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Federalization of Local Criminal Justice Procedure: A Study of Conflicts in Values and Process

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ABSTRACT

This article is an investigation into why the U.S. federal courts have failed to effectively control local police conduct by means of constitutional rules. In so doing, the article finds that the federal courts’ approach to the control of police abuse of power – federalization and

constititutionalization of criminal procedures – is ill informed of the nature and essence of police work within the community context and at the grassroots level. Particularly, it fails to take into account the structural and normative forces giving rise to police abuse. The central thesis of this paper is that the federal courts’ constitutional supervision of local police conduct is at odd with the police's operational reality and functional requirements, as reflecting entrenched local customs, shifting community expectations and contingent situational circumstances. The courts’ right-based approach is in sharp contrast with the police's utilitarian method. At a more structural level, traditionally and by design, the court is made to stand aloof from the people. The police is required to stay in touch with the people. One of the main purpose of this paper is thus to illuminate the differences in decision-making process and clarify observable disparity in constitutional value preferences between the federal courts and the local police. This will be discussed in the context of police civil liability under Title 42, United States Code, Section 1983 of the Civil Rights Act. The article concludes in observing that the federal courts and the local police, though housed under the same criminal justice system, are two distinctive social control institutions, each with its own political legitimacy base and social utility functions, They share different values, orientation, allegiance and thinking process. These differences, more so than other behavioral or organization factors, accounted for much of the observed police misconduct to date.

**Federalization of Local Criminal Procedures:
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"Of Course, it's not exactly legal to take a peep before hand. It's not one of the things you usually talk about as a police technique. But if you find something, you back off and figure out how you can do it legal. And if you don't find anything, you don't have to waste a lot of time."

Skolnick (1966:144)

I. Introduction

It is now common to refer to police as officers of the law. In a democratic society, such as the U.S. or U.K., this could mean one or more of the following: police are created by, empowered with, accountable to, and responsible for enforcing the law (Dixon 1997: 1-3). In practice, the police officers rely on the law for its legitimacy and authority (Hall 1953). In effect, the law defines the police as a social control institution (Manning 1977) and limits its operation as a political domination instrumentality (Davis 1971).

A cursory review of police accountability literature shows that students of police have long been perplexed by the continued inability of the police leadership and officers to come to terms with legal rules and constitutional norms (Morton 1999). Many have attributed such lapse of accountability to incidental “bad apple” or aberrational “deviant organization” (Stoddard 1968: 201-213) while others have suggested more enduring psychological (Toch 1979: 11-21), social (Choongh 1997: 208-238), political (Reiner 1983: 126-148), or cultural causes (Wong 1998: 85-101). However, while all these theories explained some of the more egregious and exceptional police misconduct, they fail to account for, much less come to terms with, most mundane and recurring police abuse of power.

This article is an investigation into why the U.S. federal courts¹ have failed to control local² police conduct by means of constitutional rules. The central thesis of this paper is that the federal courts’ constitutional supervision of local police policy and conduct is at odd with the

¹ Unless otherwise specified or made clear from the context of discussion, when I used “courts” I mean federal courts. I have reserved the term “Court” for the Supreme Court of the United States. The Supreme Court is referenced for its own decision, as well as the head of the federal judicial system. The arguments developed in this article, while focusing on the federal judiciary, has application to other courts, e.g. State courts when asked to enforce the state constitution on local police misconduct raised similar issues as when federal courts were asked to regulate states police conduct . More generally, the observations made here might shed light on or otherwise informed upon the different thinking pattern and analytical approach between courts and the police, a subject matter of investigation for another day. Lastly, it remains to be seen how federal courts differ from local courts in their respective approach to issues of police misconduct and the reading of the Federal Constitution. I surmised that in the main, the closer the courts are to the people, e.g. federal courts vs. state supreme courts vs. local county courts, the more amenable they are to indigenous concerns and accountable to local politics. This next line of inquiry is a logical edxtension of the current investigation.

² As used in this article “local” is a geo-political qua social socio-cultural designation. It is also a relative term. Thus “local police” activities refer to policing beyond the geo-political boundary of the supervising courts, e.g. Supreme Court vs. state police; state supreme court vs. county police; state circuit court vs. municipality police, state magistrate court vs. private coummunity police.

police operational reality and functional requirements as reflecting entrenched local customs, shifting community expectations and contingent situational context. The courts' right-based approach is in sharp contrast with the police's utilitarian method. Particularly, the courts' evaluation of police actions is too static, essentialistic and particularistic.

The main purpose of this article is thus to illuminate the differences in decision-making process and catalogue observable disparity of constitutional value preferences between the federal courts and the local police. This will be discussed in the context of police civil liability under Title 42, United States Code, Section 1983 of the Civil Rights Act. Section II of the article provides a brief review of literature on police accountability, addressing the issue of why our current approach to the understanding and control of police abuse is incomplete and ineffective. In Section III of the article, the broad outline of the Civil Rights Act and the application of Section 1983 to the police misconduct will be discussed. The Section concluded by observing that the federal courts, in the name of interpreting and applying the Constitution, have a direct veto power over objectionable police management policy, operational procedures and street behavior. In Section IV, the article traces the development of some of the more prominent criminal procedure cases disposed by the Court to show how local criminal procedure are increasingly being federalized and constitutionalized. Section V observes that the federalization of criminal procedure raises issues of conflicts of institutional values and decision making process between the federal courts, which are the promoters of Due Process Model of criminal justice, and the police, which are the defender of the Crime Control Model of criminal process. Section VI describes in detail how courts vs. police go about making decisions. It is observed that courts are right-based classical thinkers and the police are utility informed positive practitioners. Section VII concludes with the observation that the federal courts and the police are two distinctive social control institutions, with different political legitimacy base and social utility functions, though housed under the same roof within the criminal justice system. They share different values, orientation, allegiance and thinking process. These differences, more so than other behavioral or organization factors, accounted for much of the observed police misconduct to date.

