

# Falsehoods and the Patois of Pandemics— A Playbook

Dina Temple-Raston\* & Harvey Rishikof\*\*

I.	THE SPANISH FLU—THE PRECEDENT . . . . .	213
II.	A NEW YORK STYLE PANDEMIC – FOLLOW THE PLAYBOOK . . . . .	215
III.	THE GENERAL LEGAL FRAMEWORK OF COMMUNICATIONS FOR PUBLIC SAFETY ISSUES—FEDERAL AND STATE . . . . .	219
	A. <i>Legal Issues Related to Public Health Data Collection, Analysis, and Dissemination</i> . . . . .	220
	B. <i>Concepts Related to Public Health Data Collection, Protection, and Dissemination.</i> . . . . .	221
	C. <i>Federal Laws Related to Public Health Data Collection, Protection, and Dissemination.</i> . . . . .	221
IV.	THE UNADDRESSED CHALLENGE—SOCIAL MEDIA AND DISINFORMATION	225

## I. THE SPANISH FLU—THE PRECEDENT

The mysterious illness first began sweeping through Haskell County, Kansas, in January 1918. Residents of this rural community were laid low by coughs and fevers, and while most recovered, for some the disease was lethal. Some historians now believe that a handful of Haskell County “super spreaders”—men from the area who were asymptomatic—may have helped introduce the virus to a nearby military base, Camp Funston. Soldiers at the fort were preparing to ship out to Europe to take part in the “war to end all wars”—World War One.

Within weeks of the Haskell County contingent’s arrival at Funston, historian John M. Barry writes in *The Great Influenza: The Story of the Deadliest Pandemic in History*, more than a thousand soldiers were hospitalized, and thousands more were nursing symptoms in the barracks.<sup>1</sup>

Although some researchers suggest that the 1918 pandemic began elsewhere—in France a few years earlier, or China in 1917—other studies indicate that it began in Haskell County, where farmers were raising cattle and pigs—beneath a major migratory route for a variety of birds. The virus likely jumped from birds to hogs to us. Doctors at the time observed lung tissue “full of hemorrhages.”

---

\* Dina Temple-Raston is an Adjunct Professor at Temple Law School and an NPR Investigative Correspondent. © 2020, Dina Temple-Raston and Harvey Rishikof.

\*\* Harvey Rishikof is a Visiting Professor at Temple Law School and Director of Policy and Cyber Security Research at the University of Maryland’s Applied Research Laboratory for Intelligence and Security.

1. See John M. Barry, *How the Horrific 1918 Flu Spread Across America*, SMITHSONIAN MAG., (Nov. 2017), <https://perma.cc/YK25-6WV6>.

Some thought they had discovered a new disease. The pandemic lasted 15 months and killed an estimated 670,000 Americans.

As deadly as the disease was, what proved to be an even bigger threat was the decision by governments around the world to systematically “lie” about it. President Woodrow Wilson established the first modern propaganda office, the Committee on Public Information (CPI). It was led by investigative reporter and writer George Creel. Creel set out to methodically reach every person in the United States multiple times with pamphlets that explained how they could contribute to the war effort. The CPI was inspired by a Wilson advisor who wrote that to be effective, for the CPI “[t]ruth and falsehood are arbitrary terms. . . . The force of an idea lies in its inspirational value. It matters very little if it is true or false.”<sup>2</sup> Spin, it appears, has a long and strong executive tradition.

One way to ensure the CPI’s success was to make it the sole messenger. The Sedition Act of 1918<sup>3</sup> made that possible. An extension of the Espionage Act of 1917,<sup>4</sup> it covered a broader range of offenses, notably speech and expression—effectively muzzling the Fourth Estate’s ability to write honestly and critically about events. Among other things, the Sedition Act made clear that to so much as “utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language” about the United States was an offense punishable by up to 20 years in prison.

In the end, the Act not only restricted the press but cleared the way for public health officials to lie. These officials assured the American people that the disease was easily contained, suppressed information about outbreaks in military training camps, and allowed life to go on as if nothing was amiss. (In one case a parade in Philadelphia was allowed to go forward without health warnings. When local schools were finally closed as the disease ravaged the city, reporters wrote that it wasn’t a public health measure and there was no need to be alarmed.)

