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Hardin and Medvid: A Change in Indiana's Entrapment Law

From 1970 until 1976, the critical issue in Indiana's law of entrapment was probable cause to entrap. Under the pronouncements of *Walker v. State*,¹ a properly raised entrapment defense imposed on the prosecution a burden to show that the police had reasonable cause to suspect the defendant's illegal activities before the arrest. Fulfillment of this condition justified carrying out the scheme against the accused and permitted the state's case to proceed to the jury. Evidence obtained without probable cause was subject to exclusion.²

Cases succeeding *Walker* presented situations where, even though the police had initiated narcotics sales without the requisite probable cause, acquittals seemed inappropriate because of the defendants' willingness to deal. Exceptions to the demands of *Walker* were created, preventing undesirable results but lessening the previous theoretical certainty of the law.³ In *Hardin v. State*,⁴ the Indiana Supreme Court undertook clearing away the confusion found in intervening case law by removing the probable cause requirement.

Hardin concerned a commonplace drug arrest. A police informant, whose reliability was not questioned by the court, had reported narcotics purchases made from Hardin. At the instance of the police, the informant contacted Hardin to obtain heroin. The transaction was concluded routinely, and Hardin was arrested. While Hardin argued that probable cause to entrap was lacking,⁵ neither he nor the prosecution challenged the soundness of *Walker*.⁶ On the court's own motion, these ordinary facts became the setting for reconsideration of Indiana's whole law of entrapment.

The court's attention was divided between the procedural demands of *Walker* and the substantive elements of the defense itself. Having seen that the vicissitudes of undercover work did not always permit the police to acquire proof of probable cause when only minutes separated contact with suspect and consummation of a narcotics sale, the court reasoned that *Walker* was unduly burdensome. Although the danger to individual liberty

¹255 Ind. 65, 262 N.E.2d 641 (1970).

²*Smith v. State*, 258 Ind. 415, 281 N.E.2d 803 (1972). *Walker* itself did not outline the procedure by which the trial judge was to test probable cause. Later, in *Smith*, the court stated that the prosecution was required to show some evidence dated before "the scheme was set into motion," *id.* at 419, 281 N.E.2d at 806, which aroused police suspicion. Otherwise, "the work product of the scheme cannot be utilized, thereby condoning and encouraging that which was illegal in the first instance." *Id.*

³*Thompson v. State*, 259 Ind. 587, 290 N.E.2d 724 (1972); *Thomas v. State*, ___ Ind. ___, 345 N.E.2d 835 (1976).

⁴___ Ind. ___, 358 N.E.2d 134 (1976).

⁵*Id.* at 135.

⁶*Id.* at 137 (DeBruler, J., concurring).

posed by too-zealous enforcement of drug laws is great, the court also saw the peril to society presented by unchecked drug trade. The court's unstated reassessment of these perpetually conflicting concerns demanded that the cumbersome procedural device⁷ be abolished in the state's interest.⁸ *Walker* was removed from the law, root and branch.

Turning to questions of substance, the opinion then offered a brief history of Indiana's entrapment law.⁹ The state has consistently followed the position of the majorities in *Sorrells v. United States*,¹⁰ *Sherman v. United States*,¹¹ and *Russell v. United States*.¹² The federal test, the model for most states,¹³ seeks police initiation of criminal conduct; if this is found, a complete defense is established unless the accused is shown to have been predisposed to commit the act.¹⁴ Before reaffirming Indiana's adherence to *Sorrells* and its successors, the supreme court noted judicial and academic support¹⁵ for closer scrutiny of possibly abusive police practices proposed by the minorities of the three federal cases.¹⁶ However meritorious the sugges-

⁷*Walker's* clumsiness was illustrated by the difficulty the court found in affirming the convictions in *Thompson v. State*, 259 Ind. 587, 290 N.E.2d 724 (1972), and *Thomas v. State*, ____ Ind. ____, 345 N.E.2d 835 (1976).

