

Essay

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Virtual Dignitary Torts

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Abstract: The emergence of the metaverse and spatial computing, which has enabled immersive digital interactions, raise complex legal questions. This work examines the feasibility of addressing dignitary torts – such as battery and intentional infliction of emotional distress – committed via avatars. The particular challenge for tort law is the nonphysical nature of self-representations in these virtual spaces. Drawing from the historical evolutions of several dignitary torts, such as the law of battery and emotional harm, this article argues that the key in allowing for the recognition of such harms is appreciating the expansion of the protection of physical body within these torts, to the protection of a broader concept of the “self.” By this, tort law has demonstrated both its willingness and capacity to recognize new forms of wrongs without sacrificing its core principles. Accordingly, this essay lays the groundwork for recognizing harms in virtual spaces and offers several initial considerations for dignitary tort liability regime and the extension of the self in extended reality spaces. Bridging the gap between evolving technology and traditional tort law is a must in a world where virtual interactions are carrying increasingly real consequences.

Keywords: dignitary torts; virtual reality; AI; avatar liability

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1 Introduction

Can you sue for dignitary torts such as battery or intentional infliction of emotional distress (IIED) if your avatar¹ was virtually touched in an offensive way in the metaverse? A growing market of digital spaces, or virtual reality² known as the metaverse, has created new socio-legal questions.³ There no single uniform definition for metaverse.⁴ But “at its core, the metaverse is a collective virtual shared space.”⁵ Connection to these cyber spaces can either be in the traditional form or through virtual reality (VR) headsets. In addition to metaverse, the term “spatial computing” has also been used by companies investing in related technologies.⁶ While there is also not a single definition for spatial computing, it can be defined as “an evolving form of computing that blends our physical world and virtual experiences using a wide range of technologies, thus enabling humans to interact and communicate in new ways with each other and with machines, as well as giving machines the capabilities to navigate and understand our physical environment in new ways.”⁷ The term has been more commonly used since Apple unveiled its headset called Apple Vision Pro, which is more than just a VR headset; it is designed

1 Merriam-Webster defines avatar as “an electronic image (as in a video game) that represents and may be manipulated by a computer user.” *Avatar, (defined)*, MERRIAM WEBSTER DICTIONARY (updated May 9, 2025) (<https://www.merriam-webster.com/dictionary/avatar>).

2 “Virtual reality (VR) is a technology that creates a digitally simulated immersive environment or experience for users. It typically involves the use of specialised hardware and software to create a computer-generated 3D spatial, and possibly multi-sensorial, environment that can be interacted with in a seemingly real or physical way. VR allows users to experience and interact with a digital environment as though they were real.” Vítor Bernardo, *Extended Reality*, European Data Protection Supervisor (last visited May 15, 2025) https://www.edps.europa.eu/data-protection/technology-monitoring/techsonar/extended-reality_en.

3 Eric Ravenscraft, *What is the Metaverse, Exactly?*, Wired (June 15, 2025, 6:04 P.M.) <https://www.wired.com/story/what-is-the-metaverse/>.

4 Jyh-An Lee, Liang Yang, and Pan Hui, *Legal Implications of Self-presence in the Metaverse*, 25 Media & Arts L. R. 267, 267 (Dec. 15, 2023) (citing Georg David Ritterbusch and Malte Rolf Teichmann, *Defining the Metaverse: A Systematic Literature Review*, 11 IEEE Access 12368, 12368 (2023)).

5 Jesse Valente, *Governing the Metaverse*, 9 U. CINCINNATI INTELL. PROP. & COMPUT. L. J. 136 (2024).

6 Kelly Raskovich et al., *Spatial computing takes center stage*, DELOITTE INSIGHTS (Dec. 11, 2024) <https://www2.deloitte.com/us/en/insights/focus/tech-trends.html#spatial-computing-takes>.

7 Cathy Hackl, *What Leaders Need to Know About Spatial Computing*, HARVARD BUSINESS REVIEW, November 10, 2023, <https://hbr.org/2023/11/what-leaders-need-to-know-about-spatial-computing>

blend digital content with the users physical space for a “special computing” experience,⁸ or what can also be called augmented⁹ or mixed reality.¹⁰

Recognizing the significant commercial potential of virtual environments, major technology companies, in addition to Apple, have made substantial investments in virtual reality (VR) hardware. For example, Facebook rebranded itself as Meta to reflect its strategic focus on the metaverse and has emerged as a leading producer of VR headsets called Quest.¹¹ While virtual worlds of the multiplayer online games (MMOs)¹² are largely designed for playing games, the metaverse and special computing are a broader where its possibilities range from holding work meetings, attending class, or going to virtual concerts.¹³ Thus, “the metaverse concerns fundamentally three general areas – a new commercial marketplace, data integrity and protection, and interactions between users.”¹⁴ This essay seeks to focus on some of the legal implications of user interactions in these extended reality (XR)¹⁵ enabled virtual spaces from the tort law point of view.

Self-representation in extended reality spaces¹⁶ typically occurs through avatars – digital figures that users design and employ to interact with others within the virtual or augmented reality environment. Just like the real world, the virtual world

8 Apple Vision Pro Home Page, <https://www.apple.com/apple-vision-pro/> (last visited May 12, 2025).

9 Augmented reality (AR) “is a technology that overlays digital information, such as text; images; sound; videos; or 3D models, onto the real-world environment. AR enhances the real world by adding computer-generated elements to it.” Vítor Bernardo, *Extended Reality*, European Data Protection Supervisor (last visited May 15, 2025) https://www.edps.europa.eu/data-protection/technology-monitoring/techsonar/extended-reality_en.

10 *Id.* “Mixed reality (MR) systems are immersive technologies that bring physical objects into digital environments or digital objects into physical reality.”

11 Meta Quest Home Page. https://www.meta.com/quest/?srsltid=AfmBOopcogQ01t1owsg3vFRtxjGZZJDgkWB_Ey56-705o50mjSPoT4 (last visited May 12, 2025).

12 Popular examples include League of Legends, Fortnite, and Minecraft.

13 Examples of such spaces include the Meta’s Horizon World, see Meta Horizon Home Page, <https://horizon.meta.com/> (last visited May 12, 2025).

14 RESEARCH HANDBOOK ON THE METAVERSE AND LAW, 2 (Larry A. Dimatteo & Michael Cannarsa eds., 1st ed. 2024).

15 Bernardo, *supra* note 15. “Extended reality (XR) is an emerging umbrella term for all immersive technologies, including virtual reality, augmented reality, and mixed reality.” Vítor Bernardo, *Extended Reality*, European Data Protection Supervisor (last visited May 15, 2025) https://www.edps.europa.eu/data-protection/technology-monitoring/techsonar/extended-reality_en.

16 This essay uses the umbrella term of extended reality spaces to include both what is commonly known as metaverse (complete emersion), and other virtual interactions created by headsets such as Apple Vision Pro that can typically be considered as an augmented or mixed reality spaces.

is thus prone to all type of social interactions that can carry legal consequences with little to no regulation.¹⁷ One of such legal questions made headlines when a female user testing Meta's VR world called the Horizon Worlds reported experiencing sexual harassment.¹⁸ Meta called the incident "absolutely unfortunate," and noted that the user should have used a tool called "Safe Zone," that would have worked as a protective bubble allowing users to block other avatars from approaching too closely when they feel threatened.¹⁹ But this is not an isolated incident. In 2024, the British police also reported that they are investigating a 16 year's old "virtual rape" case in the metaverse.²⁰ Advancements in immersive technologies, haptic communication systems, and avatar design have only accelerated, occurring concurrently with rapid developments in artificial intelligence (AI) and the continued proliferation of XR platforms.²¹ For example, a company called bHaptics builds haptic vests with 32 feedback points,²² that are compatible with a number of VR worlds such as Meta's Horizon, or VRCHAT.²³ With this optional suit, a punch in the gut can be also physically felt. Haptic gloves with FingerTac are also on the rise. These gloves are aimed at bridging "the divide between the virtual and physical worlds,"²⁴ enabling a "real" experience with virtual objects in the metaverse.

As a result, similar experiences of harm are either already occurring or are likely to arise in the future. It is estimated that "by 2030, the metaverse could host 60 % of the world's population (approximately five billion users) and be valued at 13 trillion

17 Mandar Prakhar & Aryan Rawat, *The dark side of Metaverse: navigating the crisis of unregulated virtual reality*, LAW SCHOOL POLICY REVIEW (Dec. 5, 2024) <https://lawschoolpolicyreview.com/2024/12/05/the-dark-side-of-metaverse-navigating-the-crisis-of-unregulated-virtual-reality/>.

18 Tanya Basu, *The Metaverse Has a Groping Problem Already*, MIT Technology Review (December 16, 2021), <https://www.technologyreview.com/2021/12/16/1042516/the-metaverse-has-a-groping-problem/> (Horizon Worlds was at the time being tested).

