McGeorge Law Review

Volume 12 | Issue 3 Article 9

1-1-1980

Applying the Exclusionary Rule to Improperly Obtained in-Court Identifications: A Conflict in California

Timothy P. Murphy
University of the Pacific; McGeorge School of Law

Applying The Exclusionary Rule To Improperly Obtained In-Court Identifications: A Conflict In California

Ever since the term was coined over 40 years ago,[1] the "fruit of the poisonous tree" doctrine has mandated the suppression of evidence derived from an illegal search or seizure.[2] The doctrine applies not only to physical evidence, but also to intangible evidence such as information or statements.[3]

Recently, the Supreme Courts of California and the United States have been faced with a relatively new issue: should the doctrine require the suppression of an in-court identification of the defendant by a witness to the crime because a prior illegal search or seizure associates the defendant with the crime?[4] In *People v. Teresinski*,[5] the California Supreme Court voted 4-3 in favor of suppression. One month later, however, the United States Supreme Court unanimously approved such an identification in *United States v. Crews*.[6]

The ultimate disposition of *Teresinski* is uncertain because the People's petition for certiorari was granted by the United States Supreme Court; the judgment was vacated and the case remanded for further consideration in light of *Crews*.[7] On its face, the *Crews* holding would seem to overrule *Teresinski* on fourth amendment grounds.[8] Yet there are certain factual variations between the cases that make a distinction possible.[9] Additionally, the lead opinion in *Crews* presents a holding

1. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).
2. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).
3. United States v. Crews, 445 U.S. 463, 470 (1980).
4. The factual scenarios in the in-court identification cases can be complex, but for the purpose of illustration can be reduced to the following: a crime is committed and witnessed by the victim and perhaps others; through an illegal search or seizure the defendant is produced for the witness to view; a positive identification is then made and later repeated in court.
5. 26 Cal. 3d 457, 605 P.2d 874, 162 Cal. Rptr. 44 (1980), *vacated sub nom.* California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980).
6. 445 U.S. 463 (1980).
7. California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980).
8. This comment will not consider the possibility of *Teresinski* being upheld on "independent state grounds." *Cf.* Kaplan v. Superior Court, 6 Cal. 3d 150, 161, 491 P.2d 1, 8, 98 Cal. Rptr. 649, 656 (1971); People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955) (establishing the independent California rule permitting third party standing to invoke the exclusionary rule).
9. See text accompanying notes 212-217 *infra*.

supported by only three votes.[10] Five concurring Justices appear willing to extend the holding to admit in-court identifications even when the defendant's presence was procured through an illegal search or seizure.[11] The California Supreme Court must carefully review the various opinions in *Crews* because a different result could be suggested by each.

There are also two lines of cases on in-court identifications that are affected by the holdings of *Crews* and *Teresinski*. Prior California decisions established the so-called "happenstance" rule,[12] which is difficult to reconcile with *Teresinski*.[13] Another line of cases requires the suppression of evidence obtained through official misconduct intentionally pursued for the purpose of obtaining that evidence.[14] The status of these decisions can be clarified by a decision in *Teresinski* on remand if thorough consideration is given to the important factors underlying the exclusionary rule.

The purpose of this comment is threefold. First, because the analytical framework used by courts when applying the exclusionary rule is somewhat less than clear, it is necessary to develop a comprehensive approach detailing the factors and policies inherent in the application of the rule. A recognition of these factors will serve to clarify the rationales and holdings of the in-court identification cases. Second, since *Crews* is the only decision by the United States Supreme Court directly on point, the lead and concurring opinions in that case must be analyzed to determine the continuing validity of *Teresinski* and other prior decisions. Third, this comment will suggest potential results in *Teresinski* on remand, and how the next decision by the California Supreme Court can clarify the state of the law on this issue. Finally, this comment will conclude that since the causal connection between an in-court identification and a prior illegal search or seizure is weak, while the costs of exclusion are usually high, such identifications should be suppressed only when the effect would be to deter purposeful violations of the Constitution by police.

---

10. *See* 445 U.S. at 464 (only Stewart and Stevens, JJ., fully joined the lead opinion of Brennan, J.; Marshall, J., did not participate).

11. *See id.*

12. The "happenstance" rule permits the introduction of unlawfully obtained evidence if police inadvertently "happen" onto it in the course of investigating a different crime. See text accompanying notes 119-134 *infra*.

13. See text accompanying notes 204-209 *infra*.

14. See text accompanying notes 135-148 *infra*.

ANALYSIS OF THE EXCLUSIONARY RULE

A. Constitutional Origins

Unlike the fifth amendment, the fourth amendment contains no provision expressly prohibiting the use of evidence obtained in violation of its guarantees.[15] To introduce an improperly obtained inculpatory statement of the defendant would make him a witness against himself. But to introduce unlawfully seized evidence would not itself violate the right of a person to be secure in his house or effects.[16] By reading these two constitutional guarantees together, however, the Supreme Court first applied the exclusionary rule to enforce the provisions of the fourth amendment.[17] This integration is reasonable since both amendments are designed essentially to protect aspects of the broader right to privacy.[18] Moreover, the exclusionary remedy is necessary to insure that the guarantees of the fourth amendment are meaningful.[19]

At least three justifications for the exclusionary rule have been advanced. One theory, the redress of fourth amendment violations against individuals, has been rejected persistently.[20] By the time the exclusionary rule is applied, it is too late to repair "the ruptured privacy of the victims' homes and effects. . . ."[21] The rule acts prospectively, not retrospectively.[22]

Another justification for the exclusionary rule has been relegated to a limited status. This theory, the maintenance of judicial integrity, was recognized in the *Mapp* decision as stemming from a desire to encourage respect for the law.[23] Courts should not admit evidence obtained in violation of the law.[24] Later decisions have recognized that to take the rationale of judicial integrity to its logical limit would mandate the exclusion of all illegally seized evidence in all proceedings.[25] Such an application of the exclusionary rule would eliminate the standing requirement that restricts invocation of the rule to only those whose

15. *See* U.S. CONST., amend. IV, amend. V.

16. *See* W. RINGLE, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 1-16 (2d ed. 1979) [hereinafter cited as RINGLE]. *See generally* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 620 (1968) (citations omitted).

17. *See* Mapp v. Ohio, 367 U.S. 643, 646 (1961). For 47 years after its adoption the exclusionary rule was applied solely by federal courts. But in *Mapp* the Court recognized the need for an adequate safeguard of fourth amendment rights and consequently applied the exclusionary rule to the states through the due process clause of the fourteenth amendment. *See id.* at 652-55.

18. *See id.* at 646-48.

19. *Id.* at 655-56.

20. *See* Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 347 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960).

21. Linkletter v. Walker, 381 U.S. 618, 637 (1965).

22. *See* 364 U.S. at 217.

23. *See* 367 U.S. at 659.

