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Remarks of Justice William Harman Black at Meeting of the New York Physicians-Yorkville Medical Society in the Squibbs Building, Fifth Avenue and Fifty-Seventh Street, Wednesday, January 27th, 1937, at Nine P.M. on the "Lie Detector".

William Harman Black

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given a public address on the possibility of introduction of this type of evidence in court. Of extreme interest to members of both the legal and medical professions is the research in progress on the discrimination of feigned from real delusions.

The flexible character of the instrument makes it possible for it to be used in many allied investigations. In the near future we plan to continue our investigation of emotional reaction types with the object of discovering whether or not there is a consistent incidence of emotional reaction referable to physical and physiological typology. There are several other problems being contemplated, the chief of which are the value of an instrument of this type as an objective control of introspection and a study of its possibilities in the testing of candidates for various positions where emotional control and ability to change judgments in complex emotional situations are necessary.

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REMARKS OF JUSTICE WILLIAM HARMAN BLACK AT  
MEETING OF THE NEW YORK PHYSICIANS-YORKVILLE  
MEDICAL SOCIETY IN THE SQUIBBS BUILDING,  
FIFTH AVENUE AND FIFTY-SEVENTH STREET,  
WEDNESDAY, JANUARY 27th, 1937, AT  
NINE P. M. ON THE "LIE DETECTOR".

I AM asked to discuss in connection with the legal aspect of lying a mechanical lie detector (a machine that thinks in the inexorable terms of science) and the practicability of using it in the investigation of the guilt or innocence of men accused of crime, and also in their trials by jury. I have not been asked to speak on the social possibilities of this invention. The time may come when no family, indeed no engaged couple, will be complete without two machines, one adjusted to the robust honesty of the male and the other to the sympathetic pliability of the female mind. If intending proposers, generally of the male persuasion, were assured that their emotions would be graphed with accuracy and translated with fidelity, it might do much to prevent hasty marriages and attemptedly hasty divorces. If these machines should be used in alimony motions, husbands would hesitate to brag about their earnings in business or their winning at poker, knowing that with the inexorableness of fate the truth would be wrung out of a willing lie detector. Perjury might be confined almost entirely to the exuberant expressions of the genus known as "puppy-lovers," or the never believed promises of some politicians.

In every jury trial there are at least fourteen lie detectors, a judge, a lawyer on each side of a case, and twelve jurors. These are the cleverest lie detectors because they are human, but, being human, they are also fallible.

\* \* \* \* \*

I shall briefly discuss the lie detector, from three points of view:

1. Does it work?
2. Is it practicable for use by the public prosecutor, the accused and the Court?
3. Would such use violate any constitutional rights of an accused man?

First, I believe that in the hands of trained experts, under ideal conditions and cooperation, it works with nearly as much mechanical exactitude as adding machines or other contrivances that are said to "think." It is quite probable that it will be very much improved as time goes on. But it is only fair to say that experienced and scientific liars may help to defeat the mechanical records it makes, just as living liars deceive living judges and living jurors.

To begin with, the use of a lie detector must have at least the ostensible cooperation of a man accused of crime. The apparatus must be connected to the subject by an electrode or small metal plate in each palm.

In my opinion, in the present state of the invention and the data that has been accumulated in regard to it, the accused cannot be compelled to submit to a lie detector test. It would be a violation of his constitutional rights because he may not be compelled to testify against himself. The Fifth Amendment to the United States Constitution provides: that no person "shall be compelled *in any criminal case* to be a witness against himself, nor be deprived of life, liberty or property without due process of law \* \* \*."

"Due process in each particular case means such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

The Fourteenth Amendment to the Constitution of the United States also provides that no state shall deprive any person of life, liberty or property without due process of law.

Article I, Section 6, of the Constitution of the State of New York provides that "no person \* \* \* shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law."