19 *Id.*

20 Rebecca Camber, *British Police Probe Virtual Rape in the Metaverse*, DAILY MAIL (Jan 1, 2025, 5:13 P.M.) www.dailymail.co.uk/news/article-12917329/Police-launch-investigation-kind-virtual-rape-metaverse.html. In addition, since the launch of Second Life in 2003 (a virtual reality multiplayer world that allows users to interact with each other via their avatars), similar reports had been filed. See e.g., Lorena Arismendy Mengual, *Liability for Wrongful Behaviour in the Metaverse*, 15 JIPITEC 229, 240 (2024) (citing to a 2007 report in the Brussels relating to a Second Life investigation of a "virtual rape").

21 See, e.g., Esther Shein, *Top metaverse platforms in 2025, rise of special computing*, TECHTARGET (Dec. 27, 2024) <https://www.techtartarget.com/searchcio/tip/Top-metaverse-platforms-to-know-about>.

22 bHaptics Tactsuit Home Page, <https://www.bhaptics.com/tactsuit/> (last visited May 12, 2025, currently retails for \$499 USD).

23 VRCHAT is another example of a VR world. See VR Chat Home Page, <https://hello.vrchat.com/> (last visited May 12, 2025).

24 Yushan Yang et al., *Touch the Metaverse: Demonstration of Haptic Feedback in Network-Assisted Augmented Reality*, 2024 IEEE INTERNATIONAL CONFERENCE ON PERVASIVE COMPUTING AND COMMUNICATIONS WORKSHOPS AND OTHER AFFILIATED EVENTS 379 (2024).

dollars.”²⁵ According to one estimate from the National Society for the Prevention of Cruelty to Children (NSPCC), 15 % of children aged between five and 10 have used a virtual reality headset “and 6 % use one daily.”²⁶ Should the law recognize experiences such as the one reported by the female user as legally cognizable harms? More narrowly, can the common law of torts adapt to address claims such as virtual battery or intentional infliction of emotional distress (IIED) arising from conduct in virtual environments? These questions warrant serious attention, particularly given the rapid growth in extended reality technology users and the troubling expansion of use among increasingly younger age groups. For example, in April 2023, Meta revealed plans to reduce the minimum age for its flagship virtual reality social platform, Horizon Worlds, from 18 to 13. Two months later, following the announcement of its new Quest 3 headset set to launch for the holiday season, Meta further lowered the recommended age for its VR devices from 13 to 10.²⁷

This essay examines the feasibility of recognizing tort liability in virtual environments. Drawing from the evolution of the tort of battery, recognition of pure emotional harm (in both IIED and NIED),²⁸ and the privacy tort of appropriation of likeness, Section 2 illustrates that tort law can in fact open space for recognizing harms in XR spaces. It maintains that the key in allowing for the recognition of such harms is appreciating the expansion of the protection of physical body within these torts, to the protection of a broader concept of the “self.” Drawing on the author’s prior work, Section 2 further develops the concept of the “digital persona” to articulate virtual self-embodiments, or avatars,²⁹ are increasingly understood as aspects

25 Motley Fool Staff, *The Metaverse Could Have 5 Billion Users and a Value of \$13 Trillion, Citi Predicts* (Apr. 01, 2022, 12:48 P.M.). <https://www.nasdaq.com/articles/the-metaverse-could-have-5-billion-users-and-a-value-of-%2413-trillion-citi-predicts>.

26 Camber, *supra* note 25.

27 R.J. Cross & Edmund Coby, *VR risks for kids and teens*, U.S. Pirg Education Fund, (Nov. 15, 2023) <https://pirg.org/edfund/resources/vr-risks-for-kids/>; *see also* Meta Quest Safety Home Page, <https://www.meta.com/quest/safety-center/#> (“Using Meta Quest requires an account and is subject to requirements that include a minimum age of 10 (requirements may vary by country).”); *Welcoming Teens to Meta Horizon Worlds in the US and Canada*, Meta Newsroom, (Apr. 18, 2023) <https://about.fb.com/news/2023/04/horizon-worlds-teen-expansion-us-canada/> (explaining that Meta Quest Worlds shifted from an 18 and up rating to 13+, allowing 13–17 year olds in the US and Canada to play).

28 NIED is typically not categorized as a dignitary tort. Nevertheless, it is included in this section as the discussion on the recognition of pure emotional distress in torts is incomplete without telling the tale of NIED. *See generally*, Kenneth S. Abraham & Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317 (2019); *for a response*, *see*, Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, UNIV. OF TEX. SCH. OF L. PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES No. 710.

29 Avatars used throughout this essay include all forms of virtual self-embodiment that closely resemble the user. For example, Apple calls these Personas. *See* Apple Vision Pro Personas Home Page, *infra* note 128.

of the self, warranting dignitary protection under tort law.³⁰ Recognizing such interests not only aligns with established tort principles and the evolution of tort law to recognize protection of the “self” rather than the corporal body, it also offers a framework for addressing the persistent problem of online harassment. This essay then offers several preliminary considerations for how such harms might be conceptualized within existing legal frameworks.

Before getting into our discussion, a note on what this article is *not* about. The questions surrounding tort liability in virtual environments are numerous, and this essay does not attempt to address all of them. For example, it assumes that issues of jurisdiction are beyond its scope. It does not consider the potential liability of platform creators or manufacturers of immersive devices but instead focuses on user interactions and the possibility of tort claims between users. Accordingly, it also does not address legal questions arising from AI agents or AI-generated avatars. Rather, its focus remains on human users represented through avatars. These broader questions warrant further exploration in future work.³¹ As it will be further explained, its discussion does not include VR spaces that are inherently designed to be violent. Lastly, this essay does not cover all dignitary torts, in particular, the tort defamation since the interest protected by the tort of defamation departs from the central interest found in the other intentional dignitary torts discussed here.

2 From Protection of the Physical Body to Protection of the Dignity of the Self

In what follows, this section illustrates how the common law of torts has evolved to expand its protection from the physical body to the broader protection of the self. To demonstrate this development, this essay examines the torts of battery, intentional infliction of emotional distress (IIED), negligent infliction of emotional distress (NIED), and the privacy tort of misappropriation of name or likeness. In each of these areas, courts have gradually, yet decisively, moved away from rigid requirements focused exclusively on physical contact, extending legal protection to aspects connected to the body, the emotional dimensions of the self, and representations such as voice and likeness. These examples collectively demonstrate the law’s willingness to move beyond the physical body to address evolving harms and social norms, thereby better serving the goal of making the plaintiff whole, and protecting “the self, the

³⁰ Zahra Takhshid, *Data as Likeness*, 112 GEO. L. J. 1161 (2024).

³¹ For some of the work on such broader questions see, Marta Infantino & Mauro Bussani, *Tort Law in the Metaverse*, in RESEARCH HANDBOOK ON THE METAVERSE AND LAW, *supra* note 19 at 292.

person.” Appreciating this movement and connecting them altogether permits an understanding of avatars as an extension of the user.

2.1 Battery

Does the offensive virtual “touching” of an avatar satisfy the traditional definitions of battery? Restatement (Second) of Torts defined a battery as the following:

An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful contact with the person of the other directly or indirectly results³²

The Restatement (Third) section on Intentional Torts is also largely similar to the Restatement (Second) and states:

- (1) An actor is subject to liability to another for battery if:
 - (a) the actor intends to cause a contact with the person of the other;
 - (b) the actor’s conduct causes such a contact;
 - (c) the contact (i) is offensive or (ii) causes bodily harm to the other; and
 - (d) the other does not actually consent to the contact [or to the conduct that causes the contact].³³

With these definitions in mind, two principal issues arise in considering the touching of an avatar. First, there is the absence of physical contact, particularly where users are not employing immersive technologies such as haptic gloves or vests. Second, there is the challenge of defining what constitutes an offensive virtual touch within the context of virtual environments. The first issue to be addressed is the absence of physical contact.

While traditional examples of battery were confined to tangible physical contact, the legal application of law developed to be broader than it may initially appear. There are numerous examples illustrating how the recognition of battery has evolved to address newly emerging social contexts and wrongful behaviors. These include 1) recognition of offensive battery, 2) indirect contact satisfying the contact element of the tort, 3) relaxing the tangibility of touching to include substances such as fumes in certain cases, and 4) most notably, the recognition of the doctrine of extended personality.

³² Restatement (Second) of Torts § 13 (1965).

³³ Restatement (Third) of Torts: Inten. Torts to Persons Appendix DD § 101 (2014).

