POSTCARDS FROM THE EDGE: SURVEYING THE DIGITAL DIVIDE

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All it takes is a PC and a dream. Simply stated, the central promise of the Internet is this: online, everything is accessible and everyone is equal. News of the world, opinion, commerce, sex, politics, religion, pet psychiatry, genealogy, hip-hop music, grave sites of the rich and famous—from the sublime, to the banal, to the forbidden—it is all there for anyone and everyone to enjoy.[1] But this medium is more than a menu of materials to consume—cable TV writ large; it is a stage upon which one can *produce.* Every web-site is its own soapbox; every webmaster, his own Trotsky; every web designer, her own Frida Kahlo. Production, consumption, and their processes all are transparent on the World Wide Web. And, since identities are masked on the Net, there is no shame. The caption of Peter Steiner's classic *New Yorker* cartoon of two dogs at a computer terminal captures the principle: "On the Internet, nobody knows you're a dog."[2]

In all of these senses, the Internet ideal is a reflection of the original American ideal of the 1770s. The resources of the new nation, like those online, are limitless. The frontier is just over the next hill—or a click away. Distinctions of privilege and rank have lost their meaning; anonymity offers an antidote to the divisions of the Old World, just as screen-names conceal pedigrees—or lack thereof. In this new and glorious environment, access is all, and to borrow a well-worn phrase, "all Men are created equal."[3]

Or are they? The Internet ideal, like the American ideal before it, is just that—an ideal not yet realized. There *is* a "Digital Divide." There are Internet "haves" and Internet "have nots," those "in the Internet know" and those "out of the Internet loop."

We know this "divide" exists: nearly one-hundred-fifty articles

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1 *See* Ken Auletta, *Inside Out,* NEW YORKER, June 11, 2001, at 44. Tom Phillips, Internet investor, stated, "'Searching the dominant mode of the Internet. So the mentality of the information seeker is: I can find it if I keep looking.'" *Id.*

2 Peter Steiner, *cartoon,* NEW YORKER, July 5, 1993, at 61.

3 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

appearing in the *New York Times* over the last three years,[4] a government commission report,[5] and a Presidential address denouncing it tells us so.[6] While we know it exists, we still struggle to bring it within our field of vision, to give it clarity and depth, to describe it, and to understand it. The core question that this essay seeks to answer is: what is the Digital Divide? What does it look like, up close and from afar? What are its contours, its textures, and its limits? Where does it begin, and where does it end? The short answer is that the Digital Divide is not a single chasm, but the convergence of several fault lines. This essay explores three of them: the Access Divide, the Capital Divide, and the Treatment Divide.

Access to the Internet is the passport to a better life, a life where information, opportunity, entertainment, personal growth, and even spirituality can be channeled through a convenient and now familiar medium. For many, however, such access is a distant dream, a promise unfulfilled. Along class, racial, ethnic, disability-related, and geographic lines, the divisions are unmistakable. There are divisions between those for whom Internet access is widely available and easily accessible, and those for whom the Internet is exotic and rarely experienced. Part I discusses the "connectedness" of racial minorities relative to whites, of the poorly educated relative to the better educated, of persons with disabilities relative to persons without, and of rural residents relative to urban and suburban ones. It is a story of stark contrasts and glimmers of hope.

Part II explores the Capital Divide—the divide between those who succeeded in capitalizing Internet businesses during the "go-go" '90s, and those who did not. Here again, even in the faceless environment of the Internet, the realities of race and class cannot be escaped. Thus, the charge that has been leveled, and the perception that clearly exists, is that, in the last decade, minority-owned and minority-oriented Internet business ventures were unfairly denied the benefits of the Internet boom. We examine this claim, as much for its intrinsic importance to the New Economy as for what it tells about how far we have come, and how far we have yet to go, in the struggle for racial equality.

Part III surveys what we call the Treatment Divide. The Treat-

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[4] On August 23, 2001, the authors conducted a NEXIS search of the *New York Times* database using the query "digital divide," which yielded results from September 1, 1998 through the date of the search.

[5] *See* U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION, *available at* http://www.ntia.doc.gov/ntiahome/digitaldivide (Oct. 16, 2000) [hereinafter FALLING THROUGH THE NET].

[6] *See* President William Jefferson Clinton, State of the Union Address (Jan. 27, 2000).

ment Divide refers to the use of Internet-related data, such as click-rates, lingering patterns, and purchasing habits, by retailers to target different users for different treatment online, including price variations. To the extent it exists, the Treatment Divide violates the widely held conception of the Internet ideal—that, online, our anonymity will protect us.

I. THE ACCESS DIVIDE

Every day, in a myriad of ways, more and more of our daily lives take place on the Internet. Searching for a job, consulting a doctor, paying your bills, calling for a garbage pick-up—it's all there, simpler, easier and faster than ever before.[7] In addition, when there are problems, such as a vendor ripping you off or an employer discriminating against you, there are even places to complain online. For instance, the New York Attorney General fields citizens' complaints directly through its website.[8]

For those with Internet access and education, it is a brave and convenient new world.[9] For those who are not connected, and for those who lack familiarity with how the Internet works, it's an entirely different story. Less information, fewer resources, a skills-gap that widens with the passage of time, and ultimately, foreshortened economic horizons, constitute the fallout from the Access Divide.

A. *Race and Class*

The numbers do not lie. According to the U.S. Department of Commerce, the divide between those who are connected to the Internet and those who are not is, in large measure, a racial and ethnic one.[10] The rates of Internet access for African-Americans and Hispanics lag far behind the national average.[11] Forty-one and a half percent of all Americans were "wired" for the Internet in

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7 Some states are even contemplating online voting, which will create a direct nexus between the Internet and our most basic democratic right. *See, e.g.*, CALIFORNIA SECRETARY OF STATE BILL JONES, FINAL REPORT OF CALIFORNIA INTERNET VOTING TASK FORCE, *available at* www.ss.ca.gov/executive/ivote (Jan. 18, 2000) (studying the feasibility of using the Internet to conduct state elections); John Schwartz, *E-Voting: Its Day Has Not Come Just Yet*, N.Y. TIMES, Nov. 27, 2000, at C1.

