

Exploring Virtual Legal Presence: The Present and The Promise

I. INTRODUCTION

Virtual legal presence is a term with various shades of meanings in different industries but its essence remains constant; it is a new tool that enables some form of telecommunication in which the individual may substitute their physical presence with an alternate, typically, electronic presence. Considering its novelty, virtual presence is a difficult genre in terms of any substantial history whether it be legislative, editorial or otherwise. Therefore this paper will endeavor to develop a series of arguments concerning the usefulness and reliability of virtual presence as a tool for future online and otherwise electronic activities such as: e-commerce, learning, and politics, etc. This discussion will also present a survey of virtual legal presence: what it means presently, new industry developments, its problems and advantages, and lastly some speculations as to its future.¹

Virtual legal presence arguably will be one of the most important aspects of personal communication in the twenty-first century: the ability of people to conduct multiple everyday tasks, i.e., voting, marriage, arraignments, shareholder meetings, by being virtually or electronically present whether it be through the Internet, video, or other communications, perhaps even psychical one day. In any event, in 2002, the concept of virtual legal presence is gaining consumer confidence and expanding into an increasing number of industries. The Federal Government has taken notice and has created an E-Government initiative. States, such as California, have experimented with voting for elections online. More people are learning via teledistance courses and being healed via telemedicine devices. As technology advances, so will the sophistication of virtual presence leading into a new understanding of what it means to be present in any sense of the word.²

1. Some of the research for this paper I conducted for the MIT E-Commerce Architecture Project (ECAP) program, under the supervision of Daniel Greenwood, Esq. See <http://ecitizen.mit.edu>.

2. Virtual Presence is not new in any sense of the term, as it has existed for the greater portion of the twentieth century such as being present on the telephone, satellite communication and teleconferencing. In the new Internet age of the twenty-first century, a definitive framework of standardized definitions and guidelines are needed for the term "virtual presence." People are virtually present for more activities today than they were five years ago. The following are some questions which society, the law and other entities need to answer and establish: 1) How do we establish virtual presence? 2) How do virtual presence laws fix problems? 3) How does the use of electronic methods cause problems or harm? 4) Is physical presence required? 5) Can physical presence be achieved via for virtual or "absentee" presence?

II. VIRTUAL LEGAL PRESENCE IN STATE GOVERNMENT

1. *Sunshine Laws - Definition and the Problem Posed*

The nuances of virtual presence in relation to open-meeting laws' presence requirements is causing politicians and the public at large to reevaluate what it means to be present, whether a board member is present by telephoning in votes or teleconferencing or whether a meeting truly is accessible and open to the public if it is conducted online.³ Currently, the law is wrestling with the acceptability of virtual presence and the public is considering the benefits and disadvantages of being virtually present for governmental meetings. Specifically the Sunshine laws are a set of guidelines, which ensure public access and exposure to governmental meetings concerning public matters, the name being derived from the phrase, "Let the sun always shine on government."⁴ These laws are integral idea to the American political process, allowing the public to monitor their public officials and hold them accountable for their actions.⁵

The basic goal of these "sunshine laws" is to maintain or restore public confidence in the political process through disclosure.⁶ These laws also mandate "disclosure of political contributions are common elements of fair election practices laws, and can also facilitate interim monitoring of public officials."⁷ Virtual presence is achieved through a number of electronic means such as email, teleconferencing, videoconferencing, and even electronic bulletin boards. The major problem with virtual presence conforming to preexisting open-meeting laws, is the interpretation of what it means to be present for these meetings. Typically, being present meant being at meetings in person. Today, electronic presence is a convenience and part of modern society which cannot be ignored. Therefore the crux in the presence issue lies in the public's opinion about virtual presence and its acceptability in being tantamount to physical presence at meetings.

As all public meetings have transcripts or minutes, meetings of virtual presence must archive all emails and posted opinions from electronic bulletin boards and web site feedback and make them part of the public record.⁸ Government officials must never discuss personal opinion about legal issues in their private emails and voicemails. When it comes to appropriate action in regard to preventing Sunshine law violations and proper record keeping, it is

3. See generally NSBA.ORG, *Phoning in Your Votes*, at 1-3, at <http://www.nsba.org/nepn/newsletter/999.htm> [hereinafter *NSBA*].

4. STAR-BANNER.COM, *Our Opinion Editorial for 11/02/2001: Let the Sun Shine on Government*, at <http://www.starbanner.com/articles/insight/491.shtml>.

5. See FLORIDA ATTORNEY GENERAL, *Government-in-the-Sunshine Manual, What is the Scope of the Sunshine Law?*, Part I, A, available at <http://legal.firm.edu/sunshine/general.html>. For example in Florida, there are three basic requirements for governmental meetings which the Sunshine laws enforce: meetings must be open to the public of public boards or commissions, reasonable notice of such meetings must be given, and minutes of the meeting must be taken. *Id.*

6. See generally Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 249-50 (1994).

7. See David W. Adamany & George E. Agree, *POLITICAL MONEY* 84-85 (1975).

8. David A. Splitt, *Ethics & Laws: Don't Let Sunshine Laws Scorch Electronic Board Meetings*, *ESCHOOL NEWS ONLINE* 1 (2000), at <http://www.eschoolnews.org/showstory.cfm?ArticleID=1683>.

best to always look at the state's charter, consult the state attorney general for guidance and lastly, inform all participants that what they type or "say" in the electronic forum is on the public record.⁹ Usually, the Internet is merely regarded as just another form of electronic communication.¹⁰ Therefore, analogizing to pre-existing laws for non-online forms of communication for legal guidance is a safe bet. For example, if a state law absolutely requires notice and public participation for a meeting, it does not matter whether the meeting takes place on the Internet, in person or on the phone, Sunshine laws are violated if either notice or public participation is denied.

The definition of virtual presence often is modeled according to how different by-laws, statutes and laws define presence in the physical sense of the term in regards to being present at meetings. A "meeting" includes the discussion or presentation of any public matter, official business, or policy of the agency.¹¹ To ensure that open meetings indeed remain open to the public, full transcripts of meetings held online should be provided to members of the public who are unable to have online access to these meetings until the technology exists for the general public to oversee the meeting online.¹² Transcripts of online meetings are no more redundant than transcripts of face-to-face meetings, and are a small financial expense in order to ensure that e-government activities are held accountable to the people of the United States.¹³

Public meetings being held via teleconferencing are prohibited in some states, such as New York, Texas and Massachusetts.¹⁴ In the states that do allow virtual presence in the form of teleconferencing or e-meetings like Iowa, usually at least a quorum of physically present people is needed if there is to be a virtual participant.¹⁵ Case law exists in Illinois that allows public bodies to permit attendance of board members via telephone conference call and speaker telephone.¹⁶ Additionally, the Illinois open meetings act allows some public meetings to be held by telephone conference call.¹⁷ The Illinois School Boards Association reflects these allowances by inserting this language into its school boards meetings policies: "Board members may attend meetings via a telephone conference call and speaker telephone. A majority of the full membership of the Board shall constitute a quorum whether individuals are present physically or via a speaker telephone."¹⁸ Local boards have the authority to accept or deny the practice.

In Colorado, the legislature recently gave school boards the option to teleconference meetings but the school boards had no actual legal authority to do so.¹⁹ Presumably because the Colorado Sunshine Act defines a meeting as

9. *Id.*

10. *Id.*

11. See GEORGIA SUNSHINE LAWS, available at <http://www.pgfm.com/publications/sunshine.html>.

12. Phil Reiman, *In Congress Electric: The Need for On-line Parliamentary Procedure*, 18 J. MARSHALL J. COMPUTER & INFO. L. 963, 979-80 (2000).

