CRAWFORD, CONFRONTATION AND MENTAL STATES

Kevin C. McMunigal
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by

Kevin C. McMunigal
Judge Ben C. Green Professor of Law
Case Western Reserve University
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Confusion has confounded confrontation clause analysis since the Supreme Court radically transformed its interpretation of that clause in Crawford v. Washington. A series of Supreme Court cases applying Crawford has augmented the ambiguity. Commentators describe this Crawford line of cases as “incoherent,” “uncertain,” “unpredictable,” “a train wreck,” suffering from “vagueness” and “double-speak” and, simply put, a “mess.” Students studying (and professors teaching) the Crawford line of cases have been heard to offer even less kind assessments.

The Court handed down its most recent confrontation case, Williams v. Illinois, this past June. Williams vividly illustrates the chaotic condition of confrontation doctrine. It generated four separate opinions. Each is lengthy, with four justices devoting ninety-two pages to arguing about what Crawford means. Most telling of all is the

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“fractured” nature of the Court’s decision in Williams.\textsuperscript{10} Though five justices agreed that admission of the DNA report at issue did not violate the defendant’s right to confrontation, no majority could agree on why that was so. As Justice Kagan pointed out, the Court produced “not a single good explanation” for admission of the report.\textsuperscript{11}

Prior to Crawford, confrontation analysis turned on a hearsay statement’s reliability.\textsuperscript{12} Under this reliability regime, the confrontation clause posed no barrier to admission of a sufficiently reliable statement. In Crawford, the Court jettisoned reliability in favor of a new analytical focal point: whether a statement is “testimonial.” A non-testimonial statement faces no confrontation barrier.\textsuperscript{13} A testimonial statement is barred unless the declarant is unavailable and the defendant had prior opportunity for cross-examination.\textsuperscript{14}

What determines whether a statement is testimonial? Confrontation analysis has turned on this question for the past nine years. But the justices have yet to answer it clearly, despite having spent hundreds of pages attempting to explain testimonial analysis. The resulting ambiguity has generated criticism, as noted above, as well as debate among scholars and divisions of opinion among state and lower federal courts.

\textsuperscript{10} \textit{Id.} at 3 (Kagan, J., dissenting)(“...I respectfully dissent from the Court's fractured decision”).
\textsuperscript{11} \textit{Id}. Justice Kagan also noted that “[f]ive Justices specifically reject every aspect of [the plurality opinion’s] reasoning and every paragraph of its explication.” \textit{Id}.
\textsuperscript{12} The Supreme Court’s use of reliability as the touchstone of confrontation analysis began with \textit{Ohio v. Roberts}, 448 U.S. 56 (1980)(an unavailable witness’s hearsay statement may be admitted so long as it has adequate indicia of reliability).
\textsuperscript{13} \textit{Davis v. Washington}, 547 U.S. 813, 821 (“Only [testimonial statements] cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that ... is not subject to the Confrontation Clause.”).
\textsuperscript{14} \textit{Crawford} at 68 (“Where testimonial evidence is at issue ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).
This essay examines the central role that the Supreme Court’s treatment of mental state has played in creating the current chaos. It is clearly the case that mental state features prominently in testimonial analysis. But the Court has failed squarely to address or clearly to answer the following key questions:

1. *Does testimonial analysis turn only on mental state(s)?* Or does it also rely on non-mental elements such as solemnity, formality, the existence of an emergency, or whether the elicitor of the statement is a government agent?

2. *Whose mental state counts?* Whose mental state determines whether a statement is testimonial? Only the declarant’s? Only the mental state of the person who elicits the statement, such as the prosecutor at a preliminary hearing or a 911 operator answering a phone call from a domestic violence victim? Or must the mental states of both the declarant and the elicitor be assessed to determine if a statement is testimonial?

3. *Which mental state(s) qualify a statement as testimonial?* Only purpose? Is knowledge sufficient? What about states of awareness involving less certainty than knowledge, such as a declarant’s awareness that a statement *might* later be used as evidence? What about lack of knowledge or awareness when a reasonable person would have been aware a statement might later be used as evidence — what I call in this essay testimonial reasonableness?

4. *Mental state about what?* What is the focal point for the mental state or states that determine whether a statement is testimonial? Is the only relevant mental state one that relates to proving something, such as purpose to prove a criminal offense? Are mental states about other things relevant? For example, is a declarant’s knowledge of the formality attending the making of a statement necessary to make a statement testimonial?
What about a police officer’s awareness of an ongoing emergency at the time of the declarant’s statement? Might the proper focal point for a declarant’s mental state be the mental state of the elicitor?

Though these mental state questions arise repeatedly in the *Crawford* cases, the Supreme Court has failed to address directly or answer unambiguously any of them. One can find support for an array of inconsistent answers to all these questions throughout the *Crawford* cases.

My thesis in this essay is that the Court’s failure to think and write clearly about these mental state questions is a primary source of the current confusion in confrontation analysis. I argue that clearly recognizing, distinguishing among, and answering these key questions would bring greater clarity, coherence, and predictability to confrontation clause analysis.

Section I provides a brief primer on modern criminal law’s treatment of mental and non-mental elements and explains this essay’s use of criminal law as a foil to illustrate the *Crawford* cases’ failings in dealing with mental state. Section II examines separately and in detail the *Crawford* cases’ handling of the key questions set forth above. Section III analyzes the mental state ambiguities in Noah Webster’s 1824 dictionary definition of testimony, a definition the Court has adopted throughout the *Crawford* cases, and finds in that definition many of the same mental state ambiguities that burden testimonial analysis. Section IV offers a possible testimonial formulation that would answer these questions directly and unambiguously.
I.

Modern criminal law treats mental states more directly and clearly than do the Crawford cases. Under the influence of the Model Penal Code, criminal law’s treatment of mental state progressed to relative sophistication from a state of crudeness similar to that currently found in testimonial analysis. Accordingly, it provides a useful foil against which to compare the Crawford cases’ handling of the mental state questions identified above. This comparison helps illustrate and explain the weaknesses of the Crawford cases and how those weaknesses could be remedied.

Common law used a combination of mental and non-mental elements to define crimes. Modern legislatures still do. In Justice Jackson’s classic description, crime is “a compound concept, generally constituted only from the concurrence of an evil-meaning mind with an evil-doing hand . . . .”15 Though mental state and conduct — often referred to as mens rea and actus reus — are the most familiar ingredients of crimes, results and circumstances are also common elements of crimes. Below are graphic representations of the elements of some crimes, separated into mental and non-mental components.16 In these diagrams, I use the Model Penal Code’s four primary mental states: purpose,17 knowledge,18 recklessness,19 and negligence.20

16 For a complete explanation of diagramming criminal offenses, see Kevin C. McMunigal, Diagramming Crimes, THE LAW TEACHER (Fall, 2004).
17 See Model Penal Code, Section 2.02 (2)(a).
18 Id. Section 2.02(2)(b).
19 Id. Section 2.02(2)(c).
20 Id. Section 2.02(2)(d).
Manslaughter under the Model Penal Code requires conduct that causes a death, purpose regarding that conduct and recklessness regarding the result element of death. Diagram 1 represents these elements:

**DIAGRAM 1**

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Conduct</td>
</tr>
<tr>
<td>Recklessness</td>
<td>Death</td>
</tr>
</tbody>
</table>

Diagram 2 sets forth the elements of a hypothetical statute penalizing the knowing transportation of a stolen archaeological artifact. On the non-mental side, it requires the conduct of transporting and the circumstances that the item transported be stolen and an archaeological artifact. On the mental side, it requires purpose regarding the act of transporting and knowledge regarding the fact that the item is both stolen and an artifact.

**DIAGRAM 2**

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Transport</td>
</tr>
<tr>
<td>Knowledge</td>
<td>Stolen</td>
</tr>
<tr>
<td>Knowledge</td>
<td>Artifact</td>
</tr>
</tbody>
</table>

Many mental states required by crimes, such as those in Diagram’s 1 and 2, relate to a required non-mental element. I refer to these sorts of mental states as “symmetrical” since both the mental state and the non-mental element which is its focal point appear symmetrically beside each other in a diagram of the crime. Criminal statutes also at times
use mental state elements that relate to something that is not a non-mental element of the crime. Purpose to commit a felony, often used in burglary statutes, exemplifies such an “asymmetrical” mental element, as Diagram 3 shows.

**DIAGRAM 3**

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Enter</td>
</tr>
<tr>
<td>Negligence</td>
<td>Dwelling</td>
</tr>
<tr>
<td>Negligence</td>
<td>At Night</td>
</tr>
<tr>
<td>Purpose to commit felony</td>
<td></td>
</tr>
</tbody>
</table>

Bootlegging criminal law jargon, one can pose the central question in *Crawford* as: What are the “elements” of a testimonial statement? In other words, what mental (and possibly non-mental) element or elements are required to qualify a statement as testimonial?

**II**

**The Key Questions**

**A. Does testimonial analysis turn only on mental state(s)?**

One source of confusion in testimonial analysis is failure to distinguish between an *element* of a testimonial statement and *evidence* used to prove or disprove that element. In criminal law, the distinction between an element of an offense and evidence used to prove or disprove that element is fairly easy to grasp.

To prove purpose to kill in a murder case, for example, the prosecution might offer evidence that the defendant admitted his purpose to kill in a confession after the fact and that he had a motive to kill the victim. The defendant’s purpose to kill is a
substantive mental state element the prosecution needs to prove. The defendant’s confession and motive are evidence used to prove that mental state element.