⁸358 N.E.2d at 135.

⁹*Id.*

¹⁰287 U.S. 435 (1932).

¹¹356 U.S. 369 (1958).

¹²411 U.S. 423 (1974).

¹³See Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976) (collecting authorities). Park notes that the *Sorrells* majority is followed in all but a handful of jurisdictions.

¹⁴*Sorrells v. United States*, 287 U.S. 435 (1932).

¹⁵358 N.E.2d at 136.

¹⁶Mr. Justice Roberts, concurring in *Sorrells*, 287 U.S. at 458-59, and Mr. Justice Frankfurter, concurring in *Sherman*, 356 U.S. at 382-85, contended that the issue that should concern the courts in entrapment cases was not, as the majorities had held, the defendants' predilections, but the quality of police conduct. Justice Roberts rejected outright the Chief Justice's argument that the entrapment defense could be drawn from the statute as a matter of fair construction intended to prevent "injustice, oppression, or an absurd consequence." 287 U.S. at 447, citing *U.S. v. Kirby*, 74 U.S. (7 Wall) 482, 486 (1868). As Roberts saw the matter, entrapment could not qualify as a true defense since it does not exculpate the accused; the defendant still must be seen as having done the acts proscribed by the legislature. Because criminal law infers mens rea from the acts, the conduct of the police lends no equities to the defendant's cause. A great danger inherent in the majority's focus on the defendant's predisposition is that the accused might be convicted because of a showing of past crimes. The sole basis for the defense, Roberts said, is the "right of the court not to be made an instrument of wrong." *Id.* at 456. Proof of entrapment compels the court to protect itself from participation in reprehensible conduct.

Justice Frankfurter's opinion in *Sherman*, although not so strongly worded as the earlier concurrence, was critical of the majority's failure to furnish a theoretical foundation for the defense. His examination of the district courts' handling of entrapment showed that revulsion to individual abuses, not the *Sorrells* test, controlled their decisions. As Frankfurter framed the issue, police conduct which falls beneath "standards, to which common feelings respond, for the proper use of governmental power," 356 U.S. at 382, should cause an indictment to fall.

The fundamental-fairness, due-process tone of Mr. Justice Frankfurter's opinion was acknowledged by the majority in *Russell* when it was said that some actions might be so outrageous that any criminal proceedings might be barred. The test, however, would certainly be severe. Mr. Justice Rehnquist's citation was *Rochin v. California*, 342 U.S. 165 (1952), the infamous stomach-pump case. 411 U.S. at 431-32.

tions were, they could not be considered by the Indiana court, for the legislature had foreclosed debate by its incorporation of the *Sorrells* doctrine into the state's new penal code.¹⁷ As the court saw the code provision, inquiry into circumstances surrounding entrapment procedures had been reduced, and the courts' attention had been directed toward the culpability of each defendant. *Hardin*, then, appeared to have facilitated drug convictions by limiting examination of police practices.

Although the case has already become the object of criticism¹⁸ for promoting the cause of the state over those of individuals, the conclusion that *Hardin* will work to the disadvantage of defendants may be unfounded. It is arguable that *Hardin* has removed a procedural shield which gave only illusory protection to the accused. Furthermore, a narrow evidentiary advantage for defendants may have generated a change in the law which would operate far more fairly than the rules under *Walker*. The inadvertent benefits conferred by the supreme court were demonstrated in *Medvid v. State*¹⁹ only a month after *Hardin* was handed down.

At Medvid's trial, the prosecution called the arresting officer to the stand to show both probable cause and predisposition. In addition to his own account of the sale, the policeman repeated his informant's narration of previous narcotics transactions that involved Medvid. The informant himself did not testify. No other evidence of predisposition was introduced. A jury found Medvid guilty.