II. Understanding police abuse of power: A cursory review of literature

Historically the investigation of police misconduct have focused on uncovering abuses, identifying patterns, registering trends, and providing for remedies. (Report of the Special Committee Appointed to Investigate the Police Department of the City of New York (1895);

Cleveland Foundation Survey of the Administration of Justice in Cleveland, Ohio (1922) The Missouri Association for Criminal Justice, The Missouri Crime Survey (1926); Illinois Association of Criminal Justice (1929) National Commission on Law Observance and Enforcement (1931) Kefauver Committee (1951); President's Commission on Law Enforcement on Law Enforcement and Administration of Justice (1967); The Knapp Commission Report on Police Corruption_(1971); National Advisory Commission on Criminal Justice Standards and Goals (1973); A Twentieth Century Fund Task Force on the Law Enforcement Assistance Administration (1976). Few attempts were made to analyze the “root” problem and understand the “true” cause of police corruption and abuse. For the most time they are taken for granted. In this way, the study of police can be said to be ideological (Wong 2001).

The traditional school of thought on police abuse, as with classical understanding of crime and deviance, is that police abuse of power are aberration wrongdoing. They result from a failure of discipline internally and a lapse of supervision externally. Following from this basis premise, the primary concern of society is with the detection of abuse and punishment of offender. As the Walker Report remarked: "that some policemen lost control of themselves under exceedingly provocative circumstances can perhaps be understood: but not condoned. If no action is taken against them, the effect can only be to discourage the majority of policemen who acted responsibly and further weaken the bond between the police community." (National Commission on the Causes and Prevention of Violence 1968: 10-11).

The language of the Walker Report is revealing of the mind-set of most of the police critics and reformers of the time, and still holds credence with many today. To them police misconduct are individual in nature and behavioral in origin. Other contributing factors, e.g. corrupting environment, if existed played only a minor, secondary and inconsequential role. This classical mode of thinking was most prevalent in the pioneer days of policing studies (cir. 1950s). At that time there were a high degree social consensus on right and wrong. The police's role and missions were also clearly defined. The identification of police deviance is uncontroversial. People 'understood' the problem of police misconduct to be one of breakdown of self-discipline and failure of external constrains, i.e. police are corrupted thesis.

Few recognized that the police abuse of power might be structural in origin,³ normative in nature,⁴ and functional in effect.⁵

The earliest proponent of such thinking, Sir Robert Peel, insisted upon having high and exacting standards the police, including being of good moral characters (Klockars 1985: 41). This led to the dismissal of 5,000 and the resignation of 6,000 officers in the first eight years of the New Metropolitan Police Force of London, in order to fill a roster of 3,000 officers (Lee 1971: 240). Such high qualification standards are still being maintained today. For example, Law Enforcement Skills Program at Alexandria Technical Institute in Minnesota requires that their trainees must "file an affidavit indicating no felony record, or mental disorder, or misconduct which might bar them from employment as a peace officer".

In the United States, August Vollmer, the father of modern police administration, lent credibility to this kind of thinking by postulating demonstrable correlation between unfit police and deviance policing (Vollmer 1936:3-4). Researchers are quick to point out that deviant police might have been contaminated before they joined (Stern 1962: 97-101) and allow to join as result of less than perfect screening methods (Tappan 1960:309). Still others assert that the police work attracted the authoritarian types, and were thus given to violence and misbehavior (Van Maanen 32:407-418).

Such microscopic, individualistic and behavior account of police misbehavior led to the argument for ad hoc review, patched-up remedies and quick-fix solutions in the face of police misconduct. Many reactive solutions are hastily proposed: better selection (Wilson 1951); better salary (Johnson 1964:452); better training and supervision (Fuld 1909: 152-3) better leadership (Fosdick 1969); better citizen oversight (Littlejohn 1981:5) and better administrative rule making (Davis 1974:703-725). Still in all civil tort liability against the police remains to be a favorite, if largely ineffective, remedy (Littlejohn 58:410-424). The popularization of such microscopic, individualistic and behavior explanation in the mainstream culture effectively stifles any meaningful investigation into the true cause and

³ To say that police misconduct is "structural" is to observe that such conduct is a necessary by product of the criminal justice system or process, as currently organized and operated.

⁴ To say that police misconduct is "normative" is to observe that such conduct is an expected, as argued in this article sanctioned, outcome. The normative force for police misconduct is local community customary expectations.

⁵ To say that police misconduct is "functional" is to observe that such conduct serve certain needs, as argued in this article local community needs.

genuine nature of police misconduct. They further obscured the need for criminal justice system wide structural reform. Unfortunately, such perspectives have been, and still are adopted by the federal courts when they go about evaluating and supervising police misconduct. Part of the contribution of this article is to correct some of the misconceptions about the true nature and root cause of police misconduct in the federal courts vs. local police context.

