁸ In an article he wrote for a book in tribute to Jescheck, entitled “The mission of the criminal legal protection of honor,” he breaks directly with the statement that honor is protected insofar as it is necessary to protect the dignity of people. In his own words, “[t]his work defends the thesis that it corresponds to the rules against insults to provide the necessary guarantee of specific veracity. This thesis has the consequence that offenses of libel can no longer be conceived exclusively as crimes against persons, but must also be defined as crimes against public interests, that is, crimes established against the falsification of the formal imputation.” Jakobs’s reasons for making these claims are as follows: first, he rightly understands that criminal law is not the only method of social control. It is indeed “codified” but this does not deny straightaway that there are other institutions that constitute what he calls a global system of social control. Within these other institutions, we find family, school, the church, associations, unions, etc. These “institutions,” through the application of sanctions derived from their formal rules (as is the case of the administration of criminal justice) or informal (the rest), allow creating a stabilizing effect that permits coexistence in society.

However, for informal sanctions to be correctly applied and not be a series of mistakes and fortuitous successes, we should be able to talk openly about reprehensible behaviors and about those that are worthy of rewards. Obviously, these expressions must be truthful so that informal sanctions are not accidental. However, Jakobs correctly says that there is no “broad” right to the truth. It is so only in some cases, for example, statements made in front of a judge in court proceedings must be true. From this derives the need for at least a right to the specific truth to exist. The absence of a right to the specific truth, a right for everyone to tell the truth about the behavior of their peers, could lead to incorrect informal sanctions.

Any person who exercises a particular role in society would have, according to

¹⁸ Jakobs, *La Misión de la protección jurídico-penal del honor* [The Mission for the legal-criminal protection of honor], published in Spanish in *Estudios de derecho penal*, translation by Manuel Cancio Melia, Ed. Civitas, Madrid, 1997. Title in German: “Die Aufgabe des strafrechtlichen Ehrenschatzes” published in Th. Vogler et al. (ed), *Festschrift für H. -H. Jescheck*, 1985, volume I, pp.627 to 643.

Jakobs, the right that only true facts should be told about them about matters that are of interest so that informal sanctions do not interfere with their participation. The explanation is simple: for the subjects to relate adequately, the receiver of a message about any other subject must trust that it is true. The quality of the information received cannot be left to the recipient. Jakobs says that *“Consequently, there is a public interest that the information conforms to reality. Therefore, unlike what occurs in the exclusively personal experience, it is not a question of a broad right to the truth, but a very limited right to obtain certain information in any of those areas in which the obtaining of information is of general interest in support of the accusation.”*

Let us now briefly turn to our analysis of a Kantian view of ethical duty. If we agree with Kantianism that human beings should be respected in their dignity, treated with respect, not as a means but as an end, false expressions in all cases lead to an unworthy treatment of whoever receives the expression. It does not matter whether or not the falsehood causes harm. It only matters that a person has been treated without respect. Therefore, from a Kantian perspective, in cases, for example, where a public officer up for reelection lies about their opponent to win, the reproach will not come from the harm that they can cause to the democratic system, but this action must be condemned because it has been disrespectful and has affected the autonomy of the public.

Sunstein, on the other hand, considers that *“When a candidate or political leader lies to the citizens [...] they deny the central premise of democracy: the sovereignty of the citizenry. Politicians who lie [...] act as if citizens are merely instruments for their own use.”* From a Utilitarian perspective, Sunstein remarks that *“[w]hen citizens realize that politicians are lying, many are outraged. After a while, they adopt an indifferent position. They may even stop listening. In any case, leaders who lie undermine the democratic process making it very difficult or impossible for citizens to know who to trust. They discredit the idea of self-government. Everything becomes doubtful.”*

At this point, there is a possible conclusion: lying, in general terms, is morally reprehensible. But the justification for its reproach and type of sanctions may vary according to the subject or its authors. False expressions are not legally reprehensible in every case and therefore, for example, prohibited or silenced. In which cases is it possible to legally regulate falsehoods? The answer takes us back to the proposed taxonomy and to the cases that fall in the first column,

paying special attention to the harm they can cause. That is why some issues, including electoral processes or health protection, due to their characteristics have special regulations that delineate a specific way to proceed for public officials regarding their expressions.

Before delving into these two fields, we will first analyze the guidelines that come from the Inter-American human rights system in terms of expressions of public officials and the obligations that arise from the ethical regulations that they must comply with and that different laws embody.

4. The Inter-American Human Rights System and the treatment of false expressions from the government and public officials.

Advisory Opinion No. 5 issued by the Inter-American Court of Human Rights (I/A Court HR)¹⁹ in 1985 offered the Court's first analysis of false expressions and their protection under Article 13 of the American Convention on Human Rights (ACHR)²⁰. In this Opinion, the Court had to resolve a question related to the interpretation of Articles 13 and 29 of the ACHR concerning the mandatory membership of journalists in a professional association for the practice of journalism and also about the compatibility of Law No. 4420 in Costa Rica, which established the mandatory membership in a professional association of its members to practice journalism, with the provisions of the aforementioned articles.

¹⁹ See http://www.corteidh.or.cr/docs/opiniones/seriea_05_esp.doc (last access 4/9/21)

²⁰ "Artículo 13.- Libertad de Pensamiento y de Expresión [Article 13. - Freedom of Thought and Expression]

1. Everyone has the right to freedom of thought and expression.

This right includes the freedom to seek, receive and disseminate information and ideas of all kinds, regardless of frontiers, either orally, in writing or in printed or artistic form, or by any other procedure of their choice.

2. The exercise of the right set forth in the preceding paragraph cannot be subject to prior censorship but to subsequent liabilities, which must be expressly established by law and be necessary to ensure:

- a) respect for the rights or reputation of others, or
- b) the protection of national security, public order or public health or morals.

3. The right of expression cannot be restricted by indirect means, such as the abuse of official or private controls of newsprint, radio frequencies, or of appliances and devices used in the dissemination of information or by any other means aimed at preventing communication and the circulation of ideas and opinions.

4. Public shows may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence, without prejudice to the provisions of subsection 2.

5. Any propaganda in favor of war and any defense of national, racial or religious hatred that constitutes incitement to violence or any other similar illegal action against any person or group of persons, for any reason, including those of race, color, religion, language or national origin are prohibited." Article 13 of the ACHR.

AO-5/85 had the virtue of responding far beyond the query that Costa Rica had submitted to the Inter-American Court.²¹ The outcome is very well known: the Inter-American Court determined that these laws violated freedom of expression. But to arrive at that answer, the Court left for posterity a complete analysis of Article 13 that was taken up by both the Court and the Inter-American Commission on Human Rights directly or indirectly when they had to resolve possible violations of art. 13 of the ACHR.²²

Concerning the pertinent issue, the Inter-American Court stated that

“77. The arguments that membership is the way to guarantee objective and truthful information for society through a regime of professional ethics and responsibility have been founded on the common good. But in reality, as has been demonstrated, the common good demands the maximum possibility of information and it is the full exercise of the right to expression that favors it. It is contradictory in principle to invoke a restriction on freedom of expression as a means to guarantee it, because it is to ignore the radical and primary character of that right as inherent in each individual human being, although it is also an attribute of society as a whole. A control system for the right to freedom of expression in the name of a supposed guarantee of the correctness and veracity of the information that society receives can be a source of great abuses and, basically, it violates the right to information for that society has.” (Emphasis added).

The Court could not regulate freedom of expression to only protect true expressions. In other words, false expressions were protected, mainly because the opposite could generate censorship regulations if the government was given the power to decide when an expression was true and when it was false.

Fifteen years after this Advisory Opinion, the IACHR approved the *“Declaration of Principles of Freedom of Expression”* that establishes that *“Prior con-*

²¹ In the Inter-American system, the Inter-American Court can exercise its advisory jurisdiction so that the states can ask it questions, for example, such as the one formulated by Costa Rica regarding the compatibility of its legislation with the American Convention.

²² For those interested in the history and contents of AO-5/85, see *“Libertad de Expresión: A Treinta Años de la Opinión Sobre Colegiación Obligatoria de Periodistas: Estudios sobre el derecho a la libertad de expresión en la doctrina del Sistema Interamericano de Derechos Humanos”* [Freedom of Expression: Thirty Years of Advisory Opinion on the Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism: Studies on the right to freedom of expression in the doctrine of the Inter-American Human Rights System], General Secretariat of the Organization of American States, OEA/Ser.D/XV.18, retrieved from http://www.oas.org/es/cidh/expresion/docs/publicaciones/OC5_ESP.PDF (last access 4/9/21).

ditions, such as truthfulness, timeliness, or impartiality on the part of the states are incompatible with the right to freedom of expression recognized in international instruments.”²³

In interpreting this principle, the IACHR Office of the Special Rapporteur for Freedom of Expression explained that:

“31. Proper interpretation of international standards, particularly Article 13 of the Convention, leads us to conclude that the right to information encompasses all information, including that which we might term “erroneous,” “untimely,” or “incomplete.” Therefore, any prior conditionality to qualify information would limit the amount of information protected by the right to freedom of expression. For example, the right to truthful information would not protect information that, by contrast to truth, we would label erroneous. Therefore, this right would not protect any information that could be considered erroneous, untimely, or incomplete.

32. Requiring the truth or impartiality of information is based on the premise that there is one indisputable truth. In this regard, it is important to distinguish between subjects related to concrete facts, and that may be proven factually, and value judgements. In the latter case, it is impossible to speak of the veracity of the information. Requiring truthfulness could lead to virtually automatic censorship of all information that cannot be proved. This would eliminate, for example, virtually all public debate based primarily on ideas and opinions, which are inherently subjective. Even in cases of information regarding concrete events that may be factually proven, it is still impossible to demand veracity since, unquestionably, there may be a considerable number of markedly different interpretations of a single fact or event.

33. Moreover, even assuming that it is possible to determine the truth about everything, the debate and exchange of ideas clearly is the best method to uncover this truth and to strengthen democratic systems based on plurality of ideas, opinions and information. Prior imposition of a requirement to report only the truth expressly precludes the possibility of engaging in the debate necessary to reach it. The prospect of penalties for reporting on

²³ Declaración de Principios sobre Libertad de Expresión, [Declaration of Principles of Freedom of Expression], Inter-American Commission on Human Rights, Principio 7, retrieved from <http://www.cidh.oas.org/basicos/basicos13.htm> (last access 4/9/21).

a subject that free debate later shows to be incorrect creates the potential that informants will engage in self-censorship to avoid penalties, with the attendant harm to citizens who are unable to benefit from the exchange of ideas. The doctrine of truthful information represents a regression for freedom of expression and information in the hemisphere in that the free flow of information will be limited by the prior classification of such information as “truthful” or “erroneous,” in contradiction with the broad conception of this right in the Inter-American system.

34. In this regard, the Inter-American Court has stated that both aspects of freedom of expression (individual and collective) must be guaranteed simultaneously. The conditioning of the information that society can receive through communications media impedes the flow of timely information, diminishing a society’s capacity for informed participation. One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor.”²⁴

The final paragraph of this interpretation from the Office of the Special Rapporteur for Freedom of Expression eloquently states that false expressions cannot be sanctioned unless actual malice is demonstrated: whoever is expressing does so knowing it is a falsehood. The RFOE says:

“35. Unquestionably, the right to freedom of expression also protects information that we have termed “erroneous.” In any event, in accordance with international standards and the most highly developed jurisprudence, only information found to be produced with “actual malice” is punishable. Even in such cases, the sanction must be carried out through the subsequent imposition of liability rather than the establishment of prior conditions.”

