

# THE GREEN BAG

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of the Law

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*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities, facetiæ, and anecdotes.*

## PSYCHOLOGY AND THE "THIRD DEGREE"

Professor Munsterberg in the October *McClure's* (V. xxix, p. 614) publishes another of his suggestive articles on the relation of modern psychology to the ascertainment of truth in courts of law. In previous articles which appeared last spring in the *Times Magazine* he called attention to modern methods of testing the accuracy of memory. In this article he contends that the scientific methods of studying the association of ideas afford a means of eliciting information that a person desires to conceal more effective than the ordinary cross-examination by counsel and far more humane than the "third degree" of the metropolitan police. In some of his previous writings he has shown how persons of weak or defective intellect are frequently driven into untrue confessions by psychological effects of the police methods of examination of which the police are entirely ignorant. We are all conscious of the repulsion caused by the thought of the application of these methods though most who have had to do with detection of crime are convinced that such methods are necessary and in the long run not unfair to the criminal. We must remember, however, the real criminal is usually of abnormal mental development and peculiarly likely to be subject to subtle influences with which police are unfamiliar. The method which is here explained seems at first too simple to be uniformly effective. The examiner prepares a list of several hundred words, most of them of commonplace significance, but some of them referring to incidents or scenes supposed to be connected with the event concerning which it is supposed that information is concealed. The suspect is then told that these words will be repeated for the purpose of ascertaining what matters they call to his mind and he will be required in reply to name as rapidly as possible after each word put to him some other

word which occurs to his mind. He, therefore, understands the whole object of the process and is put on his guard. If he has anything to conceal he will naturally endeavor when the dangerous words are pronounced to name in reply some word having no apparent connection with the information which he knows is desired. If he has nothing to conceal he will give no thought to the process but will give his replies as they occur to him with uniform rapidity. It is evident, however, that if he gives thought to his answer the mental process must be slightly longer than if he answers without precaution. These differences in time may be very minute and not appreciable by the subject himself. They are said to occur with such uniformity, however, as to afford a certain test for distinguishing the words which cause embarrassment and by means of delicately adjusted electrical apparatus the relative time for reply can be accurately gauged and recorded. In the course of a long examination, moreover, a real criminal would inevitably find betraying thoughts rushing upon him for expression and a word would slip out which would cause him embarrassment and entirely disarrange the rapidity of his answers. Long experience with many instances has enabled the psychologist to deduce simple rules of detection from time variations which will put him upon the track of the matters to which the person examined is sensitive, and by repetitions of the words which are found effective a confession is frequently elicited. It was this system of experiment among many others which was tried by the author upon Orchard during the trial of Haywood last summer concerning which exaggerated rumors appeared in the press, and the article is especially interesting as recording the effect of such an examination upon so unusual a mental type as this professional criminal.

Most of us will be disposed at first to doubt the possibility of uniformly accurate results

from so simple a method and the author himself does not believe that his processes have sufficiently developed to justify their official use at present. He submits, however, that the method he uses is correct, and that only the certainty of frequent experiment is needed to make the detections so accurate as to warrant displacing our present cruder system. As we have previously called especial attention to these striking articles we feel that the present one deserves thoughtful consideration. We hope to be able to publish hereafter some of the further articles which the author is preparing upon other branches of his studies.

In the October Law Notes appears an article by Mr. Charles C. Moore under the title "Yellow Psychology," which is a sarcastic criticism of Prof. Munsterberg's article, to which the learned professor very effectively replies in the November issue. He regrets that if the judges and lawyers have known so much more about this subject than the experimental psychologists they have not relieved him of the labor of his exhaustive experiments.

#### INTERNATIONAL PRACTICE.

At the recent conference of American Republics it was proposed that admission to the bar in one country should be the equivalent of educational requirements imposed as a condition upon admission to the bar in another country. It was not, however, intended to eliminate an examination for admission if required of its own citizens by such country. Our representatives called attention to the difficulty of thus binding our several states and the results of the discussion are not as yet sufficiently definite to warrant extended comment, but the fact that lawyers of the different American jurisdictions are considering the possibility of greater freedom of intercourse is an interesting sign of the times. It emphasizes the growing importance of litigation arising out of our increased trade with our southern neighbors.

#### THE UNWRITTEN LAW.

The following editorial from the *London Law Journal* is interesting in view of the approaching second trial of Thaw.

"We have heard a great deal of late from

America of the 'unwritten law'; but the theory has been very much in the air. Now it has received actual recognition in the acquittal of ex-Judge Loring by a Californian jury. Put briefly, the case comes to this: that a father who believes, rightly or wrongly, that his daughter has been violated is justified in killing the supposed violator. This is the particular application of the 'law.' The general principle is wider, and seems to be that in certain classes of wrongs — those touching personal or family honour — the aggrieved party may, if he deems the reparation given by the law inadequate, take the redress of his grievance into his own hands. The same idea has undoubtedly had a place in the history of our own law. A husband who takes the adulterer *flagrante delicto* might — perhaps may — lawfully slay him, and, though our law in theory condemned duelling, the man who did not vindicate his honour or that of his family by sending or accepting a challenge had to suffer social excommunication. What is important to note, however, is that these sentiments were survivals — survivals from a primitive state of society. What we to-day call crimes — theft, assault, robbery, rape — were originally, as Sir H. Maine has shown, regarded merely as private wrongs, which it was the business of the individual or his family or his clan to revenge. This law-licensed right of revenge was in time waived for a composition. Afterwards the state compelled acceptance of the composition, and fixed a regular tariff, and later on a code of punishment, for injuries; but some wrongs rankled so deeply that the sufferer still held to the old rule of revenge, and society tolerated his doing so. So strong and widespread is the sympathy with crimes *passionelles* even to-day among the Latin races, that it goes far to defeat the efficacy of trial by jury. 'Extenuating circumstances' are with us the equivalent of this sympathy. Something, no doubt, must be conceded to human nature, but the object of law is, and always has been, to curb the primitive instinct of revenge; without such a curb the world would, as Sidney Smith said, be a 'wild waste of passion.' Whatever gives a sanction to this 'wild justice,' though under the guise of honour, must be regarded as a 'throwing back' to the ages of barbarism."