24. *See id.*

25. *See* 428 U.S. at 485-86.

rights have been violated directly.[26] Additionally, such exclusion also would contradict the public policy of admitting any highly probative evidence.[27]

Deterrence of illegal police conduct is the most compelling rationale for the exclusionary rule.[28] The *Mapp* Court indicated that suppression of the ill-gotten evidence is the most effective means of eliminating unlawful searches and seizures by authorities.[29] As the Court once said, the exclusionary rule removes "the incentive to disregard" the constitutional guarantees by suppressing the fruit of a violation.[30] Whatever the effectiveness of the rule for this purpose, the Court has made it clear that this is the operative justification for the rule.[31]

Therefore, the exclusionary rule is premised primarily on the need to deter official misconduct, and to a lesser extent on the importance of maintaining judicial integrity. We now turn to a discussion of the evidence that should be excluded and the circumstances under which it should be excluded to attain these goals.

B. "Fruit of the Poisonous Tree"

The exclusionary rule not only operates to suppress evidence obtained directly from an illegal search or seizure, but also evidence that is obtained indirectly from such a violation.[32] For example, if documents are illegally seized and the knowledge gained from them is used to obtain further evidence, the latter evidence will have been obtained from the former.[33] Under the "fruit of the poisonous tree" doctrine such derivative evidence is tainted by the prior illegal seizure and thus is inadmissible.[34]

To determine what evidence is the "poisonous fruit" of official misconduct, it is necessary to begin with the standard set forth in *Wong Sun v. United States*.[35] In that landmark case the Court articulated the controlling test:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evi-

26. *See id.* at 485.
27. *See id.*
28. *See id.* at 486; United States v. Calandra, 414 U.S. 338, 347 (1974).
29. *See* 367 U.S. at 656.
30. *See* Elkins v. United States, 364 U.S. 206, 217 (1960).
31. *See generally* 428 U.S. at 492.
32. RINGLE, *supra* note 16, at 3-4.
33. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390-92 (1920).
34. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).
35. 371 U.S. 471 (1963).

> dence to which instant objection is made has been come at *by exploitation of that illegality* or instead *by means sufficiently distinguishable to be purged of the primary taint*."[36]

Although a "but-for" test was rejected by *Wong Sun* as the sole basis of analysis, the illegality must still be at least a cause-in-fact of the procurement of the derivative evidence to warrant exclusion.[37] Once that step is met, the *Wong Sun* "exploitation" standard also must be satisfied to suppress the evidence.[38] The Supreme Court has not given this standard a concrete definition and apparently a number of factors are involved in identifying "exploitation."

C. *Interpreting the Exploitation Standard*

1. *The Importance of Effective Deterrence*

Recent Supreme Court decisions indicate that a highly significant factor of the exploitation standard is the extent to which exclusion will effectively deter future police misconduct.[39] For example, some cases indicate that when technically unlawful police conduct is pursued in good faith, exclusion is not required. In *Michigan v. Tucker*,[40] police interrogated the defendant without first fully informing him of his *Miranda*[41] rights.[42] Since *Miranda* was not yet decided, the police had done all that the law required of them at the time.[43] But the defendant sought to apply the *Miranda* rule retroactively so that the testimony of a witness disclosed during the interrogation could be suppressed.[44]

Initially, the *Tucker* Court pointed out that the law "cannot realistically require that policemen investigating serious crimes make no error whatsoever."[45] Turning to the specific facts before it, the Court concluded:

> The deterrent purpose of the exclusionary rule necessarily assumes that police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right . . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.[46]

---

36. *Id.* at 487-88, *citing* J. MAGUIRE, EVIDENCE OF GUILT 221 (1959) (emphasis added).
37. *See* Ruffin, *Out On A Limb Of The Poisonous Tree: The Tainted Witness*, 15 U.C.L.A.L. REV. 32, 38 (1967).
38. See text accompanying note 36 *supra*.
39. *See* United States v. Ceccolini, 435 U.S. 268, 274-75 (1978); United States v. Calandra, 414 U.S 338, 347-48 (1974).
40. 417 U.S. 433 (1974).
41. Miranda v. Arizona, 384 U.S. 436 (1966).
42. 417 U.S. at 436.
43. *Id.* at 447.
44. *Id.* at 437.
45. *Id.* at 446.
46. *Id.* at 447.

The official misconduct in *Tucker* was minor because police simply neglected to inform the defendant that counsel would be provided for him if he could not afford one.[47] Further, there was no evidence to indicate that Tucker's statement informing police of the witness was involuntary.[48] *Tucker* therefore may signify that exclusion is not warranted when the official misconduct is minor and suppression will have little deterrent effect.[49]

When litigants seek expanded application of the exclusionary rule to proceedings other than criminal trials, the Court has also cited the lack of deterrent effect as a reason for limiting the application of the rule.[50] Frequently in these situations, the Court will also balance the potential gain in deterrent effect against the long-term costs of more extensively excluding evidence.[51]

This approach has resulted in the decision that the exclusionary rule may not be invoked before a grand jury.[52] The Court felt that police would be motivated to uphold the constitutional guarantee by virtue of the fact that the evidence would still be suppressed at trial.[53] Additionally, the Court feared that the traditional inquisitorial role of the grand jury would be hindered by excluding relevant evidence from its consideration.[54]

Application of the exclusionary rule to some civil litigation also has been denied. In *United States v. Janis*,[55] Los Angeles police seized certain evidence of bookmaking activity including $4,940 in cash. When the Internal Revenue Service learned of the money, it assessed wagering excise taxes on Janis and levied on the seized funds. But during the criminal prosecution the Court determined that the evidence had been seized unlawfully and all items were ordered returned except the money. Consequently, Janis brought suit for a refund and the I.R.S. counterclaimed for the unpaid tax. In determining whether the illegally seized evidence could be used against the plaintiff, the Court weighed the cost of exclusion against the gain in deterrent effect.[56] The Court concluded that state police would be deterred from misconduct even if the evidence is used by another sovereign in a civil proceed-

47. *See id.* at 436.
48. *See id.* at 445.
49. *Cf.* United States v. Peltier, 422 U.S. 531 (1975) (issue and holding analogous to *Tucker*).
50. See notes 52-61 and accompanying text *infra*.
51. See notes 78-88 and accompanying text *infra*.
52. *See* United States v. Calandra, 414 U.S. 338, 351-52 (1974).
53. *See id.* at 351.
54. *See id.* at 349.
55. 428 U.S. 433 (1976).
56. *See id.* at 453-54.

ing.[57]

Finally, in *Stone v. Powell*,[58] the Court denied federal habeas corpus relief for alleged fourth amendment violations when the defendant had been given a full and fair hearing of his claim in state court.[59] Justice Powell observed in his majority opinion that suppression would not effectively deter official misconduct unless police believed that federal review would uncover illegal procedures that otherwise would go undetected in state proceedings. This possibility was considered "dubious."[60] Thus finding that benefits to be derived from habeas corpus review of fourth amendment cases were minimal, whereas costs were high, the Court denied such a remedy in virtually all state search and seizure cases.[61]