8 *See* http://www.oag.state.ny.us.

9 *See* JEREMY RIFKIN, THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE 228 (J.P. Tarcher 2000). "The future may become a wonderland of opportunity only for the minority among us who are affluent, mobile, and highly educated. And it may, at the same time, become a digital dark age for the majority of citizens—the poor, the non-college educated, and the so-called unnecessary." *Id.* (quoting David Kline, *Market Forces: The Need for Social Action*, HOT WIRED, *available at* http://www.hotwired.com/market/95/51/index1a.html (last visited Nov. 7, 2001)).

10 *See* FALLING THROUGH THE NET, *supra* note 5, at 12.

11 *See id.*

2000.[12] For African-Americans and Hispanics, the averages were 23.5% and 23.6%, respectively.[13] Notably, for both groups, the gaps were actually wider in 2000 than they had been in December 1998.[14] Further, the story is comparatively bleak where home access to the Internet is the measure. While roughly one-third of the entire U.S. population accesses the Internet at home, only 18.9% of African-Americans and 16.1% of Hispanics log on from their residences.[15]

Not surprisingly, the same report that documented the racial and ethnic "digital divide" concluded that class and education-based divides exist as well.[16] Access to the Internet correlates closely and directly with income.[17] In 2000, 77.7% of households with income over $75,000 were wired for the Internet, which is over twice the rate for households with incomes between $25-35,000, and three and a half times that of households with incomes from $15-25,000.[18] Likewise, disparities in education levels are directly related to the gap in access; the less schooling one has, the less likely it is that one is connected to the Internet.[19] While nearly 64% of households headed by someone with post-college education are connected, this figure falls to under 30% when the head of the household is merely a high school graduate.[20] A mere 11.7% of households headed by someone with less than a high school degree are connected.[21]

What is clear is that the Internet Age still suffers from the effects of the post-industrial era—gross income inequalities, a battered public education system, and racism. Absent dramatic private or government intervention, there is little to suggest that the situation will improve on its own. To the contrary, the trend is toward a widening gap between these Internet "haves" and "have nots." The question that policy-makers and concerned citizens must ask now is whether the trend can ever be reversed.

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12 *See id.* at 5.

13 *See id.* at 13.

14 *See id.* at 15.

15 *See id.* at xvii. There exists a similar divide with respect to computer ownership. While 51% of Americans own computers, that number falls to 32.6% and 33.7% among African-Americans and Hispanics, respectively. *See id.*; *see also* T.P. Novak & D.L. Hoffman, *Bridging the Racial Divide on the Internet*, SCIENCE, Apr. 17, 1998, *available at* http://www.sciencemag.org/cgi/content/full/280/5362/390.

16 *See* FALLING THROUGH THE NET, *supra* note 5, at 10.

17 *See id.* at 8.

18 *See id.* at xv.

19 *See id.* at 10.

20 *See id.* at 11.

21 *See id.*

B. *Disability*

As a tool for opening up the world to persons with disabilities, the Internet's potential is enormous. Wands allow paraplegics to navigate the Net and "virtually visit" places that might otherwise be closed to them. Similarly, persons with visual and hearing impairments use the online experience to communicate with others in ways that overcome, even transcend, stereotypes about their disabilities. In the words of one observer, for persons with such disabilities, the Internet can be a truly "liberating place."[22]

The potential benefits of the Internet are thus enormous, and yet the reality is disappointing. The same federal study that measured racial and class divides also documented an access divide between the able-bodied and the physically disabled.[23] According to the U.S. Commerce Department's *Falling Through the Net* report, people with disabilities are half as likely to have Internet access (21.6%) as those who are able-bodied (42.1%).[24] In addition, the access that does exist for people with disabilities is fraught with problems. By one estimate, more than 95% of websites, once reached, are not fully accessible to persons with visual, hearing, and/or mobility impairments.[25]

Consider, for instance, the issues faced by persons with visual impairments. The Internet's traditional text-based nature makes the medium easily adaptable to the needs and limitations of those who are visually impaired. A wide variety of "screen reader" software is available to convert website text into audio.[26] But the potential benefits are curtailed because, for the convenience of the visually *un*-impaired, website design is increasingly reliant upon graphics format and icons, which screen-reader software cannot interpret or translate.[27] Java applets, Shockwave displays, and stream-

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22 Patrick Maroney, *Internet: The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the Americans with Disabilities Act of 1990*, 2 VAND. J. ENT. L. & PRAC. 191, 192 (2000).

23 *See* FALLING THROUGH THE NET, *supra* note 5, at 61-88.

24 *See id.* at xvi.

25 *See* Lisa Vaas, *Web Blind Spots*, eWEEK, *at* http://www.eweek.com (Apr. 10, 2000) (stating that between 95% and 99% of websites are inaccessible to those with sight, hearing, or mobility impairments); Maroney, *supra* note 22, at 192 and accompanying text (noting that 98% of websites are inaccessible to the disabled).

26 *See* Hiawatha Bray, *It's Time to Let the Blind Surf*, BOSTON GLOBE, May 31, 2001, at E1 (noting that Apple Computer's Macintosh has long included a "rudimentary screen-reader program" and that Microsoft also produced a text-to-speech software engine used by other products); Bob Tedeshi, *Advocates for People With Disabilities Take Online Stores to Task for not Being Accessible Enough*, N.Y. TIMES, Jan. 1, 2001, at C5 (citing estimate by National Federal for the Blind Director James Gashel that 300,000 to 400,000 blind people rely on screen reader software).

