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COMMENT

MODUS OPERANDI AND MINDREADING IN *DIAZ v. UNITED STATES*

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INTRODUCTION

Witnesses with the requisite knowledge or expertise often present, as an opinion, their answer to a case's "ultimate issue." They may opine, say, that a product was unreasonably dangerous in a product liability suit, or that a patent was infringed in a patent infringement suit, or that damages of a certain amount are appropriate, even if the jury is tasked with answering that same question.[1] This principle is unambiguously announced in Rule 704(a) of the Federal Rules of Evidence. It reads: "An opinion is *not* objectionable just because it embraces an ultimate issue."[2]

The Rules feature only one caveat, articulated in Rule 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."[3] In other

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[1] 6 Michael H. Graham, Handbook of Federal Evidence § 704:1 (9th ed. 2023). There is no comprehensive list of all possible ultimate issues. See 29 Charles Alan Wright & Victor Gold, Federal Practice and Procedure § 6284, at 469 (2d ed. 2016).

[2] Fed. R. Evid. 704(a) (emphasis added).

[3] Fed. R. Evid. 704(b).

words, if the contents of a criminal defendant's mind are an ultimate issue, no expert may share an opinion on that topic. "Those matters are for the trier of fact alone."[4] Rule 704(b) recognizes the risk of an expert "intruding" on the jury's exclusive prerogative to assess a defendant's mental state.[5]

Last Term, in *Diaz v. United States*,[6] the Supreme Court considered a category of opinion testimony which tiptoes up to that forbidden line. Delilah Diaz was crossing the United States-Mexico border when a border patrol officer found roughly 55 pounds of methamphetamine hidden in two concealed spaces in her car.[7] Shortly after arrest, she disclaimed knowledge of the drugs, attributing them to a supposed boyfriend.[8] Her story was full of implausibilities,[9] though, and she was charged with knowingly and intentionally importing methamphetamine.[10] Still, she proceeded to trial with the defense that she was a "blind mule," or an unknowing courier of drugs.[11] Her mental state—that is, whether she knew about the drugs inside her vehicle—was the only live issue for the jury.

At trial, the prosecution called HSI Special Agent Andrew Flood as an expert on drug trafficking operations. Agent Flood carefully avoided testifying directly to Diaz's mental state. Instead, he testified that "most" drug couriers are aware of the drugs in their presence.[12] Put differently, he testified to the typical mental state—indeed, to the mens rea, or guilty mind—of a "class" of persons to which Diaz belonged. The trial court admitted his testimony, unpersuaded by Diaz's protests that Agent Flood's testimony was the "functional equivalent" of testimony regarding her mental state.[13]

The U.S. Court of Appeals for the Ninth Circuit affirmed.[14] It held that testimony regarding the infrequency of unknowing drug couriers is admissible, provided that the expert does not express an "'explicit

[4] Id.
[5] United States v. DiDomenico, 985 F.2d 1159, 1164 (2d Cir. 1993).
[6] 144 S. Ct. 1727, 1730 (2024).
[7] Brief for the United States at 6, *Diaz*, 144 S. Ct. 1727 (No. 23-14).
[8] Id.
[9] Id. at 6–7.
[10] Id. at 8.
[11] See Brief for Petitioner at 4-7, *Diaz*, 144 S. Ct. 1727 (No. 23-14).
[12] Petition for a Writ of Certiorari at 17, *Diaz*, 144 S. Ct. 1727 (No. 23-14).
[13] Id. app. at 31a–33a; Joint Appendix at JA10, *Diaz*, 144 S. Ct. 1727 (No. 23-14).
[14] United States v. Diaz, No. 21-50238, 2023 WL 314309 (9th Cir. Jan. 19, 2023), *aff'd*, 144 S. Ct. 1727, 1730 (2024).

opinion' on the defendant's state of mind."[15] The Ninth Circuit acknowledged, however, that the Fifth Circuit had reached the opposite conclusion in a line of similar cases.[16] The Supreme Court granted certiorari to resolve the deepening circuit split.[17]

