

LAW, LANGUAGE, AND ABOUTNESS: *DIAZ V. UNITED STATES* AS CASE-STUDY

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INTRODUCTION

This Article is about aboutness. It gives a brief primer on the subject and applies those lessons to two actual cases decided in recent years by the United States Supreme Court. In the primary decision considered, *Diaz v. United States*, the very word “about”

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is at issue because the Federal Rules of Evidence explicitly make the legal question presented turn on the word “about.”¹ Importantly, this decision was handed down by a Court that holds textualism and textualist methods in high regard,² but which nonetheless sharply split on the right answer. There is indeed a right answer in these cases, but the Justices’ textualism should be augmented by paying more careful attention to aboutness.³

I. DIAZ’S CASE

Delilah Guadalupe Diaz stood accused of *knowingly* transporting over fifty pounds of methamphetamine, an illegal narcotic,⁴ across the Mexico-United States border within a hidden compartment of the vehicle she drove.⁵ For conviction, this charge required proof beyond reasonable doubt of the foregoing.⁶ In colloquial parlance, Diaz stood accused as a drug mule,⁷ and (through counsel) asserted what is commonly termed a “blind mule defense,” to the effect that she did not know that there were drugs in her vehicle.⁸ Diaz told a somewhat incredible tale in which she was driving her alleged boyfriend’s car, that she’d seen this boyfriend at most two to three times, that she did not know his phone number, and that, for good measure, she did not know where he lives either.⁹ Within the purported boyfriend’s car were two mobile phones, one of which was given to her by a friend,

¹ 602 U.S. 526, 531 (2024).

² See, e.g., Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. 785, 839-54 (2022); William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611 (2023).

³ A stronger thesis – not relied on here – is that in almost every case there is a right answer to the question of which rights, duties, privileges, or powers parties possess. See RONALD DWORKIN, *LAW’S EMPIRE* 50 (1986); see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* ch. 5 (1985).

⁴ See 21 U.S.C. §§ 952, 960.

⁵ See *Diaz*, 602 U.S. at 528-29.

⁶ See *id.* at 529; 21 U.S.C. § 960(a)(1). While proof beyond reasonable doubt is not in the constitutional text, it is nonetheless a traditional and bedrock requirement. See *In re Winship*, 397 U.S. 358, 363 (1970) (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

⁷ See Oxford English Dictionary’s entry for “drug mule.” *Drug Mule*, OXFORD ENG. DICTIONARY, <https://doi.org/10.1093/OED/9704121173> [https://perma.cc/LG9W-XS9N] (last visited Mar. 9 2026).

⁸ See *Diaz*, 602 U.S. at 529.

⁹ *Id.*

whom she'd rather not identify, and which remained (or so her story went) locked and inaccessible.

There was, apparently, during the trial, a non-zero probability, of course, that Diaz's tale was true. (It was not.)¹⁰ Instead of being an open-and-shut case unworthy of attention in a law review, Diaz's final appeal was heard by the United States Supreme Court on the question of how Rule 704 in the Federal Rules of Evidence works. At Diaz's trial, one Andrew Flood, an agent of the Department of Homeland Security and a duly qualified expert on the subject of narcotics smuggling, testified that "in most circumstances" drug cartels use knowing drug couriers, especially since use of blind mules means that the traffickers could be in the dark about where the surreptitiously smuggled drugs are headed, which leaves them at a relative disadvantage in subsequently effecting clandestine retrieval of their illegal merchandise. On cross, Flood acknowledged, however, that traffickers do sometimes use blind mules, who are unknowing couriers.¹¹

After a verdict against Diaz, the district court sentenced her to seven years of imprisonment.¹² Diaz appealed her conviction; her lawyers argued that Flood's testimony violated Federal Rule of Evidence 704(b): "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."¹³

In an unpublished decision, the U.S. Court of Appeals for the Ninth Circuit rejected this argument on the rationale that Flood neither relayed "an 'explicit opinion' on the defendant's state of mind" nor "opine[d] about whether Diaz knowingly transported methamphetamine."¹⁴ In short, the Ninth Circuit held that Flood's

¹⁰ See *id.* at n.1. Diaz admitted (after trial but prior to sentencing) that she volunteered for the knowing mule run at issue and that talk of her "boyfriend" is fictional.

¹¹ See *id.* at 530-31.

¹² See Petition For Writ of Certiorari at 6, *Diaz v. United States*, 602 U.S. 526 (2024) (No. 23-14), 2023 WL 9643013, at *6.

¹³ FED. R. EVID. 704(b).

¹⁴ *Diaz*, 602 U.S. at 531 (citations omitted) (quoting *United States v. Diaz*, No. 21-50238, 2023 WL 314309, at *2 (9th Cir. Jan. 19, 2023)).

testimony was not about the requisite mens rea, the prime element of the charged crime, so that Rule 704 was simply inapplicable. Moreover, Ninth Circuit judges apparently did not even regard the question as a close one meriting the more detailed analysis of a published opinion.¹⁵

At issue in *Diaz* is a very narrow question: did Flood testify about whether Diaz knew that she was transporting drugs?

Answering this question in a satisfactory way is no mean feat. The Court split 6-3, in spite of agreeing on the basic tenets of textualist methodology for interpreting rules and statutes.¹⁶ Legal interpretation often requires determination of what some sentence, statement, or testimony is about, and the injunction to do so is explicit in *Diaz*. This needs to be done carefully and thoughtfully without engaging in superficially appealing but ultimately unsatisfying methods. The Supreme Court's recent decision in *Diaz* is put to work both as a cautionary tale of how things go awry when one is not rigorous in treating aboutness as well as a proving ground for a more satisfying approach.

What's required is an account of aboutness that is fit for use in legal applications. To be sure, this might seem like overkill. Were you not just told what the *Diaz* case is about—and without theoretical rigmarole? But things are not always so easy. As Nelson Goodman, one of the most important thinkers concerned with aboutness, wrote:

Speak[ing] of all statements about a given event or object, [one] is sometimes uneasily aware that he would have a hard time specifying just what statements this covers, and an even harder time giving any general rule for deciding whether a given statement is or is not about a given thing. The plausible formulae that come most readily to mind yield anomalous consequences almost as readily.¹⁷

¹⁵ See *United States v. Diaz*, No. 21-50238, 2023 WL 314309 (9th Cir. Jan. 19, 2023). To be sure, the vast majority of decisions reached by U.S. Courts of Appeals like the Ninth Circuit are unpublished. See generally Rachel Brown et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORN. L. REV. 1 (2021).

¹⁶ *Diaz*, 602 U.S. 526; see Eskridge, Jr., Slocum & Tobia, *supra* note 2, at 1612 (discussing basic tenets of textualism).

¹⁷ See Nelson Goodman, *About*, MIND, Jan. 1961, at 1.

Goodman availed himself of a highly pertinent resource in which he was skilled: the method of analytic philosophy, which is a series of movements within the broader discipline of philosophy, especially beginning in the early twentieth century, premised on the idea that thought and language possess tight links that are explicable, especially using linguistic, logical, and related notions.¹⁸ This essay will explain in some detail how aboutness works and how it is fruitfully employed as a resource for interpretation in law. This is done in conjunction with the textualism espoused by the court in many of its opinions, including in *Diaz*. While this work appears to be novel in the law, it offers a fruitful and comparatively rigorous way forward.¹⁹

The Justices in *Diaz* joined opinions with avowedly textualist reasoning. Antonin Scalia, a high reverend of textualism,²⁰ and a leading advocate for it as Associate Justice of the Supreme Court,²¹ alleged that “strict constructionism [is] a degraded form of textualism that brings the whole philosophy into disrepute.”²² More specifically, Scalia’s “‘new textualism’ . . . requires a simple, fact-based linguistic focus: Courts should determine ‘the meaning that would reasonably have been conveyed to a citizen at the time a law was enacted, as modified by the relationship of the statute to later enactments.’”²³

¹⁸ See, e.g., MAX BLACK, LANGUAGE AND PHILOSOPHY: STUDIES IN METHOD (1949); L. JONATHAN COHEN, THE DIALOGUE OF REASON: AN ANALYSIS OF ANALYTICAL PHILOSOPHY (1986); J. ALBERTO COFFA, THE SEMANTIC TRADITION FROM KANT TO CARNAP: TO THE VIENNA STATION (1991); 1 SCOTT SOAMES, PHILOSOPHICAL ANALYSIS IN THE TWENTIETH CENTURY (2003).

¹⁹ Reliance has been placed on analytic philosophy in other works, too. For a recent example, see generally Eidelson, *supra* note 2 (deploying analytic philosophy’s determinate/determinable distinction to elucidate discrimination law).

²⁰ See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); see also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

²¹ See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (exemplifying that Justice Scalia’s textualist jihad has shaped even purposivist interpretation in law).

²² See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (Amy Guttmann ed., 1997).

²³ Eskridge, Jr., Slocum & Tobia, *supra* note 2, at 1612 (quoting Daniel A. Farber & Phillip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 454 (1988) (quoting then-Judge Antonin Scalia, Speech on the Use of Legislative History (1985))).

William Eskridge—arguably the dean of (American) statutory interpretation²⁴—together with two of today’s leading experts of empirical legal studies recently wrote, “[t]he Supreme Court is now dominated by devoted textualists,” including (inter alios) “Clarence Thomas, long an enthusiastic booster of the new textualism,” and “Neil Gorsuch, the boldest heir to [Antonin] Scalia’s persistent, uncompromising textualism.”²⁵ In *Diaz*, these two textualists split in sharp disagreement—with Gorsuch penning a dissent that construed aboutness and Rule 704(b) broadly while Thomas’ majority opinion interpreted the rule narrowly using a combination of history and textualism.

A. *History and Textualism in the Diaz Majority Opinion*

The majority offered a historically based rationale to support its narrow reading of Rule 704(b)’s bar on expert testimony. The majority opinion sees the relevant history as occurring over three phases: (i) a bar from the common law on expert testimony on an ultimate issue, which went into decline; (ii) the original Federal Rules of Evidence derogation from that bar; and (iii) the amendment of Rule 704 in the wake of an attempt on President Reagan’s life, which restored the traditional bar.²⁶ In short, this

²⁴ See generally, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES (2014); WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016).

