

Classics in Psychiatry and the Law: Francis Wharton on Involuntary Confessions

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Philadelphia attorney Francis Wharton was a key intellectual figure in linking the sciences of medicine and law. In 1860, he published a monograph on involuntary confessions, which represented the closing chapter of Wharton and Stillé's *Treatise on Medical Jurisprudence*. He had already published *A Monograph on Mental Unsoundness* in 1855, the first book of the *Treatise* in its first edition. Wharton was convinced that many criminals had an inner compulsion to confess or to be caught, explained as divine jurisprudence. His remarks on confessions include a typology spanning psychodynamics to police tactics, using contemporaneous, historical, and literary examples. This remarkable document provides insight into the dynamics of unintended and involuntary confessions and is compatible, in part, with current scholarship. The author contrasts Wharton's schema with those of his English predecessor Jeremy Bentham, the psychoanalyst Theodore Reik, and others, and concludes that it represents an important transition toward a psychological approach to the criminology of confessions.

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In the mid-19th century several efforts were made to systematize medical jurisprudence—the interface between medicine and law. Prominent among the subjects treated was the jurisprudence of insanity (severe mental illness) in relation to specific capacities. On the medical education front, there were works such as T. R. Beck's *Elements of Medical Jurisprudence*¹ and Isaac Ray's *A Treatise on the Medical Jurisprudence of Insanity*²; whereas on the legal side there was *A Treatise on Medical Jurisprudence*³ by attorney/minister/educator Francis Wharton (1820–1889; Figs. 1 and 2) and his medical collaborator, Dr. Moreton Stillé. The Wharton and Stillé *Treatise*, first published in 1855, contained as its first book Wharton's *A Treatise on Mental Unsoundness*.⁴ Moreton Stillé died in 1855; the second edition of *A Treatise on Medical Jurisprudence* (1860) was edited by his older brother, Dr. Alfred Stillé. Throughout his life, Wharton retained a keen interest in the psychological dynamics of criminal behavior.

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Though Wharton and Stillé's *Treatise* enjoyed several editions and wide readership and many of his legal works remain in print, it has been observed that Wharton is seldom cited in contemporary scholarship.⁵ The most significant scholarly reviews of his psychological work have been Janet Tighe's doctoral dissertation⁶ and article on the insanity defense.⁷ As Tighe⁷ abundantly illustrates, Wharton lent substantial weight, from the legal side, to the birth of American forensic psychiatry in the mid-19th century. Not satisfied with the works of Beck and Ray, he was the first American attorney to produce a volume on the insanity defense, “stereoscopically” synthesizing jurisprudence.⁷ The larger body of work is prodigious, spanning all essential areas of law, often in multivolume format.⁵ Siegel⁵ points out that Wharton's spiritual beliefs are evident in his views on moral and legal matters. Thus, he endorsed the concept of free will and looked at human qualities as evidence of the existence of God; for example, in the conscience. This, in turn, would inform his views on confessions.

Wharton split off about 30 pages from his second edition of the Wharton and Stillé *Treatise*⁸ and published simultaneously *Involuntary Confessions, A Monograph*.⁹ As we shall see, the idea of a perpetrator's psychological state in relation to wrongdoing



Francis Wharton
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Figure 1. Francis Wharton at age 34. From Helen E. Wharton, ed., *Francis Wharton: A Memoir*, Philadelphia, 1891.

was a crucible for the synthesis of medical, legal, and spiritual dynamics. This is Wharton's modest explanation for the confessions monograph, dated September 10, 1860:

The following pages are taken from the closing chapter of the second edition of a treatise on Medical Jurisprudence, now issuing from the press, under the editorship of Dr. ALFRED STILLE and myself. They are placed in the present shape for independent distribution, as bearing on one or two branches of study distinct from that of the book in which they primarily appear [Ref. 9, front matter, typography original].

In the monograph, he argues that humans have an inherent tendency to resolve wrongdoings, for exam-

ple, by slips of behavior or an urge to confess. Thus, starting from the premise that criminals are often compelled to unburden themselves, Wharton suggests various scenarios in which confessions occur. His manifest goal is to aid in crime-solving, not to find reasons to suppress confessions due to a suspect's incompetence or police coercion, as we might do today. In that sense, he may have viewed himself as a psychological detective. But more, he needed to know how persons reconciled their deeds with God, the creator of conscience.

The monograph was published a few months later in the *American Journal of Insanity*.¹⁰ (Because this version is more easily accessed, quotations will be cited from it, rather than from Ref. 9) In the first paragraph of the monograph, Wharton sets up his subject elegantly:

This conflict between the true and false arises in all cases where guilt is attempted to be screened by human contrivance. The mind involuntarily becomes its own prosecutor. It drops at each point evidence to prove its guilt. Each statement that it makes—each subterfuge to which it resorts—each pretext it suggests—is a witness that it prepares and qualifies for admission on trial. In this, and in the universality of the psychological truth that guilt cannot



Figure 2. Francis Wharton, later years. From Helen E. Wharton, *Francis Wharton: A Memoir*, Philadelphia, 1891.

keep its counsel, we may find an attribute of divine justice by which crime is made involuntarily its own avenger. Man cannot conceal the topic of a great crime, either anticipated or committed. It sometimes leaps out of him convulsively in dreams; sometimes a false cunning leads him to talk about it to know what suspicious may be afloat; sometimes that sort of madness which impels people to dash themselves from a high tower, forces him to the disclosure. Even his silence tells against him; and when it does not, the tremor of the body supplies the place of the tremor of the mind. Nor can he keep peace with his associates. There is a disruptive power in a consciousness of common guilt, which produces a hatred so demonstrative, that if it does not supply the proof, it attracts the suspicion of a great wrong having been done [Ref. 10, p 250].

Wharton's formulation of the dynamics of confessions was informed by religion, psychology, and a keen understanding of the criminal justice process. Unlike Jeremy Bentham, who was merely descriptive in his litany of confession types,¹¹ Wharton seemed compelled to find deeper sources of self-incriminating behavior. However, instead of appreciating the inherent coerciveness of the interpersonal field of detective-suspect, he was satisfied to categorize pathways to "divine justice." Unfazed by the possibility that reductionist dynamics might invalidate all confessions, Wharton viewed internally motivated confessions as pathways to resolving crimes.

