YOU CAN'T BE SERIOUS: PROBLEMS OF FACTICITY AND 'PLAUSIBLE NONLITERAL ASSERTIONS' IN U.S. DEFAMATION LAW

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INTRODUCTION

In a scene from the 2013 film *American Hustle*,[1] 1970s con artist Irving Rosenfeld (played by a comb-over'd Christian Bale) argues with his wife Rosalyn (played by Jennifer Lawrence as more than a bit unbalanced) over their new state-of-the-art microwave oven—a gift from Irving's new friend Carmine Polito. Rosalyn, jealous of the friendship, has obstinately defied her husband's admonishment not to put metal in the "science oven" by tossing an aluminum foiled casserole into the microwave. It promptly bursts into flame. Later Irving moans: "I told you not to put metal in the science oven. What'd you do that for?" Rosalyn, unrepentant, is armed with a comeback that slams both the appliance and Irving in one blow. "You know, I read that it takes all the nutrition out of our food! It's empty, just like your deals. Empty! Empty!" Irving retorts, "Listen to this bullshit." But Rosalyn is ready: "It's not bullshit. I read it in an article!" She grabs a magazine off the

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1. AMERICAN HUSTLE (Columbia Pictures 2013).

counter and thrusts it at him with vindication. "Look: By Paul Brodeur."[2]

The scene plays as dark screwball comedy between the two heavily fictionalized characters. It turns out that Paul Brodeur, however, is the *real* name of a *real* person (and science journalist), and he was not amused by the reference, claiming that it misstated his views. When Brodeur brought a defamation suit against the filmmakers, *The Hollywood Reporter*'s legal expert Eriq Gardner recognized that it was a "provocative" defamation case because Rosalyn's claim—while sounding like a straightforward assertion of fact—was made by a character who was clearly unreliable.[3] Indeed, the deceptively simple sentence did not quite fit defamation's legal categorizations of factual assertion, opinion, rhetorical hyperbole, or satire.[4] Rosalyn's statement was not an assertion of opinion (a subjective assessment) nor was it an example of rhetorical hyperbole (loose, figurative, or exaggerated language), and it did not conform to the conventions of satire (it was not meant to ironically skewer Brodeur or his research). The California state appellate court, ruling on an anti-SLAPP motion,[5] clearly recognized this quandary, and looked to another confounding case from a decade earlier—*Knievel v. ESPN*[6]—in ruling that the line spoken by Lawrence was "not reasonably susceptible of a defamatory meaning."[7]

What the *Brodeur* and *Knievel* cases had in common were allegedly defamatory words that, on their face, carried a plain meaning—but were likely to be understood by the audience to mean something else. In *Brodeur*, Rosalyn's exasperated claim about Paul Brodeur's supposed research was used to highlight the character's ditzy defensiveness. And 10 years earlier, in *Knievel*, ESPN's playful use of "pimp" in a caption was, ironically, meant as a high compliment, rather than an assertion that the iconic motorcycle

2. Brodeur v. Atlas Entertainment, Inc., 248 Cal. App. 4th 665, 670 (2016).

3. Eriq Gardner, *How Jennifer Lawrence's "Ditzy" Character in 'American Hustle' May be Key to Libel Lawsuit*, HOLLYWOOD REPORTER (March 27, 2015 11:19 AM), https://www.hollywoodreporter.com/thr-esq/how-jennifer-lawrences-ditzy-character-784884 [https://perma.cc/J4S9-W2DS].

4. Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 COLUM. L. REV. 294, 297–301 (2000). (Noted federal judge and legal commentator Robert D. Sack explores the varieties of expression that courts have held to be opinion. Notably, none of those forms of speech were what this article refers to as PNAs).

5. Anti-SLAPP statutes typically allow defendants to contest putatively meritless litigation aimed at suppressing speech by filing a motion to dismiss. That motion forces plaintiffs to demonstrate the merits of their claims prior to expensive discovery. *See* Matthew D. Bunker & Emily Erickson, *#aintturningtheothercheek: Using Anti-SLAPP Law as a Defense in Social Media Cases*, 87 UMKC L. REV. 801 (2019).

6. Knievel v. ESPN, 393 F.3d 1068 (9th. Cir. 2005).

7. *Brodeur*, 248 Cal. App. 4th at 680.

stuntman was moonlighting as a criminal. Cases like these do not comfortably fit within existing defamation doctrine. As a result, courts have been forced to shoehorn them into inconsistent tests and categories. Such cases do, however, conform to a category of speech we call "plausible nonliteral assertions" or PNAs—words that carry dual meanings: a common (literal) one and an audience-understood (nonliteral) one.

Both *Brodeur* and *Knievel* may seem like anomalies, but judges have been wrestling with the blurring lines of language in defamation cases for decades. The *Knievel* court quoted *Levinsky's v. Wal-Mart Stores*, a 1997 case that explored the fungible edges of rhetorical hyperbole. The *Levinsky's* court acknowledged that "exaggeration and *non-literal commentary* have become an integral part of social discourse."[8] The court nevertheless warned that "[d]espite avowals that all speech is infinitely malleable, the First Amendment does not allow courts the luxury of a deconstructionist approach to language."[9] Revisiting all of these "nondefamatory" categories has become increasingly important. Indeed, today's judges are already beginning to acknowledge the newest linguistic slippages happening in our socially mediated, postmodern, post-truth world.[10]

PNAs also have important implications beyond simple juridical categorization. This article argues that, unlike the opinion defense, PNAs should be analyzed as part of the plaintiff's *prima facie* case in defamation, rather than being considered an add-on defense either under the First Amendment, under a state's constitution, or common law. By treating PNAs as part of a plaintiff's case, courts can avoid serious limitations on First Amendment protection for potentially defamatory statements, including the requirement that the defendant be a media entity or that the speech relate to a matter of public concern. These First Amendment caveats would not be necessary if the PNA analysis was treated as a common-law requirement for a plaintiff to demonstrate defamatory meaning

8. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997) (emphasis added).