There are however to be other more insightful theories of police misconduct. These intermediary range theories do not focus exclusively on the police but try to spread the blame all around. As observed by:

"Why did these men commit police abuses? Were they poorly trained? Were they unintelligent? Did they come to the department with some special streak of authoritarianism? Were their abuses somehow the result of the extreme pressures of life in New York? As we shall have occasion to observe in more detail, the answer to these questions for the most part is no. *The truth is that police abuses are the product of the police role as an instrument of authority in society, the traditions of police work, and the attitude of society toward the police.*" (Chevigny 1969: xxix-xx) (Emphasis supplied)

Chevigny was not alone in arguing that police misconduct has multiple causation. Egon Bittner observed that police are empowered by law and conditioned by para-military organizational structure to use coercive force to maintain order and deliver service (Bittner 1970: 36-47). James Q. Wilson postulated that police abuse their powers because they are asked to enforce the law, keep the peace and maintain public order in a society without common purpose, dominate mandate and keen support (Wilson 1968: 407-417). Jerome Skolnick argued that the policing in a democracy requires the violation of rules and bending of regulations (Skolnick 1966). Furthermore, he observed that police abuse is a by-product of police working personality. (Skolnick 1966: 42-70). Richard Harris showed that police misconduct resulted from formal and informal socialization at the Police Academy (Harris 1973: 159-168). Ellwyn R. Stoddard demonstrated that police deviance is promoted by internal code and group culture (Stoddard 1968a: 201-213).

However, even these more sophisticated kinds of analysis failed to capture and otherwise could not adequately explain the latent value conflicts *built into* the criminal justice system

structure as the federal courts and local police go about playing out their respective assigned role and functions the way they are expected to and in the best way they know how. Ironically, the harder the respective parties try in playing their assigned role, the more police deviance they mutually help construct. This is one of the many penetrating insight offer by this article.

There are reasons why such structural and normative analysis eludes the attention of the courts. As a remedial institution, the courts are not concerned with the causation of police misconduct as much as they are interested in putting a stop to their ill effect and providing for effective deterrence and equitable remedies.

The failure to appreciate the true nature and causes of police misconduct has dire, and far reaching, practical consequences. Disheartened police reformers (the courts included) complained incessantly that the police are corrupted beyond redemption. Frustrated police leadership felt continually being misunderstood (Johnson 1981). The truth possibly lied somewhere in between. The blind imposition of absolute conduct norms for the police by the courts, out of frustration or impatience, without fully understanding the causes of police misconduct only promises failure (Goldstein 1960: 543-589; Amsterdam 1970:785-94). The unreflective defiance of control by the police further serves to isolate them from the mainstream of the society and polity. The solution is in the better understanding police misconduct in the context of federalism. To this main issue of this article we now turn.

III. Police liability under Title 42, United States Code, Section 1983 - The Civil Rights Act

The Federal Civil Rights Statutes, Title 42, United States Code, Section 1981, 1982, 1985, 1986 and 1988 (commonly refer to as the Civil Rights Act of 1871) were first enacted during and after the Civil War years to counter what was then perceived to be a national problem of racial discrimination (*Monroe v. Page*, 365 U.S. 167 (1961); *Mich. L. Rev.* 50:1323). Subsequently, the Act has been liberally interpreted and expansively applied to protect the deprivation of Constitutional rights by state and local public officials of all citizens and non-citizens alike (Shapiro 1965). The most significant provision for our purpose is 42 U.S.C. Section 1983 which subjects state and local police officers to Constitutional scrutiny when dealing with the public in the performance of their duty under the color of state law: 42 U.S.C. Section 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

In its essence, the Civil Rights Act is a federal tort claim statute that allows persons aggrieved by state and local police activities – conduct, policies and practices - to obtain legal relief in a federal court for the violation of constitutional - civil rights. In its effect, the Act makes the state and police conform to increasingly onerous and exacting constitutional requirements. The federal courts hold a veto power over the local police. The process of subjecting local police activities to federal court scrutiny, though piece meal in nature, has through the years progress to a point that most of the local police operations are governed by one standard - that of the federal government in the name of the U.S. Constitution. The end result is the federalization and constitutionalization of local police conduct.

Federalization means that the local police now must live with such standards of appropriate police behaviors decided away from the community which they are supposed to serve and held accountable to. Constitutionalization means that local police must set their conduct norm not by local custom but with reference to constitutional mandate. Particularly, in day to day operational terms, the police must learn how to accommodate the needs of the local community and the demands of the courts at the same time. The police have to serve two masters, each with distinctive values and concerns. However, in the ultimate analysis and when forced upon to do by the courts, the local police will pay lip service to the Constitution while at all time acting responsively to local community needs and customary expectations. This is one of the lesson to be derived from this study.

IV. Setting the stage for conflicts - Federalization and Constitutionalization of States and local criminal procedure

The concept of federalism, i.e. the proper distribution of police powers between the national, state and local governments has occupied the creative spirit of the Founding Fathers (Kurland and Lerner 1987:242-301; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). and stirred the imaginative mind of contemporary political scientists (Ostrum 1983; Olson 1982).

The issue is not only of great academic interest and theoretical import, it is also of paramount practical significance and real impact. Who is to govern the States and local governments raises issues of legitimacy and utility of governance, i.e. questions of who should govern and how best to govern?

The Civil Right Acts as applied to the state and local law enforcement effort captured such a ideological, philosophical and policy debate over values and utility in concrete terms. The Civil Rights Act as applied by an active Court creates problems for the police (Melnick 1985:659-660) and was much resented by policy makers (Meese 1985:701-705) and academicians (Allen 1975:535-42). The problem is not only with the ideological orientation and philosophical underpinning of a piece of legislation, which is, as a matter of first principle, not the proper concern of the police; an executive branch of government who has pledged to uphold the law and defend the Constitution. The problem is with the impact of such judicial interpretation of the Constitution on local police's management policy, operational procedures and street activities; interpretation the police as law enforcers can ill afford to ignore and as "street corner politician" find difficult, if not even impossible, to comply. This is particularly of concern when the interpretation, application and imposition of the Act challenges the primary role and functions, and in turn compromises the mandate and legitimacy of the police, in the eyes of the local community.