As we can see, at the dawn of the 21st century in the Inter-American system, the so-called “moral taboo” prevailed regarding lies: a false expression, if it is

²⁴ Informe anual del Relator Especial para la Libertad de Expresión [Annual Report of the Special Rapporteur for Freedom of Expression], IACHR (2000), retrieved from <http://www.oas.org/es/cidh/expresion/docs/informes/anuales/Informe%20Anual%202000.pdf> (last access 4/9/21).

known to be false, deserves reproach. But, as Catalina Botero Marino explains, *“it is possible to argue that Inter-American jurisprudence offers at least two important standards applicable to any state effort aimed at prohibiting or regulating so-called “fake news.” In the first place, the simple objective falsehood of an expression cannot be object of prohibition or state sanction. [...] Second, based on the decisions of the Inter-American Court, it is possible to argue that restricting freedom of expression is only justified as a means to protect the rights of third parties or public order understood from a narrowly defined democratic perspective.”*²⁵

So far, the interpretation of the IAHRS fits quite well with the proposed taxonomy: if the expression is false, it is known to be false, and it causes harm (column “a” of the table above), it could deserve state sanctions.

It is possible to assert, as Botero Marino does, that *“During 2016, especially surrounding the Brexit vote in England and the presidential election in the United States, the term ‘post-truth’ was coined to refer to information that is not based on objective facts, but which appeals to emotions, beliefs or desires of the public. Directly related to this term, the expression “fake news” became popular, referring to the massive dissemination of false information, knowing that it was false, and to manipulate the public. Although it was a term used to denounce the false information disclosed by some politicians, very quickly they began to use it, regularly, to discredit the press, and turn them into their “enemy” and thus shielding themselves from public scrutiny.”*²⁶

Consequently, defenders of freedom of expression globally have been on the alert. The debate around the false expressions emanating from high-profile public officials that had given rise to the term “fake news” suddenly turned to restrict not only those expressions but also the press or the criticism disseminated through social media.

That alert was expressed in 2017 in the “Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda” signed by the United Nations (UN) Special Rapporteur for Freedom of Opinion and Expression, the Representative for Freedom of the Media of the Organization for Security and Co-operation

²⁵ Botero Marino, *La regulación estatal de las llamadas “noticias falsas” desde la perspectiva del derecho a la libertad de expresión*, [State Regulation Of The So-called“ Fake News From The Perspective Of The Right To Freedom Of Expression:] A Treinta Años (Ibid. footnote 22).

²⁶ Ibid.

in Europe (OSCE), the OAS Special Rapporteur for Freedom of Expression and the Special Rapporteur for Freedom of Expression and Access to Information of the African Commission on Human and People's Rights (ACHPR).²⁷ In this Declaration, they specifically established that *“General prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression [...] and should be abolished.”*

However, as the Inter-American Court of Human Rights had anticipated, the Declaration notes the main problem of this investigation, which is linked to public officials' obligations when speaking out. In the words of the Declaration, *“[...] c. State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).”*

As we can see, the element of “intent” appears as we suggested in the taxonomy of false expressions. Conversely, the aspect of the “magnitude of harm” appears in the Declaration, forcing officials to express themselves without falsehood. Thus, the Declaration continues that *“[...] d. in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.”*

The IAHRs, following the postulates established by the Inter-American Court in 1985, considered that there was a degree of distinction regarding the exercise of freedom of expression by unknown private individuals, even the media, and public officials. This distinction began in 2009 with the cases “Ríos y otros v. Venezuela”²⁸ and “Perozo y otros v. Venezuela”²⁹. The Inter-American Court stated that:

“In a democratic society, it is not only legitimate, but sometimes it is the duty of state authorities to rule on matters of public interest. However, in doing so, they are subject to certain limitations insofar as they must rea-

²⁷ Declaración Conjunta sobre Libertad de Expresión y “Noticias Falsas” (“Fake News”), Desinformación y Propaganda, [Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda], UN, OSCE, OAS, ACHPR (2017), retrieved from <http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=1056&IID=2> (last access 4/9/21).

²⁸ I/A Court H.R. Case Ríos y otros vs. Venezuela. Preliminary exceptions, Merits, Reparations and Costs Judgment of January 28, 2009. Series C n.o 194, retrieved from https://www.corteidh.or.cr/docs/casos/articulos/serie_c_194_esp.pdf

²⁹ Inter-American Court of Human Rights (IACHR) Case Perozo y otros vs. Venezuela. Preliminary exceptions, Merits, Reparations and Costs Judgment of January 28, 2009. Series C n.o 195, retrieved from https://www.corteidh.or.cr/docs/casos/articulos/serie_c_195_esp.pdf

sonably, although not necessarily exhaustively, verify the facts on which they base their opinions, and they should do so with even greater diligence than that employed by individuals, because by reason of their high position, their expressions may have a wide scope and eventual effects on certain sectors of the population, and to prevent citizens and other interested persons from receiving a manipulated version of certain events.”

Note the language used by the Inter-American Court: “duty” to express but with certain “limitations.” And what are those limitations? Make an effort to tell the truth. And what are the reasons for establishing this limitation? Clearly, the possible harm of false expressions. In the words of the Inter-American Court:

“In addition, they must take into account that as public officials they have a position of guarantor of the fundamental rights of people and, therefore, their statements cannot ignore these or constitute forms of direct or indirect interference or harmful pressure on the rights of those who intend to contribute to public debate through expression and the dissemination of their thought. This special care duty is particularly accentuated in situations of greater social conflict, disturbances of public order or social or political polarization, precisely because of the set of risks that they may imply for certain people or groups at any given time.”

These ideas are again expressed by the Inter-American Court in Resolution 1/2020 “Pandemia y Derechos Humanos en las Américas” [The Pandemic and Human Rights in the Americas]³⁰. Concerning the obligations of the states, it reads:

“34. Senior government officials should take special care when making statements or declarations about the evolution of the pandemic. In current circumstances, it is the duty of the authorities to inform the population, and as they do so, they must act with diligence and give reasoned reports that are science-based. They should also remember that they are exposed to greater scrutiny and to public criticisms, even during special periods. Governments and Internet companies must counter and be transparent about any misinformation circulating about the pandemic.

³⁰ Resolution 1/2020, Pandemia y Derechos Humanos en las Américas [Pandemic and Human Rights in the Americas], IA-CHR, April 2020, retrieved from <https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf> (last access 6/9/21).

In conclusion: the “moral taboo” — lying is wrong — is limitedly compatible with the IAHRs, since the falsity of the information in itself does not exclude it from the protection of article 13 of the ACHR. However, those in public office have freedom of expression, but it is not the same as that of unknown private individuals or even the media. For them, lying is reprehensible, and the obligation not to do so can be regulated, especially considering the consequences of falsehoods.

The following are provisions of domestic law of administrative, criminal, and ethical nature that explain the foundations and justification given in domestic law to public officials’ obligation to tell the truth.

5. General state regulations that instruct officials to tell the truth (Criminal Law, Administrative Law, and Codes of Ethics in public administration)

In drafting this section, an attempt was made to identify different norms within the domestic law of the various states of the region where the Al Sur consortium has a presence through its members, to identify the typology, nature, and justification of the obligations that weigh on public officials to tell the truth in our region. The following standards cited are by no means an exhaustive list. The goal is to confirm that these obligations exist, verify in which cases, and how they are justified in order to analyze how these norms can be inserted into the current debate around the disinformation crisis that, as some authors allege, affects our democracies.

a. Measures in Criminal Law in the face of a dishonest act of a public official

Let us imagine the following scenario: a high-ranking official is in charge of recording information related to criminal cases in process, in court, filed, etc., in documents for statistical data. To this end, they must fact-check that information carefully before including it, verifying the source documents to finally register it in the records. After some time, it becomes known that the official has entered information that does not correspond with reality, creating a problem for the statistical monitoring of the penal system.

Let us express this case in a way that is related to the object of this investigation: the official has lied (in writing, not verbally) by including false information.

What is their responsibility?

This case is not merely hypothetical. The Criminal Cassation Chamber of the Supreme Court of Justice of Colombia³¹ recently handled a similar situation. These types of rulings abound in Latin America. But we are using this sentence to demonstrate the following point: a lie of a public official in the exercise of their functions, expressed in a document, damages the public trust and therefore the lie is sanctioned in the orbit of punitive law.³²

This is the case, for example, of crimes of ideological falsehood. In the case in question, the Court explained that *“Under article 286 of the Penal Code, the crime of ideological falsehood in a public document is committed” by a public official who in the exercise of their duties, by issuing a public document that can serve as proof, expresses a falsehood or totally or partially conceals the truth.*” Further down, we will review other criminal codes in the region to show that the issue is treated similarly in all of them. For now, let us look at the issue at hand: in this case, it is criminally punished to record something false or even keeping the truth silent. The words of the Court are very eloquent when interpreting this article, explaining that the punishable act “[t]akes place when untrue statements enter the record.”

The value of truth in the official’s duties is obviously relevant. Why? Again following the reasoning of the Colombian Court (like many other courts or scholars), *“The demand is based on the social need to have faith and trust in the documents within the legal system, in opposition to the lack of credibility that could derive from their falsehood, since the principle of trust would collapse and the expectations of society would be attached to assumptions such as bad faith and legal insecurity, to the detriment of the course and agility required in contemporary social relations.”*

Let us briefly reflect on this paragraph in the case of false claims by a high-ranking public official massively expressed on social media rather than expressed in a document. Would the main argument around the justification for the reproach outlined here change? We contend that it would not change. In the same way that the false expressions in a public document destroy public trust, falsehoods

³¹ Supreme Court of Justice of Colombia, Criminal Cassation Court, SP154-2020 Filing 49523 (Passed Record No. 017), January 29, 2020, retrieved from [https://cortesuprema.gov.co/corte/wp-content/uploads/relatorias/pe/b1feb2020/SP154-2020\(49523\).PDF](https://cortesuprema.gov.co/corte/wp-content/uploads/relatorias/pe/b1feb2020/SP154-2020(49523).PDF)

³² Not all acts of public officials establish public trust. Acts of officials concerning their specific functions do establish public trust.

from officials in the exercise of their functions also destroy the trust with which society must handle itself in daily relationships. It should be noted, however, that we are not trying to assess or evaluate the virtues or defects of criminal law to address these issues but merely to demonstrate that the reasoning for the existence of the reproach persists, be it regarding false information recorded in a written document, an oral statement or a post on social media. This research is not suggesting criminal sanctions for false claims. For the moment, we are only demonstrating that the value placed in the expressions of public officials in the rule of law is very high, to such an extent that in some cases lies are criminalized when they are recorded on certain written documents.

It could be argued that in the matter of harm (using the taxonomy suggested at the beginning of this paper), a falsehood embodied in a public document can cause more damage than the same expression posted on a widely disseminated social media platform. However, we believe that this is not necessarily the case: imagine that a public official registers a person in the wrong place of birth. Suppose that same official falsely shares that person's birthplace on a widely spread social media platform. Let us now add two facts: the person misregistered and exposed on social media as born in the wrong place is a presidential candidate and the place falsely declared leads to thinking that they have commitments with a foreign state. Let us add something else: the expressions on social media are made during an electoral campaign. Are we in a position to assert that the damage is greater in the case of the false written inscription than in the case of posting on social media?

