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Recommended Citation

J. Lampert, *Lie Detectors - Industrial Use of the Polygraph*, 13 DePaul L. Rev. 287 (1964)
Available at: <https://via.library.depaul.edu/law-review/vol13/iss2/9>

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LEGISLATION NOTES

LIE DETECTORS—INDUSTRIAL USE OF THE POLYGRAPH

The increasingly widespread industrial use of the polygraph or "lie detector" invites academic as well as legislative concern. Insurance companies are more frequently requiring claimants to submit to lie tests, and it is not unreasonable to assume that finance companies, small loan agencies, and other businesses, wherein proof of customer fidelity is desirable, will soon follow suit. Perhaps the most extensive utilization of the "lie detector" is in the employer-employee relationship. Despite the traditional efforts of management to minimize internal losses, business thefts and embezzlements amounted to \$400,000 per day in 1961.¹ Because of the scientific nature of the polygraph and its apparent infallibility in the eyes of the naïve, management has been quick to view its use as a panacea to insure employee loyalty. Many employers, therefore, faced with the problem of detecting disloyalty of an employee prior to the commission of a crime, or his guilt thereafter, have demanded that applicants for employment, as well as those currently employed, submit to "lie detector" tests.

Many problems arise when an employer requires his employee to sign an agreement that, as a condition of employment or continued employment, he will submit to a "lie detector" test whenever requested to do so, for any or no reason. Questions as to whether employers may enforce these covenants, and whether refusal to take such a test constitutes sufficient grounds to discharge an employee, seem to have been resolved in three states. Legislative enactments in Oregon, California and Massachusetts have forbidden private employers to require "lie detector" tests as a condition for employment or continued employment.² A comparative analysis of these measures reveals a trend which may well trigger a substantial amount of additional legislation on this subject.

EVIDENTIARY ADMISSIBILITY OF TEST RESULTS

The statutes under study are the logical consequence of a strong public policy concerning the admissibility of polygraphic test results into evidence. Any legal discussion of the use of "lie detectors" in private industry, therefore, must include some consideration of the rules of

¹ *Business Thefts Add 5% to Cost of Goods*, N.Y. Times, June 17, 1962 (Business and Financial) p. 14.

² Mass. Acts 1963, ch. 797 at 721; Oregon Laws 1963, ch. 249 at 350; Cal. 1963 Legislative Session, ch. 1881 at 2862.

evidence which have been developed regarding the admissibility of such results.

The law with respect to the admission of the results of polygraph tests is, for the most part, very well settled.³ The first appellate court decision dealing with this issue was rendered in 1923 by a federal court in *Frye v. United States*.⁴ The accused, on trial for murder, tendered as evidence the results of a "systolic blood pressure" test. The proffer was rejected on the ground that this type of testing had not yet gained enough scientific recognition and standing to justify its use.⁵

Judicial refusal to allow such tests as proof of mendacity or veracity has been almost unanimous.⁶ While much of the early litigation involving "lie detectors" arose in criminal prosecutions, the inadmissibility of the results of lie tests has also been adopted as a guiding principle in civil cases.⁷

Greatly influenced by the courts, labor arbitrators have repeatedly ruled that employers cannot require employees to submit to "lie detector" tests.⁸ In a landmark decision, Arbitrator John F. Sembower

³ For an excellent history of this subject see, Reid, *The Lie Detector in Court*, 4 DE PAUL L. REV. 31 (1954).

⁴ 293 Fed. 1013 (D.C. Cir. 1923).

⁵ The systolic blood pressure test developed in 1918 by William Moulton Marston of Harvard was a measurement of the subject's respiration plus discontinuous recording of his systolic blood pressure. Marston took a reading of blood pressure before and after a question was asked; if significant variances were noted in the two readings, he concluded that deception had been attempted. Although today's "lie detector" measures pulse, respiration and galvanic skin response, as well as blood pressure, the courts have not changed the opinion they reached in the *Frye* case.