13. *Id.*

14. See NSBA.ORG, *supra* note 3, at 1-3.

15. *Id.* Iowa is one such state which permits teleconferencing but insists on some members maintaining a physical presence at the meeting site where everyone can hear the discussion. *Id.*

16. *Id.*

17. *Id.*

18. NSBA.ORG, *supra* note 3, at 1-3.

19. *Id.*

“any kind of gathering convened to discuss public business, in person, by telephone, or by other means of communication,”²⁰ the school boards could eventually receive the actual legal authority to teleconference.²¹ If the popular voice regards virtual presence with the same deference as it does with physical presence and realizes its amazing potential in terms of convenience, efficiency and other benefits, the legislature should reflect those desires.

Whether a meeting is by telephone or video conferencing, sunshine requirements still apply. Some states allow teleconferencing just for sick, disabled people or “when it is otherwise difficult or impossible for the member to attend the meeting in person.”²² Other states only permit meetings via electronic networks if physically convening at one location is difficult or impossible.²³ Board meetings via teleconferencing must protect the rights of the parties or the public appearing before the Board, including the right of the public to address the Board directly at each teleconference location.²⁴ The Virginia Freedom of Information Act Advisory Council backed a ruling by the state attorney general that email exchanges do not violate open meeting laws, even when messages are sent among several officials.²⁵ But the executive director of the same council said that an official electronic discussion group, a list server, would violate the state’s sunshine laws.²⁶ One state, New Hampshire, has attempted to solve the problem of emails violating Sunshine laws by establishing an email reflector, which automatically redistributes all committee email to a mailing list and automatically keeps a copy of it, thereby making the contents of all emails available for public inspection, as required by the sunshine laws.²⁷ This kind of innovation will pave the way for future harmonization of virtual presence with pre-existing physical presence laws.

20. C.R.S. § 24-6-402(1)(b).

21. NSBA.ORG, *supra* note 3, at 1-3. Julie Murphy Seavy, Legal & Policy Counsel, Colorado Association of School Boards, states her opinion about teleconferencing in the Colorado School system:

There needs to be an opportunity for each board member to hear the discussion and to be able to ask and respond fully to questions that arise during the meeting. If it is possible to conduct a meeting via a teleconference that will allow this degree of communication among members of the board, a “virtual presence” so to speak, and allow the public to view this full participation, then teleconference may be an option. With advances in technology, this option is more viable today than in years past. Personally, I continue to believe this is a topic where legislative clarification is necessary before there is actual legal certainty.

Id.

22. NEW MEXICO OPEN MEETINGS ACT, NMSA 1978, ART. 10, CH. 15, at SEC. 10-15-1, available at http://www.ago.state.nm.us/PIO/Open_Meetings_Act/open_meetings_act.html. The problems disabled people face when using the Internet are being addressed by one company Macromedia, in San Francisco, CA. It is developing software which will assist programmers in ensuring that their sites meet federal guidelines, specifically section 508 of the Rehabilitation Act. For example, the software has a tool which will point out color tones for colorblind people on web sites that they would be unable to read otherwise. See generally, Paul Festa, *Standards Body Pushes Accessibility Online*, CNET.com, Sept. 17, 2001, at <http://news.com.com/2100-1023-273069.html?legacy=cnet&tag=owv>; Gwendolyn Mariano, *Macromedia to Aid the Disabled Online*, CNET.COM, Dec. 1, 2001, at <http://news.com.com/2100-1023-276472.html?legacy=cnet>.

23. John O’Looney, *Electronic Meetings and Sunshine Laws*, at 2, at <http://www.cviog.uga.edu/govtech/Emeetings.htm>.

24. NSBA.ORG, *supra* note 3, at 1-3.

25. Carl Redman, *Electric “Sunshine” Just Isn’t the Same*, SUNDAY ADVOCATE, (2000), at 9-B.

26. *Id.*

27. See generally HOLLIS COMPUTING AND COMMUNICATIONS INFRASTRUCTURE (CCI) COMMITTEE *Email reflector (distribution list and archive)*, at <http://www.hollis.nh.us/cci/email.htm>.

i. *Acting Massachusetts Governor Jane Swift's Maternity Leave*

In 2001, Acting Massachusetts Governor Jane Swift made national and international headlines when she gave birth to twin girls while in office. Great controversy surrounded this birth not only for cultural reasons, i.e., people questioning whether she could be a working parent and Acting Governor effectively at the same time, but also whether she was present according to the definition of "presence" when teleconferencing from a hospital bed in a maternity ward.²⁸ When the Governor's Council voted 5-3 whether to seek an advisory opinion from the Supreme Judicial Court as to whether or not it was legal for Swift to preside by phone during meetings, the backlash caused by that vote resulted in so much controversy that the court never rendered an opinion on the matter.²⁹

Unlike Massachusetts, some states allow teleconferencing just for sick, disabled or in this case, women on maternity leave:

When it is otherwise difficult or impossible for the member to attend the meeting in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting.³⁰

It is still unclear whether Jane Swift technically was present during her teleconferences in her late pregnancy. By default, she indeed was present in the cultural sense but in the statutory sense, it is unclear.³¹ In any event, the birth of Swift's daughters shed light on the importance and convenience of virtual presence and its relation to open-meeting laws.

2. *Virtual Legal Presence Defined*

Virtual legal presence enables an individual or entity to substitute their physical presence with an alternate, typically electronic presence on the Internet. This virtual presence is not identical to physical presence in the sense of being able to reach out and touch someone during a teleconference, but it confers many if not most of its characteristics. Currently consumers participate in a number of online activities which pre-Internet, required their physical presence such as banking,³² buying and selling stock,³³ proxy voting,³⁴ paying

28. Open Meetings Law: State Agencies, MASS. GEN. LAWS ch. 30A, §§ 11A - A ½, available at <http://www.state.ma.us/legis/laws/mgl/66-10.htm>. "Meeting," is defined as any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

29. See MASSVOTER.ORG, *Beacon Hill Briefs: Jane Swift Delivers Good News!*, at <http://members.tripod.com/~voterinfo/>.

30. Patricia Madrid, *Open Government "Sunshine Laws,"* NEW MEXICO OFFICE OF THE ATTORNEY GENERAL, available at http://www.ago.state.nm.us/Civil/.%5Csunhsine%5C_sunshine_laws_.html.

31. See generally MASS. GEN. LAWS ch. 30A, §§ 11A - A ½. "All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section." *Id.* Can the general public meaningfully attend and participate (when possible) meetings where a Governor teleconferences her presence, such as in Acting Governor Swift's position? As long as the speakers are loud enough, sure they can!

32. See generally <http://www.fleet.com>.

33. See generally <http://www.ameritrade.com>.

credit card bills,³⁵ and federal student loan applications.³⁶ A virtually present person, during a videoconference, can see another person's facial expressions, gesticulations and hear their voice. Even during less visual communications, a virtually present person still exerts their presence through online voting, shopping, emails, real-time communications and other technologies. Any protocols for virtual presence should be analogized to pre-existing rules for physical presence and only modified as necessary if it enhances or supports the use of the electronic technology.³⁷

II. VIRTUAL LEGAL PRESENCE IN FEDERAL AND STATE GOVERNMENT

1. E-Government Initiative

a. Congress and Teleconferencing

In his "A Framework for Global Electronic Commerce," Former President Clinton recommended that consistent principles are needed to assure confidence, reliability and interoperability for video and data-conferencing.³⁸ Clinton also suggested that laws should have technology neutral language, in order to prevent the laws' expedient obsolescence thereby hindering the usage of future technologies.³⁹ The memo goes on to state that the current e-commerce laws should only be modified as needed in order to support a specific technology.⁴⁰ Indeed, an e-government is only possible through an orderly set of rules for an effective online association which have yet to be developed, whether they are derived from pre-existing laws or not.⁴¹ One possibility for developing rules for e-government lies in refining the eight-seven year-old Robert's Rules.⁴² Indeed, there is an incredible need for an online "parliamentary procedure" to govern the future usage of virtual presence in America.⁴³

i. Benefits

Teleconferencing technology has been used on a limited basis by Congress, which allows Congressmen to speak via closed circuit television or computer directly to other people, thereby allowing both parties to hear and see each

34. See generally <http://www.proxyvote.com>.

35. See generally <http://www.mbna.com>.

36. See generally <http://www.access.com>, <http://www.fafsa.ed.gov>.

37. President William J. Clinton and Vice President Albert Gore, Jr., *A Framework For Global Electronic Commerce*, Washington, D.C., at II.3, at <http://www.itf.nist.gov/eleccomm/ecom.htm> [hereinafter *Framework*].