The crime of ideological falsehood of a document conveys an obligation. The obligation to tell the truth. Going back to the Supreme Court of Colombia, "*There is ideological falsehood when the public official [...] fails their duty to tell the truth with legal effects, a duty inherent to public officials given their authority to certify the truth [...].*"³³

We could end this part of the investigation with that paragraph, but let us analyze the question in some more detail about the protected legal right we have already tangentially mentioned: public trust.

The countries of the region that classify this crime do so interpreting that there is a crime of ideological falsehood when the active subject adds or causes to add, in a pub-

³³ Supreme Court of Justice of Colombia, Criminal Cassation Court, SP154-2020, cit.

lic instrument, false statements concerning facts that must be proven with the document, to use it as if the statement were true. Let us look at some examples below.³⁴

Argentina

The articles referring to ideological falsehood — and falsehoods in general — are found in Title XII of the Penal Code, which deals with crimes against the public trust. At the same time, a part of the legal doctrine mentions faith as a legal good that complements the concept of public trust. In this way, Argentine criminal law, as mentioned by the Colombian Court regarding Colombian law, also seeks to protect the trust that the population should have in those instruments that play a key role in carrying out multiple legal acts.

The Argentine Criminal Code includes the crime of ideological falsehood of a public instrument in its art. 293 According to this provision, *“anyone who includes or causes to include false statements in a public instrument concerning a fact that the document must prove, so that it may result in harm will be punished with reclusion or imprisonment for one to six years.”* The penalty increases if the false document is intended to prove the identity of 1) members of the armed, security, police, or penitentiary forces, 2) identity cards issued by a competent public authority, civic or enlisting books, and passports; and 3) delivery and birth certificates. In these cases, the penalty will be 3 to 8 years.

On the other hand art. 296 establishes that *“whoever makes use of a false or adulterated document or certificate will be punished as if they were the author of the falsehood.”* Finally, art. 298 establishes that when any of the crimes provided for in this Chapter — among them, the crime of ideological falsehood in a public document — is carried out by a public official abusing their functions, the guilty party will also suffer absolute disqualification for double the time of the sentence.

Brazil

The crime “ideological falsehood” is provided for in the penal code in article 299:

“Omitting, in a public or private document, a statement that must be included, or inserting a false statement or different from the one that must

³⁴ All the information on the countries mentioned has been provided by AI Sur organizations.

be written, in order to violate the law, create an obligation or change the truth about a legally relevant case.”

The Superior Court of Justice considered that “[...] the crime described in art. 299 of the PC requires... altering the truth about a legally relevant fact.” (TJSP. 12th Câmara de Direito Criminal. Criminal Appeal No. 1000910-67.2016.8.26.0319. Rapporteur Paulo Rossi. J. 3/8/2021.)

Chile

The articles of the Penal Code are under the title of “Crimes against public trust,” and only a hypothesis is related to the truth of the content of the document, while the rest focus on the authenticity.³⁵ This conceptual distinction is much clearer in tax crimes on material falsehood and ideological falsehood of invoices.

The Penal Code includes several categories of crimes that sanction the falsification of public documents. In particular, article 193 refers to a special crime, committed by public officials, with various behaviors that involve falsehoods in an official document. Article 194 establishes the penalty for the same behaviors committed by individuals, and article 196 extends the sanction to those who intentionally use the false or falsified document. Additionally, articles 199, 200, and 201 refer specifically to passports and authorization documents for carrying weapons, both to punish their falsity and their use.

Costa Rica

In the Penal Code the crime of ideological falsehood is found in Title XVI Crimes against Public Trust, Section I Falsification of authentic and public documents. Specifically, article 360 presents the figure of “ideological falsehood: *“Art. 360 - Ideological falsehood. The penalties provided for in the previous article apply to those who include or have false statements included in a public or authentic document, concerning a fact that the document must prove, so that it may result in harm.*”

³⁵ See Rojas, *Réplica tardía a la recensión de Hernández sobre “Teoría funcionalista de la falsedad documental”* [Belated reply to Hernández’s review on “Functionalist theory of falsehood in documents”] retrieved from <https://scielo.conicyt.cl/pdf/politcrim/v13n26/0718-3399-politcrim-13-26-01286.pdf>

Colombia

Notwithstanding, Colombia punishes the crimes of ideological falsehood and material falsehood in a public document. They are regulated in Law 599 of 2000 (Penal Code) as follows:

“Article 286. Ideological falsehood in public documents. Penalties increased by article 14 of Law 890 of 2004, as of January 1, 2005. The text with the increased penalties is as follows: The public official who in the exercise of their functions, when issuing a public document that may serve as evidence, consigns a falsehood or totally or partially conceals the truth, will be punished with a prison sentence of sixty-four (64) to one hundred forty-four (144) months and disqualification for the exercise of rights and to hold public office for eighty (80) to one hundred eighty (180) months.”

The protected legal asset is public trust (as stated in Title IX of the Penal Code “Crimes against public trust”).

Guatemala

The Guatemalan Penal Code includes the crime of ideological falsehood of a document in its article 322: *“Whoever, on the occasion of the granting, authorization or formalization of a public document, includes or causes to include false statements concerning a fact that the document must prove, that may result in harm, will be punished with imprisonment for two to six years.”*

Mexico

In Mexico, the General Law of Administrative Responsibilities of July 18, 2016 provides, in its pertinent section that:

“Article 63. The public official who, in the case of requirements or resolutions of supervisory authorities, internal control, judicial, electoral or in matters of defense of human rights or any other pertinent matter, provides false information, as well as not responding and deliberately and with no justification delays information, despite the imposition of

coercion measures following the applicable provisions will be guilty of the crime of desacato [threatening, insulting or in any way offending the dignity or decorum of a public official due to the exercise of their duties].”

Furthermore, the crime of ideological falsification is included in Article 243, Chapter IV of the Federal Criminal Code regarding the “Forgery of Documents in General,” although the entire title Thirteenth refers to the crime of Falsehood more broadly. Specifically, the article establishes:

“Article 243.- The crime of falsification shall be punished, in the case of public documents, with a prison term of four to eight years and a fine of two hundred to three hundred and sixty days. In the case of private documents, with a prison term of six months to five years and a fine of one hundred and eighty to three hundred and sixty days.

If the person carrying out the forgery is a public official, the penalty in question will increase by up to fifty percent.

The corresponding penalty for the offense outlined in the first paragraph will be increased by up to fifty percent when documents of assignees, contractors, permit holders, or distributors included in the Federal Law to Prevent and Punish Offenses Committed in the matter of Hydrocarbons are falsified.”

Panama

The Panamanian Penal Code contains in its Title XI on Crimes against the Public Trust the crime of falsifying documents in general. Specifically:

“Article 366. Whoever falsifies or alters, totally or partially, a public deed, a public or authentic document, or the digital signature of a third party, in such a way that it may cause harm, will be punished with a prison term of four to eight years. The same sanction shall be imposed on whoever includes or causes to be included into public or authentic document false statements concerning a fact that the document must prove, provided that it may cause harm to another.”

Paraguay

Drafting unauthentic public documents in Paraguay is penalized in the penal code with law 1,160/97 in Title V of the Punishable Acts against legal relationships. The articles that refer to inserting false information into a public document are articles 246 and 250:

“Article 246.- Production of non-authentic documents 1° Anyone who creates or uses an unauthentic document to induce an error about its authenticity in legal relationships shall be punished with imprisonment of up to five years or a fine. 2° Definitions: 1. document: the statement of an idea formulated by a person in such a way that, materialized, it allows to know its content and its author; 2. non-authentic: a document that does not come from the person listed as its author. 3° In these cases, the attempt will also be punished. 4° In especially serious cases, the custodial sentence may be increased up to ten years.

Article 250.- Immediate production of public documents with false content 1° The official authorized to prepare a public document who, acting within the limits of their powers, falsely certifies a fact of legal relevance or enters it in books, records, or public data files, shall be punished with imprisonment of up to five years or with a fine. 2° In these cases, the attempt will also be punished. 3° In especially serious cases, the prison sentence may be increased up to ten years.”

Peru

In Peru, the protected legal asset is the public trust, interpreted as the requirement of a legal or judicial truth. Thus, the regulations seek to protect the trust in the truthfulness of public documents and that they contain information under the law: that the acts therein contained are valid. Article 428 of the Penal Code regulates the crime of ideological falsehood:

“Article 428°.- Whoever includes or causes to be included, in a public instrument, false statements concerning facts that must be proven with the document, to use it as if the statement were true, shall be punished, if the use of said document may result in any harm, with a prison sentence of not less than three and no more than six years and with one hundred and

eighty to three hundred and sixty-five days-fine. Anyone who uses the document as if the content were exact, provided that its use may result in harm, shall be punished, where appropriate, with the same penalties.”

Dominican Republic

The Dominican Penal Code contains in Chapter III, Crimes against public order, section 1, various falsehoods in public documents. The protected legal asset is the public trust.

“Art. 145. The public employee or official who, in the exercise of their functions, commits falsehood, counterfeiting or falsifying the letter or signature, altering the nature of the acts, deeds or signatures, signaling the intervention or presence in an act of persons who have not had a part in it, inserting deeds in the registries or other public acts after their preparation or closure.

Art. 146. The following shall be punished in the same way with the penalty of imprisonment: any civil servant or public official who, in the exercise of their ministry, has willfully and fraudulently distorted the substance of the acts or their circumstances; drafting conventions other than those that the parties have dictated or formulated; stating in the acts, as true, false facts, or as recognized and approved by the parties, those that had not really been recognized or approved; altering the true dates, giving a reliable copy of a supposed document, or stating in it something contrary or different from what the true original contains.

Art. 147. Any other person who enters a falsehood in authentic or public deeds, or in commercial and bank deeds, shall be punished with the penalty of three to ten years of imprisonment, whether they imitate or alter deeds or signatures, whether they stipulate or insert conventions, provisions, obligations or discharges after closing those, or adds or alters clauses, statements or facts that should be received or recorded in said acts.”

Consequently, we can declare that, in our region and according to the transcribed regulations, the protected legal good, expressed broadly, is the “public trust.”³⁶

³⁶ We shall not discuss further the importance of establishing and specifying the limits of a given legal asset when including it as a valued asset that must be protected by punitive law.

The different legislations of the region punish forgery and even in some cases malicious omissions of true data in public documents. The penalty increases when it is a public official who perpetrates such falsehoods. This increase in all cases seems to correlate to the public trust granted to public officials in the exercise of their functions.