9. *Id.* at 129.

10. In *Jacobus v. Trump*, Judge Barbara Jaffe reflected upon this idea, even as she dismissed a libel claim against Donald Trump: "These circumstances raise some concern that some may avoid liability by conveying positions in small Twitter parcels, as opposed to by doing so in a more formal and presumably actionable manner." 55 Misc. 3d 470, 484 (Sup. Ct. 2017). *See also* Ephrat Livni, *A strategic guide to navigating the law like Donald Trump*, QUARTZ (Apr. 9, 2017), https://qz.com/935534/a-strategic-guide-to-navigating-the-law-like-donald-trump/ [https://perma.cc/DMM5-7MUW] (arguing that Trump's reckless style of bombastic speech actually helps insulate him from defamation lawsuits, "deflecting," as Judge Jaffe wrote, "serious consideration." *Trump,* 55 Misc. 3d at 483).

rather than as an add-on defense that a defendant must raise—and one that a defendant can lose if they fail to raise it separately.

This article first reviews the current state of the law on opinion, rhetorical hyperbole, and satire—doctrines that have never been fully explicated since the U.S. Supreme Court's murky 1990 decision in *Milkovich v. Lorain Journal Co.*[11] Next, it explores illustrative defamation cases involving PNAs. The article then suggests a new approach to the PNA issue, with an emphasis on treating such statements as an integral part of the plaintiff's case-in-chief rather than as a privilege or defense that the defendant must assert. This approach also obviates problems raised by the limited scope of First Amendment protection for opinion as elucidated in *Milkovich*. Next, the article analyzes some of the difficulties with the notion of a reasonable reader against which to measure the facticity of a given statement. Finally, the article offers concluding perspectives on this important area of defamation doctrine.

I. ROOTS OF THE PROTECTION FOR OPINION, RHETORICAL HYPERBOLE, AND SATIRE

While the earliest common-law decisions offered scant protection for the potentially defamatory statements that we might today regard as protected under opinion and related doctrines, courts have steadily created a more defendant-friendly, if imperfect, doctrinal landscape. This section explores that history and illustrates why what we call PNA's are as-yet unrecognized doctrinal elements.

Defamation, the tort remedy for damage to reputation, has a long history extending back into the early common law.[12] Although the contemporary elements of defamation (or libel) vary somewhat by jurisdiction, the Restatement (Second) of Torts offers a helpful encapsulation of the elements as follows: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication."[13]

11. Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

12. *See generally* LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 61–105 (Oxford U. Press 2007). For an excellent historical examination of defamation in early America, *see* PHILLIP I. BLUMBERG, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW (Cambridge U. Press 2010).

13. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

While defamation was for most of its existence a strict liability tort that largely privileged reputation over free expression values, things began to change dramatically when the Supreme Court began to apply a sort of First Amendment overlay to common-law libel doctrine in 1964 with *New York Times Co. v. Sullivan*.[14] In *Sullivan*, the Court held for the first time that the First Amendment required public official plaintiffs to prove "actual malice" in order to recover damages.[15] Actual malice demanded a showing that the defendant either knew the challenged statement was false or had reckless disregard for its truth or falsity.[16] The Court subsequently extended the same high bar of actual malice to public figures, including celebrities and others who inserted themselves into public debate.[17] As the Court continued to explicate the constitutional fallout from the revolutionary *Sullivan* opinion, questions arose as to how other aspects of defamation doctrine were affected by the new regime, including defenses related to opinion.

The defense of opinion protects the subjective evaluations of others that are not factual in nature. The opinion defense is generally understood to have had its genesis in the fair comment privilege. Fair comment was a common-law libel privilege that was widely used in U.S. jurisdictions before the constitutionalization of libel law that began in *Sullivan*. Although the early common law originally permitted defamation judgments against mere expressions of opinion that damaged reputation, courts began to recognize a nascent version of the fair comment privilege in the nineteenth century.[18] As federal judge and legal scholar Robert D. Sack points out, common-law libel pre-*Sullivan* required only that the plaintiff establish "that a defamatory statement had been published about him or her."[19] The defendant could then assert the fair comment privilege, the original scope of which was "quite modest."[20] Fair comment required proof that the challenged language was opinion, that it was "about a matter of public concern, that it represented the speaker's actual opinion, and that it was not made solely for the purpose of causing harm to the [plaintiff]."[21] Moreover, the defendant had to prove that the opinion was based

14. 376 U.S. 254, 266 (1964).

15. *Id.* at 279–80.

16. *Id.* at 280.

17. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

18. RODNEY A. SMOLLA, LAW OF DEFAMATION § 6:4 (2020), Westlaw (database updated Nov. 2020).

19. Sack, *supra* note 4, at 300.

20. SMOLLA, *supra* note 18.

21. Sack, *supra* note 4, at 301.

either upon stated facts or upon otherwise widely known facts.[22] On top of all that, fair comment was "hedged about with caveats, conditions, and exceptions that varied from one jurisdiction to the next."[23]

This rather byzantine procedure appeared to be greatly simplified in the years after the *Sullivan* revolution.[24] The Supreme Court in *Gertz v. Robert Welch, Inc.* offered a sweeping dictum on the constitutional status of opinion in 1974. [25] As the Court put it in *Gertz*: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[26] This seemingly absolute constitutional protection for opinion was a striking break with the common-law past, at least on its face, despite the fact the issue of opinion was not actually before the Court in *Gertz*. As one commentator noted, the fallout from *Gertz* included the Restatement (Second) of Torts "unceremoniously dropp[ing] fair comment from the common law roster," because opinion was presumably no longer actionable as a matter of constitutional law.[27]

Along with *Gertz*, two other decisions from the same era, *Greenbelt Cooperative Publishing Ass'n Co. v. Bresler* and *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin* offered safe harbor for rhetorical hyperbole.[28] In *Greenbelt*, the Court did not mention the opinion privilege, holding instead that use of the term "blackmail" with regard to a real estate developer negotiating with a city council was rhetorical hyperbole as it was clearly not a term a reader would take literally, given the context of the article.[29] "On the contrary," the Court wrote, "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."[30] In *Austin*, ruling in a statutory labor context, the

22. *Id.*

23. *Id.* at 302.