²⁵ Eskridge, Jr., Slocum & Tobia, *supra* note 2, at 1614-15. For examples of fundamental issues with textualist approaches, see Mark Greenberg, *Natural Law Colloquium: Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 116-24 (2020); Felipe Jiménez, *Minimalist Textualism*, 55 SETON HALL L. REV. 1, 4 (2024). Even more fundamentally, however, textualism may violate the separation of powers by unlawfully narrowing the scope of the legislature’s power to legislate. For example, there’s a textualist presumption that Congress must speak unambiguously when enacting an otherwise constitutionally permissible result that would undermine a constitutionally derived value. See, e.g., *Jones v. Hendrix*, 599 U.S. 465, 518 (2023) (Jackson, J., dissenting) (quoting John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 121-22 (2001)).

²⁶ See *Diaz v. United States*, 602 U.S. 526, 533 (2024). Following the trial of attempted assassin John Hinckley, there was also a wholesale change in the requirements to be found not guilty by reason of insanity. See, e.g., Stephen J. Morse, *Before and After Hinckley: Legal Insanity in the United States*, in THE INSANITY

history is supposed to show the rise, fall, and limited revival of a bar on expert testimony about the ultimate issue in a given case.

1. Experts: Don't Speak with Certainty

According to the majority, common-law evidence rules categorically barred expert witnesses from speaking to the “ultimate issue” in a case, where the ultimate issue is what the trier-of-fact is required to decide. For example, regarding a medical malpractice suit, Justice Thomas gave the example of the ultimate issue being whether the plaintiff’s adverse condition resulted solely from defendant’s malpractice.²⁷ The majority noted that the common law rule operated strictly, so that “[w]itnesses remained free . . . to offer related testimony, even testimony that directly helped the jury resolve an ultimate issue.”²⁸ Thomas’s opinion illustrated this by observing that although a witness was forbidden from testifying about a testator’s mental capacity to make a will, that same witness could nonetheless testify about the condition of the testator’s mind whilst executing the will. Modal testimony—concerning what is possible—was also allowed, so that while a witness was barred from testifying whether the defendant committed malpractice, testimony that the plaintiff’s condition could have been caused by malpractice was allowed. Similarly, while a murder-trial witness could not testify that a victim’s wounds were caused by the defendant, testimony as to how wounds on the decedent’s body could have been caused was deemed permissible.²⁹

DEFENCE: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 199 (Ronnie Mackay & Warren Brookbanks eds., 2023).

²⁷ See *Diaz*, 602 U.S. at 532-33. The suppressed, perhaps somewhat controversial, premise in this example is: but for the negligence, the adverse condition would be absent. Given that premise, there can be no finding of negligence unless it is found that there was the foregoing legally sufficient factual causation. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013). But making cause-in-fact turn on the truth-value of a counterfactual conditional results in making factual causation simultaneously overinclusive and underinclusive, since concurrent causes do not count as causes, for example, a firing squad shoots the wrong man, whose estate sues for wrongful death, but no shot is a but-for cause of the man wrongfully killed when each shot on its own was sufficient to kill. See, e.g., *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

²⁸ *Diaz*, 602 U.S. at 532.

²⁹ See *id.*

The *Diaz* majority's history of the common-law rule on expert testimony on an ultimate issue has it that "[b]y the 1940s . . . [i]t soon became unclear whether, and to what extent, the ultimate-issue rule carried any force."³⁰ The ultimate issue rule was, in any event, not incorporated into the original 1975 version of the Federal Rules of Evidence.³¹ But in 1981, perhaps with rule-makers galled by dueling experts on the topic of whether President Reagan's would-be assassin was insane, the current incarnation of Rule 704(b), which is the provision at issue in *Diaz*, came into force.³² That provision is liberal in permitting otherwise admissible testimony concerning ultimate issues, but not when at-issue testimony is "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."³³

Whether the history recounted by the *Diaz* majority is relevant to what the statute means is unclear.³⁴ We can imagine that no assassination attempt was made on President Reagan but that the same form of words was in effect at the time of Diaz's alleged crime. Ultimately, it does not seem to matter that the rule's content varied over time. What's important is the content of the rule when Diaz was on trial, and the content of the rule is determined by the rule's text—at least if textualism is on the right track.³⁵

In any event, the majority opinion argues that the Rule 704(b) bar does not apply to Flood's expert testimony, reasoning that the rule "applies only to opinions about the defendant," and that "Flood did not express an opinion about whether Diaz herself knowingly transported" drugs because he "instead testified about

³⁰ See *id.* at 533; see also *United States v. Fernandez*, 480 F.2d 726, 740 (2d Cir. 1973).

³¹ See *Diaz*, 602 U.S. at 533.

³² See *id.*; see also S. REP. NO. 98-225, at 230 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3412.

³³ See FED. R. EVID. 704(b).

³⁴ See David Cohen, Note, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 543-44 (1988) (collecting cases).

³⁵ See *Diaz*, 602 U.S. at 538; see also *id.* at 550 (Gorsuch, J., dissenting).

the knowledge of *most* drug couriers.”³⁶ The majority wryly noted, “[a]fter all, Diaz may or may not be like most drug couriers.”³⁷

The Court did, however, place limits on what an expert in Flood’s shoes could have testified about; the majority indicated that if Flood had said that all couriers knowingly commit the offense, then admitting his testimony would violate Rule 704.³⁸ “Of all drug couriers—a group that includes Diaz—[Flood] opined that the majority knowingly transport drugs.”³⁹ But that testimony about the majority does not state with certainty whether Diaz is like the majority in terms of knowingly transporting illegal narcotics. To hold otherwise “mistakenly conflates an opinion about *most* couriers with one about *all* couriers.”⁴⁰ We can distill the holding: if an expert’s testimony expresses certainty that a defendant does (not) satisfy a mental-state element of the crime charged, then the testimony is disallowed under Rule 704. Testimony about what a majority (do not) do to satisfy a mental-state element of the crime charged is allowed because such testimony does not logically foreclose defendant’s mental state.

This reading is one that Justice Thomas—a fairly devoted textualist⁴¹—disagreed with his similarly devoted, but dissenting, colleague Justice Gorsuch about. The dissent—about which more shortly—looked up “about” in the dictionary, and proceeded from there, but this drew the retort from the majority that “a word’s meaning is informed by its surrounding context,” where “[a] crucial part of that context is the other words in the sentence.”⁴² Thomas’s opinion continued, “[t]he Rule as a whole makes clear that an opinion is ‘about’ the ultimate issue of the defendant’s mental state only if it includes a conclusion on that precise topic, not merely if it concerns or refers to that topic.”⁴³

The majority opinion reasoned as follows:

³⁶ *Diaz*, 602 U.S. at 534.

³⁷ *Id.*

³⁸ *See id.* at 535-36.

³⁹ *Id.* at 536.

⁴⁰ *Id.* at 535.

⁴¹ *See, e.g.*, Eskridge, Jr., Slocum & Tobia, *supra* note 2, at 1614.

⁴² *Diaz*, 602 U.S. at 536 (first citing *Smith v. United States*, 508 U.S. 223, 233 (1993); and then citing *FCC v. AT&T Inc.*, 562 U.S. 397, 405 (2011)).

⁴³ *Id.* at 537.

“To begin, the Rule targets ‘opinion[s]’ . . . the testimony must be more than a general reference, and it must reach a particular conclusion. . . .” [T]he Rule does not preclude testimony ‘about’ mental-state ultimate issues in the abstract[;] . . . it targets conclusions ‘about whether’ a certain fact is true: ‘[T]he defendant did or did not have a mental state or condition.’”⁴⁴

Thus, the majority did not view Flood’s probabilistic assessment that Diaz was a knowing mule as taking a definite stand on the fact of whether Diaz knew that she was transporting illegal narcotics across the border.⁴⁵

2. Criticism: Certainty and Credence

The criticism in this section is not wholesale. It accepts (arguendo) the majority’s textualist interpretive methodology and premises but argues that, by the majority’s own lights, they should subscribe to a position that turns out to be a reductio ad absurdum, which shows that (at least) one of their premises is incorrect.

The majority opinion “defin[ed] opinion evidence as ‘what the witness thinks, believes, or infers in regard to facts in dispute.’”⁴⁶ This definition includes credence, which is probabilistic, but which seems to be ruled out, or which is, in any event, not addressed. Elaborating on what credences are in his monograph on probability, Hugh Mellor wrote:

Credences measure how strongly we believe propositions, like the proposition that it will rain tonight, or that Pink Gin will win the Derby. They are features of the people whose

⁴⁴ *Id.* at 536-37 (alteration in original) (citing *Opinion Evidence*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968)).

⁴⁵ This mirrors, albeit on a different basis, work in evidence law scholarship that distinguishes “framework evidence,” which is not the definitive answer to a required question concerning a relevant mental state – which is termed ‘adjudicative’. See generally John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986). But this distinction is vulnerable to an argument given in the dissent. By making the probability of an event arbitrarily high or low, the distinction between framework evidence and adjudicative is rendered unsharp.

⁴⁶ See *Diaz*, 602 U.S. at 537 (quoting *Opinion Evidence*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968)).

credences they are rather than features of what the credences are about. My low credence in Pink Gin's winning the Derby is more a fact about me than it is about Pink Gin or the Derby. By this I mean that my low credence that Pink Gin will win is a mere matter of my opinion, which need not be justified by any corresponding physical or epistemic probability. In particular, there is no contradiction in your credence in Pink Gin winning being higher than mine even if we both know all there is to know about the race: that after all is why you take my bet.⁴⁷

Credences are opinions that essentially refer to probability. The majority opinion's further observation that Rule 704(b)'s bar explicitly disallows not opinions that are about an ultimate issue but instead "about whether" an ultimate issue is the case fails to disturb this. In Mellor's example, your credence is about whether Pink Gin will win the Derby.

It is important to keep in mind the difference between subjective probabilities—like credences of the sort Mellor identified—and objective probabilities. Credences are subjective probabilities; they are your opinion, for example, regarding how confident you are that Pink Gin wins. I might have a different opinion, while Pink Gin's jockey has a still different opinion about whether he rides atop the winning horse. By the majority's reckoning, credences are opinions, since they are about what someone thinks about some fact in dispute, say, which horse wins the race.