For the purposes of this research, it is enough to confirm a regional consensus that public trust is affected by falsehoods — even more so when they come from a public official. And to expand on the concept of this legal asset, we could resort to prestigious Latin American doctrinal works, but as such scope is not necessary, we will resort once again to the Colombian Supreme Court, which confirms the relationship between the harm of the legal asset with false expressions. In the words of the court:

“For some time the Court has considered, and now ratifies it, that public trust, as a constitutionally relevant and criminally protected legal good, consists of the credibility granted to the signs, objects or instruments that constitute a means of proof about the creation, modification or termination of relevant legal situations. Thus, the public trust is protected, using punitive law, through the inclusion as crimes of various behaviors that undermine or threaten this public trust, including the one provided for in article 286 of Law 599 of 2000, previously transcribed, on the grounds that Public Officials have the power of certification regarding the documents that they sign in the exercise of their duties, where they must record the truth, not partially or in a rigged way, but integrally and completely. Since past times, the Court has peacefully considered that this function or task is based on the obligation to adhere strictly to the truth about the historical existence of a phenomenon or event, as well as to include the special manner or circumstances in which it took place, insofar as they are generators of relevant effects in the context of legal and social relations.” (Emphasis added).³⁷

In summary, punitive law recognizes an anti-value in falsehood in certain circumstances, aggravated in the case of public officials with a duty to tell the truth. Failure to do so, depending on the circumstances, could have criminal consequences. In other words, lying is not without consequences.

³⁷ See Supreme Court of Justice, Criminal Cassation Court, Bogota, D.C., January 18, 2017. Filing No. 48079 SP163-2017 Passed Record No 007, in <https://lavozdelderecho.com/files/Spenal48079.pdf> (last access 4/14/21).

b. Measures in Administrative Law in the face of a dishonest act of a public official

As we know, in criminal law, in the case of malicious crimes such as the one studied in the previous section, the author must know that what they are saying is false. The case of criminal law enters the proposed taxonomy surely in column “a.” But criminal law is not the only one that deals with this type of deliberately false expressions or manifestations. It also concerns administrative law and the ethics of the public official.

But if the official who lies does so due to negligence or ignorance, depending on the case, for another reason their action could escape punitive law. It is appropriate to ask whether that false statement, written in a legal act, carries any consequence. Let us remember that what we are trying to verify is whether every time there is a falsehood by an official, there are consequences. As we did with the criminal law approach, administrative law allows us to answer the question affirmatively.

A prestigious Latin American writer, Agustín Gordillo³⁸, explains there is administrative liability *“[i]f the person due to their work has access to public power uses it in bad faith, through gimmicks or tricks — by action or omission, including silence — to carry out deceit or induce error; this type of conduct is certainly incompatible with the correct exercise of the administrative function. It is illegitimate even if the power exercised in the case was discretionary; in some of the rulings it is linked to the doctrine of personal acts and the prohibition of self-contradiction.”* In the rule of law there is value when the public officer does not carry out actions that mislead citizens. Gordillo says that this is “incompatible” with the public office.

Specialists in administrative law consider that what is harmed is the trust of the administered in the acts of power. Some call it “legitimate trust.” Pedro Coviello³⁹ explains it as follows:

“The protection of legitimate trust is a legal principle of public law, derived from the postulates of the rule of law, legal certainty and equity, which protects those who in good faith believed in the validity of acts (of

³⁸ Agustín Gordillo, *Tratado de Derecho Administrativo y obras selectas*, [Administrative Law Treaty and selected works], Volume 1 Parte General, First Edition, Fundación de Derecho Administrativo, Buenos Aires (2017), 15.4. X-30.

³⁹ Coviello, Pedro J. J., *La Protección de la Confianza del Administrado, Derecho Argentino y Derecho Comparado*, [The Protection of the Trust of the Administrator, Argentine Law and Comparative Law], LexisNexis – Abeledo Perrot, Buenos Aires (2004), p. 462.

particular or general scope, whether administrative or legislative), behaviors, promises, statements or reports from public authorities, which are legally relevant and effective to configure said protection, whose cancellation, modification, revocation or repeal causes unlawful damage to those affected by it, establishing itself, under the observance of these components, in a subjective right that the subject of the right can invoke, and that consists, in its practical aspect, in the limitation of the effects of the annulment, if it is an invalid act (of individual or general scope) or of the recognition of the right to compensation if this is not possible; if it is a valid act or behavior, its continuity or permanence; and in the cases of revocation or modification of valid acts or of repeal of normative acts (administrative or legislative), in the possibility of the recognition of the right to compensation.”

Coviello also seems to include unwritten false expressions (he mentions behaviors, promises, statements, or reports, etc.) that are legally relevant, which have specific consequences: the annulment, revocation, declaration of invalidity that the injured party may invoke due to the act that included false statements that damage the legitimate trust on which the relations between the state and the subjects of the right are based. He goes as far as noting that in certain cases pecuniary reparations can be requested.

It is not lost on us that these writers are referring to cases where administrative acts are signed with “false pretenses and legal ruses” that can be misleading, in writing or orally in some cases. But let us remember that the conceptual issue we are debating remains unaltered. If it is not appropriate to deceive citizens in writing, neither is it to deceive them orally or on social media. The requirement of public officials to tell the truth in certain circumstances in the exercise of their functions cannot be different if it is expressed in a written act than if it is done *en masse* in a social media platform.

For example, some norms presume validity and allow the invalidation of administrative acts that are not truthful, found in the laws of Latin America. We cite some cases below.

Argentina

Law 19,549 of administrative procedure establishes in its article 7 the essential requirements of the administrative act. Subsection b) provides that the administrative act must have a cause. This means that the administration “must be based on the facts and precedents that serve as its cause and on the applicable law.” For its part, art. 14 provides that the administrative act is null and void, absolute and irreparably in various cases. One of these cases occurs when the will of the Administration is excluded by “fraud, if there are non-existent or false facts or precedents” (subsection a) or when the act is issued with “lack of cause due to the facts or the right invoked are false or non-existent” (subsection b).

Colombia

In Colombian administrative law, no principle or rule provides for the veracity of administrative acts. However, the wording of article 88 of the Code of Administrative Procedure and Contentious Administrative Matters (CPACA) on the presumption of legality, implies a presumption of veracity. The text of article 88 of the CPACA states the following: *“Presumption of the legality of the administrative act. Administrative acts are presumed legal as long as they have not been rendered null by the provisions of the Law on Contentious-Administrative Matters. When they are suspended, they will not be able to be executed until their legality is definitively resolved or said precautionary measure is lifted.”*

The presumption of legality — and veracity — of administrative acts can be disputed through the means of control of nullity and restoration of the right and nullity, a judicial process that takes place in the administrative jurisdiction, or they can be revoked directly by the same authority that issued it.

The presumption of veracity, however, is enshrined in Decree 2591 of 1991 that regulates the writs for the protection of fundamental rights that provides that the alleged facts are true when they are not contested by the party in the time provided for it (art. 20).

Costa Rica

There is no explicit reference to the veracity of administrative acts, however,

the General Law of Public Administration expresses in its Article 132: “1) *The content must be lawful, possible, clear and precise and cover all questions of fact and law arising from the motive, even if they have not been debated by the interested parties.*”

Peru

One of the guiding principles of the Peruvian General Administrative Procedure is the presumption of veracity in all actions of the administrative procedure, regulated in article 51 of the General Administrative Procedure Law (LPAG):

“51.1 All the sworn statements, the alternative documents presented and the information included in the documents and forms submitted by the companies to carry out administrative procedures are presumed to have been verified by whoever makes use of them, regarding their situation, as well as the truthfulness of the content for administrative purposes, unless proven otherwise. In the case of documents issued by government authorities or by third parties, the subject of the right may prove their due diligence in carrying out the corresponding and reasonable verifications before submitting them.

51.2 In the case of translations submitted by the parties, as well as professional or technical reports or certificates presented as substitutes for official documentation, said responsibility lies jointly on whoever presents them and those who have issued them.”

All the acts, statements, and documents processed in the administrative procedures are presumed to be real. It should be noted that this presumption applies to the actions of the subject within the process and not to the administrative act itself.

Despite not being regulated, we could assert that the lack of veracity of an administrative act is sanctioned with its nullity for several reasons. In the first place, article 3.2 of the LPAG establishes as a requirement of validity of an administrative act that its content should be lawful, precise, and physically and legally possible. In addition, article 1.11. of Article IV of said rule establishes the principle of material truth, according to which the authority is under the obligation to fully verify the facts that serve as grounds for their decisions, which influences the motivation of the act (also validity requirement, article 3.4). The

LPAG renders null those acts dictated in defect or omission of the validity requirements of the administrative act, so an administrative act with false content could be rendered null due to a defect in its content or due to lack of motivation.

Dominican Republic

Law No. 107 of 2013 describes the presumption of validity of administrative acts in articles 9 and 10:

“Article 9. Validity requirements. Only administrative acts issued by a competent body will be considered valid, following the established procedure and respecting the purposes provided by the legal system for their issuance.

Article 10. Presumption of Validity. Any administrative act is considered valid as long as its invalidity is not declared by the administrative or jurisdictional authority under this law.”

Article 14 describes the requirements to render administrative acts invalid:

“Article 14. Invalidity of administrative acts. Administrative acts that subvert the constitutional order, violate any of the fundamental rights recognized in the Constitution, are dictated by a manifestly incompetent body or completely dispensing with the procedure established, those lacking motivation, when they are the result of the exercise of discretionary powers, those of impossible content, those constituting a criminal offense and those that incur in offenses expressly sanctioned with nullity by law are null and void.

Paragraph I. Administrative acts that incur in any infringement of the legal system, those that violate procedural rules, those that lack sufficient motivation in the exercise of regulated administrative powers, and those that are dictated in deviation of power, so while respecting the external form requirements, they depart from the purpose for which the power was granted can be rendered null.”

Similarly, Article 5 orders public officials to: “Act by the principle of good faith, refraining from using delaying maneuvers in procedures, and from knowingly making or providing false statements or documents or make reckless statements, among other behaviors.”

Given everything that has been said, it appears that in administrative law there is also a particularly negative assessment regarding the falsehoods of public officials in the exercise of their functions, which extends, according to experts in the matter, not only to public documents but also to expressions, acts and other manifestations that may create rights and obligations or harm those who trusted them.

c. Obligations in the laws that regulate employment and public ethics

Based on what has been stated so far, we can conclude that in the case of false statements by officials, in the rule of law, there are established consequences. On the other hand, for this reason, there exists — as some of the cited scholars say — a duty or an obligation to tell the truth. If the latter has not been clear in the two previous sections, we will now see that this duty arises in the countries of the region from the regulations governing the exercise of public functions and the codes of ethics for public officials.

In July 2018, at the XVIII Ibero-American Conference of Ministers of Public Administration and State Reform, the Ibero-American Charter of Ethics and Integrity in Public Office was approved.⁴⁰ As explained in the preamble, the Charter seeks to promote a solid integrity system that strengthens what they understood to be a common practice in Ibero-American administrations: the honest behavior of our public servants. One of the objectives detailed in the document is “To promote the integrity of those in charge and public officials.”

Along the same lines, the United Nations Office on Drugs and Crime (UNODC) under its Education for Justice (E4J) initiative in line with its Global Program for the Implementation of the Doha Declaration prepared the document “Public Integrity and Ethics.”⁴¹ This document states that “The integrity of the public sector — or public integrity — refers to the use of powers and resources entrusted to the public sector effectively, honestly and for public purposes. Additional related ethical standards that the public sector must uphold include transparency,

⁴⁰ Carta Iberoamericana de Ética e Integridad en la Función Pública [Ibero-American Charter of Ethics and Integrity in Public Office] approved in the XVIII Conferencia Iberoamericana de Ministras y Ministros de Administración Pública y Reforma del Estado [XVIII Ibero-American Conference of Ministers of Public Administration and State Reform] retrieved from <https://clad.org/wp-content/uploads/2020/10/1-Carta-Iberoamericana-de-%C3%89tica-e-Integridad-en-la-Funci%C3%B3n-P%C3%ABlica-2018-CLAD.pdf> (último chequeo 15/4/2021).