The first well-known development in the recognition of harm beyond physical harm is the recognition of “offensive battery” alongside the “harmful battery.”³⁴ Although offensive battery is an ancient tort itself, with the explicit recognition of the First Restatement of Torts, it has continued as a separate cause of action.³⁵ Whereas harmful battery involves physical contact resulting in bodily injury, tort law has explicitly expanded the scope of liability to encompass contact that, although not physically harmful, is nonetheless deemed offensive to a reasonable person’s sense of dignity.³⁶ Restatement Third states that “[a] contact is offensive if: (a) the contact offends a reasonable sense of personal dignity; or (b) the actor knows that the contact seriously offends the other’s sense of personal dignity, and it is not unduly burdensome for the actor to refrain from causing the contact.”³⁷ The Third Restatement, once again underlining the dignitary interest at the heart of battery notes that “there is no requirement that the plaintiff be aware of the offensive contact at the time that it is inflicted, so long as the circumstances demonstrate either that the contact offends a reasonable sense of dignity or that the actor knows it will seriously offend the plaintiff.”³⁸

In *Paul v. Holbrook*,³⁹ for example, the court recognized that an unwanted shoulder message from a coworker could also constitute an offensive battery. Most of recent cases of offensive battery have in fact involved “allegations by female plaintiffs of what we interpreted to be sexual, as opposed to non-sexual, touching by a defendant or defendant.”⁴⁰ This appears to be also true with respect to complaints in the metaverse. In fact, scholarship addressing “virtual rape” predates the emergence of modern metaverse platforms, with calls for criminalization gaining traction as such technologies evolved.⁴¹ If the protection of personal dignity is a core principle

³⁴ Kenneth S. Abraham & G. E. White, *How an Old Tort Became New: The Case of Offensive Battery*, 73 DEPAUL L. REV. 185 (2024).

³⁵ *Id.*

³⁶ *Id.* at 192 (scholars have observed that the origin of the qualification that conduct must be “offensive to a reasonable sense of personal dignity” is unclear; nevertheless, this limitation “has proven remarkably durable”).

³⁷ Restatement (Third) of Torts: Inten. Torts to Persons § 101 TD No. 1 (2015).

³⁸ *Id.* (however, it does then note that “[t]he contact requirement, although minimal, is a genuine requirement. An actor does not satisfy the requirement simply because his or her conduct causes the plaintiff harm or offense. Such a broad interpretation would trivialize the requirement.”)

³⁹ 696 So. 2d 1311, 1312 (Fla. Dist. Ct. App. 1997).

⁴⁰ Abraham, *supra* note 39 at 197.

⁴¹ See, e.g., Richard MacKinnon, *Virtual Rape*, 2 J. OF COMPUT.-MEDIATED COMM’N (1997); Chandler Horne, *Regulating Rape within the Virtual World*, 10 LINCOLN MEM’L UNIV. L. REV. 156 (2023); Clare McGlynn & Carlotta Rigotti, *From Virtual Rape to Meta-rape: Sexual Violence, Criminal Law and the Metaverse*, OXFORD J. OF LEGAL STUD. (2025); Natalia Rydzewski, *Between Pixels and Predators: The Landscape Of Sexual Assault And Rape In The Metaverse*, 19 FLA. INT’L UNIV. L. REV. 617 (2025).

underlying the recognition of offensive battery, then in the modern age, one may argue that avatars constitute an extension of the self that must similarly be treated with dignity.

Second, the law recognizes that indirect contact can satisfy the element of touching necessary for a *prima facie* case of battery. Courts have long accepted that actions such as firing a gun or throwing a stone constitute sufficient contact,⁴² even though the defendant does not physically touch the plaintiff themselves. Another common example can be removing the chair from behind while knowing someone is about to sit.⁴³ While the defendant does not directly touch the body of the person about to fall, she may have a claim for the tort of battery.

Third, courts appear to be interpreting the requirement of tangibility of the touching with flexibility. Although early common law definitions might have excluded contact via substances such as tobacco smoke or noxious gases,⁴⁴ several decisions have held that contact through fumes, radiation, or other intangible matter may satisfy the touching element, provided that the defendant acted with the intent to cause harm or offense.⁴⁵ This is also in line with the Restatement Third's approach which states "[t]he contact requirement is satisfied in cases where the actor causes the distribution of substances, such as hazardous or toxic chemicals or pollutants, that contact the plaintiff in an offensive or harmful way."⁴⁶

Scholars have also called this type of battery that causes physical harm without actual touching a "quasi-battery."⁴⁷ Stephen Sugarman and Caitlin Boucher note:

[I]f I shined a bright light in your eyes while you were bicycling, intending that this cause you to crash and become physically injured. I would not be liable for intentional battery since I did not make contact with your body, but would be liable for quasi-battery as I nonetheless intended to cause you physical harm."⁴⁸

Whether courts characterize such conduct as battery or quasi-battery is immaterial to the present analysis. Rather, the critical point is tort law's acknowledgment of indirect forms of harm.

Fourth – and most significant to our inquiry into virtual harms – is the doctrine of extended personality as recognized in the tort of battery. This doctrine is

⁴² Restatement (Third) of Torts: Inten. Torts to Persons § 101 DD, comm. d (2014).

⁴³ See, e.g., *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

⁴⁴ DAN B. DOBBS ET AL., *HORNBOOK ON TORTS* 67 (2d ed. 2016).

⁴⁵ *Id.* (citing *Swope v. Columbian Chems. Co.*, 281 F.3d 185 (5th Cir. 2002) (ozone fumes); *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989) (radiation)).

⁴⁶ Restatement (Third) of Torts: Inten. Torts to Persons § 101 DD, comm. d (2014).

⁴⁷ Stephen D. Sugarman & Caitlin Boucher, *Re-imagining the Dignitary Torts*, 14 J. TORT L. 101, 102 (2021).

⁴⁸ *Id.*

exemplified in the 1967 case of *Fisher v. Carrousel Motor Hotel, Inc.*⁴⁹ The plaintiff in *Fisher* was an African American “mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston.”⁵⁰ Invited to attend a conference, *Fisher* stood in line at the related event’s buffet when an employee abruptly seized the plate from his hands telling him that the restaurant did not serve African Americans.⁵¹ *Fisher* “testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn’s conduct in the presence of his associates.”⁵²

The court affirmed the awards of compensatory and punitive damages for battery, concluding that the employee’s act of forcibly taking the plate constituted an offensive contact with *Fisher*. The court cited to William Prosser’s *Law of Torts*, which noted that “[t]he interest in freedom from intentional and unpermitted contacts with the plaintiff’s person is protected by an action for the tort commonly called battery.”⁵³ Prosser continues to state, “The plaintiff’s interest in the integrity of his person includes all those things which are in contact or connected with it.”⁵⁴ In upholding the awards, the court also observed that it was not the first court to rule on this way and other examples such as snatching a book from plaintiffs hand have also been upheld as battery for causing the plaintiff to suffer “humiliation and indignity.”⁵⁵

The court also cited comment p of Restatement (Second) of Torts which in part stated:

Since the essence of the plaintiff’s grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff’s actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other’s person and therefore as partaking of its inviolability is actionable as an offensive contact with his person.⁵⁶

As illustrated by *Fisher* and the previously mentioned aspect of the law of battery, when thinking about what must be touched, courts have extended the contours of the

⁴⁹ 424 S.W.2d 627, 628–29 (Tex. 1967).

⁵⁰ *Id.* at 628.

⁵¹ As scholars have noted, the racial slur that was used in this case “is material to the fact of this case, as it makes clear the core dignitary interest being defended.” See Melissa Mortazavi, *Torts and Personhood*, 76 ARK. L. REV. 388, 388 (2023).

⁵² *Fisher*, 424 S.W.2d at 628–29.

⁵³ *Id.* at 629 (citing PROSSER, LAW OF TORTS 32 (3d ed. 1964) (emphasis added)).

⁵⁴ *Id.* (citing PROSSER, *supra* note 58 at 32).

⁵⁵ *Id.* (citing *S. H. Kress & Co. v. Brashier*, 50 S.W.2d 922 (Tex. Civ. App. 1932, no writ)).

