

The Death of Slander

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Abstract. *Technology killed slander. Slander, the tort of defamation by spoken word, dates back to the ecclesiastical law of the Middle Ages and its determination that damning someone's reputation in the village square was worthy of pecuniary damage. Communication in the Twitter Age has torn asunder the traditional notions of person-to-person communication. Text messaging, tweeting and other new channels of personal exchange have led one of our oldest torts to its historic demise.*

At common law, slander was reserved for defamation by speech; libel was actionable for the printed word. This distinction between libel and slander, however, rests on a historical reality that is no longer accurate. Originally, permanence and breadth of dissemination always coincided. Slander carried only as far as one's voice. Because of slander's presumed evanescence, common law required plaintiffs to plead special damages—proof of economic harm—in order to recover for slander. The advent of broadcast technology, with its ability to amplify the spoken word, challenged the traditional division of defamation and forced courts and legislatures to reconsider old classifications. Jurisdictions split in their decision to characterize broadcast speech as libel or slander, largely because of divergent views about which aspect of the speech—permanence or breadth of dissemination—was more important. Postbroadcast technology has further complicated the defamation arena, leaving parties unsure of how best to plead their defamation case.

In the past decade technology has again changed the way we communicate. The digital communication revolution has created instances of widespread dissemination through quick, nonreflective and often passing statements. This past year, for example, Wael Ghonim's tweet to join him in an Egyptian village square led to the downfall of Egypt's political powers. His fleeting comments to those willing to listen caused an entire nation to fall. This Article considers how courts should rule when these tweets, or text messages, not quite printed, not quite spoken, are defamatory.

This Article argues that the advent of text messaging, tweeting and other forms of digital communication, which I call "technospeech," renders the medieval tort

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of slander irrelevant in today's technological world. The article provides new support for the contention that courts and legislatures should treat libel and slander uniformly and should abolish the archaic requirement of proof of special damages, a burden traditionally reserved for the spoken word. Maintaining slander in the Twitter Age, with its requirement of proof of economic harm, vitiates the common law purpose of defamation. Treating all defamation similarly promotes fairness for plaintiffs seeking to rehabilitate their damaged reputation and provides predictability to those bringing defamation claims. A thoughtful and orderly treatment of technospeech mandates that courts and legislatures put the proverbial final nail in the coffin of slander.

INTRODUCTION

Of all the odd pieces of bric-a-brac upon exhibition in the old curiosity shop of the common law, surely one of the oddest is the distinction between the twin torts of libel and slander.¹

- William L. Prosser

Technology killed slander. Slander, the tort of defamation by spoken word, dates back to the ecclesiastical courts of the middle ages, when damning someone's reputation in the village square was worthy of pecuniary damage.² The advent of tweeting, text messaging and blogging, however, has significantly encroached upon the traditional notions of person-to-person communication.³ In light of these new channels of personal exchange, judges, lawyers and legal theorists must acknowledge that one of our oldest torts has met its historic demise. The manner in which we speak to others and of others today demands new ways of regulation. Ultimately, the Twitter Age has rendered slander irrelevant and, even more importantly, necessitates a clear and easily provable form of defamation as a means of combat against those who hide behind a screen rather than calling out their comments in a public forum.⁴ Consolidating slander and libel into the single tort of defamation will, therefore, better serve those who have suffered the type of

1. William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 839 (1960) [hereinafter Prosser, *Libel Per Quod*].

2. See RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

3. Alex Lickerman, *The Effect of Technology on Relationships*, PSYCHOLOGY TODAY (June 8, 2010), <http://www.psychologytoday.com/blog/happiness-in-world/201006/the-effect-technology-relationships>.

4. The "Twitter Age" is meant to include current digital communication such as Twitter, SMS text messaging and speech-to-text. Twitter is a free social networking site that allows users to send and receive Tweets of up to 140 characters. The Tweets are posted on the author's Twitter site and are forwarded to those who subscribe as followers. A subscriber's Twitter page can be made private, and available only to followers, or can remain public and available to anyone on the Internet. See About Twitter, TWITTER, <http://www.twitter.com/about> (last visited Oct. 17, 2011). For a discussion of SMS text messaging, see *infra* notes 119–123 and accompanying text. For a discussion of speech-to-text, see *infra* notes 179–81 and accompanying text.

reputational damage that entitles them to a remedy at law.

Courts divide defamation—the tort of supplying false communication about another in a way that results in pecuniary or emotional harm—into two categories: libel and slander.⁵ Libel, written defamation, is actionable upon proof that the defendant communicated false words in writing to a third party about one's reputation and that those words resulted in harm.⁶ Slander, spoken defamation, requires proof of the same elements as libel plus, in some circumstances, special damages—evidence that the spoken words yielded demonstrable economic harm to the defamed individual.⁷ Courts impose this additional burden on those alleging slander because spoken words are more transitory than written words, generally reaching a smaller audience and lacking the durability of words that appear in print.⁸

The libel/slander distinction is blurred when considered against the backdrop of how we currently communicate. Many town hall meetings, including a recent Presidential meeting, occur “live” online.⁹ Rather than raising their hands from the audience, people are encouraged to submit questions via Facebook and Twitter.¹⁰ The classroom bully is no longer the biggest child in the sandbox, but rather the elementary school student who is most adept at creating malignant blog posts.¹¹ Coworkers forgo face to face communication, instead sending an e-mail, lessening the time necessary to leave their desks. Text messaging, tweeting and blogging are now more regularly replacing the face to face communications that so frequently occurred during the time of slander's origin.

Defamatory text messages written on a phone screen are otherwise incapable of widespread dissemination. Defamatory tweets posted on computers, quickly disappear into cyberspace. These communications combine the presumed evanescence of slander with the permanency of libel. Under contemporary defamation law, jurisdictions are forced to characterize this type of communication

5. See *Pollard v. Lyon*, 91 U.S. 225, 228 (1875) (“[T]here is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage.”). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 372 (1974); *Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d 1238, 1245 (5th Cir. 1980); *Moore v. Cox*, 341 F. Supp. 2d 570, 574 (M.D.N.C. 2004); *Emo v. Milbank Mut. Ins. Co.*, 183 N.W.2d 508, 516 (N.D. 1971).

6. RESTATEMENT (SECOND) OF TORTS § 568 (1977).

7. *Id.* at § 633.

8. *Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 274 (S.D.N.Y. 1989) (citing *Le Massena v. Storm*, 62 A.D. 150, 154 (N.Y. 1st Dep't 1901) (finding that plaintiff must show special damages in a slander case). See also *Hartmann v. Winchell*, 73 N.E.2d 30, 32 (N.Y. 1974) (Fuld, J., concurring) (citing SALMOND'S LAW OF TORTS 370 (W.T.S. Stallybrass, 10th ed., 1945)).

9. See Michael D. Shear, *Obama Takes Questions from His Tweeps*, N.Y. TIMES—THE CAUCUS BLOG (July 6, 2011), <http://thecaucus.blogs.nytimes.com/2011/07/06/obama-takes-questions-from-his-tweeps> (Twitter users were allowed to submit 140 character questions to the President); *Obama Goes Online for Town Hall Meeting*, CNN POLITICS (Mar. 26, 2009), http://articles.cnn.com/2009-03-26/politics/obama.online_1_president-obama-questions-white-house?_s=PM:POLITICS.

10. See *supra* note 9.

11. See Jan Hoffman, *As Bullies Go Digital, Parents Play Catch Up*, N.Y. TIMES, Dec. 5, 2010, at A1, available at http://www.nytimes.com/2010/12/05/us/05bully.html?_r=1?_s=PM:POLITICS.

as slander, thereby requiring a plaintiff to prove special damages, or as libel, which relieves a plaintiff of proving economic harm.¹² This hybrid nature of digital communication calls into question the rationale for maintaining the libel/slander distinction.

Scholars and commentators, recognizing the illogic in the libel/slander distinction, regularly write that the distinction is archaic and therefore should be abolished.¹³ Some claim that the reason for consolidation is that the lines between libel and slander have become sufficiently blurred so as to make proving either confusing to parties and courts.¹⁴ Other commentators argue that the distinction between libel and slander is artificial and that the “intricate and elaborate doctrinal structure is difficult for ordinary lawyers and judges to penetrate, leading to muddled strategies and confused decisions.”¹⁵ Critics abroad also support the abolition of the semantic distinction.¹⁶ A committee of leading English judges

12. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977) (stating that special damages must be proven unless defamatory speech falls within recognized categories of slander per se while libel is actionable per se).

13. See, e.g., 1 Rodney A. Smolla, LAW OF DEFAMATION § 1:28 (2d ed. 1991); Reed R. Callister, *Defamation: Elimination of Distinction between Libel and Slander as to the Showing of Special Damages*, 33 S. CAL. L. REV. 104 (1959); Laurence W. Eldredge, *The Spurious Role of Libel Per Quod*, 79 HARV. L. REV. 733 (1966) [hereinafter Eldredge, *Spurious Role of Libel Per Quod*]; Julie C. Sipe, “*Old Stinking, Old Nasty, Old Itchy Old Toad*”: *Defamation Law, Warts and All (A Call for Reform)*, 41 IND. L. REV. 137 (2008). See also Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291 (1994) (summarizing various tort reforms); Randall P. Bezanson, *Legislative Reform and Libel Law*, 10 COMM. LAW. 1 (1992) (commenting on the proposed Defamation Act, sponsored by the Libel Defense Resource Center, which suggested unification of Libel and Slander). But see Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 142 (2008) (“The distinction between slander and libel remains important in American courts today.”).

14. See Richard J. Conviser & Roger W. Meslar, *Obsolete on its Face: Libel Per Quod Rule*, 45 ARK. L. REV. 1, 12, 26–27 (1992); Jay Framson, *The First Cut is the Deepest, but the Second May be Actionable: Masson v. New Yorker Magazine, Inc. and the Incremental Harm Doctrine*, 25 LOY. L.A. L. REV. 1483, 1503 (1992); Mike Steenson, *Defamation Per Se: Defamation by Mistake?*, 27 WM. MITCHELL L. REV. 779, 794 (2000) (“The troublesome aspect of the opinion, however, is the potential for confusion that results from a mix of slander and libel principles that could permit the conclusion in subsequent cases that ‘defamation per se’ means only defamation that falls into the categories of slander per se, irrespective of whether the plaintiff’s claim is for libel or slander.”).

15. David A. Anders, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1057 (2006). In 1988, the Libel Reform Project of the Annenberg Washington Program in Communications Policy released the Annenberg Libel Reform Proposal, a comprehensive model statute with accompanying commentary. The proposal was a response to widespread recognition that current libel law was “costly [and] cumbersome,” and failed to achieve the twin goals of defamation to protect the first amendment while allowing one to defend his or her reputation. Although it received widespread national attention, the proposal was never adopted. See Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Project*, 31 WM. & MARY L. REV. 25, 25–26, 31 (1989). Professor Laurence Eldredge advocates that all of libel and slander should fall under the general definition of defamation. See Eldredge, *Spurious Role of Libel Per Quod*, *supra* note 13.

16. See, e.g., *Defamation Act of 2005* (NSW) divs 1, 2 (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/da200599/. See also Kevin F. Crombie, *Scots Law Defamation on the Internet: A Consideration of New Issues, Problems and Solutions for Scots Law*, 1 SCOTS LAW STUDENT JOURNAL 38–39 (Oct. 2000) (Scot.), available at

advised Parliament on certain methods of reforming the law of defamation. Among other things, they recommended the abolition of the distinction in form, “which rests upon no solid foundation.”¹⁷

This Article agrees with scholars and commentators that the slander/libel distinction should be abolished, but rests its argument on very different grounds. Current technological methods of communication, which combine the hallmarks of slander and libel, render the common law distinction between the two torts, “harsh and unjust.”¹⁸ These distinctions “bear no relevance to the technological methods of communication today.”¹⁹ Contemporary digital communication renders the common law distinction between libel and slander obsolete.

This Article presents its findings in three parts. Part I explains the origins of defamation, slander and libel and illustrates the gradual shift that courts have made, from classifying all spoken words as slander to viewing certain types of speech as libel. This section will highlight the judicial responses to communication that occurs in media other than print. Part II will consider the way in which we communicate today, including an exploration of the lexicon that defines speech through technology. Part II illustrates that many of us today engage in what I call “technospeech”—a tangible and printable form of dialogue. Part II then considers the legal implications of defamatory technospeech, highlighting the current trend among courts to dredge up ancient tort principles to respond to modern day technological advances. In most instances, the historic relevance of the particular wrong is far too narrow to provide an appropriate remedy. The Article will then offer evidence that reliance on the judicial system to continue to distinguish between libel and slander is inefficient and time consuming, and then will demonstrate how, in every instance, a court is likely to label text messaging and tweeting as libel.

Part III of this Article will advocate a normative approach to abolishing the tort of slander based on the increasing prevalence of technospeech today. This illustrates that the theoretical reasons for slander are no longer supported in light of today’s digital communications. The Section first shows how technospeech renders slander historically irrelevant. Second, this Section highlights how contemporary methods of communication dilute the presence of slander in American jurisprudence, leaving little justification for maintaining a subtort that causes confusion to parties and courts. Third, this Section points to a trend over the past several centuries, which has been moving away from defamation’s original purpose of providing a mechanism for rehabilitating one’s reputation, and suggests that communication in the Twitter Age can serve as a vehicle to lead us back to

www.scottishlaw.org.uk/journal/oct2000/def.pdf (America has a different approach to defamation law. In fact, even England draws a distinction between publication and communication, which Scots courts do not.)

17. Charles E. Carpenter, *Libel Per Se in California and Some Other States*, 17 S. Cal. L. Rev. 347, 350 (1943–44) (citing Restatement (First) of Torts § 568 cmt. b (1938)).

18. *Id.*

19. *Id.*

defamation's primary objective.

I. THE EVOLUTION OF DEFAMATION

Many things can be said with impunity by word of mouth but not so when it is caught on the wind and transmitted in to print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides, and perpetuates the scandal.²⁰

- Justice Cardozo

A. DEFAMATION DEFINED: THE LIBEL/SLANDER DISTINCTION

Many have commented (though not often as eloquently as Justice Cardozo) on the distinction between libel and slander.²¹ But before one considers what has become a bit of a semantic divide, one must first recognize what the two tort theories have in common, for both are forms of defamation. The Restatement (Second) of Torts defines defamation as "a false and defamatory statement concerning another."²² The tort provides a remedy for those who suffer reputational or emotional damage from a third party communication.²³ At its core, a communication is defamatory "if it tends to so harm the reputation of another as to lower him or her in the estimation of the community or to deter a third person from associating or dealing with him [or her]."²⁴

20. *Ostrowe v. Lee*, 175 N.E. 505, 506 (N.Y. 1931).

21. *See, e.g., Shor v. Billingsley*, 158 N.Y.S.2d 476, 482 (App. Div. 1957) ("One reason often given for the distinction is that a libel written and published shows more deliberate malignity than a mere oral slander." (quoting RICHARD O'SULLIVAN, *GATLEY ON LIBEL AND SLANDER IN A CIVIL ACTION: WITH PRECEDENTS OF PLEADINGS 4-5* (4th ed. 1953)); "Written slander is premeditated and shows design." (quoting *Clement v. Chivis*, 9 B. & C. 174 (E.C.L.)); "Another reason is that a greater degree of mischief is probable in the case of a libel, owing to its more durable character, and the fact that it can be more easily disseminated." Additionally, "[a] person who publishes defamatory matter on paper or in print puts into circulation that which is more permanent and more easily transmissible than oral slander." (quoting *Ratcliffe v. Evans*, 2 Q.B. 524, 530 (1892))).

22. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

23. *See Fisher v. Lynch*, 571 F. Supp. 2d 1230, 1233 (D. Kan. 2008); *Longbehn v. Schoenrock*, 727 N.W.2d 153, 157 (Minn. App. 2007).

24. RESTATEMENT (SECOND) TORTS § 559 (1977). In order to be actionable, the communication must be "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) [made with] fault amounting at least to negligence on the part of the publisher;" and "(d) [the cause of] either actionability of the statement irrespective of special harm or the existence of special harm" RESTATEMENT (SECOND) TORTS § 558 (1977). *See also Kimber v. Bancroft*, No. CV010455708S, 2004 WL 1615972, at *6 (Conn. Super. Ct. June 25, 2004) (holding that calling a clergyman a "poverty pimp for hire" constituted defamation as it reflected unfavorably upon the clergyman's personal morality and integrity). Many scholars have paid significant attention to the post-Internet boom meaning of reputation. *See David S. Ardia, Defamation and Reputation in a Networked World*, 45 HARV. C.R.-C.L. L. REV. 261 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689865. The Internet's constant availability of information from an increasing number of diverse and frequent sources makes reputations more transient and easily challenged. *See generally* Lyrissa Barnett Lidsky, *Defamation, Reputation and the*

Historically, courts divide instances of defamation into libel and slander.²⁵ As Justice Cardozo emphasized, the difference between actions for slander and libel is predicated on the notion that the former is often evanescent; it is spoken, fleeting, soon forgotten and therefore less likely to permanently injure.²⁶ The latter is more contemplative and therefore more “deliberate and malicious, more capable of circulation in distant places, and consequently more likely to be permanently injurious.”²⁷ As a result, a plaintiff is not required to prove direct financial harm in order to recover for libel.²⁸ Upon proof of written defamation, it is assumed that damages have occurred.²⁹ In contrast, slander requires the plaintiff to prove actual harm.³⁰

Thus, what distinguishes libel and slander first and foremost—other than the means of communication—is the additional requirement that where slander is concerned, a plaintiff cannot prevail absent proof of special damages.³¹ For both libel and slander, proof that a false statement damaged plaintiff’s reputation in the community will suffice.³² If the statement is published, the plaintiff, upon proof of these elements, will recover general damages.³³

The requirement of proof of special damages is relaxed when the alleged

Myth of Community, 71 WASH. L. REV. 1, 7–8 (1996); Amy Sanders, *Defining Defamation: Community in the Age of the Internet*, 15 Comm. L. Pol’y 231, 261–62 (2010), available at <http://www.britannica.com/bps/additionalcontents/18/52038255/Defining-Defamation-Community-in-the-Age-of-the-internet> (noting that online chat groups, blogs and social media websites, such as Facebook and MySpace, have bloated the boundaries of a shared community beyond the village green to States, if not Continents). While proof of reputation and community are essential to a claim, their definition is not fundamental to the essence of my argument, as these elements are necessary whether proving libel or slander.

25. See RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

26. See *Ostrowe*, 175 N.E. at 506.

27. *Tonini v. Cevasco*, 46 P. 103, 104 (1896). See also *Pollard v. Lyon*, 91 U.S. 225, 235 (1876) (“Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander.”); *Rice v. Simmons*, 2 Del. 417, 418 (1838) (finding that libel is more permanent, deliberate and extensive); *Fonville v. M’Nease*, 23 S.C.L. (Dud.) 303, 310 (1838) (“Words are evanescent; they are as fleeting as the perishing flowers of spring; they are often the results of mere passion; but written slander is to remain; it is to be treasured up by every other malicious man for his day of vengeance . . .”).

28. See *W.J.A v. D.A.*, 4 A.3d 601, 605–06 (N.J. Super. 2010) (“noting that . . . pecuniary] damages were to be presumed for libel as early as 1670.” (citing RESTATEMENT (FIRST) OF TORTS § 568 cmt. b (1938))).

29. See *id.*

30. See, e.g., *El-Ghazzawy v. Berthiaume*, 708 F. Supp. 2d 874, 886 (D. Minn. 2010) (determining that slander is not actionable absent proof of special damages or proof that words were slander per se); *Long v. Vertical Techs., Inc.*, 439 S.E.2d 797, 800 (N.C. Ct. App. 1994) (prohibiting plaintiff from recovering absent proof of special damages).

31. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

32. *Wilson v. Meyer*, 126 P.3d 276, 279 (Colo. 2005) (citing *Tonnessen v. Denver Publ’g Co.*, 5 P.3d 959, 963 (Colo. App. 2000)).

33. See *Pollard*, 91 U.S. at 235.

defamation constitutes slander per se.³⁴ Early common law courts have labeled four types of statements as so clearly injurious to one's reputation that they could be presumed slanderous even without any proof of special damages.³⁵ These types are as follows: (1) statements that challenge plaintiff's competence in his or her trade or profession, (2) statements claiming the plaintiff has a loathsome disease, (3) statements alleging serious criminal misbehavior by the plaintiff, and (4) suggestions of a lack of chastity in a woman.³⁶

Over the past century, a trend has emerged revealing an increase in slander per se cases, thereby relieving the plaintiff of the obligation to prove special damages.³⁷ Most slander cases are brought against those accusing the plaintiff of bad business dealings, improper sexual conduct or criminal activity.³⁸ There is little left that is not slander per se, although plagiarism cases have been among the few slander cases in which the plaintiff was actually required to prove special damages.³⁹

Courts have so significantly fractionalized defamation that it is best to think of the various forms of defamation as subtypes.⁴⁰ By the mid Seventeenth century, courts already recognized three defamatory subtypes: libel, slander and slander per se.⁴¹ The early 1900s brought further fractionalization and consequently more defamatory subtypes when some jurisdictions divided libel into two types: libel per

34. *Ransopher v. Chapman*, 791 S.W.2d 686, 687 (Ark. 1990).

35. *Biondi v. Nassimos*, 692 A.2d 103, 106 (N.J. Super. 1997).

36. *Id.* at 154 (citing RESTATEMENT (SECOND) OF TORTS §§ 570–74 (1977)).

37. Original research conducted through WESTLAWNEXT.

TRIAL COURT ORDERS

	1900–1910	1940–1950	1990–2000	2000–2010
Slander Per Se	6	4	83	38

% of defamation trial court orders that were slander per se

	1900–1910	1940–1950	1990–2000	2000–2010
Slander Per Se	5%	2%	11%	18%

CASES

	1900–1910	1940–1950	1990–2000	2000–2010
Slander Per Se	20	21	579	1,118

% of defamation cases that were slander per se

	1900–1910	1940–1950	1990–2000	2000–2010
Slander Per Se	1.7%	1.4%	31.5%	37%

See also David Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1054 (2006) (“In the past quarter-century, on average fewer than 20 libel cases against media have gone to trial per year in the entire United States.”).

38. Original research conducted through WESTLAWNEXT.

39. See generally *Tacka v. Georgetown Univ.*, 193 F. Supp. 2d 43 (D.D.C. 2001).

40. The analogy is similar to William Prosser's four subtypes of privacy. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

41. See *Ardia*, *supra* note 24, at 284.

se and libel per quod.⁴² The creation of these sub-torts was prompted by court concern that there was a distinction between statements that were libelous on their face and those that required extrinsic evidence to prove inducement or innuendo; this ultimately led courts to divide libel into two categories.⁴³ Libel per se was reserved for the statements that were defamatory on their face.⁴⁴

In contrast, libel per quod applied to instances where the statement required evidence of innuendo to prove it was defamatory.⁴⁵ The notion behind libel per quod, therefore, was similar to that of pure slander; since there was potential for minimal harm, if none at all, by a particular statement, defendants should not be called to answer for their statement unless the plaintiff was able to prove that the statement caused pecuniary harm.⁴⁶ Most recently, Georgia courts created an additional sub-tort, “defamacast,” which alleviated a plaintiff from proving special damages for any type of broadcast defamation.⁴⁷

With an appreciation for the various sub-torts and the difference in pleading requirements of the various forms of libel and slander, it is important to understand the historical evolution of the two torts and the way in which the law has navigated and shepherded each in the face of technological advances.⁴⁸

B. THE JUDICIAL CONSTRUCT OF LIBEL AND SLANDER IN THE TECHNOLOGICAL ERA

The distinction between libel and slander is a historic anomaly and really just an archaic remnant of ecclesiastical law.⁴⁹ The ecclesiastical courts, which united the law with religion and morals, sharply prohibited the publication of false reports affecting the character of others.⁵⁰ Although there was no formal punishment for

42. See *Oliveros v. Henderson*, 106 S.E. 855, 857 (1921) (one of the earliest cases acknowledging the libel slander distinction); Eldredge, *Spurious Role of Libel Per Quod*, *supra* note 13, at 734 (quoting Dean Prosser) (noting a trend among American courts to require special damages for libel that depends on proof of extrinsic facts (libel per quod)). See generally Prosser, *Libel Per Quod*, *supra* note 1 (American Courts have adopted the libel per se/libel per quod distinction).

43. *Id.*

44. See RESTATEMENT (SECOND) OF TORTS § 569 *rep. note* 2 (1977).

45. *Id.* *Morrison v. Ritchie & Co*, 4 F. 645, 645–46 (Scot. 1902), is often cited as a strong example of libel per quod. In that case, defendant newspaper published reports that the plaintiff had given birth to twins. On its face, the statement was not damaging to the plaintiff’s reputation. However, the community knew that the plaintiff was not married, which made the statement defamatory.

46. See, e.g., *Morton v. Hearst Corp.*, 779 S.W.2d 268, 271 (Mo. Ct. App. W.D. 1989).

47. See *Jaillett v. Ga. Television Co.*, 520 S.E.2d 721, 724 (Ga. Ct. App. 1999) (defining “Defamacast” as “[d]efamation via a radio or television broadcast”); *Am. Broad.-Paramount Theatres v. Simpson*, 126 S.E.2d 873, 878 (Ga. Ct. App. 1962). See also GA. CODE ANN. § 51-5-10 (2011) (setting forth the Georgia statute governing civil liability for defamatory statements in visual or sound broadcasts).

48. See *supra* note 7 and accompanying text (defining pure slander as slander that requires proof of special damages).

49. See generally RESTATEMENT (SECOND) OF TORTS § 568 *cmt. b* (1977).

50. See Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 41 (1985). See generally MARTIN L. NEWELL, *THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES* (Mason H. Newell ed., 4th ed. 1924) (discussing the origins of

verbal dissemination of an untruth, the wronged party was entitled to avenge himself against the person speaking the wrong.⁵¹ The lack of technology meant that defamation during the Middle Ages was almost exclusively committed by the spoken word.⁵² These wrongful falsities the ecclesiastical courts had come to embrace were labeled as slander.⁵³ Eventually, the common law courts absorbed ecclesiastical law, due in part to the ecclesiastical courts' inability to provide an adequate remedy for those seeking relief, and the offense became a common law misdemeanor and a tort.⁵⁴

As printing presses became more commonplace, the limited nature of slander, still reserved for the spoken word, seemed "wholly inadequate" for the times.⁵⁵ The Star Chamber exercised its mandate to ensure fair treatment of prominent people by regulating dissemination of the printed word.⁵⁶ The Star Chamber classified written falsities as libel, considering them both a tort and a crime.⁵⁷ The ecclesiastical courts, however, retained jurisdiction over slander.⁵⁸

Subsequent courts did not challenge this division and instead treated the two types of defamation as separate torts.⁵⁹ Lord Hale supported the divide, writing that written and published words can contain more malice than if they had only

defamation law).

51. See MARTIN L. NEWELL, *THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES* 97-98 (Mason H. Newell ed., 3d ed. 1914) ("[E]very act whatsoever of man that causes damage to another obliges him by whose fault it happened, to repair it . . .").

52. *Id.* According to Stat. 2 Richard II stat.1 ch. 5, "devisers of false news and of horrible and false lies" have committed an act of "great slander." See NEWELL, *supra* note 51, at 21-22. Richard II ruled from 1377 to 1399. See generally CHRISTOPHER FLETCHER, *RICHARD II: MANHOOD, YOUTH, AND POLITICS* (2008) (discussing the monarch's reign). Richard II of England codified the law as slander, meaning to devise "false news and horrible and false lies." See Newell, *supra* note 51, at 21-22.

53. See RESTATEMENT (SECOND) TORTS § 568 cmt. b (1977) (noting that some types of slander remained in the ecclesiastical courts; they were the classes of slander that the common law courts found it possible by fictions or other expedients to wrest from ecclesiastical jurisdiction. The result was simply that certain types of slander, having certain characteristics and consequences, came within common law jurisdiction, while the remaining types stayed within ecclesiastical jurisdictions).

54. See Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 265 (2000) (citing KENNETH CAMPBELL, *THE ORIGINS AND DEVELOPMENT OF A PHILOSOPHY FOR THE PROTECTION OF OPINION IN DEFAMATION LAW* 39 (1990) (observing that church courts could only offer remedies of apology). See also RESTATEMENT (FIRST) OF TORTS § 568 cmt. b (1938).

55. *Id.* (quoting Lord Hale, "Although such general words spoken once without writing or publishing them would not be actionable, yet here, they being writ and published, which contains more malice than if they had been once spoken, they are actionable."). See also *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45, 47 (Mo. App. 1973) ("Slander since the time of Adam and Eve, together with libel since Johann Gutenberg invested the printing press, have met in head on confrontation with mankind's inherent belief in freedom of oral and written expression.").

56. *Id.* The Star Chamber was the court of equity, charged with administering criminal justice. In the Seventeenth Century, the Star Chamber heard crimes of political libel as a means of protecting the government's power from the printing press. For example, the Star Chamber assumed jurisdiction over libel in the interest of public harmony.

57. *Id.* Because libel tended to breach the peace, it was considered a crime at common law.

58. See *id.*

59. *Id.*

been spoken once.⁶⁰ By 1812, the notion of treating spoken and written words differently seemed fairly well settled on the grounds that the doctrine was too well-established to be repudiated.⁶¹

The popularization and proliferation of radio and television media outlets forced courts to reconsider whether all spoken defamatory words should be slander.⁶² The advent of radio technology meant that, for the first time, spoken words could be heard in areas far beyond where they were uttered. Moreover, the prestige of broadcast radio had the effect of lending credibility to the information conveyed.⁶³

The effect of technology on defamation law first gained prominent attention in *Hartman v. Winchell*, which involved famed radio gossip personality Walter Winchell.⁶⁴ The New York Court of Appeals concluded that spoken words read from a written script over the radio constituted libel and not slander.⁶⁵ One member of the Court found support for the Court's decision "because of the likelihood of aggravated injury inherent in such broadcasting."⁶⁶

Shor v. Billingsley was a more difficult case.⁶⁷ It considered an ad libbed radio comment made by radio talk show host Billingsley about Toots Shor, the owner of the famed Stork Club.⁶⁸ The controversy centered on a discussion between two radio talk show hosts, Brisson and Billingsley; the discussion was broadcast live from the restaurant belonging to famed restaurateur Toots Shor.⁶⁹ As Shor walked by, Billingsley commented that he "wished he had as much money as [Shor] owes."⁷⁰ Shor brought a lawsuit pleading defamation, libel and slander.⁷¹ The defense moved to dismiss the claim, based on the failure to prove special damages,

60. RESTATEMENT (FIRST) OF TORTS § 568 cmt. b (1938) (quoting Lord Hale, who said, "[A]lthough such general words spoken once without writing or publishing them would not be actionable, yet here, they being writ and published, which contains more malice than if they had been once spoken, they are actionable.")

