voting districts because of their race."

At the root of this constitutional transgression were "representational harms":

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...ment plan include an additional majority-black congressional district. The Georgia Legislature eventually yielded and modified the already majority-black 11th District to create a majority-black Second District as well. Several white residents of the 11th (including an unsuccessful candidate for the seat) then sued.

In a decision released on the last day of this term, the court announced that, although "by comparison with other dis-

500,000 or so residents—the court held in *Hays* that voters usually have standing to sue only if they live in the challenged district—they need not allege that they have been injured in any way. Instead, they must prove only that race was a "predominant factor" (that is, that the legislature "subordi-

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CIVIL LIBERTIES *By Harvey A. Silverglate*

Net Ignorance Is Bliss

THE EXPLOSIVE growth of computer telecommunications has been accompanied by a curious debate. Telecommunications lawyers and operators of computerized telecommunications systems and bulletin boards have been swapping ideas on how to avoid being held criminally or civilly liable for messages and postings. One result of the debate, informed as it is by a number of recent court decisions, appears to be that, for a computerized systems operator, the best way to avoid liability may be ignorance of the content of customer messages and images.

Consider the decision this May in *Stratton Oakmont Inc. v. Prodigy Services Co.*, No. 31063/94 (N.Y. Supp. 1995) by Judge Stuart L. Ain, of the New York Supreme Court, the state's trial-level court. The carrier tried to escape defamation liability for a message posted by a subscriber that made allegations of criminal conduct against Stratton Oakmont. Prodigy asserted on summary judgment that it should not be held liable because it was a passive conduit of messages, not an editor or publisher of information.

Judge Ain ruled that while "computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates," Prodigy had placed itself in a different category by asserting some control over the content of messages on its system.

The carrier had created "content guidelines" for customers, and even had devised an "emergency delete function" to weed out offensive language and eliminate offensive material instantaneously.

"It is Prodigy's own policies, technology and staffing decisions which have altered the scenario and mandated a finding that it is a publisher," concluded Judge Ain. "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."

Judge Ain's reference is to the 1991 opinion in *Cubby Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.NY). In that cyberspace libel case, the carrier's motion for summary judgment was granted on the ground that "the requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing

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COBRA Law Damages Health Care System

By Daniel I. Small SPECIAL TO THE NATIONAL LAW JOURNAL

HOSPITAL emergency rooms throughout the country have unwittingly become the playing fields for a legal clash between an unstoppable force and an immovable object.

The unstoppable force is the move to reduce health care costs by, among other things, limiting non-emergency use of expensive hospital emergency rooms. The immovable object is the accumulation of anti-"patient-dumping" laws and regulations, which have been so broadly interpreted that they present enormous obstacles to the smooth running of the system they were meant to improve. Attorneys who represent health care providers and institutions need to wake up and take notice, before they get caught in the collision.

Over the years, there have been publicized cases in which patients requiring emergency care were turned away from hospitals allegedly because of their inability to pay. Everyone agrees that this is wrong, and should be prohibited. In response, Congress enacted legislation as a small part of the 1986 Consolidated Omnibus Budget Reconciliation Act. Most of the world thinks of the act in terms of the continuation of health care benefits when changing jobs, a small piece of the act. But the hospital world increasingly thinks of it in terms of patient dumping.

Although the law has been amended repeatedly since, and only widely recognized and enforced since new regulations were issued in June 1994, patient-dumping laws and regulations are still widely referred to in the health care world as COBRA.

Unfortunately, as is so often the case with congressional legislation and government regulation, a very narrow issue that needed a surgeon's scalpel to remove it from our health care system was treated with a sledgehammer approach. What has been created is not a simple prohibition against patient dumping, but instead

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Regulations Tie Hospitals in Knots

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a confusing maze of rules and paperwork that rarely have anything to do with the problem they are meant to address.

COBRA requires, in essence, that every patient who comes to an emergency room receive a full medical screening exam and stabilizing treatment without any delay created by questions regarding ability to pay. On-call doctors must respond in a timely fashion or risk violating the law. Any transfer or discharge of such a patient requires extensive procedural hoops and paperwork. Any hospital receiving a transferred patient who believes that the technical rules have not been met must report a potential COBRA violation or risk violating the law itself. And the penalties for even the most technical violations are extraordinary: A hospital can lose its ability to bill for Medicare and other government program patients.

Ill-Defined Theory

Much of this sounds fine in theory. The problem is that the reality goes much too far. None of the principles that would limit a true patient-dumping prohibition apply to COBRA.