24. *Sullivan* itself provided a brief, somewhat obscure reference to the constitutional status of opinion in a footnote: "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292, n. 30 (1964).

25. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

26. *Id.*

27. SMOLLA, *supra* note 18, at § 6:7.

28. Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 290 (1974).

29. *Greenbelt*, 398 U.S. at 14.

30. *Id.*

Supreme Court similarly held that calling someone a "scab" or "traitor" was not a factual misrepresentation, but "merely rhetorical hyperbole, a lusty and imaginative expression of contempt felt by union members . . ." and that "such exaggerated rhetoric was commonplace in labor disputes . . . ."[31] Because these two cases are not explicitly categorized by the Court as opinion cases, the connection between opinion and rhetorical hyperbole is left somewhat opaque. At the very least, these two cases suggest, simply by the omission of any discussion of the opinion defense, that rhetorical hyperbole is a separate category of nonlibelous assertion rather than a subgenre of opinion.

They were certainly approached this way in *Pring v. Penthouse International Ltd.*, which used the cases as a springboard to explicate another category of nonlibelous expression—satire.[32] The *Pring* case stemmed from a 1979 *Penthouse* magazine article, "Miss America Saves the World," a first-person account of a baton-twirling beauty contestant whose fellatio skills are great enough to make men levitate — *perhaps*, the character muses to herself at one point, even great enough to prevent a third World War. The contestant in the story is named Charlene and is vying for the Miss America title as "Miss Wyoming." In her defamation suit, Kimerli Jayne Pring, that year's actual Miss Wyoming, was able to prove that readers indeed considered the story to be about her.[33] The trickier question was whether the satirical nature of the piece could save it from defamation liability.

On appeal, the Tenth Circuit framed the legal question not by asking whether there was a "satire" exemption in libel, but instead by creating a legal test to determine whether the expression was indeed factual.[34] Drawing on the logic of *Greenbelt* and *Letter Carriers* that hyperbolic statements "could not be taken literally" and thus "no factual representation was present,"[35] the court observed that the *Penthouse* article contained various elements, such as levitation, that likewise indicated something other than a factual account.[36] Judge Oliver Seth concluded,

> The test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but whether the charged portions in context could be *reasonably understood as describing actual facts about the plaintiff or actual events in which she participated*. If it could not be so

31. *Old Dominion*, 418 U.S. at 286.
32. Pring v. Penthouse Int'l Ltd., 695 F.2d. 438, 441–42 (10th Cir. 1982).
33. *Id.* at 443.
34. *Id.* at 439.
35. *Id.* at 440.
36. *Id.* at 443.

> understood, the charged portions could not be taken literally. This is clearly the message in *Greenbelt* and *Letter Carriers.*[37]

Three years later, the *Pring* test was embedded in jury instructions for the *Falwell v. Flynt* trial after evangelical minister and political activist Rev. Jerry Falwell brought various claims, including defamation, against the unrepentant publisher of *Hustler* magazine, Larry Flynt.[38] The minister, appalled by the magazine's parody of a Campari liqueur ad campaign—which happened to feature a boozy, boastful version of himself recounting how he lost his virginity to his mother in an outhouse—argued that the ad defamed him. The jury disagreed, finding in the *Pring* terminology that the ad could not "reasonably be understood as describing actual facts about [Rev. Falwell] or actual events in which [Falwell] participated."[39]

The libel claim was thus dismissed, but the *Pring* test accompanied the case to the U.S. Supreme Court.[40] Chief Justice Rehnquist used it verbatim to recount the trial court's libel ruling,[41] then evoked it again—with slightly different wording, but to the same effect—in considering Falwell's claim of intentional infliction of emotional distress:

> Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, *even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved*. This we decline to do.[42]

Because the legal question in *Falwell* that ultimately reached the Supreme Court did not concern libel, neither of the higher courts addressed the status of satire under defamation law directly.[43] Indeed, the Fourth Circuit betrayed some relief that it could sidestep the issue of reconciling the satirical ad with the common law "dichotomy between statements of fact and opinion."[44]

37. *Id.* at 442.

38. Falwell v. Flynt, No. 83-0155 L-R, slip op. at 1 (W.D. Va. Apr. 19, 1985).

39. *Id.* at 2.

40. Hustler Magazine v. Falwell, 485 U.S. 46, 49 (1988).

41. *Id.* at 46 ("The jury then found against respondent on the libel claim, specifically finding that the ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'").

42. *Id.* at 50 (emphasis added).

43. *See id.*; *see also* Falwell v. Flynt, 797 F.2d 1270, 1275–76 (4th Cir. 1986).

44. *Falwell*, 797 F.2d at 1276.

Nevertheless, Rehnquist's substantial account in *Falwell* of "political cartoonists and satirists" and the importance of their work to the marketplace of ideas,[45] as well as his apparent, if uncredited, adoption of the *Pring* test, seemed to suggest, at least as a matter of dicta, that satire could claim at least some level of protected status in libel law.