Credences are also subjective, since they are relative to the particular thinker who is thinking the thought at issue. By contrast, objective probabilities are not agent-relative. An objective probability would have the value that it does even if all intelligent life in the universe were to cease. Objective probabilities are frequencies in the world rather than opinions in the minds of people. As an example of an objective probability, think of a physical probability, which corresponds to a physical system and how it must operate. For example, the physical probability that a fair coin comes up heads is 50%. Or, given that the half-life of plutonium-238 is eighty-seven and seven-tenths

⁴⁷ D.H. MELLOR, *PROBABILITY: A PHILOSOPHICAL INTRODUCTION* 7-8 (2005).

years, the physical probability that half a sample of it will have undergone α -decay after that interval has elapsed is 50%.⁴⁸

⁴⁸ See, e.g., HANS REICHENBACH, *THE THEORY OF PROBABILITY* (1949). There are other notions of probability, which have been argued to be of special use in legal applications. See, e.g., L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* (1977) (invoking Baconian probability); KEVIN M. CLERMONT, *A GENERAL THEORY OF EVIDENCE AND PROOF: FORMING BELIEFS IN TRUTH* (2024) (using multivalent logics). Some non-standard treatments would recast the whole traditional discussion of attaching a probability to a proposition or event. See, e.g., SARAH MOSS, *PROBABILISTIC KNOWLEDGE* ch. 1 (2018). Approaches like Cohen's or Moss's are sufficiently radical that they can be discounted if a traditional approach yields satisfactory results.

To briefly illustrate, consider the latter. Moss's inventive monograph, which presents an elegant theory on the basis of work in much contemporary formal epistemology and linguistics. As to ordinary assertions, Moss endorsed the idea of loose and non-literal speech: "For instance, you may say 'Jones arrived at 3:00' to communicate that Jones almost certainly arrived within five minutes of 3:00, and probably within three minutes of 3:00, and additional information that perhaps could not even be paraphrased in natural language." MOSS, *supra*, at 60.

This could be tacit endorsement endorsing of the controversial Lockean thesis without actually committing to it; the Lockean thesis is controversial because "according to the thesis, S can rationally believe [that such-and-so] even if S's specific degree of belief [that such-and-so] is somewhat higher or lower than it should be, given S's evidence." Richard Foley, *Beliefs, Degrees of Belief, and the Lockean Thesis*, in *DEGREES OF BELIEF* 37-47 (Franz Huber & Christoph Schmidt-Petri eds., 2009). This is, however, dubious given the existence of the so-called preface paradox. Suppose that you write a long monograph, with many claims and many arguments. Suppose further that you have a very high credence in each of the propositions asserted therein, but you also have a very high credence that you made a mistake somewhere – though you're unsure where. See D. C. MAKINSON, *The Paradox of the Preface*, 25 *ANALYSIS* 205 (1965).

Second, Moss secured the factivity of knowledge ascriptions on the basis of expressivism rather than in terms of objective probabilities. MOSS, *supra*, at 129. This is certainly controversial; Moss was not unaware of this point, but that doesn't eliminate the controversy. Moss's line has it that natural language probability-talk is permeated by the mathematical theory of probability corresponding to Kolmogorov's probability calculus. See A. N. KOLMOGOROV, *FOUNDATIONS OF THE THEORY OF PROBABILITY* (Nathan Morrison ed., 1950). But, for example, early modern philosophy has discussion of probability that simply does not correspond to an expressivist semantics having to do with the probability calculus. Probability-talk in natural language rather antedates the mathematical theory. See, e.g., IAN HACKING, *THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION AND STATISTICAL INFERENCE* (2d ed. 1975). Additionally, we sometimes report on a probability instead of expressing it. Consider, for example, on the second day of the trial, it was probable that Jones is guilty. That seems like a report that it's (highly) plausible that Jones was guilty as of the trial's second day, rather than an expression that he was. On the expressing versus reporting distinction more generally, consider the difference between a weather forecaster reporting his

Only if the probability at issue is objective will it be the case that a 100% probability corresponds to certainty or that a zero probability corresponds to certainty of non-occurrence.⁴⁹ This marks a stark difference with subjective probability:

If the probability is subjective, so is the certainty: if you give credence [one] to an event, *you* are certain that it will occur. Equivalently, if you give credence [zero] to an event, *you* are certain that it will not occur (it has no weight in your calculations of expected outcomes).⁵⁰

Subjective certainty is a particular person's degree of certainty in some proposition. That subjective degree of certainty may, but need not, correspond to reality. One could think an event certain when it's in fact anything but.

When it comes to Rule 704's bar, the majority adopted a bright-line rule: expression of certainty runs afoul of the bar on expert testimony as to a mental-state element.⁵¹ The majority permitted expression of non-certainty, as in Diaz's case—that Diaz was a member of a class, most of whose members possess the requisite mental state.⁵² Did the majority rule out of bounds both expression of objective probability (frequency) as well as subjective probability (credence)? The majority did not have this distinction in view.

Consider the majority opinion's defense of Flood's testimony: "Flood provided evidence to support one theory, [and] his

belief that it will rain today and his act of wearing his raincoat, galoshes, carrying an umbrella, etc. See DAVID M. ROSENTHAL, *CONSCIOUSNESS AND MIND* 266 (2005).

Finally, there is arguably no need for expressivist semantics for probabilistic locutions if one is careful to distinguish between force-modifying and sense-modifying readings. See Timothy Williamson, *Knowledge, Credence, and the Strength of Belief*, in *TOWARDS AN EXPANSIVE EPISTEMOLOGY: NORMS, ACTION, AND THE SOCIAL SPHERE* (Amy Flowerree & Baron Reed eds., 2019).

⁴⁹ See Timothy Williamson, *How Probable Is an Infinite Sequence of Heads?*, 67 *ANALYSIS* 173 (2007).

⁵⁰ *Id.* at 173 (emphases added).

⁵¹ See, e.g., *Diaz*, 602 U.S. at 535-36 ("[W]hen the expert testified that all people in the defendant's shoes always set fires with malicious intent, the expert also opined that the defendant had that mental state. The expert thus stated an opinion on the defendant's mental state, an ultimate issue reserved for the jury, in violation of Rule 704(b).").

⁵² See *id.* at 536.

testimony was just that—evidence for the jury to consider or reject when deciding whether Diaz in fact knew about the drugs in her car.”⁵³ In reality, Flood did not express certainty that Diaz was a knowing courier; he talked about the majority of couriers. But suppose that he had expressed 100% probability.

There are two cases to consider: an expression of 100% objective probability and an expression of 100% subjective probability. We can, however, focus exclusively on the latter, since objective probability would be a complete non-starter. Objective probabilities are real frequencies in the world—like the rate at which a radioactive sample decays, the odds of a six-sided die coming out even, and so on. They are based on laws of nature, like the second law of thermodynamics or conservation of angular momentum.⁵⁴ There are no laws of nature for the fraction of knowing drug mules in a given population; it is wholly unobvious what sort of facts would ground the objectivity of an objective probability about the ratio of knowing drug mules. If there is no pertinent 100% objective probability for an expert to express, then there is, concomitantly, no corresponding objective certainty. Some drug couriers are knowing mules, some are not, and there are no underlying laws of nature to sort this out.

An expert like Flood can, however, express his credence that all drug couriers who possess certain properties are knowing mules. In doing so, he expresses a subjective probability of 100% when it comes to the relevant class of people. That 100% probability is how strongly he believes that the relevant class of people consists wholly of knowing drug couriers; it may or may not correspond to the actual proportion of knowing drug couriers in that population, which itself may or may not be 100%. Even if it turns out to be 100%, it easily could have been a different fraction—there is no law of nature at work. If there were, then a rational agent would conform her credence to the objective probability determined by the pertinent law of nature.⁵⁵

⁵³ *Diaz*, 602 U.S. at 535.

⁵⁴ See, e.g., BARRY M. MCCOY, *ADVANCED STATISTICAL MECHANICS* 23-24 (2010).

⁵⁵ This tracks “the principal principle.” Intuitively, it says that a rational agent’s credence in a proposition with an objective probability should be set to that objective probability, barring ‘inadmissible evidence’ (like knowledge of the future). See DAVID LEWIS, *A Subjectivist’s Guide to Objective Chance*, reprinted in 2 *PHILOSOPHICAL PAPERS* ch. 19 (1986).

In *Diaz*, there is no law of nature at work. There is only the expert's degree of belief that drug couriers bearing a certain property (say, that they're left-handed, platinum blondes) are knowing mules. Bracket the question of whether there could be such an expert; assume (*arguendo*) that it's possible.⁵⁶

In his opinion for the court, Thomas wrote, "Flood asserted that Diaz was part of a group of persons that *may or may not* have a particular mental state."⁵⁷ Thus, Flood left open the possibility that Diaz herself may not have the particular mental state required, namely: the requisite *mens rea* of knowingly transporting drug-contraband.

Imagine that an expert much like Flood—call him 'Flood*'—were to testify that in his expert opinion, all people in Diaz's position are knowing drug mules. This is an expression of the expert's subjective certainty. Per the foregoing, it could not be Flood* relaying the objective certainty that Diaz is a drug mule, since there cannot be laws of nature about drug mules and whether they are knowing or not. So, it is the subjective certainty of Flood*. The 100% subjective probability represents how strongly Flood* believes that Diaz (and those like her) are knowing drug couriers, but Diaz herself and other members of the relevant class may or may not be knowing drug couriers.

The *Diaz* majority opinion was premised on the assumption that Rule 704(b) is not violated as long as the testifying expert is careful not to foreclose that the accused may or may not have the mental state at issue.⁵⁸ This assumption is purportedly justified in two different ways: the history of the ultimate issue rule in common-law courts plus the textual considerations adduced after looking up key phrases in the dictionary.⁵⁹ At base, this assumption is the reason why an expert can apparently testify that there is a very high probability that an accused is a member

⁵⁶ Under the Supreme Court's interpretation of Federal Rule of Evidence 702 in the *Daubert* decision and its progeny, all expert testimony must be evaluated under the *Daubert* factors; the court must consider whether some methodology has a known error rate, and its testability. *See generally* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

⁵⁷ *Diaz*, 602 U.S. at 536.

⁵⁸ *See id.* at 527.

⁵⁹ *See id.* at 535-37.

of a class with the relevant mental state. According to the majority, this practice would have been justified in common-law courts, since they permitted expert witnesses to testify about whether an accused could have had some mental state even whilst disallowing testimony that an accused did (not) have that mental state.⁶⁰

As we have seen, though, expression of a subjective probability of 0% or 100% does leave it open to whether the accused does (not) have the requisite mental state. When Flood* expresses his credence that all drug couriers crossing the Mexican border are knowing drug couriers, he expresses his certainty about that fact. But a different expert may have a different degree of certainty in the same proposition, namely: that all drug couriers like Diaz are knowing drug couriers. This other expert—call her ‘Drought’—could express her subjective certainty that no drug couriers crossing the Mexican border are knowing mules. All of this seems quite allowed per the Court’s opinion.