The Supreme Court also affirmed, albeit on slightly different grounds. The majority opinion, written by Justice Thomas,[18] focused on the meaning of the word "about."[19] It declined Diaz's suggestion that the Court adopt the Oxford English Dictionary definition, which lists "concerning" and "in reference to" as equivalent terms.[20] Instead, it opted to interpret the word in its context. It found that "[t]he words surrounding 'about' make clear that Rule 704(b) . . . does not preclude testimony 'about' mental-state ultimate issues in the abstract."[21] Rule 704(b) only "targets conclusions 'about whether' a certain fact is true."[22]

Accordingly, the majority laid out a new bright-line rule. Rule 704(b) applies to the "precise topic" of the defendant's mental state but not testimony that just "concerns or refers to that topic."[23] So, expert testimony about the mental state of *all* members of a class of defendants is impermissible, because, logically speaking, it invariably applies to the precise mental state of any member of that class.[24] Testimony regarding the mental state of *most* members of a class, by contrast, is permissible, because it "does not necessarily describe [the defendant's] mental state."[25] Agent Flood's statements therefore fell outside the Rule's ambit. Indeed, the at-issue testimony, according to the majority, amounted to nothing more than the assertion that "Diaz was part of a group of persons that *may or may not* have a particular mental state."[26] This left the jury to

[15] Id. at *2 (citation omitted).
[16] Id.
[17] See Petition for a Writ of Certiorari, supra note 12, at 8–13 (cataloguing the circuit split).
[18] *Diaz*, 144 S. Ct. at 1735. Justice Thomas wrote the majority opinion. Id. at 1730. Chief Justice Roberts joined that opinion, as did Justices Alito, Kavanaugh, Barrett, and Jackson. Id. Justice Jackson penned a concurrence. Id. at 1736 (Jackson, J., concurring). And Justice Gorsuch, joined by Justices Sotomayor and Kagan, dissented. Id. at 1738 (Gorsuch, J., dissenting).
[19] See Fed. R. Evid. 704(b) ("[A]n expert witness must not state an opinion *about* whether the defendant did or did not have a mental state . . . ." (emphasis added)).
[20] Brief for Petitioner, supra note 11, at 18.
[21] *Diaz*, 144 S. Ct. at 1735.
[22] Id.
[23] Id.
[24] Id. at 1734.
[25] Id. at 1733–34.
[26] Id. at 1734.

handle the ultimate issue: was Diaz one of the few unknowing drug couriers or not?[27]

The majority's analysis was concentrated on Rule 704, and a narrow interpretation of it at that. Rule 704, however, does not "set a standard of admissibility."[28] It "merely removes a formal objection that might otherwise stand in the way."[29] As a result, the Court missed two adjacent problems with the at-issue testimony, either of which could have independently rendered it inadmissible.

Part I of this Comment examines the first of those problems: the striking resemblance between Agent Flood's testimony and inadmissible criminal propensity evidence. In arguably his most problematic statement, Agent Flood effectively introduced crimes committed by persons similarly situated to the defendant. The only relevance of those other acts was a bare (and plainly improper) suggestion that the frequency of others' past crimes made Diaz's conduct more likely to be criminal, as well. Part II considers the testimony's inherent lack of reliability. It argues that the majority intermingled two distinct categories of testimony: a) contextual scientific testimony related to a mental condition; and b) speculative testimony concerning a group of individuals' inner thoughts. The former can be indispensable to criminal trials, while the latter is unreliable and unprovable by nature. The Court needlessly gave its stamp of approval to the parts of Agent Flood's testimony which fell unmistakably into the latter category. Finally, Part III suggests an alternative, moderate holding. If the Court had added two caveats to its interpretation of "about"—caveats that addressed quasi-propensity evidence and "mindreading"[30]—it could have simultaneously preserved the admissibility of important evidence that bears on mental state and precluded prejudicial testimony like Agent Flood's. This proposed holding, it argues, is both fairer and more faithful to the Rules.