Two years after *Falwell,* the Court took up *Milkovich v. Lorain Journal Co.*, a case that had spent 15 years bouncing between trial and appellate courtrooms as the entirety of Ohio's judiciary was apparently unable to determine whether an article lamenting the alleged lies of a wrestling coach constituted factual assertion or opinion.[46] Like *Falwell,* the enigmatic *Milkovich* opinion was authored by Chief Justice Rehnquist, who attempted to synthesize and clarify the various cases—from *Gertz* to *Falwell*—in which the Court had addressed "the constitutional limits on the *type* of speech" subject to defamation law.[47] Explicitly rejecting the "mistaken reliance" on *Gertz* as having bestowed a "wholesale" opinion privilege against defamation,[48] Rehnquist laid out the rulings in *Greenbelt, Letter Carriers,* and *Falwell* to illustrate the fallacy of the "artificial dichotomy between 'opinion' and fact."[49] What the *Milkovich* opinion did *not* do, however, was clarify the distinctions in the "*type* of speech" (emphasis in original) Rehnquist set out to discuss.[50] Instead, it grouped the three precedents together, saying they provided "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[51] *Milkovich* never made a clear distinction between rhetorical hyperbole and opinion, nor did it make one between rhetorical hyperbole and satire.

Milkovich did, however, assert that *Greenbelt*, *Letter Carriers,* and *Falwell* provided "protection for statements that cannot

45. *See Hustler*, 485 U.S. at 53–57.

46. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The Ohio state courts had initially differed on whether there was sufficient evidence of actual malice. On remand, the trial court granted summary judgment on the grounds that the newspaper's statements about the coach were constitutionally protected opinion, with which the intermediate state appellate court agreed. The Supreme Court of Ohio held that the statements were factual in nature and not protected as opinion, prompting the intervention of the U.S. Supreme Courts. *Id.* at 7–8. To give one a flavor of the article: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that [wrestling coach] Milkovich and [superintendent] Scott lied at the hearing after each having given his solemn oath to tell the truth." *Id.* at 5.

47. *Id.* at 16 (emphasis in original).

48. *Id.* at 19.

49. *Id.*

50. *Id.* at 16.

51. *Id.* at 20.

'reasonably [be] interpreted as stating actual facts' about an individual."[52] Then, later in the opinion, it invoked that same *Pring* test (asking whether the statements in question could reasonably be understood to describe actual facts about the plaintiff) to determine the outcome of *Milkovich* itself, which was quite unambiguously a question of fact versus opinion: "The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative."[53] In short, it seems quite likely that the Chief Justice was content to lump the various types of speech together and use the same constitutional inquiry for all of them. As Dean Smolla points out, the upshot was that "rather than concentrate on whether the language at issue is opinion, *Milkovich* instructs lower courts to concentrate on whether it is factual. In short, the Court substituted the old dichotomy between 'fact and opinion' with a new dichotomy between 'fact and non-fact.'"[54]

What the *Milkovich* decision sought to lump, however, this article seeks to split. This history has attempted to recount how at least three distinct categories of speech—opinion, hyperbole, and satire—have been granted at least qualified First Amendment protection in libel law. This work would now add a fourth—plausible nonliteral assertions (PNAs)—which, as noted earlier, do not quite fit into any of these categories. The following section examines several illustrative PNA cases.

II. PNAS IN THE COURTS

Oxford's LEXICO defines the word *nonliteral* as "not using or taking words in their usual or most basic sense."[55] PNAs, or plausible nonliteral assertions, then, carry a *plausible* literal meaning (or assertion), but their actual meaning (what the audience understands) is actually nonliteral—and thus nondefamatory. Although courts have not explicitly recognized PNAs, there are reported cases that illustrate the concept, even if the courts in question did not entirely make the sort of distinctions this work advocates. The following discussion will explore some of these illustrative cases.

As noted briefly in the introduction of this work, a California appellate court in *Brodeur v. Atlas Entertainment, Inc.,* decided a

52. *Id.* (citing Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988)).

53. *Id.* at 21.

54. SMOLLA, *supra* note 18, at § 6:21.

55. *Non-literal*, LEXICO, https://www.lexico.com/definition/non-literal [https://perma.cc/8A78-HLGC].

case involving the film *American Hustle* that delved into PNA territory without using that label. [56] Plaintiff Paul Brodeur sued the producers and distributors of the film for defamation and false light after one of the film's characters, Rosalyn Rosenfeld, said Brodeur had written that microwave ovens had the effect of removing nutrients from food.[57] Brodeur was in fact an early critic of microwaves and is best known for his 1977 book *The Zapping of America: Microwaves, Their Deadly Risk, and the Coverup*.[58] However, Brodeur's writings had not made the claim about nutritional depletion mentioned in *American Hustle*. Nor is the claim accurate: The fast cook time and ability to steam with little water makes "science ovens" the best means of retaining nutrients.[59] Thus, as an ostensible expert on microwaves, and having never made this erroneous claim, Brodeur argued that he'd been defamed.

So, having determined that the film's expression was a matter of "public interest" and thus subject to a special motion to strike under California's anti-SLAPP statute,[60] the court turned to the question of whether Brodeur could prove a probability of success on the merits of his claims. Among other issues, the court focused on whether Rosalyn's statement in the film was "reasonably susceptible of a defamatory meaning."[61] The California court concluded it was not, based on both the farcical nature of the film and the unreliability of the character uttering the line. In support of this conclusion, the court cited several cases, including one in which the Ninth Circuit concluded that dialogue by characters in a docudrama would not be interpreted by viewers as assertions of verifiable fact.[62] As a result, the *Brodeur* court ordered that the defendants' anti-SLAPP motion be granted.

Interestingly, although the court did not apply a precise label to the sort of speech involved in *Brodeur*, it made clear it was not treating the expression as a form of opinion. As the court put it: "Authorities addressing whether an allegedly defamatory statement is an actionable statement of fact or a constitutionally protected statement of opinion, *while not directly applicable*, are

56. Brodeur v. Atlas Entm't, Inc., 248 Cal. App. 4th 665, 668 (2016).

57. *Id*. at 670.

58. *Id*. at 669.

59. *Id.* at 679.