Indeed, the absence of real world reporting is why the disease came to be known as the “Spanish Flu.” Though the virus had ravaged Britain, France, and other parts of Europe long before it reached Spain, the fact that journalists had not been allowed to write about it, to avoid potentially darkening morale during the war, meant the virus became the proverbial tree in the forest that no one heard fall. It was only after the virus struck the king of Spain that it made the news. Spain wasn’t in the war, so its journalists and public officials covered the pandemic extensively. Spain was not the first to succumb to the disease, just the first to have journalists who could say so.

---

2. Stephen L. Vaughn, *quoted in* THE THREAT OF PANDEMIC INFLUENZA: ARE WE READY?: WORKSHOP SUMMARY 65 (Stacey L. Knobler et al. eds., 2005), <https://perma.cc/HLL7-2UPT>.

3. Pub. L. No. 65-150, 40 Stat. 553 (repealed 1920).

4. Pub. L. No. 65-24, 40 Stat. 217 (codified as amended at 18 U.S.C §§792-799 (2018)).

## II. A NEW YORK STYLE PANDEMIC – FOLLOW THE PLAYBOOK

“Happy Friday. The weekend is almost here. Whatever that means.” That’s how New York Governor Andrew Cuomo started his daily televised press conference on April 17, 2020.<sup>5</sup> He appeared at a time when his state was the epicenter of the COVID-19 pandemic. “Let’s talk about where we are today in terms of the data,” he continued.<sup>6</sup>

Total hospitalizations ticked down. Again, that is good news . . . just a tick, but we’ll take it. It’s better than going up. Again, this is one day, but it is flattening, reducing slightly depending on your point of view. This is sort of a test if you’re an optimist or are you a pessimist. Pessimist[s] would say we’re basically flat. Optimists would say, I think we’re starting to trend down, so it’s a personality test.<sup>7</sup>

Anyone who knows the New York governor will tell you that there is something very “Andrew Cuomo” about all of this (his brother, Christopher Cuomo, who is the host of a CNN news show, told his producer that the governor “takes five minutes to say hello”), but what may have been lost on the audience was that the Cuomo daily briefing was following a very specific playbook: the *CDC Field Epidemiology Manual*,<sup>8</sup> which, among other things, lays out specifically how to respond publicly to a health care crisis.

*Start with empathy*, the section begins. “Whether you are speaking to affected persons, community groups, or the media, start by expressing empathy,” it recommends. “Acknowledge concerns and express understanding of how those affected . . . are probably feeling.” Without an empathetic opening, a CDC official told us in an interview, people won’t listen to the rest.

*Identify and explain the public health threat*, the second bullet point in the CDC communications chapter reads. On April 17, the “[n]umber of deaths unfortunately refuses to come down dramatically,” Cuomo told the audience, moving to a split screen with a PowerPoint slide showing the progression of the daily death toll in the state. “630—that is still breathtaking in its pain and grief and tragedy and basically flat. Again, like many of the other numbers, just in terms of overall context where are we, where are we going? Everybody wants to ask that question every day and I understand that.”<sup>9</sup>

Cuomo’s press conferences became must-see TV. MSNBC, CNN and FOX all carried his briefings live. And they became *de rigueur* streaming as well. In a six-day period toward the end of March 2020, more than 4.7 million people tuned in

---

5. Andrew Cuomo, New York COVID-19 Briefing Transcript: “Don’t Pass the Buck without Passing Bucks” (Apr. 17, 2020), <https://perma.cc/UU7L-8UDX>.

6. *Id.*

7. *Id.*

8. CDC FIELD EPIDEMIOLOGY MANUAL (Sonja A. Rasmussen & Richard A. Goodman, eds.), <https://perma.cc/SS4Q-X5TT>.

9. Andrew Cuomo, *supra* note 5.

to watch his updates through Facebook, Twitter, Periscope, and a livestream feed on the state's website, according to the governor's office. Clearly the CDC's media guidance was working for him.

Dr. Richard Goodman is a professor at Emory University School of Medicine who worked at the CDC from 1978 to 2016. He is one of the people who helped put together the original *Field Epidemiology Manual*. It took eight years, and he was the lead author of the tome's first chapter. "It was never supposed to be the heavy book it became," Goodman confessed. "The idea was to have public health officials carry the *Manual* around with them during an outbreak. It was supposed to be like a spiral bound softcover—like residents have for specialties—that they could easily refer to in the field."<sup>10</sup>

The intended audience was and continues to be an august group, the trainees of a Centers for Disease Control and Prevention program known as the Epidemic Intelligence Service, or EIS, a two-year, hands-on post-doctoral training program in epidemiology, which focuses on field work. Though not well known until recently, EIS members are the combat troops of the CDC. They are considered America's disease detectives, and they are routinely sent to the front lines to investigate the origins of mysterious outbreaks.