2. *The Degree of Causation*

Another important consideration in deciding whether to suppress evidence apparently the fruit of illegal police conduct is the directness and certainty of the causal connection between the official misconduct and the procurement of the derivative evidence. The illegal search or seizure must significantly steer authorities to the derivative evidence.[62]

The Court in *Brown v. Illinois*[63] delineated two factors that are relevant:[64] (1) the temporal proximity between the misconduct and derivative evidence, and (2) the presence or absence of intervening circumstances. These factors were utilized by the *Brown* Court in suppressing a confession obtained just two hours after an illegal arrest with no significant intervening circumstances.[65]

A further illustration of these factors can be found in the facts of *Wong Sun v. United States*.[66] A series of arrests and leads directed federal narcotics agents to the defendant Wong Sun.[67] He was arrested and released, but he later returned for questioning by the agents.[68] A written statement, that the defendant refused to sign, was prepared from the interrogation.[69] The prosecution attempted to introduce this

57. *See id.* at 454.
58. 428 U.S. 465 (1976).
59. *See id.* at 494.
60. *See id.* at 493-94.
61. *See id.* at 494-95.
62. United States v. Cales, 493 F.2d 1215, 1215-16 (9th Cir. 1974).
63. 422 U.S. 590 (1975).
64. *Id.* at 603. A third factor, "the purpose and flagrancy of the official misconduct," was also listed. But this factor seems to be a consideration of whether suppression would further the deterrence. *See* RINGLE, *supra* note 16, at 3-22.
65. *See* 422 U.S. at 604.
66. 371 U.S. 471 (1963).
67. *Id.* at 473-75.
68. *Id.* at 475-76.
69. *Id.* at 476-77.

statement at trial.[70] Although the defendant's arrest was held invalid for want of probable cause,[71] the Supreme Court declined to suppress the statement as a poisonous fruit.[72] The facts leading to this conclusion were that a period of several days had elapsed, a lawful arraignment intervened betwen the arrest and interrogation, and the defendant had returned voluntarily to make the statement.[73] Thus, the length of elapsed time and the intervening circumstances purged the taint of the illegal arrest.[74]

If oral evidence is sought to be suppressed, the directness of the causal connection becomes especially critical. The Supreme Court has held that "a closer, more direct link between the illegality" and live-witness testimony is required to suppress this type of evidence.[75] A particularly relevant factor in this analysis is the "willingness of the witness to testify freely."[76] This requirement of a more direct line of causation for live-witness testimony is due to the fact that the cost of its exclusion, possibly silencing the witness permanently, is particularly great.[77]

3. Balancing the Costs of Exclusion

Detractors of the exclusionary rule[78] may not have succeeded in overturning it yet, but they may be making some progress. Recent decisions seem to be adding the cost of exclusion as another factor in exploitation analysis.[79] The policies behind the rule must be balanced against these competing costs before the rule is applied.[80]

One general competing policy that has found consistent expression is the need to make all relevant and trustworthy information available.[81] The "evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."[82] In a system of justice designed to seek the truth, this is an especially high cost.

---

70. *Id.* at 477.
71. *See id.* at 491.
72. *See id.*
73. *See id.*
74. *See id.*
75. United States v. Ceccolini, 435 U.S. 268, 278 (1978).
76. *Id.* at 276.
77. *See id.* at 277-78.
78. *See, e.g.*, Stone v. Powell, 428 U.S. 465, n.27 (1976); RINGLE, *supra* note 16, at 1-18 (listing some detracting authorities).
79. *See* 435 U.S. at 275-76; 428 U.S. at 488; United States v. Calandra, 414 U.S. 338, 348-49 (1974). *See also* Michigan v. Tucker, 417 U.S. 433, 450 (1974).
80. *See* 428 U.S. at 488.
81. *See* 435 U.S. at 278, *citing* Michigan v. Tucker, 417 U.S. 433, 450 (1974). *See generally* 428 U.S. at 490. *See also* Branzburg v. Hayes, 408 U.S. 665, 688 (1972).
82. 428 U.S. at 490.

The exclusionary remedy also may have the ultimate effect of discouraging one of its own goals: maintaining the integrity of the judicial system.[83] Guilty persons may be freed by the suppression of critical evidence[84] and the disparity between the police misconduct and the windfall to the defendant can be particularly great.[85] Therefore, "if applied indiscriminately, [the exclusionary rule] may well have the opposite effect of generating disrespect for the law and administration of justice."[86]

When oral evidence is sought to be suppressed, it is essential to balance the costs of exclusion against the goals of the exclusionary rule. Exclusion of live-witness testimony is especially costly because it may "perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby."[87] Typical tangible evidence can be obtained by several means, but the only way to have a witness testify about his or her own knowledge is to have the witness speak before the court. Therefore, such an exclusion can seriously impede the fact-finding process and the evolution in the law of evidence is away from such impediments.[88]

D. Exceptions to the Exclusionary Rule

There are three commonly accepted exceptions to the exclusionary rule: attenuation, independent source, and inevitable discovery.[89] Since any one of these exceptions potentially could be applied to in-court identifications, some brief description of each is warranted.

The attenuation exception operates to admit evidence remotely derived from a prior illegality.[90] Upon a showing that the causal connection between the prior official misconduct and discovery of derivative evidence is weak, the evidence may be admitted because the connection has "become so attenuated as to dissipate the taint."[91] Although some degree of causation exists, it is not significant enough to warrant exclusion of the evidence.[92]

Even though evidence was once obtained unlawfully, it still may be

---

83. See text accompanying notes 23-27 *supra*.
84. 428 U.S. at 490.
85. *Id.*
86. *Id.*
87. 435 U.S. at 277.
88. *See id., citing* C. MCCORMICK, THE LAW OF EVIDENCE 150 (1st ed. 1954).
89. United States v. Crews, 445 U.S. 463, 470 (1980).
90. It involves the same considerations as the degree of causal connection factor of exploitation analysis. See text accompanying notes 62-77 *supra*.
91. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).
92. *See* RINGLE, *supra* note 16, at 3-22. See text accompanying notes 103-109 *infra* for an application of the exception.

admitted under the independent source exception if it is rediscovered through means independent of the original misconduct.[93] Application of the exception serves a dual function. First, the initial exclusion will serve to deter illegal police conduct. Second, the evidence does not remain forever inaccessible to the fact-finder since it still may be admitted if discovered through legal means.[94]

The controversial inevitable discovery exception operates to admit evidence that eventually would have been discovered properly even though it had previously been seized illegally. The prosecution must establish that, through a legitimate standard investigatory procedure with predictable results, the evidence would have been discovered.[95] In effect, the inevitable discovery exception is a "hypothetical independent source" theory.[96]

Neither the United States Supreme Court[97] nor the California Supreme Court[98] has expressly approved the inevitable discovery exception. The exception has been criticized as failing to promote the deterrence rationale of the exclusionary rule.[99] If police know beforehand that the fruits of an illegal search or seizure may be admissible, they have little incentive to conform their activities to the constitutional standard. Therefore, while the possible use of the inevitable discovery exception should be recognized,[100] further discussion of the exception herein seems unwarranted until it is given greater acceptance.