61. *See id.*

62. *See, e.g., Shor v. Billingsley*, 158 N.Y.S.2d 476, 479 (App. Div. 1957) (noting that defamatory material published via a televised broadcast was a case of first impression).

63. *See Ciolli, supra* note 13, at 144.

64. *Hartman v. Winchell*, 73 N.E.2d 30 (N.Y. 1947).

65. *Id.* at 32.

66. *Id.* at 32 (Fuld, J., concurring).

67. *Shor*, 158 N.Y.S.2d 476.

68. *Id.*

69. *Id.*

70. The full discussion went as follows:

Mr. Brisson: That is Toots Shor and a man I don't know.

Mr. Billingsley: You want to know something?

Mr. Brisson: Want to know something? I saw Toots Shor, he's a good-looking fellow, isn't he?

Mr. Billingsley: Yes, he is. Want to know something? I wish I had as much money as he owes.

Mr. Brisson: Owes you or somebody else?

Mr. Billingsley: Everybody-oh, a lot of people.

Id. at 478.

71. *See id.* at 476.

which is the element required for slander, but not libel.⁷² The New York Supreme Court, acknowledging that this was a case of first impression, distinguished it from *Hartman*, which was based on words spoken from a written script.⁷³

The Court in *Billingsley* highlighted arguments for and against changing the well-settled and historic distinction between libel and slander.⁷⁴ Here the Court first acknowledged the two distinguishing hallmarks of libel: widespread dissemination and its permanency in form, both of which create a likelihood of aggravated injury.⁷⁵ With regard to widespread dissemination, the Court cited numerous opinions and treatises that supported the contention that broadcasting reaches a “vast and far flung” audience.⁷⁶ While the Court acknowledged the same lack of durability that broadcast media has, it ultimately sided with the plaintiff, holding that the equally great potential for harm that accompanied broadcast journalism outweighed the measure of permanence.⁷⁷

Justice Hecht, who wrote for the Court, acknowledged that technology nudged the doctrinal principle of defamation law across an otherwise steadfast divide.⁷⁸ Cardozo’s opinion in *Winchell*, he wrote, recognized the duty of the Court to extend established principles of law to new technological advances, even when not covered by the literal language of previous decisions.⁷⁹ Justice Hecht believed that the genius of the common law was that it could meet any challenge posed by the “needs of life in a developing civilization.”⁸⁰

Reporters of the Restatement (Second) Section 568A subsequently adopted the *Shor* holding.⁸¹ Many legislatures followed suit and today the issue is regulated mostly by statute.⁸² Many jurisdictions, including California and Ohio, rejected *Shor* and instead labeled defamation by broadcast media as slander.⁸³ Other jurisdictions took an intermediary approach, deeming broadcasted defamatory speech as libel when it emanates from a script, and slander if comments stem from

72. *Id.*

73. *Id.* at 486–89.

74. *Id.* at 476–80.

75. *Id.* at 481.

76. *Id.*

77. *Id.*

78. *Id.* at 484.

79. *Id.*

80. *Id.*

81. *See Sorensen v. Wood*, 243 N.W. 82, 85 (Neb. 1932). *See generally* *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440, 443 (Conn. 1955); *Weglein v. Golder*, 177 A. 47, 48 (Pa. 1935).

82. VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ’S TORTS CASES AND MATERIALS* 888 (12th ed. 2010).

83. *See* CAL. CIV. CODE § 48a(1) (West 2001) (defining radio broadcasts as slander). *See also* *Brothers v. Cnty. of Summit*, No. 5:03CV1002, 2007 WL 1567662, at *26 (N.D. Ohio May 25, 2007); *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515, 1525 (W.D. Okla. 1992) (applying Oklahoma law where defendant broadcast television station has broadcast a slanderous statement); *Total Exposure.com, Ltd. v. Miami Valley Broadcasting Corp.*, No. 20162, 2006 WL 267151 (Ohio App. 2d Feb. 3, 2006); *Bacon v. Kirk*, No. 1-99-33, 2000 WL 1648925 (Ohio App. 3d Oct. 31, 2000); *Schulman v. Embrescia Communications Corp.*, No. 52280, 1981 WL 4650 (Ohio App. 8d. Nov. 25, 1981). *See also* *Chart infra* pp. 52–55.

ad libbed discussion.⁸⁴ The law regarding the treatment of defamatory broadcast speech remains inconsistent today.⁸⁵

American courts have taken a more normative approach to classifying defamatory speech on the Internet. As a general rule, Internet postings that injure one's reputation are libel, in large part because they appear in print on computer screens.⁸⁶ *Varian Medical Systems, Inc. v. Delfino*, one of the first cases to consider how Internet communication should be treated, illustrates the competing arguments and presents a resolve that appears to satiate all jurisdictions.⁸⁷ Defendants Michelangelo Delfino and Mary Day posted thousands of negative comments on websites and message boards criticizing their employer, Varian Medical Systems (VMS).⁸⁸ VMS sued the defendants for libel.⁸⁹ Predictably, the defendants answered that Internet postings should be characterized as slander rather than libel, which would require plaintiffs to meet the extra burden of proving special damages.⁹⁰ They based their argument on an interpretation of California law, which defines slander as defamatory communications that are "orally uttered, and also communications by radio or any mechanical or other means."⁹¹ The defendants noted that the statute covers television, even though television is not specifically cited, and should therefore also cover the Internet by analogy.⁹² Furthermore, they argued, because Internet postings can easily be deleted, modified or even lost in cyberspace, they do not possess the durability of traditional print.⁹³

The California Appellate Court, in 2005, ruled that Internet postings were considered libel, not slander, under California law.⁹⁴ It stated that Internet posts are representations "to the eye."⁹⁵ Although they may be easily deleted and modified, the Court concluded that posts are much more fixed than the spoken word.⁹⁶ Furthermore, the Court held that individuals could preserve messages just by printing them.⁹⁷ In short, the Court wrote, "the only difference between the publications the defendants made in this case and traditionally libelous publications

84. See, e.g., *Neely v. Wilson*, 331 S.W.3d 900, 912 (Tex. Ct. App. 2011).

85. See Chart *infra* pp. 52–55.

86. See David Watson, C.A.: *Defamatory Internet Postings Libel, Not Slander*, METROPOLITAN NEWS-ENTERPRISE (Nov. 14, 2003), <http://www.metnews.com/articles/vari111403.htm>.

87. *Varian Med. Sys., Inc. v. Delfino*, 6 Cal. Rptr. 3d 325 (Ct. App. 2003), *rev'd*, 106 P.3d 958 (Cal. 2005) (noting that internet postings are classified as libel).

88. *Varian Med. Sys., Inc.*, 6 Cal. Rptr. 3d at 333.

89. *Id.*

90. *Id.*

91. CAL. CIV. CODE § 46 (West 2011).

92. *Varian Med. Sys. Inc.*, 6 Cal. Rptr 3d at 342.

93. *Id.* at 343.

94. *Varian Med. Sys., Inc.*, 106 P.3d at 963 (noting that in California an appellate court generally does not consider issues raised for the first time on appeal; the Court held that, in this instance, it was necessary to do so, as it was a matter of public interest). *Id.*

95. *Varian Med. Sys. Inc.*, 6 Cal. Rptr. 3d at 341, 343.

96. *Id.* at 343.

97. *Id.*

is the defendants' choice to disseminate the writings electronically."⁹⁸

In *Too Much Media, LLC v. Hale*, the plaintiff contended that a defamatory Internet posting should be labeled slander, which would absolve it of the requirement of proving special damages.⁹⁹ The Court disagreed.¹⁰⁰ In rendering its decision, the Court concluded that the "wide area of dissemination, [and] the fact that a record of the publication is made with some substantial degree of permanence" render it libel.¹⁰¹ The Court went on to conclude that defamatory Internet postings should be treated as libel.¹⁰² All American jurisdictions seem to have followed suit.¹⁰³

England takes a different approach. In 2008, an English High Court judge ruled that Internet bulletin boards are more like slander than libel.¹⁰⁴ The Court's reasoning was that bulletin board discussions are characterized by "give and take" and should be considered more in that context.¹⁰⁵ The judge noted the casual conversational nature of bulletin board posts, finding that, unlike newspaper articles, such posts are often ill thought out.¹⁰⁶ "When considered in the context of defamation law, therefore, communications of this kind are much more akin to slanders than to the usual, more permanent kind of communications found in libel actions."¹⁰⁷

Notwithstanding the seeming consistency with which courts have treated defamatory Internet speech, the interstate discrepancy with which defamatory broadcast statements are treated and the international inconsistency of defamatory Internet speech, portend a future of confusion as new technological communication advances emerge. The next section of this Paper will highlight some of the newest

98. *Id.* Another significant issue in the *Varian* case was the interpretation of California's SLAPP statute. A SLAPP statute, a strategic lawsuit against public participation, threatens or financially burdens a defendant with costly litigation, forcing the defendant to cease and desist from his or her actions. In this case, defendant's Delfino and Day filed a motion to strike Varian's complaint under California's anti-SLAPP statute. The matter in controversy concerned whether filing an anti-SLAPP motion affected an automatic stay of the trial proceedings. The Court answered in the affirmative.

99. *Too Much Media, LLC v. Hale*, 993 A.2d 845, 862 (N.J. Super. 2010), *aff'd and modified*, 206 N.J. 209 (2011).

100. *Id.* at 864 (citing RESTATEMENT (SECOND) OF TORTS § 568 (1977) (demonstrating the rationale for extending the pre-Internet age definition of slander to postings)).

101. *Id.* at 864-65. *See also* W.J.A. v. D.A., 4 A.3d. 601, 604 (N.J. Super. 2010).

102. *Too Much Media, LLC*, 993 A.2d at 864.

103. *See, e.g., Rapp v. Jews for Jesus, Inc.*, 944 So. 2d 460, 465 (Fla. Dist. Ct. App. 2006) (defaming statements in a newsletter disseminated over the Internet can constitute libel); *Rizitelli v. Thompson*, No. CV95009384S, 2010 WL 3341516, at *3 (Conn. Super. Ct. Aug. 2, 2010) (mentioning the complaint, which alleged that defamatory statements on a blog constituted libel *per se/per quod*); *Lawrence v. Walker*, 9 Pa. D. & C. 5th 225, 243 (Pa. Com. Pl. 2009) (defaming statements posted on an Internet forum can constitute libel).

104. *Smith v. ADVFN Plc & Ors*, [2008] EWHC (QB) 1797 (Eng.).

105. *Id.* (comparing conversations on blogs to those in bars where passersby simply note the dialogue before moving on).

106. *Id.*

107. *Id.* ("People do not often take a 'thread' and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it.")

advances in technological communication and will illustrate how many of these advances allow us to communicate in a sort of hybrid speech, combining the evanescent and fleeting qualities of the spoken word and the permanency of the written form. These new hybrid methods of communication pose challenges similar to those posed by the printing press and then by broadcast airwaves—neither of whose forms were contemplated at the time slander originated.

II. REAL-TIME DIGITAL COMMUNICATION

Speech has become a sort of hybrid communication, combining the off the cuff discussion that frequently occurs through oral discourse with printable qualities of electronic text. Today, whole conversations are communicated through technological media rather than through actual face to face speech. Discussions occur via instant messaging or text messaging.¹⁰⁸ Individuals often share immediate thoughts and emotions without rethinking or editing their words.¹⁰⁹ For many, text messaging and tweeting are acts that occur as easily as speaking in real time. The result is a tangible and printable form of dialogue, which I term technospeech.¹¹⁰ The following Section will more fully define technospeech and will consider how technospeech is conducted in a similar manner as the type of casual, and sometimes even reckless, face to face speech that slander contemplates.

A. DEFINING TECHNOSPEECH

Technospeech is communication that (1) occurs in real time, (2) is intended for a particular group of people who know the speaker or at least have some kind of social connection with the speaker and (3) is conducted in an informal manner.. Our contemporary world is replete with examples of technospeech. For example, Twitter now replaces the bullhorn as a means to incite social change.¹¹¹ The text

108. Adam Fendelman, *Definition of SMS Text Messaging: What is SMS Messaging? What is Text Messaging?*, ABOUT.COM, <http://cellphones.about.com/od/phoneglossary/g/smstextmessage.htm> (explaining that text messages, also called short messaging service (SMS), are a communication that allows the exchange of short messages (160 characters) between mobile phone devices); Mark Milian, *Why Text Messages are Limited to 160 Characters*, L.A. TIMES (May 3, 2009, 1:28 PM), <http://latimes.blogs.latimes.com/technology/2009/05/invented-text-messaging.html> (tracking the development and success of text messaging using a limited number of characters). See also Jack Cafferty, *Technology Replacing Personal Interactions at What Cost?*, CAFFERTY FILE CNN.COM BLOGS (Jan. 3, 2011, 6:00 PM), <http://caffertyfile.blogs.cnn.com/2011/01/03/technology-replacing-personal-interactions-at-what-cost/>.

109. E.J. Westlake, *Friend Me if You Facebook: Generation Y and Performative Surveillance*, 52 THE DRAMA REV. 4, 26 (2008) (discussing the mid century French theorist Roland Barthes's distinction between "readerly text"—text that is reflective and contemplated—and "writerly text," which is a reflection of "ourselves writing").

110. See generally DAVID CRYSTAL, LANGUAGE AND THE INTERNET 94–128 (Cambridge Press, 2001); David Crystal, *2b or Not 2b*, THE GUARDIAN (DAILY), July 5, 2008, Review, at 2 (noting that text messaging has also been called "slanguage," and "textese").

111. *Twitter, Inc.*, COMPANY PROFILE FROM HOOVER'S, http://www.hoovers.com/company/Twitter_Inc/rjfkjji-1.html (describing Twitter as a free social networking site, that allows a user to send

messaging that follows from ownership of cell phones and Personal Digital Assistants (PDAs) have come to replace face to face communication.¹¹² Instant messages now serve as common means for making social plans and even ending social relationships.¹¹³ The new dynamic of communication—which is thoughtless and off the cuff, yet visible to the eye because it is in digital form—combines the fleeting and evanescent nature of slander with the permanency of libel. Consider the following examples of technospeech:

Twitter replaces bullhorns. In early January 2011, activists in Egypt called for an uprising to protest the government and rule of President Hosni Mubarak, when Wael Ghonim, an Egyptian Google executive, used social media to ensure significant attendance at an anti Mubarak rally.¹¹⁴ On January 24, Ghonim tweeted: “Despite all the warnings I got from my relatives and friends, I’ll be there on #Jan25 protests, Anyone going to be in Gam’et Dewal protests?”¹¹⁵ A later tweet made the following instruction: “Everyone come to Dar El Jekma security police allow people to join us and we are a few hundreds #Jan25.”¹¹⁶ Ghonim not only called others to arms but also solicited advice through his tweets, as in the following examples: “How many people in Muhandseen without rumors please,” and, “we want to move to Dar el Hekma where to go #Jan25.”¹¹⁷ Ghonim’s tweets created an eighteen day national revolution that led to the overthrow of Egypt’s longstanding government.¹¹⁸ His informal technospeech pleas and call to arms hearkened back to the successful leadership of the demise of Egypt’s long-ruling government. Ghonim’s activities illustrate the ease with which people can assemble and communicate through the Internet.

and receive Tweets of up to 140 characters—whether banal or insightful—which are posted on the author’s Twitter site for others to see). *See also About Twitter*, TWITTER, <http://twitter.com/about> (last visited Oct. 23, 2011).