⁵⁶ *Id.* (citing Restatement (Second) of Torts: Battery § 18, comm. p).

body to protect the dignity of the person. As scholars have noted, “personhood is not an ontological fact; it is a legal construct.”⁵⁷ And tort law has increasingly been involved in defining the contours of this personhood.⁵⁸ Today, users in the metaverse not only control every movement of their avatars, but also design them to resemble their physical appearance,⁵⁹ and use their own voices to communicate with others in the virtual environment. Recently, in the context of MMOs or even games such as the Sims, a growing trend has emerged: users livestream their gameplay with their physical faces displayed on one side of the screen and their avatar’s movements shown on the other. When a user’s avatar is inappropriately touching another user’s avatar while also making derogatory comments, as was the case in the reported case of virtual groping mentioned at the outset of the paper, it is upon tort law to grapple with the evolving nature of self-representation and the corresponding demands for dignitary protection. Or thinking about virtual co-working spaces,⁶⁰ if a co-worker’s avatar in the metaverse approaches another co-working and engages in inappropriate virtual touching, should tort law ignore this harm?⁶¹ This section has argued that given the doctrinal progression of this tort, and the other dignitary torts discussed below, it should not. Whether we decide to call this inappropriate touching a battery,⁶² a quasi-battery, or a virtual battery, the act is creating harm that needs to be remedied and tort laws expansion of its protection from the corporal body to the self-guides us to its feasibility. Next sub-section continues its exploration of tort’s law expansion of protection of the self. With recent studies illustrating the physical impact on the human body associated with the use of an avatar, we further examine the emergence of IIED and NIED.⁶³

2.2 IIED & NIED From No Injury to Recognition of a Cognizable Harm

Although the doctrinal evolution of intentional and negligent infliction of emotional distress followed distinct trajectories, one of the common interests in both torts is the

⁵⁷ Mortazavi, *supra* note 56 at 388.

⁵⁸ *Id.*

⁵⁹ The range of what avatars look are different and at times people choose avatars with nonhuman shapes and figures, which does not negate our point.

⁶⁰ See, e.g., Meta Horizon Workrooms, *supra* note 18.

⁶¹ See Denis Binder, *A Tort Perspective on Cyberbullying*, 19 CHAP. L. REV. 359 (2016).

⁶² See Alex Nicholson et al., *Trespass to the ‘person’ in the metaverse*, INT’L REV. OF L., COMPUT. & TECH. (2025) (calling it a battery, with a focus on the UK and the EU law).

⁶³ Sohye Lim & Byron Reeves, *Being in the Game: Effects of Avatar Choice and Point of View on Psychophysiological Responses During Play*, 12 MEDIA PSYCH. 348, 370 (2009).

legal recognition of harm to emotional tranquility, whether caused intentionally or negligently.⁶⁴ Courts and commentators long resisted treating mental suffering, or mental anguish, as a compensable injury. While this area of law is still developing and remains in flux, for purposes of our analysis of the expansion of protection beyond the physical body, we can say that it was the courts themselves that first perceived a category of injury for which no existing tort doctrine was an adequate fit.⁶⁵ These cases involved emotional harm that neither stemmed from a harmful or offensive bodily touching for them to be a battery, nor arose from an imminent threat to be considered as an assault.

Among the reasons frequently cited for this reluctance were: the difficulty in measuring the damages, a thing that is more or less ‘metaphysical,’ too subtle and speculative to be cable of admeasurement, flood of litigation, and even “presenting risks of outright fakery.”⁶⁶ But there was a gap in the law that needed to be filled. Courts were acknowledging that the injury was real – often manifesting as humiliation or an affront to the plaintiff’s dignity.

As for IIED, it was in 1939 that Willam Prosser wrote “[i]t is time to recognize that courts have created a new tort.”⁶⁷ And although the First Restatement initially resisted including liability for pure emotional distress, “[f]ourteen years after the Restatement’s initial publication, an amended version of Section 46 recognized liability for certain intentionally inflicted emotional distress”⁶⁸ It provided:

One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it.⁶⁹

The 1948s Restatement Supplement further explained the reasons why such harm should be recognized in torts. It stated:

The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. Such conduct is tortious. The injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests.

⁶⁴ Scholars have argued that the interests that IIED protect is broader than just the interest in emotional tranquility. See e.g., *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011).

⁶⁵ See William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939) (surveying cases where courts paved the way for the recognition of IIED harms).

⁶⁶ DOBBS ET AL., *supra* note 49 (citing Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional harm—A Comment on the Nature of Arbitrary Rules*, 34 UNIV. FLA. L. REV. 477 (1982)).

⁶⁷ Prosser, *supra* note 69.

⁶⁸ John C. P. Goldberg & Benjamin C. Zipursky, *Recklessness in Tort: Interstitial Law as Doctrinal Fine-Tuning*, in *INTERSTITIAL PRIVATE LAW* 135–141 (Samuel L. Bray et al., eds., 2024).

⁶⁹ Restatement of the Law, Torts, Supplement § 46 (1948).

In the absence of a privilege, the actor's conduct has no social utility; indeed it is antisocial. No reason or policy requires such an actor to be protected from the liability which usually attaches to the willful wrongdoer whose efforts are successful.⁷⁰

The “without a privilege” clause of the original version was later replaced by the “extreme and outrageous conduct” in the Second Restatement.⁷¹ The “outrageousness,” which has caused the tort to be also called the tort of outrage, while limiting the number of successful claims, provided a doctrinal gatekeeping function that allowed the tort to develop without opening the floodgates to excessive litigation or revisiting earlier doctrinal barriers.

The tort has been exemplified in *State Rubbish Collectors Assn. v. Siliznoff*.⁷² The case arose when members of a trade association threatened Siliznoff with violence and economic ruin unless he surrendered to their wishes about certain business accounts. Although the defendants never carried out their threat, Siliznoff “testified that because of the fright he suffered during his dispute with the association he became ill and vomited several times and had to remain away from work for a period of several days.”⁷³ The association contended that no tort had occurred because neither member had threatened Siliznoff with *immediate* physical harm, a necessary element under the traditional tort of assault.

But Justice Traynor, writing for California's Supreme Court, upheld the award for the plaintiff stating that in accordance with the Restatement [First], California recognizes liability in such cases. He noted that given the persuasive arguments “that support the recognition of a right to be free from serious, intentional, and unprivileged invasions of mental and emotional tranquility,”⁷⁴ where “mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury.”⁷⁵

In the course of the tort's doctrinal evolution, Prosser, serving as the Reporter for the Restatement (Second) of Torts, expanded the scope of IIED by incorporating a *recklessness* standard, allowing liability for conduct undertaken with reckless disregard for the risk of causing severe emotional harm.⁷⁶ Recklessness in this context can be defined “as a failure to heed a very obvious and very significant risk of

70 *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 285–86 (Cal. 1952) (citing Restatement of the Law, 1948 Supplement, Torts, § 46, comm. d).

71 Restatement (Second) of Torts § 46 (1965) states: (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

72 240 P.2d at 282.

73 *Id.* at 284.

74 *Id.* at 286.

75 *Id.*

76 Goldberg et al., *supra* note 72 at 135.

serious injury.”⁷⁷ The Restatement Third of Torts finally restated the tort in Section 104 as:

An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.⁷⁸

Therefore, despite the initial resistance, courts and commentators ultimately acknowledged the harm of emotional distress to protect the broader aspect of the “self.” Could the conduct of an avatar towards another avatar fall within the category of an IIED claim? While outrageous conduct has been a difficult threshold to meet, it is not implausible that such acts could also happen in XR spaces. Scholars have previously argued for the tort of IIED to apply to cyberattacks, arguing that such conducts meet the outrageousness requirement.⁷⁹ We will consider these issues in further detail in the last section.

Continuing with our observation on the expansion of the protection of the body to the protection of the dignity of the self, scholars have observed, “with stand-alone emotional distress as a separate tort, the Restatement Third recognizes two versions of the claim, one for intentional infliction of emotional distress (IIED), the other for negligent infliction of emotional distress (NIED).”⁸⁰

Although NIED is not typically categorized as a dignitary tort, the tale of the recognition of emotional harm is incomplete without it. The recognition of NIED claims, followed an even more complex and cautious path – one that nevertheless underscores tort law’s gradual but decisive shift away from an exclusive focus on physical harm and toward a more expansive protection of the self.

Initially, claims for negligent emotional distress were generally successful only when the harm was parasitic upon a physical injury. But under this formulation, the tort was no longer one of pure emotional harm. Scholars have observed that only in

77 JOHN C. GOLDBERG ET AL., *TORT LAW RESPONSIBILITIES AND REDRESS* 798 (5th ed. 2021).

78 Restatement (Third) of Torts: Inten. Torts to Persons § 104 DD (2014).

79 Danielle K. Citron, *Cyber Civil Rights*, 89 BOSTON UNIVERSITY LAW REVIEW 61, at 88 (2009) (citing *Gonsalves v. Conseco Ins. Co.*, No. Civ. S-06-0058, 2006 WL 3486962, at *6 (E.D. Cal. Dec. 1, 2006) (denying the defendant’s motion for summary judgment on a claim of intentional infliction of emotional distress because a reasonable jury could find that posting the plaintiff’s name and Social Security number on a website amounted to extreme and outrageous conduct); *State v. Carpenter*, 171 P.3d 41, 58 (Alaska 2007) (holding the defendant radio announcer’s actions could constitute extreme and outrageous conduct because he gave his audience the victim’s telephone and fax numbers and urged the audience to make the victim’s life “a living hell”); *Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 382 n.6, 392 (2006) (concluding that “odious e-mail messages and postings” threatening, “[y]ou can look forward to all your fingers getting broken, several kicks to the ribs and mouth, break some teeth [sic], and a cracked head,” may constitute extreme and outrageous acts)).