Wharton's Taxonomy of Involuntary Confessions

Wharton believed in the integrity of conscience such that, one way or another, a criminal will broadcast guilt before, during, or after the crime. Before the crime, he speaks of intimations, which lead back to the planning stage of the act. During the crime, certain behaviors give away guilt feelings. And after the crime, many perpetrators leave clues that indict them. It is in the latter group that we find involuntary confessions. Wharton believed one could infer guilt from unintended, involuntary acts that are pregnant with self-incrimination. As we shall see in Wharton's classification, he is not endorsing the idea that involuntary confessions be given less weight than others; nor does he give much attention to the detective side of the equation in determining voluntariness versus coercion. Instead, he wants us to focus on the details of a suspect's behavior and then to assign jurisprudential weight as appropriate.

Prior to Crime: Preparations and Intimations of Criminal Behavior

Often, Wharton asserts, the criminal tells us, if one is alert to it, of the culpable acts to follow: "There is, in almost every kind of crime, a swelling of the upper soil which shows the subterranean road which the criminal traveled" (Ref. 10, p 251). Very few criminals are clever enough to escape detection, if one looks closely enough. After all, poison must be obtained or a gun secreted on the person; research must be done, and so forth. The evidence is individualized: "Intimations are to be tested by the character of the party from whom they emanate" (Ref. 10, p 253). Wharton plays the role of detective-cum-psychologist. Here, he looks at the antecedents of criminal behavior that give away a perpetrator's identity or intent; these are a foreshadowing of the crime to come. Intimations of criminal behavior come in several forms.

Direct

This would be analogous to what we would call terroristic threats. Wharton notes that, in feudal times, a baron could make threats against his enemies with impunity. By 1860, direct threats made in the context of a lawful society would be self-defeating and thus were rarely seen. Quoting Bentham, "The tendency of such a prediction is to obstruct its own accomplishment" (Ref. 10, p 254).

Ambuscade

Here, the victim is taken by surprise, often having been lulled into a false sense of security. Citing an ambush of the Huguenots in which the 19-year-old Charles IX pretended to befriend the wounded Admiral Coligny, Wharton notes: "Here was the Medicean mask—the very luxury of artifice in which Catherine of Medicis enveloped herself when about to commit a crime; and yet, from its very excess, it was a premonition" (Ref. 10, p 255).

Precautionary

The perpetrator in these cases makes statements to the effect that the victim would die of illness; for example, that the intended victim was "past all recovery."

Prophetic

Some murderers are animated by a supernatural, fanatical feeling. Wharton says, "Murderers, especially in the lower walks of life, are frequently found busy for sometime previous to the act in throwing

out dark hints, spreading rumors, or uttering prophecies relative to the impending fate of their intended victims” (Ref. 10, pp 256–7). Recalling an 1845 murder case in Philadelphia: “Zephon . . . had got an old fortune teller . . . of great authority . . . to prophesy the death of the deceased” (Ref. 10, p 257).

Overacting

Here, the perpetrator becomes “singularly demonstrative” before others, thus arousing suspicion: “So industrious declarations of friendliness and fairness are not unfrequently [*sic*] thrown out prior to an assassination” (Ref. 10, p 257).

Evidence at Crime

Out of anxiety, the criminal broadcasts clues to culpability. Wharton emphasizes the difficulty in maintaining a lie, but also suggests that there is an unconscious need to be caught.

Incoherence at Crime

This refers to mistakes made during the commission of a crime, often in regard to avoiding detection. Using the analogy of how difficult it is for an actor to assume a part on stage for a mere hour, Wharton notes that the criminal must do so constantly and in all circumstances.

Self-Overreaching

In this instance, the perpetrator does something obvious, such as writing letters disavowing knowledge of the crime, or issuing correspondence that is meant to be only for the co-conspirators’ eyes but is preserved for others to read.

Evidence After Crime: Involuntary Confessions

Confessions of wrongdoing, according to Wharton, leak out of the criminal uncontrollably. The drive to confess appears to have a life of its own. The criminal portrayed here is tortured by guilt. Although the criminal’s intent to conceal an evil deed is overborne, there is no indication that the confession itself would not stand as evidence at trial. That is, Wharton did not predict a constitutional challenge to a confession; this would take another century. In the examples that follow, he relies on murder scenarios as illustrations.

Convulsive Confession

In this section, Wharton assumes that persons who commit murder possess a conscience. Quoting Daniel Webster, Wharton begins:

The guilty soul cannot keep its own secret. . . . The secret which the murderer possesses soon comes to possess him. . . it overcomes him, and leads him whithersoever it will. . . . It has become his master. . . . It must be confessed, it will be confessed; there is no refuge from confession but suicide, and suicide is confession” [Ref. 10, pp 264–5].

Although one can see how the extreme guilty conscience can contribute to suicide, it appears that the ordinary psychopath, for whom these dynamics are not relevant, was not acknowledged. Wharton gives no indication of the frequency of suicide-as-confession. It is most likely an example of his attraction to poetic justice and spiritual redemption.

Citing the case of Nancy Farrer,¹² a mentally ill child nurse accused of poisoning a boy, Wharton shows how the dynamic of guilt works its way into overt behavior:

Thus, after the death of “Johnny,” one of the children whom she was employed to nurse, and whom she had poisoned, she was found “excited and anxious if any two were talking, to get close to them, and to wish to know what they were saying.” And then came one of those strange convulsive confessions . . . in which the truth is thrown out as if it were too hot for the heart to hold, and yet at the same time put forth as if it were a joke, so as to relieve the mind of him who speaks from the solitude of this awful secret, and yet not too boldly proclaim guilt. Nancy told a witness after the death of one of the children, “how lucky she was with sick folks; they all died in her hands.” The witness saying, “May be you killed them,” she said, “May be I did.” “She seemed to be joking-seemed to be smiling-seemed to be very careless about it” [Ref. 10, p 287].