Some facts can simultaneously serve both substantive and evidentiary functions. A defendant’s conduct, for example, of pointing a handgun at the victim’s head and firing several shots from close range fulfills the conduct element in a murder case and thus has substantive legal significance. The same conduct is also powerful circumstantial evidence that the defendant had purpose to kill the victim, a mental state element that qualifies the defendant for murder. So the defendant’s conduct here simultaneously fulfills the conduct element — a substantive function — and helps prove the mental state element for murder — an evidentiary function.

The distinction between substantive and evidentiary functions is helpful in understanding the disarray in the Crawford cases. While this distinction seems elementary in the hypothetical murder cases discussed in the previous paragraphs, the Crawford cases have struggled with this distinction in testimonial analysis. The Court repeatedly fails to distinguish clearly between the elements that make a statement testimonial and evidence used by the Court to determine whether those elements are fulfilled. Phrased somewhat differently, the Court, in discussing various non-mental factors, has failed to clarify whether these factors serve a substantive function or only an evidentiary function.

The Court has mentioned a wide range of non-mental circumstance factors in resolving whether particular statements are testimonial. These include:

- formality of the statement

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21 See, e.g., Crawford at 51; Williams at 29.
• solemnity of the statement\textsuperscript{22}
• the lack of an emergency\textsuperscript{23}
• the presence of interrogation\textsuperscript{24}
• the identity of the elicitor as a government agent\textsuperscript{25}
• whether the statement was solely directed at establishing the facts of a past crime\textsuperscript{26}
• whether the statement was made after a suspect was identified\textsuperscript{27}

The justices have routinely obscured whether such circumstances are non-mental elements of a testimonial statement or simply evidence they rely on to prove or disprove a mental testimonial element. In other words, the Court has been unclear on whether these non-mental factors have only evidentiary significance or also have substantive significance. The justices have failed even to squarely face this critical question.

Take, for example, the non-mental factor of formality. Formality might be given substantive significance as a required element of a testimonial statement. But formality can also serve as circumstantial evidence of a required mental state on the part of the declarant or the elicitor. As formality increases, so does (1) the likelihood that the declarant knew of the evidentiary use that would be made of the statement; and (2) the likelihood that the elicitor had purpose to use the statement to prove something.

One possible formulation would be that a statement is testimonial if there is a high level of formality (a non-mental element) and the elicitor has purpose to obtain evidence

\textsuperscript{22} See, e.g., Crawford at 51; Davis at 826.
\textsuperscript{23} See, e.g., Davis at 827; Bryant at 1156.
\textsuperscript{24} See, e.g., Crawford at 53; Davis at 827.
\textsuperscript{25} See, e.g., Crawford at 51; Davis at 823 n. 2.
\textsuperscript{26} See, e.g., Davis at 826.
\textsuperscript{27} See, e.g., Williams at 31-32.
to be used against the defendant (a mental element). A diagram of this approach would look like this:

**DIAGRAM 4**

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Make a statement</td>
</tr>
<tr>
<td>No MS required</td>
<td>Formality</td>
</tr>
<tr>
<td>Elicitor’s purpose to prove</td>
<td></td>
</tr>
</tbody>
</table>

Justice Thomas has consistently taken the position that formality should have substantive significance in testimonial analysis. Passages in Justice Ginsburg’s opinion in *Bullcoming v. New Mexico* suggest such a formulation. Early in her testimonial analysis she discussed “evidentiary purpose” as a requirement for a testimonial statement. At the end of her analysis she turned to the non-mental factor of formality, concluding: “In sum, the formality attending the ‘report of blood alcohol analysis’ are more than adequate to qualify Caylor’s assertions as testimonial.” Justice Ginsburg’s use of the word “qualify” in this sentence strongly suggests that formality is a required element of a testimonial statement.

Justice Alito’s recent opinion in *Williams v. Illinois* also suggests a testimonial formulation that gives formality substantive significance. He writes:

> The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a

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28 *See, e.g.*, *Williams* at 8-11 (Thomas, J. concurring).
30 *Id.* at 2717.
31 *Id.* (emphasis added).
targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.\(^\text{32}\)

Unlike Justice Thomas, though, neither Justice Ginsburg nor Justice Alito explicitly addressed or answered the question of whether formality has substantive or only evidentiary significance. The reader of their opinions is left to speculate about the answer.

Passages in Justice Sotomayor’s concurrence in *Bullcoming* appear to reflect a view that relegates formality to only an evidentiary role. She writes:

> The formality inherent in the certification further *suggests* its evidentiary purpose. Although “[f]ormality is not the sole touchstone of our primary purpose inquiry,” a statement’s formality or informality *can shed light on* whether a particular statement has a primary purpose of use at trial.\(^\text{33}\)

In a footnote to this passage, Justice Sotomayor was even more explicit about the evidentiary significance of formality:

> . . . under our Confrontation Clause precedents, formality is primarily *an indicator of* testimonial purpose. . . . formality has long been a hallmark of testimonial statements because formality *suggests that the statement is intended* for use at trial.\(^\text{34}\)

Although Justice Sotomayor was quite clear that formality plays an evidentiary role, her use of the word “primarily” left open the possibility it might also have substantive significance. So again, her opinion, like those of Justices Ginsburg and Alito, fails to resolve whether formality has substantive significance.

\(^{32}\) *Id.* at 2242.

\(^{33}\) *Bullcoming* at 2721 (Sotomayor, J. concurring)(emphasis added).

\(^{34}\) *Id.* at note 3 (emphasis added).
To sum up the problem addressed in this subsection, the Court has left both unaddressed and unanswered the question of whether circumstances such as the level of formality, the existence of an emergency, or the identity of the elicitor as a government agent have substantive significance in determining whether a statement is testimonial.

B. Whose mental state counts?

Whose mental state counts in a criminal case is not usually a source of difficulty. The defendant's mental state takes center stage. Under a statute making knowing possession of stolen property a crime, the defendant’s mental state about the property being stolen must be assessed. Under a homicide statute, an actor’s mental state about the death that resulted from his conduct determines whether conviction is warranted and, if so, whether the crime is murder, manslaughter, or negligent homicide.

At times someone else’s mental state also counts in defining a crime. Assault statutes, for example, may require that the victim have a reasonable apprehension of an imminent battery.\textsuperscript{35} Under a “unilateral” approach to conspiracy, only the charged defendant need have purpose to commit the target offense of the conspiracy.\textsuperscript{36} But under a “bilateral” approach to conspiracy, two alleged conspirators must share purpose to commit the underlying offense for either one to be liable.\textsuperscript{37} Thus, “the question of

\begin{thebibliography}{9}
\bibitem{Dressler} Joshua Dressler, \textit{Understanding Criminal Law}, Section 27.02[E][1] 382 (5\textsuperscript{th} ed. 2009)(“Thus, today an assault ordinarily is proved if D . . . intentionally places V in apprehension of an imminent battery.”)(Id); \textit{Carter v. Commonwealth}, 594 S.E.2d 284 (2005).
\bibitem{LaFave} Wayne R. LaFave, \textit{Criminal Law}, Section 12.3(c)(6) 671 (5\textsuperscript{th} ed. 2010)(“under the unilateral approach of the Model Penal Code the one party to the agreement with the necessary mental state could be the one convicted); see Model Penal Code Section 5.03, Comment at 398-402 (1985).
\bibitem{Washington} See, e.g., \textit{Washington v. Pacheco}, 125 Wash.2d 150 (1994)(“the common law, bilateral approach to conspiracy, . . . requires an actual agreement to commit a crime between the defendant and one other”)(Id. at 153).
\end{thebibliography}
whether the requisite intent was present must be separately considered as to each individual who is alleged to be a member of the conspiracy.”38

Whose mental state counts in testimonial analysis? Only the declarant’s? Only the elicitor’s? Do the mental states of both count? Using conspiracy terminology, is testimonial mental state analysis unilateral, requiring assessment of only one person’s mental state? If unilateral, is the declarant’s mental state or the elicitor’s mental state the key? Or is testimonial analysis bilateral, requiring assessment of both the declarant’s and the elicitor’s mental states?

Ambiguity and inconsistency regarding whose mental state counts plagues the Crawford cases. Passages chronically display a muddled, schizophrenic jumping back and forth between the viewpoint of the declarant and the viewpoint of the elicitor of a statement. As a consequence, the cases give an array of mixed signals about whose mental state counts.

The consolidated cases of Davis v. Washington and Hammon v. Indiana39 illustrate this ambiguity. Each dealt with statements by suspected victims of domestic violence. Justice Scalia’s majority opinion referred at times to the mental states of the declarants, who were suspected victims, and at times to the mental states of the elicitors of the statement, in Davis a 911 operator and in Hammon a police officer. The following passage exemplifies this confusion.

. . . any reasonable listener would recognize that McCottry . . . was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any immediate danger, McCottry’s call was plainly a call for help against a bona fide threat.”40

38 LaFave, supra note 35, Section 12.3(c)(6) 671.
40 Davis at 827(emphasis added).
The phrase “any reasonable listener would recognize” obviously refers to the elicitor’s mental state. But in the next sentence, the phrases “one might call to provide a narrative report” and “for help” refer to the declarant’s mental state — the purpose of a domestic violence victim in making a 911 call.

The following sentence, also from Davis, is similarly opaque: “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”41 We normally read a mental state used in conjunction with conduct as referring to the mental state of the person engaged in the conduct. So the phrase “purpose of the interrogation” suggests that the police agent’s purpose is key since the agent is the one doing the interrogating. Language Justice Scalia places after the phrase “purpose of the interrogation,” though, makes it less clear to whose mental state he was referring. In the context of a 911 call, both the caller and the operator are likely to share a purpose to enable police assistance to meet an ongoing emergency. A person typically calls 911 to obtain police assistance and a 911 operator’s function is to assist the caller in getting such assistance.