The service started in early 1951 after thousands of American troops in Korea began succumbing to a mysterious illness that was introduced with a high fever and often ended with victims' blood vessels bursting. The infection affected some 25,000 troops, killing nearly 3,000 of them over the course of the war. Military officials were sure the Chinese Communists had figured out a way to weaponize bacteria.

The then-Communicable Disease Center in Atlanta put together a team that would figuratively parachute onto the battlefield and get to the bottom of it. The first EIS officers quickly determined that China was not to blame for the illness at all. Instead, the enemy was of a smaller and furrer variety. It turns out that the soldiers had been accidentally consuming rodent feces, which infected them with a hantavirus called Korean hemorrhagic fever. The EIS prescription: thicker food-storage bags and more rat traps.<sup>11</sup>

A year later, another EIS team linked muscle weakness among young Chicago children living in the projects to paint chips that contained lead. The disease detectives of EIS helped found the country's first poison-control program and embarked on an education campaign to ensure that parents put poisons and bleaches out of children's reach. "The EIS logo is the sole of a shoe with a hole in it and that says it all," Goodman explained. "The whole concept of EIS is shoe leather epidemiology."

EIS officers also tracked down the mysterious bacteria that made American Legion members sick in Philadelphia in 1976. Later, EIS teams were among the

---

10. Interview with the authors, May 2020.

11. MARK PENDERGRAST, *INSIDE THE OUTBREAKS: THE ELITE MEDICAL DETECTIVES OF THE EPIDEMIC INTELLIGENCE SERVICE* (2010).

first to respond to the anthrax attacks, and the SARS and H1N1 flu outbreaks. EIS officers deployed overseas to provide on-the-ground help during Ebola and the Zika virus. The program now has more than three thousand alums, most of whom work in public health and local governments across the country.

As originally envisioned, the *CDC Field Epidemiology Manual* was supposed to be a simple compendium of key lectures EIS fellows heard during the first summer of their training. The seminal lectures were given by, among others, Philip Brachman, the director of the CDC's Bureau of Epidemiology for nearly 11 years. "The summer course started in what was called Auditorium B," Goodman, who was an EIS fellow in 1978, noted.<sup>12</sup>

Everyone will tell you that one of the rites of passage at EIS then was the attaché case you got when you first arrived at CDC to hear one of Brachman's basic lectures. It was on *10 Steps on How to Investigate an Outbreak*. We didn't have computers then, and I still have my handwritten notes from that talk. Many EIS graduates from my group probably still do.<sup>13</sup>

To be successful, epidemiologists need to be persuasive, even though the information they are imparting is constantly changing. Their job is to tell people that while they don't know exactly what is causing a disease, changes in public behavior have a chance of containing it. The best advice one day can be refuted the next (*e.g.*, in the early weeks of the COVID-19 pandemic it was "don't bother wearing a mask," then it became "you must wear a mask." Similarly, in the early days of the disease children seem immune. Now we know children are at risk of a rare manifestation of the disease.) Their credibility doesn't seem to suffer because they have made clear to their audience that new information is constantly coming in, and that viruses, by their very nature, change and mutate.

That is why the third tenet of effective messaging from the *CDC Manual* reads: *explain what is known and unknown*. "Admit when information is not known. Explain what you are doing to learn more; and provide a timeframe for checking back in or when confirmed results are expected," the *Manual* recommends. "Explain what is being done to minimize risks and harm to affected or potentially affected populations."<sup>14</sup>

Dr. Sonja Rasmussen spent 20 years at CDC working on public health emergencies. She updated and edited the crisis communication chapter of the *Manual* with Abigail J. Tumpey, David Daigle, and Glen Nowak beginning in 2015. The problem, she said, was that the chapter in the previous edition didn't take into account recent pandemics, H1N1 or Ebola or the Zika virus. What's more, it focused on the printed press rather than the 24-hour news cycle. She had learned