Farrer’s case had been appealed because she had been convicted amid evidence that jurors had access to information about her previously poisoning a child. On retrial, she was found insane.

Delirium

Wharton gives the example of a murderer in Ohio named Stringfellow, who was suspected but not charged. He became ill two years later and became delirious, often saying the victim’s name and divulging secrets tying him to the crime. Stringfellow recovered and was charged with the crime. Nowadays, the absence of conscious awareness of self-incrimination would give rise to evidentiary challenges. A common example would be when the police take a statement from a person who has just come out of surgery and is vulnerable to waiving rights.

The Dreaming State

This type is more common than delirious confession. Wharton recalls a Swiss case of a man who

killed his coworker in a brewery and threw the body into a fire under a boiling vat. Years went by and the man thought it was remarkable that he had gotten away with it. Then another co-worker heard him say in his sleep, "It is now fully seven years ago . . . I put him under the boiling vat." The perpetrator was apprehended and finally confessed before he was executed. Wharton notes that persons who are troubled by guilt often have restless sleep: "That guilt takes the dreaming state as a peculiar site for the exercise of its retributive retrospections, is a familiar psychological fact" (Ref. 10, p 266). As a general rule of culpability today, a sleeping person would not have the capacity for a criminal act, so evidence derived during a parasomnia (somniloquy) could similarly be excluded or at least have its reliability questioned.

Delusions

Wharton cautions that, before a confession can be accepted as valid, it should be tested, because delusions can produce false confessions. Delusions in Wharton's parlance may be sane, insane, or somewhere in between (the delusions of witches). A sane delusion can occur under the influence of great guilt. Wharton cites the case of the Boorn brothers from Vermont who, in about 1815, had a fight with their brother-in-law Colvin, "a partial lunatic." For all they knew, Colvin could have died after they left him; but he survived and moved to the Midwest. Several years later, the Boorns' uncle began to have dreams to the effect that Colvin had been murdered and that his remains were in a certain place. Searches produced clothing and bones and, under mounting pressure, one of the brothers confessed to murdering Colvin—a fabrication, proved when Colvin turned up just in time to prevent the Boorns' execution. Forty years later, one of the Boorns was arrested on an unrelated matter. His delusion had persisted to the degree that he considered Colvin's reappearance a fraud. Wharton concludes: "But the retention of this delusion for forty years in the criminal's breast shows the enduring effect on the nervous system of the guilt of blood, even though that guilt was not consummated" (Ref. 10, p 268).

The delusions of witches, Wharton explains, derive from contemplating sinful acts. The more the sufferer broods upon the imaginary act, the more real it becomes and the more likely the "witch" will admit to all manner of human accidents. A retributive energy takes over, even though there may be no evi-

dence of wrongdoing. Wharton acknowledges that the cultural climate condoning the execution of witches was wrong, pointing to an underlying dynamic:

Now the policy which permitted the execution of these poor wretches, without proof of a *corpus delicti*, was no doubt barbarous and wrong. But this should not lead us to refuse to recognize as a part of the divine economy of rewards and punishments, this very self-punishing incident of that criminal purpose on which the mind has consciously and determinedly revealed [*sic*] " [Ref. 10, p 272].

Wharton considers insane delusions to be:

. . . incidents of that divine economy which makes a superstitious foreboding, and sometimes a monomaniac realization of the consequences of crime, one of the results of the criminal conception. . . . Sometimes, the act is one of imagination only, but is talked out in the gross familiarity of senility. But, however this phenomenon may exhibit itself, it is a part of that grand system of Providence, by which guilt is lodged in the *intent*, and by which, as a compensation for human law, which judges the overt act alone, the intent incloses in itself its own retribution [Ref. 10, pp 270, 273, emphasis in original].

When someone in a state of mania utters a delusive confession, the confession must also be taken seriously, since not all insane confessions are false ones. In other cases, Wharton observes, a manic person may admit to a murder, yet the named victim is alive. The third variation is the madman who confesses to gain fame: "So the publication of a conspicuous homicide is apt to generate a series of pretenders to the honor of being the perpetrator. Why should there not be several Charlotte Cordays among a thousand patients, as well as several Robespierres?" (Ref. 10, p 274).

Other Indicia and Dynamics of Guilt

Remarkably thoughtful and comprehensive, Wharton's schema extends to oddities of human behavior that give rise to false confessions. For his era, his formulations are quite psychological, although there is no elaborated theory of behavior. Instead, we have vivid descriptions of individuals or groups who confess in the service of dynamics other than taking responsibility for a crime.

Epidemic Confession

In this strange phenomenon, known for hundreds of years, groups of individuals confess to crimes: "Whole communities, acting under that singular fascination which mind in the aggregate often acquires over mind in the individual, have thus come forward in sackcloth and ashes, and accused themselves some-

times falsely of the act, sometimes perhaps truly of the intent” (Ref. 10, p 274). A recent example had been sent to Wharton by a British naval official, Mr. Finlaison. Six sailors all confessed to mutiny, although not one of them had ever been on the ship or seen the captain. The official reasoned that these men were homesick (quoting Finlaison): “When long on a foreign station, hungering and thirsting for home, their minds became enfeebled; at length they actually believed themselves guilty of the crime over which they so long brooded, and submitted with a gloomy pleasure to being sent to England in irons for judgment” (Ref. 10, pp 274–5).

Obtaining Notoriety

Wharton describes what amounts to a variation of factitious disorder: morbid vanity mixed with hypochondriasis. The most benign is the “sentimentalist,” who gets attention for having had sad experiences. In the next stage, experiences are fabricated. In the process, sometimes confessions to crimes are necessary to color the story. Persecutions are typical stories of the upper classes, whereas others speak of more lurid affairs.