No less authority than the present Chief Justice Hughes of the Supreme Court, in May, 1924, at a dinner at the National Institute of Social Sciences in New York, where there was no recalcitrant minority to attempt to say him nay, declared that

"It is time that we give serious thought to the question whether or not the privilege against self-crimination should be maintained \* \* \* the question whether the interests of justice do not demand the abolition of the privilege."

If the accused is willing, the lie detector might safely be used. If he objected, he could not be compelled to permit it to be used. It would naturally follow, therefore, that if a guilty man had no scientific knowledge which would enable him to physically defeat the operation of the lie detector, he would refuse to submit to it. If he thought he was clever enough by some physical means to defeat the operation of the lie detector, he might even if guilty consent to its use. If he was guilty and if he did not feel he could physically defeat the lie detector, he would undoubtedly refuse to have the test made, and for the reasons already given he could not be compelled to submit to it. It may be that with the improvement of the detector there may be a change of the law regarding incrimination of an accused by himself. This might require a constitutional amendment, but such an amendment is not impossible because there is practically no limit to the amendability of the Constitution of the United States. Likewise, there might be an amendment of state constitutions on the same subject.

Where a suspected man refuses to submit to a test by the lie detector I believe he would be afforded protection under the national and state constitutions against a compulsory examination. And yet, it must not be forgotten that an accused person may be compelled to stand up in court for identification, or to place his feet in a suitable position for view by the jury, or to make foot-marks for comparison with those found at the scene of the crime, or to make finger-prints, or to submit to a physical examination for scars or wounds, or tattoo marks. The only difference between this self-incrimination and the incrimination that would be involved in an unfavorable graph made by a lie detector is that in the cases I have just referred to the accused might avoid some of the effects of the exhibitions he was compelled to make, while in the lie-detector experiment its inventor claims that it is as nearly as possible exact in that it relies on physical effects over which the subject certainly has not complete control. It will be borne in mind that there is a lot of difference between compulsory submission to the use of the lie detector and compulsory testimony that its inventor claims is demonstrated by the graph. Having once consented to the test by a lie detector either the accused or the accuser would have the right to offer its results just as living witnesses could be summoned and examined by either side to a controversy.

Of course at the very threshold of any practical use of the lie detector in court must be the passage of a statute that would authorize its use, or the rendition of a decision by a court that would permit it.

It would be rather difficult to secure a decision upon an ideal situation which would have enough of the general factors in it to make the decision to be given a precedent for future use of it. This might be solved by making it discretionary with a judge as to whether under the circumstances of a particular case it could be useful in detecting crime or disproving the criminal charge made against an accused who submitted to the use of the invention. Professor Wigmore, the greatest living authority on the philosophy of the law of evidence, says that it is only necessary for something of a scientific nature to "have a reasonable measure of precision in its indications," and the writer who quotes him in the *Journal of Criminology* refers in this connection to the admissibility of bloodhound evidence in a case in Louisiana.

In the case of *The United States v. Frye* the defendant, on trial for murder, offered the result of a deception test made upon him by use of the "systolic blood pressure" method. The Judge refused to permit it and upon an appeal he was sustained, the Court saying:

"Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well known scientific principle of discovery the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

We think that the systolic blood-pressure test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting evidence deduced from the discovery development and experiments thus far made.

In the *Bohner* case in Illinois the court said that the refusal of the trial court to admit the testimony of a lie detector was not error.

We have come a long way from the old trial by ordeal, where an accused man was required to thrust his hand in boiling water. If it didn't hurt him a just judge at once pronounced him innocent, and if it happened to scald him there were doctors in those days who could quickly diagnose a first, second or third degree burn and might be willing to appear as an expert and submit to violent cross-examination as to whether the injury was a mere bagatelle or whether it was a permanent injury.