⁶ E.g., *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933); *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938); *People v. Becker*, 300 Mich. 562, 2 N.W.2d 503 (1942); *Boeche v. State*, 251 Neb. 368, 37 N.D.2d 593 (1949). In a representative decision, the Illinois Supreme Court held: "No court, so far as we are advised, has ever held that a lie detector may be used on the accused without his consent." *People v. Sims*, 395 Ill. 69, 69 N.E.2d 336 (1946). But see, *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Court 1938), where the defendant, on trial for robbery, was permitted to offer in evidence testimony regarding the results of a test conducted with a psychogalvanometer. It must be understood, however, that this was a trial court decision and that the conclusion reached in the *Kenny* case was not accepted by the New York Court of Appeals in *People v. Forts*, *supra*.

⁷ E.g., *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951); *California Ins. Co. v. Allen*, 235 F. 2d 178 (5th Cir. 1956); *Gideon v. Gideon*, 153 Cal. App.2d 541, 314 P.2d 1011 (1957); *Commissioner ex rel. Hunter v. Banmiller*, 194 Pa. Super. 448, 169 A.2d 347 (1961); *Aetna Ins. Co. v. Barnett Bros. Inc.*, 289 F.2d 30 (8th Cir. 1961); *Fernandez v. Security-First Nat. Bank*, 206 Cal. App.2d 676, 24 Cal. Rptr. 25 (1962); *State v. Chang*, 374 P.2d 5 (Sup. Ct. of Hawaii 1962).

⁸ E.g., *Dayton Steel Foundry Co.*, 39 Lab. Arb. 745, 63-1 Arb. Pgf. 8003 (1962); *Wilkof Steel and Supply Co.*, 39 Lab. Arb. 883, 63-1 Arb. Pgf. 8026 (1962); *United Mills, Inc.*, 39 Lab. Arb. 1259, 63-1 Arb. Pgf. 8179 (1963); *Town and Country Food Co.*, 39

flatly condemned the indiscriminate use of "lie detectors" in labor relations.⁹ After a review of the trend of decisions on admissibility of "lie detector" evidence, he said: "Although new wonders of technology are brought home to us every day, the time has not come when management can consign to a machine the job of supervision, especially when this machine is to take the employee in its embrace and measure his most intimate, vital processes."¹⁰

The unreliability of the polygraph was recently emphasized in the *Louis Zahn Drug Co.* decision.¹¹ Reiterating the rule of inadmissibility, the arbitrator concluded: "if this much doubt exists as to the fallibility of the result, it does not attain the requisite high degree of proof which is needed to support the supreme penalty of the worklife world, and the objections to its being admitted must be sustained."¹²

The refusal to admit "lie detector" evidence, and ultimately, the rationale behind the statutes under study, is the lack of reliability of the polygraph. A brief discussion of the contentions of the "lie detector's" proponents and antagonists gives insight into the legislative purpose of the enactments.

RATIONALE OF THE STATUTES

The champions of the "lie detector" point to statistical data showing ninety-five per cent accuracy of test results.¹³ These figures, however, have been called extremely misleading, because there exists no public body of knowledge to support the accuracy of the percentages reported.¹⁴ According to respected sources, the only empirical proof of test validity available at present are confession of guilt or uncontestible proof of innocence.¹⁵ Much of the apparent success of the commercial operators is provoked by the dramatics used in interrogating suspects, rather than by the method itself.¹⁶

Lab. Arb. 332, 62-3 Arb. Pgf. 9054 (1962); *Norris-Thermador Corp.*, 40 Lab. Arb. 836, 62-3 Arb. Pgf. 8897 (1963); *Illinois Bell Telephone Co.*, 39 Lab. Arb. 470, 62-3 Arb. Pgf. 8955 (1962); *Lag Drug Co.*, 39 Lab. Arb. 1121, 63-1 Arb. Pgf. 8106 (1962).

⁹ *General American Transp. Corp.*, 31 Lab. Arb. 355 (1958).

¹⁰ *Id.* at 364.

¹¹ 40 Lab. Arb. 352 (1963).

¹² *Id.* at 358.

¹³ INBAU AND REID, *LIE DETECTION AND CRIMINAL INTERROGATION* (3rd. ed. 1953).