80 DOBBS ET AL., *supra* note 49 at 704.

the latter half of the twentieth century did courts begin to consistently recognize “true” NIED claims, in which mental anguish was treated as a standalone injury.⁸¹

In addressing the doctrinal challenge of proving injury and on the path of recognizing pure NIED claims, courts gradually expanded the concept of what constituted a sufficient injury by turning to the so-called “impact rule.”⁸² Borrowing from the law of offensive battery where any form of touching, no matter how minimal, could be sufficient under the circumstances, courts tried to continue to justify providing remedy to the plaintiff’s emotional harm by anchoring liability on the physical touch.

Under the impact rule, “recovery for disturbance of emotional tranquility could be had if the defendant made even the most minimal physical contact with the plaintiff’s person.”⁸³ Without the physical impact, no liability existed. The rule was apparently first articulated in an English case called *Victorian Railway Comm’rs v. Coultas*.⁸⁴ In this case, a gatekeeper directed a coach carrying a pregnant woman to cross train tracks, narrowly avoiding a collision. She miscarried from the shock, but her claim was denied as there was no physical impact.⁸⁵ In 1896, a New York court in *Mitchell v. Rochester Ry. Co.*⁸⁶ likewise rejected a claim brought by a pregnant woman who miscarried after a team of horses charged toward her, causing fright but no physical contact. By the early twentieth century, this physical impact test had been adopted by most major industrial states.⁸⁷

But while the impact rule was supposed to help in finding a way to allow for the remedy of had indeed suffered a harm, decision such as *Mitchell* made the rule appear arbitrary and unsatisfactory.⁸⁸ Courts thus began to look for alternative ways and slowly abandoning the impact rule.⁸⁹ For example, the court in *Robb v.*

⁸¹ GOLDBERG ET AL., *supra* note 81 at 811.

⁸² *Id.* at 825.

⁸³ *Id.*

⁸⁴ Stephan Krejci, *Is General Negligence the New Exception to the Florida Impact Rule?*, 10 FLA. A&M U. L. REV. 267, 268 (2015) (citing *Victorian Railway Comm’rs v. Coultas*, 13 App. Cas. 222, 224 (1888) (P.C. appeal taken from Austl.), available at <http://swarb.co.uk/victorian-railway-commissioners-v-coultas-pc-21-jan-1888/>).

⁸⁵ *Id.*

⁸⁶ 45 N.E. 354 (N.Y. 1896).

⁸⁷ Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L. J. 805, 816 (2004).

⁸⁸ *Id.* (citing *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir. 1991) (“This rule has been criticized . . . as being arbitrarily underinclusive for there are genuine mental injuries that are not accompanied by a physical injury or impact.”)).

⁸⁹ *Id.* (citing *Plaisance*, 937 F.2d at 1011 (abandoning the physical impact test); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772–73 (Mo. 1983) (same); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 110 (Ohio 1983) (same)); see also *Conrail v. Gottshall*, 512 U.S. 532, 547 (1994) (counting only five states that still adhere to this rule) (citing *OB-GYN Assocs. of Albany v. Littleton*, 386 S.E.2d 146 (Ga. 1989); *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991); *Anderson v. Scheffler*, 752 P.2d 667 (Kan. 1988); *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980); *Hammond v. Cent. Lane Comm’n Ctr.*, 816 P.2d 593 (Or. 1991)).

*Pennsylvania R.R. Co.*⁹⁰ dealt with apparent injuries that did not result from any bodily impact. In *Robb*, the plaintiff's vehicle became stalled at a railroad grade crossing due to a rut negligently created by the railroad. While trying to move the vehicle, plaintiff saw the train approaching. She jumped out of the vehicle missing the train crashing into her vehicle by a few seconds while standing within a few feet of the collision.⁹¹ As the court observed:

[t]he plaintiff was not touched by the train; there was no bodily impact; and she suffered no contemporaneous physical injury. Nevertheless, the plaintiff was greatly frightened and emotionally disturbed by the accident as the result of which she sustained shock to her nervous system. The fright and nervous shock resulted in physical injuries including cessation of lactation which interfered with the plaintiff's ability to nurse and otherwise care for her infant child. Her nervous and general physical condition resulting from the accident also obliged the plaintiff to abandon a horse breeding business and an article which she had been engaged to write for substantial compensation.⁹²

If the court were to adhere to the impact rule, her claim should have been rejected as there was no physical impact. Nevertheless, the court articulates several reasons why the impact rule shall not be followed and instead created the zone of danger rule. According to this rule, plaintiff can recover for emotional injury as long as there is physical harm as a result of the emotional harm, and that the plaintiff is placed in the immediate risk of physical harm.⁹³ Under the zone of danger rule, the plaintiff is not solely recovering for emotional harm, but rather, the plaintiff is able to recover damages for the emotional harm because of physical harm or illness that followed the "shock," or "nervous shock," that the plaintiff had endured.⁹⁴

While some courts adopted the zone of danger test, others focused instead on the effects of emotional distress, framing the harm in terms that would support recovery for physical injury rather than for pure emotional harm, thereby satisfying the traditional physicality requirement. According to this view "a plaintiff who could establish that she had suffered a discrete bodily harm or diagnosable illness because of having been exposed to a sudden 'shock' should be deemed to be suing not for emotional distress but for the consequent physical harm or illness."⁹⁵

While this approach may have appeared to offer a doctrinal solution, plaintiffs were still required to satisfy the element of proximate cause. In many instances, the

⁹⁰ 210 A.2d 709, 710 (Del. 1965).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Restatement Second of torts treats decisions such as *Robb* as claims for physical harms. See Restatement (Second) of Torts § 313(1) (1965).

⁹⁴ GOLDBERG ET AL., *supra* note 81 at 826.

⁹⁵ *Id.*

perceived remoteness of the injury foreclosed liability for physical harm resulting from negligently inflicted emotional distress.⁹⁶ In an effort to reconcile the need of allowing recovery with the traditional requirements of tort law, courts gradually began to abandon the “per se rule of remoteness,” and in essence allowing recovery for carelessly caused physical harms.⁹⁷

But modern courts appear to be moving further away from requiring any physical injury for allowing recovery where plaintiff can show physical symptoms such as nervous behavior or sleeplessness. As experts note:

The issue of proof of symptomology, in turn, does not arise because of a question as to whether the plaintiff has suffered a physical harm. Rather, the issue is whether the plaintiff has provided sufficient circumstantial evidence to permit the factfinder to conclude that she has actually suffered emotional distress.⁹⁸

In sum, although the traditional rule disclaimed a duty to avoid causing pure emotional harm, the exceptions that once stood at the margins have, over time, begun to assume the character of the rule itself. This evolution is reflected in the Restatement (Third) of Torts, which in Section 47 under the heading “Negligent Conduct Directly Inflicting Emotional Harm on Another,” recognizes specific categories where a duty to avoid emotional harm is affirmatively imposed. It provides, in part:

An actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct:

- (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger,⁹⁹

This essay will not discuss the other areas of the NIED law: under takings, special relationships,¹⁰⁰ and bystander liability.¹⁰¹ It is suffice to say that both scenarios work in favor of the argument advanced in this paper, which is that tort law is slowly but

⁹⁶ *Id.* at 827.

⁹⁷ *Id.* (citing Restatement (Second) of Torts § 313 I1) (1965) (apparently, this is why William Prosser he described decision such as *Robb* as “claims for carelessness causing physical harms via an emotional traumatization of the plaintiff.”)).

⁹⁸ *Id.* at 829. (citing *Dailey v. LaCroix*, 179 N.W.2d 390 (Mich. 1970)).

⁹⁹ Restatement (Third) of Torts: Phys. & Emot. Harm § 47 (2012).

¹⁰⁰ (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm. Restatement (Third) of Torts: Phys. & Emot. Harm § 47 (2012). See also *Dan B. Dobbs, Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 ARIZ. L. REV. 49 (2008).