⁴¹ Integridad Pública y Ética, [Public Integrity and Ethics], United Nations Office on Drugs and Crime, 2019, retrieved from https://www.unodc.org/documents/e4j/IntegrityEthics/MODULE_13_-_Public_Integrity_and_Ethics_-_Spanish_v.pdf (last access 4/16/2021).

accountability, efficiency, and competence. United Nations staff members, for example, must “maintain the highest standards of efficiency, competence and integrity,” and integrity is defined in the United Nations Staff Regulations 3, the concept of integrity includes, but is not limited to, “**probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status**” (United Nations Staff Regulations 1.2 (b)).” (Emphasis added).

Let us focus for now on two words: honesty and integrity. Next, we will see that these two conditions in the work of the public official are repeated in the countries of the region that have their own codes or laws of ethics in public office.

In Argentina, for example, the Ley Marco de Regulación del Empleo Público Nacional (No. 25,164) [Framework Law for the Regulation of National Public Employment] establishes that officials must conduct themselves in a collaborative manner, with respect and courtesy in their relations with the public and with the rest of the personnel (Article 23). Another word to keep in mind: respect. The Law of Ethics in the Exercise of Public Function⁴² adds in its article 2 that officials must “perform with the observance and respect of the principles and ethical guidelines established in this law: honesty, probity, rectitude, good faith, and republican austerity.”

In Uruguay, Law No. 19,823⁴³, in its article 13 provides that “Public officials must maintain an honest, upright and integral conduct [...] in the performance of their function, with the preeminence of the public interest over any other.

In Chile, Law No. 20,880⁴⁴ on Probity in Public Office and Prevention of Conflicts of Interest provides that the law regulates the principle of probity in public office and the prevention and punishment of conflicts of interest. It explains what this principle consists of: “The principle of probity in the public office consists of maintaining an irreproachable official conduct, an honest and loyal performance of the function or position with the preeminence of the general interest over the individual.”

In Colombia, the Integrity Code of the Colombian Public Service⁴⁵ describes

⁴² Ley de Ética en el Ejercicio de la Función Pública, N° 25.188 [Law of Ethics in the Exercise of Public Function, No. 25,188], retrieved from <https://www.argentina.gob.ar/normativa/nacional/ley-25188-60847/actualizacion> (last Access 4/15/2021).

⁴³ Declaración de interés general del Código de Ética en la función pública [Declaration of general interest of the Code of Ethics in public office], retrieved from <https://www.impo.com.uy/bases/leyes/19823-2019> (last access 4/15/2021).

⁴⁴ Law No. 20,880 on probity in public office and prevention of conflicts of interest, retrieved from https://www.cmfchile.cl/portal/principal/613/articulos-27838_doc_pdf.pdf (last access 4/15/2021).

⁴⁵ Código de Integridad del Servicio Público Colombiano [Integrity Code of the Colombian Public Service], retrieved from https://www.funcionpublica.gov.co/documents/28587425/34877072/2019-08-21_Codigo_integridad.pdf/da1a074a-8309-a46e-11a5-cfff0a3279e9?t=1566404916392 (last access 4/15/2021).

how officials should act. Under the title “Honesty” it states: *“I always act based on the truth, fulfilling my duties with transparency and rectitude, and always favoring the general interest. I always tell the truth, even when I make mistakes because it is human to make them, but it is not correct to hide them.”* (Emphasis added).

In Mexico, the Code of Ethics for Public Officials of the Federal Government⁴⁶ provides: *“ARTICLE 12. Public officials are committed to act following the principles, values, and rules of integrity contained in this Code, as well as the legal provisions applicable to their functions, favoring at all times, as guiding criteria, the welfare of society.”* In Mexico, the General Law of Administrative Responsibilities of July 18, 2016⁴⁷ provides, in its pertinent section that: *“Article 7. In the performance of their employment, position or commission, Public Officials shall observe the principles of discipline, legality, objectivity, professionalism, honesty, loyalty, impartiality, integrity, accountability, effectiveness and efficiency that govern the public service.”*

In Panama, the Code of Conduct for Public Officials of the Comptroller General⁴⁸ establishes that officials must *“8.4. Always act with transparency, understanding it as a **pact of honesty** and trustworthiness made by public servants and citizens.”* (Emphasis added).

In Peru, Law No. 27,815⁴⁹ determines in its articles 6.2 and 6.5 that public officials should act according to the following principles: *“2. Probity: They should act with rectitude, integrity, and honesty, trying to serve the general interest and discarding any personal benefit or advantage, obtained by themselves or through a third party. (...) 5. Veracity: They shall express themselves authentically in their functional relations with all the members of their institution and with the citizens, and **contribute to the clarification of facts.**”* (Emphasis added).

These have been some examples of how public officials are expected to act in ethics regulations. As stated above, we want to highlight the words honesty, in-

⁴⁶ Código de Ética de las Personas Servidoras Públicas del Gobierno Federal [Code of Ethics for Public Officials of the Federal Government], retrieved from <https://www.gob.mx/asa/acciones-y-programas/codigo-de-etica-de-los-servidores-publicos> (last access 4/15/2021).

⁴⁷ Ley General de Responsabilidades Administrativas [General Law of Administrative Responsibilities], retrieved from http://www.diputados.gob.mx/LeyesBiblio/ref/lgra/LGRA_orig_18jul16.pdf (last access 4/15/2021)

⁴⁸ Código de Conducta de los Servidores Públicos de la Contraloría General [Code of Conduct for Public Officials of the Comptroller General], retrieved from http://www.oas.org/juridico/PDFs/mesicic4_pan_cod_cond.pdf (last access 4/15/2021).

⁴⁹ Ley del Código de Ética en la Función Pública, N° 27.815 [Law on the Code of Ethics in the Public Function, No. 27,815], retrieved from <https://www.mimp.gob.pe/files/transparencia/CET/ley27815.pdf> (last access 4/15/2021).

tegrity, truthfulness, and respect, which are found in the regulations. How are these concepts related to the object of this research? In other words, what relationship do they have with establishing a kind of mandate of truthfulness not only of ethics but also normative? We believe that it is not necessary to dwell too much on this last question. Let us put forth just a few thoughts that give an account of that relationship.

“Honesty” is a concept that, according to the dictionary, implies the quality of being honest. And the adjective honest is synonymous with being decent, upright, or honorable. At the same time, honesty implies, following the same definition, acting with integrity. Integrity, on the other hand, implies a quality: having integrity. And this word entails a quality of the person to be upright, honest, and faultless. Following a semantic interpretation of the same source, probity is synonymous with honesty, which again means acting in an upright manner with integrity in one’s actions.

We could stop here because the original definition we are looking for about honesty already encompasses the characteristics that should govern the public office that include the qualities of probity, rectitude, integrity, and honesty. All these qualities are in the regulations related to the exercise of public office in the region. We can safely say that these qualifications mean something simple: they are qualities of a person who can be trusted. And whoever lies cannot be trusted. Therefore we believe that all these regulations, demanding honesty, trustworthiness, probity, or integrity, what they demand from the public official is the duty to be truthful in their statements.

d. Preliminary Conclusion and a Comment: The Doctrine of Actual Malice

In this chapter, we argue that, in the rule of law, the regulations coming from different sectors of the normative repository value negatively lies in a public official. Not only do they value them negatively, but if they take place they can have serious or moderate consequences, both for the public official and in the acts that emanate from the untruthful statements.

At this point, it is worth stressing that knowingly stating falsehoods or being recklessly unconcerned about the truth coming out is the basis of the legal principle of “actual malice” that has been incorporated to some degree into the con-

stitutional interpretation of the exercise of freedom of expression and the press in various countries, as well as in the Inter-American human rights system. Before concluding, we want to add a comment to emphasize that this doctrine is not opposed to our conclusions.

In brief paragraphs, we will describe the North American doctrine of actual malice elaborated by the American Court in the case “New York Times v. Sullivan”⁵⁰. The decision marked a turning point for the interpretation of the constitutional clause on freedom of expression in the United States of America.

On March 9, 1964, the sentence of the Alabama Court, where the trial against the New York Times had taken place, was overturned by the Supreme Court of the United States. Judge William J. Brennan was in charge of obtaining the majority vote, after a detailed historical and legal basis, agreed on the unconstitutionality of the common law rules applied in that state, to finally arrive at the norm that should be applied to this type of case and that is commonly known as “actual malice.” Judge Brennan stated that *“the constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”*

In other words: the doctrine of “actual malice” negatively values false claims if they are known to be false or even if there is no gross negligence (reckless disregard) to find out. Due diligence in the search for the truth varies according to the profession and the subject matter. The obligations of a doctor regarding a diagnosis or that of a lawyer regarding the content or interpretation of the law will not be the same as that of the common citizen. On this last point, we should return to the postulates of the Inter-American Court of Human Rights, when, as we have already seen, it orders that officials have a higher degree of duty to verify the facts that they expose than an ordinary person precisely because of their function and the position they occupy in a democratic society. Therefore, nothing maintained here can be controversial when invoking this doctrine.

To conclude, without prejudice to the fact that we did not intend to carry out an

⁵⁰ New York Times Co. v. Sullivan, 376 U.S. 254 (1964). For those interested in a detailed history of the case, see Bertoni, *La Libertad de Expresión en el Estado de Derecho* [Freedom of Expression in the Rule of Law], Second Edition, Editores Del Puerto, Buenos Aires, Chapter “New York Times vs. Sullivan y la malicia real de la doctrina” [New York Times v. Sullivan and the actual malice of the doctrine], (2000). Also, Lewis, “Make No Law, The Sullivan’s case and the First Amendment”, Vintage Books, New York (1992).

exhaustive examination, we believe that we have demonstrated that a falsehood spread by a public official, when it occurs in this capacity, can result in criminal or administrative sanctions for the official, as well as in the legal disqualification of the acts (annulment of the act) that are a consequence of that mendacious act. Said disqualification violates the public trust and the conditions that the different regulations require regarding their public officials.

And this conclusion, which seems obvious, should be firmly stated in this research because, as we will see, often the proposed solution for the problem of massive dissemination of disinformation is censorship. These suggestions do not address the origin of many of these statements or the specific obligations that certain people have due to their position or activity in a democratic society. Sometimes they may come from private parties, but as we will show later, in many cases they come from public officials. Considering this distinction and all of the above, could a different way of approaching the problem of misinformation be thought of, at least when originating in expressions of public officials? Could we think of new areas or methods of research and development that allow us to reach better conclusions around the phenomenon and therefore achieve better solutions?

For now, we believe that investigating the problem from this perspective could aid in the creation of even more effective alternative solutions, redirecting attention to the origin of the piece of disinformation, and to those authors who have different obligations due to the position they occupy in a democratic society. These differentiated obligations, as we saw, exist and were created in our legal systems precisely to impose aggravated liabilities on public officials who, instead of respecting public trust, as they should, spread false information. These ethical and legal rules that compel officials to tell the truth and the consequent liability for non-compliance should ultimately serve as an incentive to minimize the dissemination of false information by the state. And if they do not achieve this, it would perhaps be advisable to evaluate why and how, and, if necessary, they would have to be reviewed.