112. *See* Mike Sachoff, *Teen Texting Sees Sharp Increase*, WEB PRO NEWS (April 20, 2009, 5:09 PM), <http://www.webpronews.com/teen-texting-sees-sharp-increase-2010-04>. *See generally* Crystal, *supra* note 110. *See also Cell Phones: A Tool for Cheating*, UNIV. OF ALA. COMPUTERS AND APPLIED TECH. PROGRAM (2006), <http://www.bamaed.ua.edu/edtechcases/casestudies/cell%20phones.pdf> (listing studies showing that text messages are the new form of notes passed in a classroom, and have become the “latest craze” in classroom cheating).

113. *See* ILANA GERSHORN, *THE BREAKUP 2.0: DISCONNECTING OVER NEW MEDIA* 23–25 (Cornell Univ. Press, 2010) (ending a relationship through texting is now an acceptable interaction); Eric R. Merkle & Rhonda Richardson, *Digital Dating and Virtual Relating: Conceptualizing Computer Mediated Romantic Relationships*, 49 FAM. REL. J 187, 188–89 (2000) (finding that the initial social penetration of a new relationship and the process of revealing intimate details and self-disclosure, all of which are essential to building a new bond, can take place as effectively through instant messaging as it can through face to face or telephoned communication).

114. *See Timeline: Egypt’s Revolution*, AL JAZEERA (Feb. 14, 2011, 3:54 PM), <http://english.aljazeera.net/news/middleeast/2011/01/201112515334871490.html>; Mike Giglio, *The Facebook Freedom Fighter*, NEWSWEEK, Feb. 21, 2011, at 14–16.

115. Wael Ghonim, *Wael Ghonim (ghonim) on Twitter*, TWITTER, <http://twitter.com/Ghonim> (last visited Oct. 24, 2011).

116. *Id.*

117. *Id.*

118. *See* Giglio, *supra* note 114.

Text messaging replaces talking. A recent *Wall Street Journal* study conducted by Nielsen revealed that the use of text messages is up dramatically while phone messages are down 25%.¹¹⁹ Americans sent more than two trillion text messages in 2010, and the Pew Internet & American Life Project revealed that teens prefer text messaging to voice-to-voice communication.¹²⁰ Another recent study found that 60% of teens do not consider electronic communication to be writing.¹²¹

Take for example the following web transcript of an individual ending a relationship via instant message (taken from the e-closures breakup blog):

Martin says: (2:40:39 AM) Did you get my email?

Charlotte says: (2:41:16 AM) yeah

Charlotte says: (2:41:38 AM) I wrote you a reply but it's ridiculously long and ill organized

Martin says: (2:41:50 AM) that's ok

Martin says: (2:42:25 AM) I'm sorry I emailed you, I just don't know how to talk to you anymore, I feel like I make you uncomfortable so it just seemed best

Martin says: (2:43:29 AM) like you still have to defend yourself to me, which is probly my fault, cause I got so frustrated trying to get close to you that I caused that

Martin says: (2:43:41 AM) that's the one thing I forgot to say in the email

Martin says: (2:44:17 AM) I REalize that I caused us to lose trust in each other, me in your honesty and you in my reaction/thoughts, but it was never really what it seemed

Charlotte says: (2:44:24 AM) should i send it to you anyways?¹²²

Or the following examples, written by a United States Congressman:

119. Dwight Silverman, *Texting is Replacing Talking, Study Says*, SEATTLE POST-INTELLIGENCER (Oct. 7, 2010, 10:00 PM), <http://www.seattlepi.com/business/article/Texting-is-replacing-talking-study-says-891959.php> (discussing how a Nielsen study conducted by *The Wall Street Journal* found that amongst all age groups' time spent talking on cell phones have dramatically dropped while the amount of text messages sent and received has increased). See also Christina Chang, *Texting in Class: It's More Common Than You Think*, COLL. NEWS (Dec. 17, 2010), http://www.collegenews.com/index.php?article/texting_in_class_its_more_common_than_you_think_34262435623/ (citing a Wilkes University study that found around 92% of all college students text message in class); Yifeng Hu et. al., *Friendships Through IM: Exploring the Relationship Between Instant Messaging and Intimacy*, 10 J. COMPUTER-MEDIATED COMM. 1 (Nov. 2004), available at <http://jcmc.indiana.edu/vol10/issue1/hu.html> (demonstrating a strong positive correlation between instant message use and the perceived level of intimacy between friends).

120. See *Texting Skyrockets; Typed Words Replace Talk?*, CBS NEWS (Apr. 6, 2011, 12:15 PM), <http://www.cbsnews.com/stories/2011/04/06/earlyshow/leisure/gamesgadgets/zmos/main20051303.shtml>. See also Sachoff, *supra* note 112.

121. Press Release, Pew Internet and Am. Life Project, Teens Do Not Consider A Lot of Their Electronic Texts as Writing (Apr. 24, 2008), <http://www.pewinternet.org/Press-Releases/2008/Teens-do-not-consider-a-lot-of-their-electronic-texts-as-writing.aspx>.

122. Case #84: Charlotte + Martin, E-CLOSURE (Jan. 25, 2008), <http://e-closure.blogspot.com/2008/01/case-84-charlotte-martin.html>.

*idiots i work with love this stupid b**ch! i ask them all if they will be turning down their social security and medicare. . .let's kick some gop ass! i hate them!*

and

*i cat wait to meet you in person! . . . Iunderstand this reelection stuff may take some time, but i really feel that my needs are waayyy more important!*¹²³

The real time occurrence of each of the above illustrated examples coupled with their informal nature suggest a communication form that is contrary to the reflective and edited form of publication that courts contemplated when establishing the tort of libel. Instead, technospeech is more akin to oral communication, and for many it is a more efficient way of communicating a momentary thought.¹²⁴ The contemporaneousness of instant messaging, as the communication between Martin and Charlotte reveals, allows individuals to share thoughts in real time. Twitter communicates an instantaneous call to arms in much the same way as union leaders with bullhorns or Paul Revere on his horse. Technospeech lacks the type of formal contemplation and reflection that is the hallmark of libel.

Speech in the form of technology has become an added mode of communication. As early as 1973, Daniel Bell predicted “major social consequences would derive from . . . the invention of miniature electronic and optical circuits capable of speeding the flow of information.”¹²⁵ Indeed, scores of theorists and social scientists argue that digital communication is replacing face to face-dialogue.¹²⁶ But even the many who reject this displacement theory acknowledge that technology has provided an outlet for a whole new set of speech, establishing and reinforcing social norms through new types of language and dialogue.¹²⁷ Technospeech does not entirely replace oral communication, but it

123. *Transcripts from Facebook Conversations Between Rep. Anthony Wiener and Las Vegas Black Jack Dealer Lisa Weiss*, RADAR ONLINE, <http://www.radaronline.com/sites/radaronline.com/files/Wiener-Facebook-Transcript-Watermarked.pdf> (last visited July 2, 2011).

124. See *Too Much Media, LLC v. Hale*, 993 A.2d 845, 850 (N.J. Super. 2010), *aff'd and modified*, 206 N.J. 209 (2011) (suggesting Internet boards are essentially online forums for conversation); Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L. J. 855, 899 (2000) (explaining message boards promote a looser, more relaxed communication style, as they lack “formal rules setting forth who may speak and in what manner, and with what limitations from the point of view of accuracy and reliability”).

125. Karen S. Cook et. al., *Social Implications of the Internet*, 27 ANN. REV. OF SOCIOLOGY 307, 309 (2001), available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev.soc.27.1.307> (summarizing DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* (Basic Books, 1973)).

126. See Brian Stelter & Jenna Worthman, *Watching a Trial on TV, Discussing it on Twitter*, N.Y. TIMES, July 6, 2011, at A14 (quoting Ray Valdes, an analyst with Gartner Research, as saying real-time reactions to the [Casey Anthony] trial and verdict reflected the gradual adoption of the Web as a primary mode of communication throughout the day).

127. See Lindsey Langwell et. al., *Too Much of a Good Thing? The Relationship Between Number of Friends and Interpersonal Impressions on Facebook*, 13 J. COMPUTER-MEDIATED COMM. 3, 531–49 (2008) (suggesting that digital communication is displacing face to face dialogue). See generally Amanda J. Lavis, *Employers Cannot Get the Message: Text Messaging and Employee Privacy*, 54

does subsume a generous amount of the previously existing sphere of oral dialogue.

Defamatory technospeech blurs libel and slander.¹²⁸ It therefore demands legal definition. The next part of this Paper will highlight the compendium of issues that is raised by the uncertainty of how to characterize defamation by digital communication.

B. THE PROBLEM WITH CLASSIFYING TECHNOSPEECH

Courts and legislatures confronted with defamatory technospeech will find the issue one of first impression. Individuals who have brought suits for defamatory technospeech have settled their claims prior to meeting in court, or have had these claims involving defamatory tweets dismissed.¹²⁹ Courts working to resolve this issue will find that judicial resolution of new technological issues often requires reliance on ancient common laws.

To date, individuals have filed several cases alleging defamatory technospeech.¹³⁰ When filing a complaint, the plaintiffs, like those filing suits during the early years of broadcasting and the Internet, claimed that defamatory text messages or tweets were libel and not slander, thereby relieving the plaintiff of the burden of proving special damages.¹³¹ A majority of these cases have been

VILL. L. REV. 513, 518 (2009); Westlake, *supra* note 109; Tom Van Riper, *Text-Messaging Generation Entering Workplace*, MSNBC (Aug. 30, 2006, 1:50 PM), <http://www.msnbc.msn.com/id/14576541/> (discussing changes emerging in workplace behavior between young professionals, coworkers, and clients caused by availability of new technology).

128. *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 223 (D. Conn. 2009) (asserting that “[t]oday, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages.”). A similar debate has evolved regarding whether to treat blog posts as slander or libel. See Glenn Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157, 1165 (2006) (arguing that treating blog speech as slander would provide a more equitable outcome since blog speech is more like the spoken word than it is like a newspaper). *But see* Ciolli, *supra* note 13, at 250–51 (2008) (taking issue with Reynolds’s position).

129. See Jennifer Preston, *Courtney Love Settles Twitter Defamation Case*, N.Y. TIMES, Mar. 4, 2011, at C2; Cynthia Hsu, *New Edition’s Johnny Gill Settles Twitter Lawsuit*, FINDLAW (Aug. 26, 2011, 5:44 AM), http://blogs.findlaw.com/celebrity_justice/2011/08/new-editions-johnny-gill-settles-twitter-lawsuit.html; Tanya Roth, *A Little Birdie Told Me . . . Twitter Libel Suit Dismissed*, FINDLAW (Jan. 27, 2010, 10:15 AM), <http://blogs.findlaw.com/decided/2010/01/a-little-birdie-told-metwitter-libel-suit-dismissed.html>.

130. A significant number of these cases concern defamatory tweets. See, e.g., Complaint at 5–7, *Simorangkir v. Love*, No. BC410593, 2009 WL 798260 (Cal. Sup. Ct. Mar. 26, 2009) [hereinafter *Simorangkir Complaint*]. See also Debra Cassens Weiss, *Judge Tosses Libel Suit Filed Against Tenant for ‘Moldy Apartment’ Tweet*, ABA JOURNAL (Jan. 26 2010 9:10 AM), http://www.abajournal.com/news/article/judge_tosses_libel_suit_filed_against_tenant_for_moldy_apartment_tweet/; Julie Hilden, *Libel by Twitter? The Suit Against Kim Kardashian over the ‘Cookie Diet’*, FINDLAW (Jan. 4 2010), http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/hilden/20100104.html; Sean Yoong, *Man Ordered to Tweet 100 Apologies on Twitter*, MSNBC (June 2, 2011 1:26 PM), http://www.msnbc.msn.com/id/43254386/ns/technology_and_science-tech_and_gadgets/t/man-ordered-tweet-apologies-twitter/ (describing a Malaysian man being ordered [PV] by a judge to apologize 100 times on Twitter for defaming a magazine publisher).

131. See, e.g., Order Granting in Part and Denying in Part Plaintiffs’ Motion for Summary Judgment Against Defendant at 4, *Am. Satellite v. Hoskins*, No. 06CV437, 2007 WL 5129915 (Colo.

settled before going to trial; however, the rare cases that have gone to trial have left open the issue of whether text messages or tweets are characterized as libel or slander.¹³² In *Certaineed Corp. v. Garcia*, for example, the trial court noted that “non-commercial speech, whether on Facebook, Twitter, YouTube or the roofing blog, [is] clearly subject to allegations of . . . slander or libel”¹³³ In *American Satellite v. Hoskins*, a trial court judge assumed without deciding that text messages constituted libel not slander.¹³⁴

The problem of keeping up with technology is not particular to defamation and digital communication. In *Konop v. Hawaiian Airlines, Inc.*, the Ninth Circuit noted, “courts have struggled to analyze problems involving modern technology . . . often with unsatisfying results.”¹³⁵ Currently, scholars and courts note the disarray of case law in response to technological advances concerning electronic surveillance, copyright law, trademark law and e-discovery, to name a few.¹³⁶ In

Dist. Ct. Sept. 13, 2007) (treating text messages as libel) [hereinafter Am. Satellite Summary Judgment Order]. See also Alyssa J. Long, *Internet Defamation*, TEX. BAR J. (Mar. 2010), at 202, 203, available at www.texasbar.com/flashdrive/materials/.../InternetDefamation.pdf (citing Verified Complaint at 2, Horizon Grp. Mgmt., LLC v. Bonnen, No. 2009L008675 (Ill. Cir. Ct. Jul. 20. 2009) and Memorandum of Law in Support of 2-165 Motion to Dismiss at 6, Horizon Grp. Mgmt., LLC v. Bonnen, No. 2009L008675 (Ill. Cir. Ct. Jul. 20. 2009)). In 2009, Amanda Bonnen, then a tenant at a Horizon Realty Group apartment in Chicago, Ill., composed the following Tweet: “@JessB123 You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's ok.” At the time of the Tweet, Bonnen had only 20 followers. However, the multiple Tweets on her Twitter site were public. Horizon Realty Group sued Bonnen claiming that the alleged defamatory statement damaged its business reputation as a Chicago landlord. Before reaching the decision of whether the comments should be treated as libel or slander—which would require Horizon to prove that the comments did, in fact, affect their business—a Cook County judge granted Bonnen’s motion to dismiss, arguably agreeing with Ms. Bonnen’s assertion that the “statement was made in a social context where the average reader would understand that the statement was Bonnen’s opinion, not an objectively verifiable fact.”); Simorangkir Complaint *supra* note 130, at 5–7 (alleging that Courtney Love was liable for libel due to defamatory messages Love wrote about Simorangkir on Twitter); Joshua Auriemma, *Courtney Love Sued for Tweeting*, LEGAL GEEKERY (Mar. 30, 2009), <http://legalgeekery.com/2009/03/30/Courtney-love-sued-for-tweeting/> (stating that Simorangkir maintains the Tweets were in response to a claim that Love did not compensate her for requested clothing); *Courtney Love Settles Twitter Defamation Lawsuit for \$430,000, with Designer Dawn Simorangkir*, NY DAILY NEWS (Mar. 4, 2011), available at http://articles.nydailynews.com/2011-03-04/gossip/28673744_1_twitter-posts-dawn-simorangkir-twitter-account (stating that Love settled for \$430,000 out of court); Hilden, *supra* note 130.