If a patient has insurance, or otherwise has the ability to pay for treatment, then there is, by definition, no patient-dumping issue, so COBRA should not apply. In reality, COBRA makes no distinction between insured and uninsured patients, and its requirements apply in cases where finances are not an issue.

If a transfer is made for reasons of patient care, then the patient-dumping concern that patients would get inferior care based on finances is not relevant and COBRA should not apply. In reality, what tends to happen is that the laws and regulations drawn up to protect patients are enforced despite the fact that the physician has acted in the patient's best interest and the patient is happy with the care he or she has received.

The result of this overextension of the law is that none of the players in the health care system can afford the luxury of thinking of COBRA in terms of right or wrong, or as a patient-dumping statute. Instead, it must be understood as imposing technical and paperwork requirements that will change the way business is done in most hospitals, but bear little or no relationship to ability to pay or patient care.

Most hospitals and providers will have to revise their policies and procedures from the top down. All patients coming into the emergency room must receive a full screening examination. Discussions about finances must wait until after the patient has been found to be stable.

Any conversation between a health care provider and a patient regarding insurance coverage or ability to pay can easily be misinterpreted in hindsight as putting undue financial pressure on the patient. Many of the utilization and financial pressures now placed on the emergency room staff and the business office must be largely removed from the patient contact level and moved higher up the ladder.

Burdensome Liability

One of the great ironies of COBRA is that it does not apply to HMOs and other payors. In other words, if an HMO gives orders that it will not cover one of its enrollees for emergency services, and the hospital follows those orders by discharging the patient, the HMO is not liable under COBRA for giving the orders, but the hospital is liable for following them.

In fact, the law in many states requires the HMO to pay for emergency care. Hospitals should not be put into the bind of being required by law to provide a medical screening examination for an HMO patient, and then be subject to the whim of the HMO regarding payment. Whether by negotiation, litigation or legislation, HMOs and other third-party payors will ultimately have to pay the price for COBRA's requirements.

The good news may be that, at least regarding technical violations where there are no real patient-dumping issues, the government seems appropriately concerned with corrective action, not just punishment. Therefore, it is critical that there be early detection and internal reporting of any potential COBRA violation. With early warning, corrective action can be taken—from counseling to education to new policies and procedures to whatever else is needed—in a way that is far more productive than actions taken much later only in reaction to a government investigation.

Much has been written lately about improving utilization and cutting back waste in our health care system. Congress surely did not intend to place an arbitrary roadblock in the path of common sense and cost control when it passed the COBRA law. That is precisely the way the broadly written law has been interpreted by the government agencies responsible for it, however.

Until hospitals, providers and HMOs understand the law, comply with it and then understand its enormous cost implications, we are unlikely to see necessary changes. A prohibition against patient-dumping is clearly appropriate.The procedural and paperwork nightmare that has resulted from the COBRA law and its current interpretations, however, is unnecessary, wasteful and dangerous. ■

Race-Based Districts Still Valid?

['RACE' FROM PAGE A19]
nated traditional race-neutral districting principles") in placing a "significant" number of voters in or out of the district—a standard even less determinate than *Shaw*'s emphasis on bizarreness.

Fortunately, the court once again did step back from condemning all race-conscious districting. The four dissenting justices found nothing constitutionally infirm in Georgia's plan to empower minority voters. And Justice Sandra Day O'Connor, the author of *Shaw*, wrote in a crucial solo concurrence that she would provide her more conservative colleagues with a fifth vote only when faced with "extreme instances of gerrymandering."

Strict Scrutiny Review

Even the remaining members of the majority would leave the government "free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interest"—though, again, the court left open the crucial question of what these terms mean.

For those districts shown to be predominantly motivated by race, *Miller* requires that they pass strict scrutiny review, i.e., that they are "narrowly tailored to fulfill a compelling state interest." Unfortunately, however, the opinion focuses more on what is prohibited than on what is permitted—for example, barring the Justice Department from reading the Voting Rights Act to require the maximum possible number of minority districts and

Safest Net Policy: Non-Intervention

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that publication is deeply rooted in the First Amendment." The court noted that CompuServe did not have knowledge, nor reason to know, of the allegedly defamatory statements posted to its computer banks. CompuServe thus won because of its low "level of control" over the contents of messages.

Ignorance Is Bliss

The doctrine that, in cyberspace, the common carrier's ignorance is bliss, is actually a derivation of a well-established doctrine that governs the liability of bookstores for the contents of books. In 1959, the U. S. Supreme Court decided *Smith v. California*, 361 U.S. 147, declaring unconstitutional a Los Angeles ordinance that sought to impose strict criminal liability on a bookseller possessing obscene material. To allow the imposition of such liability, held the court, would penalize "booksellers, even though they had not the slightest notice of the character of the books they sold," chilling First Amendment rights.