In the realm of regulating police conduct by the Court based on Constitution, the issue of federalism is compounded by the intervention of an active Court (Cooper 1985: 643-653). The Court is not a neutral umpire in the reading of the Constitution. Some has chosen to identify the conflicts between an active Court and the police as part and partial of the overall federalism problem confronted by the state and local government (Ross 1985:723-732). It is however more informative to study the Court separately to identify how its reading, interpretation and application of the Civil Right Acts impact and influence upon the police policy and practices in the local communities (.Becker and Feeley 1973: Barth 1968: 305-350; Baum 1976: 86-114; Medalie, Zeitz and Alexander 1968:1347-1422; Miller 1965: 365-401; Milner 1971; Murphy 1969:939-46; Seeburger & Weettick 1967:1-26; Wald, Ayers, Hess, Schantz and Whitebread 1967: 1519-1648). Particularly, what conduct norm should the local police follow and with what consequence. This is the major focus of our investigation to be dealt with extensively in section IV below.

The United States do not have one centralized police system as with the case of France or England (Ingleton, 1979). This is due to United States' liberal political culture and as a result of her historical revolutionary tradition. It is commonly accepted that "diversity, pluralism, experimentation, protection from arbitrary majoritarianism and over centralization, and a greater degree of citizen participation," contributes to better government (Advisory Commission on Intergovernmental Relations, *Urban America and the Federal System* 1969:105). This view is openly supported by the Court. Thus, while the Court in *Wolf vs. Colorado* (338 U.S. 25 (1949)) found, for the first time, that the Fourth Amendment search and seizure standard apply to the States, it nevertheless stopped short of extending the exclusionary rule, a federal remedy established in *Weeks v. United States* (232 U.S. 383 (1914)), to the States. In arriving at its ruling Justice Frankfurter took great pains to emphasize the diversity and uniqueness, and more significantly the propriety – efficiency and effectiveness - of various states in devising their own measures to control police abuse of power, e.g. how to deal with illegally or unconstitutionally obtained evidence. Indeed, the Court's strong resistance in the earlier years to adopting the "total incorporation" of the Bill of Rights guarantees in the Fourteenth Amendment and made them applicable to the States reflected such a deep seated jurisprudential conviction and constitutional commitment to the idea of federalism in action. For example, Justice Harlan was concerned enough about the "jot-for-jot and case-by-case" absorption of federal standards to local police practices that he articulated his vocal dissent in *Malloy v. Hogan* (378 U.S. 1 (1964)) in defense of the rights of the states to experiment and sounding the alarm against over-extended federal regulation: "The consequence is inevitably disregard of all relevant differences which may exist between state and federal law and its enforcement. The ultimate result is compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved ... by encroachment on the State's sovereign powers."

In later years, the vigorous enforcement of the Civil Rights Act led to the total federalization of States' criminal procedures. Federalism, as envisioned by the Founding fathers, existed all but in name. As Justice Brennan's majority opinion in *Malloy v. Hogan* (378 U.S. 1 (1964)):

"We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, *Ker v. California*, and the right to counsel guaranteed by the Sixth Amendment, *Gideon v. Wainwright*, are all enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. [The] Court thus has rejected the notion that the Fourteenth

Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'

The federalization of the States' criminal procedure did not happen in one day. Rather it represented an insidious, continuous, unrelenting and coordinated effort to impose federal constitutional norms on local policing. The Warren Court may have started the process but it took the Burger Court to consolidate its gain. The Warren Court was instrumental in establishing procedures for conducting pre-trial identification in the trilogy cases of *Wade*, *Gilbert*, and *Stovall* in 1967. (*United States v. Wade*, 388 U.S. 218(1967); *Gilbert v. California*, 388 U.S. 263 (1967) and *Stovall v. Denno*, 388 U.S. 293 (1967)). The Burger Court approvingly refined them by delineating certain exceptions - e.g. making them not applicable to pre-indictment situations. (*Kirby v. Illinois*, 406 U.S. 682 (1972)). The Warren Court started the search and seizure revolution. The Burger Court dutifully continued the tradition, albeit narrowing it somewhat. For example, in *Payton v. New York*, 445 U.S. 573 (1980) the Court required an arrest warrant for arresting a person at ones home and in *Ybarra v. Illinois*, 444 U.S. 85 (1980) it held that a valid search warrant executed at a tavern for drugs did not give automatic permission to search all patrons in the tavern without probable cause. .

However the federalization occurred, the result is the same. Through the years the Court has taken upon itself in dictating the terms of the Federal Constitution to the state officials. Thus in spite of the admonition of Justice Curtis that: "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta and ... the Constitution contains no description of those processes which it was intended to follow or forbid." (*Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How 272 (1856), and in spite of the fact that the history is an imperfect guide to the finding of substantive due process values (*Ownbey v. Morgan*, 256 U.S. 94 (1921); *Powell v. Alabama*, 287 U.S. 45 (1932)), the Court has nevertheless been undaunted in applying most of the Bill of Rights to the States. This was achieved notwithstanding vigorous internal dissensions and fiery open disagreements amongst the Court members. The dissenting Justices were as concerned about the legitimacy of applying any of the Bill of Rights to the States, as they were with the proper methods to follow and which substantive rights to apply in making various States to honor the Constitution of the nation and civil rights of the people.. Justice Black, for example, argued dispassionately for a total incorporation approach, which was not favored by the majority of the Court. (dissent in *Adamson v. California*, 332 U.S. 46 (1947)). Justice Frankfurter took the position that the Due Process Clause has independent potency and

capable of autonomous development without being unduly restricted by the Founding Fathers original intent or limited by the literal interpretation of the Constitutional text (Kamisar, Lafave and Israel 1986: Chapter 2).

