

QUASI-PERSONHOOD: AN ARGUMENT FOR INTERMEDIATE STATUS OF VIDEO GAME LIVES À LA FROZEN PRE- EMBRYOS

NGUYEN LE

INTRODUCTION

In a society that is becoming increasingly virtual, it has become undeniably difficult to ignore or explain away the tight intertwining of virtual and real life.¹ From Zoom work meetings to virtual instruction to livestreamed weddings, almost all aspects of life can be faithfully reproduced online.² Contributing to this move toward virtual socializing is not only technological innovation—leading to faster, more convenient connection—but also a worldwide pandemic that necessitated an almost universal move to virtual options for connecting with others.³

As people look for more engaging ways to supplement their real lives, online means of socialization, such as video games, have become a common and important arena for human interaction.⁴ Gaming is one of the most popular activities for socializing with loved ones, with one survey showing that only dining out is more common.⁵ Contrary to the stereotype of the lonely gamer in the basement, reports show that a majority—sixty-six percent—of gamers play with other people.⁶

As video games become more immersive and our virtual lives become more intertwined with our physical lives, it becomes more important to consider how much trust players put in gaming studios. Players no longer look at video games as simply a form of entertainment, pastime, or casual hobby.⁷ A growing number of players now look to video games for a

1. Debra Kamin, *In a Pandemic, Creative and Mostly Visual Socializing*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/realestate/quarantine-activities.html>.

2. *Id.*

3. *Id.*

4. Antonio Miller, *How Gaming Platforms are Driving Social Connection*, DIGIDAY (Nov. 7, 2022), <https://digiday.com/sponsored/how-gaming-platforms-are-driving-social-connection/>.

5. *Id.*

6. *Id. See also* James Lahey, *In-Game Chat & Social Gaming 101*, DEV (May 9, 2022), <https://dev.to/jameslahey/in-game-chat-social-gaming-101-18hk>.

7. Miller, *supra* note 4.

significant portion of their social interactions, educational and skills training, and even as tools for maintaining their mental health.⁸

With increasing dependence on and attachment to these online worlds and characters, it seems appropriate to ask what sorts of ethical or legal restrictions can be implemented to prevent studios from “sunsetting” games. This discontinuation of production and development can eliminate countless relationships, businesses, and lives, leaving little—if any—recourse for players who lose their in-game lives. And while there has been increased discussion about what video game developers might owe players,⁹ how many have considered the effects of shutting down a game or unjustly terminating an account that doubles as a second life for many players? Perhaps more importantly, how many players have considered what their studios might owe them?

A possible pathway to the answer might lie in the way courts have analyzed the validity of cases involving the loss and destruction of frozen pre-embryos.¹⁰ In these cases, patients were allowed to move forward with their claims against fertility clinics on theories of breach of contract, bailment agreements, and fiduciary duty resulting in emotional distress.¹¹ The plaintiffs in these cases successfully argued for the pre-embryos to be recognized not as mere property, but as irreplaceable property—a designation relatively closer to personhood that might be entitled to more protection.¹² Players seeking legal recourse for unjustified termination of their accounts might find the framework of these arguments applicable.

This Note will discuss the important role of video games in society as a tool for human connection, the value and meaning that players find in their in-game lives, and the potential for restitution in the event of unjust account loss or destruction. Section I provides a detailed examination of how video games may mitigate the effects of social isolation and act as a venue for

8. See generally Rachel Kowert et al., *The Relationship Between Online Video Game Involvement and Gaming-Related Friendships Among Emotionally Sensitive Individuals*, 17 CYBERPSYCH., BEHAV. & SOC. NETWORKING 447 (2014).

9. Ron Kerbs, *The Responsibility of Video Game Developers in Keeping Kids Safe While Gaming Online*, TECHSPECTIVE (Apr. 11, 2023), <https://techspective.net/2023/04/11/the-responsibility-of-video-game-developers-in-keeping-kids-safe-while-gaming-online/>; *Coming Regulations Mean Game Developers Must Be Proactive on Safety and Trust*, VENTUREBEAT: GAMESBEAT (Aug. 9, 2023), <https://venturebeat.com/games/coming-regulations-mean-game-developers-must-be-proactive-on-safety-and-trust/>; Katherine Tanganakis-Lippert, *A Sexual Assault in the Metaverse Has Investigators Questioning the Future of Virtual Crime Prosecution*, BUS. INSIDER (Jan. 7, 2024, 7:26 PM), <https://www.businessinsider.com/police-investigate-digital-gang-rape-teen-vr-metaverse-horizon-worlds-2024-1>.

10. *Frisina v. Women & Infants Hosp. of R.I.*, Nos. 95-4037, 95-4469, 95-5827, 2002 R.I. Super. LEXIS 73 (May 30, 2002); *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386 (Ariz. Ct. App. 2005).

11. *Frisina*, 2002 R.I. Super. LEXIS 73 at *50; *Jeter*, 211 Ariz. 386.

12. *Frisina*, 2002 R.I. Super. LEXIS 73 at *38; *Jeter*, 211 Ariz. 386 at 389.

shared experiences. Section II presents an illustration of the frustrations players have faced in searching for recourse after termination of their accounts. Section III provides an in-depth analysis of the legal arguments presented in two civil cases regarding the loss and destruction of frozen pre-embryos. Section IV ties together the arguments in the two cases regarding the destruction of frozen pre-embryos and analyzes the potential that the same or similar arguments can be repurposed by players litigating the destruction or termination of their gaming accounts. Section V considers whether the positive effects of video games on society demand and justify giving more importance and validation to the idea of virtual experiences, relationships, and communities.

By the Note's conclusion, the hope is that there will be the beginning of an adequate answer to a common question asked by players who have lost their virtual lives and communities to unjustified permanent bans and a related one: Is there anything that can be done for people who suffer injury to their virtual life?¹³ And if so, what?

I. ROLE OF VIDEO GAMES IN FULFILLING SOCIAL NEEDS

The use of gaming as a way to socialize virtually is not a new idea.¹⁴ Players have looked to video games as a way to connect with friends and meet new people, building and maintaining a rich social life in-game.¹⁵ For some players, this virtual life can hold as much value as their physical lives.¹⁶ The most invested players have even built full-time careers and deep romantic relationships through gaming platforms, and many would find it difficult to fully separate themselves from their in-game character.¹⁷

Gaming studios and developers are well aware that players often use their products as an extension of their real lives, and many make specific development decisions to strengthen the association between the virtual life they provide and their players' real lives.¹⁸ For gaming studios, maximizing

13. See generally StealthPolarBear, *Activision Account and Ban Issues Mega Thread*, REDDIT: R/ACTIVISION (last visited Nov. 7, 2023), https://www.reddit.com/r/activision/comments/17pl65h/activision_account_and_ban_issues_mega_thread/ (not a direct quote from any of these comments, but a general consensus among the participants in the thread is that they want to know what their legal options are).

14. See generally Logan Molyneux et al., *Gaming Social Capital: Exploring Civic Value in Multiplayer Video Games*, 20 J. COMPUTER-MEDIATED COMM. 381 (2015).

15. *Id.* at 381-82; Kowert et al., *supra* note 8, at 448.