---

12. Interview with the authors, May 2020.

13. *Id.*

14. Abigail J. Tumpey, David Daigle & Glen Nowak, *Communicating During an Outbreak or Public Health Investigation*, in *CDC FIELD EPIDEMIOLOGICAL MANUAL* ch. 12 (2018), <https://perma.cc/R8YG-FT8V>.

first-hand from her work in a CDC influenza coordination unit that crisis communication matters. “You can do a lot of the right things, but if you communicate it wrong, you’re doomed.”<sup>15</sup>

What was clear, she explained, was that the lead spokesperson needs to be a scientist. “Remember the H1N1 outbreak in 2009,” she asked us. “If I told you that there were some twelve thousand American deaths and infections in every state and hundreds of school closings would you be surprised?” She said most people don’t remember much about it because the information was communicated so effectively to the public. President Barack Obama spoke publicly about the outbreak only a handful of times. Instead, he allowed Dr. Richard Besser, the acting CDC director, and his successor Dr. Tom Frieden, to handle it. (Both are EIS alums, by the way.)

At briefings during the H1N1 pandemic, Besser would talk about washing his hands. He social distanced at the podium. The updated CDC *Manual* recommends that before every press conference, public health officials need to decide on a Single Overriding Health Communication Objective (one or two sentences repeated at the beginning, middle and end of the interview). The refrain during COVID-19 has become familiar: “Wash your hands, stay six feet apart, your actions are helping prevent the spread of the disease.”

“What we know,” Rasmussen said, “is that people get panicked when they talk about their health, so they absorb less than usual. We have to take that into account.” People listened to Besser and Frieden because they dealt with the uncertainties of H1N1 in an authoritative, non-political way, Rasmussen told us. “They were communicating reliable information to lead Americans through the crisis. And they did it so well, now we can hardly remember it happened.”<sup>16</sup>

Charles Duhigg, in a *New Yorker* article comparing the communication strategies of Seattle’s leadership with messaging in New York during the early days of the COVID-19 pandemic, found that Seattle’s efforts to stem the spread of the corona virus far outpaced those in New York precisely because from the outset the West Coast followed the CDC’s advice and put its scientists front and center.

“On the day that Seattle schools closed,” Duhigg noted, “[New York City Mayor Bill] de Blasio said at a press conference ‘if you are not sick, if you are not in the vulnerable category, you should be going about your life. . . .’ Cuomo, meanwhile, had told reporters that ‘we should relax.’ He said that most infected people would recover with few problems, adding, ‘We don’t even think it’s going to be as bad as it was in other countries.’”<sup>17</sup>

The two New York leaders eventually came around and started following the messaging guidance of the CDC *Manual*.

---

15. Interview with the authors, May 2020.

16. *Id.*

17. Charles Duhigg, *Seattle’s Leaders Let Scientists Take the Lead. New York’s Did Not*, *NEW YORKER* (May 4, 2020), <https://perma.cc/448A-AKEW>.

### III. THE GENERAL LEGAL FRAMEWORK OF COMMUNICATIONS FOR PUBLIC SAFETY ISSUES—FEDERAL AND STATE

Dr. Richard Goodman did more than just help cobble together the lectures of Brachman and others lectures for the *CDC Manual*'s first edition. He also felt strongly that there needed to be a chapter on the law. "We had a public health corps that was using powerful legal authorities but [was] never trained in the law," Goodman told us. "We wanted to remedy that."<sup>18</sup>

Goodman actually went to law school part time so he could better understand the legal authorities public health officials could wield.

Students of American constitutional law will be quite familiar with the patchwork of authorities cited in the *Manual*. The government's power to protect public health and safety is shared by federal and state authorities. At the federal level, Article I, Section 8 of the Constitution grants Congress the power to provide for the "general Welfare of the United States," and the Commerce Clause allows for the oversight of health-related activities for public safety. Legislation must fit under the enumerated powers and not run afoul of the Bill of Rights, as understood and interpreted by the Supreme Court.