Method of Suicide

Weariness of life (*tædium vitæ*) may lead to suicidal ideas. Seeking death, “the frame of mind which thus seeks it is very apt to engender phantoms of blood-guiltiness which soon appear as realities” (Ref. 10, p 276). Wharton uses the example of the deserted woman who falsely confesses to infanticide, without having borne a child (quoting a case reported by Lord Clarendon): “I fling myself, not into the river, nor into the abyss, but upon the scaffold” (Ref. 10, p 277). Wharton urges circumspection in regarding confessions as true. The first test is “absolute proof of the *corpus delicti*. Then, if there was a crime, one must connect it to the person confessing: “We must examine into his condition of mind, and see how far insanity, or remorse, or bravado, or weariness of life, or delusion, may have influenced him” (Ref. 10, pp 277–8). For this advice, Wharton relies on Jeremy Bentham, who is discussed below.

Nervous Tremor

Wharton cites the old superstition that a corpse would bleed when touched by the hand of the killer; the killer’s hand, in turn, would tremble. It is important that the murderer not be prepared for the encounter: “The murderer who might, if a due interval

be given, nerve himself to the work, often collapses if suddenly brought into contact with the deceased. The old result is reversed; for in former times it was the dead man that gave sign: now it is the living” (Ref. 10, p 279). Such a stunt perpetrated by detectives today would draw criticism both as coercive and scientifically unsupportable. Indeed, there is an argument to be made that detectives’ testimony about the suspect’s demeanor should be barred under the Fifth Amendment’s exclusionary rule.¹³ Similarly, a suspect’s silence is not considered evidence of guilt, since it is a constitutionally protected means of shielding oneself against the state.¹⁴

Morbid Propensity to Recur to Scene and Topic of Guilt

Wharton insists that the urge to confess is nearly irresistible:

[Criminals] are ever on the precipice-brink of discovery, and often comes this convulsive impulse, to throw themselves, blood-stained and confessing, into the chasm below. And even when this is not consummated, there is a strange fascination which makes them flit over the scene and topics. The impulse is to get as near to the edge as they can without toppling over” [Ref. 10, p 285].

This unlikely scenario appealed to Wharton’s poetic sensibilities.

Permanent Mental Wretchedness

Here, Wharton finally admits that the majority of crimes “are committed by men whose hearts are so rigid and callous as to give no sign of a troubled conscience. . . . No man is suddenly a great criminal. He becomes so, it is argued, by long and slow processes, during which all the impressible elements of the heart are hardened and solidified” (Ref. 10, p 288). Apparently, he did not consider what we would later regard as a psychopathic personality—that is, a person born without an effective conscience. Nevertheless, by association to place or person, there may be an involuntary remorse expressed. Such a person may become suddenly suicidal with guilt. This type of guilty reminiscence is different from ordinary recalled grief: “The latter reproduces merely a past memory, the former a present reality. The recollection of the latter is, I WAS IN TIME PAST so and so. The discovery with the former is: I AM NOW A CRIMINAL; I DID THAT DEED OF GUILT ” (Ref. 10, p 290, typography original). Such a realization has three potential outcomes: a confession, continued misery, or the “stupor or hardness” of old criminals.

Animosity Among Confederates

The keeping of secrets among criminal confederates may give rise to paranoia and further violent acts. Wharton characterizes the scenario: “He knows my secret, and I must dispatch him” and “Because he fears my betraying him, he will try to get rid of me” (Ref. 10, p 290). Although this is an obvious point, Wharton says there is a subtler dynamic, “that passionate love, producing crime, is followed by passionate hatred” (Ref. 10, p 291). Ultimately, guilt feelings poison the result of murder, he insists, citing, among other examples, the lovers in Robert Browning’s poem “Pippa Passes.” Here, after an Italian woman and her German lover together kill her husband, they experience love, but amid their “flush of delight at the removal of the obstacle to their undisturbed enjoyment, a country girl passes under the window singing a home song which brings them back to the reality of the crime they have committed. Then fierce love is followed by fierce hatred, and death by death” (Ref. 10, pp 291–2).

The Spiritual Connection

Wharton was an ordained Episcopal priest and a believer in redemption. Part of the redemptive process would be for a criminal to come to terms with the wrongfulness of the criminal act. God already would have designed the moral template, and it would then be up to the workings of the criminal’s conscience to achieve harmony with it. Wharton had published *A Treatise on Theism and on the Modern Skeptical Theories*¹⁵ just prior to *Involuntary Confessions*. In the former book, he uses the fact of a conscience, which seemingly has a life of its own, to argue the existence of God. For example:

Conscience is incessant in its action. We may be only conscious of that action at particular moments, but, whenever the curtain which covers it is lifted, we see its machinery, as we see that of a steamer when the engine door is unclosed, moving with an activity none the less incessant, from the fact that it had been unobserved. . . . It is sufficient here to advert to the effect of discovery of guilt by others as recalling the consciousness of remorse in its pristine vigor in the criminal himself, as well as to the similar effect produced by coming suddenly upon the spot where a crime was committed, or by having any of the implements or incidents of that crime recalled. Conscience, observed or unobserved, proceeds unceasingly in its task of pronouncing and registering a decree of approval or condemnation on each particular act. This process of registry is in nowise affected by its escaping our notice. It is here that we find one of the chief retributive elements of conscience. It places the soul under recognizances to keep the peace; and, on each violation, judgment is entered for a specific penalty. We may not be

conscious of this, but the judgment is, nevertheless, entered, and proceeds to accumulate interest until the period of execution arrives [Ref. 15, p 16–17, italics in original].

Tighe⁶ points out that Wharton’s broad-minded approach to jurisprudence derived from his multifaceted career and education: religious commitment, autodidactic knowledge of psychology, and lay experience with individuals with “nervous” problems. Wharton closes his *Involuntary Confessions* monograph with advice about the difference between earthly authorities’ (police) and our courts’ reliance on a higher source of morality:

So it is that while the court-house derives its sanctions from this Supreme Power, it contributes to the proof of the existence of the Power an independent share of evidence. No witness can be sworn until he declares his belief in a future state of rewards and punishments; no trial can take place without strengthening the evidence on which this state rests. Human justice falls back on divine for its support; divine justice appeals to humans as its witness. The penal precepts of the common law professedly find their basis in the dictates of an enlightened Christian conscience; the divine sanction of this conscience is nowhere so fully shown as in the course of a trial at common law. The present discussion will not be without its value, if by illustrating these truths, it shows how close the connection between the divine law and the human; and how the science of jurisprudence, while it draws down its strength from heaven and earth, may still, if rightly studied, lead its votaries from earth to heaven [Ref. 10, pp 295–6].