The development of the exclusionary rule is a good example to illustrate the federalization and constitutionalization of local criminal justice process. As early as 1914, in the case of *Weeks v. United States* (232 U.S. 383 (1914)), the Court has fashioned the exclusionary rule to bar the use of illegally obtained evidence in a federal court by federal officials. The rule however was not applicable to a state court. Subsequently, the Court restrictively applied the federal exclusionary rule such that under the so called "silver-platter doctrine" illegally seized state-evidence was allowed to be used in a federal trial (*Lustig v. U.S.*, 338 U.S. (1949)). In 1949, in the famous case of *Wolf v. Colorado* (338 U.S. 25 (1949)) the Court ruled that the Fourth Amendment prohibition against illegal searches and seizures were extended to the states via the Fourteenth Amendment. However, exclusionary rule as a federal remedy to unconstitutionally seized evidence was still withheld as a remedy. In so doing, the Wolf Court made clear that the exclusionary rule is not a constitutional requirement. The States were allowed to fashion separate remedies befitting their local circumstances and case characteristics. This position was reaffirmed later in the case of *Stefanelli v. Minard* (342 U.S. 117 (1951)) wherein the Court approved of the federal courts' standing refusal to issue injunctions against the use of unconstitutionally obtained evidence in States' criminal prosecution.

Starting with 1956, the liberal and active Warren Court sought to exclude all illegally obtained evidence from being used in any judicial forum in the nation. As a move in that direction, the Court in *Rea v. U.S.*(350 U.S. 214 (1956)) held that illegally seized evidence by federal officers were not allowed to be used in state courts. Four years later, in a reverse case to *Rea*, the Court has little problem in holding that the 'silver platter doctrine' was out of step with the mainstream, prevailing constitutional - jurisprudential thoughts (*Elkins v. U.S.*, 364 U.S. 206 (1960)). The Court held that illegally seized evidence by state officials cannot be used in federal courts. The final chapter in the development of the exclusionary rule was written in the case of *Mapp v. Ohio*. 367 U.S. 643 (1961). With a single brush, Justice Clark was able to elevate the status of the exclusionary rule from a judicially invented supervisory tool to a constitutionally required code, reasoning thusly: "Our decision, founded on reason and truth, gives to the individual no more than the Constitution guarantees him."

The development of the exclusionary rule is not atypical of the general trend. Through the years there was a gradual, but noticeable extension of various aspects of the federal criminal procedure to the states with a corresponding erosion of the states' sovereign power in such areas. As a result, today, except for the most mundane administrative details, there is only one national standard for the regulation of police conduct. In fact the only criminal procedure taught in law schools and law enforcement programs are those dealing with the interpretation and application of the Federal rules. This tendency to move away from local criminal procedure rules can be no more explained by the requirements of the Constitution as by the propriety of the decreed procedures. It is an ideological imposition of a certain constitutional order. The net result is a set of uniform rules reflecting national policy considerations and judicial concerns rather than local law enforcement needs and community expectations. This created the structural framework the police have to function in. It also provides the necessary background for our investigation into the difference in values, orientation and decision making process between the courts and the police.

V. Conflict of values between the federal courts and the police

The federalism debate, framed as a broad procedure-jurisdiction issue, in actuality is a dispute over substantive (particular and concrete) value (political, constitutional and social) choices. Who should be empowered to make such critical constitutional choices and how should those choices be made is significant only because they are determinative of substantive values (e.g. state power vs. individual rights) and bearing upon material outcome (e.g. community protection vs. criminal protection).

Thus, when Attorney General Meese argued that the Court should interpret the Constitution according to the original intent of the Founding fathers, he is arguing for more than an alternative way of looking at the Constitution (Meese 1985:701-705) He is seeking to promote a brand of political philosophy, a set of constitutional values and a kind of social morality which had thus far been deemed to have been ignored by the Court, such as right to life over privacy of choice, law and order over individual liberty, social stability over change and entrenched values over emerging interests.

In public policy determination process, values are a key determinant factor. Economists who are ultra-sensitive to the cost-benefit analysis of public choices has long postulated that:

"(A) cost-benefit approach to regulation involves two central elements: (1) listing of certain effects of regulation and (2) an evaluation of these effects as costs or benefits ... any cost-benefit analysis involves a conscious decision regarding which "effects" and whose evaluations of those effects are included. Effects of regulation are numerous and depend on whose perceptions are adopted." (Emphasis in the original) (Needham 1983: 41).

In the field of criminal justice the two most often posed questions are: what constitutional values should the federal courts promote, e.g. collective interests vs. individual rights, and what to do when constitutional choices of the courts come into conflict with political decision of the local community? These questions will be answered very differently by the federal courts vs. local community. Until police reformers understand the nature and implications of the potential value conflicts between the federal courts and the local police in decision making, they will not be able to effectively deal with police misconduct of the structural and normative kinds. Witness a number of high profile police reform movements in the past. None have been all too successful.

The first step to understanding federal courts and local police conflict is to observe that the while the federal courts and the local police are supposed to be complimentary social control institutions in the criminal justice system in enforcing law, maintaining order and promoting justice in reality both institutions work at cross-purpose from each other. Simply put, the courts prefer law over order. The police prefer order before law.