To conclude, there is something that we did not expand on, but which is no less important. The basic pillars of the rule of law, democracy, and the republic are both the publicity of government acts and access to public information. The duty of truthfulness is a consequence of these rights. It would be unacceptable for the government to provide false information. In the same way, it is inadmissi-

ble for someone who occupies a public office to do so, whatever the mechanism they use, when they use it in the exercise of their functions.⁵¹ Although there is a heated discussion in the doctrine regarding the nature of the social media accounts of public officials, political parties, and even public institutions, much of the information that the government disseminates today is done so from official accounts in social media and other digital media with an increasing number of people who are informed by these means.⁵²

In the following section, we will see some specific regulations that demonstrate the same thing that has been evidenced here (the duty to truthfulness) but now in specific areas where false statements can cause significant damage and that therefore the duty of truthfulness becomes more critical.

6. Specific regulations that command true affirmations by officials: the case of electoral campaign regulations

A study on the situation in the countries of the region would allow us to conclude that, although there are regulations on electoral matters and electoral monitoring bodies, such laws focus on issues of financing and the form of elections rather than on the conduct of candidates during electoral processes. In any case, following the doctrine and the situation in some of the countries, we believe that it is essential to define some concepts related to electoral processes. The first concept is “electoral campaign,” and the second is what is known as a “dirty campaign.”

The Electoral Dictionary states that *“electoral campaign can be defined as the set of organizational and communication activities carried out by the candidates and parties, whose purpose is to attract votes. These activities are subject to norms and guidelines that guarantee and allow equality among the opponents, purity and*

⁵¹ It is relevant at this point, for example, to name the lawsuit of the Knight Center of Columbia University against former President Donald Trump to request that the President be banned from blocking followers on his Twitter account. The Knight Center argued and the court agreed that the President disseminated public and government information and thus the account constituted a public forum. See Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (Supreme Court).

⁵² Mergel, *Implementing Social Media in the Public Sector*, State & Local Energy Report (2013), retrieved from <https://www.researchgate.net/publication/258028013> *Implementing Social Media in the Public Sector*.

“It is therefore not surprising that according to a recent Fels Institute report, 90% of all local government organizations are using Facebook and 94% have set up a Twitter account.”

*transparency of the electoral process, and the neutrality of the public powers.*⁵³

The electoral campaign is different from a “negative campaign,” which is defined as:

“[...] Those campaigns that instead of highlighting the positive elements of their own candidacy are focused on describing or drawing attention to the adversary’s defects regarding their personality, career or political positions, in such a way as to undermine or put in doubt their suitability as an alternative.” The Dictionary continues to explain that “[s]ome authors consider that a negative campaign contains political arguments that can be both true and false (García Beaudoux and D’Adamo, n.d.). However, others introduce the requirement that the information presented be true (Martín Salgado, 2002; Dworak, 2012). If this were not the case, it would rather be what is known as a “dirty campaign,” defined as one that resorts to offenses, invents information, falls into slander, or delves into the private life of the candidate (Dworak, 2012).”⁵⁴

We then see that a falsehood expressed by a candidate during an electoral process is defined as a “dirty campaign,” which, as we will see below, has regulations in some countries of the region. For example, *“In the case of dirty campaigns, they have been present in the presidential elections of Colombia (2014) and the Dominican Republic (2015) and in the referendum to modify the Bolivian Constitution on the issue of presidential re-election (2016). Unproven accusations about illegal campaign financing or corruption in the concession of public works or referring to the private lives of the candidates have been the central message of these campaigns.*

Red en Defensa de los Derechos Digitales R3D explains that *Mexico is an emblematic case, whose presidential campaigns of 2000 and, more intensely, the one of 2006, had dirty campaigns at their core through various spots, in most cases, besmirching the personal attributes of the candidates. This led to the constitutional and legal prohibition in 2007 of what has been defined as dirty campaigns. This is embodied in the Ley General de Instituciones y Procedimientos Electorales [General Law of Electoral Institutions and Procedures], which provides for*

⁵³ Diccionario Electoral (hereinafter “the Dictionary”), Instituto Interamericano de Derechos Humanos, Series Elecciones y Democracia, Third Edition: IIDH/CAPEL y TEPJF, Costa Rica/Mexico (2017), p. 93, retrieved from https://www.iidh.ed.cr/capel/media/1440/diccionario-electoral_tomo-i.pdf

⁵⁴ Diccionario, cit., pp. 103-104.

the prohibition of expressions that slander people in campaign messages (Art. 247.2), ordering the immediate suspension and removal of this type of messages.

The Association for Civil Rights in Argentina maintains that *Argentina is another country that in its National Electoral Code has regulated this prohibition: there is a prison sentence of 2 months to 2 years for those who deceive people into voting in a certain way or to refrain from doing so (art. 140). The same happens in Honduras, which in its Electoral and Political Organizations Law establishes that electoral propaganda must be kept within the limits of morals and ethics, with criminal sanctions for non-compliance (Art. 146). In addition, it prohibits anonymous propaganda or propaganda promoting electoral abstentionism, non-compliance with the law or disrespect for political institutions and the dignity of people (Art. 148).*⁵⁵

In August 2018, the National Electoral Chamber (CNE) issued Acordada Extraordinaria 66 [Extraordinary Agreement 66] that seeks to help verify the authenticity of sources of information on electoral matters and political parties. For this purpose, it establishes, among other things, the creation of a “Register of social media accounts and official websites of the candidates, political groups and highest party authorities,” the results of the monitoring of social media and electoral propaganda on the Internet carried out by the CNE must be published, and political parties must attach audiovisual material of the campaigns on the Internet and social media to the final campaign reports. On the other hand, the CNE promoted in May 2019 signing a “Digital Ethical Commitment” to preserve the democratic debate on social media and digital platforms during the national elections of that year. The commitment was signed by national political groups, social media platforms, and journalistic and civil society groups.

In Brazil, Article 9 of Resolution 23,610/2019 of the Superior Electoral Court establishes:

“The use, in electoral advertising, of any type of content, including those transmitted by third parties, presupposes that the candidate, the party or the coalition has verified the presence of elements that indicate, with reasonable certainty, the veracity of the information, submitting those responsible to the provisions of art. 58 of Law No. 9,504/1997, without prejudice to possible criminal liability.”

⁵⁵ Diccionario, cit., pp. 106-107.

Article 323 of the Electoral Code (Law 4,737/1965) establishes a prison sentence of two months to one year or the payment of 120 to 150 days of fine for “*Disclosing in propaganda, facts that are known to be false, regarding political parties or candidates and capable of influencing the electorate.*”

In Peru, among the prohibited conducts in political propaganda, political parties, alliances, movements, and political organizations are prohibited from carrying out actions **that contradict the principle of truthfulness**, according to which voters cannot be induced to make a decision on false or misleading information (Article 42 of Law No. 28,094 — Law of Political Organizations).

These provisions do not deal directly with public officials but with candidates for said office. The regulations and doctrine understand that during an electoral process it is not allowed to issue lies to capture votes, neither by public officials, for the reasons established in the previous section, or by candidates for public office. Perhaps this idea is also found in the ethical conditions mentioned above which are desirable and enforceable in public officials, even more so in those elected by popular vote.

In the discussion about electoral campaigns and dirty campaigns, unlike the obligations imposed on public officials in the exercise of their functions, there tend to be more extensive areas where the obligations of truthfulness govern. Thus, the cited laws do not distinguish between falsehoods in pamphlets, social media, speeches, or platforms. As Eduardo Ulibarri already argued, in a work that is a few years old, “*politics takes place in a world of images, concepts, perceptions, and discourses on reality. Information is part of the action. It is as important for the politician as the Gospels and their dissemination are for the Church. For this reason, in the field of politics, when there is manipulation, it is more likely that it begins at the source, not in the middle. Usually, the media are accomplices — unwilling or willing — but not the originators. They can follow up and amplify, but mostly, they do not start it.*”⁵⁶ (Emphasis added). This is one more reason to draw a parallel between this issue and the problems that social media or the Internet may pose for our information ecosystem, and to reevaluate less novel but no less relevant institutions and instances.

⁵⁶ See Ulibarri, *Entre la Libertad de Información y la Manipulación. El Delicado Manejo de la Información Política* [Between Freedom of Information and Manipulation. The Delicate Management of Political Information], in “Partidos y Clase Política en América Latina en los 90” [Political Parties and Class in Latin America in the 90s], Instituto Interamericano de Derechos Humanos – Centro de Asesoría y Promoción Electoral (1995), p. 488.

7. Specific regulations that command true statements by public officials: the case of health care regulations

So far it is clear that there is an obligation to tell the truth in some cases and that it particularly affects public officials in the exercise of their functions. However, these are not the only permissible restrictions on freedom of expression that command the truth. Similar obligations weigh on eminently commercial discourse, for example, the advertising market, not only in our region but also in others, where the protection of freedom of expression is even stronger and in the opinion of certain critics, almost absolute.⁵⁷ In the health field, state regulations are clear regarding the obligation against issuing misleading messages, and even worse, false messages.

In writing this article, we collected data from at least nine different jurisdictions of the Inter-American region. It seems that in health matters, the main restrictions relate to the “advertising” of medicine or issues related to health care. The regulations are clear in that they specifically stipulate the need to avoid misleading messages or, even worse, false information.

The reasons behind this type of regulation: if incorrect information is sent through advertising messages by mass media about certain products, there would be negative consequences for the health of a large number of people. Perhaps this is why this regime is relevant for the purposes of our research. Like the advertising of medical or public health products by mass media, the expressions of high-ranking officials can have similar effects on the population due to their high circulation. Consequently, if advertising is regulated to avoid false messages, does this type of obligation extend or could it extend to the statements made by officials — or even public figures (according to their position and profession, of course) — that reach a large number of people and also have the “authority” granted by their position to convince people of their claims?

The following description, although not exhaustive, suggests that it does extend to those statements, particularly in light of the subsequent section citing some recent examples of expressions in the framework of the COVID 19 pandemic at the regional level.

⁵⁷ Speech by Professor Robert Post, former dean of Yale University, on the 10th anniversary of CELE, Sept.2019 (publication pending). See also Balkin, *Information Fiduciaries and the First Amendment*, UC Davis Law Review (2016), retrieved from https://lawreview.law.ucdavis.edu/issues/49/4/Lecture/49-4_Balkin.pdf. Although the article refers to another topic that is also relevant to the disinformation debate for other reasons, we are especially interested in the development of the permissible restrictions on freedom of expression under the First Amendment and especially what the government can order to say or not say under the First Amendment without it constituting an abusive limitation of freedom of expression.

a. How is advertising or the dissemination of information on medicine regulated?