¹⁴ Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L. REV. 694 (1961).

¹⁵ Sternbach, Gustafson and Colier, *Don't Trust the Lie Detector*, HARV. BUS. REV., Nov.-Dec. 1962, p. 54.

¹⁶ CALIFORNIA LEGISLATIVE COUNCIL MEMORANDUM 138, *The Case Against the Use of the Polygraph* 4 (1963).

The practical utility of the polygraph in personnel investigation is stressed by the advocates of this manner of examination. In their book, which includes all of the strongest arguments of "lie detector" enthusiasts, Fred Inbau and John E. Reid voice the opinion that there should be wide public acceptance of the polygraph.¹⁷ They point out that the tests and the accompanying procedures have a decided psychological effect in inducing confessions from guilty individuals.

On the other hand, it has been stated that the only real deterrent is "fear of the possibility of discovery and punishment."¹⁸ Most of the confessions secured result from the subject's belief that the machine is infallible, and fear that his lies will be revealed.¹⁹ It may be that same fear *on the part of the innocent* which may well prevent the polygraph from ever becoming a useful industrial instrument. Further, the value of the "lie detector" to industry would surely collapse in an organization once its weakness became known to the employees. John Larson, one of the two men credited with the creation and development of the modern "lie detector," is very much aware of the alleged benefit of "voluntary" confessions, as evidenced by his recent observation: "I originally hoped that instrumental lie detection would become a legitimate part of professional police science. It is nothing more than a racket. The lie detector, as used in many places, is nothing more than a psychological third degree aimed at extorting confessions, as the old physical beatings were. At times I'm sorry I ever had any part in its development."²⁰

"Lie detector" operators and their supporters argue that by this testing technique innocent people are readily eliminated as suspects, thus sparing them any further fear, embarrassment or inconvenience.²¹ The "lie detector," however, can no more conclusively prove innocence than it can conclusively prove guilt. Mr. L. H. Harrelson, President of Chicago's Keeler Polygraphic Institute, recognizes that: "It should be understood that a polygraph examiner is an expert giving an opinion just as any other expert . . . be he doctor or handwriting analyst."²²

¹⁷ INBAU AND REID, *op. cit. supra* note 13.

¹⁸ LEE, *THE INSTRUMENTAL DETECTION OF DECEPTION* (1953).

¹⁹ CALIFORNIA LEGISLATIVE COUNCIL MEMORANDUM 4.

²⁰ Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 *YALE L. REV.* 694, 714, note 77 (1961).

²¹ INBAU AND REID, *op. cit. supra* note 13 at 111.

²² *Business Uses of the Lie Detector*, *Business Week*, June 18, 1960, p. 98. This article contains comments made by employers who have used the polygraph. Leo Bramson, President of Bramson's, Chicago department store, claims he cut his losses in half the first year he introduced periodic personnel checks.

As to the test itself, it is contended that nervousness may affect the outcome.²³ The outcome may also be affected by differing degrees of involvement in the crime being investigated, such as having given encouragement to the perpetrator. Innumerable shadings of "guilt" or "innocence" are possible, depending on both the actual participation of the subject and his emotional constitution.²⁴ Studies have pointed out the varying effects environment and heredity have on the outcome of the test.²⁵ It is acknowledged that the machine cannot differentiate between guilt and guilty knowledge; nor can it measure the subject's anxiety about the proceedings, his reaction to the electrode attached to his body, or his reaction to the examiner, among many other variables. Since the polygraph measures physiological response to a given question, not truth or falsity, the argument that it may be used to prove innocence is, at best, unfounded.