38. *Id.* at III.9.

39. *Id.* at II.3.

40. *Id.*

41. Reiman, *supra* note 12, at 966.

42. *Id.* at 967. Robert's Rules are a set of guidelines designed for parliamentary procedure, or "deliberative assemblies," that allows everyone to be heard and to make decisions without confusion, i.e., rules surrounding asking questions, making motions, and a fixed order of business. *Id.*

43. *Id.*

other.⁴⁴ The benefits of being virtually present as opposed to being physically present at floor debates, hearings, meetings or votes are numerous; by being virtually present, a Congressman would not have to travel to Washington D.C., and would develop a closer relationship with his constituents by spending his/her freed up travel time in their district.⁴⁵ Essentially, electronic “town hall” meetings would be created through teleconference meetings between citizens and their representatives.⁴⁶ Certainly, as exciting as it is to speculate about the possibilities of online government and initiatives, the government and Congress historically have been reluctant to accept innovation and depart from tradition.⁴⁷ Considering the terrorist attack on September 11, 2001, it might become imperative to develop and adopt new rules and practices that embrace being virtually present when being physically being present is not feasible.⁴⁸

The idea of an e-Congress for better or worse has been thrust out in the forefront of the World Trade Center attack and the anthrax scares on Capitol Hill.⁴⁹ The Democratic Leadership Council has developed a proposal for an e-Congress, which would allow individuals to draft legislation, vote and debate over the Internet.⁵⁰ Yet, Article 1, Section 5, of the Constitution may prohibit an online Congressional session, which appears to prohibit the Congress to convene at any other place other than where the House itself physically sits.⁵¹ It is unknown whether or not this Article could be interpreted to include being virtually present on the Internet.

ii. Possible Harms

Despite the benefits of virtual presence within the government, such as through online voting, there are legitimate concerns that virtual presence laws will push “citizens farther from living, breathing contact with their government.”⁵² It is questioned whether the same level of emotion and sincerity can accompany electronic or virtual participation which physical participation imparts.⁵³ These concerns are valid. They will be obviated by the future ubiquity of video or web conferencing, which allows participants a close simulation of physical presence with their peers including visual and real-time audio conversation.⁵⁴ Therefore the keen passion of physical confrontation at a meeting will be preserved for politically involved citizens.

Security concerns for an e-Congress web site understandably are extreme considering the huge potential of destruction and sabotage by hackers. If there

44. Carl Cron, *Congress in the Information Age*, at 2, at <http://www.mesastate.edu/~mgizzi/papers/11.htm>.

45. *Id.*

46. *Id.* at 1-2.

47. *Id.* at 2.

48. *Id.* at 1-3.

49. Cron, *supra* note 44, at 1.

50. *Id.* at 1-3.

51. US CONST. art. I, cl. 5. “Neither House, during the Session of Congress, shall, without the consent of the other adjourn for more than three days, nor to any other place that in which the two Houses shall be sitting.” *Id.*

52. Redman, *supra* note 25, at 9-B.

53. *See id.*

54. O’Looney, *supra* note 23, at 3-7.

were to be an e-government site, security measures would have to ensure that only lawmakers would have access to secure parts of the site and that the public also would have read-only access to legislative actions to be in conformity with Sunshine laws.⁵⁵ Despite the potential Constitutional barrier to having Congress convene online, the technology does exist to create an e-government site.⁵⁶ Virtual presence is the means by which e-government exists; it operates through a telecommunications system in which physical presence is substituted with a virtual one. Congress' own trial with teleconferencing displays its interest and commitment to virtual presence as being a valid and reliable means of conveying someone's presence non-physically. The full actualization of virtual presence indeed remains to be fulfilled.

B. E-Voting in State Elections

i. Allowability in Various States

Online voting in the United States is still very much in its infancy, but the potential for virtual presence becoming an effective substitute for in person voting is encouraging, according to preliminary trials in Arizona and Alaska. Arizona offered the nation's first official election online in March 2000 for the presidential primary.⁵⁷ Each voter received in the mail a personal identification number and could vote from their home personal computer.⁵⁸ There were some glitches in the process such as several people not being mailed their identification number, personal home computers being incompatible or having outdated web browsers.⁵⁹ Surprisingly despite these setbacks, the officials reported the absence of voter fraud.⁶⁰

These preliminary trials show that online voting is more feasible in smaller communities in terms of organizational skills and its potential to boost voter turnout and provide information about candidates and their platform.⁶¹ (See Addendum Figure 1 for map of states, which have implemented e-government initiatives). Other states such as California, Massachusetts, Washington and others have organized task forces to investigate the potential benefits of online voting and its feasibility.⁶² Certainly, virtual presence in terms of online voting is gaining momentum, popularity and strength throughout the United States.

55. David McGuire, *Democratic Group Floats Idea For Virtual Congress*, NEWSBYTES, October 25, 2001, at 1, at <http://www.newsbytes.com/news/01/171528.html>.

56. *See id.*

57. *See generally* Amy Borrus, *Online Voting Passes Its First Test*, BUSINESSWEEK ONLINE, at 1, at <http://www.businessweek.com/bwdaily/dnflash/may2000/nf00516a.htm?scriptFramed>.

58. *See* Kristen E. Larson, *Electronic Commerce in the 21st Century: Article Cast Your Ballot.com: Fulfill Your Civic Duty Over the Internet*, 27 WM. MITCHELL L. REV. 1797, at 1812-13.

59. *See id.*

60. Borrus, *supra* note 57, at 1.

61. *Id.*

62. Massachusetts H., No. 3282, Sec.1-2 (2001). H.R. 3282 established a task force to "conduct research, studies and interviews to investigate various methods of conducting state elections via the Internet." *Id.*

ii. The Alaskan Model

In Alaska, due to geographical necessity, virtual presence is a staple of state government, which arguably enables the interaction of citizens with their government officials. The Alaskan government has implemented video conferencing and Public Opinion Messages (POMs), in an effort to encourage communications between⁶³ Alaskans and their state government.⁶⁴ The Legislative Teleconference Network (LTN), broadcasts State Legislature sessions, press conferences between Alaskan delegates and the delegates in Washington, D.C., public hearings, and other governmental meetings, in an effort to encourage public involvement and ease of accessibility to governmental activities.⁶⁵ Whether real-time communication is possible by citizens at network sites with their delegates depends upon the activity such as a constituent meeting between an individual legislator and residents of a specific voting district.⁶⁶ Alaskans even have the ability to testify at public teleconferences, following regular rules of procedure as used when a person testifies in person, i.e., speaking to the chair of the conference, giving their name and address.⁶⁷ Despite being physically absent, an Alaskan's virtual presence is just as meaningful as a physical one at governmental meetings.

Alaskans also convey their electronic presence to their legislators through POMs, which are brief emails sent to legislators by citizens to discuss legislative issues, but by no means are meant to be a substitute for letters, in person appointments and other forms of communication. POMs are sent via the Alaska Legislative Computer System (ALECSYS) only during the legislative sessions, thereby enabling Alaskans to communicate expeditiously with their representatives by exerting a virtual presence, expressing their wishes and ideas in seconds. Arguably, the methods with which the Alaskan government conducts its activities serve as an excellent template for the successful integration of the virtual aspect in governmental activities. In this state, a person's virtual presence is accepted as being tantamount and perhaps superior to physical presence. The rest of the United States would be wise to seriously consider implementing Alaska's methods of e-government and virtual presence.