To communicate or enforce its powers, the federal and state governments can use statutes, regulations, proclamations, press conferences, and executive orders. Or, what has been the latest form of communications—social media. As has been evident during the current COVID-19 pandemic, the "police power" of the state, which may be exercisable by a governor, is "extensive."<sup>19</sup> Under this power the state can regulate private interests, personal interests and uses of property:

A state's police power . . . may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.<sup>20</sup>

The traditional constitutional protections of the Fourth, Fifth, and Fourteenth Amendments apply, but due process only requires that the actions not be unreasonable, arbitrary, or capricious, that there be a fit between the rule and object desired, and that notice and opportunity for a hearing or proceeding be provided.<sup>21</sup> Usually, the least restrictive means should be employed when individual liberties are involved, and the action must be necessary, use reasonable means, be proportional, and avoid harms.<sup>22</sup>

As explained in the *Manual*, a clear communication strategy is required due to the breadth and scope of authorities that states can exercise under mandatory

---

18. Interview with the authors, May 2020.

19. See *Bond v. United States*, 572 U.S. 844 (2014).

20. *Holden v. Hardy*, 169 U.S. 366, 392 (1898).

21. See *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

22. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

infectious disease reporting requirements, the power over information gathering, and the range of entities covered, including physicians and other healthcare providers, diagnostic laboratories, clinical facilities, and schools and daycare centers. Such considerations encompass the authorities necessary to

- Obtain microbiological and other laboratory specimens from hospitals and private laboratories;
- Review patients' medical records kept in the offices of physicians, dentists, and other healthcare providers;
- Administer questionnaires to and collect specimens from persons affected in the outbreak;
- Administer questionnaires to unaffected persons who might serve as controls in analytic studies and/or as important sources of information;
- Retain information about medical histories and laboratory results;
- Protect confidentiality;
- Implement a variety of measures intended to control the immediate problem, prevent recurrences, and evaluate the effectiveness of interventions;
- Collect additional data on an ongoing basis;
- Recall an implicated product;
- Close a business or otherwise restrict activities relating to the source of an outbreak;
- Use isolation or other forms of restrictions of activities of affected persons;
- Quarantine exposed persons;
- Vaccinate or administer antibiotics to exposed groups.<sup>23</sup>

*A. Legal Issues Related to Public Health Data Collection, Analysis, and Dissemination*

As detailed in the *Manual*, legal issues related to data collection, analysis, and dissemination raise some critical legal and policy questions:

- Who is asking for these data to be collected, analyzed, and/or disseminated?
- Why are these data being collected, analyzed, and/or disseminated?

---

23. James D. Holt, Sudevi Navalkar Ghosh & Jennifer R. Black, *Legal Considerations*, in CDC FIELD EPIDEMIOLOGICAL MANUAL ch. 13 (2018), <https://perma.cc/Q99P-467G>.



- What type of data (*e.g.*, state, county, geographic codes, individual names, social security numbers, or other personally identifiable codes) are being collected, analyzed, and/or disseminated?
- Under what legal authority are the data being collected, analyzed, and/or disseminated?
- How will the data be stored, secured, and maintained?
- Who will have access to the data and for what purposes?<sup>24</sup>

Answers to these questions can identify which laws—federal and/or state—might apply to the field investigator undertaking the work, to the data being collected, and to any resultant response. For example, when a state public health official requests assistance from a CDC field investigator about an outbreak within a state, both federal and state laws could apply to various aspects of the investigation. At times, those laws may appear to conflict, especially where each respective jurisdiction has separate but overlapping roles and responsibilities. Each participant (federal and state) in the investigation must ensure compliance with all laws that apply to it or its actions in the given circumstances.

*B. Concepts Related to Public Health Data Collection, Protection, and Dissemination*

As described by the *Manual*:

- “Health information privacy” broadly refers to the rights of individuals to control the acquisition, uses, or disclosures of their identifiable health data.
- The closely related concept of “confidentiality” refers to the obligations of persons who receive information to respect the privacy interest of individuals who are the subjects of the data.
- “Security” refers to technologic or administrative safeguards or tools to protect identifiable health data from unauthorized or unwarranted access or disclosure.<sup>25</sup>

*C. Federal Laws Related to Public Health Data Collection, Protection, and Dissemination*

Federal officials have limited authority to initiate epidemiologic investigations. In fact, many CDC authorities are permissive rather than compulsory. Thus, CDC’s involvement in state and local public health investigations usually is intended to assist the state or local investigator rather than exercise a specific

---

24. *Id.*

25. *Id.*

federal authority. Field investigators need to be aware of the following laws, regulations, and legal provisions:

- The regulations found in part 46 of title 45 of the Code of Federal Regulations (CFR) require that data collections deemed to be research require approval by an institutional review board and informed consent by research participants. These regulations protect the rights, welfare, and well-being of research participants. However, most epidemiologic investigations generally fall outside the scope of these regulations.
- The Paperwork Reduction Act of 1995 and its implementing regulations (PRA) may apply if a federal agency, including CDC, conducts or sponsors a data collection involving 10 or more respondents during a 12-month period. The purpose of the PRA is to ensure that federal agencies do not overburden the public with federally sponsored data collections, with duplicate data collections, and/or with data collections that are not necessary to conduct government business. Data collections subject to the PRA require approval by the White House Office of Management and Budget.
- The Privacy Act of 1974 is the federal law that protects the confidentiality of individually identifiable information when records are maintained by a federal agency in a system of records in which the information is retrieved by a person's name, identification number, or other unique identifier. The Privacy Act has four basic policy objectives:
  - To restrict disclosure of personally identifiable records maintained by agencies;
  - To grant individuals increased right of access to agency records maintained on themselves;
  - To grant individuals the right to seek amendment of agency records maintained on themselves upon showing that the records are not accurate, timely, or complete; and
  - To establish a code of "fair information practices" that requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.
- The Freedom of Information Act (FOIA) "provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. The FOIA thus established a statutory right of public access to Executive Branch information in the federal government."
  - FOIA exemption 3 protects information prohibited from disclosure by another federal statute provided that the statute either requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to

particular types of matters to be withheld. Examples are found in the Trade Secrets Act, PHSA section 308(d), and newly amended PHSA section 301 (d).

- FOIA exemption 5 protects inter- or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency. Courts have construed this language to exempt those documents, and only those documents, that are normally privileged from discovery in civil litigation.
  - FOIA exemption 6 protects personal privacy interests by exempting records in personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.
- 
- The Federal Records Act of 1950 requires all federal agencies to make and preserve records containing adequate and proper documentation of their organization, function, policies, decisions, procedures, and essential transactions.
  - The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted in part to provide legal privacy protections for certain individually identifiable health information called protected health information (PHI). Specifically, HIPAA set out Standards for Privacy of Individually Identifiable Health Information, commonly known as the HIPAA Privacy Rule. The HIPAA Privacy Rule provides national standards for protecting the privacy of health information and regulate how certain “covered entities” (health plans, healthcare clearinghouses, and healthcare providers who engage in certain electronic transactions) use and disclose protected health information. Pursuant to the HIPAA Privacy Rule, these covered entities must provide certain assurances to patients and safeguards for securing patient records. However, appreciating the critical need for public health to use PHI to identify, address, and monitor the public’s health, the HIPAA Privacy Rule expressly permits PHI to be shared for specified public health purposes. For example, covered entities may disclose PHI, without individual authorization, to a public health authority legally authorized to collect or receive the information for the purpose of preventing or controlling disease, injury, or disability. See 45 CFR §164.512 (b). Further, the HIPAA Privacy Rule permits covered entities to make disclosures that are required by other laws, including laws that require disclosures for public health purposes.
  - HIPAA also enacted Security Standards for Protection of Electronic Protected Health Information, commonly known as the HIPAA Security Rule. The HIPAA Security Rule sets technical standards for ensuring proper access to electronic protected health information by authorized users and provides comprehensive security implementation requirements and specifications. Entities that transmit HIPAA-

covered data need to ensure that methods of transmission, storage, and disposition comply with the Security Rule.

- Section 301(d) of the PHSA provides that persons engaged in certain research where identifiable, sensitive information is collected shall receive a certificate of confidentiality from HHS to protect the privacy of individual subjects of such research if the research is funded in whole or in part by the US government or may receive such a certificate from HHS where the research is funded by other parties. The use of this provision may require consultation with the appropriate offices within the respective HHS agency providing funding for the research.
- Sections 308(d) and 924(c) of the PHSA, provide protection for identifiable information collected respectively by CDC and the HHS' Agency for Healthcare Research and Quality. "Assurances of Confidentiality" under section 308(d) can be used to protect individuals and institutions providing information and provides that "No [identifiable] information . . . may be used for any purpose other than the purpose for which it was supplied unless such establishment or person has consented." The use of this provision may require consultation with appropriate offices within the respective HHS agency.
- The E-Government Act of 2002 in part protects the confidentiality of federal government statistical collections of identifiable information, including health information. The Act restricts the use of information gathered for statistical uses to the purposes for which it is gathered and penalizes unauthorized disclosures. It also requires federal agencies to conduct "privacy assessments" before developing or procuring information technology that collects, maintains, or disseminates identifiable information.
- Titles II and III of the E-Government Act of 2002 require that agencies evaluate systems that collect personally identifiable information to determine that the privacy of this information is adequately protected. Office of Management and Budget Memorandum M-07-16 is guidance to the federal Executive Branch that defines personally identifiable information as "information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc." Each federal agency will have an established policy to identify, manage, and respond to suspected or confirmed breaches of personally identifiable information.
- The regulations found at 42 CFR Part 2 implement section 543 of the PHSA (42 USC §290dd-2) and provide for confidentiality of alcohol and drug abuse patient records regulations, more specifically, the confidentiality of the identity, diagnosis, prognosis, or treatment of any patient records maintained in connection with the performance of any federally assisted program or activity