¹⁰¹ Negligent Infliction of Emotional Harm Resulting from Bodily Harm to a Third Person, Restatement (Third) of Torts: Phys. & Emot. Harm § 48 (2012). See also *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (establishing the bystander liability rule for this area of law), and *Thing v. La Chusa*, 771 P.2d 814, 819 (Cal. 1989) (limiting bystander recovery of damages for emotional distress).

steadily moving towards the protection of the self beyond bodily injuries, with all its difficulty and resistance from both legal scholars and some of the courts. These doctrinal shifts and try and errors reflect, in part, a respond to scientific evidence of the impact of emotional harm. This is evident by even the Third Restatement Reports note on PTS. The Reporters note:

Since it gained recognition in the DSM-II, there has been considerable research into PTSD. Researchers have measured the incidence of PTSD following specific traumatic (trauma is not limited to sudden events, it includes, for example, repeated sexual harassment and child sexual abuse) events, the role of individual characteristics in determining whether an exposed individual suffers PTSD, the role of non-traumatic stressors, such as the stress of daily life, in the development of PTSD, and the relationship of PTSD with other mental-health diseases. (citation omitted).¹⁰²

Similarly, while the law is slow in catching up with the modern advancements, academia has been busy detailing the scientific evidence of emotional and physical entanglements of people and their experiences with avatars and the metaverse. Studies on avatars and virtual environment are older than the newly emerged metaverse worlds. For example, since the late 1990s, “studies have investigated the physiological reactions to stressful virtual environments, generally as a method for treating phobias, post-traumatic stress syndrome, and similar conditions using biofeedback as an objective tool.”¹⁰³ Such biological studies have only increased.¹⁰⁴

Whether the person is wearing a haptic suit or gloves that can resemble the physical impact or a “nervous shock” that some courts have required, or wearing devices that can record racing heartbeats¹⁰⁵ and other biometric features, the evidence of emotional and in some cases physical harm on people who do experience harassments by other avatars clearly exists in these immersive worlds and experiences. Tort

102 Restatement (Third) of Torts: Phys. & Emot. Harm § 47, comm. b (2012). See also Martha Chamallas, *Trauma Damages*, 52 Sw. L. Rev. 543 (2024).

103 See e.g., B. K. Wiederhold et al., *The effects of immersiveness on physiology*, 58 STUDIES IN HEALTH TECH. & INFORMATICS (1998) (revealed a positive correlation between immersion level and both heart rate and respiration rate); see also Valentin Fauveau et al., *Comprehensive Assessment of Physiological and Psychological Responses to Virtual Reality Experiences*, 1 J. of Med. Extended Reality (2024) (findings suggest that immersive VR can elicit significant autonomic nervous system responses, mirroring real-world stress reactions).

104 See, e.g., Hyewon Kim et al., *Effect of Virtual Reality on Stress Reduction and Change of Physiological Parameters Including Heart Rate Variability in People With High Stress: An Open Randomized Crossover Trial*, FRONTIERS IN PSYCH. (2021) (concluding that VR relaxation was effective in reducing subjectively reported stress in individuals with high stress).

105 *Track Your Fitness Stats on Meta Quest With Heart Rate Monitoring and Android Integration*, Meta (January 11, 2023) <https://about.fb.com/news/2023/01/track-fitness-stats-on-quest-heart-rate-monitoring-android-integration/>.

law should be prepared to face these new realities. Many of these harms have been sexual harassment cases report by women.¹⁰⁶ As previously mentioned, scholars have illustrated tort law's traditional gender bias,¹⁰⁷ especially as it relates to resistance in recognizing emotional harm.¹⁰⁸ A similar trend can be observed as it relates to reports of "virtual rape" and sexual harassments. An increasing body of scholarship has addressed the phenomenon of "virtual rape," underscoring both the seriousness of the harm and the law's persistent reluctance to confront it.¹⁰⁹ Such harassments experienced through avatar interactions are real to people the same way PTS is real.

Now that we have illustrated how the concept of the self has expanded beyond the boundaries of the physical body in torts, it is time for the law to reckon with this emerging reality of the metaverse. As Homes once said, "The life of the law has not been logic; it has been experience."¹¹⁰ The evolving recognition of emotional harms within tort law as discussed reflects its capacity to respond to new forms of injury without forsaking its foundational normative commitments. As one last example, this essay briefly addresses the tort of misappropriation of likeness, and then turns to the discussion of defense.

2.3 Appropriation of Likeness

William Prosser's classification of privacy law into four distinct torts continues to define the field today.¹¹¹ Among these four torts, the tort of appropriation of

106 See, e.g. Naomi Nix, *Attacks in the metaverse are booming. Police are starting to pay attention.*, THE WASHINGTON POST (Feb. 6, 2024) <https://www.washingtonpost.com/technology/2024/02/04/metaverse-sexual-assault-prosecution/>; see also Nancy Jo Sales, *A girl was allegedly raped in the metaverse. Is this the beginning of a dark new future?*, THE GUARDIAN (Jan. 5, 2024) <https://www.theguardian.com/commentisfree/2024/jan/05/metaverse-sexual-assault-vr-game-online-safety-meta>.

107 On privacy torts and gender bias, see JESSICA LAKE, *THE FACE THAT LAUNCHED A THOUSAND LAWSUITS: THE AMERICAN WOMAN WHO FORGED A RIGHT TO PRIVACY* 67 (2016). On the famous case of *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), Lake writes: "Chief Justice Parker's inability to identify with her meant he could not understand or empathize with her plight, which led to his unwillingness to provide her with a remedy." More generally, see also, Anita Bernstein, *Gender in Asbestos Law: Cui Bono? Cui Pacat?*, 88 TULANE L. R. 1211 (2014).

108 See, e.g., Martha Chamallas *Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990).

109 See, e.g., McGlynn, *supra* note 46.

110 Benjamin C. Zipursky & John C. P. Goldberg, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (citing OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (1881) to argue that in emerging areas of tort law, scholars add value not by rigidly applying doctrine but by asking whether recognition of new claims advances broader social goals).

111 William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

likeness (sometimes referred to as misappropriation of likeness) is the most pertinent to the present discussion.¹¹² Restatement Second of Torts defines this tort as the following:

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.¹¹³

The issue relevant to our question of torts in the metaverse and the protection of the self, is how the concept of likeness has evolved. It was in *Pavesich v. New Eng. Life Ins. Co.*,¹¹⁴ that the Supreme Court of Georgia for the first time in the U.S. recognized such privacy right in common law.

But the protection of what was initially unwanted distribution of the physical image, expanded to include other aspects of unauthorized use of one's self, such as voice.¹¹⁵ With the expansion of the scope of the tort, liability began to attach to the unauthorized use of one's "persona."¹¹⁶ This expansion encompassed even the implicit reference to an individual's identity. In *White v. Samsung Electronics America, Inc.*,¹¹⁷ the court ruled in favor of Vanna White after Samsung depicted a robot dressed in a blonde wig and evening gown, mimicking White's signature gestures from *Wheel of Fortune*. In holding for White, the court emphasized: "the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity."¹¹⁸ The court noted that case law, such as *Midler*,¹¹⁹ only teaches us, "the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity."¹²⁰

Even this privacy dignitary tort could not hold to specific means for the protection of one's identity. As developed in the author's prior work, *Data as Likeness*,¹²¹ this protection should now be conceptualized as the "digital persona," encompassing the legal protection of certain personal data. While this essay does not undertake a

¹¹² The other torts are intrusion upon seclusion, public disclosure of private facts, false light.

¹¹³ Restatement (Second) of Torts § 652C (1977).

¹¹⁴ 50 S.E. 68, 77 (Ga. 1905). Before *Pavesich*, *Roberson*, 64 N.E. at 442 led the way for the statutory recognition of the tort of appropriation of likeness (a woman was denied a right to privacy for the unauthorized use of her image, in return, the New York legislature enacted a statute to give such privacy protection).

¹¹⁵ *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).

¹¹⁶ JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 89 (2018).

¹¹⁷ 971 F.2d 1395 (9th Cir. 1992).

¹¹⁸ *Id.* at 1398.

¹¹⁹ Recognizing the extension of voice to include one's identity for the purpose of the misappropriation tort.

¹²⁰ *White*, 971 F.2d at 1398.

¹²¹ Takhshid, *supra* note 35.

full discussion of the concept, it refers the reader to *Data as Likeness* for a more detailed treatment.

But as this brief overview illustrates, tort law has progressively expanded its protection of the self beyond physical body, and this can include the self-representation in the form of avatars. In fact, as previously noted, Apple calls its version of avatar for the XR space, Persona.¹²² Through the technology incorporate in its VR headsets, by a mere scan of the face, personal Personas are captured and created. As Apple defines it: “Your Persona is a dynamic, natural representation of your face and hand movements that can be used while you’re wearing Apple Vision Pro.”¹²³ These Personas are highly realistic digital avatars that mirror the user’s human features and expressions, rather than adopting a cartoon-like form that most other VR tech currently use.¹²⁴ Apple says that personal Personas are encrypted on the user’s device and Optic ID or passcode for access.¹²⁵

Optic ID represents an even more intimate digital identifier than those commonly used, as it relies on iris recognition technology captured by Apple’s VR headset camera. According to Apple:

When you set up Optic ID, spatiotemporally modulated eye-safe near-infrared light illuminates the eye, so that the Apple Vision Pro eye cameras can capture images of your iris. This iris image data is sent to and processed on the Secure Enclave and a portion of the Apple M2 chip’s neural engine that’s protected within the Secure Enclave, where it is transformed into a mathematical representation for enrollment.¹²⁶

Given the level of personalization, it is difficult to regard such visual representations as anything other than the user, despite their non-physical format. Tort law must grapple with these emerging realities, the virtual self, and virtual wrongs, which will only become more sophisticated with time. The next section examines the issue of defenses.