60. *Id.* at 677–78; *see* CAL. CIV. PROC. CODE § 425.16(c) (West 2015) (California's anti-SLAPP statute, one of the most expansive in the country, allows defendants whose speech falls under the statutory umbrella to file a special motion to require plaintiffs to establish a probability of prevailing on their claims early in the litigation. Defendants who succeed are generally entitled to recover attorneys' fees and costs.).

61. *Brodeur*, 248 Cal. App. 4th at 680.

62. Partington v. Bugliosi, 56 F.3d 1147, 1154–55 (9th Cir. 1995).

instructive here."[63] Thus, the court implicitly acknowledged what this article explicitly argues—PNAs are not a form of opinion and should not be treated doctrinally as if they were.

A 2003 opinion by the New Mexico Supreme Court illustrates the PNA issue in connection with an academic defamation dispute. The lawsuit in *Fikes v. Furst* arose as a result of "two anthropologists involved in a decades-long dispute regarding each other's observations of the Huichol Indian community in Mexico."[64] Dr. Jay Fikes sued Dr. Peter Furst after Furst made a series of allegedly defamatory statements about Fikes' academic credentials and competence. In one group of statements, Furst told a museum curator a variety of reasons why Fikes was not qualified to work on a particular anthropological project. A second group of statements made to other academics disparaged Fikes' relationship with the University of Michigan. Furst told others that the university had, in the high court's account, "'disowned Dr. Fikes,' '[d]idn't want anything to do with him,' and was 'sorry they had ever given him or provided him with a doctor's degree.'"[65]

The *Fikes* court noted that "statements that may seem plainly defamatory to an outside observer may be understood by the intended recipient in a completely different way,"[66] which is, of course, the sort of statement this article refers to as a PNA. The intermediate appellate court in *Fikes* had been unconvinced, insisting that the statements in question were still defamatory despite the disbelief by the recipients.[67] But this was not the argument the defendant was making, the New Mexico high court pointed out. It was not a question of whether the audience thought his statements were false. It was whether they "*thought that he was trying to convey something different than the ordinary meaning of his words*."[68] In another context, the argument "might not be plausible," the court added, but in the *Fikes* case, it had actually been confirmed by the deposition testimony.[69]

Indeed, in an unusual twist, because the statements were made to a small group of individuals, it was possible in this case to actually depose those recipients to determine the meaning they ascribed to the statements. One recipient testified that the statements did not affect his view of the plaintiff, and that the statements were "typical of what he hears in the anthropological

63. *Brodeur*, 248 Cal. App. 4th at 680 (emphasis added).
64. Fikes v. Furst, 81 P.3d 545, 547 (N.M. 2003).
65. *Id.* at 548.
66. *Id.* at 550.
67. Fikes v. Furst, 61 P.3d 855, 866 (N.M. Ct. App. 2003).
68. *Fikes*, 81 P.3d at 550 (emphasis added).
69. *Id.*

community."[70] Another recipient pointed out that the statements were "extreme, but are not outside the range of what goes on in academic talk."[71]

As a result of this deposition testimony, the court concluded that the statements were not understood in a literal manner in the academic community, and thus the plaintiff failed to meet his burden to prove defamation.[72] Although the court made a reference to the opinion doctrine, this article argues that the statements do not in fact fall into opinion as ordinarily understood, but instead are characteristic of plausible nonliteral assertions. In line with this article's broad argument, the New Mexico court treated the issue as part of the plaintiff's requirement to demonstrate defamatory meaning, rather than falling under an opinion defense that the defendant would be required to raise. Moreover, the state high court appeared to treat the matter as one of state common-law defamation doctrine rather than turning to First Amendment doctrine via *Milkovich*.[73] Thus, the *Fikes* court, although not recognizing a separate category for PNAs, generally followed what this article advocates as the better approach.

A 2013 D.C. Circuit case provides yet another example of a PNA, although not so identified by the court. In *Farah v. Esquire Magazine*, the federal appellate court considered a defamation complaint by an author and publisher of a "birther" book entitled *Where's the Birth Certificate? The Case that Barack Obama is not Eligible to be President*.[74] The book was written by plaintiff Jerome Corsi and published by a company owned by plaintiff Joseph Farah.

The book came out three weeks after President Obama released his long-form birth certificate from Hawaii, unquestionably ending the dispute about his citizenship, at least among rational observers. *Esquire*'s Politics Blog then published a satirical blog post titled: "BREAKING: Jerome Corsi's Birther Book Pulled From Shelves!"[75] The post went on to state: "In a stunning development one day after the release of [the Corsi book], [Farah] has announced plans to recall and pulp the entire 200,000 first printing run of the book, as well as announcing an offer to refund

70. *Id.*

71. *Id.* at 550.

72. *See id.* at 553.

73. "[Dr. Furst] made a prima facie showing that the recipients did not attribute a defamatory meaning to the statements he made. Because proof that a defamatory communication occurred was essential to Dr. Fikes' case, Dr. Furst's showing gave rise to a burden on Dr. Fikes to show that there was an issue of fact concerning a statement of defamatory meaning. Dr. Fikes did not carry that burden." *Id.* at 551 (emphasis added).