27 *See* Maroney, *supra* note 22, at 193.

ing videos have served to cut off opportunities for successful application of screen-reader software.[28] "What once was an architecture that fostered equality has become an architecture of inaccessibility."[29] As leading Internet scholar Lawrence Lessig has observed, "When graphics entered the Net . . . the blind became 'blind' again."[30]

In a reversal of the usual pattern, just as technology is leading us backward, legal precedent may be prodding us forward. In 1999, for instance, in a case of first impression, the Seventh Circuit Court of Appeals held that a website is a "place of public accommodation" within the meaning of the Americans with Disabilities Act (ADA).[31] As "places of public accommodation," websites are thus prohibited by federal law from excluding persons with disabilities on account of their disability.[32] The U.S. Department of Justice has formally endorsed this expansive view of the ADA.[33]

Congress has also responded. In 1998, Congress passed the Work Force Investment Act, an amendment to the Rehabilitation Act of 1973.[34] The law mandates that all federal websites designed after August 7, 2000 must be accessible to persons with disabilities.[35] On December 21, 2000, the federal government promulgated accessibility requirements applicable to federal agency websites.[36] These standards may serve as de facto guidelines for the

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[28] *See id.* "These additional features can include information that websites once would have presented in a pure [screen-readable] textual format as well as additional information unavailable in translatable formats. Consequently, an increasing percentage of information contained on web pages is inaccessible to the disabled." *Id.*

[29] *Id.*

[30] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 66 (Basic Books 1999).

[31] Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (interpreting the ADA to prohibit "the owner or operator of a store, hotel, restaurant, . . . Web site, or other facility (*whether in physical space or in electronic space* . . .) that is open to the public" from discriminating against disabled people) (emphasis added) (internal citations omitted). The court also cautioned, however, that "section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled . . . ." *Id.* at 563. Title III of the ADA, § 302(a), itself provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" by the owner, lessee, or operator of such a place. Americans with Disabilities Act, 42 U.S.C. § 12182(a) (2001).

[32] *See* 42 U.S.C. § 12182(a).

[33] *See* Brief of Amicus Curiae United States at 6, Hooks v. Okbridge, Inc., 232 F.3d 208 (5th Cir. 2000) (No. 99-50891). Similarly, a U.S. Justice Department letter, dated September 9, 1996, opined that the ADA applies to cyberspace, stating, "Covered entities that use the Internet for communications regarding their programs, goods or services must be prepared to offer those communications through accessible means as well." Jonathan Quinn, *Making Sites Accessible to the Whole Wide World*, NAT'L L.J., Nov. 8, 1999, at B14.

[34] Rehabilitation Act of 1973, 87 Stat. 355 (codified as amended at 29 U.S.C. § 791 (1998)).

[35] *See id.* § 794(d).

[36] *See* 36 C.F.R. § 1194.22 (2000). Among the standards set forth in 36 C.F.R. § 1194.22

Internet. Lastly, the market, too, is a potential source of more inclusive standards. Given the millions of Americans who have disabilities, and the potential audience they represent, the market may ultimately accomplish what the law can only facilitate—an Internet that is truly physically accessible.[37]

C. *Geography*

America is principally an urban and suburban society. It is here that the bulk of the population resides and the majority of businesses are located. Consequently, it is not surprising that it took longer for Internet service to penetrate rural America than the rest of the nation. Fortunately, however, according to government estimates, this gap has narrowed. In 2000, 41.5% of households nationally had Internet service; in rural areas, the number was close behind at 38.9%.[38] This rural access rate represents a 75% increase from 1998's access rate of 22.2%.[39]

But while rural Americans appear to be catching up to their urban counterparts in terms of its overall rate of physical access, significant disparities exist in the quality of the Internet access provided in different localities. Access to cable modem broadband service, for instance, which is faster and more reliable than dial-up service, is far more prevalent in large cities than in smaller ones, and is downright rare in towns with populations under 25,000.[40] Cities with populations of over one million, for example, have 100% broadband cable access, which is nearly four times the access rate of cities and towns in the 25,000-50,000 population range, and twenty times the rate of towns with populations between 5,000 and

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are that text equivalent must be provided for every "non-text element," row and column headers must be identified, and information that is "conveyed with color" must also be "available without color." *Id.* As one commentator perceptively notes, "Litigants who sue private providers of Internet sites and services under the [ADA] will likely use these federal standards as a model for Internet accessibility requirements." Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 26-27 (2001).

37 *See* Jenny Strasburg, *Pushing for Net Access; Activists Point Out that Big Profits Await Web Sites that Accommodate the Disabled*, S.F. EXAMINER, Mar. 26, 2000, at B1 (citing statistics that approximately one in ten Americans has a disability). As one disability activist and wheelchair user explained, "If I go to a site and it's not comfortable to me, I'll go somewhere else and spend my money." *Id.* Another such activist rhetorically asks, "How many companies would knowingly throw away 8% to 10% of the market they could be reaching?" *Id.*

38 *See* FALLING THROUGH THE NET, *supra* note 5, at 5. Rural black households, however, lag well behind the national average, with an access rate of only 19.9% in 2000. *See id.* On the other hand, this number is up from the extremely low rate of 7.1% in December 1998. *See id.*

39 *See id.*

40 *See* Mark Wigfield, *Rural Virginia Town Fights for Broadband Access*, WALL ST. J., June 7, 2001, at B6.

10,000.[41]

Perhaps the most significant result of this "quality divide" is found in the business sector, where the extra time it takes rural businesses to connect and maneuver the Internet severely undermines their ability to compete, particularly in high-tech fields.[42] Companies whose Internet connections lag, whether by minutes or even seconds, are at a distinct competitive disadvantage.[43] The chair of one congressional committee compared the fate of rural America without broadband connections to that of a nineteenth century town that the railroads had bypassed.[44] Some twenty-six million Americans work and live in rural America.[45] If outdated technology continues to hinder rural businesses, the consequences for those businesses and the communities in which they are located could be serious.