Operating as it does, to prevent the use of *any* tainted evidence, the exclusionary rule has perhaps its most dramatic impact when applied to testimonial evidence, particularly when the testimony is an in-court identification of the defendant by the victim or another witness. The

---

93. *See* RINGLE, *supra* note 16, at 3-22.

94. *See* Silverthorne Lumber Co. v. United States, 251 U.S 385, 392 (1920). See notes 110-115 and accompanying text *infra* for an application of the independent source exception to an identification issue.

95. *See* Comment, *The Inevitable Discovery Exception to the Exclusionary Rule*, 74 COLUM. L. REV. 88, 93 (1974).

96. RINGLE, *supra* note 16, at 3-14.

97. *See* Fitzpatrick v. New York, 414 U.S. 1050 (1973) (White, J., dissenting from denial of certiorari).

98. *But see* People v. Superior Court (Tunch), 80 Cal. App. 3d 665, 674-75, 145 Cal. Rptr. 795, 799-800 (1978) (interpreting some cases to have impliedly adopted the exception).

99. *See* 80 Cal. App. 3d at 681, 145 Cal. Rptr. at 804; Comment, *The Inevitable Discovery Exception to the Exclusionary Rule* 74 COLUM. L. REV. 88, 99 (1974).

100. *See* Commonwealth v. Garvin, 448 Pa. 258, 293 A.2d 33 (1972) (the court employed the inevitable discovery exception to admit in-court identifications obtained after the defendant was illegally arrested).

> The illegal arrest in this instance merely provided the means for the confrontation with [the witness] more promptly than would otherwise have been the case. . . . We cannot assume that but for the illegal arrest the appellant would have remained at large indefinitely.

Id. at 266, 293 A.2d at 37-38 (footnotes omitted).

significant cases where the rule has been applied to such testimony will now be examined.

THE ELEMENTS OF IN-COURT IDENTIFICATIONS

In *Crews*, Justice Brennan identified three elements of in-court identifications: (1) the presence of the witness in the courtroom; (2) the ability of the witness to base the identification upon the mnemonic representation he or she formed of the defendant at the time of the criminal act itself; and (3) the presence of the defendant in the courtroom.[101] If any of these elements is supplied by an illegal search or seizure, the in-court identification might be suppressed.[102]

United States v. Ceccolini[103] illustrates a possible tainting of the first element of in-court testimony. In that case an illegal search revealed evidence of unlawful gambling and a witness who had knowledge of the crime.[104] Four months later investigators interviewed the witness and her testimony led to the defendant's indictment for perjury.[105] Therefore, the discovery of the witness and her subsequent testimony were products of the prior unlawful police actions.

The *Ceccolini* Court permitted the witness's testimony in spite of its connection to the prior illegal search.[106] The Court concluded that the presence of intervening circumstances attenuated the connection and purged the taint from the testimony.[107] These circumstances included the length of time between the search and court appearance and the willingness of the witness to testify freely.[108] The *Ceccolini* result indicates that the attenuation exception has ready applicability to the first aspect of in-court identification.[109]

The second element of in-court identifications requires that the witness's substantive testimony not be tainted by any official misconduct.[110] This may be an issue if the defendant is identified at a pre-trial lineup that is either conducted unconstitutionally or while the defendant is in illegal custody. For instance, in *Crews* the Court had to determine whether the witness's memory of the assailant was affected by

101. United States v. Crews, 445 U.S. 463, 471 (1980).
102. *See id.* (a majority holding indicating that if either of the first two elements is come at by exploitation, then the identification will be suppressed). There is dispute as to the third element. See text accompanying notes 167-177 *infra*.
103. 435 U.S. 268 (1978).
104. *Id.* at 270-72.
105. *Id.* at 272.
106. *Id.* at 279.
107. *See id.*
108. *See generally id.*
109. *See* 47 U. CIN. L. REV. 487, 492 (1978).
110. *See* United States v. Crews, 445 U.S. 463, 472 (1980).

intervening photographic and in-person lineups.[111] The witness's testimony will be inadmissible if it is tainted by the illegal police acts.[112]

In *United States v. Wade*,[113] the Court enumerated certain factors to be employed in assessing whether the witness's recollection is based on the incident itself or has been affected by intervening illegal acts. These factors include prior opportunities to observe the accused, any failures to identify the accused, any discrepancies in descriptions given, and the lapse of time between the incident and the courtroom identification.[114] If it satisfies the *Wade* test, the prosecution has in effect met the independent source test by showing the witness's memory to be rooted so strongly in the incident itself that it is unaffected by intervening factors.[115]

Neither of the first two aspects of in-court identifications is tainted in any of the four major cases discussed hereafter. In each instance the witness (usually the victim) came forward voluntarily to report the incident and describe the perpetrator before any illegal search or seizure occurred.[116] In addition, there is no indication that the witness's recollection was affected by an intervening lineup identification that rendered the in-court testimony inadmissible.[117] Instead, it is the third element (the presence of the defendant in the courtroom) that is the issue in each case. It was an illegal search or seizure in virtually each case that led to the defendant's discovery and subsequent court appearance.[118] Had it not been for this appearance, the witness could not have made the identification by pointing out the defendant for the fact-finder to see. All of the relevant cases turn on this issue.

In analyzing the decisions discussing in-court identifications made after an illegal search or seizure, there are two lines of cases, the "happenstance" and "roundup" cases, that establish the outer parameters of admissibility. These cases serve to frame the issue of this comment and are a good beginning point for discussion. Then the impact of *Crews* can better be assessed, and some of the possible future dispositions of *Teresinski* can be discussed.

---

111. *See id.* at 473.
112. *See id.*
113. 388 U.S. 218 (1967).
114. *See id.* at 241.
115. *See* 445 U.S. at 473 n.18.
116. *See generally* 445 U.S. at 471-73; United States v. Edmons, 432 F.2d 577, 581 (2d Cir. 1970); People v. Teresinski, 26 Cal. 3d 457, 461, 605 P.2d 874, 875, 162 Cal. Rptr. 44, 46 (1980), *vacated sub nom.* California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980); Lockridge v. Superior Court, 3 Cal. 3d 166, 170, 474 P.2d 683, 686, 89 Cal. Rptr. 731, 734 (1970).
117. *See generally id.*
118. See text accompanying notes 120-123 (*Lockridge*), 136-141 (*Edmons*), 153-162 (*Crews*), 184-194 (*Teresinski*) *infra*.