¹²² Apple Vision Pro Personas Home Page <https://support.apple.com/en-us/118483> (last visited May 14, 2025).

¹²³ *Id.*

¹²⁴ Other companies are also continuously improving their avatars and also incorporating AI powered avatars. Meta states as one of its missions that they “continue to invest in photorealistic avatars. These true-to-life representations enable people to feel that familiar sense of presence across distances.” See Meta Avatars Home Page <https://www.meta.com/avatars/?srsltid=AfmBOoplI2IKpzZSc4HCcJOM0yvoQiFflcnpwKZeEJv128GZChNyYG8jb> (last visited May 14, 2025).

¹²⁵ Apple Vision Pro Personas Home Page, *supra* note 128.

¹²⁶ *Id.*

3 A Word on Defenses: Consent and First Amendment

If one accepts the central claim advanced in this essay – that the evolution of digital torts reflects a broader shift from protecting the physical body to safeguarding the integrity of the self, and that tort law should similarly extend its protection to digital self-representation in the form of avatars in XR environments – the most immediate objection to this proposition is likely to center on the question of consent. Has the metaverse user not, by entering such a space, implicitly consented to an environment where legal boundaries are uncertain – if they exist at all – and where atypical or even aggressive behavior may be normalized? What if, by design, the metaverse in question is intended to facilitate interactions such as being virtually punched or slapped in the face? It is therefore necessary to first clarify the scope of the argument advanced in this essay.

First, the harm in the XR spaces in this essay only includes virtual worlds which do not inherently promote acts of virtual violence or video games that center around violence and intentional virtual touching. For example, a popular metaverse platform, VRChat,¹²⁷ allows its users to build their own virtual spaces using Unity.¹²⁸ It allows the creator to add content warnings such as “sexually suggestive, graphic violence, excessive gore, extreme horror, etc.”¹²⁹ While the implications of user generated VR worlds are topics that can be studied in length, they are not within the scope of this essay.

Moreover, the virtual worlds and the possibility of torts in such worlds advocated in this essay are limited to spaces where users are using personal avatars that resemble more or less our reality. Examples can include Second Life¹³⁰ or workspaces advertised by companies such as Meta.¹³¹ While harm in the other VR worlds or gaming is a question worth thinking about, for the purposes of initial consideration of the feasibility of virtual torts in virtual spaces, this essay limits the scope to reality like avatars and spaces. This results from the fact that “unlike video games, the Metaverse is purposefully designed so that users can bright with them their true and complex individual identities.”¹³² It is in such spaces that “avatars can truly be a means of virtual embodiment.”¹³³

¹²⁷ VR Chat Home Page, <https://hello.vrchat.com> (last visited May 13, 2025).

¹²⁸ Unity Home Page, <https://unity.com/made-with-unity> (last visited May 13, 2025).

¹²⁹ *Id.*

¹³⁰ Second Life Home Page, <https://secondlife.com> (last visited May 13, 2025).

¹³¹ Meta Horizon Workrooms, *supra* note 18.

¹³² SCOTT SHACKELFORD ET AL., THE METAVERSE WHAT EVERYONE NEEDS TO KNOW 72 (2025).

¹³³ *Id.*

As such, consider a recent news about a gamer from China, who uses the pseudonym Qiaboen, arguing that he can sue for emotional distress for having been virtually slapped more than 4,800 times in an online video game by other players.¹³⁴ Qiaboen has been playing the game for over 15 years and is the highest ranking player.¹³⁵ He has argued that “because all the players could see the slaps, his dignity was insulted.”¹³⁶ In this example, even assuming that the U.S. legal system had adopted the argument advanced in this essay, the player would still be unlikely to succeed on his claim for two principal reasons. First, the game is designed to allow the players to use virtual slaps (the slaps claims are in the form of thrown? eggs and sandals at the other players avatar), and players consent to the inherent design and rules of the games. Next, the avatars in the game are not human like avatars, they do not move, do not resemble the players, and lack other features that an avatar in a XR space would have. Under such circumstances, the argument of self-representation through avatar advanced in this essay will most likely not succeed.¹³⁷

Next, the question of recreational versus non-recreational use arises. One might argue that because these environments are frequently designed for entertainment, the nature and scope of user consent, which can be implied or express, should be construed more broadly akin to the way courts evaluate consent in physical-world recreational contexts. To address this concern, three points must be considered.

First, while consent plays a significant role in the success of affirmative defenses in the context of recreational activities, it is not always dispositive. The recreational nature of the activity alone does not determine the outcome. There are many aspects that a court considers determining the validity and the scope of consent, and intentional touching cannot always fall within the scope of consent. Thus, the scope of consent is a question that will determine the outcome of many cases. Next, even in negligence lawsuits, where the defense of assumption of risk is raised, courts have been willing to hold defendants liable despite the recreational nature of the activity.¹³⁸

Third, not all VR worlds are recreational or set up for entertainment. As previously noted, big investors of VR are not betting alone on entertainment and gaming

134 Zoey Zhang, *Man sues China gaming firm for depression after being ‘virtually slapped’ 4,800 times*, MYNEWS, (April 6, 2025, 6:00 P.M.), <https://www.scmp.com/news/people-culture/trending-china/article/3304913/man-sues-china-gaming-firm-depression-after-being-virtually-slapped-4800-times>.

135 *Id.*

136 *Id.* What he calls as slaps were in the form of digital eggs or sandals thrown at his avatar.

137 One grey area can be how much the person is invested in their avatars, even if they do not look like the human player. In this case, the user has been playing the game more than 15 years. We will briefly discuss the issue of personal investment in the avatar in our last section.

138 For a full analysis of this topic, see Zahra Takhshid, *Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, 42 CARDOZO L. REV. 2183 (2021).

industry and see the potential far beyond that. Tim Cook, the CEO of Apple, has noted: “I do think that a significant portion of the population of developed countries, and eventually all countries, will have AR experiences every day, almost like eating three meals a day. It will become that much a part of you.”¹³⁹ Metaverses is “more of a concept that describes the way we communicate, socialize, do business, shop, and do just about everything else in the future.”¹⁴⁰ Thus, reducing the metaverse to a gaming platform overlooks its broader and evolving functions. While consent can be a valid defense to a virtual tort, it is not a decisive factor that should preclude further consideration of tort liability.

The next defense that deserves closer consideration is the First Amendment and its potential implications for dignitary tort liability in virtual spaces. This is particularly important as we considered the tort of IIED. In *Snyder v. Phelps*,¹⁴¹ the Supreme Court held that IIED brought by private plaintiffs can sometimes run afoul of the First Amendment when matters of public concern are involved. But the Supreme Court has also long ruled that several classes of speech are not constitutionally protect.¹⁴² In *Chaplinsky v. State of New Hampshire*¹⁴³ the court stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.¹⁴⁴

The harassments and wrongs discussed in this essay fall within the categories of unprotected speech. Others have also argued that “humiliating threatening, and persistent online cruelty amounts to extreme and outrageous activity because it falls outside of the norms of decency.”¹⁴⁵

Moreover, as previously discussed, the immersive nature of the VR experience adds additional elements to the wrong that make speech in that space fundamentally different from an old traditional chatroom or the modern version of harassment in social media

¹³⁹ SHACKELFORD ET AL., *supra* note 138 (citing Bernard Marr, *The Best Metaverse Quotes Everyone Should Read*, FORBES (Aug. 15, 2022, 12:59 A.M.) <https://www.forbes.com/sites/bernardmarr/2022/08/15/the-10-best-metaverse-quotes-everyone-should-read/>).

¹⁴⁰ *Id.*

¹⁴¹ *Snyder v. Phelps*, 562 U.S. 443 (2011).

¹⁴² For a criticism of this decision see Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011).

¹⁴³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹⁴⁴ *Id.*

¹⁴⁵ DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 121 (2014).

platforms comments. The user in the VR is using their own voice to inflict the harm. Accordingly, the nature and scope of harassment in these settings should not be equated with more conventional forms of online harassment, as such comparisons may obscure the proper legal framework, the availability and the reach of certain defenses.

4 Initial Considerations for Dignitary Torts in the Metaverse

This essay has shown that tort law has gradually shifted its focus from exclusively protecting the body to recognizing harms to the self. As we move toward a future in which technological advancements render our digital identities as commonplace as email communication once replaced letters and phone calls, tort law must be prepared to think creatively about recognizing injuries occurring in virtual spaces – particularly those involving digital representations of the self via avatars. This essay offers several initial considerations for paving the way.