I. MENTAL STATE OPINIONS AS PROPENSITY EVIDENCE

The crucial sentence of Agent Flood's testimony is as follows: "[I]n most circumstances, the driver [possessing drugs] knows they are

[27] Id. at 1735.

[28] 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 7:20, at 885 (4th ed. 2013).

[29] Id.

[30] *Diaz*, 144 S. Ct. at 1743 (Gorsuch, J., dissenting).

hired."[31] To understand why the testimony should have been found inadmissible, consider its logical equivalents. Assume that possession is uncontested, as it was here. Because the mens rea requirement for Diaz's crime is mere knowledge, his statement is the precise equivalent of the following: "In most circumstances, someone who crosses the border with drugs in their possession is guilty of knowingly and intentionally importing drugs." Or, more bluntly: "Most members of the relevant class of persons have committed the charged crime." It is clear, then, that Agent Flood did not merely provide evidence of drug couriers' typical mental state, as the majority would have it. Rather, he also introduced the crimes of others apprehended by law enforcement in a similar situation. Therein lies a problem. Agent Flood's testimony functioned too similarly to impermissible criminal propensity evidence for comfort.[32]

Under the Federal Rules of Evidence, prior criminal acts cannot be introduced to imply that if a defendant committed the crime before, then she probably committed the crime again. A defendant's prior criminal acts are only admissible for a particular "purpose," such as to prove motive, intent, or knowledge.[33] Fairness justifies this rule. Prior acts introduced for a particular "purpose" are admissible because they "integrate[]" with case-specific evidence.[34] Their introduction is not in furtherance of a mere generalization; they link to specific facts. And, most crucially, the defendant can disprove their relevance (by distinguishing between the past and present events). Acts *not* introduced for a particular purpose, on the other hand, are hopelessly general. Sometimes people act in conformity with their past; sometimes they do not. There is no way to test whether a defendant, in any particular instance, repeated a prior action.[35] The Supreme Court has long recognized the unfairness of untethered prior crimes evidence.[36]

[31] Petition for a Writ of Certiorari, supra note 12, at 17 (citing id. app. at 15a).

[32] The resemblance to propensity evidence is briefly mentioned in the Brief of Amicus Curiae National Association of Criminal Defense Lawyers at 29–30, *Diaz*, 144 S. Ct. 1727, 1740–41 (No. 23-14).

[33] Fed. R. Evid. 404(b)(2).

[34] Alex Stein, Foundations of Evidence Law 185–86 (2005).

[35] Id. at 183–84.

[36] See Michelson v. United States, 335 U.S. 469, 475–76 (1948) (explaining that evidence of prior criminal acts, like other forms of propensity evidence, "is said to weigh too much with the jury, and to so overpersuade them as to . . . deny [the defendant] a fair opportunity to defend against a particular charge").

This principle holds normative weight whether the prior crimes in question were committed by the defendant herself or by other members of the class to which she belongs. In fact, the prohibition on evidence of prior crimes may be only more vital in the context of a class. After all, as Ronald Dworkin explains, "put[ting] someone in jail on the basis of a judgment about a class," whether accurate or inaccurate, is unjust because it "denies [her] claim to equal respect as an individual."[37] So, the prior crimes of other drug couriers should only have been provided to the jury in *Diaz* if those crimes had some meaningful nexus to the at-issue conduct. Otherwise, they functioned prejudicially but without substance, ripe for inference but untestable with respect to Diaz herself.