THE OUTER PARAMETERS OF THE IN-COURT IDENTIFICATION CASES

A. *The Happenstance Cases*

The first California cases to discuss the admissibility of in-court identifications that had been derived from an illegal search or seizure established the so-called "happenstance" rule. In *Lockridge v. Superior Court*[119] the Los Angeles police found a gun belonging to the defendant while conducting a warranted search for the investigation of another crime.[120] A serial number on the gun led police to the report of a robbery in Lennox that had occurred two years before.[121] The suspects' photographs were then shown to the victims of the robbery, who identified the defendants as their assailants.[122] The warrant later was declared invalid.[123]

The California Supreme Court denied the defendant's petition for a writ to compel the trial court to suppress the identifications.[124] Citing *Wong Sun*, the court said that the testimony was not arrived at via an exploitation of the illegality.[125] The Los Angeles investigation was not aimed at finding new witnesses, nor did it gain any further evidence since the identity of the victims was already known to the police.[126] Since the discovery of a lead for one crime during the investigation of another was "pure happenstance,"[127] suppression of the identifications would not further the deterrence rationale of the exclusionary rule.[128]

Two years after *Lockridge*, the remarkably similar case of *People v. McInnis*[129] was decided. The court again found that the discovery of evidence of one crime during the investigation of another was pure happenstance.[130] The decision emphasized that suppression of the victim's identification testimony would give "a crime insurance policy in perpetuity to all persons once illegally arrested."[131] Thus, the costs to

119. 3 Cal. 3d 166, 474 P.2d 683, 89 Cal. Rptr. 731 (1970).
120. *See id.* at 168-69, 474 P.2d at 684-85, 89 Cal. Rptr. at 732-33.
121. *See id.*
122. *See id.*
123. *See id.*
124. *Id.* at 171, 474 P.2d at 686, 89 Cal. Rptr. at 734.
125. *See id.* at 169-70, 474 P.2d at 685-86, 89 Cal. Rptr. at 733-34.
126. *See id.* at 171, 474 P.2d at 686, 89 Cal. Rptr. at 734.
127. *See id.*
128. *See id.*
129. 6 Cal. 3d 821, 494 P.2d 690, 100 Cal. Rptr. 618 (1972). Shortly after a robbery in Pasadena, the victim and another witness were shown several hundred photographs, but were unable to make an identification. One month later, Los Angeles police arrested the defendant on an illegal weapons charge and photographed him. When this latter photo was shown to the two witnesses they identified the defendant as the robber. However, the arrest was held to be unlawful. *Id.* at 823-24, 494 P.2d at 690-91, 100 Cal. Rptr. at 618-19.
130. *See id.* at 825, 494 P.2d at 692, 100 Cal. Rptr. at 620.
131. *See id.* at 826, 494 P.2d at 693, 100 Cal. Rptr. at 621.

society of excluding such evidence were considered by the court as well as the effect of suppression on the deterrence rationale.[132]

While the holdings in *Lockridge* and *McInnis* indicate that the happenstance discovery of unsought evidence does not satisfy the exploitation standard, the reasoning behind this conclusion is somewhat unclear. In many ways, the decisions seem to be employing the attenuation exception because there are indications that the time lapse between the search or seizure and the later testimony is so great that the taint of the prior illegality has become attenuated.[133] It seems more likely that the *Lockridge-McInnis* rule is a tacit recognition of the importance of satisfying the deterrence rationale.[134] When police do not originally seek the questioned evidence, but merely "happen" onto it, there is no purposefulness in their misconduct. Since they cannot predict when they will happen onto evidence again, exclusion is unlikely to deter them from such conduct.

B. The Roundup Cases

A very different situation from the *Lockridge* type case is presented when evidence has been obtained through official misconduct intentionally pursued for the purpose of obtaining that evidence. In *United States v. Edmons*[135] between 50 and 60 agents of the Federal Bureau of Investigation were sent to a neighborhood in New York City for the purpose of arresting a group of persons who allegedly had interfered with the arrest of one Oliver the day before.[136] The agents were told that anyone who had been part of the group could be arrested for failure to have a draft card, yet the only description they were given was that the suspects were "young and black."[137] Five persons were arrested on this basis, even though some said their draft cards were available in their homes nearby.[138] After the defendants were brought to police headquarters they were presented to three of the four agents who had been hampered in the performance of their duty the previous day.[139] The fourth agent identified some of the defendants at their ar-

132. The "happenstance" rule has been followed by lower California courts. *See* People v. Griffin, 59 Cal. App. 3d 532, 537-38, 130 Cal. Rptr. 648, 651 (1976); People v. Fitzgerald, 29 Cal. App. 3d 296, 314, 105 Cal. Rptr. 458, 469 (1972); Williams v. Superior Court, 25 Cal. App. 3d 409, 412-13, 101 Cal. Rptr. 91, 93 (1972).

133. *See* 6 Cal. 3d at 826, 494 P.2d at 693, 100 Cal. Rptr. at 621; 3 Cal. 3d at 170, 474 P.2d at 686, 89 Cal. Rptr. at 734.

134. *See* 60 CALIF. L. REV. 870, 877-78 (1972).

135. 432 F.2d 577 (2d Cir. 1970).

136. *See id.* at 580.

137. *Id.*

138. *Id.* at 580-81.

139. *Id.* at 581.

raignment on the morning after their arrest.[140] These arrests were held illegal and the defendants then sought to suppress the agents' identifications as tainted by the unlawful arrests.[141]

Two significant points emerge from the appellate opinion in *Edmons*: (1) that the illegal arrests were a prime ingredient of the in-court identifications;[142] and (2) that the deterrent purpose of the exclusionary rule would be well-served by suppression.[143] Indeed, the court concluded:

> We are not obliged here to hold that when an arrest made in good faith turns out to have been illegal because of lack of probable cause, an identification resulting from the consequent custody must inevitably be excluded. But in a case like this, where flagrantly illegal arrests were made for the precise purpose of securing identifications that would not otherwise have been obtained, nothing less than barring any use of them can adequately serve the deterrent purpose of the exclusionary rule.[144]

The Supreme Court's decision in *Davis v. Mississippi*[145] lends support to the *Edmons* holding. In *Davis* fingerprint exemplars were suppressed because they were derived from a roundup of over twenty suspects fitting only a general description of the assailant.[146] The Court held that such a procedure did not comply with the fourth amendment.[147]

Unlike the happenstance cases, invocation of the exclusionary rule in the roundup cases is necessary to secure compliance with fourth amendment standards. As the Court said in *Davis*: "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry. . . ."[148] The deterrence of future instances of official misconduct intentionally pursued for the purpose of obtaining that evidence can best be accomplished by suppressing the fruits of that misconduct.