C. E-Voting in the Federal Government

Virtual online voting reform would enable more Americans to participate in the political process.⁶⁸ Their virtual legal presence would liberate the masses of the physical burden of traveling to the voting booth, which considering the hectic pace of everyday twenty-first century life, will become an increasing obstacle and hindrance to voter turnout.⁶⁹ The rate of political participation is

63. ALASKA STATE LEGISLATURE, *Information & Teleconferencing*, at 5, at <http://www.legis.state.ak.us/home/lios.htm> [hereinafter *Alaska*].

64. *Id.* at 1.

65. *Id.* at 4-5.

66. *Id.* at 5.

67. *Id.* at 6.

68. See Deborah M. Phillips and David Jefferson, *VIP Reports: Is Internet Voting Safe?*, at 1, at <http://www.voting-integrity.org/text/2000/internetsafe.shtml> [hereinafter *Phillips*].

69. See generally MILITARY STATE BOARD OF ELECTIONS *Military Absentee Voting Goes Electronic in*

extremely low in the U.S., which begs the question if Americans have forgotten what a privilege voting is.⁷⁰ In the Bush Gore election, there was a correlation between voting behavior and social class possibly because either family or work obligations hindered their attendance.⁷¹ Indeed, the greater the obstacles placed on voting, the lower the participation. Perhaps the outcome of the last election would have been different had there been some form of virtual voting.⁷²

Two ideas have been proposed to facilitate the voting process: electronic voting at a polling station such as through touch screen technology and remote Internet voting at any connected computer including personal home computers.⁷³ Specifically Internet voting poses security concerns such as how to appropriately encrypt electronic ballots and determining the responsibility for online voting integrity depending on the vendor or third party-provider of the platform.⁷⁴ Election integrity and privacy are also a possible risk for third-party provider.⁷⁵ It is apparent that regulation and laws are needed not only for virtual presence but also for issues that arise as an offshoot of virtual presence such as service provider liability for Internet virtual presence activities.

Out-of-state military voters may now complete part of the absentee voting process online in Virginia for out-of-state Virginia military voters.⁷⁶ The military voter must first download an absentee ballot application which they either email or fax back to the general registrar.⁷⁷ They then receive an electronic ballot which is printed out and mailed back.⁷⁸ This process is an improvement over the former method of first waiting for the application in the mail and then mailing in the absentee ballot application. The applicant then had to wait for the actual absentee ballot application to arrive in the mail.⁷⁹ Possibly this electronic ballot system will be extended to out-of-state student voters.⁸⁰

In light of the deployment of many military personnel in the wake of the September 11, 2001 terrorist attacks, the success of pilot programs like Virginia's will help shape and build confidence in electronic voting and the reliability of virtual presence for online voting. Perhaps future online military votes could affect the outcome of the next presidential election. In any event, virtual presence in the form of online voting for the military exists as another useful example of how virtual presence can transform and revolutionize society all accomplished through the substitution of physical presence with a virtual one.

Virginia, Nov 6, 2001, at 1-2, at http://www.sbe.state.va.us/Election/Military/.../Military_absentee_voting/htm [hereinafter *Military*].

70. Larson, *supra* note 58, at 1808-1812.

71. Interview with Prof. Michael L. Rustad, Thomas F. Lambert Jr. Professor of Law and Director of the High Technology Program, Suffolk University Law School in Boston, MA (Nov. 10, 2001).

72. Phillips, *supra* note 70, at 1.

73. *Id.*

74. *Id.* at 3.

75. *Id.*

76. *Military*, *supra* note 69, at 1-2.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

D. International Scope

i. Internet Voting in Sweden

Sweden is one of the few countries, which has implemented Internet voting trials, and plans online voting to fully replace paper voting in person.⁸¹ Unsurprisingly, virtual presence in Sweden has the respect and status of physical presence by the amount of trust they place in the effectiveness and reliability of substituting physical presence with virtual presence. Sweden, for example, has a much higher rate of political participation because they make it easy to vote, such as giving the working class time off to vote.⁸² The Swedish government recognizes the potential of virtual presence for online voting, namely the benefit of widening the voters' scope of participation and the rapid tallying of votes.⁸³ The future will reveal the promise and potential of virtual presence for online voting in Sweden.⁸⁴

2. Verifying Virtual Presence Identification

Verifying online identities in order to ensure that someone's virtual presence matches up with their real-world identity, is an important aspect of virtual presence. Presently, most identification is achieved via a password, which is mailed to the consumer, or through a password the consumer chooses. Verifying online identity is especially important in regards to online voting. Unlike online credit card theft or other online identity crimes, online voting fraud would affect the outcome of elections including possibly the selection of the next President of the United States.⁸⁵ A national identification database has been proposed which would include all registered voters in the United States to allow cross-referencing of public databases to avoid fraud.⁸⁶ Yet, Americans have vehemently opposed past proposals for a national database, for reasons of privacy concerns.⁸⁷ Other identification systems for online voting include

81. See *Internet Voting in Sweden*, at 1, at <http://www.governments-online.org/articles/10.shtml>. The Democracy Commission's report for online voting in Sweden requires that the following five elements must be fulfilled in order to have a reliable electronic voting system on the Internet: "Only people eligible to vote should be able to vote; It should be possible to use one's vote only once; Ballots absolutely secret; It should not be possible for a vote cast to be changed by anyone else; The system should ensure correct tallying of votes at all levels (district, constituent and area)." *Technology and Administration in Election Procedure*, Final Report from the Election Technique 2000 Commission, Stockholm, Swedish Government Official Reports, SOU 2000:15, at sec. 5, at <http://www.governments-online.org/documents/InternetVotingSweden.pdf> [hereinafter *Election*].

82. Interview with Prof. Michael L. Rustad, Thomas F. Lambert Jr. Professor of Law and Director of the High Technology Program, Suffolk University Law School in Boston, MA (Nov. 10, 2001).

83. See *Election*, *supra* note 81, at sec. 5.

84. See generally Jackie Ashley, *Cook Plans to Make UK First to Vote on Internet*, GUARDIAN UNLIMITED, at 1-2, at <http://www.guardian.co.uk/internetnews/story/0,7369,628776,00.html>. As of January 7, 2002, British Leader of the Commons, Robin Cook, announced plans to make the UK the first country in the world to use the Internet for voting. The 59% voter turnout in the last UK national election jump-started the movement for online voting. Preliminary trials are underway, which already show that online voting appeals to people under 40 years of age. *Id.*

85. See generally Phillips, *supra* note 68, at 4. In 1999, 40,000 social security numbers were stolen on the Internet. It is for this statistic and others that voting on the Internet is not recommended. *Id.*

86. *Id.*

87. *Id.*

biometrics, a method of identification, which identifies the individual by their biological characteristics such as a fingerprint or retinal scan.⁸⁸

In other countries, such as Finland, a national identity smart card that has the citizen's identity particulars stored in a microchip, solves their problem of online identification for virtual presence activities such as online voting.⁸⁹ This solution is only feasible in terms of an individual owning a home computer and a smart card scanner, something which unfortunately reinforces the "digital divide"⁹⁰ between the wealthier technology owning segments of society compared to the poorer ones.⁹¹ Another approach to voter identification for electronic voting took place in April 1999, in Japan, the government conducted the first e-voting trial in which voting cards with the individual's personal information were issued.⁹² The voter showed their voting card to the polling official, which the official then cross-referenced, verified, and in turn gave the voter a magnetic card from the card container. The polling official would then lead the voter to a voting booth.⁹³ The voter then dropped their magnetic card upon completing their voting.⁹⁴ Both of these trials enjoyed success.

Voting on the Internet differs from voting electronically, for example such as using touch screen technology to vote as opposed to punching holes in a card.⁹⁵ Voting electronically will ease the confusion in regards to ambiguous punch holes but it still requires the physical presence of an individual at a polling station. Whereas voting online which involves the virtual presence of an individual, will yield even greater results than voting accuracy: convenience, higher voter turnout, accuracy, ease of tallying votes, as long as the appropriate security and encryption measures are in place to safeguard against hackers and transmission problems.⁹⁶ The benefits of virtual presence are unmistakable in regards to voting when the physical body is no longer what is required in order to make decisions and vote.