74. Farah v. Esquire Magazine, 736 F.3d 528, 530 (D.C. Cir. 2013).

75. *Id.*

the purchase price to anyone who has already bought . . . the book."[76] The blog post quoted Farah as stating that "in light of recent events, the book has become problematic, and contains what I now believe to be factual inaccuracies . . . I cannot in good conscience publish it and expect any one to believe it."[77] The post also cited an unnamed source at the publishing company who said, "I mean, we'll do anything to hurt Obama, and erase his memory, but we don't want to look like fucking idiots, you know? Look, at the end of the day, bullshit is bullshit."[78] Less than two hours later, the blog published an update "for those who didn't figure it out" making clear that the post was "satire."[79]

After Farah and Corsi sued for defamation, false light, and related torts, *Esquire* moved for dismissal under the D.C. anti-SLAPP statute.[80] The trial court then dismissed the action.[81] On appeal, the D.C. Circuit considered the First Amendment requirements for holding a defendant liable for defamation.[82] These included the doctrine, quoting *Milkovich* and *Falwell*, that the First Amendment protects statements "that cannot reasonably be interpreted as stating actual facts about an individual."[83] As well, the court noted, again quoting *Milkovich*, the First Amendment requires that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."[84] Finally, defendants cannot be liable "unless the disputed statement is 'reasonably capable of defamatory meaning.'"[85]

Applying these standards, the *Farah* court reasoned that, in context, "the reasonable reader could not understand [the blog post] to be conveying 'real news' about Farah and Corsi."[86] Identifying numerous indicia of satire in the post, the court ruled that the blog post was entitled to First Amendment protection and upheld the dismissal of the defamation claim by the trial court.[87]

Although the D.C. Circuit, in the opinion of the authors of this article, unquestionably reached the correct result, the jurisprudential path by which it got there demonstrates the

76. *Id.*
77. *Id.* at 532.
78. *Id.*
79. *Id.* at 530.
80. *Id.* at 531.
81. *Id.*
82. *Id.* at 533–34.
83. *Id.* at 536 (citations omitted).
84. *Id.* at 534 (citation omitted).
85. *Id.* at 535 (citation omitted).
86. *Id.* at 537.
87. *Id.* at 538–39.

problem with treating PNAs as a subset of opinion, rhetorical hyperbole, or satire rather than a stand-alone legal category. By focusing on First Amendment protection for defamation defendants rather than basic common-law requirements for establishing defamatory meaning as part of the plaintiff's case, the D.C. Circuit thereby introduced into the analysis Supreme Court requirements that limit full First Amendment protection to speech about a matter of public concern and often require that the defendant be a media defendant. While those requirements were certainly met in *Farah*, the case nevertheless demonstrates the limitations of an approach based solely on First Amendment doctrine rather than rooted in basic common-law requirements in defamation.

III. CONSTRUCTING THE APPROPRIATE AUDIENCE

When nonliteral statements of various sorts are at issue, courts have frequently turned to an imagined reasonable audience member of some sort to determine how readers or viewers would understand the language in question and whether it would be viewed as defamatory. There are a variety of such tests in defamation law, which this section will explore.

Perhaps the most fundamental "constructed" audience is that which courts use to determine if a particular allegation would be defamatory at all. The Restatement (Second) of Torts' view is that a statement is defamatory if it would harm the plaintiff's reputation "in the eyes of a substantial and respectable minority" of the community.[88] As Professor Clay Calvert has noted: "Today, courts often apply some variation of this benchmark, such as the 'considerable and respectable segment in the community' formulation."[89] While this sort of standard functions reasonably well when the nature of the defamatory statement is relatively straightforward, courts have tended to drill down deeper in cases where the sentiment expressed is less than clear or is in some way underdetermined.[90] Moreover, as Professor Lyrissa Barnett Lidsky has pointed out, the construction of such hypothetical audiences is subject to considerable discretion by judges: "[C]ourts rarely resort to polls, surveys, or even witness testimony to determine the values held by the community segment but instead rely on their own

88. RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (AM. LAW INST. 1977).

89. Clay Calvert, *Difficulties and Dilemmas Regarding Defamatory Meaning in Ethnic Micro-Communities: Accusations of Communism, Then and Now*, 54 U. OF LOUISVILLE L. REV. 1, 10 (2016); *see also* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 21 (1996) (discussing the use of "considerable and respectable class of people" in a defamation case).

90. *See, e.g.*, *Farah*, 736 F.3d at 537–38 (analyzing what hypothetical audience to consider in determining whether challenged statements were defamatory).

personal knowledge and intuitive judgments which they subsequently label common knowledge or common sense."[91]

In the case of arguably nonliteral statements (rhetorical hyperbole, satire, and PNAs)—prior to consulting the "substantial and respectable" minority viewpoint—courts must first consider the issue of whether a statement truly states or implies actual facts about the plaintiff. To do that, courts frequently turn to a "reasonable reader" construct, like the one in *Pring*. Most courts seem to have rendered this reasonable reader as a fairly savvy interpreter of texts.[92] As one California court described the reasonable reader: "the hypothetical reasonable person—the mythic Cheshire cat who darts about the pages of the tort law—is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity."[93]

Consider, for example, the *Farah* blog post case discussed earlier.[94] In *Farah*, the D.C. Circuit pointed out that in cases involving satire, the test "is not whether some readers were actually misled, but whether the hypothetical reasonable reader could be (after a time for reflection)."[95] Rather than imagining the reaction of a reasonable online reader in general, the court instead focused its analysis on a very particular constructed audience member—a reasonable reader of *Esquire*'s political blog.

That reader, the court reasoned, would not interpret the challenged blog post about a publisher withdrawing a "birther" book to be factual.[96] "That article's primary intended audience—that is, readers of 'The Politics Blog'—would have been familiar with *Esquire*'s history of publishing satirical stories, with recent topics ranging from Osama Bin Laden's television-watching habits to 'Sex Tips from Donald Rumsfeld,'" the court wrote.[97] A reasonable reader of the blog would also have been aware of the nature of the Obama birth certificate controversy, as well as some of the prominent players involved.[98] With that background, plus the unlikelihood of the blog post as a whole, the reasonable reader "would have recognized that the article was 'reporting' events and

91. Lidsky, *supra* note 89, at 7.

92. *See, e.g.*, New Times, Inc. v. Isaacks, 146 S.W.3d 144, 158 (Tex. 2004) (noting in case involving satirical story about plaintiff that "this is not the same as asking whether all readers actually understood the satire, or 'got the joke.' Intelligent, well-read people act unreasonably from time to time, whereas the hypothetical reasonable reader, for purposes of defamation law does not.").