UNITED STATES V. CREWS

Since *Crews*[149] is the only Supreme Court decision directly on point,

---

140. *Id.*
141. *Id.*
142. *See id.* at 583.
143. *See id.* at 584.
144. *Id.* (footnotes omitted).
145. 394 U.S. 721 (1969).
146. The victim was raped by someone she could only describe as a young, black male. Accordingly, police combed the town and brought over 20 such persons to headquarters for fingerprinting. *Id.* at 721-22.
147. *See id.* at 728. One author has opined that the *Davis* holding requires the suppression of identifications obtained after an unlawful arrest of the defendant. Quinn, *In The Wake of Wade: The Dimensions Of The Eyewitness Identification Cases*, 42 U. COLO. L. REV. 135, 155 (1970).
148. 394 U.S. at 726.
149. 445 U.S. 463 (1980).

it has a profound impact upon all of the relevant cases, as well as upon *Teresinski*. But it is an especially difficult case to interpret because it leaves many questions unresolved.

The prosecution of the defendant in *Crews* stemmed from three robbery incidents.[150] Between the third and sixth of January in 1974 three women were accosted and robbed in a restroom on the grounds of the Washington Monument.[151] The modus operandi in each incident was substantially similar and the descriptions of the assailant given to police by each victim matched.[152] On January 9, Officer Rayfield of the United States Park Police observed Crews in the area of the crimes and realized that he fit the descriptions given by the robbery victims.[153] Rayfield and his partner stopped the defendant who told them his name and age (16).[154] Crews was allowed to leave and while he was in a restroom the officers located James Dickens, who believed he had spotted the assailant on January 3.[155] Dickens observed the defendant leaving the restroom and identified him as the person he had seen at the time of the incident.[156]

Crews was taken into custody as a suspected truant and photographed although he never was formally charged with an offense.[157] He was then identified by the robbery victims both from the photograph and in a lineup.[158] The District of Columbia Superior Court ruled the station house detention on the truancy charge illegal for lack of probable cause.[159] Consequently the photographic and lineup identifications were suppressed.[160] The court, however, admitted the victims' in-court identifications, and the defendant was convicted of robbery.[161] This ruling was reversed by the District of Columbia Court of Appeals which suppressed all identification evidence.[162]

The Supreme Court granted certiorari and reversed the Court of Appeals.[163] In his lead opinion Justice Brennan progressively examined each of the three elements of in-court identifications.[164] For each of the first two aspects, he concluded that no issues were presented by the

150. *Id.* at 465.
151. *Id.*
152. *Id.* at 465-66.
153. *Id.* at 466.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 467.
158. *Id.*
159. *Id.* at 467-68.
160. *Id.* at 468.
161. *Id.*
162. Crews v. United States, 389 A.2d 277 (D.C. 1978).
163. 445 U.S. at 470.
164. *Id.* at 471-75.

case.[165] But when considering whether the defendant's courtroom presence was a poisonous fruit of the illegal detention, Brennan subdivided his analysis into two parts. First, he dismissed the claim that the defendant himself could be a tainted fruit of the illegal detention by citing a line of cases holding that a prior illegal arrest is not itself a bar to subsequent prosecution.[166] In the second subdivision of his opinion, Brennan dealt with the argument that the defendant's corpus could itself be considered tainted evidence because the witness's act of pointing out the defendant is a critical ingredient of the in-court identification.[167] Brennan found it unnecessary to decide this latter issue.[168] Instead, he noted that the authorities had had reason to suspect Crews before the illegal detention occurred.[169] Thus, they did not derive the impression or appearance of the defendant from the detention, since it was already known to them.[170] The only benefit gained from the unlawful detention was the "link" of the witnesses' memory of the defendant with the appearance of the accused.[171] This link was of no evidentiary value, so that there was no "fruit" of the illegal act to suppress.[172] In this latter part of his opinion, Brennan was supported by only three votes.[173]

In contrast to Brennan's skirting the corpus-as-evidence question, five concurring Justices felt that the issue could be answered readily.[174] Justice White considered the manner in which the defendant's presence was procured to be irrelevant.[175] Since an illegal arrest would not by itself bar a subsequent trial, the presence of the defendant for purposes of identification "is merely the inevitable result of the trial being held."[176] Suppressing the defendant's corpus also would "effectively [insulate] one from conviction for any crime where an in-court identification is essential."[177]

If Justice Brennan's opinion is accepted as authoritative, the admissibility of an in-court identification procured after an illegal search or

165. *Id.* at 471-73.
166. *See id.* at 474.
167. *See id.* This latter argument must be distinguished from the earlier contention by defendant that there should be no prosecution because his presence was illegally procured. The defendant's alternative argument is that the illegal arrest revealed his appearance to police and, therefore, his corpus should be suppressed as a poisoned fruit.
168. *Id.* at 475.
169. *Id.*
170. *See id.*
171. *Id.*
172. *Id.*
173. *See id.* at 479 (White, J., concurring).
174. *See id.*
175. *See id.* at 478.
176. *Id.*
177. *Id.*

seizure will remain an unsettled issue. Because if authorities were unaware of the defendant's appearance before the illegal arrest, his corpus could be considered the tainted fruit of that illegality. An identification would be impossible if the defendant's corpus was suppressed.

On the other hand, if Justice White's view is considered controlling, then an in-court identification seemingly would be admissible in any instance when the courtroom presence and recollection of the witness were not the products of unconstitutional police acts.[178] One question that then arises is whether this view is intended to be so extensive as to include even identifications obtained by unconstitutional dragnet procedures[179] pursued for the precise purpose of securing the identifications. The broadness of White's opinion would seem to require their admission. Such a literal reading of his opinion ignores the more compelling consideration of the need to deter police misconduct, and is therefore unlikely.

The *Crews* decision thus raises as many questions as it answers. A future case will have to clarify whether the view of Justice Brennan or that of Justice White is authoritative and under what circumstances it is to be applied. Resolving these questions will go a long way towards determining the validity of uncertain cases like *Teresinski*.

PEOPLE V. TERESINSKI[180]

In the early morning of December 3, 1976 three men robbed a Seven-Eleven store in Woodland, California, taking about $70.[181] Mr. Cady, the store clerk at the time of the incident, gave a description of the robbers to police when they arrived shortly thereafter.[182] A witness who had been outside the store gave a description of the car used in the robbery.[183]

A short time later, Officer Rocha of the Dixon Police stopped an unfamiliar vehicle in Dixon because he believed that at least two of the three occupants were juveniles and in violation of the local curfew.[184] Before they pulled to a stop, Rocha saw the driver and front-seat passenger glance back at him while reaching down.[185] At this point Rocha

178. *See id.* (White indicates that the identification of Crews should not be suppressed since the victims' own presence and recollection were untainted).