In the court of appeals, *Hardin* provided the unexpected grounds for reversal. In overturning *Walker*, the *Hardin* court had focussed on the efficacy of police tactics without considering the law of evidence spawned by the probable cause inquiry.²⁰ While the policeman's testimony would certainly have been competent to show probable cause to entrap,²¹ even absent demonstration of the initial informer's reliability,²² hearsay was held incompetent to prove Medvid's criminal predisposition.²³

¹⁷IND. CODE § 35-41-3-9 (Supp. 1977). The provision reads as follows:

Entrapment

Sec. 9 (a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

¹⁸10 IND. L. REV. 747 (1977). That writer argued that *Hardin* was the culmination of a series of cases which purged elements of the Roberts-Frankfurter test from Indiana entrapment law.

¹⁹___ Ind. App. ___, 359 N.E.2d 274 (1977).

²⁰358 N.E.2d at 136.

²¹*Walker v. State*, 255 Ind. 65, 71-72, 262 N.E.2d 641, 645 (1970).

²²*Kelley v. State*, ___ Ind. App. ___, 315 N.E.2d 382 (1974), *McCarty v. State* ___ Ind. App. ___, 338 N.E.2d 738 (1975).

²³The court's footnote, 359 N.E.2d at 276, pointed to *Sumpter v. State*, 261 Ind. 471, 306 N.E.2d 95 (1974), a curious prostitution case in which the defendant's gender was not adequately

The logic of *Medvid* is compelling. *Walker* and its successors had provided the sole Indiana authority for the admissibility of hearsay to prove any issue material to entrapment. With *Walker* no longer part of the law, it followed that the hearsay exception which was created to allow proof of probable cause to entrap should likewise be a nullity. Thus, *Medvid* carried *Hardin's* abolition of *Walker* to its natural conclusion and contributed a much-needed evidentiary rule to Indiana's law of entrapment.

To appreciate the attractive simplicity of *Medvid's* reasoning, it is necessary to re-examine *Walker* and its successors. The preceding paragraphs describe an ungainly snarl of rules finally untangled by the combination of *Hardin* and *Medvid*. Closer study of entrapment law during the intervening six years finds gross unfairness and confusion prevailing. While *Walker* was law, defendants bore the burden of unfavorable evidentiary rules. The form of *Walker's* test threatened the state with acquittals won, not by meritorious pleas, but through adventitious circumstances. Analysis will show that these difficulties, latent in *Walker* itself, grew to monstrous magnitude. *Hardin* removes the procedural problem conclusively, while *Medvid* offered defendants relief from the oppression caused by an overbroad hearsay exception.

On its face, *Walker* presented only an evidence problem to the supreme court. Plentiful testimony at trial suggested that *Walker* was a narcotics dealer, and therefore predisposed to sell to police agents, but that evidence was, in part, hearsay.²⁴ Defense counsel objected strenuously on that ground, while the state countered that hearsay was admissible to show predisposition whenever entrapment was raised.²⁵ The trial judge agreed with the prosecution: "I think it . . . is an exception to the hearsay rule, when entrapment is a defense."²⁶ On appeal, *Walker* urged the plainly correct position that Indiana law contained no hearsay exception concerned with entrapment. To affirm the conviction, the *Walker* court found it necessary to justify admission of the hearsay report.

Instead of adopting the state's trial argument,²⁷ the court referred to a rarely cited federal case, *Heath v. United States*,²⁸ which had held that hearsay was admissible to show "reasonable grounds to believe"²⁹ in the defendant's previous illegal activity. This evidence showed that the police did "not

proved. The supreme court wrote "[w]e only hold that evidence of reputation introduced as substantive evidence of guilt is inadmissible." *Id.* at 482-83, 306 N.E.2d at 103.

²⁴255 Ind. at 71-72, 262 N.E.2d at 645.

²⁵Brief of Appellant at 19, *Walker v. State*, 255 Ind. 65, 262 N.E.2d 641 (1970) (citing trial transcript).

²⁶Brief of Appellant at 20, *Walker v. State*, 255 Ind. 65, 262 N.E.2d 641 (1970) (citing trial transcript).