Smith did not say, however, that liability could never be imposed. Indeed, clearly, if it could be proven that booksellers knew they were selling obscene material, they could be prosecuted.

The court also left open the question of "whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be."

Fast-forward 35 years. Common carriers are now dealing with information traffic millions of times more voluminous than a bookstore's inventory. Onerous as it would be to require that a bookseller be familiar with every publication in its store, it surely would be more onerous to require that a computer telecommunications carrier know about, control and edit every message. If it were an unconstitutional burden to impose such a monitoring requirement, then presumably a carrier that followed CompuServe's lead in being a passive conduit would insulate itself from liability.

Counterintuitive Approach

There must be something counterintuitive about this approach, which is probably why some in the industry hesitate to remain ignorant. Perhaps it smacks of "conscious avoidance," which is disfavored as a defense in other areas of civil and criminal law. Perhaps it seems plain irresponsible. Perhaps it is difficult for some carriers simply to butt out of the private business of customers.

The Boston Globe carried a story May 29, shortly after the *Prodigy* decision, on the "dilemma" that digitized child pornography poses for online services, which fret at being held criminally liable for materials posted to, maintained on and distributed by their systems. The Globe reported:

"When brought to their attention, some of the companies, including America Online, said they would remove the illegal child pornography. Others contend it is impossible to check every entry posted to the thousands of bulletin boards on the Internet and suggested customers themselves might have to act as gatekeeper to restrict illegal material."

Then, in a naive bit of advice to readers, the article went on to discuss the impact of the *Prodigy* decision:

"However, companies might become more diligent about policing their services following a ruling last week by a state judge in New York that said Prodigy Services Inc. was responsible for the content published on its online service and could be sued for libel for material posted by one of its customers."

One online service executive was quoted as saying, "We have removed child porn in the past—the things that we believed were just fundamentally illegal when they were brought to our attention—and we will continue to comply with the law."

It is ironic that a presumably sophisticated reporter and members of the industry in question should have so misread the message of the case. In reality, until Congress changes the law, "benign neglect" appears to be the safest approach.

It is hardly true that online services enhance their First Amendment protections when they take extraordinary steps, as editors or censors, to seek "to comply with the law." A close reading of the scant available case law hints that such efforts at compliance, much like "Good Samaritan" laws, expose the actor to more rigorous standards of liability than would follow the turning of a blind eye.

The law might well be altered radically in the near future, however, as Congress continues to grapple with proposed new legislation aimed not only at ridding the vast Internet of "obscene" postings and messages, but also at limiting the availability (to children) of non-obscene but "offensive" materials. No one knows yet precisely what legislation will survive the full process. All that can be said now is that it is not clear a common carrier's efforts to be a "good citizen" and watch after the morality and legality of its customers' communications will pay off.

Perhaps, when the dust of the computer telecommunications revolution settles, it will be recognized that the best solution in cyberspace, as it has been in the print media for a long time, will be simply to give the free marketplace of ideas the greatest possible leeway. One hopeful sign is that online software providers are creating technology to enable parents to block Internet materials they don't want their children to see. This would place the responsibility where it belongs—in the home. ■

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constitutional if it is read too expansively.

Single Clue

But the opinion did provide one clue about the act's role: The court suggested that it was their view that the Justice Department should have approved Georgia's initial reapportionment plans, which included two purposefully drawn majority-black districts.

By reaffirming the act's "non-retrogression" principle—that redistricting cannot render black voters worse off than they previously were—the court essentially licensed Georgia to take race into account to ensure that it preserved Democratic Rep. John Lewis' majority-black, Atlanta-based district. And the court's declaration last term in *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity," suggests that compliance with the Voting Rights Act provides at least some safe harbor when it comes to the drawing of minority districts.

Without more than these clues and suggestions, however, there will be no end to the litigation. As it stands now, every intentionally drawn minority district invites a suit from a few disaffected white residents. And decisions not to draw such districts invite both objections from the Justice Department and suits under the Voting Rights Act.

Shaw invoked Justice Potter Stewart's classic definition of obscenity—"I know it when I see it"—to explain which districts are suspect and which are not. Acting more and more like the court did in the 1960s, when it reviewed a seemingly never-ending stream of dirty movies, the justices next term will look over five more minority districts—three in Texas and two in North Carolina. It is essential that the resulting decisions provide more detailed guidance than the court's efforts to this point. But so far, halfway to the millennial reapportionment, the legitimacy of the post-1990 redistricting remains largely up in the air. ■