Compare the sentence addressed in the prior paragraph with the following sentence from Justice Ginsburg’s majority opinion in Bullcoming: “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events.’”42 Like Justice Scalia, Justice Ginsburg mentioned a “primary purpose.” But while Justice Scalia talked about the primary purpose “of the interrogation,”

41 Davis at 822 (emphasis added).
42 Bullcoming at 2714.
suggested the key purpose belongs to the interrogator, Justice Ginsburg wrote of “the statement” having a “primary purpose,” suggesting that it is the declarant — the person making the statement — who must have the primary purpose.

These sorts of ambiguous and contradictory passages are characteristic of the *Crawford* cases.

**Dodging the Question.**

One reason the *Crawford* cases prove elusive on whose mental state counts is that, rather than squarely addressing and answering this question, the justices routinely dodge it. They write about mental state in ways that make it possible for them to avoid answering the question.

At times, for example, the justices use pathetic fallacy when addressing mental state. Pathetic fallacy is the treatment of inanimate objects or things as if they had feelings, thoughts, or sensations. Poets and novelists use it when they write of stars awakening, the moon sleeping, a field laughing, or nature being glad. Scientists engage in pathetic fallacy when they say that nature “abhors” a vacuum or that air “tries to escape” an area of low pressure. The justices similarly rely on pathetic fallacy when they write of inanimate objects such as affidavits and DNA reports as having mental states.

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44 See Percy Bysshe Shelley, *To Jane: The Keen Stars Were Twinkling* (“The stars will awaken / Though the moon sleep a full hour later . . .”).
45 *Id.*
47 See Charlotte Bronte, *Jane Eyre*, Chapter 24 (1847) (“Nature must be gladsome when I was so happy.”)
In his recent opinion in *Williams*, Justice Alito used pathetic fallacy when he wrote that “the primary purpose of the Cellmark report . . . was not to accuse petitioner or to create evidence for use at trial.”49 In *Melendez-Diaz*, which like *Williams* dealt with scientific evidence, Justice Scalia similarly used pathetic fallacy. That case concerned drug analysis certificates submitted by state drug lab analysts, which Justice Scalia referred to as “affidavits.” Rather than explicitly stating whose mental state or states count in making these affidavits testimonial, Justice Scalia wrote about the purpose “of the affidavits.” In a representative sentence, he said that “the sole purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.”50

A document such as an affidavit obviously has no mind and thus cannot itself have a purpose. So to whose purpose was Justice Scalia referring here? One possibility is the declarant’s ~~~ the lab analyst who wrote and signed the affidavit. The lab analyst almost certainly had purpose to prove the “composition, quality, and the net weight” of the analyzed substance. But “purpose of the affidavits” might also refer to the mental state of the elicitor ~~~ either an investigating police officer or prosecutor who requested the creation of the affidavit. It might also refer to the mental state of the prosecutor who ultimately offered it into evidence at trial. The investigating police officer and the prosecutors involved in the investigation and trial of the case would all have had purpose to prove the “composition, quality, and the net weight” of the analyzed substance.

Yet another possible reading of Justice Scalia’s phrase “purpose of the affidavits” is that he was referring to the mental states of the Massachusetts legislators who enacted

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49 *Williams* at 2243 (emphasis added).
50 *Melendez-Diaz* at 311 (emphasis added).
the statute that authorized creation and admission of the affidavits at issue in the case in lieu of live testimony. In other words, purpose here might refer to the legislative intent behind the Massachusetts statute. The following sentence from Justice Scalia’s opinion in *Melendez-Diaz* strongly suggests such an interpretation:

> We can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose -- as stated in the relevant state-law provision -- was reprinted on the affidavits themselves.\(^{51}\)

In the italicized language, Justice Scalia appeared to refer to the Massachusetts legislature’s purpose in passing the statute. Who other than the legislature could have “stated” anything in a “state law provision”? It is also worth noting that the first part of this sentence, which talks about the analyst declarants “being aware of the affidavits’ evidentiary purpose” appears to assume that the key purpose belongs to someone other than the analyst declarants.

Each of these interpretations of whose purpose the phrase “purpose of the affidavits” refers to — the lab analyst’s, the police officer’s, the prosecutor’s, or the legislature’s — is plausible. The existence of so many plausible interpretations demonstrates the ambiguity in Justice Scalia’s *Melendez-Diaz* opinion on whose mental state counts.

When Justice Scalia writes about the purpose of an affidavit or Justice Alito writes about the purpose of a DNA report, I do not suggest we view them as believing or implying that an affidavit or a report has a mental state. Rather, this is their oblique way of talking about the mental state of one or more of the people involved in the creation of an affidavit or report. Pathetic fallacy here is a rhetorical device that allowed the justices

\(^{51}\) *Id.* (emphasis added).
to dodge the question of whose mental state counts in determining what is testimonial. Use of this device forces the reader to speculate about whose mental state the justices were referring to in these passages.

Justice Scalia and Bryan Garner recently published a treatise on textualist interpretation.\textsuperscript{52} The authors make clear that they reject “the drafter's subjective intent” as a goal of sound legal interpretation. “Subjective intent” they write “is beside the point. Speculation about it ~~ even in the oddly anthropomorphic phrase \textit{intent of the document} ~~ invites fuzzy-mindedness.”\textsuperscript{53} Justice Scalia here pejoratively labels use of pathetic fallacy by non-textualists as “oddly anthropomorphic.” He and his co-author also associate its use in interpreting a legal text with speculation and “fuzzy-mindedness” about the drafter’s mental state. But Justice Scalia seems to have been unable to heed this lesson. As pointed out above, in \textit{Melendez-Diaz} he repeatedly used precisely the same device he now criticizes. Ironically enough, what results in \textit{Melendez-Diaz} from the use of pathetic fallacy is “fuzzy-mindedness” about whose mental state counts in making an affidavit testimonial.

The \textit{Crawford}, \textit{Davis}, and \textit{Bryant} cases all concerned interrogation. In these cases, rather than separately and directly addressing the mental state of the person being interrogated and the mental state of the person doing the interrogating and telling us whose mental state or states count in making a statement testimonial, Justice Scalia and Justice Sotomayor wrote of the interrogation having a purpose. The following sentence is illustrative: “We conclude from all this that the circumstances of McCottry’s

\textsuperscript{52} Antonin Scalia & Bryan A. Garner, \textit{READING LAW} (2012).
\textsuperscript{53} \textit{Id}. at 30 (emphasis in original).
interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.” 54 Like Justice Alito’s and Justice Scalia’s use of pathetic fallacy in Williams and Melendez-Diaz, the word “its” in this sentence from Davis again allowed Justice Scalia to avoid naming the person (or persons) whose purpose counts. As mentioned above, both the declarant and elicitor involved in the 911 call this passage refers to very likely had purpose “to enable police assistance to meet an ongoing emergency.” Writing about the purpose “of an interrogation” was another oblique way of talking about the mental state of one or more of the people involved in an interrogation. Again this verbal device clouds the issue of whose mental state counts in Crawford analysis.

Similar dodging of the question of whose mental state counts is characteristic of the Crawford cases. In Bullcoming, for example, Justice Ginsburg wrote that “[t]o rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events.’ ” 55 In Williams, Justice Alito wrote: “When the ISP lab sent the sample to Cellmark its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against the petitioner.” 56 Talking of a statement’s purpose or a laboratory’s purpose in these sentences allows the justices to avoid having to attribute the purpose mentioned to any particular human being.

54 Davis at 828 (emphasis added).
55 Bullcoming at 2714 (emphasis added).
56 Williams at 31 (emphasis added).
C. Which mental state?

The *Crawford* cases demonstrate that it is impossible to think or communicate effectively about mental state without a clear, consistent vocabulary distinguishing among different mental states. In criminal law both judges and legislators have used a wide range of mental state terms, typically without clearly defining or distinguishing among them. A U.S. Senate Report described the resulting chaos in federal criminal law:

Present Federal criminal law is composed of a bewildering array of terms used to describe the mental elements of an offense. [A] consultant on this subject identified 78 different terms used in present law. These range from the traditional “knowingly,” “willfully,” and “maliciously,” to the redundant “willful, deliberate, malicious, and premeditated,” to the conclusory “unlawfully,” “improperly,” and “feloniously,” to the self-contradictory “willfully neglects.” No Federal statute attempts a comprehensive and precise definition of the terms used to describe the requisite state of mind. Nor are the terms defined in the statute in which they are used.57

This babel of mental states inevitably created confusion. Perhaps the signature achievement of the Model Penal Code was its replacement of this jumble of mental state verbiage with four mental states: purpose, knowledge, recklessness, and negligence.58 The Model Penal Code defines and distinguishes each from the other three.59

Here are abbreviated definitions of the four Model Penal Code mental state terms in the context of a homicide case:

58 Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code* 19 Rutgers L.J. 575, 575 (1988)(“Of the many advances in the law contributed by the drafters of the Model Penal Code, none appears to be of greater immediate or long-term significance than that in the area of culpability.”); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 815 (1980)(“In 1953 the Model Penal Code drafters presented what may be their most significant and enduring achievement, a thoughtful definition of distinct levels of culpability.”).
59 See Model Penal Code, Section 2.02 (2).
• **Purpose** ~~ it is the actor’s *conscious object* to cause death\(^{60}\)

• **Knowledge** ~~ the actor is *practically certain* death will occur\(^{61}\)

• **Recklessness** ~~ the actor is *aware of a substantial risk* death will occur\(^{62}\)

• **Negligence** ~~ a reasonable person *should be aware of a substantial risk* death will occur\(^{63}\)

Like criminal law prior to the Model Penal Code, the *Crawford* cases have failed to define and distinguish among mental states. Sometimes these competing mental states have been expressly stated, while at other items they have been implied. To help understand and sort through this confusion it is helpful to establish a working mental state vocabulary for testimonial analysis. In this essay, I use four mental states analogous to the Model Penal Code mental states set forth above. These are:

• **Purpose** ~~ something is the actor’s *conscious object* (e.g. to prove or disprove someone’s guilt of a crime)

• **Knowledge** ~~ the actor is *practically certain* of something (e.g. that the actor’s statement will be used to prove or disprove someone’s guilt of a crime)

\(^{60}\) *Id.*, Section 2.02(2)(a) (*Purposely.* A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a result;)(emphasis added).