132. See generally Response to Certaineed Motion for a Finding of Contempt at 11, *Certaineed Corp v. Garcia*, No. C09-563RAJ, 2010 WL 4652700 (W.D. Wash. Aug. 27, 2010) [hereinafter Response to Certaineed Motion]; Am. Satellite Summary Judgment Order, *supra* note 131, at 3–4.

133. Response to Certaineed Motion, *supra* note 132, at 3.

134. See Am. Satellite Summary Judgment Order, *supra* note 131.

135. See *Konop v. Hawaiian Airlines*, 302 F.3d 868, 874 (9th Cir. 2002) (interpreting the electronic surveillance statute).

136. *Id.* See Brett White, *Viacom v. Youtube: A Proving Ground for DMCA Harbors Against Secondary Liability*, 24 ST. JOHN’S J. LEGAL COMMENT 811, 834, 843 (2010). See generally *Viacom v. Youtube, Inc.*, 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010); Steven Behnken, *Use and Sale of Trademarks in Interned Applications*, J. OF THE DUPAGE CNTY BAR ASS’N (DCBA BRIEF), Oct. 2009, at 26, 28, available at <http://www.dcbabrief.org/vol221009art3.html>. See also Daniel B. Garrie et al., *Mobile Messaging Making E-Discovery Messy: Mobile Messaging and Electronic Discovery*, 32 HASTINGS

some instances, the inconsistency exists among the fifty states. In *Raftopol v. Ramey*, the Connecticut Supreme Court cited a fifty state survey that revealed that the law regarding reproductive technology in “the vast majority of the states” had failed to deal with the now all too common issue of whether, when and how surrogacy agreements are enforceable.¹³⁷

Given the lack of available precedent for cyberspace tort actions and the conflicting nature of the cases that exist, parties and courts have tried to use traditional common law torts in novel ways, including application by analogy to assault, common law invasion of privacy and intentional infliction of emotional distress.¹³⁸ California courts applied the brick-and-mortar tort of trespass to chattels to resolve a cyberspace wrong.¹³⁹ In *Intel Corp v. Hamidi*, the California Court considered Intel’s motion for a permanent injunction against a disgruntled former Intel employee who sent mass e-mails to thousands of Intel employees, allegedly flooding the company’s e-mail system.¹⁴⁰ The trial court, relying on the theory of trespass to chattels, permanently prohibited the defendant from sending unsolicited e-mails to the company’s employees, and the Court of Appeals affirmed.¹⁴¹

In *Thrifty-Tel, Inc. v. Bezenek*, a California Appellate Court addressed the issue of whether trespass to chattels was an appropriate tort remedy to ensure protecting computer networks from unauthorized access or use by third parties.¹⁴² Myron and Susan Bezenek’s son used the family computer to hack into Thrifty-Tel’s system.¹⁴³ Bezenek accessed the local telephone company’s network over six to seven hours.¹⁴⁴ *Thrifty-Tel* introduced a slight amount of evidence, showing that its system was “overburdened . . . denying some subscribers access to phone lines”

COMM. & ENT. L.J. 103, 108 (2009) (“The digital age and the use of the mobile and analogous technologies has muddled the legal distinctions that used to guide the courts, rendering the rules of e-discovery confusing to administer.”).

137. *Raftopol v. Ramey*, 12 A.3d 783, 785 (Conn. 2011) (citing Dara Hofman, *Mama’s Baby, Daddy’s Maybe: A State-by-State Survey of Surrogacy Law and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 454 (2009)).

138. See *Asis Internet Servs. v. Azoogole.com*, 357 F. App’x 112, 113 (9th Cir. 2009) (claiming spam and emails were an assault on plaintiff under the Controlling the Assault of NonSolicited Pornography and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. §§ 7701); *Deering v. CenturyTel Broadband Servs.*, No. CV-10-63-BLG-RFC, 2011 WL 1842859, at *1 (D. Mont. May 16, 2011); *Marquez v. Reyes*, No. 10-cv-01281-BNB, 2010 WL 2364435, at *1 (D. Colo. June 10, 2010) (alleging assault by the Internet where information sent through the Internet served as a weapon to harm plaintiff). See also *Order* at 1, 4-5, *Schlein v. Bd. of Regents Univ. of Neb.*, No. 575 111, 1999 WL 34995572 (Neb. Dist. Ct. Feb. 17, 1999); Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 23, 45 (2010) (looking for common law crimes available to punish cyberharms).

139. See *Intel Corp. v. Hamidi*, 71 P.3d 296, 299 (Cal. 2003).

140. *Id.* at 301.

141. *Id.* at 300 (reversing the rulings of the lower courts because Intel failed to show actual damages in terms of impairment to its server, a necessary element of trespass to chattels).

142. *Thrifty-Tel v. Bezenek*, 46 Cal. App. 4th 1559 (1996).

143. *Id.* at 1563.

144. *Id.* at 1564.

during the short period of time.¹⁴⁵ The Court found defendants liable for trespass to chattels solely because their son gained unauthorized access to the *Thrifty-Tel's* computer network.¹⁴⁶

Intel illustrates the problem of applying traditional common law torts to modern technology wrongs. The *Intel* Appellate Court, by using a novel approach of applying a centuries old tort to a new age crime, tried to fit a square peg into a round hole. To the extent that in this case proof of trespass to chattels requires the plaintiff to show that the defendant's intentional conduct interfered with Intel's use, the plaintiff failed to prove his claim.¹⁴⁷ As in this example, courts continue to apply trespass to chattels to cases of Internet hacking and spam.¹⁴⁸

In applying trespass to chattels to cases such as *Intel* and *Thrifty-Tel*, the courts are essentially reworking the traditional tort to fit a new wrong. At common law, trespass to chattels protected a property owner from intentional interference with his or her use and enjoyment of the property.¹⁴⁹ E-mail spam, however, does not prevent a computer user from enjoying his or her screen, and Intel did not demonstrate that the influx of mass e-mails caused a drain on Intel's system.¹⁵⁰ Perhaps Intel would have been better off using the traditional tort of nuisance, which is satisfied upon proof of unreasonable annoyance, to demonstrate the requisite harm.¹⁵¹ Indeed, such is also applicable in *Thrifty-Tel*, where the Court found only the slightest evidence of harm.¹⁵² Nevertheless, the cases that follow *Intel* and *Thrifty-Tel* have slowly eroded the law of trespass to chattel.¹⁵³ Each successive ruling has found defendants liable on no more evidence than some slight interference with the plaintiff's computer network, thereby reconfiguring the old tort to look like something entirely different.¹⁵⁴ Richard Epstein, is critical of the application of an archaic law to a technological problem.¹⁵⁵ Regarding the use of trespass to chattels for Internet torts, Epstein asks "whether the hoary rules of trespass to chattels should apply to [cybertrespass] in light of the functional

145. *Id.* (explaining that Thrifty-Tel "presented no evidence of actual losses").

146. *Id.* at 1566.

147. See Adam Mossoff, *Spam—Oy, What a Nuisance*, 19 BERKELEY TECH. L.J. 625, 643–46 (explaining the reasons for Intel's failure to prove trespass and arguing that a better approach would have been for Intel to argue nuisance).

148. See *Sch. of Visual Arts v. Kuprewicz*, 771 N.Y.S.2d 804, 807 (2003); *Atl. Recording Corp. v. Serrano*, No. 07-CV-1824 W(JMA), 2007 WL 4612921, at *1, *4 (S.D. Cal. Dec. 28 2007).

149. RESTATEMENT (SECOND) OF TORTS § 158 cmt. i (1965).

150. See *Intel Corp. v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003).

151. RESTATEMENT (FIRST) OF TORTS § 822 (1938); see also Mossoff, *supra*, note 147, at 643–646 (explaining how and why nuisance would have been a more suitable tort for the Intel case).

152. See *Thrifty-Tel v. Beznec*, 46 Cal. App. 4th 1559, 1564 (1996).

153. See generally *Sch. of Visual Arts*, 771 N.Y.S.2d 804; *Atl. Recording Corp.*, 2007 WL 4612921, at *1, *4.

154. See, e.g., *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (awarding an injunction solely on the basis of CompuServe's assertion that the spammer's use of disk space and processing power showed that "the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct").

155. See Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace?*, 1 J.L. ECON. & POL'Y. 147, 147 (2005).

differences between a dog's ear and the Internet."¹⁵⁶

Where defamation is concerned, judicial reliance on previously decided case law has produced "an erratic and anomalous development" of the law.¹⁵⁷ Courts first divided defamation into libel and slander following Johannes Gutenberg's Fourteenth Century invention of the printing press.¹⁵⁸ To be sure, some technological advances drive uniformity in the law. The judicial response to Internet defamation is one such example.¹⁵⁹ However, jurisdictions vary in their classification of defamatory broadcast speech.¹⁶⁰ American jurisprudence does not demand uniformity and indeed, where defamation is concerned, states have the right to regulate the law as they see fit.¹⁶¹ The libel/slander distinction, however—particularly as it applies to emerging technology—creates an undue burden on parties and results in confusion in the courts.

Characterizing technospeech is a costly and time-consuming proposition. When a type of communication has not yet been characterized as libel or slander, plaintiffs generally plead libel to avoid the extra requirement of special damages.¹⁶² Defendants respond with a failure to state a claim motion, since, in their view, the statement, if defamatory at all, should be characterized as slander.¹⁶³ Judiciaries presented with issues concerning new technology are often at a loss for available or appropriate guiding precedent, and are therefore forced to consider ancient torts to provide remedies to modern wrongs.¹⁶⁴ In each instance, the result can be unnecessary, costly and confusing. Judicial or legislative characterization of technospeech as either libel or slander will prevent unnecessary delays and judicial wrangling between parties.

C. THE PRACTICAL MANDATE FOR TECHNOSPEECH: A CALL FOR LIBEL

The issue of how to characterize technospeech remains fertile, and even the Supreme Court has hinted at its reluctance to tackle the thorny issue that no court

156. *Id.* at 159.

157. See SCHWARTZ, *supra* note 82.

158. See *Gaynes v. Allen*, 339 N.W.2d 678, 680 (Mich. Ct. App. 1983) (explaining the varying reactions among jurisdictions to *Gertz v. Robert Welch*, 418 U.S. 323 (1974)).

159. See *Varian Med. Sys., Inc. v. Delfino*, 6 Cal. Rptr. 3d 325 (Cal. Ct. App. 2003). See also Chart *infra* pp. 52–55.

160. See Chart *infra* pp. 52–55.

161. See *Senna v. Florimont*, 958 A.2d 427, 441 (N.J. 2008) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)) (“[T]he role of the First Amendment in regulating state defamation law is more limited when ‘speech [touches] on matters of purely private concern.’”).

162. See *Shor v. Billingsley*, 158 N.Y.S.2d 476 (App. Div. 1957) (determining whether unscripted broadcasts were libel or slander). See generally *Varian Med. Sys., Inc. v. Delfino*, 6 Cal. Rptr. 3d 325 (defendants alleged that Internet postings must be classified as slander); *Too Much Media, LLC v. Hale*, 993 A.2d 845 (N.J. Super. Ct. App. Div. 2010) (defendant alleged that the only potential harm lay in slander per se).

163. See *Shor*, 158 N.Y.S.2d at 477. See also *Too Much Media*, 993 A.2d at 846.

164. See *Intel Corp. v. Hamidi*, 71 P.3d 296, 299 (Cal. 2003) (using the theory of trespass to analyze spam).

has yet to resolve.¹⁶⁵ Technospeech's combination of the qualities courts find in slander and libel make it difficult to assign to one type of defamation as opposed to another. The issue requires courts to balance the transient nature of technospeech against its "representation to the eye."¹⁶⁶

Characterizing technospeech as either libel or slander has significant consequences to plaintiffs pleading a defamation case. Today, plaintiffs can successfully prove libel and slander without proof of special damages.¹⁶⁷ Nonslander per se cases, which I term "pure slander," require proof of economic harm.¹⁶⁸ Labeling technospeech as libel means that it joins the majority of defamatory subtypes that do not require plaintiffs to show economic harm as a consequence of defamatory speech.

The hybrid quality of defamatory technospeech makes it somewhat difficult to categorize. Technospeech is often fleeting; appearing briefly on a blog, website or phone screen and flying off into cyberspace just as promptly. Charlotte and Martin's text messages were most likely promptly erased.¹⁶⁹ Twitter feeds change within seconds, each new post pushing an old post further back into cyberspace.¹⁷⁰ Technospeech, which is contemporaneous speech, is often not reflective. The evanescent nature of technospeech, coupled with its lack of deliberation and premeditation, arguably place it squarely in the category of pure slander. However, technospeech always appears as a firm and fixed medium. Its visual appearance makes it more capable of permanence and widespread dissemination, which are features of libel.

Courts, when faced with deciding whether communications made in a fleeting and easily deleted way were libel or slander, shoved the questioned defamation into the libel box. In *Varian Medical Systems*, the Court, over the defendant's objections, found that, while Internet posts can be easily deleted and modified, they are still much more fixed than the spoken word.¹⁷¹ Electronic writings, the Court held, are identical to those created by pen and paper.¹⁷² The notion of fixation seemed to tip the balance in favor of labeling the speech as libel.¹⁷³ In *Too Much Media, LLC*, the Court relied heavily on the capabilities of the dissemination to reach a wide audience.¹⁷⁴ The *Shor* Court also concluded that widespread

165. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (noting that the earlier cases dealing with print and broadcast media, where First Amendment issues are concerned, should not govern the Internet as now, with the Internet, "anyone with a phone line can become [both] town crier... [and] pamphleteer").

166. *Varian Med. Sys.*, 6 Cal. Rptr. 3d at 341, 343.

167. See RESTATEMENT (SECOND) OF TORTS § 575 cmt. a (1977).

168. See *id.* § 575.

169. See *supra* note 122 and accompanying text.

170. *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Oct. 23, 2011). See also *Discover More About #newtwitter*, YOUTUBE (Sept. 23, 2010), <http://www.youtube.com/watch?v=NshQFrpC2O4>.

171. *Varian Med. Sys.*, 6 Cal. Rptr. 3d at 343.