88. *Id.* See also Sally Wiener Grotta, *A Biometric Twist to Windows XP*, BUSINESS 2.0., VOL. 21, No. 1, at 40. New software has been released by DigitalPersona, "U.areU. Personal" (\$69) which replaces passwords by reading fingerprints for Microsoft Windows XP. Each fingerprint image is encrypted and serves as a convenient password solution for small businesses and consumers. Biometrics are not infallible but they add an extra measure of security and privacy. *Id.*; see also S. Yae Yang, *A New Look in Security*, BUSINESS 2.0., VOL. 21, No. 1, Jan. 15, 2002, at 40. Other biometrics software, such as iris recognition software, is becoming more widespread, i.e., the Panasonic Authentication Iris Recognition Camera (\$239). *Id.*

89. *Election*, *supra* note 81, at sec. 5.2.

90. Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1051 (2001). The digital divide depicts how the poor and minorities are left out of participating in online activities. It is proposed that once the Internet permanently merges with television, even the poorest of people will be able to enjoy Internet access.

91. See *Election*, *supra* note 81, at sec. 5.2,

92. *Id.* at § 5.4.

93. *Id.*

94. *Id.*

95. See generally SILICONVALLEY.COM, *Mass. Could Become Second State to Allow Annual Meetings on Web*, at 1, at <http://www.siliconvalley.com/docs/news/tech/025819.htm>.

96. Larson, *supra* note 58, at 1808-12.

III. VIRTUAL LEGAL PRESENCE IN BUSINESS, WORK, EDUCATION, LAW AND MEDICINE

1. Business

a. Online Board Meetings

Like virtual presence in open-meetings, (see section III, 1, A, of this discussion) virtual presence in regards to online board meetings raises the same concerns as to whether being virtually present is tantamount to being physically present. When searching for the definition of presence in state open-meeting laws one reads the state statutes, whereas for board meetings, one looks at the corporate charter. Currently, case law is sparse in regards to the validity of being virtually as opposed to physically present. One Illinois court in *Freedom Oil Company v. Illinois Pollution Control Board*, determined that it is not necessary for members of a public body to be in each other's "physical presence" in order to constitute a quorum for a public meeting as long as all of the other provisions of the Open Meetings Act are observed.⁹⁷ According to the plaintiff, *Freedom Oil Company*, a "meeting" did not occur when four members were telephonically connected and two were physically present.⁹⁸ The Illinois Appellate Court defeated this claim and held that a valid meeting took place, recognizing the validity of virtual presence as being tantamount to physical presence of purposes of the corporate charter.⁹⁹

Looking at the corporate charter of existing companies, some already address whether virtual presence is equivalent to physical presence for the purposes of being present for board meetings. Increasingly more companies are incorporating virtual presence clauses in their charters, which clarify their position on virtual presence. Some companies permit only authorized telecommunications between board members to constitute a meeting.¹⁰⁰ Rules and practices that apply to physical open-meetings have been extended to virtual presence in open e-meetings. Like for physical presence meetings, agendas are posted¹⁰¹ and the same standards of preserving public and board member rights are applied for virtual presence. The future trend of virtual presence meeting guidelines remains to be established.¹⁰²

97. *Freedom Oil Co. v. Illinois Pollution Control Bd.*, 275 Ill. App. 3d 508, 514.

98. *Id.*

99. *Id.* The court went on to say that the "absence of authority in the Act (the Act which created the Board) to conduct Board meetings by telephone conference does not indicate a legislative intent to prohibit such meetings." *Freedom Oil Company v. Illinois Pollution Control Board*, 275 Ill.App.3d 508, 514. *Id.*

100. See OXNARDS.ORG, *Bylaws of the Board 2140 BB*, at http://www.oxnardsd.org/pubs/bps/div_2/2140bb.htm. "Except for authorized video teleconferencing, any use of direct communication, personal intermediaries or technological devices by a majority of Board members to develop a collective concurrence as to an action the members will take on an item is prohibited." *Id.*

101. *Id.* "Agendas shall be posted at all teleconference locations and shall list all teleconference locations whenever they are posted elsewhere. Additional teleconference locations may be provided to the public. (*Government Code 54953*)." *Id.*

102. *Id.*

All teleconferenced meetings shall be conducted in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the Board, including the right of the public to address the Board directly at each teleconference location. All Board policies,

B. Shareholder Voting Online

Shareholder voting online is one of the newest aspects of e-commerce. A shareholder is able to assert their wishes through their virtual presence on a web site by voting, attending shareholder meetings, and other activities. Presently, most shareholders buy, sell and review their stocks online but all other activities are in the physical world.¹⁰³ Two arguments exist concerning the usefulness of shareholder voting online. The “pro” argument asserts that shareholder democracy and greater accountability by management would likely be a byproduct of greater virtual presence at shareholder meetings. Virtual presence would allow shareholders to hold their officials more accountable because of the ease of virtually attending a meeting as opposed to physically traveling to the meeting site.¹⁰⁴

Opponents claim that shareholders would be less able to hold their officials accountable because of the importance of physically confronting officials.¹⁰⁵ In addition, critics claim that the high cost of having teleconferencing equipment for a PC, presupposes that someone not only owns a PC but also has the money to possess video teleconferencing technology.¹⁰⁶ Corporate sponsored teleconferencing facilities for those who cannot afford or wish to use computer video teleconferencing technology, could solve this problem of universal access.¹⁰⁷ Regardless of which way modern security concerns and physical confrontation priorities are worked out, virtual presence technology certainly will have the potential to play a huge role in stimulating shareholder democracy, i.e., video teleconferencing over the Internet, which allows people to see and speak to each other in real time.¹⁰⁸

Currently, the largest obstacle is the question of security for online voting. It has been proposed that online shareholder voting occur through a corporate homepage, and only registered shareholders be allowed through the site’s firewall, in addition to other security features such as the encryption of sensitive information.¹⁰⁹ Even if voting does not occur on the corporate website due to security concerns, the site still could facilitate shareholder communications by exchanging ideas on the site prior to the next meeting through a secure electronic communications board or some other device.¹¹⁰ A shareholder’s virtual presence on a corporate website would allow for freer

administrative procedures and bylaws shall apply equally to meetings that are teleconferenced. The Superintendent or designee shall facilitate public participation in the meeting at a teleconference location.

Id.

103. See Margaret Kane, *Virtual Shareholder Meetings Flop*, CNET NEWS.COM, (2001), at <http://news.cnet.com/news/0-1005-200-7083108.html>.

104. See George Ponds Kobler, *Shareholder Voting over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance*, 49 ALA. L. REV. 673, 697-98 (1998).

105. *Id.*

106. *Id.* at 696-99.

107. *Id.*

108. *Id.* at 697-98.

109. See George Ponds Kobler, *Shareholder Voting over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance*, 49 ALA. L. REV. 673, 699-700 (1998).