Bentham on Self-Incrimination

Jeremy Bentham (1748–1832), Professor at University College London,¹⁶ (Fig. 3), was a commentator on law and medicine.¹⁷ Wharton relied on Bentham’s wisdom, but departed from his predecessor’s secularity. Bentham had his own taxonomy of confessions. For example, in *Treatise on Judicial Evidence*,¹¹ he writes:

When a man freely, spontaneously, and not before a tribunal, makes declarations which tend to fix some crime upon him, two questions naturally arise: 1. To what can such a revelation be ascribed? 2. How does it come to the knowledge of the tribunals?

To answer the first of these questions, is to ascertain the motives which may lead an individual to make declarations prejudicial to himself. To answer the second, is to point out the causes why such declarations are divulged, the particular incidents which bring them to the knowledge of the judges.

A man may thus give testimony against himself—

1. *From participation as an accomplice.*—Conversations between accomplices about the time, the place, the means, or other circumstances of a crime, whether projected or already committed.



Figure 3. Jeremy Bentham's "auto-icon" at University College London (Ref. 16, between pages 78 and 79). Photograph taken in 1948. Courtesy, The Wellcome Trust Centre for the History of Medicine at University College, London.

2. *From mere confidence.*—The criminal, whether from interested views, or in the hope of finding a fellow feeling, makes disclosures relative to the crime to a person who had no hand in it. . . .

3. *From direct boasting.*—The supposed delinquent, vain of his offense, voluntarily relates it, with more or less detail, to a person who, he expects, will admire him and join in his feelings. . . .

4. *From imprudent boasting.*—That is, boasting without foreseeing its consequences. Animated by the same motive of vanity or sympathy, as in the other case, a man relates some deed of his own, which, though not criminal itself, turns out to be a proof of the principal fact.

5. *From mere imprudence in conversation.*—Hurried on in a recital, without any intention to boast, a man relates some fact regarding himself, without perceiving that this incident has a necessary connection with the principal fact, that is, the fact of his crime. . . .

6. *From an unadvised desire to exculpate himself.*—The uneasiness of the guilty is at first his greatest enemy. If he believes that he is exposed to the imputation of having committed the crime, or that suspicion is, already directed against him, he adopts indirect means of justifying himself; he introduces into his conversation facts, which he thinks

fitted to remove suspicion, and which produce an opposite effect.

7. *From repentance, or the distraction of terror.*—It may happen, that the criminal, overwhelmed by anguish and remorse, may seek relief in confession, whether made confidentially to his friends, or those he takes to be his friends, or even with the intention that these acknowledgments shall be used in evidence against him.

8. *From the influence of a higher interest.*—A man, in pursuit of some gain or advantage, discloses a fact which becomes a proof of his crime . . . [Ref. 11, pp 157–9, typography original except ellipses].

Evolving Formulations

It appears that Bentham understood that criminals often lack common sense and that they betray themselves with either guilt or hubris. In contrast with Wharton's later formulations, Bentham's observations are not infused with a spiritual dimension and lack a psychodynamic trajectory. Wharton made similar observations and framed them spiritually and psychologically.

Bentham was aware that official misconduct in the service of obtaining confessions was rampant—and unrepentant, as the following example shows.¹⁸

A soldier [in 1821], of the name of Fischer, was apprehended on suspicion of having robbed and murdered Kügelchen, the most celebrated of the German painters of his day. The court, believing that the prisoner denied his guilt from mere obstinacy, consigned him to a loathsome dungeon, to extort a confession. He held out for a considerable time, but at last confessed. Before the sentence was executed, circumstances came out, which directed suspicion against another soldier, Kalkofen. The result of the new investigation, was the clearest proof of Fischer's innocence; the other was broken on the wheel, and Fischer, liberated, free from all suspicion, by the very judges who had thought fit to torture him into a false confession. He said, that he confessed, merely to be released, even by an unjust execution, from the intolerable sufferings of a mode of confinement which preyed equally on the body and the mind [Ref. 18, p 59, footnote].

Here Bentham articulates what everyone knows—or should know—that torture produces confessions of dubious reliability. Though the reality of police misconduct did not escape Wharton, apparently he accepted the problem of coerced confessions as self-evident. In the 20th century, refinements in criminal process and psychology would sharpen the focus on confessions and their meaning. Whereas evolving formulations, notably psychoanalytic, concerned the individual psychology of how and why suspects confess, it was not until the post-*Miranda*¹⁹ era that social psychological concepts and research broadened our understanding.

Twentieth-Century Formulations

In the early 20th century, suspects were expected to give confessions irrespective of mental state or capacity. For example, Hoban, in a 1912 review article, takes this position:

It is universally admitted that all persons capable of committing a crime can confess. The question in the cases of infants is not so intricate, since the *Capax doli* [capacity to deceive or know right from wrong] can generally be determined as a question of fact. In the case of a confession of an intoxicated man, there seems to have arisen some conflict of opinion, but it is generally held that intoxication does not *per se* render the confession inadmissible, but only goes to its sufficiency; yet it was held that the confession of one, under the influence of liquor furnished by the arresting officer, was inadmissible [Ref. 20, p 351, footnotes omitted].

Alcohol effect is an example of an exogenous factor having bearing on the functioning of the mind and official coercion an obvious factor in the analysis of the reliability of a statement. Yet there are instances in which the workings of the mind could produce false or unreliable data—not simply a function of an insane mind. The 20th century gave rise to concepts of neurosis and the unconscious, shifting the locus of the compulsion to confess from extrinsic factors to hidden dynamics.