179. See text accompanying notes 135-148 *supra*.

180. 26 Cal. 3d 457, 605 P.2d 874, 162 Cal. Rptr. 44 (1980), *vacated sub nom.* California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980).

181. Petition for Writ of Certiorari at 8-10, California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980) [hereinafter cited as Petition].

182. Petition, *supra* note 181, at 15.

183. Petition, *supra* note 181, at 15.

184. 26 Cal. 3d at 460, 605 P.2d at 875, 162 Cal. Rptr. at 45.

185. *Id.*

suspected that the occupants had either alcohol or a weapon in the vehicle.[186] After ordering the driver and front-seat passenger out of the car, Rocha discovered an open beer can and loaded revolver under the front seat.[187] Rocha then called for a backup unit and after it arrived he searched the interior of the car finding a bag of marijuana and a paper bag full of money.[188] All three occupants were then arrested for investigation of robbery.[189] Rocha was still unaware of the Woodland robbery.[190]

After the suspects were booked in Dixon, the money found in the car was traced to the Seven-Eleven robbery.[191] The defendants were transported to Woodland a few hours after their arrest and photographed.[192] Cady identified the defendants from the photographs and later in court.[193] The trial court, however, found the arrest to be unlawful and suppressed Cady's identification testimony as a poisoned fruit.[194]

On appeal, the California Supreme Court affirmed the suppression order.[195] Initially, the court devoted a lengthy portion of its opinion to affirm that there was indeed no probable cause for stopping the vehicle.[196] Turning to the issue of whether the identifications should be suppressed, the court cited the *Wong Sun* "exploitation" standard as controlling.[197] The court concluded that to remove the taint from unlawfully obtained evidence requires "an intervening independent act by the defendant or a third party."[198] Finding no intervening act, the court held that the identifications were tainted and therefore inadmissible.[199]

In order to distinguish the happenstance cases, the *Teresinski* majority concluded that those decisions were limited to cases involving independent police agencies investigating independent crimes.[200] These were not the facts in *Teresinski* according to the majority.[201] Under these circumstances, the majority held the identification testimony to

186. *Id.*
187. *Id.* at 461, 605 P.2d at 875, 162 Cal. Rptr. at 45.
188. Petition, *supra* note 181, at 13-14.
189. Petition, *supra* note 181, at 14.
190. 26 Cal. 3d at 468, 605 P.2d at 880, 162 Cal. Rptr. at 50 (Manuel, J., dissenting).
191. Petition, *supra* note 181, at 12-14.
192. Petition, *supra* note 181, at 14.
193. 26 Cal. 3d at 461, 605 P.2d at 875, 162 Cal. Rptr. at 46.
194. *Id.*
195. *Id.* at 464, 605 P.2d at 878, 162 Cal. Rptr. at 48.
196. *See id.* at 461-63, 605 P.2d at 875-77, 162 Cal. Rptr. at 46-47.
197. *Id.* at 463, 605 P.2d at 877, 162 Cal. Rptr. at 47.
198. *Id.* at 464, 605 P.2d at 877, 162 Cal. Rptr. at 47, *citing* People v. Sesslin, 68 Cal. 2d 418, 428, 439 P.2d 321, 328, 67 Cal. Rptr. 409, 416 (1968).
199. *See* 26 Cal. 3d at 464-65, 605 P.2d at 877-78, 162 Cal. Rptr. at 47-48.
200. *See id.* at 464-65, 605 P.2d at 877-78, 162 Cal. Rptr. at 48.
201. *See id.*

have been arrived at by exploitation of the illegal arrest.[202]

THE KEY ISSUES IN *TERESINSKI* ON REMAND

Now that the *Teresinski* judgment has been vacated and the case remanded for reconsideration in light of *Crews*,[203] the perplexing identification issue is raised in California once again. The California Supreme Court now has the opportunity to clarify the law in this area in three significant ways: (1) by distinguishing and explaining the rule in the happenstance cases; (2) by giving *Crews* an interpretation that renders it either distinguishable from the facts in *Teresinski* or controlling of them; (3) by incorporating the considerations of the roundup cases as an integral part of the analysis.

A. Distinguishing The Happenstance Cases

Distinguishing the happenstance cases is perhaps the first issue that should be addressed, because the majority's original resolution of the matter was vague at best. A lower court may well have difficulty interpreting the decisions in light of the "independent agencies, independent investigations" language in *Teresinski*.[204] *Teresinski* seems particularly subject to the characterization of a happenstance case because the Dixon and Woodland police departments can hardly be considered anything but separate.[205] The defendants were neither originally arrested for the Woodland robbery, nor were the Dixon police ever investigating that incident.[206]

Perhaps the only realistic basis for distinguishing *Teresinski* from the happenstance cases lies in the importance of deterring unconstitutional police activity. If the stop in *Teresinski* was made solely to secure any evidence of any unlawful activity on the part of the defendants, and the alleged curfew violation was merely used as a pretense for the stop,[207] then there is greater deterrent value in exclusion of the evidence. In this sense, *Teresinski* is no longer a happenstance case since the police were not really seeking evidence of a specific crime when they happened onto evidence of another. Instead, they were never really investigating anything specific, but sought any evidence of any crime. The *Teresinski* result would therefore be compatible with the policy ration-

202. *Id.* at 465, 605 P.2d at 878, 162 Cal. Rptr. at 48.
203. California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980).
204. *See* 26 Cal. 3d at 464-65, 605 P.2d at 877-78, 162 Cal. Rptr. at 48.
205. Woodland and Dixon are separated by approximately 16 miles in a relatively rural area of northern California. The two towns are also in different counties (Yolo and Solano).
206. *See* 26 Cal. 3d at 468, 605 P.2d at 880, 162 Cal. Rptr. at 50 (Manuel, J., dissenting).
207. See text accompanying notes 214-216 *infra* for an interpretation of *Teresinski* as a roust case.

ale underlying the happenstance rule.[208]

However, the *Teresinski* court really may have decided that the happenstance rationale is no longer valid and that suppression is a necessary remedy in all such cases to deter future instances of official misconduct. Justice Tobriner, who wrote the *Teresinski* majority opinion, also dissented in *McInnis*[209] on policy grounds. The court may therefore have switched to Tobriner's original view. If the court is making a change in the law, it should say so openly instead of hiding behind a meaningless distinction.

B. Applying Crews

When the California court interprets the *Crews* decision in the process of reconsidering *Teresinski*, it is initially faced with a choice between the view of Justice Brennan and that of Justice White. If the latter is followed, there seems little chance of suppressing the identification because of the broadness of White's opinion. Apparently the defendant's presence in court for purposes of identification is the only allegedly tainted aspect of the identification process in *Teresinski*.[210] Since White views the manner in which the defendant's person is procured to be irrelevant to his presence at trial,[211] it would seem that the identifications in *Teresinski* must be admitted.