In which case the majority actually bans very little; the Court disallows only testimony that is directly about Diaz.⁶¹ This result follows from the historical fact that common-law courts would not have permitted testimony on the ultimate issue in a case and from the fact that such testimony would (arguably) be about whether Diaz herself was a knowing drug courier. But it does not appear to bar either testimony like that of Flood* or Drought.

Justice Jackson joined the majority opinion. While her vote was not necessary to secure a majority, and she wrote only for herself, her concurrence nonetheless bolsters the foregoing take on what the majority opinion does, and does not, bar.⁶² Jackson embraced all of the majority opinion, observing that it, and Rule 704, “strike[] a very important balance” where they “allow[] potentially highly probative expert testimony to be submitted to the jury, while leaving ‘[t]he ultimate issue of [the defendant’s] mental state . . . to the jury’s judgment.’”⁶³ The concurrence opined

⁶⁰ This history is binding not because it is just history but because the majority took it that the 1981 amendment reverted back to the ultimate issue rule when it comes to evidence about relevantly necessary mental states like *mens rea*. *Id.* at 531-34.

⁶¹ *Id.* at 536.

⁶² *Id.* at 538 (Jackson, J., concurring).

⁶³ *Id.* at 538 (third and fourth alterations in original) (quoting the majority).

that that a broader bar than the court's strict construction could work out detrimentally, and stated that "given the biases, stereotypes, and uneven knowledge that many people have about mental health conditions, . . . expert evidence could help jurors better understand a defendant's condition and thereby call into question a mens rea that might otherwise be too easily assumed."⁶⁴ Key to this testimony not being barred is that the expert make probabilistic or qualified testimony. An expert can speak to how schizophrenics usually think, how kleptomaniacs typically reason, what battered women often believe, and so on.

Experts necessarily make qualified testimony whenever they express a subjective probability—whenever they express what their credence in a proposition is. An expert is communicating what the probability of some proposition is according to her. When Flood* testifies that people like Diaz are certain to be drug mules, that all people like Diaz are knowing drug mules, or that the probability of someone like Diaz knowing that she's a drug courier is 100%, Flood* expresses his certainty in these propositions. When Drought testifies that people like Diaz are certain not likely to be drug mules, that no people like Diaz are knowing drug mules, or that the probability of someone like Diaz knowing that she's a drug courier is 0%, Drought expresses her certainty in these propositions. Those propositions are the very same ones that Flood* took diametrically opposite views on.

The Court's interpretation of Rule 704 should, by its own lights, admit—rather than bar—an expert's expression of subjective certainty, say, that all people like Diaz are knowing drug couriers. To be sure, the Court's take on Rule 704 does bar any expression of objective certainty that all people like Diaz are knowing drug couriers, but there is no such thing; there are no laws of nature about drug couriers.

Things get worse still for the majority view. Suppose that Flood had expressed his credence of 100% that Diaz is a knowing mule. Again, it is not clear that there is any such thing as objective certainty to be had about this matter.⁶⁵ But Flood's

⁶⁴ *Id.* at 540.

⁶⁵ Even if we live in a deterministic universe, it is unobvious why there would be laws of nature concerning when a given drug courier knows what she is up to. That things are determined in the universe does not entail that one can determine what

subjective certainty in no way forecloses the possibility that Diaz is in fact not a knowing drug courier. We can imagine Flood's assertion that there is no chance that Diaz did not know that she was smuggling drugs across the border. We can further imagine Flood conceding on cross that although he is not infallible, he nonetheless possesses much experience identifying knowing drug couriers. We thus have a situation where Flood expresses his certainty that Diaz possessed the requisite mens rea without foreclosing the possibility that Diaz did not.

The Court's position, therefore, renders the bar in Rule 704(b) more or less superfluous. Where did the majority go wrong? Arguably it was the Court's assumption that the bar is not violated as long as expert testimony does not foreclose the possibility that the at-issue subject—Diaz, in the case at bar—may or may not have had the mental state at issue. Subjectively certain expert testimony does not foreclose that possibility. Neither did Flood's actual testimony, where he said that most couriers like Diaz are knowing mules. The majority's interpretation of Rule 704 stands en garde, either against an impossibility or a science-fiction scenario where brain-scans reveal one's thoughts.⁶⁶

B. *The Gorsuch Dissent*

The rhetoric-laced dissent spoke of a "tradition" that is "much older" than the exception enumerated in Rule 704(b), whereby "many courts barred experts from offering opinions on so-called ultimate issues like mens rea" but went on to say that "[t]he Federal Rules of Evidence are no longer so strict . . . except in one respect: *mens rea*."⁶⁷

1. A Broad Bar

The dissent contended that the rule's clear text "prohibits an expert from offering *any* opinion on the subject" of "the

those determined facts are. See, e.g., David Lewis, *Are We Free to Break the Laws?*, 47 THEORIA 113 (1981).

⁶⁶ Regarding brain scans, see MICHAEL S. PARDO & DENNIS PATTERSON, MINDS, BRAINS, AND LAW: THE CONCEPTUAL FOUNDATIONS OF LAW AND NEUROSCIENCE ch. 4 (2013).

⁶⁷ *Diaz*, 602 U.S. at 546 (Gorsuch, J., dissenting) (citation omitted).

defendant's mental state (or, as the government concedes, the mental state of a class that includes her),”⁶⁸ and that “whether an expert’s opinion happens to be definitive or probabilistic makes no difference.”⁶⁹ This is in contrast to how the majority opinion held that if an expert’s testimony forecloses the possibility that a defendant does (not) satisfy a mental-state element of the crime charged, then that testimony is barred, but not otherwise.

In support of the line that all testimony as to *mens rea* is barred, not just the testimony that expresses certainty, the dissent asked readers to “imagine if Agent Flood had explicitly addressed Ms. Diaz and said she ‘most likely knew’ she was carrying drugs.”⁷⁰ The dissent took the Rule 704 bar “to remove from federal courtrooms experts who claim to know what was inside a man’s head at a particular moment in the past when he committed a particular act.”⁷¹ To be sure, the majority could retort that the at-issue testimony did not claim to know what was inside Diaz’s head when she crossed the border toting illegal narcotics. Flood disclaimed knowledge on cross.⁷²

The dissent asserted: “An expert may not state any opinion concerning, regarding, or in reference to whether the defendant . . . had the requisite mental state to convict. Period. Lest any doubt remain, the Rule takes pains to emphasize, ‘[t]hose matters are for the trier of fact alone.’”⁷³

Like the majority, the dissent adopted an interpretation of Rule 704 that is strict. Unlike the *Diaz* majority, the dissent drew on the dictionary to press for a wide, rather than narrow, rule—wide in the sense that the word “about” encompasses matters concerning, regarding, or in reference to some subject.⁷⁴ From the dictionary definition of “about,” the dissent concluded that the text of Rule 704 bars experts from offering any opinion whatsoever

⁶⁸ *Id.* at 548.

⁶⁹ *Id.*

⁷⁰ *Id.* at 549.

⁷¹ *Id.* at 551.

⁷² *See id.* at 531 (majority opinion).

⁷³ *Id.* at 548-49 (Gorsuch, J., dissenting) (quoting FED. R. EVID. 704(b)).

⁷⁴ *Id.* at 548-49 (citing *About*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/concerning_adj?tab=meaning_and_use [https://perma.cc/XV46-8G9Z] (last visited Nov. 2, 2025); AM. HERITAGE DICTIONARY 5 (5th ed. 2011)).

concerning, regarding, or in reference to whether an accused acted with the required mens rea.⁷⁵

The dissent presented an argument to the majority in the form of a dilemma for them. One horn of the dilemma has it that Flood's opinion was about Diaz's knowledge or ignorance, so that the testimony is barred by Rule 704.⁷⁶ On the other horn of the dilemma, assume (arguendo) that Flood's opinion is not about Diaz's knowledge or ignorance,⁷⁷ in which case, it is arguably not relevant under Rule 402.⁷⁸ In either event, it's urged that the testimony should be barred, since it is about Diaz's knowledge or ignorance (and accordingly disallowed), or because it is not (and, thus, irrelevant).

When it came to considering the majority opinion, it was assumed that Flood was a duly qualified expert pursuant to the *Daubert* trilogy of decisions.⁷⁹ The dissent scoffed at this in strident rhetoric, asserting that "[n]o one, at least outside the fortuneteller's den, can yet claim the power to conjure reliably another's past thoughts."⁸⁰ But this objection goes to the issue of whether the alleged expert is an expert, not that of whether he violated the injunction to not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.⁸¹ Apropos a Rule 704 objection that this injunction is violated, the question is whether otherwise admissible evidence is admissible given Rule 704.

⁷⁵ See *id.* at 548-50.

⁷⁶ See *id.* at 552-53.

⁷⁷ "Ignorance" denotes lack of knowledge. Notably, it is sometimes instead used to refer to false belief or the absence of true belief. See, e.g., Cosim Sayid, *Knowledge-Norms in a Common-Law Crucible*, 34 *RATIO* 263, 265 n.12 (2021).

⁷⁸ See *Diaz*, 602 U.S. at 552-53 (Gorsuch, J., dissenting) (citing *FED. R. EVID.* 401, 402); see also *id.* at 541-42 (Jackson, J., concurring).

⁷⁹ See generally *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Flood's status as expert does not seem to have been contested by Diaz's trial court attorneys.

⁸⁰ *Diaz*, 602 U.S. at 544 (Gorsuch, J., dissenting).

⁸¹ See *Daubert*, 509 U.S. at 579; *Gen. Elec. Co.*, 522 U.S. at 136; *Kumho Tire Co.*, 526 U.S. at 137.

2. Criticism

The dissent arguably went awry in trying to fashion a rule that absolutely bars any expert testimony about the defendant's mentality that is an element of the charged offense or proffered defense. The dissenters assumedly held the view that this sort of rule does not eviscerate the legal process in a criminal trial of prosecuting or defending an accused. But the rule urged by the dissent, which permits no expert opinion whatsoever about the defendant's mentality insofar as it's an element of the charged offense or a defense thereof, seems to have consequences that the dissent did not fully appreciate, let alone embrace.

Begin from the dissent's premise that Rule 704 "not only prohibit[s] an expert from stating a definitive opinion about the defendant's mental state (or, as the government concedes, the mental state of a class that includes her)," but also "prohibits an expert from offering *any* opinion on the subject."⁸²

Justice Gorsuch thought that Rule 704 was clearly violated:

Flood testified that, "in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B."