Proponents of the use of the polygraph are ready to answer any criticism. They hold that, "even though the lie detector is not one hundred per cent accurate, there can be no doubt that it is more efficient and accurate than our presently accepted method of eliciting the facts."²⁶ There are many who disagree with this contention. They allege that the use of the polygraph tests as prerequisites to employment and for employment continuance will be viewed as a symbol of management distrust and suspicion. Employees will be resentful and will distrust employers for fear of being falsely accused, and the atmosphere for work will deteriorate. Consequently, opponents of the "lie detector" conclude that the traditional personnel testing policies should be continued. Psychological tests, interviews, questionnaires, and firsthand observations of performance may take longer, but they are more effective in the long run for preserving good employee relations while still detecting the guilty.²⁷

The sponsors of the "lie detector" legislation recently enacted in California presented a very interesting discussion of the Constitutional questions raised by the use of the polygraph. They contend that such use is "an erosion of the basic validity of the due process of law and therefore a violation of the Fifth Amendment."²⁸ This allegation follows from the

²³ Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L. REV. 694, 697 (1961).

²⁴ *Ibid.*

²⁵ See, e.g., a study showing the variations of behaviors and attitudes in relation to ethnic affiliation and class position, BENDIX AND LIPSET, *CLASS, STATUS AND POWER*, 271-81, 284-370 (1953).

²⁶ Streeter and Belli, *The "Fourth Degree": The Lie Detector*, 5 VAND. L. REV. 549 (1952).

²⁷ CALIFORNIA LEGISLATIVE COUNCIL MEMORANDUM 12-13.

²⁸ *Id.* at 9.

fact that it should not be necessary to prove that a person is innocent when the accepted concept of due process demands proof of a man's guilt, never his innocence.

The man who, in 1926, perfected the polygraph that is almost universally used today, Leonarde Keeler, objects to the use of the term "lie detector." Professor Keeler, often called the father of the "lie detector," compares the polygraph to the tools of the physician, stressing: "No matter what diseased condition is being sought, the instrument is still called a stethoscope, not a T.B. detector, a pneumonia detector, or a leaky heart valve detector. *It is merely a diagnostic aid to an experienced examiner.*"²⁹ Keeler believes that until competent operators are selected by examination and licensing, and the tests placed within their exclusive province, the polygraph should be unavailable for courtroom use.³⁰ Even if it was admissible, so-called "lie detector" evidence would always be rebuttable. Logically following Professor Keeler's view, it becomes evident that *there is even more reason to restrict the use of the polygraph in industry, where the employee is not afforded the procedural safeguards so jealously applied in a court of law.*

THE STATUTES

The first state to enact legislation concerning the industrial use of "lie detectors" was Massachusetts. Originally enacted in 1959, the statute read as follows:

No employer shall require or subject any employee to any lie detector tests as a condition of employment or continued employment. Any person violating this section shall be punished by a fine of not more than two hundred dollars.³¹

This act was repealed in 1963 and replaced, after heated legislative debate,³² with a measure which, while more strongly worded, is somewhat more difficult to interpret:

Any employer who subjects any person employed by him, or any person applying for employment, to a lie detector test, or causes, directly or indirectly, any such employee or applicant to take a lie detector test, shall be punished by a fine of not more than two hundred dollars. This shall not apply to lie detec-

²⁹ Keeler, *Debunking the Lie Detector*, 25 J. CRIM. L. AND P. §§ 153, 159 (1953). (Emphasis added.)

³⁰ *Ibid.* Two states have passed examination and licensing statutes regulating polygraph operators. Both the Illinois and the New Mexico laws were enacted in 1963. ILL. REV. STAT. ch. 38, §§ 591-980; New Mexico Laws 1963, ch. 225 at 436.

³¹ Mass. Acts 1959, ch. 255 at 176.

³² Letter from Herman C. Loeffler, Director, Massachusetts Legislative Reference Bureau, to the DePAUL LAW REVIEW, Feb. 14, 1964, on file in the DePaul University Law Library.

tor tests administered by law enforcement agencies in the performance of their official duties.³³

The petition for this legislation was presented by the Massachusetts State Labor Council, AFL:CIO.³⁴ There can be little doubt that organized labor would strongly support legislation of this type whenever introduced.

Another act, generally following the pattern which was set out in the first Massachusetts enactment, was passed this year in Oregon.