Here again, though, there is cause for hope. Satellite and wireless technologies require far less terrestrial infrastructure than broadband technology does, and thus might offer a more economical means for speeding up rural connection.[46] Some have pushed Congress and the Federal Communications Commission ("FCC") to seek policies, such as expanding the FCC's licensing spectrum for satellite systems, that would increase reliance on these technologies, all to the benefit of rural areas.[47] Likewise, some local governments have taken it upon themselves to wire rural areas for broadband services despite challenges by the telecommunications industry and state legislatures.[48] Given the pace and complexity of change in the Internet Age, the question that remains is whether technology-enhancing efforts will pay off in time to save rural businesses from a fatal blow. As the chair of the House Committee on Small Business observed, "It may cost nearly $11 billion to make telephone lines in rural America capable. My primary concern is

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41 *See id.*

42 *See Testimony on Broadband Impact on Rural Business: Hearing Before the Subcomm. on Regulatory Reform and Paperwork Reduction of the House Comm. on Small Business,* 108th Cong. (2001) (statement of Rep. Mike Pence, Chairman, House Comm. on Small Bus.), *available at* 2001 WL 528005 (F.D.C.H.) [hereinafter *Testimony on Broadband Impact on Rural Business*].

43 *See id.*

44 *See id.*

45 *See* FALLING THROUGH THE NET, *supra* note 5, at 2 n.3-4 (noting that of approximately 105 million U.S. households, "[a]bout 1/4 . . . were in rural areas in August 2000").

46 *See Cook Criticizes FCC Spectrum Allocation in House Hearing,* SATELLITE WK., May 28, 2001, *available at* 2001 WL 8140091.

47 *See id.*

48 *See* Wigfield, *supra* note 40, at B8 (describing how Bristol, Virginia spent $7 million on broadband).

that the investment will not occur quickly enough."[49]

D. *A "Mercedes Divide"*

Soon after his appointment, FCC Chair Michael Powell described his suspicion of the term "digital divide."[50] Powell called it "a dangerous phrase," used to justify what, from his point of view, are wrong-headed government initiatives designed to provide poor people with cheap access to technology.[51] Furthermore, Powell actually ridiculed the idea of an Access Divide. "'I think there is a Mercedes divide,' he said, 'I'd like to have one; I can't afford one.'"[52]

Michael Powell has it all wrong. Access to the Internet is not a luxury, like owning a Mercedes, and computer literacy is not just a handy personal skill, such as speaking French. Internet access is fast becoming a *sine qua non* of informed citizenship and successful entry into the working world. To deny this is to condemn many Americans to second-class citizenship at best, economic and political irrelevance at worst. People who lack the technology, the skills, or both, to access and navigate the Internet are falling farther and farther behind. With every passing day, there is more that they do not know, and may never be able to learn.[53] Until it can help over-

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49 *Testimony on Providing Rural Broadband Access: Hearing Before the Subcomm. on Regulatory Reform and Paperwork Reduction,* 108th Cong. (2001) (statement of Rep. Mike Pence, Chairman, House Comm. on Small Bus.), *available at* 2001 WL 583724 (F.D.C.H.) [hereinafter *Testimony on Providing Rural Broadband Access*].

50 *See* Stephen Labaton, *New F.C.C. Chief Would Curb Agency Reach,* N.Y. TIMES, Feb. 7, 2001, at C1.

51 *Id.*

52 *Id.* In later testimony to the Internet Subcommittee of the House Energy and Commerce Committee on March 29, 2001, Powell stated that his remark was "regrettable." *Testimony on Telecommunication and the Internet: Hearing Before House Energy and Commerce,* 108th Cong. 54 (2001) (statement of Michael Powell, Chairman, FCC), *available at* 2001 WL 312498 (F.D.C.H.). Following up on Powell's statement, Rep. Bobby Rush (D-IL) asked Chairman Powell to address the fact that "information technology is changing so rapidly that if we waited for . . .the markets necessary. . . to correct the problems, that some people would just be so far behind that they . . . would not be able to catch up because the technology changes so rapidly." *Id.* In response, Powell noted that he was hopeful because of the Internet's sheer "pace of penetration." *Id.* at 55. Powell also opined that although there were "gaps along economic conditions," in web access, "many of the inequities that are assumed aren't actually accurate." *Id.*

53 The mere presence of a computer, without training in computer literacy (and often basic literacy skills) cannot bridge this gap. As one commentator notes, "if every person in the world were given a personal computer and Internet connectivity, these technologies would still not empower those individuals who lack fundamental literacy and know-how." Nolan A. Bowie, *Bridging the Digital Divide, available at* http://www.uvmb.org/ltw/win01/LTW_win01.pdf (Winter 2001). This is in large part because "[t]he Internet today is a text-based technology that requires not only traditional literacy skills and comprehension, but also keyboarding (typing) skills and the ability to use a PC." *Id.* Unfamiliarity with the Internet as a medium and mode of behavior, therefore, will seriously compound other skill deficits.

come existing inequalities rather than perpetuate and compound them, the Internet cannot truly be a revolutionary medium, and its promise of equality and access can never truly be fulfilled.[54]

II. THE CAPITAL DIVIDE

The Internet may be anonymous, but the real world of Internet finance certainly is not. As in virtually every other sector of American society, personal interactions in the financial industry are necessarily infused with assumptions about race, gender, and "difference." For Internet entrepreneurs of color, this may mean significant and special obstacles in raising startup money for business ventures on the Internet, or so it has been alleged.[55] Perceived or real, this phenomenon might be called the Capital Divide.[56]