93. Patrick v. Superior Court (Torres), 27 Cal. Rptr. 2d 883, 887 (Cal. Ct. App. 1994).

94. *See Farah*, 736 F.3d at 530.

95. *Id.* at 537.

96. *Id.*

97. *Id.*

98. *Id.*

statements that were totally inconsistent with Farah's and Corsi's well-publicized views and could not reasonably have taken the story literally."[99]

Similarly, in *Knievel v. ESPN*, the Ninth Circuit concluded that readers of an "extreme sports" website would interpret the word "pimp" as applied to motorcycle daredevil Evel Knievel in a nonliteral way—even as a compliment—rather than ascribing criminal conduct to him.[100] The website had published a photograph of Knievel, his arms around both his wife and another woman, with the caption, "Evel Knievel proves you're never too old to be a pimp."[101] Knievel and his wife sued for defamation, claiming the caption suggested Knievel was soliciting prostitution and that his wife was a prostitute.[102] The Ninth Circuit rejected this interpretation of the term "pimp," reasoning that the website as a whole was "lighthearted, jocular, and intended for a youthful audience," and employed other youthful slang such as "'dudes rollin' deep' and 'kickin' it with much flavor.'"[103] The court thus read the term "pimp" through the lens of the hip, young reasonable reader of the website, for whom "pimp" could mean someone who was "cool" rather than denoting a hardened criminal.[104]

However, the dissent argued that the majority had taken too narrow of a view of the reasonable reader by focusing on the target audience of the website.[105] Judge Bea pointed out that, "the case law does not allow a court to judge whether a statement is defamatory by asking who was *intended* to read or hear it."[106] Instead, the dissent reasoned, "one cannot judge the liability of a defamer by the composition of what he claims is his targeted audience. One has to consider not only who was *targeted*, but who was *hit*."[107]

Although a complete typology of all the ways courts construct hypothetical audiences in determining defamatory meaning is beyond the scope of this article, the courts and commentators cited in this section make clear that this general style of analysis is critical in defamation cases. In the PNA context, this article suggests that resorting to a hypothetical audience should, as in *Farah* and *Kneivel*, hew as closely to the intended target audience of the speaker as possible. In an enormously complex and

99. *Id*. at 538.
100. Knievel v. ESPN, 393 F.3d 1068, 1074 (9th Cir. 2005).
101. *Id*. at 1070.
102. *Id.*
103. *Id*. at 1077.
104. *Id*. at 1077 n.8.
105. *Id*. at 1083 (Bea, J., dissenting).
106. *Id*.
107. *Id.*

fragmented media sphere, adequate protection of free expression interests would seem to require that speakers not be forced to make risky guesses as to the sort of audience a court would envision as the ultimate locus of meaning.[108] Instead, to the extent the constructed audience is understood as the speaker's intended target audience, the speaker can make a reasoned assessment of the risks of publishing the speech.

ANALYSIS AND CONCLUSION

The three illustrative cases discussed earlier—*Brodeur, Fikes*, and *Farah*—make clear that there is indeed a separate class of nonliteral statements that courts have been willing to protect against defamation liability. The courts sometimes treat this type of speech as a subset of opinion or rhetorical hyperbole, and sometimes as an (unnamed) form of expression separate from those traditional categories, at least in the *Brodeur* decision.

One of those cases—*Farah*—clearly involved satire about the birther book, something the D.C. Circuit pointed out in great detail. On the other hand, while *Brodeur* involved a film that might be characterized as containing elements of satire (although perhaps farcical is a better adjective to describe *American Hustle*[109]), the putative defamation about Brodeur and his view on microwaves and nutrition was not itself satirical in nature. In the academic defamation claimed in *Fikes*, satire was simply not an element. Thus, this work contends that while PNAs can encompass satire, satire does not by any means exhaust the category.[110]

What advantages inure in identifying a separate class of nonliteral statements that does not fall into the legal categories of opinion, satire, or rhetorical hyperbole? For one thing, clearer conceptual distinctions are always useful in the law, as so much of legal discourse—perhaps particularly so in defamation doctrine—consists of complex analysis of various elements of language and their presumed meaning. As one astute commentator put it recently in a study of satire in defamation, it's important for scholars to

108. *See generally* Clay Calvert & Matthew D. Bunker, *Know Your Audience: Risky Speech at the Intersection of Meaning and Value in First Amendment Jurisprudence*, 35 LOY. L.A. ENT. L. REV. 141, 176 (2015) ("These sorts of mental gymnastics and levels of audience abstraction may be challenging for a court to perform, but for a speaker, ex ante, they pose tremendous difficulties.").

109. *See* Manohla Dargis, *Big Hair, Bad Scams, Motormouths*, N.Y. TIMES (Dec. 12, 2013), http://www.nytimes.com/2013/12/13/movies/american-hustle-with-christian-bale-and-amy-adams.html [https://perma.cc/BH5K-QXKT] (A *New York Times* review referring to the film as a "screwball comedy").

110. *See supra* Part III. Constructing An Appropriate Audience, at 357–60.

develop "an adequate terminology" for this area of doctrine.[111] This article is an attempt to at least make a start on doing exactly that.

Beyond the conceptual realm, however, recognizing a distinct legal category for PNAs could potentially open the way for courts to treat such expression differently in practice than its doctrinal cousins. One of the most important ways to operationalize that difference, this work argues, is to rely less on First Amendment doctrine and more on basic common-law requirements for defamation, as the *Brodeur* court did.