Both pre-trial and on appeal, the government characterized Agent Flood's testimony as "modus operandi" evidence.[38] If true, that characterization would neutralize the critique developed here. Anonymous past acts are regularly used to prove intent under a modus operandi theory, as the reoccurrence of similar behaviors tends to negate the possibility of accident, inadvertence, or other innocent mental states.[39] Some portions of Agent Flood's testimony, such as opinions regarding the typical operation of a drug trafficking organization ("DTO"), indeed squarely developed a modus operandi. Those sorts of opinions instruct the jury on the ways in which criminal organizations repeatedly commit particular crimes. The trial court correctly admitted them.[40]

But the key testimony—Agent Flood's opinion that most drivers knowingly possess large quantities of drugs—cannot be lumped together with the testimony about DTO operations, not least because it is totally divorced from the DTO. As presented, Agent Flood's opinion actually concerned the modus operandi of "drivers," if such a thing were possible. However, modus operandi evidence is usually limited to conduct so "unusual and distinctive as to be like a signature."[41] And its admissibility often "turns on the similarity between the prior act and the charged

[37] Ronald Dworkin, Taking Rights Seriously 13 (1977).

[38] Joint Appendix, supra note 13, at JA15; Brief for the United States, supra note 7, at 14, 29–30, 36.

[39] 2 John Henry Wigmore, Evidence in Trials at Common Law § 303, at 247–48 (Chadbourn rev. ed. 1979).

[40] Petition for a Writ of Certiorari, supra note 12, app. at 30a–31a.

[41] Wright & Gold, supra note 1, § 5254, at 312 (citing McCormick's Handbook of the Law of Evidence § 190, at 449 (Edward W. Cleary ed., 2d ed. 1972)).

offense."[42] Drug couriers, as a class, cannot have a group-wide modus operandi, at least not when engaging in the activities relevant here. Simply driving a vehicle that contains drugs is neither a distinct nor an unusual way to commit the charged crime. Moreover, the similarities between Diaz and another drug courier may be minimal; another courier may have transported drugs completely differently. Perhaps a modus operandi justification would be tenable if Agent Flood's testimony had been limited to drug couriers who shared specific attributes with Diaz—for instance, those who possessed two cellphones (like Diaz)[43] or who hid the drugs in compartments. But, as seen through a comparison to the government's own cases,[44] a modus operandi cannot be established at the level of generality here. If it could, then the exception would swallow the rule; all past crimes of drug possession would become automatically admissible against all drug couriers.

The *Diaz* jury therefore may have understood Agent Flood's testimony as propensity evidence: "Because most people in the defendant's class have the mens rea, it is more likely that Diaz does too." While this is not exactly the same as typical propensity evidence for criminal *character*, it leads the jury towards the same forbidden inference. Such an inference is unfair in other ways, too: "[E]vidence of crimes committed by a third person who is not on trial saddles a defendant with the burden of proving the innocence of another."[45] Perhaps most fundamentally, it serves no purpose besides suggesting higher probability of guilt. The Court should have announced a common law rule against this sort of testimony for the same reasons that Rule 404(b)(1) prohibits propensity evidence.

This Comment diverges from the dissent, written by Justice Gorsuch,[46] on this point. Justice Gorsuch attacked Agent Flood's testimony on relevance grounds, since the testimony was not explicitly "about" the

[42] United States v. Graham, 51 F.4th 67, 82 (2d Cir. 2022); see also United States v. Foskey, 636 F.2d 517, 524 (D.C. Cir. 1980) (collecting cases in various circuits holding that a prior criminal act is only relevant to demonstrate intent if "similarity between the two events" can be established).

[43] Brief for the United States, supra note 7, at 6.

[44] For example, the United States cited *United States v. Dunn*, 846 F.2d 761, 762 (D.C. Cir. 1988), which held that expert testimony regarding "the quantities of drugs, drug-packaging material, drug paraphernalia and weapons" developed drug traffickers' modus operandi. See Brief for the United States, supra note 7, at 23–24.

[45] Brief of Amicus Curiae National Association of Criminal Defense Lawyers, supra note 32, at 30 (quoting Mark J. Kadish, The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box, 46 Am. U. L. Rev. 747, 785 (1997)).