16. Molyneux et al., *supra* note 14, at 382; see also Kowert et al., *supra* note 8.

17. See Kowert et al., *supra* note 8.

18. Ben Sim, *Effective Gameplay Elements for Designing Addictive Video Games*, GAME DEV. (July 3, 2017), <https://www.gamedeveloper.com/production/effective-gameplay-elements-for-designing-addictive-video-games#close-modal>.

player engagement and retention is key to long-term success.¹⁹ Fostering players' reliance on their specific game as a way to socialize and maintain personal relationships is a strong strategy for achieving these goals, and studios spend much time and money on building robust player-on-player interaction systems to capitalize on players' emotional and social investment.²⁰

In building these social systems, gaming studios allow players to interact with both other players and the game's environment in a way that mirrors reality.²¹ In many popular "cozy" games, players receive a plot of land where they can build and personalize their home.²² Players can receive visitors in their home, fostering a sense of pride and attachment.²³ These games also encourage players to invest time into gathering resources to build additions to their home and both in-game and real currency into purchasing these upgrades.²⁴ This creates a bond between players and their in-game homes.²⁵ For many players, this home is a safe space where they can express themselves and interact with others despite any shyness or social anxiety they may have in real life.²⁶

Developers also invest heavily in their chat system, allowing players to use pre-set emotes, text-chat, and voice-chat to interact with others in the game.²⁷ This helps to foster in-game relationships, as players can more easily get to know each other and connect.²⁸ As players establish more in-game relationships, they have more reason to return to the game over other options.²⁹

Even games that do not necessarily advertise themselves as sociable games often implement social media-like systems to increase

19. *Id.*; see also Josh Bycer, *Why Video Games Are Addictive and There's Nothing Inherently Wrong with That*, MEDIUM (Nov. 8, 2018), <https://medium.com/@GWBycer/why-video-games-are-addictive-8167ab145c4d>.

20. Sim, *supra* note 18.

21. *Id.*

22. See e.g., *Animal Crossing*, GAMERANT, <https://gamerant.com/tag/animal-crossing/>; *Stardew Valley*, GAMERANT, <https://gamerant.com/tag/stardew-valley/>. These games, along with similar titles, allow players to build, decorate, and expand their homes. In *Stardew Valley*, players can also choose to build co-operative farms with their friends, where they play in the same server and work together to expand the farm. Players can also choose to have relationships with their friends in co-op mode or with the non-player characters ("NPC") in single-player mode. In *Animal Crossing*, players are able to visit other islands, simulating social visits and in-person hangouts in real life.

23. See sources cited and discussion *supra* note 22.

24. See sources cited and discussion *supra* note 22.

25. See sources cited and discussion *supra* note 22; see also Kowert et. al, *supra* note 8, at 450.

26. See sources cited and discussion *supra* note 22; see also Kowert et. al, *supra* note 8, at 450.

27. Lahey, *supra* note 6.

28. Sim, *supra* note 18.

29. *Id.*

competitiveness and keep players coming back.³⁰ These games usually have leaderboards where top players are listed along with their player stats and public ranking categories to signal how skilled a player is, in addition to the usual chat features that allow players to interact in real time.³¹ Leaderboards and ranking categories offer concrete goals to work toward—moving up on the leaderboard or beating out higher ranked players in matches—and provide an intense feeling of accomplishment when players excel in matches against higher ranked competitors.³²

To further ensure that players come back again and again, developers also tap into players' psychological rewards system by investing in gamification strategies.³³ Dedicated teams of designers work on making the in-game mechanics the perfect balance of difficult and satisfying.³⁴ This includes considerations such as the psychological effects on human chemical rewards systems of various inputs such as time, in-game resources required to complete achievements or goals (i.e., health, energy, and in-game currency), frequency of achievement awards, frequency of skill level increases, variety of skills available, and the variety of activities available.³⁵

With all the investment that gaming studios put into making games addictive and keeping players engaged, it should come as no surprise that players find fulfillment in multiple areas of life through their game of choice.³⁶ Players commonly look to social games to maintain relationships—some of these relationships may exist exclusively in-game, while others may overlap with their real lives.³⁷ It is not uncommon for players to have close friends that they only know through their gaming, having never met in person. In fact, some players have even met long-term partners through a video game.³⁸

For many people, video games are one of the best ways to share experiences and maintain a connection with friends and loved ones who live

30. *Id.*; see e.g., *Call of Duty*, GAMERANT, <https://gamerant.com/tag/call-of-duty/>; *Valorant*, GAMERANT, <https://gamerant.com/tag/valorant/>.

31. Sim, *supra* note 18.

32. *Id.*

33. See *Gamification*, in OXFORD ENG. DICTIONARY (2023) (“The action or process of making something into or like a game; spec. the application of elements of game playing (such as point scoring, competition with others, etc.) to other areas of activity, typically to encourage engagement with a product or service.”); see also Sim, *supra* note 18; Bycer, *supra* note 19.

34. Sim, *supra* note 18.

35. Bycer, *supra* note 19; see also Sim, *supra* note 18 (“Leveling Systems” section discusses how game design factors such as time spent to achieve next character levels can make a game more addictive to players, while “Discovery and Exploration” section discusses novelty as another factor).

36. Molyneux et al., *supra* note 14, at 393; see also Kowert et. al, *supra* note 8 at 447.

37. Molyneux et al., *supra* note 14, at 393.

38. Kowert et. al, *supra* note 8, at 448.

far away.³⁹ Instead of simply having a video call, players can gather their friends from near and far to go on quests.⁴⁰ Instead of lamenting their inability to meet up for a hike or picnic at a neighborhood park, they can build their own parks and forests on virtual co-op farms.⁴¹ Instead of simply texting their cross-country friends about their favorite team winning, players can team up with those friends to take down common enemies in-game.⁴² This socially rich and interactive option became particularly important when the COVID-19 pandemic forced society into social isolation and many relationships became long-distance.⁴³

Following the isolation of the COVID-19 pandemic and the subsequent move toward online alternatives to socializing in-person, society has increasingly recognized the validity of online relationships and the potential societal value of video games.⁴⁴ Humans are inherently social creatures, and the sudden withdrawal from society negatively affected many people psychologically and physically.⁴⁵ Studies have shown that people reported an increase in feelings of depression and anxiety stemming from the isolation of the pandemic.⁴⁶ Other mental health conditions were also found to be exacerbated by the isolation and disruption in routine.⁴⁷ Subjects surveyed in a 2022 study also reported increases in insomnia, psychosis, and substance use and abuse as a result of the social isolation and disruption caused by the pandemic.⁴⁸

For many, especially those who lived alone, video games offered an immersive and engaging way to lessen the feeling of isolation during this time.⁴⁹ Unlike a FaceTime call or a Zoom meeting, video games presented an opportunity for more active participation and interaction with other participants.⁵⁰ Families who had to put weekly dinners and birthday

39. Nicole Clark, *The Video Game That Got Me Through My Long-Distance Relationship*, CUT (Apr. 18, 2018), <https://www.thecut.com/2018/04/video-games-loneliness-long-distance-relationship.html>; Heather Kelly, *They Laughed, They Cried, They Killed Monsters: How Friendships Thrived in Video Games During the Pandemic*, WASH. POST (Mar. 20, 2021), <https://www.washingtonpost.com/technology/2021/03/20/video-games-pandemic-friends/>.

40. Kelly, *supra* note 39.

41. *Id.*

42. *Id.*

43. *Id.*; Bryan Lufkin, *How Online Gaming Has Become a Social Lifeline*, BBC (Dec. 16, 2020), <https://www.bbc.com/worklife/article/20201215-how-online-gaming-has-become-a-social-lifeline>.

44. Kelly, *supra* note 39; Lufkin, *supra* note 43.

45. Alexiss Jeffers et al., *Impact of Social Isolation During the COVID-19 Pandemic on Mental Health, Substance Use, and Homelessness: Qualitative Interviews with Behavioral Health Providers*, INT'L J. ENV'T RSCHS. & PUB. HEALTH, 2022, at 1.