That was a violation of Rule 704(b), plain as day. Just walk through its terms. The government called Agent Flood as an "expert witness" to address the question "whether the defendant did or did not have . . . a mental state . . . that constitutes an element of the crime charged." After all, whether Ms. Diaz acted "knowingly" was the only question at trial, all that separated her from a conviction. And Agent Flood proceeded to do just as he was asked, offering an "opinion about" that very question.

. . . .

. . . The Rule also bars an expert from testifying that a class of persons (say, all people carrying drugs over the border) has the legally proscribed mental state when that class includes the defendant Likewise, the Rule bars an expert from opining that a hypothetical person who matches the defendant's description (say, a hypothetical woman who

⁸² *Diaz*, 602 U.S. at 548 (Gorsuch, J., dissenting).

drives a car full of drugs across the border) will have the mental state required for conviction. All those opinions, the government now acknowledges, are “about” the defendant’s mental state and cannot be offered consistent with Rule 704(b).⁸³

This puts the difference between the majority and dissenters down to whether the majority’s position that the Rule’s language containing “about whether” permits testimony that does not express probabilistic certainty.⁸⁴ What should prosecutors do to prove that a criminal defendant possessed the requisite *mens rea*? The dissent instructed that prosecutors should engage “in proving *mens rea* the old-fashioned way by presenting circumstantial evidence and appealing to reasonable inferences.”⁸⁵ Doing otherwise, Justice Gorsuch argued:

[It] undermines our historic commitment that *mens rea* is a necessary component of every serious crime by turning the inquiry into a defendant’s mental state from an exacting one guided by hard facts and reasonable inferences into a competing game of “I say so.” It diminishes our respect for the presumptively free person, his free will and individuality, by encouraging the lazy assumption that he thinks like “most.” And it reduces the vital role juries are meant to play in criminal trials.⁸⁶

This argument cuts against the course that the dissent would have prosecutors plot. It’s unclear why it diminishes respect for the accused’s free will and individuality to have an expert testify about what he is likely to do. And, in any event, Rule 704 does not say anything about a criminal defendant’s free will. The idea of punishing criminals presupposes that they acted freely,⁸⁷ which is

⁸³ *Id.* at 546-48 (citations omitted).

⁸⁴ The dissent speculated that a future court might not allow very certain, but still somewhat uncertain, probabilities to be expressed by an expert. *See id.* at 549-50. To be sure, this reading of the majority opinion seems rather strained; the majority enunciated a clear criterion for when the Rule 704 bar is to be imposed.

⁸⁵ *Id.* at 550.

⁸⁶ *Id.* at 551.

⁸⁷ This is almost true, but not quite—duress, for example, is not universally regarded as an excuse for murder. *See, e.g.,* Gideon Rosen, *Culpability and Duress: A Case Study*, 88 PROC. ARISTOTELIAN SOC’Y 69, 73 (2014) (discussing how common-law

not only consistent with their having durable dispositions to act or think in certain ways but also, arguably, that their acts were determined in advance.⁸⁸

The dissent commended to the prosecution an indirect course to show that Diaz possessed the requisite mens rea of knowledge that she was transporting drugs over the direct course of expert testimony that prosecutors actually pursued.⁸⁹ Prosecutors should have adduced evidence on which it is reasonable to infer that Diaz did indeed know what she was doing.

Since there was a surfeit of evidence in Diaz's case of her guilt, the way in which the prosecution proceeded was arguably ill-advised. They ended up litigating a case over the meaning of a rule of evidence through two appeals all the way up to the highest court in the land, when they could have secured Diaz's conviction without Flood's testimony. But even if prosecutors' use of Flood's testimony was, as the dissent put it, "to gild the lily,"⁹⁰ an inefficient strategy does not itself violate the rules of evidence, so long as the strategy proceeds on admissible evidence.⁹¹

A major problem with the dissent's approach is that its interpretation of Rule 704's bar sweeps very wide. Imagine that an expert testifies that the accused was extremely intoxicated to the point of blacking out at the time a complex fraudulent transaction is alleged to have been made. The expert's testimony seems to be about whether the purported fraudster formed the required scienter.⁹² Suppose that counsel for an intellectually disabled accused charged with the same offense as Diaz calls on an expert to address the extent of the accused's mental incapacity. The expert's testimony seems to be about whether the accused

courts and the international criminal tribunal for the former Yugoslavia do not accept duress as an excuse for murder but some continental legal systems, following Kantian moral philosophy, do).

⁸⁸ See, e.g., Harry G. Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 830, 838-39 (1969) (arguing that free will is compatible with not being free to do otherwise).

⁸⁹ See *Diaz*, 602 U.S. at 550-51 (Gorsuch, J., dissenting).

⁹⁰ *Id.* at 551.

⁹¹ See FED. R. EVID. 401 advisory committee's notes to 1972 proposed rules.

⁹² See, e.g., 18 U.S.C. § 1348. The subject is quite vexed. See generally Sherif Girgis, Note, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460 (2013) (posing the difficulty of picking out the right set of intentions constituting the requisite mens rea for an offense).

possessed the requisite mens rea in the wide sense adumbrated by the dissent—it is concerning, regarding, or in reference to, whether an accused acted with the required mens rea.⁹³ As some scholars have noted, “the defendant committing an inchoate crime is aware or believes that there is still time to desist and renounce.”⁹⁴ An expert testifies about her credence that this condition was met in a given case, given her experience with similar cases. Does the expert violate Rule 704?

The problem is acute in so many situations. Imagine someone is accused of intentional homicide with his large automobile at Coney Island, near the boardwalk in Brooklyn. An expert on geolocation testifies that the accused’s car was actually about 650 miles from the boardwalk in Brooklyn, Michigan. The accused murderer could not have formed the mens rea that the prosecution says was present. On the dissent’s line, testimony about an alibi can run afoul of the Rule 704 bar.

Another way in which the dissent’s interpretation sweeps too wide is that there are no principles for which kind of testimony runs afoul of Rule 704’s bar. The dissent is plainly troubled by assignment of fairly high or very high probability: people “‘generally’ know,” “‘almost always’ know,” “[i]n my experience, 99% of drug couriers know,” and so on.⁹⁵ But under the dissent’s proposed interpretation, it is not only at this end that there would be an issue. Suppose that a prosecution expert on psychiatric conditions concedes on cross that “it’s maybe possible” that the defendant did not know what she was doing. This, too, in the dissent’s light, is an opinion about whether the accused possessed the requisite mens rea. Or suppose that the same expert simply concedes his fallibility, stating, “I am very confident that the accused is faking mental illness, but, yes, ultimately, whether she’s faking is not knowable by creatures like us, and, yes, there’s a very tiny chance the other way.” Likewise, the defense expert

⁹³ See generally, e.g., Jenney E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539 (2016) (proposing that juvenile defendants’ culpability should be reevaluated using their mens rea or lack thereof).

⁹⁴ Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1139 (1997).

⁹⁵ *Diaz*, 602 U.S. at 551 (Gorsuch, J., dissenting).

seems barred from testifying on cross that it's possible that the defendant is faking it.

Finally, consider a prosecution for knowing possession of child pornography, where the accused's expert testifies that it is very probable that the child depicted is computer-generated, and does not exist, which is an interest (perhaps perversely) protected by the Supreme Court's free speech jurisprudence.⁹⁶ In other words: it is very unlikely that any actual child is depicted in the materials at issue. The prosecution expert testifies that he's certain that this is the teenager presented by prosecutors as Jane Doe No. 2. It is unclear how this prosecution can reasonably proceed under a regime governed by the dissent's take on Rule 704. The prosecution turns, in part, on whether the mens rea at issue concerns an actual minor.

II. ABOUTNESS

The main problem, so far, with the Justices' work in *Diaz* is that the majority's interpretation of Rule 704 may bar nothing, whilst the dissent's take bans far too much. The Court's opinions do not contain any decisive argument.⁹⁷ On the majority view, Rule 704, as amended following the attempt on President Reagan's life, reverted to the common-law rule on expert testimony regarding an ultimate issue in the case. On the dissent's view, the aboutness bar applies liberally. Who is right? While the Justices adduced textual and historical considerations for their respective conclusions,⁹⁸ these are inconclusive, as the split decision suggests. The question of whether Flood testified about Diaz's knowledge or ignorance of hauling drugs is a highly focused one, but the Justices' approaches were not very helpful in rigorously and satisfyingly answering it.

⁹⁶ In *Ashcroft v. Free Speech Coalition*, the Supreme Court per Justice Kennedy ruled (*inter alia*) that attempted proscription of virtual child pornography ran afoul of the First Amendment because it was substantially overbroad and poorly tailored. 535 U.S. 234 (2002).

⁹⁷ Some have argued that, at least as to philosophical theories, knockdown arguments are rather hard to come by. See generally, e.g., DAVID LEWIS, 1 PHILOSOPHICAL PAPERS (1983).

⁹⁸ See *supra* Parts IA, IB.

This is where we can turn to explore different accounts of aboutness and see how they suggest ways forward. The goal here is not a total survey of aboutness, but covering some of its greatest hits. We will focus on two accounts in particular, while briefly passing over some others.

A. Goodman's Three Kinds of Aboutness

In 1933, Gilbert Ryle sketched a pathbreaking, three-page analysis of the word “about.”⁹⁹ His considerations disclaimed wide-ranging ambition; Ryle wrote that his “remarks belong to terminology and partly only to English terminology.”¹⁰⁰ Ryle’s specific, cabined aim was to say what a sentence of English is about. Ryle’s main proposal for aboutness in this sense—let’s call it *sentence-aboutness*—is simple: a sentence is about what it mentions. Although Ryle’s first stab at sentence-aboutness concerns just the noun-phrases occurring in a sentence, he extended it to cognates of a non-phrase.¹⁰¹

The next watershed moment in thinking about aboutness arguably came in 1961, with the publication of Nelson Goodman’s “About,” which is simultaneously indebted to Ryle’s thinking in 1933—employing the very same title—as well as a substantial improvement on it and departure therefrom.¹⁰² Ryle’s approach was not wholly just about the exact items mentioned, since his notion of aboutness encompassed items mentioned plus their cognates. But Goodman realized that Ryle’s approach was still much too limited. Goodman used simple statements to demonstrate a broader point:

- (1) “Maine has many lakes”

This sentence “is obviously about Maine.” But then consider:

⁹⁹ See generally G. Ryle, ‘About’, 1 ANALYSIS 10 (1933) [hereinafter Ryle, *About*]. In something of a companion piece, Ryle extended his analysis to fictional objects in a co-authored discourse. See generally G. Ryle, R. B. Braithwaite & G. E. Moore, *Imaginary Objects*, 12 PROCS. ARISTOTELIAN SOC’Y SUPP. VOLS. 18 (1933).