²⁷The brief for the State was concerned principally with questions of waiver and did not contest *Walker's* argument.

²⁸169 F.2d 1007 (10th Cir. 1948). The court's probable cause language pretty clearly refers to predisposition. This solecism may be the source of *Walker's* problems of definition. See text accompanying notes 38-39 *infra*.

²⁹*Id.* at 1010.

initiate the intent and purpose of the violation,"⁵⁰ that is, the defendant was predisposed. The *Heath* court had acted only, if incorrectly,⁵¹ on the law of evidence while leaving the remainder of the conventional *Sorrells*⁵² theory intact. *Heath's* rule, although questionable in its approval of remote evidence and in its use of entrapment terms,⁵³ at least added no procedural complications to the understanding of the law. *Walker*, however, seized upon *Heath's* "reasonable grounds" language and managed to convert the misnomer into probable cause to entrap. Since rudimentary law permits the use of hearsay to prove other forms of probable cause, the same could be said for probable cause to entrap.⁵⁴ In a peculiar and roundabout manner, the *Walker* court had installed a hearsay exception into Indiana's entrapment law.⁵⁵

The vices of *Walker* were three. Acceptance of *Heath's* rule of evidence produced two of the defects, while the third was caused by the form of the novel element the court chose instead of an unadorned hearsay exception. First was the use of hearsay at trial to show probable cause to entrap without taking steps to prevent the jury's hearing the second-hand accounts.⁵⁶ Commonly a policeman, an especially attractive witness for the prosecution, would repeat a description of the defendant's criminality which had originated with an informant, often a very undesirable source. Prejudice could color judgment as a jury heard the informant's unfavorable opinion of the defendant.⁵⁷ Second, although the *Walker* court wrote as if probable cause to entrap and predisposition were conceptually distinct, the likeness of the facts they required for proof invited conflation. The opinion itself leaves its reader with the impression that the two were one,⁵⁸ so it is not surprising that a jury could mistake a policeman's reasonable cause to suspect for the defendant's criminal predilections. It soon became the practice of prosecutors to

⁵⁰*Id.*

⁵¹See the criticism of *Heath* written by Aldrich, C. J., in *Whiting v. U.S.*, 321 F.2d 72, 76-77 (1st Cir. 1963). Similar arguments against the use of hearsay were expressed by Jackson, J., in a dissent to *Walker* itself, 255 Ind. at 72, 262 N.E.2d at 646.

⁵²287 U.S. 435 (1932).

⁵³169 F.2d at 1010.

⁵⁴The court's citation for this proposition was *Kinnaird v. State*, 251 Ind. 506, 242 N.E.2d 500 (1968), an inappropriate choice since the issue was the use of hearsay before a magistrate for issuance of an arrest warrant, not use at trial.

⁵⁵255 Ind. at 71, 262 N.E.2d at 645.

⁵⁶A contrary rule was laid down for the first district in *Locklayer v. State*, ___ Ind. App. ___, 317 N.E.2d 868, 872 (1974).

⁵⁷The process ignored the prevailing rules for use of character evidence. The usual foundation would not be laid, nor would the defendant's reputation among the general community be shown. See 1 WIGMORE, EVIDENCE §§52 *et seq.* (3d ed. 1940). *Walker*, referring to the hearsay admitted there as reputation evidence, was unconcerned with these deficiencies. 255 Ind. at 71, 262 N.E.2d at 645.

⁵⁸It appears that the same evidence was used to support both the finding of predisposition and that of probable cause. Compare 255 Ind. 65, 68-69, 262 N.E.2d 641, 644 *with id.* at 72, 262 N.E.2d at 645, where identical hearsay reports from *Walker's* acquaintances were used to show his reputation as a marijuana dealer.

substitute hearsay for direct proof of the substantive element,³⁹ even though *Walker* had explicitly circumscribed the acceptable uses of hearsay.⁴⁰ Third, by insisting on police knowledge of the defendant before initiation of the scheme, the court made it impossible in theory for the state to secure convictions of drug dealers who had succumbed to state solicitation without having been known previously to the authorities.⁴¹ The court had left a trap for the prosecution, as well as the defense.