In Argentina, resolution 20/2005 from the Ministry of Health and Environment establishes that all publicity or propaganda directed at the public of over-the-counter medicinal specialty products and dietary supplements must comply with the ethical criteria established by the Administración Nacional de Medicamentos, Alimentos y Tecnología Médica [National Administration of Medicines, Food and Medical Technology] (ANMAT). Under this power, the ANMAT issued Provision 4980/2005 that contains the general and specific rules for all advertising or propaganda directed to the public, to promote different types of medicinal products. In turn, in 2010, the ANMAT issued Provision 2845/2011 creating the Program for the Monitoring and Inspection of Advertising and Promotion of Products Subject to Health Monitoring. This program aims to evaluate the advertisements issued in the media to determine if they comply with current regulations. Finally, Provision 9660/2016 established an automated real-time capture system control advertisements aimed at the general public. The ANMAT also publishes the regulations on the advertising of health products, from which the prohibition of deception in advertisements is easily deduced.⁵⁸

In Colombia, the regulation on misleading advertising⁵⁹ is more general but includes advertising in the field of health products, in the Estatuto del Consumidor Ley 1480 [Consumer Statute Law 1480] of 2011.⁶⁰ Something similar to Colombia happens in Costa Rica. The regulation on advertising is very broad, however, Ley N° 7472 de Promoción de la Competencia y Defensa Efectiva del Consumidor [Law No. 7472 on the Promotion of Competition and Effective Defense of the Consumer] and its respective regulations refer to false advertising in all cases (defined as “any form of information or communication of an advertising nature, whose content is contrary to the truth”). The Law makes a clear distinction between misleading advertising and false advertising. Article 113.c of the regulation states:

⁵⁸ See Publicidad en Productos para la Salud [Advertising in Health Products], ANMAT in <http://www.anmat.gov.ar/comunicados/comunicado-publicidad-consumidores.pdf> (last access 6/10/21).

⁵⁹ See Información Engañosa, Protección del Consumidor, Superintendencia de Industria y Comercio [Misleading Information, Consumer Protection, Superintendency of Industry and Commerce], in <https://www.sic.gov.co/informacion-enganosa> (last access 6/10/21)

⁶⁰ See Estatuto del Consumidor, Ley N° 1480 [Consumer Statute, Law No. 1480] of 2011, retrieved from: http://www.secretariassenado.gov.co/senado/basedoc/ley_1480_2011.html (last access 6/10/21).

“Article 113.-Rules for supply, promotion, and publicity. The supply, promotion, and advertising of goods or services by merchants or suppliers will be governed by the following general rules:

c) Advertising must not be disguised, denigrating, false or abusive, nor may it contain any manifestation or visual presentation that directly or indirectly, by affirmation, omission, ambiguity, or exaggeration, could reasonably lead to confusion to the consumer, bearing in mind the nature and characteristics of the goods or services advertised, as well as the audience to whom the message is directed, and the medium to be used.”

In Guatemala, there is no legal regulation of advertising. However, various media outlets, advertising agencies, and associations created and subscribed to the Código de Ética Publicitaria.⁶¹ [Code of Ethics in Publicity]. Articles 15 to 17 of this code regulate advertisements related to health. In particular, Article 16 provides that *“Advertisements for products for patients, treatments and medical products must not a. Contain statements that could lead to deceiving the consumer regarding the composition, characteristic, or results of the medicine or treatment for the symptoms for which it is recommended.”*

In Panama, advertising broadcasted by radio and television is regulated by Decreto Ejecutivo 189 [Executive Order 189] of 1999: *“Article 161. Concessionaires of public radio and television services may not transmit within their programming any type of advertising originating within the Republic of Panama related to 1. Activities related to health, such as products, treatments, cures, and others whose sale, distribution or application has not been previously authorized by the Ministry of Health.”* Advertising related to the health sector in Panama is regulated by the Publicity and Propaganda Commission, made up of different departments and public bodies. And the Health Code, after a reform in 2008 through Law 13, states: *“Article 171. Any form of publicity or propaganda referring to hygiene, preventive and curative medicine, drugs and hygienic or medicinal consumer products, cosmetics, and beauty products, which were not previously approved by the Ministry of Health is prohibited. The Ministry of Health shall object to any propaganda aimed at deceiving or exploiting the public, or which in any way may be detrimental to the health. It constitutes deception or*

⁶¹ See Código de Ética Publicitaria [Code of Ethics in Publicity] of Guatemala in <http://biblio3.url.edu.gt/Libros/2012/Etica-Publicitaria.pdf> (last access 6/10/2021).

public prejudice to use any method of propaganda to recommend medical services that are not officially authorized or which are in disagreement with scientific facts; to advocate medicine to which properties are attributed that they do not possess or that are not among those acceptable by the Ministry at the time of registration, and vitiate in any way the pre-established regulations. The state, through the Ministry of Health or by law, will prohibit any type of advertising, promotion, or sponsorship of drugs, even when they are legal, provided that it is scientifically proven that these are harmful to human health and that they constitute a threat to public health.”

Resolution 0523 of 2019 in its art. 58: *“Article 58. Truthfulness in advertising. Any publicity advertisement referring to the transactions covered by this Title must be true, the advertiser shall take care that the facts are not misrepresented and that the advertisement or publication does not cause any error or mislead. Statements that refer to the nature, composition, origin, substantial qualities, or properties of the products or services must always be accurate and verifiable at any time. For the purposes of this Law, misleading advertising is understood to be that which refers to characteristics or information related to any good, product, or service, which leads to error or confusion due to the inaccurate, limited, false, exaggerated, partial, artificial, or biased manner in that it is presented.”*

In Peru, Article 3 of Law No. 27,808 Ley de Transparencia y Acceso a la Información Pública [Law on Transparency and Access to Public Information] establishes in a general way the obligation of all entities of the Public Administration regarding not only access to the information requested by any citizen but also regarding the obligation of public entities to promote and publicize that information. This also includes information related to public health held by public entities. In addition, Title V of Law No. 27808 regulates the Sanctions applicable to public entities that through actions or omissions violate the legal system of transparency and access to public information. The behaviors are classified as infractions and are divided into minor, grave, and very grave. Without prejudice to the corrective measures that are implemented to reverse or correct the damage caused by acts and their effects.

For its part, article 4 of the aforementioned law states that public officials who fail to comply with the provisions of the rule will be prosecuted for the crime of Abuse of Authority (article 377 of the Penal Code). As has been detailed, this regulation is general and applies to any public matter, including public health is-

sues. On the other hand, Law No. 26,842, Ley General de Salud [General Health Law] specifically regulates health information and its corresponding dissemination. The regulation, in its Title IV, refers to two issues: updating data in the Health Authority and information, propaganda, and publicity on health issues. Regarding the latter, it regulates that **the dissemination should not induce the recipients of the information to carry out practices that involve risks; it must not contradict the provisions of the Health Authority regarding prevention, treatment, and rehabilitation of diseases** (emphasis added). Likewise, article 121 makes the Health Authority responsible for warning the population about the risks and harms of certain products, substances, and activities.

Finally, in the Dominican Republic, advertising is regulated by Resolution 016-2014. This document prohibits misleading advertising and establishes defense and remedy mechanisms. This resolution directs health publicity issues to the Ley General de Salud [General Health Law]. For its part, the Ministry of Public Health issued the Technical Guidelines that establish the rules on health advertising. This Guideline⁶² specifically stipulates that “Information contained in advertising must be based on verifiable scientific evidence, be independent, accurate, reliable and true.”

Evidently, the states in the region have established clear guidelines to sanction any false or misleading advertising in matters related to public health. In some cases, the states have included sanctions for public officials who disseminate false or misleading information on public health issues. For the purposes of our analysis, the existence of precedents where the authorities are obliged to transmit certain information on health matters is relevant, but it is also pertinent to verify that the basis of the limits to advertising on drugs and health issues responds to the potential for harm, the massive scale of its dissemination and the legitimacy that medical laboratories have in the different states. All these factors medical distributors share in many cases with public officials. Particularly those of high rank and those specialized in the field.

⁶² See Technical Guidelines that regulate the advertising and promotion of medicine, cosmetics, health products, personal and household hygiene, Ministry of Public Health (2016), in <http://infadomi.org/wp-content/uploads/2018/09/Reglamento-sobre-Publicidad-y-Promoci%C3%B3n-de-Medicamentos-Cosm%C3%A9ticos-Productos-Sanitarios-PUBLICIDAD-DE-MEDICAMENTOS.pdf> (last access 6/10/2021).

8. Leading cases of false statements by public officials in the region.

The theoretical and normative approach carried out so far could be a mere academic exercise if no false statements by public officials were actually detected. Of course, any moderately informed person could intuitively conclude that there are expressions that are made without verifying their veracity, both in traditional media and in social media. Or even in media outlets and then later replicated by social media platforms, increasing the audience to unsuspected limits.

This chapter details only a few cases of false statements by public officials.⁶³ The compiled work is not a complaint or an assessment against the authors of such claims. It is also not a complete compilation. Rather, this chapter attempts to empirically verify that the problem exists, without prejudice to the assessment that may be made of its magnitude by the quantity or content of these messages.

In the framework of the COVID 19 pandemic, there were multiple instances of false information widely disseminated by public officials through different mechanisms. For example, in Argentina, between October and November 2020, the members of Congress Martín Grande and Mónica Frade (from the “Juntos para el Cambio” party) asked the national government to consider chlorine dioxide as an alternative to combat COVID-19. In addition to the absence of any evidence regarding its efficacy, that statement is specifically contraindicated by well-known scientific arguments and by the international community through the World Health Organization⁶⁴ In the same framework, in Brazil, the Alexandre Gusmão Foundation (Funag), a research and dissemination agency of the Ministry of Foreign Affairs (MRE), published a video with false information indicating that the use of masks was not effective to combat the coronavirus and even that it was harmful to people’s health. In an event organized by Funag called ‘The international situation post coronavirus’, panelist Carlos Ferraz, member of the National Secretariat for Youth of the Ministry of Women, Family and Human Rights (MMFDH), stated that ‘masks not only are not effective in fighting the pandemic, but they are also harmful, they cause health problems.’ The President of the Foundation, Roberto Goidanich, was also part of the event and said that it was a ‘fallacy’ that the World Health Organization (WHO) was the ‘owner of the truth’ and

⁶³ The information consigned was sent by organizations that work in the countries of Al Sur.

⁶⁴ See Diputados piden ensayos con dióxido de cloro, pese a que se trata de una sustancia tóxica [Representatives request trials with chlorine dioxide, despite the fact that it is a toxic substance], Chequeado, November 10, 2020, retrieved from: <https://chequeado.com/hilando-fino/diputados-piden-ensayos-con-dioxido-de-cloro-pese-a-que-no-hay-evidencia-de-cure-el-nuevo-coronavirus/> (last access 6/11/2021).

that it had a ‘scientific opinion.’”⁶⁵ These statements are false and also discredit the international body in charge of dealing with health emergencies, recognized as such by the state of Brazil itself. The WHO recommends: “Masks are a key measure to suppress transmission and save lives. Masks should be part of a comprehensive “Do it all!” approach. Depending on the type, masks can protect healthy people or prevent transmission.”⁶⁶ This is one of many other cases in Brazil.⁶⁷

Even President Jair Bolsonaro said in a live stream: “Hydroxychloroquine, azithromycin, ivermectin and Anitta, zinc, vitamin D have been successful [in treating Covid-19]” These statements were made even though many studies have observed side effects such as cardiac arrhythmia, prompting the American Medical Association to issue a statement calling for the use of chloroquine to be limited to clinical studies within hospitals, under strict control. Azithromycin is an antibiotic that can be used against secondary bacterial infections in cases of Covid-19 but does not act directly against the virus that causes the disease. There is also no scientific evidence to support the recommendation of ivermectin, a medicine used against lice, as prevention or treatment for Covid-19.⁶⁸

In Chile, senior officials have made questionable claims. For example, the metropolitan mayor stated on television that there is no scientific evidence or research that establishes that public transport is a source of Covid-19 transmission. Fast Check CL consulted research and scientific articles available on the Internet, which deny what Mayor Guevara said.”⁶⁹ In the same vein, in Guatemala,

⁶⁵ See “Fundação do Ministério das Relações Exteriores Publica Vídeo com Informações Falsas sobre a Pandemia”, Agencia de Emergência, September 9, 2020, retrieved from <https://agendadeemergencia.laut.org.br/2020/09/fundacao-do-ministerio-das-relacoes-exteriores-publica-video-com-informacoes-falsas-sobre-a-pandemia/> (last access 6/11/2021).