46. *Id.*

47. *Id.*

48. *Id.*

49. Lufkin, *supra* note 43.

50. *Id.*

celebrations on hold could have virtual game nights from their various homes using games like *Jackbox Games*.⁵¹ Friends who could no longer meet for weekend adventures could now go on virtual quests together in fantasy massively-multiplayer online games (“MMOs”) instead.⁵² Coworkers who could no longer get to know each other over company-sponsored happy hours could hone their cooperative detective skills and “sus out” imposters with a team game of *Among Us*.⁵³

As the pandemic stretched on, video games also played a role in giving players a reason to get out of bed and safely leave the house, further lessening the burden of social isolation.⁵⁴ Augmented reality games, such as *Pokemon GO!* and *Harry Potter: Wizards Unite*, motivated players to venture outside and allowed them to participate in a wide-spread quest while maintaining social distance.⁵⁵ In this way, the suspicion many had during pandemic lockdowns that society had completely broken down was alleviated.⁵⁶

In addition to depending on video games for social interactions with new friends and familiar loved ones, some players have also been able to build full-time careers in gaming,⁵⁷ with studios seeking out top players for endorsement deals and streaming-based marketing.⁵⁸ Similar to the dopamine carrot developers may use to entice players to choose their game over others by optimizing effort-to-reward ratios to maximize the effect their game has on reward centers in players’ brains, studios looking to

51. *Jackbox Games*, GAMERANT, <https://gamerant.com/tag/jackbox-games/>. *Jackbox Games* is a series from a developer of the same name that offers a convenient way for groups to have virtual “game nights.” Similarly to how a group might have an in-person game night with a variety of games to choose from, *Jackbox Games* allows the group to choose from a variety of games in the collection. Depending on the game chosen, players can participate in trivia contests, group puzzle games, and classic team games reminiscent of games like *Charades* and *Dictionary*.

52. Lufkin, *supra* note 43.

53. *Id.*

54. Louise A. Ellis et al., *COVID-19 as ‘Game Changer’ for the Physical Activity and Mental Well-Being of Augmented Reality Game Players During the Pandemic: Mixed Methods Survey Study*, 22 J. MED. INTERNET RSCH., 2020, at 1 (2020).

55. *Id.*; see generally *Pokemon GO*, GAMERANT, <https://gamerant.com/tag/pokemon-go/> (*Pokemon GO* sends players on a geocache-esque hunt framed by the nostalgia of the original *Pokemon* games, animated shows, and films. Players use their phones to find and capture pokemon that spawn in actual physical locations. Common spawn sites include local businesses, landmarks, parks, and the like.); *Harry Potter: Wizards Unite*, GAMERANT, <https://gamerant.com/tag/harry-potter-wizards-unite/> (*Harry Potter: Wizards Unite* is a game similar to *Pokemon GO*. Instead of pokemon trainers searching for and capturing pokemon, players in *Harry Potter: Wizards Unite* play as wizards who hunt down magical objects in the physical world using their phones.).

56. Ellis et al., *supra* note 54.

57. Ali Dursun, *How Influencers and Streamers Affect Game Popularity*, MEDIUM (Jun. 23, 2023), https://medium.com/@ratic_io/how-influencers-and-streamers-affect-game-popularity-1979227d5e8f.

58. *Id.*

increase their player base often do so by luring in top streamers and gamers with the carrot of lucrative endorsement deals.⁵⁹

For players successful enough to make gaming their full-time jobs, alleged cheating resulting in a ban or a security breach resulting in their account being stolen can lead to significant financial harm.⁶⁰ E-sports, streaming, and other methods by which gamers can monetize their skills are becoming increasingly common.⁶¹ With top players bringing in seven-figure earnings per year and top streamers making six-figures per month on platforms such as Twitch,⁶² it is hardly a stretch to say that a video game studio's decision to shut down an account or oversight resulting in an account being hacked can have enormous financial consequences for players.⁶³

II. ACCOUNT LOSS: COSTS AND SEARCH FOR SOLUTIONS

Understandably, with so much of their personal and sometimes professional lives intertwined with their in-game characters, players may become emotionally attached to their preferred video games.⁶⁴ Given this attachment, extreme distress is unsurprising in cases where players are no longer able to access these in-game lives.⁶⁵ For some players, this could be

59. *Id.*

60. *Id.*

61. *Id.*

62. Joseph Yaden, *What Is Twitch? Everything You Need to Know About the Top Live-Streaming Platform*, DIGITALTRENDS (Aug. 9, 2022), <https://www.digitaltrends.com/gaming/what-is-twitch/> (Twitch provides a platform for content creators to livestream and interact with their followers. Although Twitch is used by content creators in many categories, a significant number of the channels on the platform are dedicated to livestreaming video games. Streamers livestream matches, walk-throughs, and game sessions for viewers to watch and comment on via a live chat. Viewers can subscribe to channels they enjoy, allowing the streamer to earn money from their streams. Ads also provide more prolific streamers with another way to generate income.).

63. *Highest Paid Streamers on Twitch by Subscribers*, STREAMCHARTS, <https://streamscharts.com/subscribers?sortBy=income>. The top streamer listed on StreamsCharts is Jynxzi, who has an estimated monthly income of just under a quarter of a million dollars.

64. Mike Swanson, *My Year-Long Struggle Against a Call of Duty Permanent Ban*, TUMBLR: MIKE SWANSON'S BLOG (Nov. 26, 2023, 12:11 PM), <https://blog.mikeswanson.com/post/735082689953169408/my-year-long-struggle-against-a-call-of-duty-false> (blogpost detailing one player's experience fighting a wrongful ban on his twelve-year-old account, including an account of his progression through the stages of grief, the benefits he and other players get from gaming, and call for the developer to address wrongful permanent bans).

65. *Id.* ("Playing Call of Duty after work or school can serve as stress relief. For someone who has invested significant time and energy to build up an in-game character, losing this activity can have a big impact.").

due to a developer's decision to "sunset" or discontinue a game.⁶⁶ For others, the game still exists but they are personally locked out due to unfounded allegations of cheating, hacking, or some other error on the part of the studio.⁶⁷

Countless forum posts across social media platforms such as Reddit depict players desperately trying to regain access to their lost accounts from various gaming studios to no avail.⁶⁸ For some players, hundreds of hours spent building relationships and progressing through the game are lost.⁶⁹ For others, thousands of dollars are gone with no chance of recovery.⁷⁰ Some players are not even able to pinpoint a specific reason why their accounts may have been disabled by the developer and attempts to contact a support team only lead to more frustration.⁷¹ Many wonder if they have any legal recourse.⁷²

66. xland44, *What Games Did You Love Playing but They Shut Down?*, REDDIT: R/GAMING (Oct. 4, 2023), https://undelete.pushbullet.com/r/gaming/comments/16zzlp/what_games_did_you_love_playing_but_the_y_shut_down/ (original post deleted by user, but comments on thread are relevant to discussion; link is to archived post).

67. Swanson, *supra* note 64; *see also* StealthPolarBear, *supra* note 13 (thread with 799 comments about Activision account bans); W0kinman, *Longtime COD Player Banned Without Explanation with No Recourse*, REDDIT: R/CODWARZONE (May 2, 2021), https://www.reddit.com/r/CODWarzone/comments/n3ceqd/longtime_cod_player_banned_without_explanation/ (rightful owner of *Call of Duty* account banned following attempted hack, Activision denied appeal); EA_Lanna, *Re: Why am I banned When I Have Never Cheated or Violated Terms of Service?*, EA ANSWERS HQ: APEX LEGENDS (Dec. 2021), <https://answers.ea.com/t5/Technical-Issues/Why-am-I-banned-when-I-have-never-cheated-or-violated-terms-of-m-p/11043576> (Blizzard employee responds unhelpfully to question about account ban, offers no solution); Bosku, *My Account Suddenly Banned*, BLIZZARD FORUMS: NEW PLAYER HELP (Aug. 14, 2022, 10:07 PM), <https://us.forums.blizzard.com/en/d3/t/my-account-suddenly-banned/53809> (new player banned without warning or violation explanation and player details extensive experience in gaming and experience with unrelated past violations).

68. *See supra* note 67.