¹⁰⁰ See Ryle, *About*, *supra* note 100, at 10. Ryle was perhaps concerned that other languages denote different aboutness concepts. For more on conceptual worries along these lines, see generally Ian Rumfitt, *Savoir Faire*, 100 J. PHIL. 158 (2003).

¹⁰¹ See Ryle, *About*, *supra* note 100, at 10-11; see also STEPHEN YABLO, ABOUTNESS ch. 2 (2014).

¹⁰² See Goodman, *supra* note 17, at 1.

- (2) "Aroostook County grows potatoes"

As Goodman noted, "[s]ince Aroostook County is in Maine, the statement [(2)] seems also to be about Maine." He continued, observing that the following two sentences are also about Maine:

- (3) "New England is north of Pennsylvania"

- (4) "New England States are small."¹⁰³

If one adopts the Rylean tack, then this phenomenon is difficult to deal with, since what sentences (3) and (4) are about goes rather beyond the items mentioned in the sentences or their cognates.

Goodman observed that "[a]pparently we speak about Maine whenever we speak about anything contained in (whether as part, member, member of member, etc.), Maine, and whenever we speak about anything that contains Maine."¹⁰⁴ But Goodman then countered that "to accept this principle is to overlook an obvious Hempel syndrome."¹⁰⁵

What Goodman had in mind was the well-known paradox of the ravens, introduced by Carl Hempel.¹⁰⁶

Begin with a hypothesis:

- (5) All ravens are black.

How can one confirm whether (5) holds? Here are two possible observations one can make of some object, ϕ :

- (6) ϕ is a black raven.

Such an observation confirms the universal generalization (5). But apparently so does:

- (7) ϕ is a yellow paperweight.

In (7), one is confirming the logical equivalent of (5) sentence:

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See generally Carl G. Hempel, *Studies in the Logic of Confirmation*, 54 MIND 1 (1945). To be sure, Hempel made this point still earlier, albeit in French. See C. G. Hempel, *Le Problème de la Vérité*, 3 THEORIA 206 (1937).

- (8) All non-black things are non-ravens.

One wishes to avoid what Goodman labeled mere “indoor ornithology,”¹⁰⁷ which occurs when aboutness is extended too broadly.

But it is, however, desirable that logically equivalent sentences be classified as about the same thing. And it is further desirable that a sentence and its negation are about the same thing. Goodman distanced himself from merely inspecting the sentence to determine what it’s about because “mention of [item] *k* [or its cognates] by [sentence] *S* is neither a necessary nor a sufficient condition for *S* to be absolutely about *k*.”¹⁰⁸ This marks a key break with Ryle and a move forward for the study of aboutness. Look at:

- (9) “Maine’ has five letters”¹⁰⁹

This sentence is not about Maine, the state in New England. Goodman was hunting for a sense of aboutness that goes beyond items used, but not too far, where “*S* yield[ing] logically a statement mentioning Maine is not a sufficient condition for *S* to be absolutely about Maine; *S* must, roughly speaking, yield such a statement without yielding a parallel statement for everything else.”¹¹⁰ This is Goodman’s idea of what a sentence suitably implies, which is both more and less capacious than what the sentence logically entails.

Goodman used a sentence pair to illustrate this:

- (10) “Maine prospers”

- (11) “The Atlantic State farthest from Florida prospers”¹¹¹

These sentences are about the same thing, but (10) does not entail (11), since an empirical premise, from geography, is required, to

¹⁰⁷ NELSON GOODMAN, *FACT, FICTION, & FORECAST* 71 (1955).

¹⁰⁸ Goodman, *supra* note 17, at 9.

¹⁰⁹ *Id.* at 4.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 10.

the effect that Maine is the farthest Atlantic state from Florida.¹¹² What makes that premise true is not a matter of logic alone.

It is arguably a bug that suitable implication makes every sentence about a lot of things.¹¹³ It is arguably a desideratum for a theory of aboutness that a sentence should be about a single thing. That singular locus of aboutness was a central dogma in Ryle's treatment.¹¹⁴ That said, Goodman made some progress on this issue with a tripartite typology of aboutness.

First, we have absolute aboutness:

(12) A statement "*S is absolutely about k* if and only if some statement *T* follows from *S* differentially with respect to *k*."¹¹⁵

Where:

(13) *T* follows from *S* differentially with respect to *k* if *T* contains an expression designating *k* and follows logically from *S*, while no generalization of *T* with respect to any part of that expression also follows logically from *S*.

Thus, the sentence that crows are black is about crows as well as black things; it is about both. This is an example of how Goodman's notion of absolute aboutness violates the Rylean datum that a sentence is about one thing.

Another trouble with absolute aboutness is that Hempel and his ravens feast on it. (5)—that all ravens are black—ends up being about non-ravens and non-black things. This is far too promiscuous.¹¹⁶ A sentence can be about things—plural—that we do not or cannot even realize. Such a promiscuous take on aboutness would prove devastating in the law. For example, criminal statutes would, by their terms, have an extremely broad reach.

We move to the second level: immediate aboutness:

¹¹² Modally speaking, (16) could turn out not to be true even when (15) is. We can imagine, for example, that America annexes one or more of the Canadian maritime provinces and makes them into states—Atlantic states—but that they do not prosper when Maine does. See, e.g., SAUL A. KRIPKE, NAMING AND NECESSITY 26-27 (1980).

¹¹³ See STEPHEN YABLO, ABOUTNESS 24 (2014).

¹¹⁴ See Ryle, *About*, *supra* note 100, at 11.

¹¹⁵ Goodman, *supra* note 17, at 7.

¹¹⁶ Goodman accepted that absolute aboutness is "purely extensional"; we can substitute extensional equivalents like the examples in the text. See *id.* at 10.

(14) “A statement *S* may be called *immediately about k* if *S* follows from itself differentially with respect to *k*—and therefore both mentions and is absolutely about *k*.”¹¹⁷

With immediate aboutness, Goodman managed to resist “all ravens are black” not being about non-ravens. But the cost incurred is that a sentence is no longer about what its logical equivalent is about—at least not in terms of the intended sense of Goodman’s immediate (as opposed to absolute) aboutness. Thus, we have the somewhat odd result that a theorem about properties of prime numbers is not immediately about numbers lacking non-trivial divisors. But this is not just a mathematical quirk.

In the law, claim-rights and duties are correlative in the sense given by Wesley Hohfeld.¹¹⁸ Hohfeld’s analytic account of jural relations satisfies the modal square of opposition.¹¹⁹ While this factoid may seem like it’s purely of interest to logicians, that’s not the case. Consider, for example, that in the modal square, duty and privilege are contradictories, which means that they cannot share truth-value. Thus, if A owes to B no duty to ϕ in context *c*, then A enjoys a privilege against B to not- ϕ in *c*. Moreover, as to rights and duties, they, too, are correlative, such that A owes B a duty to ϕ in *c* if and only if B has a right that A ϕ in *c*.

The concern with immediate aboutness is that, for example, B’s right with respect to A is not immediately about A’s duty to B. Why not? The right does not mention the duty; *mutatis mutandis* for the duty mentioning the right. Therefore, immediate aboutness is out of the question, since it strictly requires both absolute aboutness as well as appropriate mention. A notion of aboutness in which legal correlatives are not necessarily about the same thing is problematic because they really are about the same thing; Hohfeldian correlatives are merely flip sides of the same coin.

Finally, Goodman sketched a third type of aboutness: relative aboutness.¹²⁰ As he put it:

¹¹⁷ *Id.* at 12.

¹¹⁸ See generally WESLEY NEWCOMBE HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., 1946).

¹¹⁹ See generally Jean-Yves Béziau, *The New Rising of the Square of Opposition*, in *AROUND AND BEYOND THE SQUARE OF OPPOSITION* (Jean-Yves Béziau & Dale Jacquette eds., 2012).

¹²⁰ See Goodman, *supra* note 17, at 13-16.

(15) “ S and Q are about k relative to each other if and only if some unitary consequence T of $S \bullet Q$ follows differentially with respect to k from $S \bullet Q$ but not from either S or Q alone.”¹²¹

The animating idea for Goodman with relative aboutness was that sentences about, say, Aroostook County, are about Maine in this specialized sense that trades on some suitable logical link to Maine. But Goodman did not spell out a general account.¹²² In the wake of his tripartite taxonomy, one might even be skeptical that there is any general account of aboutness on offer. If so, then little wonder that the opinions in *Diaz* failed to convincingly resolve whether Flood testified about Diaz’s mens rea.

Apropos of the judicial duel in *Diaz*, Goodman’s ideas about aboutness help bring the Justices’ disagreement into sharper focus. The dissent pushed what we can make out as an absolute sense of aboutness, in the sense that a whole range of statements ends up being about a verboten concern. The statement that most people like Diaz are probably knowingly trafficking narcotics is about whether Diaz possessed that mental state. So, apparently, is any opinion about the properties of a group that does or could include Diaz. By contrast, the majority opinion can be read as reading into the rule a version of relative aboutness, which is much more highly restricted than absolute aboutness, where the restriction goes in terms of mention. Probabilistic testimony thus gets a pass, except when it is pegged at 100% (or 0%, presumably). That additional restriction is itself potentially justifiable.¹²³ The rule in question does not mention probability, after all.¹²⁴

¹²¹ *Id.* at 16.

¹²² See YABLO, *supra* note 85, at 24.

¹²³ Due to the principle of probabilistic excluded middle, if the probability of some event is 0%, then the probability of non-occurrence of that event is 100%. See generally KOLMOGOROV, *supra* note 43.

¹²⁴ This would involve the court thinking that probability is a real-valued function on the open unit interval, such that: $0\% > \text{Pr}(\text{event}) > 100\%$. On one way of assigning probability, only events that are knowable a priori should be assigned a probability of 100% (or 0%), and empirical matters should never be assigned an endpoint probability: 100% or 0%. See generally Brian Skyrms, *The Structure of Radical Probabilism*, 45 ERKENNTNIS 285 (1996). This would be a cogent response to the credence criticism in Part I, too. Thus, for example, whether Goldbach’s conjecture is true in number theory can be assigned either 0% or 100%, but the probability that the next President of the United States is a socialist cannot be assigned either of those values.