What account for such structural tensions and normative conflicts? Professor Packer described the existence of two competing models of criminal process existing side by side, i.e. the Crime Control Model and the Due Process Model. These models are based on quite different operational assumptions, goals and ideal.⁶

⁶ I draw upon upon Packer's "two models of justice" (due process vs. crime control) to illuminate my "two conceptions of order" (constitutional vs. communal) approach. While not make explicit by Packer, both of us consider police deviance as structural, normative and functional in nature. My approach differs from Packer's models in the following regards: (1) Packer's major concern is with how the criminal justice system work overall. My main interested is in why police deviance exist. (2) Packer conceives of the criminal justice system performing two competing functions, i.e. due process vs. crime control, as informed by two conflicting values. I argue that different branches of the government, i.e. courts vs. police, at different level of government, i.e. federal vs. States, perform different role and functions, as instructed by different mandate, i.e. Constitutional law vs. mass politics (3) Packer's models are goal oriented models. My approach is a process denominated approach, i.e. legal justice vs. popular justice; constitutional ordering vs. communal ordering. (4) Packer's models pre-supposes two bi-polar conflicts between due process and crime control. My approach turns on

The Crime Control Model, represented by the police, is there to protect the society and suppress criminals. Professor Packer observed thusly:

"The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to breakdown of public order and hence to the disappearance of an important condition of human freedom ... The claim ultimately is that the criminal process is a positive guarantor of social freedom. In order to achieve this high purpose, the Crime Control Model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime ... The model, in order to operate successfully, must produce a high rate of apprehension and conviction, and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited." (Packer 1968:158-9).

The Due Process Model, promoted by the courts, is everything the Crime Control Model, championed by the police, is not. The Due Process Model is mainly concerned with justice and fairness in separating the guilty from the innocent. The Due Process Model postulates that:

"The processes that culminate in these highly afflictive sanctions are seen as in themselves coercive, restricting, and demeaning. Power is always subject to abuse - sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, in this model, be subjected to controls that prevent it from operating with maximum tyranny." (Packer 1968:165-166).

What are the net consequences and real implications of these built-in structural value conflicts for the courts and the police? How can the tensions be effectively reduced? To the extent that such conflict of values exists, the problem of reducing police misbehavior must start by discussing how to lessen the conflicts between the courts and the police instead of concentrating on how to suppress the perceived misconduct. In this regard, it must be stated emphatically, that neither of the two models are logically more sound or better than the other. Nor, as made apparent by the discussion in the prior section (Section IV), the courts' choices should be preferred over those adopted by the local legislative, judicial or administrative

differences between Constitution driven ordering on the one hand and communal determined ordering on the other.

authority. However, in as much as values are themselves not negotiable items, ultimately someone's' choices must prevail. Professor Wechsler's observation (in the course of commenting upon the Proposed Model Penal Code dealing with the use of firearms) in this regard was instructive:

"On its merits, you are dealing with an intractable problem in the balancing of values ... The justification for the provision we advance is that the preservation of life has such moral and ethical standing in our culture and society that the deliberate sacrifice of the life merely for the protection of property ought not to be sanctioned by law. And I suppose that this is the kind of proposition that cannot be demonstrated, that involves in the end one's convictions. And one either holds convictions or one does not." (Emphasis supplied) (ALI Proceedings 35: 285-86 (1958))

Whose judgment should be followed in a democratic regime ultimately depends on ones institutional authority and Constitutional mandate. In the conflict between the police and the courts, the courts necessarily holds an upper hand. Packer put it thusly:

"Because the Crime Control Model is basically an affirmative model, emphasizing at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the Due Process Model is basically a negative model, asserting limits on the nature of judicial power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution." (Packer 1968: 173).

This spell trouble for the police who is caught in between fulfilling the expectations of the local community and answering to the requirements of the Constitution.

VI. Differences in decision making process between the courts vs. police

Classical - rights based thinking vs. Positive - utility driven thinking

So far the article has discussed about the conflict of values in terms of end goals and objectives between the two institutions. There are however more fundamental differences in the way courts and police go about analyzing issues and solving problems.

The Federal courts system is a rights based institution. It exist enforce individual rights protected by Constitution. The courts are held accountable to principles of justice and fairness embodied in the Constitution. The courts in enforcing rights is not supposed to consider the impact of the judicial decision on political, social or economic arrangements in the society.

The police on the other hand are an utility based institution. The police are designed to be responsive to the people in the community they serve: in fighting crime, maintaining order, providing service and more generally as a resource to solve their problems (Wong 2001a). Law enforcement decisions are made in light of the totality of utility functions to the community as a whole and not just the abstract rights of a single individual. The community thus sets the goals and priorities for the police, to whom they are held ultimately accountable. (Johnson 1981:297-303). The National Advisory Commission on Criminal Justice Standards and Goals had described the role and functions of the police thusly: "The fundamental purpose of the police throughout America is crime prevention through law enforcement; however, enforcement priorities for every agency must be established locally." (The National Advisory Commission on Criminal Justice Standards and Goals 1973:13)⁷

In sum, the federal court serves to uphold abstract notions of Kantian justice (Kant 1971: 237-260) and the police seek to promote a sense of Bethamite justice (Bentham 1971:263). In terms of goals, the Court guarantees the liberty rights of a few against the tyranny of many. The police protect the welfare interests of the many against the interference of a few.

The right base analysis resembles the classical mode of thinking. The utility school of thought approaches the positive way of thinking. The 18th century classical thinkers are abstract thinkers. As observed by Mannheim: "historically, positivists must have regarded the work of the Classical School, with its abstract notions of crime, its neglect of the criminal as an individual human being, and its attempt to produce a correspondence abstract equation between crime and punishment, as truly representative of the metaphysical stage in the development of criminology." (Mannheim 1960:15).