69. *See, e.g.*, ItsClassifiedx, REDDIT: R/ACTIVISION (Nov. 7, 2023), <https://www.reddit.com/r/activision/comments/17pl65h/comment/k86rse4/> ("I'll kick it off! 86 days ago I got permabanned out of the blue. I'm a software developer and the day I got banned I started to work with Hyper-V and Kubernetes on a Ubuntu VM. I played a game [later] that day after my workday and the next day I was banned. Never cheated, been playing cod for years, had every cod and [paid] a lot of money. Over 600 hours in the last cod alone. Support does not care and neither does steam."); sfrattini, *7years, 20k Hours Account Perma Banned. No Warning, No Explanation. Support is Trying to Look Into It...*, REDDIT: R/PATHOFEFILE (Dec. 22, 2023), https://www.reddit.com/r/pathofexile/comments/18ocpog/7years_20k_hours_account_perma_banned_no_warning/ (user spent "1000 euro in MTX," dedicated twenty thousand hours to game over seven years, and got no response from development team).

70. sfrattini, *supra* note 69.

71. W0kinman, *supra* note 67.

72. *Id.*

Although there have been court battles involving video game studios, they have mainly centered around allegations of antitrust violations⁷³ or toxic work environments at studios leading to discriminatory and harassing behaviors.⁷⁴ Most recently, studios have faced legal issues regarding their duty to protect young players and player privacy.⁷⁵ Additionally, shocking headlines about predators using gaming platforms to commit in-game sexual crimes have bolstered public demand for criminal and civil consequences for virtual acts.⁷⁶

But what about the players who are not victims of sexual harassment or virtual assault, but instead suffer from the loss of their in-game lives, relationships, careers, and communities? What legal remedies are available to them and how can they best frame the issue to courts when the societal value of video games is still widely diminished to entertainment for lonely oddballs?

The answer might lie in current legal battles in the assisted fertility and reproduction sector. Outside of the expected claims of medical malpractice and related harms, there have been a number of cases where plaintiffs have sought to recover for the loss of frozen pre-embryos prior to implantation.⁷⁷ A study of these cases might uncover potential frameworks players can use to seek recovery from video game developers for harms they may suffer when their virtual lives are lost or destroyed.

III. LEGAL FRAMEWORKS PRESENTED IN FROZEN PRE-EMBRYO CASES

When it comes to potential recovery for damages to and loss of property with massive sentimental value—a second, virtual life stored in a video game, for example—cases involving loss or damage of a potentially viable embryo stored by a fertility clinic may offer a framework.⁷⁸ While plaintiffs in these fertility cases have not been able to move forward on wrongful

73. See Diane Bartz, *US FTC Tries Again to Stop Microsoft's Already-Closed Deal for Activision*, REUTERS (Dec. 6, 2023, 2:49 PM), <https://www.reuters.com/markets/deals/us-ftc-tries-again-stop-microsofts-already-closed-deal-activision-2023-12-06/> (article discusses antitrust and anti-competition worries in bid to stop Microsoft-Activision deal).

74. Kirsten Grind et al., *Activision CEO Bobby Kotick Knew for Years About Sexual-Misconduct Allegations at Videogame Giant*, WALL ST. J. (Nov. 16, 2021, 10:59 AM), <https://www.wsj.com/articles/activision-videogames-bobby-kotick-sexual-misconduct-allegations-11637075680>.

75. Kerbs, *supra* note 9.

76. Tangalakis-Lippert, *supra* note 9.

77. See, e.g., *Frisina v. Women & Infants Hosp. of R.I.*, Nos. 95-4037, 95-4469, 95-5827, 2002 R.I. Super. LEXIS 73 (May 30, 2002); *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386. (2005).

78. See generally *Frisina*, 2002 R.I. Super. LEXIS 73; *Jeter*, 211 Ariz. 386.

death claims—which would most likely be ineffective in the case of a video game player losing access to their in-game life in any case—they have been able to pursue claims for loss of irreplaceable property, breach of bailment contract, and breach of fiduciary duties.⁷⁹ In jurisdictions that do not strictly require physical symptomatology, plaintiffs in cases for loss of property with massive sentimental value, including potentially viable embryos, have also been allowed to proceed with infliction of emotional distress—both negligent and intentional.⁸⁰

A. *Frisina v. Women & Infants Hospital of Rhode Island*

In 2002, the Superior Court of Rhode Island heard three consolidated cases against the Women and Infants Hospital of Rhode Island's In Vitro Fertilization Clinic in which the plaintiffs sought recovery for destruction or loss of frozen embryos harvested and stored by the clinic.⁸¹ Over the course of three years, multiple couples who sought assisted reproduction services at the clinic were informed that the pre-embryos they entrusted to the clinic for freezing and storage were destroyed.⁸² The plaintiffs all signed consent forms prior to and in the course of their fertility treatment, including a document that vaguely absolved the clinic of liability in the case of accidental destruction of the pre-embryos.⁸³

The plaintiffs in *Frisina* denied that the consent forms they signed took away all liability that the clinic had in the loss or destruction of the embryos, with one plaintiff testifying that she understood the provisions in the consent form to mean that the clinic was not liable in the case of “a careful accident.”⁸⁴ She further clarified that “[a] careful accident is one, I believe, that is an act of God. A careless or a sloppy accident is one of human error.”⁸⁵ Thus, the plaintiffs alleged that in this case, where the pre-embryos were lost due to human action or inaction, the clinic was still subject to liability.⁸⁶

79. See generally *Frisina*, 2002 R.I. Super. LEXIS 73; *Jeter*, 211 Ariz. 386.

80. See generally *Witt v. Yale-New Haven*, 51 Conn. Supp. 155 (2008); see also *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28 (N.Y. App. Div. 2001) (in which plaintiffs were allowed to proceed on a medical malpractice claim based solely on emotional harm after their frozen pre-embryos were implanted in another person); *Del Zio v. Presbyterian Hosp.*, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 14, 1978) (in which plaintiffs were allowed to proceed with intentional infliction of emotional distress claims after doctors destroyed the pre-embryos (in vitro culture) due to their opinion that it was medically inadvisable to continue with the procedure).

81. *Frisina*, 2002 R.I. Super. LEXIS 73.

82. *Id.* at *4-6.

83. *Id.*

84. *Id.* at *48.

85. *Id.* at *49.

86. *Id.*

The *Frisina* plaintiffs alleged that the clinic was liable for (1) medical malpractice, (2) breach of bailment contract, and (3) breach of fiduciary duty resulting in both negligent and intentional infliction of emotional distress—causing “severe trauma and emotional anguish, pain and suffering”—due to the “loss of irreplaceable property.”⁸⁷

The *Frisina* court began with an analysis as to whether the loss of frozen pre-embryos could satisfy the elements of negligent infliction of emotional distress.⁸⁸ The elements of negligent infliction of emotional distress under Rhode Island law presented a challenge for the plaintiffs due to the requirement that there be a victim around whom to structure the claim and that there be physical symptoms proving the emotional distress.⁸⁹ The court subsequently held that the plaintiffs could not move forward with this claim due to a lack of both victim and physical symptomatology.⁹⁰

Since it might be difficult for a player who has suffered the loss of their in-game character to show physical symptoms stemming from the emotional anguish they suffered, and even harder to convince courts to recognize a video game character as a person when they have been unwilling to recognize even a human pre-embryo as such,⁹¹ a claim of negligent infliction of emotional distress appears unpromising for players looking to recover from developers. That said, physical symptoms from lack of socialization and human connection have been documented in studies, so this path to recovery is far from impossible.⁹²

Even with its dismissal of one claim on the basis of the lack of physical symptomatology, the court’s decision in *Frisina* still presents a potential course of action for players with its recognition that the loss of immensely sentimental property is different from the loss of mere property.⁹³ Although the court firmly declined to recognize frozen pre-embryos as persons under Rhode Island law—for good reason given the implications of such a

87. *Id.* at *6.

88. *Id.* at *9-30.

89. *Id.* at *10, *13.

90. *Id.* at *29-30.

91. *Id.* at *32.

