Spring 1978

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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

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\(^1\)255 Ind. 65, 262 N.E.2d 641 (1970).
\(^2\)Smith v. State, 258 Ind. 415, 281 N.E.2d 805 (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.*
\(^4\)--- 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 device\textsuperscript{7} be abolished in the state’s interest.\textsuperscript{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.\textsuperscript{9} The state has consistently followed the position of the majorities in \textit{Sorrells v. United States},\textsuperscript{10} \textit{Sherman v. United States},\textsuperscript{11} and \textit{Russell v. United States}.	extsuperscript{12} The federal test, the model for most states,\textsuperscript{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.\textsuperscript{14} Before reaffirming Indiana’s adherence to \textit{Sorrells} and its successors, the supreme court noted judicial and academic support\textsuperscript{6} for closer scrutiny of possibly abusive police practices proposed by the minorities of the three federal cases.\textsuperscript{16} However meritorious the sugges-
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. 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 criticism 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 been 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 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. While the policeman's testimony would certainly have been competent to show probable cause to entrap, even absent demonstration of the initial informer's reliability, hearsay was held incompetent to prove Medvid's criminal predisposition.

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.

20255 N.E.2d at 156.
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. Defense counsel objected strenuously on that ground, while the state countered that hearsay was admissible to show predisposition whenever entrapment was raised. The trial judge agreed with the prosecution: "I think it . . . is an exception to the hearsay rule, when entrapment is a defense." 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, the court referred to a rarely cited federal case, Heath v. United States, which had held that hearsay was admissible to show "reasonable grounds to believe" in the defendant's previous illegal activity. This evidence showed that the police did "not
initiate the intent and purpose of the violation," that is, the defendant was predisposed. The Heath court had acted only, if incorrectly, on the law of evidence while leaving the remainder of the conventional Sorrells theory intact. Heath's rule, although questionable in its approval of remote evidence and in its use of entrapment terms, 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. In a peculiar and roundabout manner, the Walker court had installed a hearsay exception into Indiana's entrapment law.

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. 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. 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, 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

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30Id.
31See 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.
32287 U.S. 435 (1932).
33169 F.2d at 1010.
34The 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.
35255 Ind. at 71, 262 N.E.2d at 645.
36A contrary rule was laid down for the first district in Locklayer v. State, ____ Ind. App. ___, 317 N.E.2d 868, 872 (1974).
37The 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.
38It 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,\(^3\) even though \textit{Walker} had explicitly circumscribed the acceptable uses of hearsay.\(^4\) 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 \textit{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 \textit{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 \textit{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 \textit{Kelley v. State},\(^45\) a jury learned form 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 informant's declarations, standards for admissibility were relaxed.\(^46\)

\(^{39}\)This was the practice adopted by the prosecution in \textit{Medvid}, which was tried while \textit{Walker} was still effectual.

\(^{40}\)255 Ind. at 71, 262 N.E.2d at 645.

\(^{41}\)Although the State was rescued from embarrassment in \textit{Thompson} and \textit{Thomas}, the court struggled to reach these exceptions demanded by the letter of \textit{Walker}.

The absurdity of this possibility, acquittal of the patently culpable defendant, was noted in \textit{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.

\(^{42}\)For an authoritative exposition of Indiana's entrapment law in this period, see \textit{Gray v. State}, 249 Ind. 629, 251 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).

\(^{44}\)Ind. App. ----, 315 N.E.2d 382 (1974).

\(^{45}\)See \textit{Payne v. State}, ---- Ind. App. ----, 343 N.E.2d 525 (1976). The informant, Kaeding, had told the police that the accused dealt in marijuana, and that he paid "frequent visits to Michigan City." Id. at 525. Defense counsel objected that Kaeding's declarations did not even satisfy the standard of reliability for probable cause as set out in \textit{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 and Thomas v. State 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, 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, 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" 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. Another reading might be that the reports from Nau which led the police to the accused supplied probable cause. 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 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.

4259 Ind. 587, 290 N.E.2d 724 (1972).
43Ind. ___, 345 N.E.2d 835 (1976).
4259 Ind. 587, 290 N.E.2d 724 (1972).
4304 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.
5259 Ind. at 590, 290 N.E.2d at 726.
5"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.
6This solution, however, suggests a reliability problem. See note 46 supra.
become predominant, and the stringency of the probable cause requirement was questionable.

_Thomas v. State_ 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."6

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, 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.6 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.

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65 _Ind._ __, 345 N.E.2d 835 (1976).

66 Id. at 837.


68 The 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 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. 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. 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-
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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