relating to substance abuse education, prevention, training, treatment, rehabilitation, or research.

- The Genetic Information Nondiscrimination Act of 2008 (Pub. L. 110-233, 122 Stat. 881) is a federal law that protects individuals against discrimination based on their genetic information in health coverage (Title I) and in employment (Title II). Various regulatory provisions implement the Genetic Information Nondiscrimination Act: for the Department of Labor (29 CFR Part 2590), for Department of the Treasury (26 CFR Part 54), for HHS/Centers for Medicare and Medicaid (45 CFR Parts 144, 146, and 148), for HHS/Office of Civil Rights (45 CFR Parts 160 and 164) (and for the Equal Employment Opportunity Commission (29 CFR Part 1635)).<sup>26</sup>

As the *Manual* notes, the law grants broad authority to public health officials to investigate diseases, and relevant regulations create compulsory powers to protect public health and safety. The current pandemic has raised the issue of how to use social media to track and trace using legal powers. If members of the public participate voluntarily, there will be few legal issues. However, if participation is mandatory and compulsory, the courts will surely be asked to adjudicate the state's power.

#### IV. THE UNADDRESSED CHALLENGE—SOCIAL MEDIA AND DISINFORMATION<sup>27</sup>

Although peddling falsehoods is not necessarily a new phenomenon during a pandemic, as we suggest in our earlier discussion of the Spanish Flu, what is novel is the sheer scale and scope of “false news” and misinformation on social media platforms provided by Twitter, Facebook, Instagram, YouTube, Reddit, and countless others. The culprits aren't just misguided Americans. Our adversaries, particularly China and Russia, employ surrogates, bots, and proxies as part of a campaign to exploit cleavages in our body politic.

Social media have been asked to remove falsehoods and misinformation from their platforms, with particular concern about political misstatements and medical advice. In some cases, the actual source of the misinformation is the President, which complicates the situation. Some of the platforms, such as Twitter, have decided to label particular posts as suspect by affixing a “Get the facts . . .” banner. Twitter then redirects users to more authoritative and objective sources. But not all platforms have taken such a position, and many have allowed factually questionable posts to remain in place with no comment or redirection. As private organizations, none of the media platforms is governed by the First Amendment.

Zignal Labs recently analyzed millions of COVID-19 mentions on the Internet and in social media in a recent white paper entitled “The Strategic Infodemic of

---

26. *Id.* Footnotes to sources cited in the *Manual* are omitted here.

27. This section is drawn from Suzanne Spaulding & Harvey Rishikof, *How Putin Works to Weaken Faith in the Rule of Law and Our Justice System*, LAWFARE BLOG (Sept. 17, 2018, 9:20 AM), <https://perma.cc/SHV3-AAWD>.

COVID-19: The Onset of a Great Global Influence Competition.”<sup>28</sup> Its researchers concluded that there had been a “concerted effort from the PRC to fit disinformation into its overarching information campaign” for a “calibrated strategic intent to undermine the West’s diplomatic influence.” Among other things, the Chinese campaign tried to fuel conspiracy theories about the Trump administration’s response to the virus. The posts suggested that martial law was in the offing.

The death of George Floyd at the hands of a Minneapolis police officer provided yet another opportunity for adversaries to try to gain control of the narrative. Minority communities in the U.S. were already in crisis, as the virus and economic fallout of the pandemic hit them disproportionately hard. Reactions to Mr. Floyd’s death provided an opportunity for adversarial messaging about the unfairness of the system.