[46] Diaz v. United States, 144 S. Ct. 1727, 1738 (2024) (Gorsuch, J., dissenting).

defendant.[47] The critique here does not require acceptance of that strained claim. To the contrary, it is well understood that regular criminal propensity evidence is probative,[48] insofar as it has a "tendency to make a fact"—the defendant's guilt—"more or less probable than it would be without the evidence."[49] The prior acts of a class of persons may well be similarly relevant, at least in a probabilistic sense. But relevance is inconsequential. This Comment posits that the prejudicial, unfair nature of Agent Flood's past crimes testimony should have rendered it inadmissible *despite* its possible relevance, just as Rule 404(b)(1) precludes a similar sort of relevant evidence.[50]

If law enforcement officers are allowed to introduce past defendants' crimes under the guise of a mere mental state opinion, prosecutors will gain a loophole through which they can elicit quasi-propensity evidence, the spirit of evidentiary rules will be frustrated, and highly prejudicial testimony will go unchecked. Rule 704(b) should preclude mental state opinions that introduce the mens rea of other members of the class. It should require that Agent Flood either add the details necessary to develop a true modus operandi or simply skip the reference to mental state entirely. It should, in effect, require that law enforcement officers present mental state opinions more fairly.

II. THE INHERENT UNRELIABILITY OF MENTAL STATE OPINIONS

The other critical flaw in the testimony is found in its framing. This is best revealed by a comparison between what the government told the trial court that Agent Flood *would say* and what Agent Flood *actually said*. According to the prosecution's pre-trial briefing, Agent Flood was set to testify that DTOs "[g]enerally do not entrust large quantities of drugs to couriers that are unaware they are transporting them."[51] Once on the stand, however, he turned the expected testimony on its head: "[I]n most circumstances, the driver [possessing drugs] knows they are hired."[52] The

[47] Id. at 1744.

[48] See John Monahan, The Clinical Prediction of Violent Behavior 71 (1981) ("[T]he probability of future crime increases with each prior criminal act.").

[49] Fed. R. Evid. 401(a).

[50] See Fed. R. Evid. 404(b)(1) ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

[51] Joint Appendix, supra note 13, at JA17.

[52] Petition for a Writ of Certiorari, supra note 12, app. at 15a.

former version of the opinion is stated in terms that reflect the nature of Agent Flood's expertise—namely, DTOs. The latter version is couched instead in terms of the inner thoughts of drug couriers.

If Agent Flood gave the testimony as it was proposed, there would have been no problem. However, through his choice of words, Agent Flood veered away from his expertise and into the unknowable, giving the impression of, in Justice Gorsuch's words, "clairvoyan[ce]."[53] His version of the planned testimony was unempirical and unfair, and it usurped the jury's role. Courts take into account the specific wording of an expert's testimony when assessing violations of Rule 704(b).[54] Agent Flood's framing should have accordingly been fatal to its admissibility.

To be clear, Agent Flood played a valuable role in Diaz's trial. His knowledge of DTOs was likely helpful to the jurors, many of whom presumably lacked relevant personal experience. Contextual evidence of that sort is termed "framework" evidence in an amicus brief filed by a group of evidence law professors.[55] Framework evidence is "abstract, empirical data that can be relevant to the current dispute."[56] It can make a mental state more or less likely, but the jury must make an inferential step in order to apply it to the defendant.[57] Agent Flood provided several pieces of useful framework evidence, including descriptions of the places where drugs are often hidden in a vehicle[58] and of the risks associated with unknowing couriers.[59] Proper framework evidence is grounded in the terms of the expert's actual expertise, though. It contrasts with opinions on the mens rea of a class of defendants, which is definitionally speculative and unempirical. The Court should have understood Rule 704(b) to contain an implicit requirement that experts avoid insinuations of mindreading.

The Rule's legislative history supports this interpretation, and the majority's recounting of that history was incomplete. In its version, Rule 704(a) embodies a broadly permissive principle, while Rule 704(b) is a "narrow," particularized exception,[60] written into the rules in the wake of

[53] Diaz v. United States, 144 S. Ct. 1727, 1745 (2024) (Gorsuch, J., dissenting).

[54] Brief for the United States, supra note 7, at 30 (citing United States v. Smart, 98 F.3d 1379, 1388 (D.C. Cir. 1996)).