That the perception exists cannot be denied. It is an accepted premise of "digital divide" literature that Internet entrepreneurs of color have greater difficulty raising money than their white counterparts.[57] The title of one installment of the *New York Times*' award-winning series "How Race Is Lived In America" demonstrates the currency this notion has achieved: *A Limited Partnership: The Black Internet Entrepreneur Had the Idea; The White One Became the Venture's Public Face.*[58]

The theory of a "capital divide" is more than the suggestion that racism is afoot in the business world. The Capital Divide in-

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[54] Some people have employed a rights-based theory of access to the digital divide. One even goes so far as to compare the structure of Jim Crow segregation to the increasing disenfranchisement millions of poor, minority, rural, and physically disabled Americans to the economic opportunity, education, entertainment, and social equality that the Internet provides. *See* RIFKIN, *supra* note 9, at 236-40. Rifkin observes that rights movements of the twentieth century have often rested on some type of right not to be excluded from access. *See id.* at 238. For instance, "When feminists in the 1970's and 1980's brought lawsuits against exclusive men's clubs, arguing that by being denied the right to access they were being excluded from important social interactions that were critical to their ability to engage competitively in business, they too [like African-Americans at lunch counters in the South] eventually prevailed in the courts." *Id.* at 238.

[55] According to York Eggleston, the African-American founder of Quality of Life Networks, a website devoted to a range of issues, "When people ask about a digital divide, they're talking specifically about access to technology. But it's also about access to capital." York Eggleston, *Opportunity Knocks: Minority Entrepreneurs Are Cashing In*, ALLEYCAT MAG., Feb. 2000, at 68.

[56] *See generlly id.*

[57] *See* ROBERT M. ENTMAN, COMING TOGETHER: BRIDGING THE GAP BETWEEN INVESTORS AND MINORITY INTERNET ENTREPRENEURS v. (Aspen Institute 2000) ("From the seed money stage to that of obtaining the millions it takes to grow a business successfully, minorities have rarely been able to cross the invisible, but very real, color bar to e-commerce success.") [hereinafter COMING TOGETHER].

[58] Amy Harmon, *How Race is Lived in America: A Limited Partnership: The Black Internet Entrepreneur Had the Idea; The White One Became the Venture's Public Face*, N.Y. TIMES, June 14, 2000, at A1.

volves deep structural barriers that are peculiar to startup businesses in general and Internet startups in particular, and which may make it even harder for racial and ethnic minorities to win acceptance in the world of Internet business than in other business fields.

Every startup venture, no matter what its nature or who its progenitor is, faces the same basic challenge: to convince investors that an untested business idea can move from plan to profit dollars in a reasonable period of time. Inevitably, a leap of faith is required. At the height of the Internet investing boom of the late 1990s, minority entrepreneurs reported persistent difficulties in persuading venture capital firms ("VCs") and others to take that essential step, especially when the business ideas under consideration were themselves minority-oriented.[59]

At its most benign, the problems confronted by minority Internet entrepreneurs may be seen as structural in nature. Not infrequently in a culture where race and material success are correlated, such persons were often among the first in their families to have contact with the capital markets. As such, they lacked the extended "old-boy" or family network of potential investors that most entrepreneurs tap first for investment dollars.[60] Ignoring such structural imbalances, traditional VCs in the 1990s seemed to assume that "worthy" minority business ideas would receive the backing of minority investors, and that failure to win such backing was a rejection of the idea by the progenitor's "own community."[61]

Such attitudes are unfair, even insensitive, but they are not unique to the world of Internet business ventures. This outlook simply mirrors a phenomenon faced by minority entrepreneurs generally. That said, the effect of these impediments may be compounded in the Internet arena by assumptions and, in some cases, realities about Internet usage. Most acute is the effect in cases where minority entrepreneurs are pitching minority-oriented Internet ventures.

As we have seen, so far as can be measured with current data, there is, in fact, an Access Divide that breaks down along racial, ethnic, class, and geographic lines, among others. Whatever the reason, the fact remains that racial and ethnic minority communities are less "connected" to the Internet than comparable white communities. Such data has been used to bolster ethnic and racial

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59 *See* COMING TOGETHER, *supra* note 57, at vi.

60 *See id. at* 2.

61 *Id.* at 4.

stereotypes about Internet usage, or lack thereof. Thus, false and stereotypical statements such as "'Latinos don't really use the Internet'" are presented as valid, market-driven rationales for declining to fund minority-oriented Internet businesses.[62] It is here that the Capital Divide and the Access Divide merge, double back upon themselves, and reinforce one another.

While most observers acknowledge the problem of a Capital Divide, few can agree on how pervasive it is. Some argue that, as bad as things may seem for those who failed to win financing for their projects, they could be worse. "There's a dearth of [B]lacks, Latinos, Asians and women [as Internet business owners]," according to George Fatheree, III, the African-American co-founder of govWorks.com, "but [the Internet startup business is] an environment that's much more a meritocracy" than other parts of the business world.[63] Put another way, "old-boy" networks and personal comfort levels are one thing, but where there is money to be made, the only color that investors care about is green.