It isn’t necessary to support one ideology over another or to take a right-wing or left-wing position. Instead, the dissemination of deliberate disinformation may have a more general goal: to sow discord by incensing individuals on *both* sides of divisive issues. For example, during the 2016 election Russia’s Internet Research Agency (IRA) took out ads on Facebook that focused on racial inequality, stoking feelings of injustice that already existed among racial and ethnic groups. Russia didn’t want one particular side to win, it just wanted to rankle the masses.

One set of social media posts focused on the supposed indifference of U.S. courts to charges of police brutality against minorities, while at the same time separate posts fueled outrage over alleged attacks against law enforcement officers by Black activists. Not stopping there, the IRA sometimes employed cross-targeting—for example, aiming posts calling for an end to racism, apparently among police, at police and military profiles exclusively—so as to foster their resentment of real activists they might encounter on the job.

Having long realized that the most effective disinformation is based on a kernel of truth, Moscow has latched on to legitimate criticisms of the justice system. Shows like “America’s Lawyer” and the “Criminal Injustice” segment on the Russian-backed Sputnik International channel’s “Loud & Clear” news program often weave genuine concerns and real grievances with misleading narratives. Important causes are thereby hijacked, making Kremlin-linked outlets appear to be the champions of justice reform in the United States, while in reality they are seeking to do just the opposite: weaken our institutions and spread discord.

These tactics suggest a false choice between holding the justice system to account for perceived injustices and stymying the Russian efforts to spread distrust. Russia will use real instances of corruption, unfairness, and bias to discredit an entire institution. Thus, Russia’s information operations targeting the 2016 election included cyber-enabled tactics like “hack-and-leak.” Among other

---

28. Signal Labs, *The Strategic Infodemic of COVID-19: The Onset of a Great Global Influence Competition*, <https://perma.cc/7EM5-KFCK>.

tactics, Russian hackers might crack into healthcare sites and personal emails to expose unflattering communications, perhaps mix in fabricated communications to drive their point home; steal sensitive information; alter data; or simply seek to demonstrate that healthcare systems lack security—to hack just to show that they can.

A recent EU document details a Russian campaign that pushed fake news reports onto the Internet in English, Spanish, Italian, German, and French. The stories use contradictory, confusing, and malicious details to make it harder for the EU to communicate its response to the coronavirus pandemic. “A significant disinformation campaign by Russian state media and pro-Kremlin outlets regarding COVID-19 is ongoing,” said the nine-page document.<sup>29</sup>

These tactics aren’t new. Back in 1983, Dennis Kux, the chair of President Reagan’s Active Measures Working Group that was tasked with countering Soviet propaganda, pointed out that “[t]he best means of rendering the ground less fertile is to ensure that people . . . are fully aware of attempts to deceive them.” The public needs to be made aware that an adversary is working to exacerbate the current decline in our trust in democratic institutions.

Russia’s information operations are designed to divide Americans by focusing, for example, on the shortcomings of the U.S. response to the virus, politicizing it, and undermining any sense that the government is making unbiased decisions. One can imagine how Russia might focus, in the future, on apparent inequities in how a vaccine is being distributed, to create divisions in the country. These are all developments that further revisions of the *CDC Field Epidemiology Manual* might address.

In the meantime, a better public understanding of our public health system, how it functions, and why its role is so important, might help build some resilience against such a campaign of divisiveness. But imparting such an understanding requires an all-of-government response that is honest and fact-based, which has been lacking in the current pandemic. This, again, is why the CDC suggests that scientists take the lead in communicating during an outbreak of infectious disease. As one CDC official told us, “When you put the politicians front and center these days, at least fifty percent of the people listening aren’t inclined to believe what they are saying.”

Failing to provide correct information in a timely manner about the pandemic may lead to the situation described in the HBO series “Chernobyl,” in which one character dolefully laments, “What is the cost of lies? It’s not that we’ll mistake them for the truth. The real danger is that if we hear enough lies, then we no longer recognize the truth at all.”<sup>30</sup>

---

29. Robin Emmott, *Russia Deploying Coronavirus Disinformation to Sow Panic in West*, *EU Document Says*, REUTERS (Mar. 18, 2020), <https://perma.cc/5WLN-DPVZ>.

30. CHERNOBYL (HBO 2019), <https://perma.cc/T2GL-XWBM>.

\*\*\*