Formally, entrapment seemed to have acquired a new component, but the contents of the addition were little different from the old law.⁴² Defendants claiming entrapment after *Walker* were likely to conclude that what had been created was not a procedural limitation of the police, but an evidentiary advantage for the state. Testimony formerly competent only to persuade a magistrate at a probable cause hearing, but inadmissible at trial, had been made a subject for the jury's examination.

The examples of abuses springing from *Walker* were many. The simplest had the police testifying from second-hand knowledge to the accused's experience in narcotics trade in addition to a first-hand account of the sale which was charged at trial.⁴³ More objectionable was the situation in *Hauk v. State*,⁴⁴ where both probable cause and predisposition were established solely by the out-of-court declarations of the informant who had effected all of the sales known to the police. In *Kelley v. State*,⁴⁵ a jury learned from the police witness that anonymous telephone calls had led the investigation to the defendant's home. Another resident, not the accused, was named in the informant's story to the police. These facts evoke troubling reliability questions which were elided by the court. When settled law should have prevented use of an informer's declarations, standards for admissibility were relaxed.⁴⁶

³⁹This was the practice adopted by the prosecution in *Medvid*, which was tried while *Walker* was still effectual.

⁴⁰255 Ind. at 71, 262 N.E.2d at 645.

⁴¹Although the State was rescued from embarrassment in *Thompson* and *Thomas*, the court struggled to reach these exceptions demanded by the letter of *Walker*.

The absurdity of this possibility, acquittal of the patently culpable defendant, was noted in *Whiting v. U.S.*, 321 F.2d 72, 76-77 (1st Cir. 1963), where it was seen that, in some circumstances, the need to show suspicion of the accused before initiation of the police scheme ignores the undeniable origin of the intent to commit the criminal act in the mind of the accused and not in the creative enticement of the police.

⁴²For an authoritative exposition of Indiana's entrapment law in this period, see *Gray v. State*, 249 Ind. 629, 231 N.E.2d 793 (1967).

⁴³*Hineman v. State*, 155 Ind. App. 293, 292 N.E.2d 618 (1973). The police witness told the court that his superiors had reported rumors of extensive marijuana trade at Hineman's address.

⁴⁴___ Ind. App. ___, 312 N.E.2d 92 (1974).

⁴⁵___ Ind. App. ___, 315 N.E.2d 382 (1974).

⁴⁶See *Payne v. State*, ___ Ind. App. ___, 343 N.E.2d 325 (1976). The informer, Kaeding, had told the police that the accused dealt in marijuana, and that he paid "frequent visits to Michigan City." *Id.* at 332. Defense counsel objected that Kaeding's declarations did not even satisfy the standard of reliability for probable cause as set out in *Bowles v. State*, 256 Ind. 27, 267 N.E.2d 56 (1971), which required a previous record of reliability and extrinsic cir-

Even without the broad hearsay exception engendered by the probable cause to entrap requirement, defendants pleading entrapment would still have had reason to doubt the efficacy of *Walker's* protections. When the threat to prosecution interests appeared in *Thompson v. State*⁴⁷ and *Thomas v. State*⁴⁸ the supreme court excused the state from the rigor of the *Walker* rule by holding that, in some instances, foreknowledge of the accused was unnecessary to justify entrapment. The court's actions in these cases suggested that lack of probable cause to entrap would seldom bar conviction.

In *Thompson*,⁴⁹ the original plot had been directed against a man named Nau. When the police met Nau to make the contemplated mescaline purchase, Nau had missed his supply and was unable to deliver. On the following day, however, Nau phoned the informant to tell him that the chemical had been procured. Nau led the police agent to Thompson, who also had no mescaline, but who acquiesced to a sale of LSD. Citing *United States v. DeLoache*,⁵⁰ the court held that Thompson had initiated the offense. The rationale offered by the court was that where the police are led by the original suspect to a "previously unsuspected third-party stranger"⁵¹ who becomes the object of the police scheme, and who commits the solicited acts, entrapment is no defense.