\(^{61}\) *Id.*, Section 2.02(2)(b) (*Knowingly.* A person acts knowingly with respect to a material element of an offense when: . . . (ii) if the element involves a result of his conduct he is *aware that it is practically certain* that his conduct will cause the result;)(emphasis added).

\(^{62}\) *Id.*, Section 2.02(2)(b) (*Recklessly.* A person acts recklessly with respect to a material element of an offense when he *consciously disregards a substantial and unjustifiable risk* that the material element exists or will result from his conduct. . . .)(emphasis added).

\(^{63}\) *Id.*, Section 2.02(2)(b) (*Negligently.* A person acts negligently with respect to a material element of an offense when he *should be aware of a substantial and unjustifiable risk* that the material element exists or will result from his conduct. . . .)(emphasis added).
• **Awareness** ~~ the actor is *aware of a substantial probability* of something (e.g. that the actor’s statement will be used to prove or disprove someone’s guilt of a crime)

• **Reasonableness** ~~ a reasonable person *would be aware of a substantial probability* of something (e.g. that the person’s statement will be used to prove or disprove someone’s guilt of a crime)

Awareness in the testimonial context is analogous to Model Penal Code recklessness in that it requires awareness of a substantial probability less than practical certainty. Reasonableness in the testimonial context is analogous to Model Penal Code negligence in that it requires that a reasonable person would be aware of a substantial probability less than practical certainty.

Just as the *Crawford* cases jump back and forth between the perspectives of declarant and elicitor, they also jump around among various mental states, including purpose, knowledge, awareness, and reasonableness as defined above. The justices have never explained nor acknowledged their frequent mixing of such distinct mental states.

*Purpose*

Purpose is mentioned throughout the *Crawford* cases more than any other mental state. Early in his *Crawford* majority opinion, Justice Scalia quoted an 1828 dictionary definition of testimony by Noah Webster.\(^{64}\) The only mental state that definition mentions is purpose.\(^{65}\) In the interrogation cases, as noted in Section II (B), above, Justices Scalia and Sotomayor discussed the purpose of an interrogation.\(^{66}\)

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\(^{64}\) *Crawford* at 51.

\(^{65}\) *Id.;* 2 N. Webster, *An American Dictionary of the English Language* (1828).

\(^{66}\) *See Davis* at 828; *Bryant* at 1150.
Diaz, Justice Scalia wrote about the purpose of an affidavit. In Bullcoming, Justice Ginsburg invoked “evidentiary purpose.” These references to purpose appear at first reading to indicate that someone (either the declarant, the elicitor, or both) must have something as a conscious object — must desire to bring it about.

**Knowledge**

The justices also mention knowledge as a key mental state, especially for a declarant. In Crawford, for example, Justice Scalia explained why Sylvia Crawford’s statement was testimonial by saying that: “Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition [of testimonial].” To explain why the DNA report in Williams was not testimonial, Justice Alito similarly wrote that “[t]he technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating – or both.”

The justices use here of knowingly and knowing implies that what an actor knows — not necessarily what the actor desires — renders a statement testimonial.

**Awareness**

Still other passages have implied that awareness on the part of a declarant is sufficient to render a statement testimonial. Justice Alito wrote in Williams: “In addition, the technicians who prepared the reports must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be

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67 See Melendez-Diaz at 311.
68 See Bullcoming at 2717.
69 Crawford at 53, note 4 (emphasis added).
70 Williams at 2244 (emphasis added).
incriminating.”  And Justice Scalia writes in Melendez-Diaz that “the analysts were aware of the affidavits’ evidentiary purpose . . .”  

Reasonableness

The Crawford cases also have stated or implied that reasonableness is sufficient to qualify a statement as testimonial. In Crawford, the Court described a possible testimonial formulation that included “pretrial statements that declarants would reasonably expect to be used prosecutorially.” In Davis, Justice Scalia stated:

. . . it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet any ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.  

In Melendez-Diaz, Justice Scalia referred to affidavits as having been ”made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

At times, the justices have used quite different mental states in close proximity to one another without any indication they are conscious of the contradictions such usage reflects. Consider, for example, the following passage from Melendez-Diaz:

Here, moreover, not only were the affidavits ”made under circumstances which would lead an objective witness reasonably to

\[^{71}\text{Id. (emphasis added).}\]
\[^{72}\text{Id.}\]
\[^{73}\text{Crawford at 51 (emphasis added).}\]
\[^{74}\text{Davis at 822 (emphasis added).}\]
\[^{75}\text{Melendez-Diaz at 2532 (emphasis added).}\]
believe that the statement would be available for use at a later trial," but under Massachusetts law the sole purpose of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves.\textsuperscript{76}

In this passage, Justice Scalia mentioned three distinct mental states. In the first sentence he used reasonableness, then purpose. In the next sentence, he switched to awareness, a mental state distinct from both reasonableness and purpose.

Jerome Hall, a leading twentieth century criminal law scholar, complained of judges displaying similar clumsiness in their treatment of mental states in criminal law. “The apex of this infelicity” he wrote “is ’wilful, wanton negligence,’ which suggests a triple contradiction – ‘negligence’ implying inadvertence; ‘wilful,’ intention; and ‘wanton’ recklessness.”\textsuperscript{77} The passage from Melendez-Diaz quoted above ~ with its use of reasonableness, purpose, and awareness ~ reflects the same sort of “triple contradiction.” This use of distinct mental states as if they were interchangeable has created the same sort of confusion in testimonial analysis that long plagued criminal law.

What might explain these contradictions? I examine two possibilities below. Both involve the justice’s giving the word purpose a meaning in confrontation analysis that differs from its meaning in ordinary usage. In other words, they seem to have treated purpose as a testimonial term of art. The first possibility is that the justices view purpose in the Crawford cases as meaning ”some sort of mental state.” The second possibility is that the justices view purpose and reasonableness as synonymous. Both of these possibilities have parallels in criminal law.

\textsuperscript{76} Id. (emphasis added).
\textsuperscript{77} Jerome Hall, GENERAL PRINCIPLES OF THE CRIMINAL LAW 124 (2\textsuperscript{nd} ed. 1960).
1. Purpose as “some mental state”

The Latin phrase mens rea, literally translated from Latin as “guilty mind,” is an amorphous, catchall criminal term of art roughly meaning “a culpable mental state.” Judges made the word intent a criminal law term of art with a meaning similar to mens rea ~ “some culpable mental state.” Intent as a term of art encompassed not only intent as it is commonly defined in ordinary usage ~ having a conscious object\(^{78}\) but also distinct mental states such as knowledge,\(^{79}\) recklessness,\(^{80}\) and even negligence.\(^{81}\)

Deviation between the legal meaning of intent and its meaning in ordinary usage has caused and continues to cause lawyers, judges, law professors and law students to struggle with deciphering mental states in criminal law. The word intent became freighted with so many conflicting meanings, the Model Penal Code drafters ultimately abandoned it entirely as a mental state term. Instead they used the word “purpose” to convey the mental state of an actor having a conscious object, carefully limited it to that use, and clearly distinguished it from other mental states.

By simultaneously incanting purpose as the key to testimonial analysis while also referring to mental states distinct from purpose in testimonial analysis the justices appear to be using purpose as a confrontation clause term of art. Without acknowledging they have done so, they seem to have given purpose a legal meaning in the Crawford cases

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\(^{78}\) See, e.g., The Oxford English Dictionary (defining purpose as “that which a person sets out to do or attain; an object in view; a determined intention or aim.”).


\(^{80}\) See, e.g., Regina v. Faulknor, 13 Cox Crim. Cases 550 (1877)(defining intent in terms equivalent to Model Penal Code recklessness ~ knowledge that an injury “would be a probable result” of the defendant’s conduct).

\(^{81}\) See, e.g. State v. Clardy, 73 S.C. 340, 358 (1905)(defining intent as “gross negligence”).
that differs from its meaning in ordinary usage. Just as judges did with intent in criminal law, the justices have used purpose to mean “some mental state” as opposed to an actor’s aim or intention. In short, Justice Scalia and his colleagues through their treatment of the word purpose have replicated in the Crawford cases the unhappy and confusing treatment that judges gave to the word intent in criminal law.

2. Equating purpose and reasonableness.

Some passages in the Crawford cases appear to do something even more perplexing than treating purpose as a term of art meaning “some mental state.” In these passages, the justices actually equate purpose and reasonableness, two quite distinct mental states.