There is evidence to support this view. In several high-profile transactions, financiers and established businesses have funded minority-owned or minority-oriented business ventures on the Internet.[64] Minority-owned and minority-oriented Internet portals—websites that organize content and community along a particular theme or related themes—have had the greatest success raising capital.[65] In August 1999, BET.com, an African-American-oriented portal that leverages the resources and franchise of the well-known Black Entertainment Network conglomerate, won funding from heavyweights such as Microsoft, News Corp., USA Networks and others, to the tune of $35 million.[66] Likewise, NetNoir, an African-American-owned website that offers its "affluent and aspirational African-American audience . . .tools to manage . . .life," counts AOL and Radio One among its financial backers.[67] In February 2000, Joseph Park, the Asian-American founder of Kozmo.com, and a beneficiary of millions in VC financing, flatly denied that he had faced discrimination in his bid to fund his venture, "Our VCs have been absolutely fabulous to us."[68]

It is probably too early—or too late—to tell whether and to what degree a Capital Divide has held back Internet opportunities

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62 *Id.* at 5-6.
63 Eggleston, *supra* note 55, at 70.
64 *See* Brian Orsak, *The Changing Face of Portals*, 4 SILICON ALLEY REP. 94, 100 (2000).
65 *See id.*
66 *See id.*
67 *Netnoir Corporate Partnetships, at* http://www.netnoir.com (last visited Nov. 9, 2001).
68 Eggleston, *supra* note 55, at 76.

conceived and/or oriented toward racial and ethnic minorities. In the boom years of the mid to late 1990s, investors poured hundreds of millions of dollars into the pockets of "dot.com" wunderkinds and, in the process, some minority entrepreneurs received the backing they required. Now that the boom has gone bust, however, a question remains as to whether even the few documented success stories will even be duplicated. After all, in the spring of 2001, Joseph Park's Kozmo.com was out of business.

III. THE TREATMENT DIVIDE

The above "divides" relate to the isolation of various groups from the Internet. But even those persons who do have access to, and are frequent users of, the Internet are increasingly being categorized and "divided" based on their habits. Primarily, consumers are being "divided" by businesses that can use information about consumers' web-browsing habits to customize marketing and pricing.[69] Businesses that engage in this type of target marketing are beginning to treat consumers differently, depending upon those consumers' browsing habits and preferences.[70]

Such practices are possible because technology enables businesses to track where each of us travels in cyberspace, how long we stay, and what we do there. Not only is it possible, but profitable as well. The watchword for many Internet retailers and advertisers is thus "customization"—using individualized consumer data to advertise and value products based on consumer characteristics.[71]

Customization benefits everybody. The retailers argue that they get want they need, sales, at a lower cost while consumers get the products and services they want. But there is another side to customization called "customized" or "dynamic" pricing.[72] The premise is that data collected over the Internet regarding individual consumers makes it possible to charge different prices to different people for the same product or service.[73] It is a market at its

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69 *See infra* notes 78-90 and accompanying text.

70 *See id.*

71 For various perspectives on the effects of increased customization and personalization, see FRANK FEATHER, FUTURE CONSUMER.COM: THE WEBOLUTION OF SHOPPING TO 2010, 237-40, 279-81 (John Wiley & Sons 2000); BILL GATES, BUSINESS @ THE SPEED OF THOUGHT: SUCCEEDING IN THE DIGITAL ECONOMY 225-35 (Warner Books 1999); ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW 44-52, 105-12 (Public Affairs 2000); ELLEN REID SMITH, E-LOYALTY: HOW TO KEEP CUSTOMERS COMING BACK TO YOUR WEBSITE 60-61, 68-76, 169-70 (Harper Business 2000); *Keeping the Customer Satisfied*, ECONOMIST, July 14, 2001, at 9; *A Long March Mass Customisation*, ECONOMIST, July 14, 2001, at 63.

72 *See infra* notes 78-90 and accompanying text.

73 *See id.*

most rational, one might argue, with prices set according to what the customer is prepared to pay. Consumers who believe in fairness see it in a different light. From their point of view, customized pricing is yet another aspect of the Digital Divide—a Treatment Divide in which similarly situated consumers are profiled, categorized, and singled out for inequitable pricing and disparate treatment based on their conduct online.

A. *Variable Pricing Off-Line and On*

Customizing prices to consumers is not a new idea and is not unique to the Internet. In the traditional offline economy, variable pricing, differing prices among broad groups of customers, is commonplace. For instance, business travelers generally pay more for airline tickets than other travelers, high-volume produce purchasers pay less than low volume buyers, and wealthy nations pay more for drugs than poor nations.[74] Using demographic and other information as proxies for income, and thus willingness to pay, retailers have even engaged in other, more questionable forms of price discrimination. Catalog retailers like Victoria's Secret have offered identical goods at different prices depending upon the recipients' zip code.[75] Coca-Cola has even considered customizing its pricing based on the weather.[76] In 1999, Coca-Cola tested a new vending machine that would automatically increase prices for its drinks as the ambient temperature rose.[77]

At least one major Internet retailer has toyed with the idea of varying prices, but encountered disastrous results. In September 2000, Amazon.com disclosed that it had engaged in an "experiment" using variable pricing, charging different prices to consumers for identical goods.[78] The pricing differences were

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74 *See* Scott Wolley, *I Got it Cheaper Than You*, FORBES MAG., Nov. 2, 1998, at 82; *see also Hope of Cheap AIDS Drugs Comes to S. Africa*, ST. LOUIS POST-DISPATCH, Mar. 11, 2001, at A13 (describing the pricing of AIDS-fighting drugs).

75 *See* Wolley, *supra* note 74, at 82; Kathryn Balint, *The Alert Consumer*, COPLEY NEWS SERV., Jan. 31, 2000, *available at* LEXIS, News Library, Copley News Serv. File. One consumer went so far as to allege that by producing three different versions of its Christmas catalog, with discounts on a $75 purchase ranging from $5 to $25, Victoria's Secret had committed fraud in violation of the Racketeer Influenced Corrupt Organizations Act ("RICO"). *See* Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649 (S.D.N.Y. 1996), *aff'd*, 113 F.3d 1229 (2d Cir. 1997) (holding that no fraudulent claims or omissions had been made awarding defendant sanctions under Rule 11 of the Federal Rules of Civil Procedure).

76 *See* Balint, *supra* note 75.