⁷ The same report goes on to note that the police should function within the confine of the Constitution and the law. However, as so often the case, it fails to mention the inherent difficulties, much less providing a satisfactory solution, of how the police can reconcile the conflicting demands imposed on them by the Constitution and the local community for order and security. The unarticulated assumption is that what the Constitution stands for and approved by the Court are also what is desirable for or agreeable to the local people. This assumption is an aspiration, not fact; an ideal, not reality. The contrary seems to be true. Judging by the existence of widespread police misconduct in the execution of their law and order functions, e.g. using third degree on uncooperative criminals, it can fairly be said that the local people must have implicitly condoned such behavior if not even explicitly authorized them. (Wilson 1968)

The classical criminologists insist that punishment should be made to fit the crime. The contemporary police reformers (including judges) want restitution from the officers. The whole focus is on just desert. Personal differences and situational contingencies are not considered. The impact on society is ignored. The major concern is with uniformity (distributive justice) and proportionality of punishment (substantive justice). The classical school was introduced to counteract the abuses and arbitrariness of old time punishment regiment. Under this classical influence the courts have a natural tendency to ignore the impact of its decision on the affected people and impacted community when they engage in rights based analysis. The decisions of the courts in the criminal procedure area are replete with such examples:

(1) In *Warden v. Hayden* (387 U.S. 294 (1967)) in discussing of the right of police to search and seize for mere evidentiary materials, Justice Douglas insisted in his dissent that the Fourth Amendment in the Constitution "creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by the magistrates through the issuance of warrants."

(2) In *Terry v. Ohio* (387 U.S. 294 (1967)) Chief Justice Warren argued that the Fourth Amendment "search and seizure" clause allow the police to conduct investigative "stop and frisk" without probable cause or warrant. However he has no reservation in declaring that the right of the individual to be left alone by the police is absolute: "It must be recognized that whenever a police officer accosts an individual and restrain his freedom to walk away, he has seized the person."

(3) In *Rochin v. California* (342 U.S. 165 (1952)) the Court held that in "pumping" a suspect's stomach for drugs, the police have acted beyond the bound of civilized conduct to such an extent that it "shocks the conscience" of the people. There are private areas belonging to the individual where no police legitimate law enforcement activities could reach: in this case Rochin's inner body cavity.

(4) In *Cohen v. California* (403 U.S. 696 (1974)) the Court has no problem declaring that wearing a "Fuck the draft" jacket in a Los Angeles Courthouse is absolutely protected, declaring that: "one man's vulgarity is another man's lyric."

The classical approach has long been criticized as too sterile in content - highly rationalistic and formalistic, and devoid of any empirical base or scientific methods, and at times bordering on irrelevance. This critique of classical thinking has also been directed at the courts.

Horowitz has long lament the fact that courts lack the institutional capacity and competency to make well informed public policy. He further observed that judges and lawyers think legally, i.e. non-probabilistically. They are unfit to solve "most problems of planning and social policy (which) require a mind-set fixed on the behavior of most of the people, most of the time." (Horowitz 1977: 32).

Courts as utilitarian thinkers: A rejoinder

Some perceptive and thoughtful Court watchers (seeking to defeat this line of argument) might be heard to argue that the Court has never completely abandoned the utilitarian approach. Witness the clear example of *Mathews v. Eldridge* (424 U.S. 319 (1976)) wherein the Court openly embraced a balancing test and cost-benefit analysis method. In deciding what and when legal process is due to Social Security disability recipients, the Court took into consideration the following:

"(F)irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional substitute procedural requirements would entail." (424 U.S. 335 (1976))

The implication of this holding, as a rejoinder to the courts being classical thinkers, is evident and potent. Taken literally, *Mathews v. Eldridge* confirms that courts may not be classical thinkers on rights issues on every occasion. In this regard, the courts indeed have much leeway in adopting a sliding scale rule in the interpretation of open textual Constitution clauses, e.g. due process or reasonable search and seizure. They also have departed from the strict "rights based" analysis in other less flexible areas when deemed necessary, e.g. obscenity is not offensive speech. If that should be the case, how can we argue that the courts are only protective of individual rights and not solicitous of collective interests and communal welfare? More significantly, how can it be argued that courts are classical and not utilitarian thinkers?

Through the years, the courts have been successful in avoiding the straitjackets of restrictive constitutional principles, when justice dictate or when policy requires. They do so by creating exceptions to the general rule or by draw fine distinctions with definitions. Thus in the First Amendment cases the Court decided that "fighting words" are not protected by the Constitution, (*Cohen v. California*, 403 U.S. 15 (1971)); obscenity publications with "no social redeeming value" are not protected speech (*Roth v. United States*, 354, U.S. 476 (1957)); 'stop and frisk' is not quite the same as "search and seizure" (*Terry v. Ohio*, 392 U.S. 1 (1968) and 'public safety' questioning is not the same as criminal interrogation. (*New York v. Quarles*, 467 U.S. 649 (1984). For some the hair splitting made a mockery of Constitutional jurisprudence (*Terry v. Ohio*, 392 U.S. 1 (1968) (Douglas dissent). For others they provide too convenient a rationalization for deviation from a rights based and absolute constitutional jurisprudence.

Overall, the Burger Court was more inclined to the use of balancing as a guide for decision making. The Court's new balancing act is best captured by the line of cases dealing with searches and seizures, starting with the 'stop and frisk' doctrine.⁸ The most representative example is perhaps the case of *United States v. Sharpe*. The Court held there that the 30-40 minutes detention of one defendant and the 20 minutes detention of another was not an illegal arrest even though the police had seized the person without a probable cause or a warrant. The Court reasoned that the detention, though cannot be considered as brief, was nevertheless reasonable under the circumstances given the diligence of the officers and needs of investigation involved. In so doing the Court stretched the limits of *Terry v. Ohio* (392 U.S. 1 (1968) and *U.S. v. Place* beyond recognition. The only question left is how far could and