110. *Id.* at 699-700.

dissemination of information to the shareholders and presumably reduce costs than the present system.¹¹¹

i. New Developments in Massachusetts

A new bill sponsored by Senator David P. Magnani, is in the pipeline in Massachusetts, which would allow annual stockholders' meetings to be conducted online and to provide electronic notice to stockholders.¹¹² This bill passed in the House of Representatives but has been stalled in the Senate for revision, to introduce language which would allow companies to either hold their meetings online or hold the gatherings in person.¹¹³ Critics claim that face-to-face meetings are essential for confronting corporate officials¹¹⁴ and holding them accountable for their actions.¹¹⁵ Unlike the general contention that online activities increases direct democracy, critics of the Massachusetts' bill claim that it would erode democracy by denying physical confrontation.¹¹⁶ In addition, concerns about handicapped stockholder online participation have been raised. If passed, this new bill would make Massachusetts only the second state in the nation, Delaware being the first, to allow publicly traded companies to hold shareholder meetings online.¹¹⁷ The Massachusetts' bill would allow shareholders to conduct their regular activities online: listen to a CEO's address, vote on proxy statements, make motions, and take part in Q & A.¹¹⁸

Delaware allows a company to hold their annual meeting online, but to date no company has done so.¹¹⁹ Online meetings would be advantageous for large companies, whose shareholders do not live near the meeting location.¹²⁰ Many companies are reluctant to hold meetings online due to security concerns and the costs of tracking down all shareholders to forward them documentation about the meetings because not all shareholders hold securities in their name.¹²¹ It is evident that physical meetings are still preferred to virtual presence for their impact and confrontation value. In addition, security concerns dampers online shareholder meetings today but the future does appear promising. As

111. *Id.* at 697-98.

112. See Senate. No. 1792, Senator David P. Magnani, available at <http://www.state.ma.us/legis/history/s01792.htm>.

113. See Philip Ranalli, *Corporate Meetings Bill is Shelved Shareholder Group Raps Online Forums*, THE BOSTON GLOBE, Aug. 24, 2001, at B1.

114. Kane, *supra* note 105, at 1. In this article, the President of the Domini Social Equity Fund, Amy Domini, asserts that confrontation is one of the sacred rights that shareholders acquired after the Great Depression. She says,

Already physically today you have management just turn off the mike and say 'we don't want to hear from you,' but they can't physically turn (shareholders) away. You go online and the sky's (the) limit. You can have a phony person pretending to be a real person, zero accountability, and total control by the management of the owners.

Id.

115. See THE BOSTON GLOBE, Aug. 31, 2001, *Letters to the Editor*, at 1.

116. See Ralph Ranalli and Peter J. Howe, *OK Is Near for Online Shareholder Meetings*, THE BOSTON GLOBE, Aug. 23, 2001, at 1.

117. See SILICONVALLEY.COM, *Mass. Could Become Second State to Allow Annual Meetings on Web*, at <http://www.siliconvalley.com/docs/news/tech/025819.htm> [hereinafter *Silicon*].

118. *Id.*

119. Kane, *supra* note 103, at 1.

120. *Id.*

121. *Id.*

technology advances, so will virtual presence and its ability to have equal footing in the public's eye.¹²²

2. School Board Meetings

Whether virtual presence is achieved in voicemails, emails, and other electronic documents, is hotly debated not only in the corporate world but also in the scholastic. For one school in Florida, the school board members were faced with stringent concerns from the surrounding community whether their voicemails and emails violated Floridian Sunshine laws.¹²³ Ironically these concerns presumptively create the inference that virtual presence is tantamount to physical presence or else the Sunshine laws would not be violated because a Sunshine law cannot be violated where a person was never "present" to begin with.¹²⁴

Even when a statute addresses the validity of one form of virtual presence, it may overlook an offshoot of the same issue. For example, Florida law addresses the issue of virtual presence in voicemail messages and defines them as amounting to a meeting, defined by Florida open meeting laws as "any kind of gathering, convened to discuss public business, in person by telephone, or other means of communication."¹²⁵ When personal opinions are exchanged between the board members, the voicemail becomes tantamount to a public meeting even though it is not a conference call.¹²⁶ This is a twist that perhaps many corporations would not anticipate if they did not look at their state's statutes concerning virtual presence requirements and ramifications for open-meeting laws.

A virtual presence issue arose in South Carolina recently in the form of an open meeting violation because the South Carolina Press insisted that the information posted by the Beaufort County school superintendent was sensitive and therefore not subject to public disclosure.¹²⁷ Some Beaufort County citizens asserted that merely posting school board opinions and comments online, one form of virtual presence, resulted in a public meeting. Legally speaking, the court held that no open meeting violation occurred because the statutorily required majority of school board members were not present in order to constitute a legal meeting. "The law covers electronic meetings, preventing the board from using a conference telephone call to exclude the public, but whether the board used the Internet to avoid conducting business in the sunshine is open to interpretation."¹²⁸

122. Teleconferencing will allow shareholders to participate and confront officials as opposed to passively watching a meeting online. Teleconferencing on a large-scale possibly will remedy the participation fears that critics have about virtual shareholder meetings.

123. See Andrew Trotter, *Let the Sunshine In Using e-mail for Board Business? Check Open-meeting Laws*, at <http://www.electronic-school.com/0696f6.html>.

124. *Id.* "The board members are 'painfully aware' that the sunshine law bars them from discussing among themselves in private 'any issue that may come up for a vote.' In electronic communication, they err on the side of caution: 'If there's any concern, we just usually stop the conversation.'" *Id.*

125. *Id.*

126. *Id.*

127. See David A. Splitt, *Ethics & Laws: Don't Let Sunshine Laws Scorch Electronic Board Meetings*, ESCHOOL NEWS ONLINE, (2000), at <http://www.eschoolnews.org/showstory.cfm?ArticleID=1683>.

128. *Id.*

It is undisputed that U.S. laws need to keep pace with technological advances which incorporate virtual presence. Unlike other technological concerns such as Cybersquatting, virtual presence directly infiltrates areas of life outside the Internet. Indeed, presence determines whether a valid meeting occurred but a domain exists whether it is legitimately owned or not. Possibly one day all meetings will involve some form of virtual presence. The conveniences of virtual presence cannot be denied,¹²⁹ as long as the law does not stifle progress by its silence or misinterpretation of what it means to be virtually present and clicking a mouse to say “aye” or “nay.”

3. Telecommuting/Telework

Virtual presence allows people to substitute their physical presence with a virtual one, thereby obviating the need for being physically present to work. Telecommuting is defined as “using telecommunications technology to work at home instead of commuting to a conventional work place at the conventional time.”¹³⁰ Telecommuting or telework is chosen by people who wish to work at home for various personal and business reasons, such as the freedom of not having to commute and having time-space restrictions.¹³¹ Telework could mean working entirely by telecommunication means, or working part-time in a physical office or working in a “telecenter” or satellite office.¹³² It also could involve videoconferencing or working using conventional telework tools such as a phone or asynchronous devices such as email and fax.¹³³

It has been suggested that in order to avoid feelings of isolation or loneliness, videoconferencing should be the primary or supplemental means of teleworking, because it allows face-to-face communication.¹³⁴ Teleconferencing or any video-communication refers “to a synchronous linking of individuals at remote locations by means of transmitted audio and video signals.”¹³⁵ A telepresence is created by the establishment of a shared virtual space among people who are not in close physical proximity with each other, as in a physical office space.¹³⁶ Physical presence among colleagues can motivate an employee to work, helps prevent boredom and helps them “stay in the loop.”¹³⁷

129. *Id.* In Bucks County, P., when the Central Bucks school board used the district web site to solicit comments on a tough redistricting decision, the board received 500 comments posted online in comparison to the meager response to the public meeting where about two dozen speakers offered testimony. *Id.*

130. Dawn R. Swunk, *Telecommuter Law: A New Frontier in Legal Liability*, 7 AM. BUS. L.J. 857, 859 (2001).

131. EcaTT Final Report, *Benchmarking Progress on New Ways of Working and New Forms of Business Across Europe*, Aug. 2000, at 1.1 See also Jesse Bryant, *Take this Job and Move it: Telecommuter's Toolkit*, ZDNET ANCHORDESK, at 1, at <http://www.zdnet.com/anchordesk/stories/story/0,10738,2607387,00.html>. Around 19.6 million workers telecommuted in the United States in 1999 and it is projected that there will be almost 29 million U.S. teleworkers by the end of 2003. *Id.*; Empirca Press Release, *Share of Teleworkers Will Rise to 11 Percent of the Labour Force by 2005*, at 1, at <http://www.empirca.com/ecatt/news/Madrid-pm1e.html>. In the European Union, it is projected that roughly 16 million EU residents will be teleworking by 2005. *Id.*

132. *Telework and Video-Mediated Communication: Importance of Real-time, Interactive, Communication for Workers with Disabilities*, at 2, at http://www.dinf.org/csun_99/seission0238.html [hereinafter *Telework*].