At one time, judges in criminal cases regularly conflated intent and negligence. Director of Public Prosecutions v. Smith,82 a well known English homicide case, provides a classic example. It demonstrates a parallel between judicial fumbling with mental state in criminal law and testimonial analysis. Charged with killing a police officer, the defendant in Smith lacked purpose to kill the officer but was nonetheless prosecuted for murder under a theory that intent to inflict grievous bodily harm qualified the defendant for murder. As the drafters of the Model Penal Code noted in criticizing the case, Smith “effectively equated” such intent "with what the defendant as a reasonable man must be taken to have contemplated, thus erecting an objective rather than a subjective inquiry to determine what the defendant ‘intended.’”83

Instead of treating purpose as encompassing purpose, knowledge, awareness or reasonableness, as discussed above, the justices at times in the *Crawford* cases treat reasonableness as a definition of purpose. Consider the following passage from Justice Kagan’s recent dissent in *Williams*:

> [In *Melendez-Diaz*], [w]e held that the certificates fell within the Clause’s “core class of testimonial statements” because they had a clear “evidentiary purpose”: They were “made under circumstances which would lead an objective witness to reasonable believe that [they] would be available for use at a later trial.”

Justice Kagan’s placement of a colon between “evidentiary purpose” and a definition based on reasonableness indicates that, just as the *Smith* case “effectively equated” intent with negligence, Justice Kagan has effectively equated purpose with reasonableness. Justice Scalia appears to have succumbed to the same conflation of purpose and reasonableness when he repeatedly used the words “objectively” and “objective” in relation to purpose in the *Davis* and *Hammon* cases.85

The equating of purpose with reasonableness in the *Crawford* cases is a rhetorical ploy reminiscent of the doctrines of constructive and presumed intent. Judges in criminal cases substituted negligence for intent through a verbal sleight of hand, a legal fiction known as “constructive” or “presumed” intent.86 The word “constructive” in legal usage has been defined as conveying “that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law.”87 Judges used this fiction to perform legal alchemy,

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84 *Williams* at 4 (Kagan, J., dissenting).
85 See *Davis* at 822, 826-828, 830-831.
86 See Rollin M. Perkins, CRIMINAL LAW 658-660 (1957).
87 BLACK’S LAW DICTIONARY, 386 (rev. 4th ed. 1986)
converting one thing into something quite different by simply placing the word “constructive” before it. Intent became negligence by adding the word “constructive.”

Consider the following passage from *State v. Clardy*, a South Carolina homicide case:

The Court charged that “a criminal intent is attributed to a person who even does a grossly careless act,” which in light of the undisputed facts, meant, that “a criminal intent is attributed to a person who kills another with a deadly weapon from gross carelessness,” . . . So the language of the charge, “the law presumes that he intended to do what he actually did do,” in the light of the facts, simply means, “the law, in the case of a homicide with a deadly weapon under circumstances showing gross carelessness, presumes that he intended to do what he actually did do.” . . . The Circuit Judge, recognizing the rule that there must be a criminal intent for every common law crime, and having previously clearly stated the law concerning murder and voluntary manslaughter, was submitting to the jury the law as to voluntary manslaughter, in which gross negligence supplies the place of criminal intent.

The drafters of the Model Penal Code discussed and rejected such conflation of intent and negligence:

The Model Code's approach to purpose and knowledge is in fundamental disagreement with the position of the House of Lords in *Director of Public Prosecutions v. Smith*. That case effectively equated "intent to inflict grievous bodily harm" with what the defendant as a reasonable man must be taken to have contemplated, thus erecting an objective instead of a subjective inquiry to determine what the defendant "intended." In the Code's formulation, both "purposely" and "knowingly," as well as "recklessly," are meant to ask what, in fact, the defendant's mental attitude was. It was believed to be unjust to measure liability for serious criminal

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88 A HANDBOOK OF CRIMINAL LAW TERMS, 353 (2000) (Bryan A. Garner, ed). Constructive intent is “a legal principle that actual intent will be presumed when an act leading to the result could have been reasonably expected to cause that result.”

offenses on the basis of what the defendant should have believed or what most people would have intended.\textsuperscript{90}

In the \textit{Crawford} cases, the justices appear to have used similar verbal slight of hand to substitute testimonial reasonableness for testimonial purpose without acknowledging that they have done so.

It is possible that the justices have simply confused what has to be proven with evidence used to prove it. I discussed in Section II A, above, the difference between a testimonial element and evidence offered to prove that element and described how the Court in the \textit{Crawford} cases has failed to distinguish between items having substantive and evidentiary significance. The equating of purpose with reasonableness may reflect a similar confusion.

Evidence of reasonableness is often powerful circumstantial evidence of mental states that are wholly or partially subjective. Evidence that a reasonable person \textit{would have known} something or \textit{would have been aware} of something makes it more likely that a particular person \textit{knew} or was \textit{aware} of it. Thus reasonableness is relevant evidence on questions of knowledge and awareness. Such evidentiary use of reasonableness can easily result in confusion between an objective standard such as negligence or testimonial reasonableness and a subjective standard such as knowledge, recklessness, or testimonial awareness.

\footnote{Comment to Model Penal Code § 2.02, \textit{General Requirements of Culpability} (1985).}
D. Mental state about what?

We encounter relational concepts — ideas that capture a relation between two people or things rather than an inherent quality of a single person or thing — often in our everyday lives. A question such as “Is Sam taller?” makes no sense without a reference point. Taller than whom? Legal rules often use relational concepts. No item of evidence, for example, is inherently relevant. Rather, relevance is a relation that may or may not exist between an item of evidence and an issue that item is offered to prove or disprove.\(^91\) Proportionality, a constitutional and statutory requirement for criminal punishment, similarly is not an inherent quality of any particular punishment, but a relation that may or may not exist between a particular punishment and the crime for which it is imposed.\(^92\)

Mental states used as elements of crimes typically have a similar relational quality.\(^93\) The architecture of the law of homicide, for example, turns primarily on an actor’s mental state regarding a death the actor’s conduct caused. Purpose or knowledge regarding the death typically is required for murder,\(^94\) recklessness regarding the death for manslaughter,\(^95\) and gross negligence regarding the death for negligent homicide.\(^96\)

\(^91\) See Federal Rule of Evidence 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).
\(^92\) See Kate E. Bloch & Kevin C. McMunigal, Criminal Law: A Contemporary Approach, 74 (2005)(“Proportionality in punishment is widely viewed as desirable, in addition to being constitutionally required.”); Oregon Rev. Statutes, Section 161.025 (“The general purposes of the [Oregon criminal laws] are: . . . [t]o prescribe penalties which are proportionate to the seriousness of the offense and which permit recognition of differences in rehabilitation possibilities among individual offenders.”).
\(^93\) See Id. at 212.
\(^95\) See, e.g., Id. at Section 210.3(1)(a).
\(^96\) See, e.g., Id. at Section 210.4(1).
A statute may require and a defendant may have a variety of mental states about different things. A burglary statute, such as the one diagrammed in Section I, above, for example, requires purpose regarding the commission of a felony but only negligence regarding the building being a dwelling and the entry taking place at night. A defendant prosecuted under such a statute might possess different mental states regarding these three distinct focal points — commission of a felony, dwelling, and at night. Attempts to analyze the mental state requirements of such a statute or the mental states of such a defendant without clearly distinguishing among these three different focal points invite confusion. The same is true for the mental states involved in testimonial analysis.

Mental state analysis in the *Crawford* cases has been ambiguous and inconsistent on focal point. Sometimes no particular focal point is given — as when Justice Ginsburg used the phrase “evidentiary purpose” in *Bullcoming*. At other times it is quite specific, as in Justice Alito’s recent plurality opinion in *Williams* where he described the mental state focal point as “accusing a targeted individual of engaging in criminal activity.”

The justices have described the mental state focal point in testimonial analysis in a variety of ways. Here are some examples that demonstrate the malleability of the mental state focal point in testimonial analysis:

- “purpose of establishing or proving past events potentially relevant to later criminal prosecution”
- “purpose of establishing or proving some facts”
- “purpose to create a record for trial”

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97 *Bullcoming* at 2717.
98 *Williams* at 31.
99 *Davis* at 822.
100 *Crawford* at 51.
• “purpose of creating an out of court substitute for trial testimony” 102

• awareness “that the contents [of a DNA report] would be incriminating”103

• knowledge of “structured police questioning”104

• reasonable belief “that the statement would be available for use at a later trial”105

Framing the Focal Point

The malleability of the mental state focal points used in the Crawford cases give the justices flexibility in framing testimonial analysis. Judges and lawyers often use framing as an analytical and rhetorical device.106 Framing involves selecting a focal point for analysis or argument the way a photographer adjusts a camera lens for a photograph or a director chooses to shoot and edit scenes in a movie.

Framing can involve a choice between early and late time frames. People v. Decina,107 a classic criminal law case, demonstrates a court choosing early time framing. Decina was charged with reckless driving resulting in death after his car struck and killed children on a sidewalk. Decina, who had long been subject to seizures, had “blacked out” as the result of a seizure just before his car ran onto the sidewalk.

101 Bryant at 1155.
102 Id.
103 Williams at 2244.
104 Crawford at 53.
105 Id. at 51-52.
Criminal law treats the acts of a person while unconscious as involuntary and thus not subject to criminal liability.\textsuperscript{108} If one chooses a late time frame for assessing liability, focused on the moments just before Decina’s car struck the children, he would not be liable because his actions at this point in time were involuntary due to his lack of consciousness. Also, it would be difficult to attribute a culpable mental state to him while he was unconscious. But if one adopts an early time frame, focused on Decina’s conduct prior to the blackout of choosing to drive his car, both the conduct and mental state problems evaporate. His act of choosing to drive was clearly voluntary. And choosing to drive when aware that he was subject to seizures and loss of consciousness was, at least arguably, reckless. In Decina, the New York Court of Appeals adopted an early time frame and sustained Decina’s conviction.