[55] See Brief for John Monahan et al. at 5, *Diaz*, 144 S. Ct. 1727 (No. 23-14).

[56] Id.

[57] Id. at 6–7.

[58] Petition for a Writ of Certiorari, supra note 12, app. at 14a.

[59] Id. at 16a.

[60] Diaz v. United States, 144 S. Ct. 1727, 1735 (2024).

the trial of John Hinckley Jr., the would-be assassin of Ronald Reagan.[61] Hinckley Jr. called an expert to opine on his mental state and was subsequently acquitted by reason of insanity; the public was outraged.[62] The majority suggested that the exception was meant to be confined to its origins. But Rule 704(b) was not passed solely to avoid a battle of the experts in insanity defense cases. Congress had several other overlapping purposes. It wanted to discourage bare conclusions in favor of details, which are more useful to the jury.[63] It also wanted to discourage testimony "beyond [an expert's] area of competence."[64] In fact, the House and Senate Reports make clear that Congress explicitly wanted to preclude psychiatric testimony on a defendant's mens rea but permit testimony regarding psychiatric conditions.[65] This is logical. No one can provide reliable opinions about the thoughts going through a defendant's head, but psychiatrists can provide helpful empirical context on diagnoses or symptoms. Similarly, Agent Flood cannot read minds, but he can ably testify to common practices of DTOs.

When a psychiatric expert reaches beyond his field, Congress pointed out, "[h]e no longer addresses himself to medical concepts but instead must infer or intuit . . . the probable relationship between medical concepts and legal or moral constructs such as free will."[66] In other words, a psychiatrist goes too far when he starts to speculate about the contents of the defendant's mind. The same logic should apply to experts generally. And whether the testimony refers to a single defendant or a class of defendants is also immaterial to this point. An opinion about the mens rea of "most" defendants would arguably require only more mindreading than a similar opinion about a single defendant, anyway. The Rule is best understood to preclude experts' unverifiable mental state speculations. Only jurors may attempt mindreading.

A rule against experts reading the minds of drug couriers (or any class of defendants) has no implications for ordinary framework evidence. As long as expert testimony bearing on the defendant's mental state is

[61] Id. at 1733.

[62] Brief for the United States, supra note 7, at 4; see also Paul R. Rice, The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary, 171 F.R.D. 330, 593 (1997) (describing the historical basis for Rule 704(b)).

[63] Mueller & Kirkpatrick, supra note 28, § 7:21, at 895.

[64] Id.

[65] Brief for the United States, supra note 7, at 32–33 (first citing H.R. Rep. No. 98-577, at 16 nn.29 & 33 (1983); and then citing S. Rep. No. 98-225, at 230 (1983)).

[66] S. Rep. No. 98-225, at 231.

couched in the vocabulary of actual expertise, it can be safely admitted. The proposed interpretation of the Rule would not even affect analogous expert testimony previously approved by the Ninth Circuit: the opinion that DTOs "wouldn't use an unknowing courier" in *United States v. Castellanos*,[67] that the drugs in question "would have never been entrusted to an unknowing dupe" in *United States v. Cordoba*,[68] and so on.

In her brief concurrence, Justice Jackson suggested that *Daubert* and its progeny, rather than Rule 704(b), could stand up to the threat of unreliability.[69] But empirically speaking, they do not; data shows that expert reliability standards have little impact in criminal cases.[70] And moreover, the Court need not shift the problem to other Rules where ultimate issue doctrine can capably provide a solution. The Court could have found that Rule 704 permits framework evidence but precludes quasi-psychic claims about what a class of persons does or does not know.