But the Justices' textualist methods do not discriminate between these readings. The text of the rule at issue simply uses the term "about," and while philosophers like Goodman helpfully distinguish different notions of aboutness and how they differ, it is unobvious how "about" in the rule denotes only one of these concepts. While we can use Goodman's ideas to make sense of the Justices' disagreement, it does not help us to resolve the disagreement. One can imagine a possible world more or less like this one, where the Federal Rules of Evidence made clear that absolute aboutness is the subject in Rule 704 when it comes to the bar on expert testimony, perhaps complete with a citation to the foregoing papers by Ryle and Goodman. But that's not how things went down in the actual world. Something for a future version of the rules, to be sure.

One could say that the "about" in Rule 704 is ambiguous, pointing to Goodman's three levels of aboutness, and then appeal to canons of construction to resolve the ambiguity in a case like *Diaz*'s. Such a canon would likely be substantive rather than semantic, in the sense that it is a legal rule rather than a linguistic norm.¹²⁵ Substantive canons reflect the substantive values in a given legal system.¹²⁶ But even assuming (arguendo) that "about" is ambiguous, it is not clear that there is a substantive canon of construction that would aid *Diaz*'s cause. For example, the rule of lenity says that criminal provisions should, in the case of ambiguity, be construed to the benefit of the accused,¹²⁷ but in *Diaz*, the provision being interpreted is a neutral rule of evidence law, which applies exactly the same to prosecutors and criminal defense counsel.¹²⁸

¹²⁵ See, e.g., Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 515-16 (2023). Therein, Eidelson & Stephenson argued, per the title of their paper, that use of substantive canons of construction in textualism is incoherent, but this question is left open by the proposal made in the text.

¹²⁶ See, e.g., William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1091 (1989).

¹²⁷ See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985).

¹²⁸ See, e.g., *Diaz v. United States*, 602 U.S. 526, 588 (2024) (Jackson, J., concurring) ("Rule 704(b) is party agnostic.")

B. Yablo's Ways

The foregoing was not intended as an exhaustive treatment of aboutness; the goal has been to provide a brief primer that covers the greatest hits of aboutness.¹²⁹ Yablo's key insight is to connect aboutness to subject-matter, which is itself composed of ways of being true or false.¹³⁰ There are some sorts of purported explanations that are deeply problematic, although in some sense reparable. Yablo considered, for instance:

(16) "*Pigs fly* does not say *inter alia* that pigs fly or dogs bark."

(17) "*Pigs fly* does not 'partly agree' with *Dogs bark* just because both imply *Pigs fly or dogs bark*."

(18) "Permission to take Monday off does not license taking the week off, though to take the week off is inevitably to stay away on Monday."

Here, (16) is an example of what Yablo called "Content Part," (17) of "Common Content," and (18) of "Permission."¹³¹ The trouble with (16) is to think that some sentence *S* says what *T* does just in case *S* is implied by *T*. (A sentence implies the disjunction of itself together with any other sentence, of course.) The trouble with (17) is thinking that *S* and *T* share content whenever they have non-trivial implications in common. And the trouble with (18) is thinking that permission to ψ covers ϕ -ing if to ϕ is necessarily to ψ .

¹²⁹ One notable omission is Hilary Putman, *Formalization of the Concept 'About'*, 25 PHIL. SCI. 125 (1958). Therein, Putnam took an intriguing approach based on the relative fraction of information, but on the line espoused there, sentences cannot be about grammatical items that are beyond what they contain, which greatly limits its utility. Another notable omission is David Lewis, *Statements Partly About Observation*, 17 PHIL. PAPERS 1 (1988). Lewis's account depends on the mereological notion of parts, which is important to Yablo's ideas, but which are handicapped by the fact that we desire to know the exact subject-matter of a sentence rather than all of the subject-matters that it supervenes upon, which is a point that Goodman's treatment was alert to avoid. See generally *id.*; Goodman, *supra* note 17, at 5 (disallowing that saying something about all things says something about a particular).

¹³⁰ See generally YABLO, *supra* note 102; see also Stephen Yablo, *Precis of Aboutness*, 17 PHIL. STUD. 771, 772 (2017) [hereinafter Yablo, *Precis of Aboutness*].

¹³¹ See Yablo, *Precis of Aboutness*, *supra* note 131, at 772-74.

To fix (16), we should say that *S* says that *T* if every way for *T* to be true is implied by a way for *S* to be true, in addition to *S* implying that *T*; the implication alone does not suffice. To fix (17), we should say that *S* and *T* share common content just when they have a part in common. With permission, a promising start to repair (18) is that permission to ψ covers ϕ -ing just in case ϕ -ing is a part of ψ -ing.¹³²

With subject-matter, the subject-matter of *P* is the set of ways for *P* to be true. To get clearer on ways, follow Yablo in his explication of a heuristic for paradigms where ways work and foils when they do not.¹³³ In line with the foregoing, to sing is a way to sing or dance, but note that to sing and dance is not a way to sing. For me to sing—you should be so lucky—is a way for someone to sing, but for all to sing is not a way for me to sing. To yodel is a way of singing, but to sing badly is (plausibly) not a way of singing.

In *Diaz*, we know what is barred; Rule 704(b) bars “stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.”¹³⁴ In short, we wish to know whether Flood’s statement was a way of doing so/just that. The dissent argued that it was; the majority opinion argued that it was not.¹³⁵

A way is, in general, an answer to what linguists call a how-question.¹³⁶ Flood testified that in most circumstances like *Diaz*’s, there is a knowing drug mule.¹³⁷ Is that a way of testifying about *Diaz*’s mental state? We can get a grip on this by looking at two notions of how hypotheses are confirmed: simple confirmation and

¹³² Careful, though: permission to walk your doggie and clean up after it is arguably not just permission to walk your doggie.

¹³³ YABLO, *supra* note 102, at 34-43.

¹³⁴ FED. R. EVID. 704(b).

¹³⁵ See *Diaz*, 602 U.S. at 535-37 (majority holding that Flood did not testify about *Diaz*’s mens rea); *id.* at 548-49 (Gorsuch, J., dissenting) (arguing that Flood did testify about mens rea).

¹³⁶ Linguistically, this is a species of a wider genus called wh-questions. See generally Lauri Karttunen, *Syntax and Semantics of Questions*, 1 LINGUISTICS & PHIL. 3 (1977). This was anticipated by JAAKKO HINTIKKA, KNOWLEDGE AND BELIEF: AN INTRODUCTION TO THE LOGIC OF THE TWO NOTIONS 131-32 (1962) (presenting a unified treatment of knowledge with respect to wh-clauses); see also Jason Stanley & Timothy Williamson, *Knowing How*, 98 J. PHIL. 411, 420 n.17 (2001).

¹³⁷ See *Diaz*, 602 U.S. at 528, 530.

inductive confirmation. The difference between them is explicated in terms of ways (of being true, of being false).

Simple confirmation is cheap. Say that evidence E simply confirms hypothesis H just in case the probability of H given E is strictly greater than the probability of H alone. Assume for simplicity that H has E as a part, which works for a case like Diaz's; H is a generalization and E is some instance. Symbolically: E simply confirms H just when $\text{pr}(H|E) > \text{pr}(H)$. Now imagine that H implies E. H is logically stronger, so its probability is lower than that which it implies.¹³⁸ Thus: if H implies E, then we trivially have simple confirmation.

On this view, of course Flood is providing confirmation for the hypothesis. He has been watching drug mules, mule by mule. Each instance confirms his hypothesis that most people in these circumstances are knowing mules.

But simple confirmation is a bit too cheap. Suppose that Flood had testified not that in most circumstances like Diaz's the courier knows but that in all cases like Diaz's the courier knows. In this case, H = Everyone in this situation is a knowing courier. Suppose for argument's sake that Flood testifies that I am a knowing drug mule crossing the Mexican border into America in circumstances like Diaz's. E is an instance of H, and H implies E; if everyone in this situation is a knowing drug mule, then so am I. So, we have simple confirmation of H: everyone in this situation is a knowing mule.

In fact, no matter how much E counts against H, it is still the case that E counts in favor of a hypothesis that entails H—namely E & H.¹³⁹ This is a no-win situation.

Compare simple confirmation to the more complex notion of inductive confirmation. For inductive confirmation, it is not enough that $\text{pr}(H|E) > \text{pr}(H)$. Inductive confirmation demands that E extend to the rest of H. Return to Hempel and his ravens. H = all ravens are black. Suppose that one has evidence that Rory the non-black thing is a non-raven. The hypothesis H contains, *inter alia*, that Ray the raven is black, but it does not contain that Rory the non-black thing is non-raven. Under inductive

¹³⁸ At most, $\text{Pr}(H) = \text{Pr}(\text{Pr}(H|E))$; it's never the case that $\text{Pr}(H) > \text{Pr}(H|E)$.

¹³⁹ YABLO, *supra* note 114, at 95.

confirmation, E must speak to the probability of the non-E parts of H. Thus, logical equivalents concur on what simply confirms them—hence the trouble with non-black non-ravens—but not in what inductively confirms them.

What are the parts of these theses? On Yablo's thesis, they are the ways that the proposition at issue can be true or false. So, we have different topics (ravens versus non-black things); different subject-matters (how ravens are colored versus how non-black things are taxonomized); different truth-makers (Ray and his raven buddies are black and make true the hypothesis that all ravens are black versus Rory and her fellow non-black things are non-ravens); differences in containment (the original hypothesis contains Ray is black versus its logical equivalent that Rory is non-raven); and differences in inductive generalization (speaking to the probability of Ray is black versus the probability of Rory is non-raven). As a recipe, we can say (roughly): T is a part of S when the reasons that determine T's truth-value are among the reasons that determine S's truth-value. It is not enough that the truth-values covary. We are now able to apply to *Diaz* this machinery from Yablo's work on aboutness.

What the dissenters and majority in *Diaz* agree on is that Flood could not have testified that Diaz knew that she was drug courier; this much is common ground.¹⁴⁰ If what Flood testified to says that Diaz is a knowing courier, then his testimony surely violated the bar in Rule 704. Recall that the bad explanation of content by Yablo's lights is that S contains/(*inter alia*) says T just when T is implied by S.

This is bad because an arbitrary statement does not contain a disjunction of that statement and any other statement. The statement that pigs fly does not (*inter alia*) say that pigs fly or dogs bark. So, Flood's testimony that all drug couriers in this situation are knowing would be verboten on the bad explanation of content because it entails that Diaz, too, is a knowing drug mule. But the key is to say what is permissible or wrong with Flood's actual testimony—and to articulate the correct rationale for that judgment. Flood did not, after all, state that Diaz is a knowing

¹⁴⁰ See *Diaz*, 602 U.S. at 535-36; *id.* at 548 (Gorsuch, J., dissenting).

drug courier. He stated something else, which defense counsel and the dissent argue included the forbidden statement.