92. Jeffers et al., *supra* note 45.

93. See *Frisina*, 2002 R.I. Super. LEXIS 73, at *30-37.

ruling⁹⁴—it does seem to consider the possibility that to categorize them as merely property would not be quite correct either.⁹⁵ Quoting a 1992 Tennessee case,⁹⁶ the court appeared open to the idea that “pre-embryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life,”⁹⁷ though it fell short of explicitly adopting that view.⁹⁸

The court also appeared to later cite an author regarding potentially significant losses unique to the loss of pre-embryos.⁹⁹ The decision highlighted the assertion that “negligent or inadvertent destruction of embryos, due to equipment malfunction or human error, is also likely to be actionable or should be so because of the significant financial, physical, or emotional loss that each imposes,” though the court stopped short of adopting this assertion as its own view.¹⁰⁰

Following this same logic, a player could potentially ask a court to recognize their in-game persona as belonging to an “interim category that entitles them to special respect.”¹⁰¹ Although a player could not argue that in-game personas have the same “potential for human life”¹⁰² that frozen

94. To see the potential implications of such a ruling, we can turn to the Alabama Supreme Court’s holding in *LePage v. Center for Reproductive Medicine*. In this 2024 case, Alabama’s highest court held that the destruction of frozen pre-embryos by an unauthorized person allowed for a claim under the state’s Wrongful Death of a Minor statute. *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024), *reh’g denied*, No. SC-2022-0515, 2024 WL 1947312 (Ala. May 3, 2024). The effects of this ruling are already apparent in Alabama, where medical providers are becoming increasingly hesitant to offer in vitro fertilization and other assisted reproduction services due to fears of criminal and civil liability. Other jurisdictions, particularly those with more restrictive legislation around reproductive health care, are also expected to see similar cases where this line of reasoning may lead to similar holdings regarding frozen pre-embryos. Experts are concerned that such rulings will lead to more difficulty in accessing assisted reproduction services and further restrictions on reproductive health care as a whole. Although the *LePage* ruling is still recent and its full repercussions are not yet known, it is clear from the immediate aftermath that assigning personhood to frozen pre-embryos can have significant and potentially seriously damaging effects for people in need of reproductive health care—especially, ironically, those in need of assisted reproduction services. Susan Crockin & Francesca Nardi, *Alabama’s Supreme Court Rules Frozen Embryos are “Unborn Children” and Admonishes IVF’s “Wild West” Treatment*, AM. SOC’Y FOR REPROD. MED., 2024, <https://www.asrm.org/news-and-events/asrm-news/legally-speaking/frozen-embryo-destruction-and--potential-travel-restrictions-for-surrogacy-arrangements2/> (last visited Oct. 27, 2024).

95. *Frisina*, 2002 R.I. Super. LEXIS 73, at *15 (citing *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (discussing the categorization of pre-embryos as neither property nor persons); the court does not explicitly endorse the view of the *Davis* court regarding the status of pre-embryos and agrees with the defendants in the present case that pre-embryos cannot be victims due to not being legal persons, but does seem amenable to a discussion as to whether embryos are more than property).

96. *Davis*, 842 S.W.2d 588.

97. *Frisina*, 2002 R.I. Super. LEXIS 73, at *15 (citing *Davis*, 842 S.W.2d at 597 (1992)).

98. *Frisina*, 2002 R.I. Super. LEXIS 73, at *15.

99. *Id.* at *28-29

100. *Id.*

101. *Id.* at *15 (citing *Davis*, 842 S.W.2d at 597).

102. *See id.*

pre-embryos do, the ability to socialize, make a living, build relationships, learn, and participate in other important aspects of life afforded to players through video games¹⁰³ might be said to hold a “potential human life experience.”¹⁰⁴ Likewise, it might be reasonable for a player to claim that the negligent destruction of their virtual life also results in “significant financial, physical, or emotional loss.”¹⁰⁵ Although this might not be an irrefutable argument on its own, it may strengthen other arguments for video games as a potential human life experience.

This special significance afforded to frozen pre-embryos compared to other forms of property was also a basis for the court allowing the plaintiffs to move forward with their breach of bailment contract and breach of fiduciary duty claims.¹⁰⁶ The court again clarified that although there have been discussions in other jurisdictions regarding what might set frozen pre-embryos apart from other property, the plaintiffs were still only “seeking to recover for the physical loss of their pre-embryos rather than for the loss of the possibility of achieving pregnancy.”¹⁰⁷ Thus, the *Frisina* court found the clinic’s argument—that it did not breach its duty, contractual or fiduciary, because no successful pregnancies were guaranteed—unconvincing.¹⁰⁸

Additionally, the court found that the contracts between the plaintiffs and clinic for storage of frozen pre-embryos and other fertility procedures were more akin to “contracts of marriage, or contracts relating to illness, death, and burial” than contracts for mere property storage.¹⁰⁹ The court recognized that these more sentiment-based contracts have previously been found by other courts to allow recovery for emotional and mental suffering absent physical injury where other contracts may not, citing *Buenzele v. Newport Amusement Ass’n*, 29 R.I. 23 (1908):

103. *Id.*; see also Swanson, *supra* note 64.

104. The term “potential human life experience” is mine, used here to compare the significant losses that can be felt by players whose accounts are unjustly terminated or are otherwise rendered inaccessible by gaming studios to the significant losses that can be felt by patients—and hopeful parents—whose frozen pre-embryos are lost or destroyed by medical facilities. The potential for human life that patients see in these pre-embryos are partly what makes them irreplaceable property, rather than ordinary property. In the same way, the potential for human life experience that players see in the creation of a new persona (with personality and appearance to their exact liking) and building of careers, relationships, communities, and stories is what makes these video game accounts and virtual lives irreplaceable property to them. I’m not suggesting that the emotional toll is the same in both situations, but one can see how these losses can be felt much more deeply than, say, the loss of a lawnmower.

105. *Frisina*, 2002 R.I. Super. LEXIS 73, at *29; see also discussion *supra* note 104.

106. See generally *Frisina*, 2002 R.I. Super. LEXIS 73, at *37-38.

107. *Id.* at *37.

108. *Id.* at *37-38.

109. *Id.* at *34-35.

[T]he feelings and sentiments of the complaining party are so involved and in wrought that they form a necessary and unavoidable ingredient in the matter of the contract, and are very properly held to be within the contemplation of both parties as an inducement and consideration of the contract, and so to be considered in the award for the breach.¹¹⁰

Thus, in cases where emotional anguish may ordinarily not be considered, the nature of these sentiment-based contracts may allow it.¹¹¹ This mirrors the difference in treatment between ordinary and irreplaceable property.

Furthermore, the court denied the clinic's assertion that plaintiffs assumed any risk that arose when they signed the various consent forms.¹¹² Although the consent forms contained language that absolved the clinic from liability in the event that the frozen pre-embryos were lost in an accident of some kind, the court declared that the language was not specific enough to cover instances where the clinic destroys or loses the frozen pre-embryos through their own actions.¹¹³ Following this line of reasoning, the court declined to recognize the clinic's motion for summary judgment based on its asserted defense that the plaintiffs agreed to an assumption of risk.¹¹⁴

In using this framework, a player seeking to recover damages from a developer for the loss of their in-game persona could argue that the irreplaceable nature of their property and the inherent sentiments and feelings present in their own contracts with the developer may allow for consideration of emotional harms.¹¹⁵ Similar to a patient who has spent considerable time, money, and emotional capital in the quest to have a healthy biological child through in vitro fertilization, a dedicated player may have spent considerable time toiling away in-game, money to upgrade their in-game persona, or emotional capital in building the in-game relationships they have with other players.¹¹⁶

Consequently, players might be able to successfully argue that the loss of their in-game personas should be categorized as loss of irreplaceable

110. *Id.* (citing *Buenzle v. Newport Amusement Ass'n*, 29 R.I. 23 (1908)). The court also went on to consider testimony that in vitro fertilization procedures can be especially exhausting for plaintiffs due to the physical and emotional taxation that accompanies the harvesting of eggs, implantation, the wait for results, and the pregnancy or lack thereof that may follow. *Id.* at *35-36.