Framing can also involve choosing between narrow or broad viewpoints. This sort of framing is analogous to a photographer’s choice between a narrow or a wide angle lens. \textit{Commonwealth v. Root},\textsuperscript{109} a classic criminal case on causation, provides examples of both narrow and broad framing. Root engaged in a late night drag race with the victim, another driver. As the two approached a bridge, the road narrowed from three to two lanes. The victim, who had been following behind Root in the same lane, tried to pass just as the road narrowed to two lanes. A truck coming from the opposite direction collided with the victim’s car and the victim died in the collision. The key issue in the

\textsuperscript{108} See, e.g., \textit{Model Penal Code} Section 2.01 (1985)(“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act . . . The following are not voluntary acts . . . a bodily movement during unconsciousness . . . ”).

\textsuperscript{109} 403 Pa. 571, 170 A. 2d 310 (1961).
case was whether the victim’s actions “broke the chain” of proximate causation between Root’s illegal acts and the victim’s death.

Like testimonial awareness and reasonableness, proximate cause turns on foreseeability. Assessment of foreseeability necessitates choice of a focal point. What is it that must be foreseeable to establish causation in a homicide case such as Root? The resulting death? How it occurred? When it occurred? Judges have considerable flexibility in framing the focal point of foreseeability in causation analysis.

A majority of the Pennsylvania Supreme Court in Root supported its finding that the victim’s acts were not foreseeable by adopting a very narrow time frame. Like a photographer selecting a narrow lens, it focused solely on the final seconds before the crash. Root, the majority found, could not have foreseen the precise place and time at which the victim would pass him — where the road narrowed and when a truck was coming the other way. A dissenting justice supported his contrary conclusion that the victim’s acts were foreseeable (and thus did not break the chain of causation) by selecting a broad time frame. Like a photographer using a wide angle lens, the dissenting justice focused on the entire race rather than just the seconds immediately before the crash. Once such a broad time frame is adopted, the answer seems inescapable that Root could have and almost certainly did foresee that the victim would try to pass him during the race since each driver trying to pass the other is the very point of a drag race.

If the applicable legal standard is sufficiently ambiguous, judges have the power to make choices about framing — early or late, broad or narrow. As the Root case demonstrates, a choice about framing the focal point in mental state analysis can dictate
the answer to a mental state question such as foreseeability. The same is true with framing the focal point of mental states in testimonial analysis.

*Time framing in confrontation analysis*

Confrontation clause analysis presents numerous opportunities for, indeed requires, the Supreme Court to make framing choices about the focal point of mental states. In dealing with some confrontation questions, the Court has adopted a late time frame — when the prosecutor offers a statement at trial. In *Williams*, the most recent *Crawford* case, the plurality provided two separate grounds for its conclusion that admission of testimony regarding a DNA report did not violate the confrontation clause. The first ground was that the prosecutor’s purpose in offering the statement *at trial* was not to prove its truth.\(^{110}\) Here Justice Alito’s framing was late — at the time of trial. It was also narrow. He focused not on whether the statement was used to prove something, which it was, but solely on whether the prosecutor’s purpose was to prove the truth of the statement. But in setting forth the plurality’s second, alternative ground for affirming Williams’ conviction — that the DNA report at issue in *Williams* was not testimonial — Justice Alito switched to early framing, when the DNA report was created.\(^{111}\)

One of the problems with the various phrasings the Court has used to describe the mental state focal point in testimonial analysis is that, like Justice Alito’s opinion in *Williams*, they mix two distinct time frames: adjudication and investigation.

\(^{110}\) *Williams* at 16-27.

\(^{111}\) *Id.* at 28-33.
Adjudication settings.

Three of the Court’s paradigm examples of testimonial statements come from adjudication settings -- a prior trial, a preliminary hearing, and a grand jury hearing.\textsuperscript{112} In such adjudication settings, the elicitor will be a prosecutor, her mental state will be purpose, and the focal point of the elicitor’s purpose will be to prove something. When a prosecutor seeks to prove something in an adjudication setting, her purpose is to demonstrate to a fact finder that the government’s evidence meets the applicable standard of proof.\textsuperscript{113} The focal point of the elicitor’s mental state in an adjudication setting is demonstrating something \textit{to someone else} -- a judge or jury.

Investigation settings.

The \textit{Crawford} cases have all arisen in investigation settings. In an investigation setting, neither the police nor the prosecutor seeks to “prove” something in the sense that that word is used in an adjudication setting -- demonstrating \textit{to someone else} that a standard of proof has been met. Rather, police and prosecutors eliciting statements from declarants in an investigation setting are likely to have three “evidentiary” purposes distinct from the purpose they have in an adjudication setting of proving to a factfinder that an applicable standard of proof has been met. Each of these investigative purposes has a slightly different focal point. None has the same focal point as a prosecutor’s purpose in an adjudication setting.

\textsuperscript{112} \textit{Crawford} at 68 ("Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

\textsuperscript{113} At a preliminary hearing and at a bench trial, the fact finder is a judge. At a grand jury hearing and at a jury trial, the fact finder is a jury. At a preliminary hearing and at a grand jury hearing, the applicable standard of proof is probable cause. At a bench or jury trial, the standard of proof is beyond reasonable doubt.
One purpose of the police in an investigation is to determine if a crime was committed. In the *Crawford* case, for example, the police needed to ascertain whether Michael Crawford acted in self-defense as he claimed. If so, no crime would have been committed. In *Davis* and *Hammon*, the police needed to figure out if a domestic assault had taken place. In *Melendez-Diaz*, the police needed to know if the substance the defendant possessed was in fact cocaine. Rather than saying the police (or prosecutors) in an investigation setting have purpose to prove something, it is more accurate to say that they are trying to “determine” or “ascertain” something.

If they determine a crime was committed, the second investigative purpose the police have is to determine who committed it. This task could be relatively easy in some cases, such as *Crawford*, but challenging in others, such as *Williams*. This second purpose is conditional. It comes into being only if the police first determine a crime was committed. Again, it would be clearer to say that the purpose of the police here is to determine or ascertain, rather than prove, the identity of the perpetrator.

If the police determine that a crime was committed and who committed it, they then have a third investigative purpose — to gather and preserve evidence for use by the prosecutor later to prove the crime and the identity of the perpetrator in adjudication settings. Again, it would be clearer to say that the purpose of the police here is to gather and preserve evidence rather than to prove the crime or the identity of the perpetrator.

Just as the mental states of the police and prosecutor are likely to differ depending on whether they are operating in an adjudication or investigation setting, the mental states of declarants making statements in adjudication settings are also likely to differ from the mental states of declarants making statements in investigation settings. In an adjudication
setting, as discussed in greater detail in Section III, below, witnesses may or may not have purpose to prove something. All such declarants, though, are likely to know that their statements are being used to prove something. In contrast, declarants in investigation settings might have any one of a number of mental states about the investigative focal points discussed above, especially the third one.

Some declarants in investigation settings have the same purposes as the police and prosecutors. When scientific evidence is involved, as in *Melendez-Diaz*, *Bullcoming*, and *Williams*, the technicians who provide that evidence are likely to share the investigative purposes of the police and prosecutors. But declarants who do not work for or with police and prosecutors, such as declarants who are interrogated by police, may have a range of mental states other than purpose in regard to the three investigative focal points identified above. Like reluctant trial witnesses, they may not share the purpose of the police to determine if a crime was committed, to determine who committed it, and to gather and preserve evidence for later use in adjudication settings. Instead, they might have knowledge, awareness, or reasonableness in regard to these investigative focal points.

Ambiguity and inconsistency in the Court’s descriptions and framing of the focal point in testimonial mental state analysis masks these distinctions. A phrase such as Justice Ginsburg’s “evidentiary purpose” could cover a wide range of both adjudicative and investigative purposes. It fails to distinguish among possible focal points just is it fails to distinguish between the mental state of a declarant and the mental state of an elicitor.

Justice Alito’s plurality opinion in *Williams* illustrates the malleability of the mental state focal point in testimonial analysis. He concluded that a DNA report was not
testimonial. Justice Alito was able to distinguish *Melendez-Diaz* by narrowing the focal point of his “primary purpose” inquiry. The purpose required, he found, was not just to prove something or to gather and preserve evidence, but to accuse “a particular individual.” The ambiguity and malleability of the mental state focal point in testimonial analysis gave Justice Alito power to frame the focal point for his purpose inquiry and he chose to frame that focal point narrowly. As a result of that narrow framing, the statement at issue escaped the restrictions of the confrontation clause.

### III

Though the Court has repeatedly refused to commit to a definition of testimonial, it has committed to a definition of testimony — an 1828 definition given by Noah Webster.\(^\text{114}\) Displaying his allegiance to both textualism\(^\text{115}\) and originalism,\(^\text{116}\) Justice Scalia quotes this definition early in his majority opinion in *Crawford*\(^\text{117}\) and it reappears frequently in the *Crawford* cases.\(^\text{118}\) It is not surprising, then, that ambiguities in Webster’s definition of testimony foreshadow cognate ambiguities in testimonial analysis.

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\(^{114}\) In *Bryant* Justice Sotomayor states that “We defined ‘testimony’ as ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact’,” citing Justice Scalia’s *Crawford* opinion and acknowledging Webster’s 1828 dictionary as the source of the definition. *Bryant* at 1152(emphasis added).