133. *Id.* at 3.

134. *Id.*

135. *Id.*

136. *Id.*

137. Jesse Bryant, *Take this Job and Move it: Telecommuter's Toolkit*, ZDNET ANCHORDESK, at <http://www.zdnet.com/anchordesk/stories/sotry/0,10738,2607387,00.html>.

Telecommuting may not be right for everyone, however, the potential benefits of being virtually present for work are astounding. For example, telework also has the potential for assisting people with disabilities, who otherwise are able to work but physically unable to commute.¹³⁸ Currently, particularly in Europe, the potential benefits and impact of telework for people with disabilities are being researched.¹³⁹

One real-world example of a company successfully using teleconferencing and achieving results, which otherwise would be impossible without using videoconferencing, is the international law firm of Blackwell, Sanders, Peper, & Martin.¹⁴⁰ They use videoconferencing to provide ongoing training for attorneys simultaneously all over the world, thereby providing their attorneys with equal footing despite their geographical differences.¹⁴¹ Virtual presence through videoconferencing also adds the benefit of one attorney advising another in a unique area of law where a specialist does not exist in that city.¹⁴² Their teleconference meetings allow for international interoffice meetings, which permit one firm to catch up on another firm's business, in addition to minimizing travel time and maximizing contact among different law offices.¹⁴³ Psychologically, it helps to solidify the various law offices, which apart from their virtual meetings, are separated by country, and often by language and culture.¹⁴⁴

Even without videoconferencing that allows different parties to visually see each other, telework still has advantages in terms of a faceless relationship between co-workers. In a recent study, respondents who telework stated that the absence of preconceived ideas about each other based on looks has been an asset of being on a virtual work team and that it can be "easier to share ideas with someone who is faceless."¹⁴⁵ Americans in the business sector are starting to realize that trust and teamwork can be achieved by virtual means, not just by being face-to-face with someone else.¹⁴⁶ This is not to say that virtual presence replaces physical presence but it closely replicates its characteristics that are welcomed in the twenty-first century's global economy.¹⁴⁷ Current

138. See *Telework*, *supra* note 132, at 2. Telecommuting has allowed disabled people to work, i.e., an employee who suffers from searing back pain. It also acts as an incentive for young workers with little experience to work for low-paying and high-stress jobs such as call-center jobs or telemarketer jobs. *Id.* See generally Stephanie Clifford, *When Telecommuting Actually Works*, BUSINESS 2.0, Nov. 2001, at 126.

139. See *Telework*, *supra* note 132, at 2.

140. See WORLD.COM, *Blackwell Sanders Makes Their Case for Videoconferencing*, at http://emeetings.wcom.com/casestudies/Blackwell_sanders.php3.

141. *Id.*

142. *Id.* Blackwell Sanders Peper Martin regularly use their teleconferencing abilities as a selling pitch with clients by mention their ability to quickly access and consult their network of attorneys around the world at their convenience. *Id.* at 2.

143. *Id.* at 1.

144. *Id.*

145. See WORLD.COM, *Meetings in America III: A Study of the Virtual Workforce in 2001*, at <http://emeetings.wcom.com/meetingsinamerica/articles/pressrelease1.php3>. This survey yielded some very positive attitudes concerning the benefits of teleworking such as 56% of those surveyed believe that virtual meetings save time and money. The time saved through the virtual work is used for other productive work-related activities. *Id.* at 16. Some other interesting statistics: The typical worker spends seven hours weekly commuting to their office. *Id.* Seventy-three percent surveyed want to participate in telework activities more often. *Id.* at 14. Ninety-five percent enjoyed teleworking. *Id.* at 5.

146. WORLD.COM, *Virtual Work Emerges as a Prominent Trend in the American Workforce*, (2001), at <http://e-meetings.wcom.com/meetingsinamerica/articles/pressrelease1.php3>.

147. In the wake of the terrorist attack of September 11, 2001, teleconferencing skyrocketed reinforcing the

technological trends project that web conferencing will replace video conferencing.¹⁴⁸ Yet, despite the technological device used for conveying one's virtual presence for teleworking, global companies have already made a huge financial commitment to the promise and potential of virtual presence.

4. Education

A. Teledistance Learning

Since the 1870s, distance education has existed in the United States through courses conducted via television, radio and correspondence.¹⁴⁹ Primarily, these programs were directed towards military personnel and adults too poor or unable to conventionally attend courses. Today, the online degree or eDegree industry is booming and is viewed as a potential financial windfall for many major universities.¹⁵⁰ The structure of these online courses varies not only from entity to entity but also from state to state.¹⁵¹ Despite the possible large financial benefits derived from eDegree programs, the goal of teledistance learning is reputable: to educate those adults who are intellectually inclined to attend higher education but who are financially or physically unable to leave their homes to attend classes in a physical classroom.¹⁵²

The debate surrounding the quality of long distance learning has been debated since its advent in the United States in the late nineteenth century.¹⁵³ Arguably, whether a student attends a class virtually or physically, has little effect on the student's learning experience in relation to the effect of a particular student's motivational and study skills upon his/her gained knowledge. Arguably the Internet offers advantages that television, radio or correspondence can offer such as real-time chatting, ease of dissemination of classroom materials, email, etc.¹⁵⁴ In the near future, online courses will be extended to professional degrees such as virtual medical schools.¹⁵⁵ Online distance learning also may allow the shier or awkward student to fully express himself or herself. The education quality debate aside, the Federal Government has recognized the validity and merits of a student's virtual presence.

In October, 2001, the House of Representatives passed H.R. 1992, The Internet Equity and Education Act, which eliminates the former twelve hour

importance of a viable means of conveying a virtual presence when a physical one is not feasible or desired. Dave Carpenter, *Teleconferencing Industry Records Busiest Month Ever*, THE BOSTON GLOBE, Oct. 22, 2001, at C2.

148. *Id.*

149. Anya Sostek, *The Rise of eDegrees* (2001), at 7, at <http://www.governing.com/5virtual.htm>.

150. *Id.* at 4.

151. *Id.* at 2.

152. Robert MacMillan, *U.S. House Ok's Lowering Aid Hurdles for Net Learning*, NEWSBYTES, at 2, at <http://www.newsbytes.com/cgi-bin/udt/im.display.printable?client.id=newsbytes&story.id>.

153. Sostek, *supra* note 151, at 7.

154. *Id.* See also Lisa Vaas, *The E-Training of America*, PC MAGAZINE, VOL. 20, NO. 22, Dec. 26, 2001, at iBiz 1. A recent Garner study on e-learning stated that "training is moving online for the same reason that companies attempted outsourcing 10 years ago: not because it is better, but because it is cheaper and more measurable." Garner analysts project that by 2005, the global market for e-learning will grow from \$2.1 billion to \$33.6 billion, about a 100 percent compound annual rate. *Id.*

155. Bob Leitch, *A Short Report on the Current State of Military Telemedicine*, MATMO.ORG, at 4, at <http://www.matmo.org/news/ashortstor.../ashortstoryonmilitarytelemed.htm>.

requirement of teacher-student face time and allows schools to offer more than half of their classes online. Prior to this bill, a school with fewer than twelve hours risked its federal funding.¹⁵⁶ According to this new law, students are required to log on for Internet courses at least once a week.¹⁵⁷ This bill passed by an overwhelming majority in the House and symbolizes the growing power that virtual presence is gaining in modern American society. The Government is recognizing the validity of being virtually, as opposed to physically, present in a classroom and the benefits and growing needs of people to be virtually present for their courses. This bill has large financial implications for the government, specifically that it will be funding an exponentially growing number of online institutions. This bill conveys the Government's commitment to teledistance learning for the benefit for society.