172. See *id.*

173. See *id.*

174. *Too Much Media*, 993 A.2d at 865.

dissemination placed defamatory broadcasts on the side of libel, even though the content in question was incapable of appearing in print.¹⁷⁵

Tweets, text messages and speech-to-text also maintain the durable and fixed nature of traditional common law libel.¹⁷⁶ Every tweet appears on the Twitter website. Publication, therefore, is identical to any other Internet posting. So, too, are blog posts, all of which can be printed and distributed. Text and instant messages can be similarly viewed. Unlike tweets or other messages in the blogosphere, short message services do not appear on computers. One argument in favor of characterizing text messages as slander (i.e., a form of oral communication) is that they only appear on another's phone and are customarily deleted within minutes if not a short time thereafter.¹⁷⁷ But recent technological advances make it possible to publish text messages, or to email them to friends, thereby relieving them of the ephemeral or fleeting qualities that remain unique to pure slander.¹⁷⁸

Technology for the newest forms of digital communication assures that communications can appear in printed form. Speech-to-text renders the keyboard irrelevant by converting spoken words into text on a computer screen.¹⁷⁹ Although involving speech, courts resolving defamatory comments that derive from speech-to-text technology are less likely to be troubled by labeling them libel since once appearing in text, these comments can be edited and reflected upon. More problematic, however, is Skype, a software program that allows individuals to make phone calls through the use of the Internet.¹⁸⁰ To put it simply, Skype is a phone call through the Internet. As such, it really is pure speech, and defamatory remarks made through Skype are fleeting and ephemeral. However, when combined with speech-to-text technology, Skype conversations can be reduced to writing, making them both permanent in form and capable of dissemination, the qualities upon which courts based their decisions when characterizing defamatory words.¹⁸¹

175. *Shor v. Billingsley*, 158 N.Y.S.2d 476, 482 (App. Div. 1957).

176. There is, however, some question in the blogosphere as to whether one can defame another in 140 characters.

177. However, Droids, iPhones and other syncable devices are capable of storing entire conversations on a hard drive making information available for future reference.

178. There are many websites that instruct cellular phone users how to print text messages. See, e.g., *Printing Texts*, SAP HELP PORTAL, http://help.sap.com/saphelp_40b/helpdata/pt/d6/0db80d494511d182b70000e829fbfe/content.htm (last visited Oct. 24, 2011); *How to Print Texts from an iPhone*, LENA SHORE, <http://www.lenashore.com/2010/08/how-to-print-texts-from-an-iphone/> (last visited Oct. 24, 2011). It has become increasingly common for websites to capitalize on the ability to print text messages by creating "archives" of text messages that are submitted by willing participants. See, e.g., TEXTS FROM LAST NIGHT, <http://textsfromlastnight.com/> (last visited Oct. 24, 2011).

179. James A. Martin, *From Speech to Text*, PCWORLD (October 7, 2010, 1:00 AM), http://www.pcworld.com/article/138262/from_speech_to_text.html.

180. *Call Mobiles and Landlines—Cheap Calls*, SKYPE, <http://www.skype.com/intl/en-us/features/allfeatures/call-phones-and-mobiles/> (last visited Oct. 18, 2011).

181. *Shor v. Billingsley*, 158 N.Y.S.2d 476, 481 (App. Div. 1957). (describing permanency in form as the reasoning behind libel/slander distinction). See also *supra* notes 74–77 and accompanying

Given its susceptibility for easy distribution, it seems rational to characterize technospeech as libel. If courts adopt this position, plaintiffs claiming defamation through electronic communication would be exempt from fulfilling the additional requirement of pleading special damages.¹⁸² Such a decision is not without implication. The next Section will consider the consequences of defamation in a world in which communication that looks like speech is labeled libel.

III. THE DEATH OF SLANDER

Technology has killed slander. This Part advances three arguments in support of my contention. Part A illustrates how technospeech renders slander historically irrelevant. Part B highlights how contemporary methods of communication dilute the presence of slander in American jurisprudence, leaving little justification for maintaining a subort that causes confusion to parties and courts. Part C demonstrates how, given the presence of technospeech, principles of fairness support abolishing the libel/slander distinction, thereby assuring that credible plaintiffs are able to rehabilitate their damaged reputations.

Maintaining the subort of pure slander in the Twitter Age, with its requirement of proof of economic harm, vitiates the common law purpose of defamation. Moreover, technospeech creates a further blurring of the law of defamation, perpetuating the kind of uncertainty and unpredictability that courts and scholars cite as support for abolishing the libel/slander distinction.¹⁸³ A thoughtful and orderly treatment of technospeech mandates that courts and legislatures put the proverbial final nail in the coffin of slander.

A. IRRELEVANCE

The libel/slander distinction rests on a historical reality that, given present forms of communication, no longer exists. The printing press, which first appeared around the Fourteenth Century, prompted courts to divide defamation into two separate torts.¹⁸⁴ During the reign of King Henry VIII, courts recognized that the

text.

182. See RESTATEMENT (SECOND) OF TORTS § 569 (1977).

183. See, e.g., *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 308 (Mo. 1993) (libel per quod “[adds] to the confusion” of libel law); *Gibson v. Kincaid*, 221 N.E.2d 834, 842 (Ind. App. 1966) (the libel per se/libel per quod distinction has “been used, abused misused and confused”); *Protic v. Dengler*, 46 F. Supp. 2d 277, 280 (S.D.N.Y. 1999) (the use of the terminology libel per quod “arguably is more confusing than helpful”). See also Stanley S. Arkin & Luther A. Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 COLUM. L. REV. 1482, 1483 n.9 (1968) (noting “confusion regarding libel per se and libel per quod”); Conviser, *supra* note 14, at 2–3 (acknowledging the confusing nature of libel per quod); M. Linda Dragas, *Curing a Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113, 115 (1995) (libel laws are arbitrary and confusing).

184. See *supra* notes 59–61; Van Vechten Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 547 (1903) (“When, at length, early in the seventeenth century, the potentialities of the printing press dawned upon the absolute monarchy, the emergency was met, not by further additions to the list of actionable imputations, but by a direct importation of the Roman law This

written word, given its permanency in form and ability for widespread dissemination, was a much greater threat to reputational harm than was the spoken word, which carried only so far as one's natural voice permitted.¹⁸⁵ The potential for fairly limited harm that slander might impose supported judicial requirements for proof of special damages. After all, with slander, the words were understood to be so fleeting that plaintiffs could only present hearsay-type evidence to establish their existence.

In the 1940s and 1950s, broadcast defamation challenged the traditional classifications of libel and slander.¹⁸⁶ Ad libbed defamation over broadcast airways was evanescent. It lacked permanency in form, yet it was capable of widespread dissemination. Courts and legislatures diverged in their response to broadcast journalism.¹⁸⁷ Those that followed *Shor v. Billingsly* found that widespread dissemination tipped the balance in favor of characterizing the defamatory speech as libel.¹⁸⁸ Other jurisdictions believed that the fleeting nature of the speech was sufficient for maintaining the more burdensome requirement of proof of special damages.¹⁸⁹

That different jurisdictions took oppositional approaches to characterizing defamatory broadcasts is not surprising. Broadcasts presented courts, for the first time, with a type of communication that was neither exclusively written nor exclusively spoken.¹⁹⁰ Faced with placing broadcast defamation into one of two categories, courts were forced to pick a side.

Technospeech presents courts with the same quandary, since it significantly blurs the hallmarks of libel and slander. Text messages and tweets appear in written durable textual forms. They can be read by many and disseminated with ease. However, text messages are typically quickly deleted, and tweets disappear into cyberspace, often at breakneck speed. The nature of these communications renders them "soon forgotten and therefore less likely to injure."¹⁹¹ The casual

special provision for written or printed defamation, first adopted in the criminal law, eventually became also a principle of civil judicature."); Adam Freedman, *What's the Difference Between Libel and Slander*, LEGAL LAD (MAR. 12 2011), <http://legallad.quickanddirtytips.com/whats-the-difference-between-libel-and-slander.aspx> ("Libel, which comes from the Latin libellus, or 'little book,' came into fashion with the advent of the printing press."). See also *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45, 47 (Mo. Ct. App. 1973) ("Slander, since the time of Adam and Eve, together with libel since Johann Gutenberg invested the printing press, have met in head on confrontation with mankind's inherent belief in freedom of oral and written expression.").

185. See *Veeder supra* note 184.

186. See, e.g., *Am. Broad.-Paramount Theatres v. Simpson*, 126 S.E.2d 873, 878 (Ga. Ct. App. 1962) (questioning the State Court's ability to address broadcast defamation with a new characterization of the tort).

187. See, e.g., CAL. CIV. CODE §46 (West 2007). But see LA. REV. STAT. ANN. § 14:47 (2007) (Louisiana has simplified how to treat a defamatory broadcast over radio or television by eliminating the distinction between the two torts.). See also Chart *infra* pp. 52–55.

188. See, e.g., *Gearhart v. Wsaz, Inc.*, 150 F. Supp. 98, 112 (E.D. Ky. 1957).

189. See *supra* notes 5–8 and accompanying text.

190. See discussion *supra* notes 62–66 and accompanying text.

191. See *supra* notes 17–18 and accompanying quotes and text.

verbal style of text and instant messages “lack[s] the contemplative and deliberate maliciousness that is likely to injure.”¹⁹²

Given the nature of how we communicate today, the law would be best served by dispensing with the requirement of proving special damages, an element of slander, for defamatory technospeech. The Star Chamber first imposed the requirement of special damages because of the sense that harm cannot come from the spoken word because it is so transient.¹⁹³ In contrast, despite its evanescent nature, defamatory technospeech is capable of significant harm. Indeed, society is replete with examples of harm caused by textual communications.¹⁹⁴ Courtney Love’s tweet caused Dawn Simorangkir’s reputation and business to suffer.¹⁹⁵ Horizon Realty sued over a tweet from its tenant presumably out of fear that people would no longer rent from them.¹⁹⁶ Today’s technology—whether it takes the form of broadcast airwaves or cellular phones—gives strength to transient comments. Consequently, the notion of a spoken or fleeting statement’s inability to harm is no longer an absolute.

Instances of slander still occur and abolishing slander wholesale is not without consequence.¹⁹⁷ Combining slander with the tort of libel would negate the original intent behind requiring proof of special damages for slander cases. Relieving slander plaintiffs of this burden could leave courts sifting through cases where the transient nature of the defamatory comment causes the type of minimal harm that the framers of slander intended to avoid. However, retaining slander, while treating similar transient defamatory text messages and tweets as libel, is uneven at best and unfair at worst. It suggests that the defendant who speaks through a megaphone is free from liability absent proof of special damages, while the defendant who text messages one person may be responsible for the same defamatory content even if he or she fails to cause economic harm. The contemporary irrelevance of defamation’s historic underpinnings coupled with the current uneven state of defamation law supports a normative rationale for consolidating libel and slander.

192. See *supra* notes 17–18 and accompanying quotes and text.

193. See *supra* notes 56–61 and accompanying text.

194. See *supra* notes 129–131 and accompanying text.

195. See *supra* at notes 129–31.

196. See *supra* at note 129–31.

197. **TRIAL COURT ORDERS**

	1900–1910	1940–1950	1990–2000	2000–2010
Slander	120	197	654	174
Libel	276	402	628	139

CASES

	1900–1910	1940–1950	1990–2000	2000–2010
Slander	511	462	1,292	1,398
Libel	612	1,015	549	507

Original research conducted through Westlaw Database.

B. DILUTION

Technospeech is driving slander out of existence. The schism between libel and slander grew from the notion that victims of slander were less deserving of damage awards than victims of libel since the slanderous statements were fleeting and less capable of harm.¹⁹⁸ The lack of potential for greater harm in slander cases meant that plaintiffs were forced to prove special damages: a showing of economic harm that stemmed from the defamatory comments.¹⁹⁹ Courts abolished the requirement of proving special damages when they deemed that defamation was slander per se.²⁰⁰ But the requirement to prove special damages remained for the limited number of cases that did not fall into the libel or slander per se categories.²⁰¹ This relative difference between pure slander and libel is in some instances completely perverse since, under the traditional libel/slander distinction, “a letter read by one person [is] much more harmful than a speech heard by a thousand.”²⁰²

For decades, scholars, judges and commentators have called upon decision makers to take the reins of the twisted ropes of libel and slander and merge them into the single tort of defamation.²⁰³ In 1966, Professor Laurence Eldredge led the group advocating for the consolidation of defamatory sub-torts.²⁰⁴ Others have followed suit arguing that America’s present defamation regime is costly, confusing and misused.²⁰⁵ Reporters for the Restatement (Second), in the historical notes, acknowledge that the presence of constantly changing technology demands abolition of the libel/slander distinction.²⁰⁶

American jurisdictions have responded to critics in varying ways.²⁰⁷ Some jurisdictions have abolished the libel/slander distinction wholesale, eliminating the need to prove special damages in any instance.²⁰⁸ Other states have toyed with the

198. See generally Ciolli, *supra* note 13.

199. See *Manno v. Am. Gen. Fin. Co.*, 439 F. Supp. 2d 418, 434 (E.D. Pa. 2006) (citing Dougherty v. Boyertown Times, 547 A.2d 778, 782 (Pa. 1988)).

200. See *Pollard v. Lyon*, 91 U.S. 225, 236 (1876).

201. See *supra* notes 24–26.

202. Ciolli, *supra* note 13, at 143 (quoting JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 375 (3d ed. 2007)).

203. See *supra* note 13 and accompanying text.

204. See Eldredge, *Spurious Rule of Libel Per Quod*, *supra* note 13.

205. See Sipe, *supra* note 13, at 144–45, 148–53; James Windon, *Fee Shifting in Libel Litigation: How the American Approach to Costs Allocation Inhibits the Achievement of Libel Law’s Substantive Goals*, 3 J. INTL. MEDIA & ENT. L. 175 (2010). See also Mark Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 806–16, 836–48 (1964); Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL. RTS. J. 467, 499–550 (1994).

206. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977) (“With the discovery of new methods of communication, many courts have condemned the distinction as harsh and unjust. This anomalous and unique distinction is in fact a survival of historical exigencies in the development of the common law jurisdiction over defamation.”).

207. See Chart *infra* pp. 52–55 (identifying each jurisdiction’s treatment of defamation, including legislative and judicial responses to criminal defamation and broadcast defamation).

208. See, e.g., LA. REV. STAT. ANN. § 14:47 (combining oral and written defamation into one tort);

libel/slander distinction where broadcast defamation is concerned, labeling all broadcast defamation as either slander or libel.²⁰⁹ The State of Georgia created a separate tort, called defamacast.²¹⁰ And while most states retain the libel/slander distinction, many have called into question the validity of having two separate torts for the same type of wrong.²¹¹

To date, no state court has passed on the issue of whether text messages or tweets should be characterized as libel or slander.²¹² Much like the nationwide reaction to broadcast defamation, jurisdictions presented with the hybrid nature of defamatory technospeech could characterize the speech as each sees fit, defining it as either libel or as slander. Jurisdictions, however, also have a third option: They can create a separate category of defamation for technospeech, much like Georgia did for defamatory broadcasts. Courts and/or legislatures choosing this option could designate all technospeech as libel given that it appears in a permanent, textual form and could also require plaintiffs to prove special damages, since this

Shupe v. Rose's Store, 192 S.E.2d 766, 767 (Va. 1972) (treating libel and slander as one tort of defamation); Mitchell v. Peoria Journal-Star, Inc., 221 N.E.2d 516, 519 (Ill. App. Ct. 1966) (abolishing the distinction between libel and slander). See also Newberry v. Allied Stores, Inc., 773 P.2d 1231, 1236 (N.M. 1989) (noting "there are good reasons for abolishing the distinction between libel and slander" (quoting Reed v. Melnick, 471 P.2d 178, 182 (N.M. 1970))); Defamation Act 2005 (NSW) ss 7, 35, 37 (Austl.) (abolishing the common law distinction between libel and slander and removing requirement of proof of special damages).