⁶⁶ See “Coronavirus disease (COVID-19): Masks”, World Health Organization, December 1, 2020, retrieved from: <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-masks> (last access 6/11/2021).

⁶⁷ Other cases in Brazil: The Minister of Women, Family and Human Rights stated: “We came to see the miracle of the use of chloroquine associated with other medicines. And people are being saved here in Floriano [Brazilian municipality]. Extraordinary! I am taking this protocol to all of Brazil.” The trip [to Floriano] took place after information began to circulate that the drug was responsible for emptying the hospital’s ICU (Intensive Care Unit). However, the hospital’s technical coordinator declared that the improvement of patients attributed to chloroquine is false, and the differential to avoid the ICU is the use of drugs such as corticosteroids and anticoagulants for hospitalized patients. See in “É fake that é a chloroquine that cures, said to be a hospital coordinator where Damares seeks a protocol for coronaviruses,” Folha de Sao Paulo, May 15, 2020, retrieved from: <https://www1.folha.uol.com.br/colunas/painel/2020/05/e-fake-que-e-a-cloroquina-que-cura-diz-coordenador-de-hospital-em-que-damare-buscou-protocolo-para-coronavirus.shtml>. (last access 6/11/21).

⁶⁸ See “Em live no pior dia de Manaus, Bolsonaro mente sobre Covid-19 no Brasil”, Folha de Sao Paulo, January 15, 2021, retrieved from: <https://piaui.folha.uol.com.br/lupa/2021/01/15/bolsonaro-live-pazuello-covid-19/>

⁶⁹ See “No hay, hasta aquí, ningún dato que permita señalar que el transporte público es un foco de contagio, no hay investigación”: #falso [There is no data to indicate that public transport is a source of transmission, there is no research”: #false] Fact Check CL, March 20, 2020, retrieved from <https://www.fastcheck.cl/2021/03/20/felipe-guevara-no-hay-hasta-aqui-ningun-dato-que-permita-senalar-que-el-transporte-publico-es-un-foco-de-contagio-no-hay-investigacion-falso/> (last access 6/11/2021).

the President of the Republic, Alejandro Giammattei declared at an international event that ivermectin is a substitute for vaccination against COVID-19.⁷⁰

As we stated before, these are just a few examples. But they show that false statements by officials exist and they have an impact on the public debate of central issues such as vaccination, health control, and containment of the pandemic. Thus, the following chapter will evaluate from a theoretical point of view but anchored in reality the influence of these false statements. The investigation will end with some recommendations.

9. How much influence do lies exert (or how much damage do they cause)

At this point, some questions emerge from the research. First, false statements by public officials are found in the countries studied and have been disseminated or amplified through social media.

Second, some regulations would establish an obligation for officials to express themselves truthfully, especially, but not limited to, in the areas covered by this investigation: during electoral processes or in the fight against the pandemic currently affecting the world.

Thirdly, we have concluded that, beyond the normative issue, “lies” in general are valued negatively and therefore deserve reproach, although as has been made explicit at the beginning, cases may occur where the assertion of a false fact should not, necessarily, have legal or even social consequences. It is what in the initial chapter of this research we called the “moral taboo” that, in the taxonomy we proposed, can be somehow deconstructed, remaining only pertinent in cases of knowingly false statements or with an attitude of manifest negligence and that, in addition, cause considerable harm.

In this chapter, and taking these three cases into account, we understand that it is appropriate to dwell on the last one, that is, if the false statements made by public officials have a negative influence on reality in some way or, in other words, if they cause considerable harm. As we have focused on false statements during

⁷⁰ Agencia Ocote, through its project *Fáctica*, fact-checked and found out the President's statement false. See “*Por qué la ivermectina no sustituye a la vacuna, como aseguró Giammattei*” [Why ivermectin does not replace the vaccine, as Giammattei claimed], Agencia Ocote, April 23, 2021, retrieved from <https://www.agenciaocote.com/blog/2021/04/23/por-que-la-ivermectina-no-sustituye-a-la-vacuna-como-aseguro-giammattei/> (last access 6/11/2021).

electoral processes or related to the fight against COVID-19, we understand that to answer these questions, we should have empirical studies that demonstrate the harm caused, or, contrarily, that they are harmless.⁷¹ These two issues are the ones that were precisely and especially cited in the “UN Office of the Special Rapporteur Report.” The Rapporteur says that:

“In recent years, state-led disinformation campaigns in various countries have sought to influence elections and other political processes, control the content of public debates, or curb protests and criticism against the government. In the context of the COVID-19 pandemic, there have been several instances of state actors spreading unverified claims about the origins of the virus responsible for COVID-19, denying that the disease was spreading, or providing false information about transmission rates, the death toll, and health advice. This misinformation has had a negative impact on the efforts to control the pandemic, endangering the right to health and the right to life, as well as the trust of citizens in public information and in government institutions.”⁷²

Regarding the two issues mentioned, we refer to them in specific sections above. But going back to Cass Sunstein, on truth in politics he argues⁷³ that

In life and in politics, truth matters. In the end, it might matter more than anything else. It is a precondition for trust and hence for cooperation. But what, exactly, can governments do to restrict the dissemination of falsehoods in systems committed to freedom of speech? In brief: Much less than some of them want, but much more than some of them are now doing.

I have argued in favor of a general principle: False statements are constitutionally protected unless the government can show that they threaten to cause serious harm that cannot be avoided through a more speech-protective route. I have also suggested that when lies are involved, the government may impose regulation on the basis of a weaker demonstration of harm than is ordinarily required for unintentional falsehoods. Reasonable people

⁷¹ Some of these studies have been cited above. See *supra* note v.

⁷² Khan, *La desinformación y la libertad de opinión y de expresión* [Disinformation and freedom of opinion and expression], cit., para. 49.

⁷³ Sunstein, *Liars*, cit., p. 131.

can disagree about how to apply these ideas in concrete cases. In general, however, this principle, and the accompanying suggestion, gives a great deal of constitutional protection to falsehoods and even lies.” (Emphasis added).

Sunstein is concerned about falsehoods that cause harm. Interestingly, in this chapter, his fundamental reference to the damage caused by fake news is linked to health protection. The author states⁷⁴ that:

“[...]public officials have considerable power to regulate deepfakes and doctored videos. They are also entitled to act to protect public health and safety, certainly in the context of lies, and if falsehoods create sufficiently serious risks, to control such falsehoods as well. In all of these contexts, some of the most promising tools do not involve censorship or punishment; they involve more speech-protective approaches, such as labels and warnings.”

Sunstein does not propose a system that regulates the possibility of censorship against lies that cause harm in the field of public health protection. However, he understands that something must be done. Ultimately, and according to what was outlined in our research, the proposed solution is to look at and evaluate the existing regulations, the existing obligations, and their operations in different societies, particularly regarding those who, like public officials, have duties regarding their expressions, and investigate how to use these existing precepts to strengthen the public debate. And this is one of the conclusions of our work.

10. Conclusions

Having reached the end of this investigation, we can observe its trajectory. We began by defining a conceptual classification of false claims. We focused on the intent of the author and the possible harm in order to evaluate the cases where they deserve a reproach and what type of reproach they deserve. A first conclusion was that, despite the existence of what we, along with Sunstein, call the “moral taboo” of lies, there may be cases that do not deserve any consequence.

However, as the research shows, neither the Inter-American Human Rights Sys-

⁷⁴ Sunstein, *Liar*s, cit., p. 133.

tem (SIDH) nor the regulations in force in the countries of the region consider the special case of false statements by public officials devoid of consequences. The study described a mandate and an expectation — explicit in some cases and tacit in others — that officials must express true facts and that before manifesting themselves they must apply verification criteria with more rigor than any other person. It was also shown that failure to do so in certain circumstances can have relevant consequences ranging from criminal to ethical.

The establishment of specific responsibilities and obligations to tell the truth or not to lie, with malice or negligently, for some persons due to their functions does not necessarily constitute an illegitimate restriction on the right to freedom of expression. As we have shown, false expressions, knowing that they are false — the standard of actual malice — excludes the protection that false expressions enjoy under article 13 ACHR.

The cases included in this study have shown that a) there were false statements by high-ranking public officials; and b) that they, depending on the context, could have relevant and harmful effects. For this reason, the report “Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression. Broadband Commission research report on ‘Freedom of Expression and Addressing Disinformation on the Internet’”⁷⁵ presented the following recommendations for political parties and political actors:

“Political parties and other political actors could:

- 1. Speak out about the dangers of political actors as sources and amplifiers of disinformation and work to improve the quality of the information ecosystem and increase trust in democratic institutions.*
- 2. Refrain from using disinformation tactics in political campaigns, including covert tools of public opinion manipulation and ‘dark propaganda’ public relations firms.”*

Many of these false claims circulated on social media platforms with a wide reach in the population. The investigation started by citing research that shows that

⁷⁵ See Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression. Broadband Commission research report on ‘Freedom of Expression and Addressing Disinformation on the Internet’, Broadband Commission for Sustainable Development, Sept. 2020, p.263, retrieved from https://www.broadbandcommission.org/Documents/working-groups/FoE_Disinfo_Report.pdf (last access 4/27/2021).

there is no consensus on the impact that social media alone has in these types of cases. Expressions do not happen in a vacuum; there is a context; and amplification by traditional media outlets that, in any case, can contribute to the impact that expressions on social media are often said to have without empirical research to support it. For these reasons, we argue that in addition to delving into the study of our new media ecosystem, including social media, their business models, their scope, and their potential liability (when appropriate), attention should be paid to the other actors who participate in the public debate and who have long had specific responsibilities regarding their speech.⁷⁶ This study allows us to look beyond the messenger and focus on some of the substantive issues that we believe make up the main challenges of the current problem of misinformation.

⁷⁶ The “UN Office of the Special Rapporteur Report” cited above is quite illustrative, when addressing the issue. See “Respuestas de los Estados a la desinformación: principales motivos de preocupación” [State responses to disinformation: main reasons for concern] (paragraphs 46 et seq.). The subject covered in this research is avoided. The responses that are mentioned, and that, in some cases the Report criticizes, are mainly linked to Internet shut-downs, criminal defamation laws, consumer protection, and financial fraud, the regulation of social media, and new trends aimed at regulating platforms. Any effort in enforcing the obligations of state actors not listed in the report as answers have been evaluated. Even so, the conclusions address the issue in line with the recommendations in this research. The UN Office of the Special Rapporteur Report clearly states that “[i]n consonance with their obligation to respect human rights, states should not make, sponsor, encourage or disseminate statements that they know or should reasonably know to be false [...]” (Emphasis added).