\(^{117}\) *Crawford* at 51.

\(^{118}\) See *Davis* at 824; *Melendez-Diaz* at 310; *Bryant* at 1152; *Bullcoming* at 2720 (Sotomayor, J. concurring); *Williams* at 2259 (Thomas, J. concurring).
Webster’s definition states that testimony is “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”\textsuperscript{119} The definition provides the following elements: (1) the \textit{conduct} of making a declaration; (2) the \textit{circumstance} of solemnity; and (3) the \textit{mental state} of purpose to prove something. The definition does not address whether a mental state is required regarding the making of the declaration and/or the circumstance of solemnity. These elements and ambiguities may be diagrammed as follows:

**DIAGRAM 5**

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>?</td>
<td>Make a declaration</td>
</tr>
<tr>
<td>?</td>
<td>Solemnity</td>
</tr>
<tr>
<td>Purpose to prove</td>
<td></td>
</tr>
</tbody>
</table>

The Webster definition is clear about requiring solemnity as an element. So, unlike the \textit{Crawford} cases, the Webster definition makes clear that solemnity has substantive as well as evidentiary significance. The Webster definition is also clear about the focal point of the purpose it mentions. Purpose to prove something is required.

But the Webster definition is unclear both about whose mental state counts and which mental states count. It does not make clear who has to have purpose to prove. It also is not clear about what, if any, mental state is required regarding solemnity.

\textit{Purpose to prove}

\textsuperscript{119} \textit{Crawford} at 51; 2 Noah Webster, \textit{An American Dictionary of the English Language} (1928).
To whose purpose does the Webster’s definition refer? The purpose of a single person? If so, is it the purpose of the declarant? The purpose of the elicitor? Or does the creation of testimony require that the declarant and the elicitor share a purpose to prove something?

The Webster’s definition is ambiguous on these questions. Its use of the word purpose in the singular might initially be thought to suggest that only one person’s mental state counts in establishing a statement as testimony. But the word purpose here could easily encompass a purpose shared by more than one person, requiring that both the declarant and the elicitor have purpose to prove. Some conspiracy statutes, for example, use “purpose” in the singular when they require more than one person to share a purpose to commit the target offense of the conspiracy.120

A mental state requirement in a criminal statute typically refers to the mental state of the person whose act is the subject of the statute. The conduct required by the Webster’s definition is that a “declaration or affirmation” be “made.” Since the declarant by definition makes a declaration or affirmation, the most obvious construction of “purpose of establishing or proving some fact” is that it refers to the declarant’s purpose.

Testimony from a reluctant witness

A problem arises, though, if we read the Webster’s definition as requiring that the declarant have purpose to prove. Such a requirement would exclude from the Webster’s definition of testimony many statements we routinely describe and classify as testimony.

120 See, e.g., NEW MEXICO STATUTES ANNOTATED, Section 30-28-2 (“Conspiracy consists of knowingly combining with another for the purpose of committing a felony . . .”) (emphasis added).
Consider a prosecution witness’s statements on the stand under oath at a trial in a criminal case. Who in a trial context has “the purpose of establishing or proving” facts? Certainly the prosecutor who calls a witness and elicits the witness’s statements through her questions has purpose to prove the elements of the charged offense. Many witnesses called by the prosecution share this purpose. An investigating police officer in a drug case, for example, called by the prosecutor to testify about surveillance of the defendant or the result of a search of the defendant’s residence likely shares the prosecutor’s purpose to prove the defendant’s guilt. Likewise, a victim called by a prosecutor in a theft case likely shares the prosecutor’s purpose to prove the crime.

But not all trial witnesses share the evidentiary purpose of the lawyer who calls them to the stand. Unlike the police officer and theft victim mentioned in the prior paragraph, some witnesses are indifferent and others hostile to the objectives of the lawyers who compel them to take the witness stand. The Federal Rules of Evidence recognize this reality, making specific provision for hostile witnesses by allowing lawyers who call them to use leading questions.\(^\text{121}\) Although statements by reluctant witnesses at trial, before a grand jury, and at a preliminary hearing are routinely described and classified as testimony,\(^\text{122}\) such witnesses do not share the prosecutor’s purpose to prove the defendant’s guilt.

\(^{121}\text{See Federal Rule of Evidence 611. Mode and Order of Examining Witnesses and Presenting Evidence} . . . (c) \text{Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness’s testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.}\)

\(^{122}\text{See, e.g., United States v. Eisen, 974 F. 2d 246, 263 (1992) (“Here, the testimony of the hostile witness provided affirmative proof that was necessary to construct the}\)
Consider a murder case involving euthanasia. An elderly man is charged with having killed his wife of many years, who was paralyzed as a result of a painful and debilitating disease. The prosecutor seeks to prove that the husband gave her an overdose of morphine with purpose to kill her. The prosecutor calls the defendant’s son to the stand to describe his mother’s condition, how she pleaded with his father to end her life, and how his father discussed with him whether and how to comply with her request. The son sympathizes with his father’s actions. He feels strongly that his father should not be prosecuted or convicted for any crime, much less murder, and has been uncooperative with the prosecution. The prosecutor subpoenas the son and on the stand at trial the son initially refuses to answer the prosecutor’s questions. The trial judge threatens to hold the son in contempt and the son reluctantly answers the prosecutor’s questions and provides evidence against his father.

Certainly we describe and classify the son’s trial statement as testimony. But did the son have purpose to prove his father’s guilt? Unlike the prosecutor who elicited the son’s testimony, it is not the son’s conscious object to prove his father’s guilt. He does not desire to establish his father’s guilt. Rather than purpose, the son’s mental state about proving something is knowledge — he is practically certain that his statements under oath will be used to prove his father’s guilt, though he does not desire to bring that about.

Whose mental state or states under the Webster’s definition, then, qualify the son’s trial statement as testimony? The prosecutor’s purpose in calling and examining the Government’s case . . . “)(emphasis added); Project: Fourteenth Annual Review of Criminal Procedure, 73 Geo. L. J. 573, 669 (1984)(“ . . . the admission of prior inconsistent grand jury testimony of a hostile witness does not violate the confrontation clause when the witness is available at trial for cross-examination.”)(emphasis added).
son? The son’s knowledge that his statement is being used as evidence? The son’s knowledge that he is under oath in a court of law? The son’s knowledge of the prosecutor’s purpose? Noah Webster’s definition of testimony simply does not answer these questions.

Consider another example in which it is a parent who is reluctant to help the prosecution convict her child. The defendants are charged with manufacturing methamphetamine in a recreational vehicle that functioned as a mobile “meth lab.” To establish the defendants’ connection with the vehicle at a preliminary hearing, the prosecution subpoenas the vehicle’s registered owner, the mother of one of the defendants. The prosecution seeks to prove that the son, who has a history of drug problems, stole the vehicle from his mother’s driveway.\textsuperscript{123} The mother does not want to provide evidence against her son. But having been compelled to attend the preliminary hearing and placed under oath, she reluctantly tells what happened.

The mother here, like the son in the euthanasia case, lacks the purpose to prove specified by the Webster definition, and instead has knowledge that her testimony will be used to help prove the defendants’ guilt. Nonetheless, we still call her statement at the preliminary hearing testimony.

Can the Webster’s definition of testimony with its requirement of purpose to prove something be squared with the fact that we routinely describe and classify as

\textsuperscript{123} Fans of the television show \textit{Breaking Bad} will recognize this scenario as inspired by an episode in which the police trace the ownership of a motor home used as a mobile meth lab by the show’s two main characters, Walter White and Jessie Pinkman. Jessie’s friend, “Combo” Ortega, stole the mobile home from his family and sold it to Jessie for $1,400. Combo’s mother later tells police that she failed to report the theft because she did not want her son convicted of a crime.
testimony trial, grand jury and preliminary hearing statements from reluctant witnesses who lack such purpose?

One possibility would be to give purpose in the context of Webster’s definition a meaning that differs from and is broader than its meaning in common usage, as the justices seem to have done in testimonial analysis. It might be read as meaning “some mental state” about a statement being used as evidence. This would be an odd definition of purpose, though, to attribute to Noah Webster, a preeminent lexicographer who undoubtedly knew the difference between knowledge and purpose and used purpose here in the same way that he defined it in 1828 — “that which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, measure, or exercise.” \(^{124}\)

A perhaps more plausible way to square the definition’s requirement of purpose to prove with the fact that reluctant witnesses who testify lack such purpose would be to read purpose in Webster’s definition as referring only to the mental state of the elicitor of the statement rather than the mental state of the declarant. In the trial and preliminary hearing examples above, that would be the mental state of the prosecutor who called and questioned each witness.

It might seem odd to read Webster’s definition as combining the conduct of one person, the declarant, and the mental state of a different person, the elicitor. But one could argue in support of such a reading for an interpretation of the word “made” in the Webster’s definition that includes both the conduct of the elicitor and the conduct of the declarant.

\(^{124}\) See 2 Noah Webster, An American Dictionary of the English Language (1928).
“Made” has a wide range of meanings in current usage and had a similarly wide range of meanings in 1828 when Noah Webster used it in defining testimony. The most obvious way to make a statement is to speak or write it, as the declarants did in the trial and preliminary hearing examples discussed above. Webster’s 1828 dictionary, though, provides roughly two pages of definitions for the verb “make.”125 These include “to cause to act or do,” to “cause to exist,” “procure,” or “induce.”126 A prosecutor at a trial, before a grand jury, and at a preliminary hearing might be said to cause a witness to act in making a statement, and to procure and induce a witness’s statement by calling the witness, using or threatening use of a subpoena, and asking the questions that elicit the statement. If “made” in the Webster’s definition is interpreted to include the conduct of the eliciting prosecutor, it is easier to read the “purpose of establishing or proving” specified in the Webster’s definition as referring to the prosecutor’s mental state.