First, let us benefit from the holding of *Robb* to address the concern of floodgate of lawsuits and why such concern should not stop us from recognizing harm where harm is happening. Although the law remains unsettled, courts have nonetheless crafted approaches that both acknowledge the harm and constrain its scope. The court noted in *Robb*:

[i]t is the duty of the courts to afford a remedy and redress for every substantial wrong. Part of our basic law is the mandate that ‘every man for an injury done him in his *** person *** shall have remedy by the due course of law ***.’ (citation omitted) ... if there be increased litigation, the courts must willingly cope with the task.¹⁴⁶

Next, before laying out the zone of danger test, the court went on to also touch on another concern that also resonates with us, which is the question of illusory claims in the metaverse. The court observed:

As to the danger of illusory and fictional claims, this is not a new problem; our courts deal constantly with claims for pain and suffering based upon subjective symptoms only; and the courts and the medical profession have been found equal to the danger. Fraudulent claims may be feigned in a slight-impact case as well as in a no-impact case.¹⁴⁷

In addition, this essay has shown that emerging scientific research demonstrates how wrongful conduct in virtual environments – such as virtual groping or sexual harassment – can produce measurable physical effects on the user. Such empirical

¹⁴⁶ *Robb*, 210 A.2d at 714 (1965).

¹⁴⁷ *Id.*

evidence may help address lingering hesitation in recognizing these harms as legally cognizable.

Next, the issue of proving harm in the metaverse may be raised. However, as observed in *Robb*, this evidentiary challenge is not unique to virtual environments, even if its contours may differ in this context. The court noted:

[T]he problems of adequacy of proof, for the avoidance of speculative and conjectural damages, are common to personal injury cases generally and are surmountable, being satisfactorily solved by our courts in case after case.¹⁴⁸

Moreover, as in conventional personal injury cases, plaintiffs may present physiological and psychological symptoms – such as sleeplessness, heightened stress, or PTSD – as evidence of harm. If the plaintiff is wearing a haptic suit, the suit may also record tactile sensations or physiological responses, such as an elevated heart rate. While the methods of proving harm in virtual spaces differ in form, they bear meaningful similarities to those long accepted in tort law.

Courts have been creative in finding limits for liability and the ability to bring claims. Here also, as discussed in the previous section, one way to limit virtual dignitary torts is by confining them to instances involving avatars that closely resemble the user. If avatars evolve to become more like Apple's Persona, incorporating bodily features and biometric likenesses, establishing such claims will not present difficult questions. However, even in cases where users do not scan themselves into the virtual world but instead design and edit their own avatars, the degree of resemblance to the user may still support the argument that the avatar functions as an extension of the self, thereby reinforcing the viability of the tort claim.

We can also take into considerations how invested the person has been in using its avatar and in associating itself with the avatar. This can resemble the test found in other areas of tort law that have required “a reaction beyond that which would be anticipated in a disinterested witness”¹⁴⁹ for the recovery of an emotional harm.

Courts may also require a pattern of repeated conduct to establish intent to cause harm in XR spaces. For instance, persistently intruding upon another user's avatar – such as repeatedly approaching or invading their virtual space – may serve as evidence of such intent. Courts have relied on evidence of a pattern of conduct as a critical factor in allowing IIED claims to proceed to the jury. For instance, in *Lopez v. Trahan*,¹⁵⁰ a New York court found that a triable issue of fact existed regarding the plaintiff's claim for intentional infliction of emotional distress. Lopez filed suit against her former employer, Dr. Trahan, asserting IIED among other causes of

148 *Id.*

149 *Thing*, 771 P.2d at 829–30 (An NIED Bystander liability case).

150 234 A.D.3d 552, 554 (2025).

action. In denying summary judgment, the court emphasized the repeated nature of the alleged misconduct and noted:

A reasonable jury could view the evidence that plaintiff's employer regularly screamed at, berated, and physically assaulted her as "both (1) a deliberate and malicious campaign of harassment and intimidation and (2) an abuse of power" [citations omitted] Plaintiff's medical records documenting her repeated visits to the emergency room for asthma, high blood pressure, and a panic attack following verbal and physical altercations with her boss create issues of fact as to whether plaintiff suffered severe emotional distress that was caused by his conduct.¹⁵¹

Similarly, regular misconduct in the metaverse can give rise to a viable virtual IIED claim.

This essay previously addressed the possibility of a battery in XR spaces at the end of the discussion on battery, but now a world on assault. The tort occurs "when, because of the right kind of intentional act by the defendant, the plaintiff reasonably apprehends that she is about to be touched in a harmful or offensive manner."¹⁵² While the tort is to protect people from the threats of being touch, if we recognize the viability of virtual battery, we can accordingly recognize the viability of the threat of such virtual touching. Similarly, with the technology that allows either recording of the VR spaces or suits that track heartbeat, proving that the plaintiff did in fact apprehend and believe they were about to be touch, is not impossible.¹⁵³

Another important consideration is that because many dignitary torts hinge on prevailing social norms, it is essential to account for the norms specific to XR environments. These norms may diverge from those governing physical interactions, and this divergence can cut both ways: it may complicate the viability of certain claims or, alternatively, reframe what constitutes conduct offensive to a reasonable sense of dignity. Accordingly, thinking about a framework for the 'reasonable digital person' becomes critical to articulating a coherent liability regime within virtual spaces. In the case of battery, for example, determining offensiveness is largely in the hands of the fact finder. As such we can also ask the jury to determine whether a reasonable person would find such interaction to be offensive virtual touching, or outrageous conduct. As experts have noted, "at the cost of some uncertainty, this approach has the advantage of permitting the law to track changing norms regarding the proprietary of different kind of touch."¹⁵⁴

¹⁵¹ *Id.*

¹⁵² JOHN C. GOLDBERG AND BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW TORTS* 218 (2010).

¹⁵³ One last potential tort worthy of mention for the XR spaces is the tort of purposeful infliction of bodily harm which appears in section 104 of the Tentative Draft 1 of the Intentional Torts Restatement. See e.g., *Eichenwald v. Rivello*, 318 F. Supp. 3d 766 (D. Md. 2018) (plaintiff sues when defendant knowingly sent a GIF with a rapidly flashing strobe image to cause plaintiff a seizure).

¹⁵⁴ *Id.* at 201.

These claims can also be limited to immersive metaverse environments only, thereby distinguishing them from digital harms arising from non-immersive technologies. Such narrowing not only reflects the unique nature of embodied presence in virtual spaces but also serves to mitigate concerns about a flood of litigation or potential misuse of the legal system.

These initial observations are intended to encourage tort scholars to engage with the concept of the reasonable digital person, the extended digital self-advocated here, and to consider how conduct in the metaverse may similarly give rise to viable dignitary tort claims. In this path, building a baseline understanding of the underlying technology across the legal community from judges to legal academy, is an essential starting point. Courts have already begun to incorporate virtual reality in their courtrooms, with judges using VR headsets to examine crime scenes. They have also begun dealing with augmented reality tort cases, such as the question of the feasibility of trespassing by a digital Pokémon Go that is only visible through a device and not by the naked eye.¹⁵⁵ As such practices become more common, the legal academy must be prepared to engage with and teach about the metaverse in a more comprehensive and informed manner.¹⁵⁶

5 Conclusions

Technological advancements have fueled a booming industry for extended reality (XR). With spatial computing emerging as a key technological trend in 2025 and AI capabilities advancing rapidly, further developments are inevitable. People are evermore digitally connected and the self that tort law has long protected is expanding beyond the physical into the virtual spaces that did not exist before. In this evolving landscape, tort law faces an existential question: whether to remain static or to evolve in response to shifting social norms and newly emerging forms of harm. While tort law has traditionally had a hard time recognizing new torts, it has shown willingness to allow for its principles to be interpreted more broadly. It is thus time to reconsider both the concept of the self protected by tort law and the scope of harm cognizable within dignitary torts, so as to permit recovery through tort law for harms occurring within XR spaces.

¹⁵⁵ *Marder v. Niantic, Inc.*, No 4:16-cv-04300-KAW (N.D. Cal. 2016) (the case was settled). For more on this topic see Madison Pevey, *Cover Your Ash: Upholding the Physical Entry Requirement for Trespass in the Age of Pokémon Go*, 44 VT. L. REV. (2019).

¹⁵⁶ Sean O'Driscoll, *Florida Judge Wears VR Headset To Step Inside Simulated Crime Scene*, NEWSWEEK (Jan. 3, 2025, 10:47 A.M.) <https://www.newsweek.com/virtual-reality-headset-court-judge-florida-aggravated-assault-case-2009193>.