209. See CAL. CIV. CODE § 46 (West 1996) (stating that slander encompasses all defamation by radio); LA. REV. STAT. ANN. § 14:47 (explaining how Louisiana has simplified how to treat a defamatory broadcast over radio or television by eliminating the distinction between the two torts); MICH. COMP. LAWS ANN. § 600.2911(8) (West 2011) (explaining libel encompasses all radio and televised broadcasts); Metcalf v. KFOR-TV, Inc., 828 F. Supp. 1515 (W.D. Okla. 1992) (analyzing defamation suit under slander, regardless of there being a script). See also Gray v. Wala-TV, 384 So. 2d 1062, 1065 (Ala. 1980) (discussing whether, read from a manuscript or not, broadcast defamatory language is libel); Greer v. Skyway Broad. Co., 142 S.E.2d 98, 103-04 (N.C. 1962) (explaining distinctions between libel and slander held inapplicable to radio and televised broadcasts); Niehoff v. Cong. Square Hotel Co., 103 A.2d 219, 220 (Me. 1954) (drawing no distinction between libel and slander, broadcast statements treated the same); Kelly v. Hoffman, 61 A.2d 143, 144 (N.J. 1948) (holding defamatory words broadcast are actionable without regard to whether they are spoken or written and do not require proof of special damages); Matherson v. Marchello, 473 N.Y.S.2d 998, 1004 (N.Y. App. Div. 1984) (explaining all defamation that is broadcast should be classified as libel).

210. Am. Broad.-Paramount Theatres Inc. v. Simpson, 126 S.E.2d 873, 879 (Ga. App. 1962) (listing "defamacast" as the only classification of defamatory words spoken over the radio or television).

211. See Gertz v. Robert Welch, Inc., 418 US 323, 347 (1974) ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."). See also Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 793 (Ky. 2004) (recognizing that even though there are two separate torts—libel for written communications and slander for oral—the essence of the two is the same: damage to one's reputation); Grein v. La Poma, 340 P.2d 766, 767 (Wash. 1959) (en banc) (calling into question the preservation of the libel/slander distinction based on the English history of the question in the 19th century as to whether the distinction should be abolished); Boyles v. Mid-Florida Television Corp., 431 So.2d 627, 633 (Fla. Dist. Ct. App. 1983), approved, 467 So.2d 282 (Fla. 1985) (recognizing the element of innuendo still exists for private individuals even though Gertz abolished one distinction between libel per se and libel per quod).

212. See *supra* note 132 and accompanying text.

speech is fleeting and not contemplated or edited.²¹³ Requiring special damages in this instance would assure that the defamatory technospeech actually caused the type of harm that is worthy of civil damage awards.

Courts labeling technospeech as libel, while requiring plaintiffs to prove special damages, would be treating the wrong in a manner similar to the subtort of libel per quod. Courts created and adopted libel per quod based on the theory that defendants should not be called to answer for their statement unless the plaintiff was able to prove that the statement caused pecuniary harm. This theory rests on the presumption that a particular statement, which is not defamatory on its face, offers the potential for minimal harm, if none at all.²¹⁴ The issue on the merits of libel per se—libel that does not require proof of special damages and libel per quod—led to great debate and, in fact, Dean Prosser and Professor Eldredge dedicated significant scholarship to the value of libel per quod (Prosser arguing its value; Eldredge disagreeing).²¹⁵ The debate over the value of libel per quod remains today.²¹⁶ And several states have refused to distinguish between these two subtorts.²¹⁷ No doubt creating a new subtort of defamatory technospeech would lead to similar debate.

Creating a subtort of defamatory technospeech would accomplish the benefits associated with proof of special damages, such as assuring the speech in question is that of a redressable wrong and preventing plaintiffs from filing law suits absent some reflection on the damage done. However, the benefits are obfuscated when weighed against the burden of adding another subtort to the defamation lexicon. Legislative and judicial creation of defamatory subtorts, such as libel per quod and defamacast, has done little if anything to help navigate the law of defamation. Muddling the already murky defamation waters by creating a new and novel theory of defamatory technospeech would serve no purpose other than to saddle a plaintiff with the requirement of additional proof of harm.

The better view is to recognize that the existence of technospeech supports the long-standing movement by much of the literature to abrogate the libel/slander distinction. Consolidating all of defamation into one tort would assure a more

213. See Reynolds, *supra* note 128, at 1163.

214. See, e.g., Morton v. Hearst Corp., 779 S.W.2d 268, 271 (Mo. Ct. App. 1989).

215. See Eldredge, *Spurious Rule of Libel Per Quod*, *supra* note 13, at 756 (arguing that the prevailing view among courts is that all libel claims are actionable without proof of special damages and that such view should not be altered); Laurence H. Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79, 79 (1972) (describing libel per quod as a “spurious rule”); Prosser, *Libel Per Quod*, *supra* note 1, at 847–48 (arguing that the majority of courts distinguish between libel per se and per quod); William L. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629, 1629–30 (1966) (reiterating and explaining his claim that most jurisdictions had accepted libel per quod). See generally Haven Ward, “I’m not Gay, M’kay?”: *Should Falsely Calling Someone a Homosexual be Defamatory?*, 44 GA. L. REV. 739, n. 51 (2010).

216. See *supra* note 183 and accompanying text.

217. See *Libel and Slander Per Se vs. Per Quod*, DANCING WITH LAWYERS, <http://www.dancingwithlawyers.com/freeinfo/libel-slander-per-se.shtml> (last visited Sept. 22, 2011) (noting that Arizona, Arkansas, Mississippi, Missouri, Oregon and Tennessee do not distinguish between libel per se and libel per quod).

streamlined approach to defamation and will preclude confusion and costs to parties to litigation and to the courts.

The libel/slander distinction creates an undue burden on parties and on the courts. The continuing dichotomy between written and spoken defamation and the correct way to treat the “in between” words of technospeech create a constant interchange between parties during the pleadings stage of the proceedings. The currently unresolved issue has left parties guessing how to best plead their cases.²¹⁸ In almost every instance, plaintiffs pleading defamation will label the speech libel, in hopes of avoiding the burden of pleading special damages. Defendants, in turn, often file a motion to dismiss the case on the grounds that the speech is indeed slander, and the plaintiff therefore failed to state a claim.²¹⁹ This judicial wrangling results in unnecessary and costly delay. Legislatively labeling technospeech as libel would assist plaintiffs in pleading their cases and would help defendants properly respond to the claim.

“Courts have struggled to analyze problems involving modern technology . . . often with unsatisfying results.”²²⁰ Many have been critical of the *Hamidi* and *Thrifty-Tel* decisions for the misapplication of brick and mortar cases to technological wrongs.²²¹ Technological innovations continually challenge courts in ways other than finding applicable precedent. These cases of first impression tie up judicial time as they seem to yield a disproportionate amount of lengthy appeals and complex pleadings.²²² In *Varian Medical Systems, Inc. v. Delfino*, the Court spent over four years debating whether the defamatory Internet postings should be considered libel or slander.²²³ In addition, over two years passed from the time a lower New York court decided the *Shor* case and the Appellate Division affirmed the decision that nonscripted, broadcasted defamation should be treated as libel.²²⁴ Preemptively resolving the distinction between libel and slander would benefit and streamline the judicial process.

The gradual erosion of pure slander, coupled with the panoply of problems that accompany its existence, support abolishing pure slander and creating a single tort of defamation, whereby proof would be similar to proof of libel. Merging libel and slander would satisfy the need for fairness to parties pleading defamation, and would alleviate courts of the burden of using brick-and-mortar type cases to resolve technological issues. It would also allow legislatures to streamline their treatment of defamatory wrongs. Thus, technospeech, with its host of issues, is actually a fortuitous development whose emergence serves as the proper catalyst to move defamation toward necessary consolidation.

218. See generally *supra* notes 70–104 and accompanying text.

219. See *supra* notes 67–103 and accompanying text.

220. See *supra* notes 67–103 and accompanying text.

221. See *supra* notes 150–57 and accompanying text.

222. See *supra* notes 150–57 and accompanying text.

223. *Varian Med. Sys., Inc. v. Delfino*, 6 Cal. Rptr. 3d 325, 341 (Cal. Ct. App. 2003).

224. See *Riss v. Anderson*, 304 F.2d 188, 197 (8th Cir. 1966); *Shor v. Billingsley*, 158 N.Y.S.2d 476, 480–81 (N.Y. App. Div. 1957).

C. FAIRNESS

Though there are two separate torts—libel for written communication and slander for oral—the gist of the two is the same: “the injury to the reputation of a person in public esteem.”²²⁵ Characterizing technospeech as libel will preserve the right of victims of defamation by digital communication to restore their reputation without having the burden of proving economic harm. In other words, calling technospeech libel assures that the tort of defamation by digital communication reflects the original intent and spirit of this tort.

At its core, defamation is a means to remedy injury to one’s reputation, and for that reason defamation should be viewed as a dignitary tort.²²⁶ Dignitary torts are “injuries to one’s personality or the dignity one has as a person.”²²⁷ While, early on, dignitary torts were reserved for harm to the actual person, today courts include defamation in their list of dignitary harms.²²⁸

Dignitary torts permit recovery upon a showing that plaintiff’s personal dignity was in some way violated. The ecclesiastical court’s intent behind the wrong of defamation was based on the belief that publishing false reports affecting the integrity of another was morally wrong.²²⁹ Consequently, the ecclesiastical courts did not originally require proof of special damages for slander. It was only once the printing press was invented, and libel came into being, that courts considered injury resulting from an oral communication as somewhat trifling and potentially of utter disregard.²³⁰ Sometime around the mid Eighteenth Century, plaintiffs pleading slander were required to prove special damages in order to recover for pure slander.²³¹

Economic torts provide liability for pure economic loss.²³² Plaintiffs are prevented from recovery absent a showing of specific financial harm.²³³ Wrongs

225. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004).

226. See RESTATEMENT (SECOND) OF TORTS § 575 cmts. a–b (1979) (differentiating the types of damage to reputation allowing the target to recover without showing any other damages from others that do not allow for recovery without additional economic or pecuniary losses on the forms of defamation that result in reputational harms).

227. J. Martin Burke & Michael K. Friel, *Getting Physical: Excluding Personal Injury Awards Under the New Section 104(a)(2)*, 58 MONT. L. REV. 167, 179 (1997).

228. *Vogt v. Churchill*, 679 A.2d 522, 524 (Me. 1996) (noting that defamation is a dignitary tort). See, e.g., *Barrows v. Wiley*, 478 F.3d 776, 780 (7th Cir. 2007); *Johnson v. Harris*, No. 08-13328, 2009 WL 3126315, at *5 (E.D. Mich. Sept. 28, 2009); *State v. Corbitt*, 82 P.3d 211, 219 (Utah Ct. App. 2003).

229. See *supra* note 24 and accompanying text.

230. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890).

231. G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 770 (2006) (citing Blackstone’s interpretation of libel and slander).

232. See *Town of Alma v. Azco Const., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000) (observing that some torts are expressly designed to remedy pure economic loss). See also *Van Sickle Constr. Co. v. Wachovia Commercial Mortg. Inc.*, 783 N.W.2d 684, 691–92 (Iowa 2010) (an economic tort allows for the recovery of economic damages).

233. See, e.g., RESTATEMENT (SECOND) OF TORTS § 552B (“[D]amage recoverable for a negligent

that courts generally label as economic torts include fraud, deceit or negligent representation.²³⁴ In each instance the plaintiff has suffered an injury that results in harm to his or her financial well-being.

Requiring proof of economic loss for slander is problematic for two reasons. First, it means that pure spoken defamation is not actionable unless an individual suffers some type of economic harm. Thus, a police officer failed to recover in slander even though content was deemed defamatory, since the police officer failed to show how the defamatory content affected his livelihood.²³⁵ Second, it separates pure slander from all other defamatory subtorts as the only tort that prohibits an action for the purposes of either proving in court that the defamatory content was wrong or for reinstating one's good name.

Much has been made of economic torts and in fact the Restatement (Third) has been fashioned around the notion that tort law is primarily focused on remedying plaintiffs for economic loss as a result of a wrongdoer's conduct.²³⁶ But in contrast to most torts, one could argue that defamation is not an economic tort.²³⁷ In fact, with the exception of pure slander, proof of economic harm is not a prerequisite to recovery.²³⁸ This has prompted at least one scholar to assert that the tort does not even belong in the Restatement (Third).²³⁹

When framed as a dignitary, as opposed to an economic tort, the requirement of special damages for pure slander is illogical, as it sets that small category of defamatory conduct apart from the large majority of tortious claims based on the same type of actionable conduct.²⁴⁰ The artificial divide is irrational, given the tort's original intent, and inappropriate when measured against the backdrop of traditional defamation law.²⁴¹

To be sure, there is a large movement, led by Judge Richard Posner, in favor of reframing tort law exclusively in terms of economic harm.²⁴² Economic tort

misrepresentation are those necessary to compensate the plaintiff . . . including (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered . . .").

234. See *Martinez v. Green*, 131 P.3d 492, 494 n.3 (Ariz. Ct. App. 2006) (citing *Nelson v. Progressive Corp.*, 976 P.2d 859, 867 (Alaska 1999)).

235. See *Gomes v. Fried*, 186 Cal. Rptr. 605, 615 (Ct. App. 1982).

236. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC LOSS (Preliminary Draft No. 1, 2005); RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS (Preliminary Draft No. 2, 2006).

237. See *supra* note 211 and accompanying text. See also *Vogt v. Churchill*, 679 A.2d. 552, 524 (Me. 1996) (noting that defamation is a dignitary tort); *Johnson v. Harris*, No. 08-13328, 2009 WL 3126315 (E.D. Mich. Sept. 28, 2009).

238. See discussion *supra* notes 31–36.

239. See *Anderson, supra* note 37, at 1047–48.

240. See generally Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 721 (2006).

241. See *Anderson, supra* note 37, at 1047 (“Defamation is a dignitary tort; attempting to reduce it to a remedy for economic loss would be historically unfaithful, doctrinally radical, and destructive of important cultural values.”).

242. See generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (3d ed. 2000) (applying economic theories to property, contract and tort law); RICHARD EPSTEIN, *SIMPLE RULES FOR A*

theorists assert that the proper role of tort law is to assure just compensation for economic harm.²⁴³ The use of economic sanctions as a corrective measure, and as a great equalizer, has sprung up in legal spheres other than tort law.²⁴⁴

In contrast to Justice Posner, Justice Cardozo emphasized tort law's moral aspect, suggesting that in certain instances, a plaintiff is entitled to have a wrong redressed for personal reasons.²⁴⁵ His view echoes that of Blackstone, who identified a list of personal tort actions, including defamation, designed entirely to allow "victims to vindicate one or more of his absolute rights to life, liberty, and the use of property."²⁴⁶ Traditional defamation rules permit a jury to award nominal damages for libel or slander per se.²⁴⁷ Allowing nominal damages served "a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false."²⁴⁸ The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to his reputation has occurred."²⁴⁹

The requirement of proof of special damages for pure slander makes it an economic tort. A robust tort regime, however, must take into account noneconomic harm. Both libel and slander per se acknowledge the need for damages for something other than economic harm, as each tort allows for nominal damages upon proof that the defendant defamed the plaintiff and was not otherwise excused.²⁵⁰ The threshold question in any defamation case is whether the defendant's comment was injurious to the plaintiff's reputation.²⁵¹ A defamatory wrong in most instances is actionable absent proof of economic harm.²⁵² However, under the doctrine of pure slander, the plaintiff cannot recover damages absent a showing of economic harm.²⁵³ The irony is that once the plaintiff does successfully prove special damages, he or she is also then entitled to an award of nominal, and

COMPLEX WORLD (1995); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 14 (1987).