What Flood actually testified to was that, in most circumstances, people like Diaz are knowing couriers. That statement does not, however, entail that Diaz is a knowing courier. This was enough for the majority, but using entailment alone as the test makes it difficult for the Court to handle other cases. The point is, that if there is no entailment, then we can stop there. Entailment is necessary, but not sufficient. Meanwhile the dissent argued that the Court should rule Flood's testimony out of bounds because it pertains to the same topic—who is a knowing drug courier in a certain context. Justice Gorsuch would also, according to the rule he enunciated, have to rule out testimony that knowing drug mules are rarer than jackpot-winning Powerball tickets—1/292,201,338.

The better explanation for when S contains T is that S contains/(*inter alia*) says T just in case every way for T to be true is implied by a way for S to be true when S entails T. Entailment is not enough. Recall, too, the earlier recipe: T is a part of S when the reasons that determine T's truth-value are among the reasons that determine S's truth-value. So, S = in most circumstances, people like Diaz are knowing drug couriers. And T = Diaz is a drug courier. S is what Flood testified.

We could have two experts testifying that most people like Diaz are knowing couriers whilst disagreeing on the ways that their testimony is true; the one expert thinks it's because this set of people over here makes the assertion true and the other expert because this different set of people over there makes the statement true. In this case, the two experts' testimony shares common content on the bad view—the view that there is a non-trivial implication in common. But what we should instead say is that the experts agree on something—that most people like Diaz are knowing couriers—whilst they disagree on something else. Their agreement is not grounded in their testimony implying that the testimony of one of them is made true or that testimony of the other is. On the Yablo theory of aboutness, we should instead say that their testimony shares common content because of the parts shared by the respective expert's testimony.

If this is right, then the majority reached the right result in *Diaz*. Flood's testimony was not about Diaz's knowledge or ignorance of whether she was smuggling drugs across the border. In one respect, the majority is right: T is a part of S only if S implies T. And the dissent, in part, missed that necessary condition. It is certainly not enough with most legal rules to merely satisfy entailment of T by S. The *Diaz* majority is correct that S does not entail that T. The trouble is that entailing that T would not be enough either. In *Diaz*, non-entailment is sufficient to dispose of the case. But this sets up a conflict between aboutness and entailment, since they lead to different results in the same sorts of cases.

But we can resolve this conflict by appeal to the text of Rule 704. Suppose Defendants A and B are bring tried for some crime.¹⁴¹ We, therefore, apply Rule 704 severally to each. Expert E testifies, "Either A had the mens rea or B did." Note that E's testimony does not entail that A had the requisite mens rea; E's assertion is compatible with A's lack of mens rea. Mutatis mutandis with respect to B. But clearly E's testimony is (partially) about whether A had the required mens rea. And, likewise, it's also (partially) about whether B did. Aboutness clearly gets the clearly correct result while entailment does not.

CONCLUSION: THE ADVANTAGES OF ABOUTNESS AUGMENTING TEXTUALISM

We have mined aboutness and used it as a resource to sort out better and worse answers to how, if at all, two sentences share content. We have secured a firmer basis for the majority's decision in *Diaz* that Rule 704 did not bar the expert testimony at issue. And we can apply this resource in other cases, whenever there are disputes amenable to the theoretical machinery and concepts wielded in the aboutness literature.

For example, in other cases where textualist methodology yields no definitive result, augmenting it with a better understanding of aboutness could offer what textualism alone cannot. This Article closes on one such plausible case.

¹⁴¹ See FED. R. CRIM. P. 13 (joint trial).

Diaz concerned a legal provision that explicitly mentions “about.” The tools we surveyed and used to deal with *Diaz* can also be employed profitably to deal with situations where the legal dispute does not reference “about.” This somewhat speculative concluding part of the Article aims to do just that.

Gerald Lynn Bostock was a child welfare advocate for Georgia’s Clayton County.¹⁴² After a decade on the job, Bostock joined an amateur gay softball league. Bostock’s employment with the county was subsequently terminated because he had engaged in conduct (allegedly) unbecoming of a county employee.¹⁴³ The United States Court of Appeals for the Eleventh Circuit ruled that Title VII of the Civil Rights Act of 1964,¹⁴⁴ which bars employment discrimination because of sex, does not provide a cause of action for employment discrimination on account of sexual orientation.¹⁴⁵

The late Aimee Stephens was hired at Harris Funeral Homes in Michigan’s Garden City.¹⁴⁶ Stephens was born male, diagnosed by physicians with gender dysphoria, and, after six years of working for the mortuary, notified them of her intention to present as a woman. Stephens was terminated for being a trans person.¹⁴⁷ The United States Court of Appeals for the Sixth Circuit ruled that Title VII does not protect trans persons from employment discrimination.¹⁴⁸

The late Donald Zarda taught skydiving as an instructor at Altitude Express. He alleged that his employment was terminated after he revealed his homosexuality. Zarda died in a skydiving mishap, but his estate continued the employment discrimination suit he filed. After substantial litigation, the United States Court of Appeals for the Second Circuit in an en banc sitting held 10-3 that an employer violates Title VII in terminating employment merely on account of someone being gay.¹⁴⁹

On appeal, the U.S. Supreme Court agreed with the Second Circuit that Title VII bars employment discrimination against gay

¹⁴² *Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020).

¹⁴³ *Id.*

¹⁴⁴ *See* 42 U.S.C. § 2000e-2(a)(1).

¹⁴⁵ *See Bostock*, 590 U.S. at 654.

¹⁴⁶ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

¹⁴⁷ *See id.* at 566.

¹⁴⁸ *See id.* at 600. 884 F.3d 560, 600 (6th Cir. 2018).

¹⁴⁹ *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (en banc).

or trans people in the central *Bostock* decision it rendered that was heard together with appeals from the cases dealing with Stephens and Zarda.¹⁵⁰ Joined by Justice Thomas, Justice Alito dissented; he used a textualist analysis purporting to show that Justice Gorsuch's own textualist analysis erred.

Justice Gorsuch's majority opinion held (*inter alia*) that discrimination because of sexual orientation or trans identity is discrimination because of sex. Employment discrimination because of sex is subject to Title VII, but *Bostock* and its companion cases are controversial because it is neither straightforward nor uncontroversial that discrimination because someone is a transsexual or discrimination because someone is homosexual is discrimination because of sex.

Title VII makes it unlawful "for an employer . . . to discriminate against any individual . . . because of . . . sex."¹⁵¹ Courts of Appeals around the country rejected claims that discrimination because of sexual orientation—whether someone is heterosexual or homosexual—is actionable under this provision of Title VII.¹⁵² But there has been a sea of change in thinking about legal sanctions pertaining to sexuality and same-sex relations.¹⁵³

Judge José Cabranes on the US Court of Appeals for the Second Circuit explained the basic case for the plaintiffs in these cases, elaborating in the *Zarda* appeal:

Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of . . . sex." [Plaintiffs'] sexual orientation is a function of his sex. Discrimination . . . because of his sexual orientation therefore *is* discrimination because of his sex, and is prohibited by Title VII.¹⁵⁴

¹⁵⁰ See generally *Bostock*, 590 U.S. 644.

¹⁵¹ See 42 U.S.C. § 2000e-2(a)(1).

¹⁵² See also Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 73 n.24 (collecting cases from the First, Second, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits).

¹⁵³ See also *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (criminalizing consensual sodomy violates due process); *United States v. Windsor*, 570 U.S. 744, 775 (2013) (barring interstate recognition of same-sex marriage violates due process); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (disallowing same-sex marriage violates due process and equal protection).

¹⁵⁴ See *Zarda*, 883 F.3d at 135 (Cabranes, J., concurring) (citation omitted).

Aboutness is important because whether Judge Cabranes and his fellow jurists were correct turns on what the Title VII prohibition is about. Discrimination law is, at least as to Title VII, a subject dealing in statutory torts. And “[i]t is . . . textbook tort law” that a plaintiff seeking redress for a defendant’s legal wrong typically must prove but-for causation.¹⁵⁵ Assume (*arguendo*) that the Supreme Court’s discrimination tort law is correct in reading “because of sex” as “but for sex.” That is to say: the high court reads Title VII in terms of factual causation in the law.¹⁵⁶ And that factual causation takes the form of a counterfactual analysis, where we ask: but for the cause C, would E have occurred?

Of interest now is the question of whether a potential cause contained within sex-discrimination would suffice to have caused the pertinent statutory tort. In the metaphysics of causation, the question concerns whether one cause screens off the other.¹⁵⁷ The Alito dissent’s argument is, in the main, that a weaker cause than sex-discrimination suffices to explain the effect complained of by plaintiffs in the foregoing lawsuits—or at least, a different cause. To wit, Alito’s claim that discrimination was on the basis of aboutness is important because whether Cabranes and his fellow jurists were correct turns on what the Title VII prohibition is about. Discrimination law is, at least as to Title VII, a subject dealing in statutory torts. Viewed Alito’s way, there is not a but-for cause present, as Title VII read the textualist way requires, since Bostock would have been, Alito argued, fired if Bostock had instead been a gay woman (instead of a gay man).

¹⁵⁵ See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013).

¹⁵⁶ Legal causation is traditionally bifurcated into factual causation and legal causation. But-for causation is argued to be the former – a determination of whether cause C actually caused effect E. To be sure, there are dissenters from this “typical” norm that factual causation is a matter of but-for causation. See, e.g., H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985) (arguing that the but-for test is essential but not the exclusive test for factual causation); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985) (criticism of but-for test’s ability to handle cases of overdetermination and pre-emptive causation); Jane Stapleton, *Law, Causation, and Common Sense*, 8 OXFORD J. LEG. STUD. 111, 113 (1988) (a factor should be seen as causal if it contributes to existence of the relevant at-issue phenomenon); MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 121 (2009) (criticism of omissive causation using the but-for test).

¹⁵⁷ See generally, e.g., HANS REICHENBACH, *THE DIRECTION OF TIME* 205 (Maria Reichenbach ed., 1956); PATRICK SUPPES, *A PROBABILISTIC THEORY OF CAUSALITY* (1970).

The suggestion this essay closes on is that aboutness is of help in resolving such disputes where traditional textualist analyses are inconclusive, and this occurs even when, unlike in the *Diaz* case, the word “about” is not featured prominently.