Because the *Thompson* court excluded probable cause language from its opinion, reconciliation with *Walker* is difficult. One interpretation of *Thompson* might be that probable cause to entrap had already been legitimately provided by the investigation of the first suspect.⁵² Another reading might be that the reports from Nau which led the police to the accused supplied probable cause.⁵³ Both renderings leave *Walker* essentially undisturbed. Or, the court may have meant that where a defendant had fortuitously fallen into an ongoing trap for criminals, probable cause was unnecessary to justify entrapment. If this was the holding of the *Thompson* court, the deference toward police practices mentioned in *Walker*⁵⁴ had

cumstances tending to verify the informer's story. The *Payne* court offered an elaborate justification for the admissibility of Kaeding's reports which seemed, ultimately, to be grounded in his friendship with the investigating officers.

⁴⁷259 Ind. 587, 290 N.E.2d 724 (1972).

⁴⁸___ Ind. ___, 345 N.E.2d 835 (1976).

⁴⁹259 Ind. 587, 290 N.E.2d 724 (1972).

⁵⁰304 F. Sup. 183 (W.D. Mo. 1969). The facts in *DeLoache* resembled those found in *Thompson*, but the federal court was not faced with a probable cause to entrap doctrine.

⁵¹259 Ind. at 590, 290 N.E.2d at 726.

⁵²"Having properly commenced an investigation centering upon a prime suspect, the agent may follow it to its logical conclusion as a means of apprehending the accused even though the accused turns out to be a third-party stranger." *Id.* at 591, 290 N.E.2d at 726. The opinion went no farther than to imply that the investigation of Nau was within *Walker's* dictates, and did not digest evidence of probable cause against Nau.

⁵³This solution, however, suggests a reliability problem. See note 46 *supra*.

⁵⁴255 Ind. 65, 71, 262 N.E.2d 641, 645 (1970).

become predominant, and the stringency of the probable cause requirement was questionable.

*Thomas v. State*⁵⁵ indicated plainly the last interpretation of *Thompson* was the court's meaning and that *Walker* would not prevent convictions in all cases of state-initiated crime. In *Thomas*, the police pawn entered a barroom and asked the defendant whether anyone present had narcotics to sell. Thomas replied that he had drugs himself. The informant walked to an apartment building where Thomas sold him a packet of heroin. The police had no knowledge of Thomas before the deal was made. In upholding Thomas' conviction, the court offered not even speculative reasons which might have sustained the actions of the informant and the police under the *Walker* rule. The basis for affirming the verdict was that the "informant had merely provided an opportunity for the Appellant to carry out his natural propensity to commit the crime."⁵⁶

Later in the opinion, the court acknowledged that its framing of the facts disregarded police solicitation, but stressed that the defendant's readiness to make the heroin sale showed him to be deserving of conviction. Although the court's candor was edifying, a more serious erosion of the probable cause requirement had been revealed. Under *Thomas*, it appeared that even random police solicitation of crime would be overlooked if the person encouraged demonstrated inadequate resistance. Any limitations on police conduct installed by *Walker* had been virtually removed by *Thomas*. Volunteers like Thompson and Thomas, while making unattractive candidates for acquittal, were not clearly distinguishable from other defendants pleading entrapment,⁵⁷ whose readiness to deal may have been just as great. The *Walker* doctrine should have dictated the same procedural protections for both groups.

After *Thompson* and *Thomas*, *Walker's* purported limitations on the police were dead letters. The sole consequence of *Walker* retaining any vitality by the time of the *Hardin* decision was the hearsay exception. The question which remained after *Hardin* was whether the exception had survived the abolition of the element created to permit the admission of hearsay, probable cause to entrap.⁵⁸ If the exception has persisted, entrapment trials will be conducted in approximately the same manner they were while *Walker* ruled, and defendants will continue to have their guilt determined largely on the basis of remote, second-hand testimony.