5. *Telemedicine*

Telemedicine involves the medical care of a patient remotely or at a distance.¹⁵⁸ The patient's physical presence is substituted with a virtual one, thereby allowing doctors to remotely diagnose a person in rural places, in space, or even someone five minutes away who is housebound. These telemedicine consultations can take place via teleconferences, over the phone, and other information systems.¹⁵⁹ The ability of a patient and doctor to forgo the burden of traveling for a medical examination yields many benefits such as helping to cut waiting lists and speeding up medical access in general.¹⁶⁰ In addition to the convenience of a virtual presence substituting physical presence, telemedicine diagnoses have remarkably been accurate.¹⁶¹ Researchers in Ireland have found that teleconference diagnoses for rheumatology patients were 97% accurate, with only 6% of patients actually requiring an in person physical meeting with the specialist.¹⁶²

In addition to teleconferences, the researchers found that the telephone consultations were 71% accurate in diagnosis. Remarkably telemedicine is not limited to remote diagnosis, but it also includes actual trans-Atlantic telesurgical operations, such as by remotely operating a surgical robot arm that performs a surgical procedure.¹⁶³ Notwithstanding any technological glitches or problems, telesurgery is almost identical to in person surgery in terms of the

156. Jenifer Hoyt, *House Votes to Relax Restrictions on Internet Courses*, THE NANDO TIMES, at 1, at <http://www.newsbytes.com/news/01/171009.html>.

157. MacMillan, *supra* note 152, at 1.

158. Steven M. Edworthy, *Telemedicine in Developing Countries*, BMJ.COM, at 1, at <http://www.bmj.com/cgi/content/full/323/7312/524>.

159. Sharon R. Klein and William L. Manning, *Telemedicine and the Law*, THE HEALTH LAW RESOURCE, at 1, at <http://www.netreach.net/~wmanning/telmedar.htm> [hereinafter *Klein*].

160. BBC NEWS ONLINE, *Telemedicine Can Cut Waiting Lists*, at 1, at http://news.bbc.co.uk/hi/english/health/newsid_1516000/1516968.stm [hereinafter *Waiting Lists*].

161. When I was an intern at Massachusetts General Hospital in 1994, I interned for the Teledermatology Department. Even in 1994, my bosses had great success in diagnosing patients solely by looking at images or photographs. Because our photographs of the dermatological disorders were so helpful in diagnosing patient's disorders, they were practically tantamount to physical examinations of patients.

162. *Waiting Lists*, *supra* note 160, at 1.

163. BBC NEWS ONLINE, *Doctors Claim World First in Telesurgery*, at http://news.bbc.co.uk/hi/english/sci/tech/newsid_1552000/1552211.stm. This operation took place in September 2001, by doctors in the United States on a 68-year-old woman in eastern France. The operation was successful and her doctors discharged her two days after the operation. *Id.*

impact of the surgeon's movements; the estimated time delay between a remote physician's movements and the return video image displayed on the screen was less than 200 milliseconds.¹⁶⁴ Many patients still prefer face-to-face consultations but the growing trend towards trusting and preferring virtually presence exams cannot be mistaken.¹⁶⁵

The old saying, "putting your money where your mouth is" certainly applies to the United States Federal Government's faith in the effectiveness and reliability of virtual presence in telemedicine. Federal funding for telemedicine projects has totaled more than \$100 million through a variety of agencies.¹⁶⁶ Furthermore, since 1999 the Federal Government has been reimbursing physicians for exams and private insurance companies appear to be following suit.¹⁶⁷

One risk that telemedicine poses is the vulnerability of highly confidential information being transmitted over fiber optic cables and other devices.¹⁶⁸ Currently these exposures are the focal point of research in the online community because these susceptibilities apply not only to telemedicine conferences but also to e-commerce and other online activities. State laws dictate the amount of protection for confidentiality, privacy and data but unfortunately, most laws concerning the confidentiality of patient's records, whether in electronic or paper form, are not uniform.¹⁶⁹ To solve this problem of fragmentation among state agencies, federal legislation has been proposed to standardize privacy laws but as of yet, none have been passed.¹⁷⁰ In the future, new laws need to be passed for liability purposes to regulate privacy laws as activities involving virtual presence and transmission of sensitive materials increases.

6. Online Courtrooms

The court system indeed has already recognized the benefits and validity of being virtually present as opposed to being physically present. Virtual presence presents witnesses with an alternative to coming to court by testifying over the Internet via inexpensive video and audio technology.¹⁷¹ Courts are allowing more witnesses to testify via video conferencing and video recordings.¹⁷² It has

164. *Id.* at 2.

165. *Waiting Lists*, *supra* note 160, at 2. One English statistic states that while both General Practitioners and patients are pleased with their telemedicine experiences, 42% of the patients still would prefer in person visits with their doctor. *Id.*

166. *Klein*, *supra* note 159, at 1.

167. Scott Shepard, *Telemedicine Links Memphis Doctors to Rural Patients*, MEMPHIS BUSINESS JOURNAL, Sept. 7, 2001, at 2, at <http://memphis.bcentral.com/memphis/stories/2001/09/10/story8.html>. For example, a Mid-South Telehealth Consortium in Memphis, Tennessee has received about \$700,000 in state and federal funds to wire four Memphis hospitals to service five rural Tennessee towns. *Id.*

168. *Klein*, *supra* note 159, at 1.

169. *Id.* at 4.

170. *Id.*

171. INNOVATIONLAW.ORG, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, at 3, at http://www.innovationlaw.org/pages/probing_permit.htm [hereinafter *Innovation*].

172. FED.R.CIV.P. 30(b)(7) (allowing telephonic depositions by agreement of the parties). *See also* Robert MacMillan, *Michigan Creates Online 'Cybercourt'*, NEWSBYTES, at <http://www.newsbytes.com/news/02/173524.html>. On January 9, 2002, the state of Michigan signed into law that created an online court that will jurisdiction over commercial and business complaints in which the dispute is more than \$25,000. The judges will be specially trained for this online court. Michigan hopes to attract New Economy businesses in the same

been proposed to allow discovery and cross-examination of witnesses via electronic means, such as Internet-based telephony or video conferencing.¹⁷³ In the future, perhaps entire trials will be conducted online. A defendant's right to facing his/her accusers in person, a right arising out of the Sixth Amendment to the United States Constitution, would be preserved by facing an accuser virtually as opposed to physically.¹⁷⁴ This interpretation, however, has yet to be explored. The future of court sessions being held online will be indubitably become part of everyday life in the twenty-first century.

IV. CONCLUSION

Most states are addressing the issue of virtual presence and teleconferencing. The future will reveal a better idea of "presence" albeit be virtual or physical. Indeed someday "being there" could be established by virtue of someone's computer being turned on.¹⁷⁵ When it comes to virtual presence, it should be thought of as an enhancement rather than a replacement of physical presence. The possibilities of what virtual presence could bring society are endless, as long as society has the courage to be virtually present for the future.

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way that Delaware appeals to large corporations for the incorporation of major public companies. *Id.*; Julia Scheeres, *Cybercourts Set for Tech Trials*, WIREDNEWS, Jan. 12, 2002, at 1, at <http://www.wired.com/news/print/0,1294,49689,00.html>. The court is expected to be fully functional by October, 2002, allowing lawyers to file their briefs online, argue via teleconference and present evidence through streaming video. Unlike pre-existing sites such as clickNsettle.com and icourt.com that provide online dispute resolution and document retrieval, the Michigan Cybercourt will be the very first cybercourt in the nation. *Id.* See also Doug Isenberg, *The Pros and Cons of "Cybercourts,"* GIGALAW.COM, at <http://www.gigalaw.com/articles/2001/pfv/isenberg-2001-04-pfv.html>.

173. *Innovation*, *supra* note 171, at 3.

174. US CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

175. Reiman, *supra* note 12, at 972.

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