No person, or agent or representative of such person, shall require, as a condition for employment or continuation of employment, any person or employee to take a polygraph test or any form of a so-called lie detector test. Violation . . . of this act is punishable upon conviction, by a fine of not more than \$500. or by imprisonment in the county jail for not more than one year, or by both.³⁵

Over the audible protestations of that state's "lie detector" operators, the third bill on this subject was passed this year by the California Legislature. It provides:

No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector, or similar test or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof or the state government or any agency or local subdivision thereof, including, but not limited to, counties, cities and counties, cities districts authorities, and agencies.³⁶

THE SANCTIONS

The different sanctions imposed by the three states may have some bearing on the amount of litigation which arises under these statutes. A two hundred dollar fine, as imposed by the Massachusetts law, may not serve as a very efficient deterrent to a company which places great emphasis on the results of polygraphic examinations in the hiring of employees. Conversely, a possible prison sentence will probably act as a more effective method of reducing the industrial use of the "lie detector" in Oregon and California.³⁷

³³ Mass. Acts 1963, ch. 797 at 721.

³⁴ Mass. House Bill no. 3331 (1963).

³⁵ Oregon Laws 1963, ch. 249 at 350.

³⁶ Cal. 1963 Legislative Session, ch. 1881 at 2862.

³⁷ The California statute contains no express penalty, but the California Labor Code, of which it is a part, provides a five hundred dollar fine or six months in jail, or both, for any infraction of a law wherein no penalty is provided. CAL. PENAL CODE § 177; CAL. LABOR CODE § 23.

It might be noted that both of the Massachusetts statutes as well as the Oregon and California enactments employ the word "shall." This word, when used in legislative measures, evidences a desire on the part of the draftsmen to make the statute mandatory, not merely permissive. CAL. LABOR CODE § 15. "Shall" is mandatory and "may" is permissive.

LEGISLATIVE EXEMPTIONS

Oregon is the only state of the three which has not expressly exempted some official or political body from the operation of its statute. The California Legislature saw fit to restrict the operation of the "lie detector" law to private business and industry. Its exemption of federal, state, and local government includes law enforcement agencies as well as, it would appear, *all* other governmental functions. If the employees of the State of California may be subjected to polygraphic testing as a condition of their employment or continued employment, it is difficult to understand the motives behind refusing to allow discretion in this area to private employers. This exemption seems to imply that the California Legislature does have confidence in the reliability of the "lie detector," but only insofar as it is used by the government.

The report on the polygraph given to the California lawmakers attempts to justify this broad exemption by contending that, "if the arguments against prohibiting the use of polygraphs have any validity at all, it is in connection with police departments."³⁸ As to testing policemen themselves, the study claims the officers have little adverse feeling "for they realize they are in a unique position of trust in protecting the people."³⁹ The inherent inconsistency between this view and the position taken earlier in the report concerning use by industry is readily apparent. An employee in the private sector of the economy who is entrusted with large sums of money or with the handling of drugs is obviously in as unique a position of trust as any police officer.

The exemption of all other governmental divisions from the operation of the statute is rationalized on the ground that the legislature can set conditions for public personnel practices "easily"⁴⁰ and it can add safeguards in terms of appeals from supervisory decisions on hiring and firing.⁴¹ These justifications seem to directly conflict with the legislative policy of California to discredit the validity and reliability of the polygraph.

The law enforcement agencies of Massachusetts may utilize the "lie detector" in the "performance of their official duties."⁴² The Massachusetts statute pertains only to the use of "lie detectors" by employers, as evidenced by the express wording of the first line of the statute. The act does not, on its face, purport to deal with police testing of suspects, but it is most reasonable to assume that this was the motivation for the new exemption. There does exist, however, a distinct possibility that the exemption might have been included to allow testing of perspective and

³⁸ CALIFORNIA LEGISLATIVE COUNCIL MEMORANDUM 15.

³⁹ *Ibid.*

⁴⁰ *Id.* at 16.

⁴¹ *Ibid.*

⁴² Mass. Acts 1963, ch. 797 at 721.

present police personnel for employment purposes. The question obviously raised is, what is the meaning of "official duties" of the state's law enforcement agencies? Official duties may be interpreted to refer only to normal investigation of crimes, but a very forceful argument could be made that this statute includes in its exemption the activities of firing and hiring as performed by the state's law enforcement agencies.