There is going on a liberalization of the methods used in eliciting truth from accused men. There have been proposed in many states laws that would permit a district attorney to comment upon the failure of

the accused to take the stand in his own behalf so that he might be cross-examined. This liberalization may extend to the use of the lie detector. The greatest obstacle to its adoption, even if the Constitution should be amended so as to permit it, would be the fallibility or lack of expertness, or scientific knowledge, of the operator who would conduct the experiment with the lie detector. Of course as between an unfavorable report of the lie detector as reflected by the graph of its operations and the favorable evidence from the accused, the jury would be the judge. But the main difficulty a lawyer would have would be to convince the jury that the operator of the lie detector was absolutely honest, expert and reliable.

The observations I have made apply alike to investigation before indictment, and after an indictment where an accused man was being tried.

One of the greatest advantages of this lie detector is that its records are permanent and easily susceptible to instantaneous check. The originality of the invention you have seen tonight lies in the fact that it does not depend upon any "deception technique" and its graphs are not arrived at by any process of exclusion. It is not remarkable that this machine invented by Dr. Summers, a priest of the church, should be honest and definite in its results, nor is it remarkable that the splendid results it has attained before scientific men should be interpreted by the most direct imaginable system, based on absolute experience, in operation and reading.

Benvenuto Cellini in his autobiography says of his father: "I was ill two months \* \* \*. My father said it seemed to him a thousand years till I got well in order that he might hear me play again. But when he talked to me of music, with his fingers on my pulse, seeing that he had some acquaintance with medicine and Latin learning, he felt it change so much if he approached the topic that he was often dismayed and left my side in tears."

It has been said that a lie detector must record two or more bodily changes, for no one known change can be depended upon to give true and significant responses to deception. That observation may not apply to this lie detector because, as I understand it, it does not rely for its results upon the deception technique.

It may interest you to know that during the preceding three years to 1934 forty-five Chicago banks availed themselves of the lie detector to detect embezzlement among employees, apparently to greatest satisfaction of the banks and the investigators.

In conclusion let me quote Mr. Justice Oliver Wendell Holmes, who said:

"The best test of truth is the power of the thought to get itself accepted in the competition of the market. \* \* \* Every

year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge."

I thank you sincerely for the honor of appearing before you, and I hope there may continue the cooperation that has so long existed between doctors and lawyers for the discovery of truth.

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## HOW OLD THE NEW

By JAMES J. WALSH, M.D., PH.D.

I VENTURED to suggest in the preceding article on "How Old the New" that surgical anesthesia had been described, and manifestly practiced in one form or another every century during that period which used to be called the "dark ages," but which is proving now to have anticipated us in so many ways that it rather deserves, as John Fiske suggested, to be called the bright ages. The comparative antiquity of surgical anesthesia has been coming home to a great many minds in recent years. Anyone who devoted more than a modicum of attention to the history of medicine as it has developed during this first generation of the twentieth century will quite surely be convinced of this old-time practice of anesthesia and how much more of suffering that it saved than we have had any idea of until the consultation of original documents in history came to be the rule.

When it comes to the acceptance of the idea of asepsis in the medieval period, the great majority of physicians are likely to balk. They are quite persuaded that antiseptic surgery was introduced by Lister and that it was founded on a series of original thoughts of his that had never come to the mind of surgeons before. It would be particularly easy to think this if one looked only at the opposition that Lister encountered during the early years of his practice of what may be called asepsis. When Lister left Edinburgh for London to teach surgery at one of the colleges there, it was proposed that as a courtesy he should be invited to become a member of the London Surgical Society. The president of that organization, himself one of the most distinguished surgeons in England, is said to have intervened with the bitter expression: "That charlatan Lister? Never! I'll blackball him myself if necessary." As a matter of fact, Lister's ideas were taken up much sooner and ever so much more enthusiastically by the German and French surgeons than by the English and Americans, though it would be easy to expect that similarity of language would make English-speaking surgeons more sympathetic. Antisepsis was no more a novelty than anesthesia, but it had to make its way against opposition just as anesthesia did.