⁵⁵ ___ Ind. ___, 345 N.E.3d 835 (1976).

⁵⁶*Id.* at 837.

⁵⁷See *Payne v. State*, ___ Ind. App. ___, 343 N.E.2d 325 (1976); *Kramer v. State*, ___ Ind. App. ___, 317 N.E.2d 203 (1974); *Fischer v. State*, ___ Ind. App. ___, 312 N.E.2d 904 (1974).

⁵⁸The language of the *Walker* court in creating the exception was that "[e]vidence as to appellant's reputation to commit the offense charged may be heard for the limited purpose of determining whether or not the police officers had good cause to believe that he was trafficking [sic] in narcotics." 255 Ind. 65, 71, 262 N.E.2d 641, 645 (1970).

If, however, *Medvid* is followed and the purge of *Walker* completed, trial practices and police tactics will be affected. After *Medvid*, it appears that prosecutors who wish to show prior criminal conduct of the accused as proof of predisposition will more often be compelled to place informers on the stand. Objection to this witness-production rule is likely on two grounds. It may be claimed that citizen informers may be exposed to vengeance in their communities, and, consequently, that fear of reprisal will discourage reports to the police. Second, informants who have criminal records do not make ideal witnesses, since their misdeeds allow their credibility to be impeached by defense counsel.

Neither argument is telling. The concern for private informers seems overstated. In past cases where informers' hearsay statements were heavily relied upon, the informers were frequently named at trial, so the likelihood of revenge would not be increased. The difficulty posed by unattractive witnesses may be compensated for by resort to other modes of proof. The discovery of a large supply of drugs in the defendant's possession, or the defendant's recent record of similar criminal conduct could be used to demonstrate predisposition without placing an unreasonable burden on the state.

Medvid's stricter rule of evidence may necessitate some changes in police practices. It would no longer be possible to send an unaccompanied and unobserved informant to make a narcotics deal unless the agent could later act as a reliable witness. More official participation in undercover work and surveillance suggest themselves as solutions, although the police may protest that the new procedure would be inconvenient and sometimes impracticable.

The chance that the *Medvid* approach will not be followed by the supreme court deserves serious attention. In overruling *Walker*, the *Hardin* court retained the deference toward police practices expressed in the earlier opinion.⁵⁹ If this attitude controls in the supreme court, *Medvid* may fall into disuse because of its effects on the law enforcement and undercover operations. Another impediment to *Medvid's* easy acceptance is that *Hardin* appeared to regard the admissibility of hearsay as an incident of the entrapment defense, not as a creature of *Walker*.⁶⁰ Thus, it would not be difficult for another court, looking no farther than *Hardin*, to hold that Indiana law retains a hearsay exception despite *Walker's* disappearance. Alert scholarship and essential fairness recommend the contrary result, so that *Medvid's* rule prevails in Indiana.

Medvid should not cause substantial changes in the verdicts of most entrapment cases. The defense is not favored by courts and juries, and their suspicion of the defense will not permit wholesale acquittals of drug traf-

⁵⁹*Id.*

⁶⁰The *Hardin* court stated that "the focus upon the subjective intent of a defendant necessarily opens the gates to the introduction into evidence of often variable hearsay and suspicious evidence." 358 N.E.2d at 136.

fickers. A degree of prejudice is inherent in the plea, so that success is likely only when the accused can appeal compelling to intuitions of fairness.

More importantly, Indiana's entrapment law has been significantly improved by *Medvid's* interpretation of *Hardin* eliminates much of the harshness caused by a lax hearsay exception. The witness-production rule imposed by *Medvid* will mean that defendants may be convicted over entrapment pleas only by evidence which has been directly tested for veracity by a jury. The task of trial courts, made simpler by *Hardin*, is more closely attuned to justice by *Medvid*.

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