But if Brennan's opinion is followed, this conclusion may not follow. Brennan declined to decide whether the defendant's person could be the unlawful fruit of an illegal arrest.[212] In this light, Teresinski's person could well be suppressible fruit because, unlike the case in *Crews*,[213] he was unknown to police as a potential suspect before the detention. It was the official misconduct that revealed his identity and made him available for the identification. Accordingly, the identification could be suppressed if Brennan's view is accepted, because the defendant's person was procured illegally.

C. Incorporating The Roundup Rationale

The conflicts of *Teresinski* with the happenstance cases and *Crews* can be overcome in yet another fashion. There is another possible in-

208. See note 134 and accompanying text *supra*.

209. *See* People v. McInnis, 6 Cal. 3d 821, 827, 494 P.2d 690, 693, 100 Cal. Rptr. 618, 621 (1972) (Tobriner, J., dissenting). See notes 129-132 and accompanying text *supra* for a discussion of *McInnis*.

210. There is no mention in *Teresinski* that the witness's presence was illegally procured or that his memory was impaired by the unlawful arrest of the defendant.

211. *See* United States v. Crews, 445 U.S. 463, 478 (1980) (White, J., concurring).

212. *See id.* at 475.

213. *Compare id. with* People v. Teresinski, 26 Cal. 3d 457, 464, 605 P.2d 874, 877, 162 Cal. Rptr. 44, 47 (1980), *vacated sub nom.* California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980).

terpretation of the *Teresinski* facts that, by incorporating the rationale of the roundup cases,[214] would require suppression of the identifications. Perhaps, in reality, Officer Rocha stopped the defendants' car only because he thought they were carrying on some illegal activity. He might have believed them to have liquor or illegal drugs in the passenger compartment even though he had no specifically articulable facts for his belief. In short, Rocha's detention of the defendants could have been directly aimed at procuring evidence of illegal activity without the slightest bit of reasonable suspicion.

If such were the case, there would be a purpose and flagrancy to the official misconduct not unlike the roundup cases. Unwarranted rousts by police are unlawful and future instances of such misconduct can best be deterred by suppression.[215] Through this interpretation of *Teresinski* the happenstance cases can be distinguished and the identifications can be suppressed unless White's view in *Crews* controls and overrules *Edmons*.[216] But if the roundup rationale is to be followed, the court must cite to stronger facts that specifically demonstrate a lack of any justification for stopping the vehicle and an intent to roust the defendants on the part of Officer Rocha.

Therefore, one of two methods can be employed on remand to salvage the original *Teresinski* result. On one hand, the court can choose to follow the view of Justice Brennan in *Crews* and then distinguish that case on the facts. The court would then have to decide the tough question that Brennan left unanswered: whether the defendant's corpus can be considered a fruit of the unlawful arrest.[217] Alternatively the court can characterize *Teresinski* as a roundup case and base suppression on *Edmons* and the dicta in *Davis*.

Concluding Observations

The identification cases are acute examples of the competing goals that can arise in fourth amendment cases. In deciding whether to admit an in-court identification after an illegal search or seizure, a court is invariably faced with a policy choice. On the one hand suppression may seriously impair the public policy of making all evidence available in a case and frustrate the need to punish the guilty. Yet, admission of the identification may permit a violation of constitutional rights to go unchecked.

A proper exploitation analysis considers three competing factors: the

214. See text accompanying notes 135-148 *supra*.
215. *See generally* Terry v. Ohio, 392 U.S. 1, 16 (1968).
216. See note 179 and accompanying text *supra*.
217. See text accompanying notes 167-172 *supra*.

need for deterrence, the degree of causal connection, and the costs of exclusion.[218] In applying these considerations to the identification cases, two factors remain relatively constant. First, the line of causation leading from the official misconduct to the subsequent in-court identification is unbroken by significant intervening circumstances, but is usually lengthy. Second, the costs of exclusion are generally high since it is the victim's testimony that is sought to be suppressed. He may be the only person capable of identifying his assailants.

The third factor of exploitation analysis, fulfillment of the deterrence rationale, turns essentially on the motivations of the police when they illegally search or seize the defendant. If they merely happen onto the proffered evidence or have some significant degree of justification for their actions, then suppression will have little deterrent effect. Police cannot foretell when they will happen onto evidence again and they may be reasonably mistaken as to what facts constitute the proper justification for a valid search or seizure.[219]

However, if the police secure evidence through official misconduct intentionally pursued for the purpose of obtaining that evidence, suppression will have deterrent value. The exclusionary remedy will demonstrate that any criminal evidence police seek to gain through deliberate unconstitutional acts will be denied them. They will be motivated to comply with the fourth amendment in securing the desired evidence.

In light of these three considerations, suppression of in-court identifications should be granted only when it will result in the deterrence of future police misconduct. Suppression of all in-court identifications secured by an illegal search or seizure, even when there is no resulting deterrent effect, would cause the exclusion of reliable evidence and possibly set a guilty person free. But this reasoning should not be taken to the extreme of permitting even identifications obtained through official misconduct intentionally pursued to secure that evidence. Approval of identifications obtained in this manner would make a mockery of the fourth amendment.

A balancing of the need for deterrence with the other two exploitation factors can explain why an identification procured through a roundup was suppressed in *Edmons*,[220] while an identification obtained by happenstance was admitted in *Lockridge*.[221] Yet in *Teresinski*, the

218. See text accompanying notes 39-88 *supra*.

219. *See* People v. Teresinski, 26 Cal. 3d 457, 463, 605 P.2d 874, 876-77, 162 Cal. Rptr. 44, 47 (1980), *vacated sub nom.* California v. Teresinski, — U.S. —, 101 S. Ct. 311 (1980) ("reasonable mistake of law" argument).

220. See text accompanying notes 39-88 *supra*.

221. See text accompanying note 134 *supra*.

court cited the exploitation language of *Wong Sun* as its standard for determination[222] but never gave consideration to the policies that are a part of exploitation analysis. The majority's opinion smacks of the unacceptable "but for" test,[223] for the court merely begins with the premise that the arrest was illegal and concludes that the identification was tainted because the chain of events leading from the arrest was unbroken.[224]

The United States Supreme Court has made it clear that mechanical applications of the exclusionary rule are improper and any analysis must consider the competing policies underlying the rule.[225] By giving consideration to the three factors, a court can adequately protect the competing interests involved. Such an analysis also serves the equally important function of providing a clear and logical body of case law on a difficult issue.

Timothy P. Murphy

222. *See* 26 Cal. 3d at 463, 605 P.2d at 877, 162 Cal. Rptr. at 47.
223. See text accompanying note 36 *supra*.
224. *See* 26 Cal. 3d at 464, 605 P.2d at 877, 162 Cal. Rptr. at 47.
225. *See* United States v. Ceccolini, 435 U.S. 268, 274 (1978) ("The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well.").