III. A PROPOSED REINTERPRETATION OF RULE 704(B)

Animating the decision in *Diaz* was a fear that the opposite holding would "prohibit all opinions even related to the ultimate issue of a defendant's mental state."[71] Some of those opinions, as Justice Jackson emphasized, can be critically important to juries.[72] For example, she noted that if jurors are instructed on the typical symptoms of "battered woman syndrome," they can better assess whether one such defendant is capable of a crime's required mens rea.[73] The Court did not want to expand Rule 704(b) beyond recognition or rule in a way that would have "reverberating" effects for psychiatric expert testimony.[74]

Those concerns are valid. If the Court had adopted the defense's definition of the word "about," Rule 704(b) would indeed have become unworkably broad, perhaps even precluding crucial framework testimony.[75] But the concern that criminal juries will significantly

[67] 524 F. App'x 360, 362 (9th Cir. 2013).
[68] 104 F.3d 225, 229 (9th Cir. 1997).
[69] Diaz v. United States, 144 S. Ct. 1727, 1738 (2024) (Jackson, J., concurring).
[70] Brief of Amicus Curiae National Association of Criminal Defense Lawyers, supra note 32, at 11–12.
[71] *Diaz*, 144 S. Ct. at 1735.
[72] Id. at 1737 (Jackson, J., concurring).
[73] Id.
[74] See Brief for John Monahan et al., supra note 55, at 26.
[75] *Diaz*, 144 S. Ct. at 1735.

overweigh the testimony of mental state experts is valid, too.[76] The alternate holding proposed by this Comment would balance these competing concerns and would have better served the Federal Rules of Evidence and criminal trials of many varieties.

Here is that proposed holding, recapitulated: expert testimony bearing on mental state is permissible, *provided that* it does not describe the mens rea of other members of the defendant's class *and* that it is not stated as a prediction about a class of persons' thoughts at a particular moment in time. In other words, this Comment adopts the majority's interpretation of "about" but argues that the Court should have carved out particular subsets of mental state expert opinions. The Court should have put some guardrails on its holding.

Of course, there will be close calls. But administrability does not demand the majority's all-or-nothing approach. The proposed rule, as demonstrated by a cursory review of the types of testimony highlighted by concerned parties, applies nicely to a variety of scenarios. Returning, for instance, to Justice Jackson's example, if an expert describes common clinical symptoms of battered woman syndrome, he is not making a direct claim about the inner thoughts of any single battered woman at any particular moment in time.[77] The jury's view of her mens rea (or lack thereof) may be influenced by the expert, but it will nonetheless need to make its own inferences. That testimony would thus fall on the admissible side of the proposed line. But an opinion about what "most" battered women are *thinking* during, say, a domestic dispute would be considered mindreading and therefore inadmissible. Or, borrowing an example from the evidence law professors' brief, testimony about how bookkeepers "tend to keep ledgers" should be admissible, despite its relevance to mental state.[78] Not admissible would be the opinion that most bookkeepers with errors in their ledgers *intend* to falsify their records. That statement would effectively introduce past crimes among the class of bookkeepers. Finally, this rule is workable with respect to other witnesses who testified in *Diaz*, too. For example, the defense called an automobile mechanic to testify that the car operated normally despite the hidden drugs and, therefore, that Diaz could have unknowingly couriered

[76] Brief for Petitioner, supra note 11, at 38; Reply Brief for Petitioner at 18, *Diaz*, 144 S. Ct. 1727 (No. 23-14).

[77] *Diaz*, 144 S. Ct. at 1737 (Jackson, J., concurring).

[78] Brief for John Monahan et al., supra note 55, at 24.

them.[79] This testimony has evident probative value with respect to mental state, but it connotes no pretense of mindreading. It would be admissible under the proposed standard for the same reasons that Agent Flood's would not be.

Diaz's ramifications are expansive. The "blind mule" defense is widely invoked in drug importation cases.[80] Even more importantly, the holding has implications for all sorts of crimes where mens rea is the ultimate issue. Prosecutors can now develop experts on the mental states of "most" market manipulators, tax fraudsters, and gun possessors. The Court's bright line allows the government, in those contexts and others, to slowly but surely encroach on the spirit of Rule 704(b) and on the crucial role of the criminal jury.

[79] Brief for the United States, supra note 7, at 12.

[80] Caleb E. Mason, Blind Mules: New Data and New Case Law on the Border Smuggling Industry, 26 Crim. Just. 16, 18 (2011).