77 *See id.*

78 *See* Linda Rosencrance, *Amazon Charging Different Prices on Some DVD's*, COMPUTER WORLD, Sept. 5, 2000, *at* http://www.computerworld.com/storyba/0,4125,NAV47_STO 49569,00.html. That article revealed, for instance, that in Computer World's own pricing experiment, they were charged $64.99 for a *Planet of the Apes* DVD when they used a Net-

randomized, and Amazon's spokesperson claimed they were part of a "test" designed to evaluate how consumers perceived certain aspects of the Amazon website, including its home page, navigation system, and general design and pricing policies.[79] Naturally, Amazon customers were furious. This furor became so heated that in the end, Amazon offered refunds to consumers who had paid the higher prices.[80]

B. *From Customized Advertising to the "Sucker Surcharge"*

Very recent technology has made such data collection and customization techniques both more intrusive and more efficient by permitting the collection of click-stream data, or data chronicling Internet users' navigational habits. Click-stream data begins with *which* websites a particular shopper favors, but also may include: how long that person lingers on each page; how long it takes the consumer to decide whether to make the purchase; how much the customer has been willing to pay relative to normal retail price; whether the consumer reads the "terms and conditions"; and if the consumer takes advantage of online bargains.

Internet merchants, aided by third parties such as DoubleClick and 24/7 Media that combine and aggregate information from many retailers, can now pervasively and extensively monitor how we behave online.[81] As author Jeffrey Rosen notes, the Internet moves information collection a giant step forward, as "[i]nvisible scanners automatically record the stores you visit, the magazines you browse, the pages you linger over, and the time you linger over them. Similar to credit card purchases in real space, all the click-stream data generated in cyberspace are permanently traceable and permanently retrievable."[82] The differences between data collection in the off-line and on-line world is both quantitative

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scape Internet browser. *See id.* Seconds later, using an Internet Explorer browser, they were quoted a price of $74.00 for the same product. *See id.* Other commentators noted that discounts on certain CD's shifted from 25% to 40% in the span of five minutes. *See Dynamic Pricing on the Web is Proving Difficult*, MARKETING WEEK, Oct. 26, 2000, at 43; Scott Medintz, *Et Tu, Amazon?*, MONEY, Nov., 2000, at 29; Joe Salkowski, *Amazon.com's Variable Pricing Draws Ire*, CHI. TRIB., Oct. 9, 2000, at C2.

79 *See* Rosencrance, *supra* note 79.

80 *See* Jessica Davis, *American Consumers Will Force e-tailers to Just Say No to Dynamic Pricing*, INFO WORLD, Oct. 9, 2000, at 116.

81 This monitoring occurs, among other ways, through web browsers by placing "cookies," or small text files, on hard drives. Such cookies may identify us (though not necessarily by name) to the merchant (or, as in the case of third-party ad servers, to a potential network of merchants) as having certain habits and preferences. *See In re* Double Click, Inc. Private Litig., 154 F. Supp.2d 497, 502-05 (S.D.N.Y. 2001); *see also* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 163 (Knopf 2000).

82 ROSEN, *supra* note 81, at 165; *see also* Salkowski *supra* note 78, at C2 ("Amazon . . . knows exactly how much each individual has been willing to pay on every visit to its site. It

and qualitative. One Internet data collection executive asserted, "[In the off-line context,] [c]ustomer data collection usually . . . starts with the cash register, or what's been purchased. Our technology lets you get at 10 times more information . . . . We turbo charge the data warehouse with a persistent record of what a customer does over time."[83]

The same deep pools of personal data can not only reflect whether a consumer is likely to respond to a particular ad, but can even indicate whether that same consumer will pay a premium to get what they want. Thus, tracking click-stream behavior allows retailers to distinguish price-sensitive shoppers from all others. Professor Jonathan Zittrain writes:

> [I]magine that everything on the Web were priced with just you in mind. Buying a week's worth of groceries can suddenly involve as much price variation as buying a car, a project in which a talented salesperson can extract several thousand dollars more from the rich (or foolish) than from the poor (or frugal).[84]

Internet sales tactics surpass those used offline, observes Zittrain, for "what coupons only roughly hinted at (those who don't bother to clip them pay more for the same products as those who do), the Web may force outright."[85] A consumer lobbyist echoes this prediction, noting that as companies amass and analyze vast amounts of consumer information, "'You'll be getting offers that are targeted for you, but they won't necessarily be the best offers.'"[86] Instead, you will be receiving the offer "'that the computer predicts you're most willing to buy.'"[87]

At least one company, Personify, Inc., has developed software to calculate consumer purchases, making such customized pricing much easier for Internet merchants. The Personify system, without necessarily tracking users' names, is designed to collect detailed navigational information about users' habits.[88] In turn, companies

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knows what sort of books and movies we prefer and can tell if we're impulse shoppers or the sort to wait for sales and coupons.").

[83] David Needle, *Personality Platform Offers "Customer Intelligence," at* http://www.siliconvalleyinternet.com (Feb. 7, 2001).

[84] Jonathan Zittrain, *Welcome to Second Class*, CIO MAG., Mar. 1, 2001, *available at* http://www.cio.com/archive/030101/diff.html; *see also* Albert A. Foer, *E-Commerce Meets Antitrust: a Primer*, 20 J. PUB. POL. & MKT. 51, 62 (2001) ("E-commerce generates much more information about customers than was previously available, making it more likely that price discrimination will be practiced.").

[85] Zittrain, *supra* note 84.

[86] Jeff Gelles, *Privacy Safeguard May Miss Its Mark*, PHILA. INQUIRER, May 28, 2001, at C1 (quoting Consumers Union lobbyist Frank Torres).