111. *See id.* at *34-36.

112. *Id.* at *49-50.

113. *Id.* at *38, *45-50.

114. *Id.* at *50.

115. Swanson, *supra* note 64; StealthPolarBear, *supra* note 13; W0kinman, *supra* note 67.

116. Swanson, *supra* note 64; StealthPolarBear, *supra* note 13; W0kinman, *supra* note 67; xland44 *supra* note 66; ItsClassifiedx, *supra* note 69; sfrattini, *supra* note 69.

property due to the breach of a sentiment-based contract.¹¹⁷ The loss of that persona and access to the game might bar players from contacting friends who are only available to them in-game and deprive them of enjoyment of any in-game achievements, upgrades, progress, or other features that they either spent significant time working for or paid money to obtain.¹¹⁸

Similar to the sentiments and feelings the court considered to be a factor in the contracts between the parties in the *Frisina* case,¹¹⁹ it could be argued that the emotional investment of dedicated players may occupy the same role in contracts between players and developers in the form of terms of service.¹²⁰ The contracts analysis in *Frisina* may also allow players to employ similar arguments against defenses raised by developers based on any assumption of risk they agreed to in the terms of service since the agreements are usually composed of non-specific language similar to the consent forms.¹²¹

Even if a court found that players assume the risk of account termination when they agree to the terms of service, the common language in those documents usually specifies that players assume that risk in relation to account termination due to player misbehavior.¹²² A player who has been banned through no fault of their own would be outside of the conditions detailed in this provision and cannot be said to have assumed the risk according to the language of the terms of service.

B. *Jeter v. Mayo Clinic of Arizona*

Jeter v. Mayo Clinic of Arizona,¹²³ a 2005 case out of Arizona, offers another potential framework for recovery that may be useful to players seeking recovery for account loss. In *Jeter*, the plaintiffs received assisted reproduction services at the Mayo Clinic of Arizona, including the harvesting, fertilization, and implantation of pre-embryos.¹²⁴ To proceed with the in vitro fertilization, the plaintiffs were required to sign a medical consent form allowing the clinic to administer services and provide storage

117. *Frisina*, 2002 R.I. Super. LEXIS 73; Swanson, *supra* note 64.

118. Swanson, *supra* note 64; StealthPolarBear, *supra* note 13; W0kinman, *supra* note 67; xland44 *supra* note 66; ItsClassifiedx, *supra* note 69; sfrattini, *supra* note 69.

119. *Frisina*, 2002 R.I. Super. LEXIS 73, at *34-35.

120. RIOT GAMES, *Riot Games Terms of Service* (Sept. 15, 2023), <https://www.riotgames.com/en/terms-of-service>.

121. *Id.* at § 2.3 (“You understand and agree that using the Riot Services comes with the risk that your account may be terminated or suspended in accordance with these Terms and that, whenever you use the Riot Services, you’ll bear this risk in mind. . .”).

122. *Id.*

123. 211 Ariz. 386 (Ariz. Ct. App. 2005).

124. *Id.* at 389-90.

for the frozen pre-embryos.¹²⁵ Any pre-embryos not used in the subsequent attempts at implantation remained with Mayo Clinic for freezing and storage.¹²⁶ Both parties appeared to understand that the signed consent form acted as a contract, though they disagreed on whether the contract was for a bailment.¹²⁷

At some time following the failed implantation attempts, the plaintiffs made a request in writing for the remaining embryos to be transferred to a different fertility clinic of their choice.¹²⁸ Although the expectation was that ten frozen pre-embryos would be transferred, Mayo Clinic allegedly only provided the new clinic with five frozen pre-embryos and gave no explanation for the absence of the other five.¹²⁹ The plaintiffs were able to successfully conceive a child with the five frozen pre-embryos available, but faced another daunting round of harvesting when they wanted a second biological child.¹³⁰ The *Jeter* plaintiffs sought to recover for breach of bailment contract and fiduciary duty similar to the plaintiffs in *Frisina*, along with claims for wrongful death and negligent loss or destruction of property.¹³¹

Like the negligent infliction of emotional distress claim in *Frisina*, the *Jeter* court dismissed the wrongful death claim, finding that the frozen pre-embryos failed to meet the legal definition of “person” under Arizona law.¹³² The court provided a lengthy analysis of the personhood status and wrongful death elements, along with its reasons for declining to include frozen pre-embryos.¹³³ Although the wrongful death claim was dismissed, the court allowed the plaintiffs to proceed with the remaining claims.¹³⁴

125. *Id.* at 389.

126. *Id.*

127. *Id.* at 405. The *Jeter* court explains that in determining whether there was a bailment, a bailment is “when personality is delivered by another in trust for a specific purpose with an express or implied agreement, the property will be returned or accounted for when that purpose is accomplished . . .” *Id.*

128. *Id.* at 389-90.

129. *Id.* at 390.

130. *Id.*

131. *Id.* at 389-90; *see also, Frisina*, 2002 R.I. Super. LEXIS 73 at *6.

132. *Id.* at 389.

133. *Id.* at 391-400. The court’s analysis was truly lengthy and detailed. Although quite informative and interesting, it is not relevant to the issue presented in this Note since it is highly unlikely that legal personhood would be extended to in-game personas. And, although not unimaginable, a player is unlikely to seek recovery from a developer under a wrongful death claim. Perhaps in a future where the legal system recognizes the loss of a player’s in-game, virtual relationships, there is the possibility that this permanent death of in-game life will be given relatively more equal treatment such as a death in physical reality. However, this would again require the expansion of legal personhood. Considering the serious implications—to reproductive health law, privacy law, and constitutional law, among others—of expanding personhood to apply to pre-embryos, this is a tough view to advocate for and not one this Note can support at this time.

134. *Id.* at 406.

Thus, *Jeter* may provide another potential framework for players seeking recovery.¹³⁵

In allowing the plaintiffs to proceed with their negligent loss claim, the court pointed to the Restatement (Second) of Torts § 323—Negligent Performance of Undertaking to Render Services—which has been adopted in Arizona statutory law as a cause of action.¹³⁶ The court determined that the Mayo Clinic is potentially liable under § 323 if its agreement to harvest eggs and store frozen pre-embryos was one to provide “services that Mayo should have recognized as necessary for the pre-embryos’ care.”¹³⁷ Any harm that resulted from their negligence in storing the frozen pre-embryos could therefore fall under the provisions set forth in § 323 given that reliance can be shown.¹³⁸

In jurisdictions that recognize a § 323—or similar—cause of action, players may be able to argue that it should be applied to the video game context. By developing a game meant to fully engross players, taking calculated and involved action to keep players reliant on and invested in the game,¹³⁹ it might be argued that developers “undertak[e] . . . to render services to another which [they] should recognize as necessary” in order to protect players’ in-game property.¹⁴⁰

It seems impossible that a video game developer—especially the big-name shops with hundreds of experienced employees—would be unable to recognize that maintenance of game servers, secure storage of in-game assets, and consistent access to both are all baseline services necessary to maintain the main service they offer to their players: an engrossing game and virtual life platform.¹⁴¹ Furthermore, it would be difficult to argue that

135. *Id.* at 401. The breach of fiduciary duty claim is not relevant in this case as it relates to a potential medical malpractice issue, so will not be further discussed in this Note. While the breach of bailment contract claim is also related to potential medical malpractice, the court’s analysis of the contract’s formation may be relevant and will be briefly discussed.

136. *Id.* at 402 (citing RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW. INST. 1965)). Here, the court provides the relevant provisions from Restatement (Second) of Torts § 323 (1965):

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other’s reliance upon the undertaking.