Psychoanalytic Theory

Freudian theory produced interest in understanding the criminal mind and the mindset of individuals with guilty consciences. With psychoanalysis came a set of tools with which to dissect the mechanisms of conscience. Such secular formulations would not have been entirely inconsistent with Wharton's, in that he considered scientific discoveries as uncovering God's work.⁵

No one took up the challenge more than Theodore Reik, who applied psychoanalytic principles to criminology and to the dynamics of the guilty mind.²¹ According to Reik:

The compulsion to confess is the unconscious tendency toward expression of repressed instinctual impulses that is modified by the influence of the need for punishment. Its result, a confession, unconsciously represents a punishment and satisfies part of the need for punishment. If the need for punishment is too great, the confession cannot be arrived at, only a substitute of the original action in which the need for punishment had its beginning . . . The universal yearning for transference, which we meet not in analysis alone, but which has found its most conspicuous form in it, can be allied with the compulsion to confess. It is as if we were constantly waiting to entrust to somebody our secret wishes and our emotional reactions to them [Ref. 21, p 251].

Re-examining historical and literary examples of neurotic criminals, he makes a convincing point that there are hidden dynamics at work within criminal justice that have no way of coming to light without psychoanalytic theory. Freud acknowledged the guilt dynamic portrayed in Shakespeare's *Lady Macbeth* (sleepwalking scene) in his discussion of "character-types" in 1916.²² Wharton also cited *Lady Macbeth* as evidencing guilt through an obvious sleep disturbance that served to inform others.

Freud himself was circumspect about using his theories for forensic purposes.²³ In his 1906 lecture at a Viennese jurisprudence seminar, he noted the word-association research of Jung and his own observations on parapraxes as areas of interest in the truth-finding process. The affective cathexes associated with mental complexes may manifest in a person's reaction time to a stimulus word, and hence to a "psychical self-betrayal." Then, suggesting that psychoanalysis may be a powerful tool in truth-finding, he wryly tells the attendees: "The task of the therapist. . . is the same as that of the examining magistrate. We have to uncover the hidden psychical material; and to do this we have invented a number of detective devices, some of which it seems that you gentlemen of the law are now about to copy from us" (Ref. 23, p 108). Freud emphasizes here that the technique of psychoanalysis is only practicable in persons with neurosis. That is, its use is to uncover unconscious motivations and barriers to awareness that would not be present in the criminal, who would consciously resist the process.

Regarding confessions, Freud cautions lawyers about using tests such as word association:

In your examination you may be led astray by a neurotic who, although he is innocent, reacts as if he were guilty, because a lurking sense of guilt that already exists in him seizes upon the accusation made in the particular instance. . . . It can be that he has in fact not committed the crime with which you have charged him but that he has committed one of which you know nothing and of which you are not accusing him [Ref. 23, p 113].

Concluding his lecture with more cautionary words, he suggests that, due to the ambiguity inherent in psychological experiments, an expedient solution would be to conduct the testing over a period of years "*without their results being allowed to influence the verdict of the Court*" (Ref. 23, p 114, italics in original). Thus, Freud touches on the question of admissibility of clinically derived data, or, to use Strachey's locution, "any half-baked application of psycho-

analytic theories in legal proceedings” (Ref. 23, p 102). This renders Wharton’s formulations, to a degree, amateurish in their reliance on folklore, rather than critically considered science.

As Strachey points out in the notes to Freud’s 1906 lecture, Freud concerned himself little with criminology. However, in 1930, Freud was asked by Viennese law professor Josef Hupka (spelled Kupka by Strachey) to comment on the possible misuse of psychoanalytic theory in the prosecution of a young man, Philipp Halsmann, for patricide.²⁴ The prosecutor, having convicted the defendant once and seen the matter reversed, turned to the medical faculty of Innsbruck to render an opinion that the defendant had an Oedipus complex that explained his homicidal behavior and subsequent repression; this in the absence of any significant evidence against him. Following the death of his father on a Tyrolean hiking trail, an apparent homicide, the young man appeared bewildered and unable to give a satisfactory explanation for the events. The prosecutor, using contemporary psychological theory, implied that the shock of the event caused the young man not to remember it. The prosecution experts’ report formulated the defendant’s amnesia as a neurotic defense mechanism. Was the young man simply innocent or did his neurosis render him incapable of remorse? This situation is reminiscent of Freud’s admonition to the legal students in Vienna—that a person can appear guilty, yet be innocent of the instant offense. There was a second conviction and more public outcry. Following Hupka’s editorials, Freud published a letter in the *Neue Freie Presse* (Vienna) that was republished in 1931 and appears in his *Standard Edition*.²⁵ In the brief critique of the medical faculty’s opinion, Freud begins by pointing out that the Oedipus complex is universal. Then he counters the opinion with two basic premises: first, there was no evidence that Halsmann murdered his father and thus no reason to invoke the psychological theory. Second, the defendant was not otherwise mentally ill or neurotic and would not be subject to an analysis imputing those qualities to him. After two years in prison, Halsmann was released but not exonerated until 1973. Freud stayed out of the courtroom as he had in the 1924 Leopold and Loeb case in Chicago.²⁶ In the Halsmann critique, he uses a literary example, Dostoevsky’s *The Brothers Karamazov*, to caution against using what Wharton would term “intimations of guilt” too literally. In the novel, a son overtly shows

murderous intent toward his father. When the father is killed, the son is convicted, although it was another son who committed the crime. Freud considered Dostoevsky second only to Shakespeare in literary genius.²⁴ Literature aside, a forensic professional needs all the facts before relying too heavily on intimations as indicia of culpability.

Social Science and Confessions

Social science research has exploded the jurisprudence of confessions, far beyond what Wharton might have envisioned.^{27–32} The problems inherent in contemporary interrogation technique have been pointed out recently by Leo.³³ For example, a vulnerable individual may appear to fit the profile of a guilty person, causing detectives to attribute guilt. When a confession is obtained, the investigation may be closed. This problem is barely countenanced in publications on the Reid interrogation technique, the best known method for extracting confessions.³⁴ However, Inbau and colleagues³⁴ point out that a person who is emotionally upset can cause an investigator to mistake affect for guilt. The Reid technique relies on the premise that guilty persons often want to unburden themselves. In that sense, there is facilitation, without overreaching, of the natural tendency that Wharton and Reik endorse, albeit for different reasons. The analysis of police overreaching can be subtle and can include testimony about police procedure, individual dynamics of the suspect, and nuances of the interpersonal field of the interrogation.