PROHIBITION OF VOLUNTARY LIE TESTS

The new Massachusetts act was passed over the veto of the governor,⁴³ who felt that its effect would be to "prohibit the use of the lie detector in industry and business under any circumstances." It is the opinion of the governor that this legislation would prevent employees from taking lie tests even if they truly wanted to. In his words: "This legislation would have an unfortunate result in the case of an innocent employee who was under suspicion of wrongdoing. Such a person, at his own request, could not be given the opportunity to clear his reputation by taking a lie detector test."⁴⁴

On the other hand, the courts of Massachusetts may choose to be more liberal in their interpretation of the concept "indirectly cause." In their effort to determine the legislative intent behind the new enactment, the courts will, as a matter of course, look to the first piece of legislation on this subject. One of the important differences, and this also serves to differentiate the new Massachusetts act from those of Oregon and California, is the fact that the tests, in order to fall within the prohibition of the statute, need no longer be required as a "condition for employment." The California and Oregon statutes do not seem to cover a situation in which an employee is required to take a lie test to qualify for a promotion or a raise. The 1963 Massachusetts act has provided for just this means of evasion.

A possible solution of the "voluntary test" question may be found in analogy to the law of entrapment. Under most criminal entrapment provisions, a person cannot be convicted if his allegedly criminal conduct was *incited* or *induced* by a peace officer; however, if the officer merely affords the opportunity and the idea originated in the mind of the party claiming entrapment, he will not be exonerated.⁴⁵ Applying this analogy

⁴³ Mass. House Bill no. 3731 (1963).

⁴⁴ *Ibid.*

⁴⁵ The Illinois Criminal Code contains a representative definition of entrapment. "A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated." ILL. REV. STAT. ch. 38, § 7-12. See, *People v. Tolver*, 26 Ill. 2d 100, 185 N.E. 2d 874 (1962); *People v. Clark*, 25 Ill. 2d 331, 185 N.E. 2d 191 (1962); *People v. Hall*, 25 Ill. 2d 297, 185 N.E. 2d 143 (1962).

to the situation wherein the employee "volunteers" for a lie test, if it can be proven that the employer induced or coerced him in any way to submit to the test, the employer is guilty under the statute. Conversely, if the idea to take the test *actually* originated in the mind of the employee, using this analogy at least, the employer will not be guilty of indirectly causing the employee to take the test. While it must be conceded that *any* tests allowed under the statute will, as a practical matter, nullify its effectiveness, a judicial interpretation is required before the true meaning of this enactment can be known.

CONCLUSION

Despite the fears evidenced by Massachusetts Governor Peabody, there exists some opinion that the measures did not go far enough. The three statutes manifest a public policy which views "lie detectors" with a very suspicious eye; however, only employers are affected by the enactments. Some insurance companies have begun to require claimants to submit to "lie detector" tests as a condition for payment of their claim. The possibility that the polygraph will become popular in the small loan or finance fields, for example, does not seem to have been considered. This potential use of the "lie detector" is clearly as violative of the underlying statutory policy as the practices of employers, but no action has been taken in this field.

Additional enactments concerning the industrial use of the polygraph will most probably be passed, particularly in states where labor is strong; and it is reasonable to assume that the Massachusetts, Oregon and California statutes will serve as prototypes for future legislation. The policy of a state which desires the abolition of the "lie detector" will best be served by statutes similar to the original Massachusetts and Oregon acts which do not attempt to exclude any political division or agency.

Accepting the position that "lie detector" tests are unreliable and the results thereof are invalid, the desire on the part of the states to abolish them is understandable. The very purpose for which the legislation in question was enacted was to abolish the use of polygraphic testing, but the success of these measures must necessarily be very limited in scope. All use of the "lie detector" should be forbidden; the fact that a person volunteers to submit to a lie test does not confer any greater reliability or validity to the results. The ideal statutory enactment could be very short and uncomplicated; a statement declaring that any use of a "lie detector" is illegal, plus a provision for an adequate sanction, would be the best means of effectuating state policy as regards "lie detectors."

J. Lampert