137. *Id.*

138. *Id.*

139. Sim, *supra* note 18.

140. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

141. Sim, *supra* note 18.

players do not rely on the developers to provide these services.¹⁴² Thus, any harm that players suffer as a result of the developer's failure to exercise reasonable care might well open them up to liability under § 323.¹⁴³

Although § 323 specifies that a plaintiff can recover for physical harms, the *Jeter* court considered that due to "the special respect due to pre-embryos," plaintiffs could potentially also recover for economic and emotional harms.¹⁴⁴ Similar to the *Frisina* framework, this special respect due to the potential human life could be translated to the potential human life experience present in the context of in-game personas.¹⁴⁵ This would therefore allow players to potentially recover damages for harm without any physical injury or resulting symptoms.

The court in *Jeter* also considered the existence of a bailment contract between the parties and its potential breach.¹⁴⁶ This could offer another useful supporting option for players seeking to sue developers. The court held that the contract for storage between the two parties constituted a bailment contract even without an explicit mention of a bailment relationship.¹⁴⁷ The terms of service agreement that players are usually required to accept in order to play video games might be argued to be a bailment contract in some situations where there is mention of storage of player assets by the developer.¹⁴⁸ This would allow players to add an additional claim for breach of bailment contract, thus providing an alternative avenue to recovery.

IV. POTENTIAL APPLICATION OF LEGAL FRAMEWORKS TO UNJUSTIFIED ACCOUNT TERMINATION CASES

Similar to patients seeking recovery for lost, missing, or damaged pre-embryos that they reasonably expected fertility clinics to store safely, players may feel that they should be able to bring suit against gaming studios

142. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

143. *Id.*

144. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 402 (Ariz. Ct. App. 2005).

145. *See generally supra* Section III.A.

146. *Jeter*, 211 Ariz. at 405-6.

147. *Id.* at 406.

148. RIOT GAMES, *supra* note 120, at §§ 2.1.2, 2.2; *see also Jeter*, 211 Ariz. at 405-6 (the court denies Mayo Clinic's claims that an explicit bailment agreement was needed to proceed with a claim for breach of a bailment contract; although the court specifies that its ruling on the existence of a bailment agreement in this case is a narrow one and for these circumstances only, its reasoning can potentially be used as persuasive authority in account termination cases).

when they are denied access to their online lives and relationships.¹⁴⁹ When a player chooses to invest their time and money in one game over the many others available, they might feel that there is a loyalty owed to them by the studio.¹⁵⁰ In fact, many players do feel a sense of abandonment and betrayal when studios end development of certain titles and shut down servers, and players may be interested in seeking legal recourse for their loss.¹⁵¹

Unjustified account termination exacerbates the sting of betrayal due to the confusion, shame, and grief that many players feel when informed that they have been banned through no fault of their own.¹⁵² Some players mourn the way they would when a relationship ends or their employment is terminated.¹⁵³ Others might grieve greatly for the loss of what is essentially an incarnation of themselves—a virtual option for shared human experiences.¹⁵⁴

However, as the court outlined in *Frisina*, monetary damages for lost or damaged property—even irreplaceable property—are limited to the actual value of the property in question, “excluding, of course, any fanciful or sentimental value that might be placed on it.”¹⁵⁵ This might be of little help to players looking to recover for loss of accounts and the mental anguish they suffer due to the loss. While some players do spend a significant amount of money on game-related purchases or in-game upgrades and might reasonably expect to recover those costs through legal action, many others invest hours upon hours of real time, and immeasurable amounts of emotional energy, into their in-game lives and relationships, but only very small amounts of actual money if any at all.¹⁵⁶

Players who are seeking to recover for emotional suffering or distress due to the loss of their virtual lives and the means by which they maintain their in-game relationships may have better luck leaning on *Frisina*’s allowance for recovery for emotional distress due to breaches of contracts that are emotional in nature.¹⁵⁷ Similarly to how the plaintiffs in *Frisina* could recover for emotional distress due to the inherent sentimental value

149. See, e.g., Swanson, *supra* note 64 (“For many, online multiplayer is an opportunity to spend time with friends. It’s an important part of their social circle. A ban can have a negative effect on their ability to socialize. A false ban is a kind of scarlet letter among fellow players that creates a stigma that is extremely difficult to overcome. Like being shunned.”)

150. See discussions on Reddit and other forums, *supra* note 69; Swanson, *supra* note 64.

151. See sources cited *supra* note 150.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Frisina v. Women & Infants Hosp. of R.I.*, Nos. 95-4037, 95-4469, 95-5827, 2002 R.I. Super. LEXIS 73, at *33 (May 30, 2002) (quoting *De Spirito v. Bristol Cnty. Water Co.*, 227 A.2d 782 (1967)).

156. Swanson, *supra* note 64. Swanson himself only spent seventy dollars on the game, although he mentions that many players spend much more.

157. *Frisina*, 2002 R.I. Super. LEXIS 73, at *34-38.

of the contract—as the court explained being more analogous to a contract regarding marriage, death, or burial than a contract for mere storage of property¹⁵⁸—players might be able to recover more than “market value” monetary damages on the theory that the storage of a significant part of their lives and selfhood in the form of their in-game characters is inherently sentimental.

Players who lose significant income from lost streaming business and endorsement deals might be able to recover much more due to the more easily calculated costs, but those same players may have had valid breach of contract claims regardless of how they frame their legal arguments.¹⁵⁹ Even so, these professional players with more protective contracts that can be breached may want to strengthen their position by also asking for recognition of the interim status of in-game assets and personas that elevates them above mere property.¹⁶⁰

Whether professional or recreational, players may be heartened to find that they potentially have an even stronger claim than the plaintiffs in the frozen pre-embryo cases. A common limitation on recovery amounts in those cases is the dismissal of certain types of harms due to a lack of “physical symptomology.”¹⁶¹ Unlike the plaintiffs in *Frisina*, players can refer to studies that show social isolation can increase psychological and physical symptoms of anxiety and depression, among other disorders.¹⁶²

If a player bringing suit against a gaming studio can prove that they personally suffered physical symptoms of social isolation after the loss of their gaming account and in-game relationships, they may be able to recover for negligent or intentional infliction of emotional distress in addition to the breach of contract and fiduciary duty claims that were allowed in the frozen embryos case.¹⁶³ Potential physical symptoms that players could assert a claim under might range from increased irritation or low mood due to anxiety, depression, or insomnia up to severe effects due to episodes of psychosis or serious health problems associated with substance abuse.¹⁶⁴

158. *Id.* at *34.

159. Dursun, *supra* note 57.

160. *Frisina*, 2002 R.I. Super. LEXIS 73; *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386 (Ariz. Ct. App. 2005).

161. *Frisina*, 2002 R.I. Super. LEXIS 73, at *10.

162. Jeffers et. al., *supra* note 45, at 12.

163. *Frisina*, 2002 R.I. Super. LEXIS 73, at *50; *Jeter*, 211 Ariz. at 406.

164. Jeffers et al., *supra* note 45, at 12.

V. POSITIVE SOCIAL IMPACTS OF VIDEO GAMES AS JUSTIFICATION
FOR RECOGNIZING VIRTUAL LIVES AS MORE THAN MERE
PROPERTY

Regardless of whether a player seeking legal recourse for harms caused by a developer terminating their access to their account wants to recover only for physical and economic harms or also for their pain and emotional anguish, the path to legal remedy appears to lie in proving that a player's in-game activity offers a potential human life experience. If a player can successfully argue that a court should recognize in-game personas as not just mere property, but irreplaceable property with interim status between "person" and "property" in the way frozen pre-embryos have been categorized,¹⁶⁵ they would have more options for suing a developer for improper account bans or deletions.