Current scientific explorations of the dynamics of false confessions are informed by social psychology. We are indebted to Dr. Gisli Gudjonsson³⁵ for a comprehensive review of the literature. From his work, we see that false confessions arise in a variety of situations and that accused persons, innocent or guilty, may act against liberty interest. Though Gudjonsson’s formulations do not wander into a Wharton-type analysis of reconciliation with God’s will, we still can see how criminal suspects behave in the specialized interpersonal sphere of the interrogation. Thus, somewhat contrary to Wharton’s ideas, interrogations, which are inherently coercive, sometimes produce truth, sometimes not.

American formulations of admissibility of confessions are based on the assumption that, without coercion by police, otherwise procedurally clean custodial statements are permitted to go to the jury. As we have seen in *Colorado v. Connelly*,³⁶ the fact that a

suspect may confess for psychotic reasons does not imply that the statement is involuntary, at least by constitutional standards. Thus, if the police are but passive recipients of incriminating information, there may not be a civil rights issue. Nevertheless, false or incompetent statements admitted as evidence may lead to serious miscarriages of justice.³³ State legislatures have the discretion to take into account subjective aspects of a confession, especially in light of competency to waive *Miranda* rights. Concerns surrounding expert testimony have recently been reviewed by Watson and colleagues³⁷ and by Davis and Leo.³⁸ Whereas before the 19th century, confessions were accepted at face value, precluding the need for a trial,²⁷ current research underscores the subtlety of the interactions between detective and suspect, which may bear on the reliability of the statement.³⁸ The degree to which expert witnesses are permitted to comment on the effects of the interrogation on the suspect's will varies by jurisdiction.³⁷ Testimony on the dynamics of confessions may be especially relevant in postconviction cases. According to The Innocence Project, 25 percent of convictions reversed by DNA evidence included incriminating statements, outright false confessions, or guilty pleas.³⁹

Discussion

Wharton was not troubled by the involuntary (unintended) nature of some confessions, as they arose through a natural psychology and not by external coercion. There is no evidence in his 1860 monograph, however, that he favored coerced confessions, and he had read Bentham on the subject. The privilege against externally compelled self-incrimination developed during the fall of ecclesiastical law in England during the time pilgrims fled to America. This right was not present in the Magna Carta, but was among the newly granted civil rights of British subjects and appeared among several colonial constitutions before its appearance in the Bill of Rights in 1789.⁴⁰

Before Wharton's time, confessions were so important in criminal adjudications on both sides of the Atlantic that an accused's failure to enter a plea (to stand mute) was met with torture or death by pressing (*peine fort et dure*).⁴¹ However, confessions were generally regarded as a beneficial product of conscience, not brought about by force. This practice was unlawful in America, although there was at least one such execution in connection with the Salem

witch trials.⁴⁰ In Bentham's typology, there were also loose-lipped confessions or revelations caused by character flaws, for example, arrogance. It was not until Wharton's treatise that we see a psychological approach to the forces operating on individual suspects. The contemporary discussion of terrorism and "waterboarding" acknowledges that torture is likely to produce unreliable information, though the prohibition of torture has deeper moral and legal roots.⁴²

Wharton in the Crossfire

By the time of Wharton's treatise on confessions, the American tradition of protecting citizens from self-incrimination was well established. His analysis of false confessions, like Isaac Ray's 1838 *Treatise*,² retains vibrancy and freshness. The fact that the *American Journal of Insanity* reprinted attorney Wharton's work is remarkable. In the same issue, Wharton and Stillé's revised *Treatise*⁸ and the late T. R. Beck's revised (by Gilman) work on medical jurisprudence were reviewed.⁴³ The *Journal's* editor in 1861 was John P. Gray, who replaced T. R. Beck. Whereas the anonymous book reviewer (presumably Gray) elevates these authors to Olympian status, placing them in a distinguished lineage of jurisprudence scholars, no mention of Isaac Ray's work is to be found. It is well known that Ray and Gray occupied opposite poles of the philosophical debate over the existence of moral insanity, with Ray its champion and Gray applying the *coup de grâce* with his testimony at the 1881 trial of Guiteau, President Garfield's assassin.^{6,44,45} Ray had died earlier in 1881.

Gray was firmly entrenched in the idea of free will and against heretical views expressed by transcendentalists and phrenologists. In his anonymous review of Ray's *Mental Hygiene* in 1864,⁴⁶ Gray criticized many aspects of his colleague's philosophy, concluding:

Aside from the one fatal doctrine [moral insanity], so persistently urged as that even if true it must perplex and deter the reader, we can only speak ill terms of unqualified admiration of the whole book. As it is, we confess to a feeling of impatience that so much matter of the highest importance to the welfare of community should be deprived of its practical value by a union with the false philosophy of a past age [Ref. 46, pp 349–50].