243. See generally *supra* note 242.

244. Professors Thomas Koenig and Michael Rustad have advocated a different theory for tort, which they call "Crimtort." Crimtort advocates using tort law to punish through economic sanctions. See THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 207 (2001).

245. Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo to Posner Torts Opinions*, 62 U. FLA. L. REV. 667, 669, 670, 672, 674 (2010).

246. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L. J. 524, 548 (2005).

247. *Thayer v. Eastern Maine Med. Ctr.*, 740 F. Supp. 2d 191, 201 (D. Me. 2010); *Johnson v. Clark*, 484 F. Supp. 2d 1242, 1254 (M.D. Fla. 2007); *Maison de France, Ltd. v. Mais Oui!, Inc.*, 108 P.3d 787, 794 (Wash. Ct. App. 2005).

248. *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 660 (D.C. Cir. 1966).

249. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (1977)).

250. See discussion *supra* notes 31–36.

251. See e.g., *Socha v. Nat'l Ass'n of Letter Carriers Branch No. 57*, 883 F. Supp. 790, 806 (D. R.I. 1995) (citing *Elias v. Youngken*, 493 A.2d 158, 161 (R.I. 1985)).

252. *James v. Coors Brewing Co.*, 73 F. Supp. 2d 1250, 1253 (D. Colo. 1999).

253. *Tucker v. Fischbein*, No. Civ.A.97-6150, 2005 WL 67076, at *3 (E.D. Pa. Jan. 11, 2005).

punitive, damages.²⁵⁴

The lack of a proof of economic harm requirement in libel and slander per se cases is evidence of defamation's real role, which is to avenge one's tarnished reputation. Abolishing the libel/slander distinction would mean that a court of law would be the appropriate forum for any seemingly defamed individual to have his or her day in court, and potentially avenge an injury to his or her reputation, regardless of how the defamation was delivered. Granting victims of pure slander their day in court is consistent with Judge Cardozo's view of a just democratic legal system.

Technospeech, which would fit squarely on the side of libel, means that a very small subset of defamation requires proof of special damages, and this small subset is not only inconsistent with the other torts, but is also inconsistent with the notion that defamation is a dignitary tort. Preserving the libel/slander distinction for the relatively few pure slander cases of today creates a theoretical divide among the single tort of defamation. Libel is not, nor is it meant to be, an economic tort. Neither is slander per se, which exempts the proof of special damages requirement. Under current law, pure slander, with its requirement of proof of special damages, remains a distant cousin from the more appropriate pleadings required for libel and slander per se.

IV. CONCLUSION

Current defamation law hardly benefits anyone. The unforeseen proliferation of digital communication necessitates an expansion of the hypothesis that the libel/slander distinction should be abrogated. The confusion and unfair burden that such a distinction brings to litigants, coupled with the lack of reasonable precedent and the judicial burden of resolving the issue of whether digital communication is libel or slander, weigh heavily in favor of abolishing the libel/slander distinction and allowing for one all encompassing tort of defamation. Given the way we communicate, it is time for courts and legislatures alike to acknowledge the death of slander.

254. Sipe, *supra* note 13, at 147.

CHART A

LEGISLATIVE AND JUDICIAL RESPONSES TO DEFAMATION BY JURISDICTION¹

Jurisdiction	Civil Statute Regulating Defamation	Abrogate Libel Slander Distinction By Case Law or Statute	Treat Scripted and Unscripted Defamatory Broadcasts Equally	Criminal Statute Criminalizing Defamation
Federal				
Washington				
D.C.				
Alabama			XX ⁱⁱ	X ⁱⁱⁱ
Alaska				
Arizona				
Arkansas				
California	X ^{iv}		X ^v	
Colorado	X ^{vi}			
Connecticut				
Delaware	X ^{vii}			
Florida	*viii			X ^{ix}
Georgia	X ^x		X ^{xi}	XX ^{xii}
Hawaii	X ^{xiii}			
Idaho				
Illinois		X ^{xiv}		
Indiana	X ^{xv}			
Iowa	X ^{xvi}			
Kansas				
Kentucky	X ^{xvii}		X ^{xviii}	
Louisiana		X ^{xix}	X ^{xx}	X ^{xxi}
Maine			X ^{xxii}	
Maryland	X ^{xxiii}			
Massachusetts				*x ^{xxiv}
Michigan	X ^{xxv}		X ^{xxvi}	X ^{xxvii}
Minnesota				X ^{xxviii}
Missouri				
Mississippi	X ^{xxix}			X ^{xxx}
Montana	X ^{xxxi}			X ^{xxxii}
Nebraska	X ^{xxxiii}			
New Hampshire				X ^{xxxiv}
New Jersey			X ^{xxxv}	*x ^{xxxvi}

New Mexico	X ^{xxxvii}		
New York	X ^{xxxviii}	X ^{xxxix}	*xl
Nevada			
North Carolina		X ^{xli}	
North Dakota	X ^{xlii}		X ^{xliii}
Ohio	X ^{xliv}		
Oklahoma	X ^{xlv}	X ^{xlvi}	X ^{xlvii}
Oregon	X ^{xlvi}		X ^{xlvi}
Pennsylvania	X ^{li}	X ^{li}	*lii
Rhode Island			
South Carolina			
South Dakota	X ^{liii}		
Tennessee	X ^{liv}		
Texas	X ^{lv}		X ^{lvi}
Utah	X ^{lvii}		X ^{lviii}
Vermont			
Virginia	X ^{lix}	X ^{lix}	
Washington	X ^{lxi}		
West Virginia	X ^{lxii}		
Wisconsin	X ^{lxiii}		X ^{lxiv}
Wyoming	*lxv		*lxvi

i. Key:

* Constitution of jurisdiction provides an inferential cause of action

** Jurisdiction has a statute, which allows criminal prosecution of any crime not listed in their criminal code

X Jurisdiction has a statute or case law for cause of action

XX State has legislation or case law that is currently in conflict

ii. Gray v. Wala-TV, 384 So. 2d 1062, 1065 (Ala. 1980) (whether read from a manuscript or not, broadcast defamatory language is libel), *negative treatment* by Nelson v. Lapeyrouse Grain Corp., 534 So.2d 1085 (Ala. 1988).

iii. ALA. CODE § 13A-11-160 (2011) (criminal libel statute).

iv. CAL. CIV. CODE § 45 (West 2011) (civil cause of action for libel); CAL. CIV. CODE § 46 (West 2011) (civil cause of action for slander).

v. CAL. CIV. CODE § 46 (West 2011) (slander encompasses all defamation by radio).

vi. COLO. REV. STAT. ANN. § 13-25-124 (West 2011) (libel and slander pleading requirements).

vii. DEL. CODE ANN. tit. 10, § 3919 (West 2011) (codifies truth as a defense).

viii. Fla. Const. art. I, § 4 (cause of action for civil defamation in constitution).

ix. FLA. STAT. ANN. § 836.01 (West 2011) (criminal libel statute).

x. GA. CODE ANN. § 51-5-1 (West 2011) (civil cause of action for libel); GA. CODE ANN. § 51-5-4 (West 2011) (civil cause of action for slander).

xi. Am. Broad.-Paramount Theatres, Inc. v. Simpson, 126 S.E.2d 873, 879 (Ga. Ct. App. 1962) (“defamacast” is a special classification for defamatory words spoken over the radio or television).

- xii. H.R. 348, 151st Gen. Assemb., Reg. Sess. (Ga. 2011) (amending original criminal defamation law). *See generally* Williamson v. State, 295 S.E.2d 305 (Ga. 1982) (introducing a new to replace the former statute, now held to be unconstitutional).
- xiii. HAW. REV. STAT. ANN. § 657-4 (LexisNexis 2011) (civil statute of limitations).
- xiv. Mitchell v. Peoria Journal-Star, Inc., 221 N.E.2d 516, 519 (Ill. App. Ct. 1966) (“Illinois law, by evolvement, ha[s] abolished all distinctions between slander and libel except as to whether the defamation was oral or written.”).
- xv. IND. CODE ANN. § 34-15-1-1 (West 2011) (civil statute for libel or slander).
- xvi. IOWA CODE ANN. § 659.1 (West 2011) (pleading requirement).
- xvii. KY. REV. STAT. ANN. § 411.051 (West 2011) (civil action for libel).
- xviii. Gearhart v. WSAZ, Inc., 150 F. Supp. 98 (E.D. Ky. 1957) (finding all defamatory broadcasts made over television to be libel rather than slander).
- xix. LA. REV. STAT. ANN. § 14:47 (2011) (Louisiana has a policy of making oral and written defamation equally inclusive, by combining the two into a single crime entitled “defamation”).
- xx. *Id.*
- xxi. *Id.*
- xxii. Niehoff v. Cong. Square Hotel, 103 A.2d 219 (Me. 1954) (finding no distinction between libel and slander; broadcast statements are treated the same).
- xxiii. MD. CODE ANN., CTS. & JUD. PROC. § 3-501 (West 2011) (slander defined as applied to specific circumstances).
- xxiv. 32 Mass. Prac., Criminal Law § 534 (3d ed.) (“While there is no statute which defines or punishes criminal libel, it is a punishable offense.”). MASS. GEN. LAWS ANN. ch. 279, § 5 (West 2011) (“If no punishment for a crime is provided by statute, the Court shall impose such sentence, according to the nature of the crime, as conforms to the common usage and practice in the commonwealth.”).
- xxv. MICH. COMP. LAWS ANN. § 600.2911 (West 2011) (cause of action for defamatory (i.e., libelous or slanderous) broadcasts).
- xxvi. MICH. COMP. LAWS ANN. § 600.2911(8) (West 2011) (libel encompasses all radio and televised broadcasts).
- xxvii. MICH. COMP. LAWS ANN. § 750.370 (West 2011) (criminal libel statute).
- xxviii. MINN. STAT. ANN. § 628.22 (West 2011) (criminal statute: indictment); MINN. STAT. ANN. § 609.765 (West 2011) (criminal statute: elements).
- xxix. MISS. CODE ANN. § 95-1-1 (West 2011) (civil defamation).
- xxx. MISS. CODE ANN. § 99-7-33 (West 2011) (indictment for libel).
- xxxi. MONT. CODE ANN. § 27-1-802 (2011) (civil definition of libel); Mont. Code Ann. § 27-1-803 (2011) (civil definition of slander).
- xxxii. MONT. CODE ANN. § 45-8-212 (2011) (criminal statute).
- xxxiii. NEB. REV. STAT. § 20-209 (2011) (cause of action).
- xxxiv. N.H. REV. STAT. ANN. § 644:11 (2011) (criminal statute).
- xxxv. Kelly v. Hoffman, 61 A.2d 143, 144 (N.J. 1948) (broadcasted defamatory words are actionable without regard to whether they are spoken or written, and do not require proof of special damages).
- xxxvi. N.J. Const. art. I, § 6 (New Jersey State Constitution provides an inferential criminal cause of action).
- xxxvii. NMRA, Civ. UJI 13-1001 (codified civil jury instructions).
- xxxviii. N.Y. CIV. RIGHTS LAW § 76 (McKinney 2011) (evidence for libel).
- xxxix. Matherson v. Marchello, 473 N.Y.S.2d 998, 1004 (N.Y. App. Div. 1984) (holding that all defamation that is broadcast should be classified as libel).
- xl. N.Y. Const. art. I, § 8 (New York State Constitution provides cause of action for criminal libel).
- xli. Greer v. Skyway Broad. Co., 124 S.E.2d 98, 104 (N.C. 1962) (distinctions between libel and slander held inapplicable to radio and televised broadcasts).
- xlii. N.D. CENT. CODE § 14-02-02 (2011) (civil defamation); N.D. CENT. CODE § 14-02-03 (2011) (civil libel defined); N.D. CENT. CODE § 14-02-04 (2011) (civil slander defined).
- xliii. N.D. CENT. CODE § 12.1-15-01 (2011) (criminal statute).

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- xliv. OHIO REV. CODE ANN. § 2739.01 (West 2011) (cause of action for libel and slander).
 - xlv. OKLA. STAT. ANN. tit. 12, § 1441 (West 2011) (libel defined); OKLA. STAT. ANN. tit. 12, § 1442 (West 2011) (slander defined).
 - xlvi. *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515 (W.D. Okla. 1995) (court analyzes defamation suit under slander, regardless of there being a script).
 - xlvii. OKLA. STAT. ANN. tit. 21, § 771 (West 2011) (criminal libel statute).
 - xlviii. OR. REV. STAT. ANN. § 31.205 (West 2011) (damages recoverable in tort actions for defamation).
 - xlix. OR. REV. STAT. ANN. § 135.733 (West 2011) (sufficiency of accusatory instrument in a criminal action).
 - i. 42 PA. CONS. STAT. ANN. § 8343 (West 2011) (burdens of proof in action for defamation).
 - ii. *Summit Hotel v. Nat'l Broad. Co.*, 8 A.2d 302, 310 (Pa. 1939) (distinction between libel and slander are not suited for the radio broadcast medium).
 - iii. Pa. Const. art. I, § 7 (constitution has criminal cause of action).
 - liii. S.D. CODIFIED LAWS § 20-11-2 (2011) (defamation defined); S.D. CODIFIED LAWS § 20-11-3 (2011) (libel defined); S.D. CODIFIED LAWS § 20-11-4 (2011) (slander defined).
 - liv. TENN. CODE ANN. § 29-24-101 (West 2011) (civil action for words imputing sexual impropriety).
 - lv. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2011) (civil libel).
 - lvi. TEX. FIN. CODE ANN. § 89.101 (West 2011) (criminal statute for slander).
 - lvii. UTAH CODE ANN. § 45-2-2 (West 2011) (libel and slander defined).
 - lviii. UTAH CODE ANN. § 76-9-404 (West 2011) (criminal statute for defamation)
 - lix. VA. CODE ANN. § 8.01-45 (West 2011) (civil action for words tending to breach the peace).
 - lx. *Shupe v. Rose's Store*, 192 S.E.2d 766, 767 (Va. 1972) (finding that both libel and slander are to be treated under Virginia Code as defamatory words).
 - lxi. WASH. REV. CODE ANN. § 4.36.120 (West 2011) (pleading requirements libel and slander).
 - lxii. W. VA. CODE ANN. § 55-7-2 (West 2011) (cause of action for insulting words).
 - lxiii. WIS. STAT. ANN. § 893.57 (West 2011) (statute of limitations for civil action).
 - lxiv. WIS. STAT. ANN. § 942.01 (West 2011) (criminal statute for defamation).
 - lxv. Wyo. Const. art. I, § 20 (Wyoming State Constitution has cause of action for civil defamation).
 - lxvi. *Id.* (Wyoming State Constitution has cause of action for criminal defamation).