To move closer to obtaining recognition of in-game lives, relationships, and communities as irreplaceable property that players should be entitled to recover damages for in the case of loss or destruction through account termination, society must take steps toward embracing video games as a valid component of the human experience. Even though video games have contributed greatly to human connection and society's collective mental wellness, as the universal isolation felt in the COVID-19 pandemic lockdown period made abundantly visible, they are often dismissed as a hobby for those who keep themselves separate from society.¹⁶⁶

When it became impossible, illegal, and medically unwise to connect with loved ones in person and attend events physically due to the high risk of serious illness, video games offered players worldwide an option for maintaining relationships and avoiding complete isolation.¹⁶⁷ Players could substitute in-game socializing for the everyday human connection that suddenly became noticeable and undeniably essential once the effects of its absence were felt.¹⁶⁸ Even activities that only existed in physical reality as large, crowded affairs were successfully moved into the virtual realm—for example, artists partnered with Epic Games to perform concerts in *Fortnite* complete with special effects and millions of viewers.¹⁶⁹

The social isolation during the pandemic lockdown period greatly affected individuals' mental wellbeing in ways ranging from depression to

165. *Frisina*, 2002 R.I. Super. LEXIS 73 at *15.

166. Lufkin, *supra* note 43.

167. *Id.*

168. *Id.*

169. Andrew Webster, *Travis Scott's First Fortnite Concert Was Surreal and Spectacular*, VERGE (Apr. 23, 2020, 7:17 PM), <https://www.theverge.com/2020/4/23/21233637/travis-scott-fortnite-concert-astronomical-live-report>.

anxiety to substance abuse issues.¹⁷⁰ Research has even suggested that there will be serious impacts felt in the foreseeable future from the extended time society spent with minimal human interaction.¹⁷¹ Considering the positive effects of the virtual reality and connection provided by video games, it seems unjust and inaccurate that they are not seen as an effective and powerful tool to counteract the negative effects of social isolation. It seems even more unjust that such an effective and relatively accessible tool for maintaining mental health can be denied to those who need it without legal repercussion.

As such, courts should give more consideration to the legal rights of players who are denied access to the accounts and communities that they have spent massive amounts of time and resources on—including immeasurable emotional investment. This will only become a more pressing issue as the video game industry and its player base continues to grow.¹⁷² As demonstrated by the struggle that legal systems and regulators face in keeping up with the pace at which social media grows,¹⁷³ waiting for the problem to mature—enough that it can knock down the door of government buildings with damaging misinformation¹⁷⁴—before taking steps to address it is not a workable solution. It seems reasonable then that the best course of action might be to get ahead of the potential legal issues surrounding video games and the immersed virtual life they enable before they loom too large to rein in.

CONCLUSION

One big obstacle still stands in the way of building a robust body of law that covers video games: the lingering refusal to recognize video games as a force closer to social media behemoths than to a tabletop game of Chutes & Ladders.¹⁷⁵ The longer society leaves virtual, in-game lives and activity unrecognized and unregulated, the bigger the issues are bound to be when

170. Jeffers et al., *supra* note 45, at 12.

171. *Id.*; Angela Hoyos & Diego Angel-Urdinola, *Unmasking a Silent Crisis: The Impact of COVID-19 on Adolescent Mental Health and Skills Development*, WORLD BANK BLOG (Oct. 9, 2023), <https://blogs.worldbank.org/education/unmasking-silent-crisis-impact-covid-19-adolescent-mental-health-and-skills-development>.

172. Miller, *supra* note 4.

173. Jamie Susskind, *We Can Regulate Social Media Without Censorship. Here's How*, TIME (July 22, 2022, 1:45 PM), <https://time.com/6199565/regulate-social-media-platform-reduce-risks/>.

174. Wayne Rash, *Disinformation Propelled by Social Media and Conspiracy Theories Led to Insurrection*, FORBES (Jan. 19, 2021, 8:00 AM), <https://www.forbes.com/sites/waynerash/2021/01/19/disinformation-propelled-by-social-media-and-conspiracy-theories-led-to-insurrection/?sh=28cdd74634e0>.

175. Miller, *supra* note 4.

they finally come into focus.¹⁷⁶

Players should not doubt the value of fighting for recovery when they suffer harm caused by unjustified account termination and should consider their options for bringing these claims before the court. With the *Frisina* and *Jeter* analytical frameworks, they may be able to structure their arguments by analogizing their loss of irreplaceable property (their virtual life) to the loss of irreplaceable property that is frozen pre-embryos.¹⁷⁷ Far from only strengthening their position, these frameworks may also provide a path for courts to follow as they examine the legal merits of virtual life-based claims of injury.

Perhaps even more pressing than individual plaintiffs asserting their entitlement to legal remedies for loss of virtual life, courts should allow these novel legal issues to move through the system in order to build a body of case law around video game litigation. In the absence of targeted regulation of virtual life and potential injuries in the context of those virtual lives, case law may be the only tool available to address these issues for some time. Whether the legal conflicts resolved relate to property loss and destruction, negligence, breach of duty, or some other legal harm, any foundation for regulation of virtual life will undoubtedly come in handy in the not-so-distant future.

Even if the idea of a loss of virtual life appears to be an issue too rooted in abstract ideas of existence¹⁷⁸ and emotional anguish to allow recovery for actual damages, this is not an issue that can be dismissed as insignificant. Although it cannot be denied that claiming physical harm or injury in the context of virtual life and experiences is difficult, but courts have shown a willingness to consider somewhat more metaphorical, sentimental-based arguments in situations that call for it. Such instances can be seen in cases of litigation involving the destruction and loss of frozen pre-embryos, where less literal claims of harm in the context of a manufactured life that does not

176. *Id.*; see also Susskind, *supra* note 174.

177. *Frisina v. Women & Infants Hosp. of R.I.*, Nos. 95-4037, 95-4469, 95-5827, 2002 R.I. Super. LEXIS 73, *38 (May 30, 2002); *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 (Ariz. Ct. App. 2005).

178. Michael Hammond, *Ontology*, EDUC. STUD.: U. OF WARWICK (July 11, 2017), <https://warwick.ac.uk/fac/soc/ces/research/current/socialtheory/maps/ology/>. Existence has been such a prevalent topic of discussion for philosophers that an entire branch of metaphysics exists to study it: ontology. As the University of Warwick points out, an area of debate in discussing existence is the difficulty in defining reality. Reality, as concrete as it may seem at times, can be defined as “an objective reality which exists independent of the observer, and, on the other [hand], reality as it appears subjectively or, more commonly, as negotiated within groups.” *Id.* If reality—and existence—cannot be absolutely defined, how can virtual reality be ruled out as a legitimate form of existence? And if virtual reality can be argued to be a legitimate form of existence, how can virtual lives be relegated to mere property instead of a category closer to personhood in the eyes of the law?

Id.

exist and might not have ever had a chance at existence are allowed.¹⁷⁹

It could certainly be said that a situation involving a couple seeking fertility assistance is much more morally and emotionally fraught than a situation involving a player using video games to fulfill their human need for connection, but are they really so different? After all, if courts can recognize the elevated status of pre-embryos of uncertain viability and allow plaintiffs to proceed with claims against providers for their loss, it seems conceivable that they could be persuaded to recognize the elevated status of virtual lives enriched by long-term, intimate relationships, social connection, and professional fulfillment.

With this in mind, players looking for legal recourse after their accounts have been unjustly terminated by developers may find success by arguing for the recognition of their virtual lives as deserving of an interim status between property and personhood. The framework provided by *Frisina* and *Jeter* suggests that the irreplaceable nature of the property entitles the owners of this “interim” property to recover for damages beyond the monetary value of their losses.¹⁸⁰ By following the same argument framework and presenting their virtual lives as also deserving of recognition as “interim” property, players might then be able to recover for damages beyond the monetary value tied to their video game accounts. The sentimental qualities inherent in a virtual life could entitle players to seek recovery for emotional and non-physical harms in addition to monetary losses, providing them with a way to obtain restitution in the case that their in-game lives are terminated without cause.

179. See generally *Frisina*, 2002 R.I. Super. LEXIS 73; *Jeter*, 211 Ariz. 386.

180. See generally sources cited *supra* note 179.