Wharton derived much of his early understanding of moral insanity from Ray's writings, but moved closer to Gray's position against moral insanity during the revisions of his textbook.⁶ The concept of moral in-

sanity had become, in some circles, code for depravity (psychopathy). Ray, meanwhile, was critical of Wharton's methods in an 1856 review of *Mental Unsoundness*; in the book, Wharton criticized Ray for a paucity of legal citations.⁴⁷ Ray's concern, among others, was that Wharton's grasp of psychiatry was insufficient to choose which authorities to cite (he cited all). As Tighe⁶ illustrates, Wharton's views toward moral insanity became more negative with each edition of his *Medical Jurisprudence* (containing *Mental Unsoundness*), thus cleaving away from Ray's point of view. This divergence is evident as early as Wharton's second edition in 1860, and by the 1873 edition, the anti-moral-insanity view was the consensus.⁶ By 1873, Ray had won a small victory by helping to shape the New Hampshire Rule for the adjudication of insanity. Here, the state would not define insanity as a matter of law. Instead, the jury, after hearing expert testimony, would conclude, as a matter of fact, whether the defendant was insane. Although depravity alone would not qualify as insanity, New Hampshire juries were not hamstrung by the M'Naughten Rule, which had already been adopted in many American jurisdictions. Wharton felt the need to publish New Hampshire Judge Doe's entire opinion in the *Pike*⁴⁸ case for the purpose of knocking it down; a jury, he argued, would be incompetent to make a determination of insanity.⁶

For someone like Gray, to consider the possibility of psychological dynamics leading to false confessions smacked of moral insanity, that an individual could be overcome by impulses, perhaps not even be aware of them, and lose the power of reason. There was no psychoanalytic theory yet, only a deistic formulation. Why, then, would the *Journal of Insanity* have embraced Wharton's formulations while not mentioning Ray's? The most likely reason was that Gray viewed Wharton as a kindred spirit in terms of adherence to deistic ideas, not one given to fads and fancies in medical jurisprudence, or to coddling the depraved. The importance of religious thinking as a substratum of the moral insanity debate has been thoroughly discussed by Belkin.⁴⁹ He viewed it as a polarizing reaction to the rapid secularization of American society brought about by, among other things, a materialistic philosophy of nature irreconcilable with Christian scripture. By the end of Wharton's life, legal science had become firmly secularized.⁵⁰

Wharton's Ultimate Position on Confessions

In the 1882 edition of Wharton and Stillé's *Medical Jurisprudence*,⁵¹ there is an expansion of the section on involuntary confessions (Psychical Indications)—as usual, the final chapter in the first volume of the massive work. Although Wharton was a master raconteur, his illustrative examples, especially from Britain and Europe, were excessive. There is no significant philosophical shift in his views on confessions. The underlying dynamic in involuntary or "convulsive" confessions is that the truth works its way to the surface through acts, utterances, dreams, admissions, or suicide.

Wharton appears reluctant to admit that there are certain character types—"rigidity of heart," for example—that are associated with great crime. Even here, he stretches mightily for a materialistic theory to explain how the wicked memories of the criminal can resurface. Quoting Dr. Maudsley's 1870 formulation:

[I]n a brain that is not disorganized by injury or disease, the organic registrations are never actually forgotten, but endure while life lasts; no wave of oblivion can efface their characters. Consciousness, it is true, may be impotent to recall them; but a fever, a blow on the head, a poison in the blood, a dream, the agony of drowning, the hour of death, rending the veil between our present consciousness and these inscriptions, will sometimes call vividly back, in a momentary flash, and call back, too, with all the feelings of the original experience, much that seemed to have vanished from the mind forever [Ref. 51, p 766].

Ultimately, Wharton reprises his main theme, that confessions are part of a divine scheme that creates retributive justice through reconciliation with God, the "Chief Magistrate." Law enforcement on earth is merely an instrument of higher justice. Thus, the work of psychology takes on greater weight: "The inquiry is an important one in legal psychology, for it not only aids in the enforcement of the law, but it leads us to those supreme sanctions on which all law rests" (Ref. 51, p 766).

How can Wharton's formulations inform contemporary forensic psychiatric practice? Forensic professionals have an obligation to examine all evidence in a case for "psychical indications" of guilt; not so much to serve law enforcement as to be thorough in our approach. Wharton's anecdotes suggest a Sherlockian technique of using the minutiae of a suspect's words and deeds as evidence, the underlying theory being that the criminal has a drive (if not a compulsion) to confess. A simple clinical interview of a defendant is not sufficient to derive meaning from

an incriminating statement. The forensic professional must be aware of the totality of the evidence, which is where Wharton's advice rings true.

Although such detective work by forensic professionals may indeed serve a law enforcement function, there may be admissibility problems. For example, one can imagine an evidentiary hearing on the admissibility of a slip of the tongue or talking in one's sleep as scientific evidence of an involuntary confession. Even though such pieces of the puzzle may serve a folk-psychological or persuasive function, our theory of knowledge would not necessarily support the opinions. Among the gifts of the 19th century's Gilded Age is the power of observation and attention to detail. Whereas a reader today might consider some of Wharton's anecdotes tedious, ignoring the context and details of the defendant's story is substandard forensic psychiatry. Freud, citing Dostoevsky, quoted the line "[Psychology is a] knife that cuts both ways" (Ref. 52, p 189). A forensic professional cannot glibly interpret what appear to be incriminating data—even a confession—in the service of law enforcement. The resulting work product should not evidence a moral trajectory. Griffith and colleagues⁵² emphasize the importance of an expert's narrative. The authors insist on ethical vigilance in the reporting of narrative details that have significant implications for a criminal defendant. Wharton, as an attorney with ethics-based constraints different from ours, did not need to be concerned about using a *mélange* of science and religion in his formulations. We do not have that latitude. Thus, to cherry pick aspects of a case and seize the narrative for rhetorical purposes is disingenuous and ethically dubious, although we sometimes limit detail to protect the subject.⁵²

Ideally, the forensic expert would want to contextualize fully the defendant's behavior and motivations while maintaining scientific objectivity. This would mean, among other things, coming to terms with the source of a criminal's guilt feelings, be they spiritual or neurotic. As we practice today, it would be out of place to take the overt position that an incriminating statement is reliable because it redeems the criminal in God's eyes or that it is not reliable, because the individual is neurotic and acting out a need for punishment. Yet, these are aspects of reality requiring reflection by experts and their intended audiences. Wharton was on a different mission: to serve God and to ensure that the guilty were brought

to justice. It vexed him that Isaac Ray's activism interposed a jury to determine insanity as a factual matter in New Hampshire. An ethical expert witness, then, could be a potential roadblock in the path toward divine justice. Our job is to gather facts and to synthesize them, so that judges and juries can resonate with them and their experiences and attitudes. The harder part is to maintain objectivity and empathy without being insensitive to domains beyond the clinical and legal.

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