An implied mental state requirement for the declarant?

If purpose in the Webster’s definition refers only to the prosecutor’s purpose in the reluctant witness examples, what, if any, mental state must the declarant have in order to qualify a statement as testimony? The Webster’s definition is ambiguous on this question as well. There are at least two possible interpretations.

One is to read the Webster’s definition as implying a required mental state for the declarant, one perhaps considered so obvious it need not be mentioned. But what mental state? A number of plausible mental states might be used here, including knowledge, awareness and reasonableness. In the reluctant witness examples above, the witnesses would easily fulfill all three of these mental states. In a courtroom or grand jury room

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125 See 2 Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1928).
126 Id.
setting, the taking of an oath, the formality of the questioning, the presence of a court reporter transcribing the statement, the presence of a judge at the trial and preliminary hearing, and the presence of jurors at the trial and grand jury hearing, would be powerful circumstantial evidence that the declarants knew their statements would be used as evidence. For the same reasons, they would also fulfill the lesser mental states of awareness and reasonableness.

Here is a diagram representing such an “implied mental state” interpretation of the Webster’s definition of testimony:

### DIAGRAM 6

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Make a declaration</td>
</tr>
<tr>
<td>No mental state required</td>
<td>Solemnity</td>
</tr>
<tr>
<td>Declarant’s knowledge, awareness, or reasonableness re: use of statement to prove</td>
<td></td>
</tr>
<tr>
<td>Elicitor’s purpose to prove</td>
<td></td>
</tr>
</tbody>
</table>

_Solemnity as a proxy for a declarant’s mental state_

Another possible interpretation of the Webster’s definition of testimony that would square it with the reluctant witnesses’ lack of purpose to prove something would be to read that definition as dispensing entirely with any mental state requirement for the declarant. Under this reading, the required circumstance element of solemnity could be treated as a proxy for the declarant’s mental state.
The crime of rape traditionally included lack of consent by the victim as an element.\textsuperscript{127} Following the lead of the Model Penal Code, many modern rape statutes have dispensed with lack of the victim’s consent as an element as well as any mental state requirement regarding lack of consent on the part of defendant.\textsuperscript{128} Such statutes use conduct elements such as compulsion, force, or threat by the defendant and/or resistance by the victim as proxies for both the victim’s lack of consent and the defendant’s mental state regarding the victim’s lack of consent.\textsuperscript{129} Under this proxy approach, a defendant’s use of compulsion, force or threat and the victim’s resistance are viewed as powerful enough circumstantial evidence of the victim’s lack of consent and the defendant’s awareness of the victim’s lack of consent to render separate proof of either unnecessary.

Although unlike compulsion, force, or resistance, solemnity is a circumstance rather than a conduct element, solemnity in Webster’s definition of testimony could be treated as a proxy for a declarant’s knowledge, awareness or reasonableness regarding use of the declarant’s statement as evidence to prove something. Like a compulsion, force, or resistance element in a rape statute, solemnity could be viewed as sufficient circumstantial evidence of the declarant’s testimonial knowledge, awareness or reasonableness to dispense with separate proof of such mental states.

Here is a diagram representing a proxy approach to the declarant’s mental state:

\textsuperscript{127} See, e.g., Iowa Code Section 709.1 (2002)(“Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances: 1. The act is done by force or against the will of the other . . . “)(emphasis added); William Blackstone, Commentaries on the Laws of England 210 (1769)(defining rape as “carnal knowledge of a woman forcibly and against her consent.”)(emphasis added).
\textsuperscript{128} See, e.g., Model Penal Code Section 213.1 (1)(a);N.Y. Criminal Law Section 130.35.
\textsuperscript{129} Id; Idaho Code Section 18-6101 (2004).
The purpose of this Section in examining various interpretations regarding the declarant’s and elicitor’s mental states that could be given to the Webster’s definition of testimony has not been to make a case for any one of these interpretations. Instead, it has been to show the ambiguity of that definition on key mental state questions. The Webster’s definition fails to establish whose mental state counts. Despite the fact that it specifically mentions purpose, it is also unclear about which mental states, if any, count on the part of a declarant in establishing a statement as testimony. As we saw in Section II B and II C, above, these same problems obfuscate testimonial analysis. When Justice Scalia chose to adopt the Webster’s definition as a reference point for confrontation analysis, with it came its ambiguities on mental state.

The ambiguity of the Webster’s definition has relevance not just for helping to explain the current state of testimonial analysis, but also for the originalist methodology that Justice Scalia espouses and that has featured prominently in the *Crawford* cases. The Webster’s definition, coming as it does from an 1828 dictionary, is the sort of interpretive source favored by textualists and orginalists because, it is argued, such sources limit
judicial power. But as this Section has shown, the Webster’s definition provides little guidance and thus no limitation on judicial power on two key mental state questions in testimonial analysis.

IV

Elephant seals annually undergo what marine biologists call a “catastrophic molt.” They completely shed their fur coats and replace them with new ones. Supreme Court justices are typically not so lucky when it comes to existing case law. The Court does at times abandon prior case law, as it did in Crawford when it disposed of Roberts and over two decades of case law that viewed reliability as the key to the confrontation clause. But unlike legislators, who are free to cast off and replace old statutes, the doctrine of stare decisis typically inhibits the justices from openly discarding prior case law.

So the task for the foreseeable future for both the justices of the Supreme Court and lower court judges is to make some sense out of the confusion currently found in the Crawford cases. Doing that, in my view, requires clear and direct answers to the mental state questions addressed in this essay. In this section I offer, as an example, one possible formulation that would answer each question directly and clearly and thus bring some order to the confusion.

Criminal statutes often provide for alternative mental states. An actor can qualify for murder under the Model Penal Code, for example, if she has purpose, or

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knowledge, or extreme recklessness regarding a death that results from her conduct. Here is a diagram of these elements:

**DIAGRAM 8**

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Conduct</td>
</tr>
<tr>
<td>Purpose, or Knowledge, or Extreme Recklessness</td>
<td>Death</td>
</tr>
</tbody>
</table>

Similarly, under my suggested formulation here, a statement would qualify as testimonial if the declarant makes the statement with purpose, knowledge, or awareness regarding use of the statement in an adjudication setting (e.g. a trial, preliminary hearing, or grand jury hearing) to prove something. The elements of a testimonial statement would be: (1) the declarant’s conduct of making a statement; (2) the declarant’s mental state of purpose regarding the conduct of making that statement; and (3) either purpose, knowledge, or awareness on the part of the declarant regarding use of the statement to prove something in an adjudication setting. Here is a diagram of these elements:

**DIAGRAM 9**

<table>
<thead>
<tr>
<th>MENTAL</th>
<th>NON-MENTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Declarant’s Purpose</td>
<td>Make a statement</td>
</tr>
<tr>
<td>Declarant’s Purpose, Knowledge, or Awareness Re: use in adjudication</td>
<td></td>
</tr>
</tbody>
</table>
This approach provides clear answers to all four of the questions examined in this essay.

1. *Does testimonial analysis turn only on mental state(s)?* The only non-mental element would be the act of making a statement. The many non-mental factors that have been mentioned by the Court, such as formality, the existence of an emergency, or the identity of the elicitor as a government agent, would have no substantive significance. They would serve only an evidentiary function in regard to the declarant’s evidentiary purpose, knowledge or awareness.

2. *Whose mental state counts?* Only the mental state of the declarant would count. Like the traditional common law approach to conspiracy, this approach is unilateral. The mental state of the elicitor would have no substantive significance. It would have only evidentiary significance regarding the declarant’s mental state if communicated or otherwise apparent to the declarant.

3. *Which mental state(s) qualify a statement as testimonial?* Three alternative mental states count: purpose, knowledge, or awareness, as I have previously defined those terms. To make it absolutely clear, purpose here refers to an actor’s conscious object, what he or she desires to bring about. It is not used as a term of art to mean “some mental state.” Testimonial reasonableness ~~ what a reasonable person would have known or been aware of ~~~ would have no substantive significance as part of the testimonial formulation. Reasonableness would have only evidentiary significance. What a reasonable person would have known or been aware of is useful circumstantial evidence of the actual declarant’s mental state of purpose, knowledge or awareness.
4. *Mental state about what?* The focal point of the declarant’s mental state ~~ whether purpose, knowledge, or awareness ~~ concerns use of the statement to prove something in an adjudication setting. This is a narrower focal point than the Court uses in some cases, but broader than the one used by Justice Alito in *Williams*. The declarant’s mental states about other things, such as knowledge of the formality attending the making of a statement necessary or the elicitor’s identity as a government agent, would have only evidentiary significance.

**Conclusion**

The primary goal of this essay has been to explain and help remedy the confusion in the *Crawford* cases by tracing that confusion back to repeated failures squarely to address and clearly to answer a series of distinct, though closely related and thus easily conflated, questions about mental state. My premise has been that separating these questions from one another and directly addressing each will help judges, academics, and practicing lawyers think and speak more clearly and cogently about confrontation analysis and the *Crawford* cases, just as separating and directly addressing analogous mental state questions greatly helped judges, legislators, academics and practicing lawyers think and speak more clearly and cogently about mental state in criminal law.