There are two distinct problems with applying the opinion/satire/rhetorical hyperbole model to PNAs. First, the opinion/satire/rhetorical hyperbole is part of the First Amendment infrastructure the Supreme Court has erected, as part of its intervention into state defamation law that began with *Sullivan*. As we have noted, these constitutional requirements are generous, but they come with some disturbing caveats that limit their application to certain types of libel cases. The Court has frequently suggested that its First Amendment buffers are available, to a greater extent, to media defendants, especially in cases of speech about matters of public concern.[112] Although the "media defendant" requirement appears to be in a state of some doctrinal flux, it is nonetheless applied by lower courts with some regularity.[113] The "public concern" requirement is alive and well, and can severely limit a defendant's access to the suite of First Amendment protections provided by *Sullivan* and its progeny. If a defendant is not a media entity, or if the putative defamation cannot be categorized as speech about a matter of public concern, the

111. Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, 35 REV. LITIG. 45, 69 (2016). *See also* Ashley Messenger, *The Problem with New York Times Co. v. Sullivan: An Argument for Moving from a "Falsity Model" of Libel Law to a "Speech Act Model*," 11 FIRST AMEND. L. REV. 172, 232 (2012) (for an attempt to deploy speech-act theory from philosophy of language in defamation doctrine).

112. *See, e.g.,* Milkovich v. Lorain Journal, 497 U.S. 1, 20 (1990) (holding unequivocally in the specific realm of First Amendment opinion jurisprudence that "a statement of opinion *relating to matters of public concern* which does not contain a provably false factual connotation will receive full constitutional protection." (emphasis added)); *see generally* Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure–Private Concern Defamation Cases?* 14 COMM. L. & POL'Y 1 (2009); Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597 (2000) (an excellent overview of the Supreme Court's limits on First Amendment coverage of nonmedia defendants and matters of private concern, as well subsequent lower court developments).

113. *See* Clay Calvert et al., *Plausible Pleading and Media Defendant Status: Fulfilled Promises, Unfinished Business in Libel on the Golden Anniversary of Sullivan,* 49 WAKE FOREST L. REV. 47, 83 (2014) ("On the other hand, there remains, in some jurisdictions and in certain circumstances, the vestiges of an increasingly blurry dichotomy between media and nonmedia defendants.").

protections of *Sullivan*'s progeny, including *Milkovich*, may be simply unavailable.

A significant advantage of this article's approach to PNAs is that it does not invoke the First Amendment at all. Rather than engage the constitutional overlay created by *Sullivan's* progeny, courts can use standard common-law analysis of the defamation element of the libel tort to effectively protect defendants whose speech falls within the PNA category. We argue that the PNA determination should be part of the plaintiff's case-in-chief in defamation, rather than an add-on defense created through the First Amendment, as opinion is frequently regarded. Courts frequently adhere to the axiom that constitutional interventions should be avoided if at all possible, instead relying on more modest forms of legal doctrine, such as common-law principles, to decide cases.[114] The approach suggested here does exactly that, requiring that courts determine—as part of the plaintiff's case—that the speech in question was understood literally in order to create defamatory meaning in the mind of the reasonable target audience member. This article refers to this part of the defamatory meaning element as the "facticity" requirement.

This emphasis on facticity as part of the plaintiff's case also eliminates a second disadvantage of the opinion/satire/rhetorical hyperbole model. Many courts following the latter model require that opinion, satire or rhetorical hyperbole be raised as an affirmative defense by the defendant.[115] In other words, a plaintiff can successfully establish a *prima facie* case of defamation and ultimately prevail unless the defendant specifically raises an opinion-related defense. Various authorities have left the question of whether opinion is an affirmative defense quite murky. As legal scholar Richard H.W. Maloy put it:

> The Supreme Court in *Milkovich* did not say whether 'opinion' was an element of the tort of defamation or an exception to the cause of action for defamation, raised usually by an affirmative defense. . . The *Restatement of Torts*, though not completely answering that issue, by not including 'opinion' in its definition, seems to take the position that it is an exception, raised by an affirmative defense . . .[116]

114. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

115. *See* Richard H.W. Maloy, *The Odyssey of a Supreme Court Opinion About the Sanctity of Opinions Under the First Amendment*, 19 TOURO L. REV. 119, 173–75 (2002).

116. *Id.* at 173–74.

Maloy's research suggests that only New Jersey courts have explicitly taken the position that opinion-related issues are part of the plaintiff's *prima facie* case in defamation rather than an affirmative defense.[117]

This distinction between plaintiff's case and affirmative defense has serious implications, of course, which is why this article argues for the treatment of PNAs as part of the plaintiff's case. For example, because opinion is often treated as a defense, defendants can lose their right to raise that defense if they are not careful to preserve it.[118] Similarly, opinion as a defense allows plaintiffs to meet the basic elements of defamation without adducing proof as to the facticity of the alleged libelous statements, placing the burden on defendants to make that showing.[119] Our argument, on the contrary, is that the *plaintiff* should be required to demonstrate that the speech in question was perceived by the relevant audience as a factual statement—the defendant should not be *required* to come forward with any evidence (although the defendant certainly can do so).

At the end of the day, recognition of PNAs as conceptually distinct from opinion, satire, or rhetorical hyperbole will provide increased analytical rigor and nuance to defamation law. Moreover, adopting the proposal offered herein that the PNA issue be dealt with as part of the plaintiff's case-in-chief offers increased protection for defendants' free expression interests that can be operationalized through common-law defamation doctrine rather than calling upon the First Amendment superstructure that, at least as currently configured, offers less-than-optimal protection in a number of contexts.

117. *Id.* at 175.

118. *E.g.,* Faigin v. Kelly, 184 F.3d 67, 76 n. 3 (1st Cir. 1999) (explaining that while the question of whether the defendants' statements were opinion and therefore protected by the First Amendment was close, but still not addressed on appeal since it was not raised).

119. *See, e.g*, Nichols v. Moore, 396 F. Supp. 2d 783, 792–93 (E.D. Mich. 2005) (featuring an analysis of the defendant's contention that his speech was constitutionally protected opinion speech). *See also* Partington v. Bugliosi, 56 F.3d 1147, 1151–52 (9th Cir. 1995).