[87] *Id.*

[88] *See* Needle, *supra* note 83; *see also* Martin LaMonica & Jessica Davis, *Personify Debuts*

like Virtual Vineyards, an online wine seller, use the software to offer different prices and deals to their customers depending on previous purchasing patterns.[89]

Consider the implications. Retailers can charge higher prices to those most likely to pay them without disclosing that the same goods are being sold to other customers at a lower price. For instance, consumers who show characteristics of being thrifty or wary when making purchases may receive discounts. Otherwise, since the Internet certainly offers wide purchasing options, such consumers would simply buy their products from another site. By contrast, consumers whose click-streams suggest impetuosity might only be offered products at a higher price, in effect a "sucker surcharge," on the basis of a data profile devoid of price consciousness or wariness.[90]

Some argue that such online price customization is not all that conceptually different from the price variation that occurs offline, such as when merchants offer special "discount cards" to shoppers who simply have the sense to ask for them. CVS Pharmacies, for instance, offers free "ExtraCare" discount cards to anyone who asks.[91] But online price customization differs from traditional "saver" programs in important ways. First, Internet price customization is not nearly as transparent to consumers as clip-and-save coupon deals. Consumers whose prices are inflated based on their navigational habits are unlikely to know that such clandestine tactics even exist, much less that these tactics are being directed at them personally. Second, price variation can be pursued far more specifically and aggressively by companies online. In the offline

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Single-View CRM Platform, INFOWORLD, Feb. 5, 2001, at 5 (describing the newest Personify personalization software).

89 *See* Wolley, *supra* note 74, at 82.

90 For additional perspectives on the pros and cons of such "variable" or "dynamic" pricing, see Michael M. Thomas, *I Smelled a Scam: Amazon Gave Me Dynamic Pricing*, N.Y. OBSERVER, Oct. 9, 2000, *available at* http://www.newyorkobserver.com/pages/story.asp?ID=3299 (decrying the "sheer topsy-turviness of 'dynamic' or . . . prejudicial pricing" because traditionally, "discounts have gone to customers who buy a lot, or regularly, and pay on time"); *Dynamic Gouging*, S.F. EXAMINER, Oct. 6, 2000, at A20; Paul Krugman, *Reckonings; What Price Fairness?*, N.Y. TIMES, Oct. 4, 2000, at A35.

> Dynamic Pricing . . . uses a potential buyer's electronic fingerprint . . . to size up how likely he is to balk if the price is high. If the customer looks price-sensitive, he gets a bargain; if he doesn't, he pays a premium . . . . But dynamic pricing is also undeniably unfair: some people pay more just because of who they are.

Id. But see Salkowski, *supra* note 78, at C2 (opining that dynamic pricing "only makes sense," and that it is not practical to ask retailers to avoid such pricing and "to ignore customers' preferences while setting prices").

91 *See* Sanders Kleinfeld, *Demographically-based Marketing Targets Students*, UNIVERSITY WIRE, July 13, 2001, at 22; Joe Lavin, *To Market, To Market, To Give Way Too Much Personal Info*, BOSTON HERALD, June 10, 2001, at 22.

context, price-sensitive consumers self-select by asking for discounts, and those that do not ask are presumed as indifferent regarding price. Online price variation is retailer-directed and invisible since the retailer decides which customers get the discounts. Such potentially enlightening information (which simply cannot be tracked in offline scenarios) places far greater knowledge, and thus potential sales leverage, in the hands of web merchants than consumers expect or are accustomed to.

The idea that certain consumers are systematically singled out for pervasive mistreatment on the Internet by a central network that monitors and disseminates information contradicts the core promise of the Internet, anonymity and equality. The profiles underlying differential pricing, particularly if based on demographic as well as navigational information, could become indelible. Were such profiles to become centralized, for instance, they might reveal that a particular purchaser is (1) an attorney who (2) makes a comfortable (though not extravagant) living, (3) practices Internet/civil rights law, and (4) consistently purchases every new Internet/civil rights law book online, immediately upon publication. If these profiles were then widely disseminated, it might be difficult for such a purchaser to make any purchases online without being automatically, and permanently, tagged as an easy mark for such books. Furthermore, centralized profiling also undercuts the idea of total access to information by foreclosing choice in an arena where choice is a fundamental value.

What remains to be seen is how consumers, and the retail industry generally, will respond to the challenge of variable pricing on the Internet. Unlike the "access" and "capital" divides, which often betray a lack of political and economic power on the part of those affected, the implementation of the "treatment" divide depends on consumers' acquiescence to the will and tactics of large retailers. If consumers refuse to engage in reckless spending, educate themselves, and freely exercise their retail options, this will go a long way to ensure that the Internet remains a means to greater consumer empowerment.[92] From the industry standpoint, such responsible consumer behavior will also ensure that retailers who price competitively across the board will maintain a ready audience and respected reputation among consumers.

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92 *See* Scott Shuger, *Hooked on Debate*, SLATE MAG., Oct. 4, 2000, *available at* http://www,slate.msn.com/code/TodaysPapers/TodaysPapers.asp?show=10/4/2000 ("Whenever you're buying nonessential items like records online, don't accept the first price offered. If there's dynamic pricing afoot, you'll probably get countered with a lower price.").

CONCLUSION

Like the Founding Generation of the 1770s, we live in revolutionary times, an era in which the decisions we make collectively about how the Internet community is organized and operated will effect users (or citizens) for years to come. The choices we face are infinite and difficult, and range from the technology in which to invest, to how to utilize our technology for the greatest good. If we are to make those choices intelligently and with sensitivity, we first must understand deeply both the benefits and the burdens bestowed by the Internet. Additionally, we must understand to whom those benefits flow and upon whom those burdens fall. We must, in other words, survey the Digital Divide.

Ralph Waldo Emerson wrote, "The ends pre-exist in the means."[93] Increasingly, the "means" of our culture is the Internet itself, a medium through which almost all forms of social interaction can and do take place. Especially given the scope of that medium's influence, our society's success in living up to the American ideal of freedom and equality will be measured, in part, by how well we fare in achieving the Internet ideal. It will be measured by how effectively we bridge the Digital Divide.

[93] Ralph Waldo Emerson, *Compensation, in* ESSAYS 100 (Houghton Mifflin 2000) (1883).