⁸ The 'stop and frisk' doctrine was first enunciated by the Warren Court in the case of *Terry v. Ohio*, 392 U.S. 1 (1968). At first the doctrine was invented to accommodate legitimate police investigative needs, i.e. an opportunity for the police to accost the suspects in the course of detecting or foiling suspected criminal activities. It was meant to be a limited exception to the Fourth Amendment probable cause and warrant requirements. The rule is thus a reluctant compromise of a sort. Under the stewardship of Chief Justice Burger the doctrine matured into an accepted balancing test; expanding itself further than otherwise had been intended by the Warren Court. The rule became a valid justification for proactive police activities. Instead of allowing the police to conduct brief stop and frisk under exceptional circumstances the Burger Court would now permit the police to regularly resort to the doctrine to justify infringement of the citizens' right based on police needs, good faith and due diligence. The emphasis has thus been shifted from a concern about the subjective rights of the individual to the objective needs of the police. See *U.S. v. Sharpe* 105 S. Ct. 1643 (1985). For the evolution of the doctrine in recent time see *Davis v. Mississippi*, 394 U.S. 721 (1969), *Adam v. Williams*, 407 U.S. 143 (1972), *Dunaway v. New York*, 442 U.S. 200 (1979), *Michigan v. Summers*, 452 U.S. 692 (1981), *Florida v. Royer*, 460 U.S. 491 (1983), *United States v. Place*, 462 U.S. 696 (1983), *Hayes v. Florida*, 105 S. Ct. 1643 (1985).

would the balancing test be extended to compromise the residual liberty rights of the *individual* in the face of deemed legitimate law enforcement needs. (Barrett 1960:46).

The new balancing acts adopted by the Burger Court required it to make allowances for complex cost-benefit analysis. In *New York v. Quarles* (467 U.S. 649 (1984)) the Court concluded that "the need for answer to questions in a situation posing a threat to the public safety outweighs the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. "We decline to place officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the questions without the Miranda warning"

It is argued here that in spite of the Burger Court's tendency to be more flexible in adjusting rights between the individual and society, its overall approach was still quintessentially a Due Process one based on a rights analysis. The important point to note about the Burger Court is not that it has at times adopted the balancing approach and cost-benefit analysis. The lesson to be learnt is that, in spite of such departure from the established Constitutional norm, the Court has been uneasy over its choices and seek to justify its decisions in terms of rights based analysis and classical reasoning: individual rights vs. collective interests.

In the end, the perceived Burger Court revisionist balancing approach or cost-benefit analysis came as a reaffirmation of the centrality of Constitution and revealing of the Court's classical reasoning process and rights based jurisprudence discussed above, than a denial and negation of them.

Frame of reference in making decision: Courts vs. police

Thus far we have observed that the federal courts' classical rights based approach in defining citizens' constitutional rights is at odd with the police's positive utilitarian approach in promoting community interests. What is the frame of references informing upon the courts vs. police decision making?

How the Court makes decisions

The court's decision making is very much affected by its constitutional mandate, legal culture, institutional role, organizational structure and judicial philosophy.

(1) Constitutional mandate of courts:

The courts rely on the Constitution for its legitimacy and authority (*Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)). This makes the Court ultra-sensitive to charges of judicial law making or social policy formulation. As a result it is very careful to shape its decisions to conform to the letters of the Constitution. Justice Black's fiery dissent in *Katz v. United States* (389 U.S. 347 (1967)) offers tell-tale signs of the Court's sensitivity: "I do not believe that it is proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the time" and thus reach a result that many people believe to be desirable." Thus, even at the height of judicial activism in the 1930s (economic) and 1960s (civil rights), the Court still spoke of decisions being required by the language of the Constitution. In this regard, Justice Douglas's tortuous interpretation of the Constitution to implying a "zone of privacy" in favor of private procreation choices in *Griswold v. Connecticut* (381 U.S. 479 (1965)) is legendary: "(S)pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees in that help give them life and substance ... Various guarantees create zones of privacy." The duplicity of such an approach to constitutional interpretation did not go unnoticed. Justice Potter Stewart was quick to observe the inherent difficulty, if not manifested inconsistency, of appearing faithful to the Constitution's Bill of Rights and subscribing to substantive due process liberty rights at the same time:

" In *Griswold v. Connecticut*, the Court held a Connecticut birth control law unconstitutional ... Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it is clear to me then, and it is clear to me now, that the *Griswold* decision can be rationally understood only as holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. And so understood, *Griswold* stands as one in a long line of cases decided under the doctrine of substantive due process, and I now accept it as such." (*Roe v. Wade*, 410 U.S. 113, 167-168 (1973)).

The need to refer back to the Constitution for judicial authority conditioned the way in which the Justices perceive and resolve a problem in front of them. For the most part, this meant the protection of personal rights and promotion of individual liberty, to the exclusion and at the expense of other social or moral considerations.

The Constitution is a document of individual rights. This is so in two senses:

First the Constitution articulates a set of a priori, inalienable rights - e.g. rights to freedom of movement, prohibition of bills of attainder and ex post facto law and habeas corpus (Chafee

1951: 5-6). These rights are considered to be self-evident, belonging to every free man, and inalienable. They are absolute in nature, universal in application, and immutable in character.

Second, the Constitution expresses a set of consensual arrangements certain fundamental rights as against the society, e.g. right to due process of law. Such constitutional entitlement, as agreed upon rights, mark the final settlement, at a point in time, of the perennial conflict between an individual's claim to liberty and the society's need for order and security.

The two sets of constitutional command require the Court to look at quite different places for the proper reading of the Constitution. When the Court is asked to defend the inalienable rights of the people under the Constitution, the Court is required to look to the past to ascertain what those rights were and should mean today. For example, in resolving the issue of the applicability of the Bill of Rights to the States, the Court must investigate the development of the Bill of Rights in the United States, both in terms of where it originated and how it found its way into the Constitution (Barrett 1985:15-19). The process involved was a historical and analytical one. In so doing the Court was not interested in examining the present conditions and requirements of the society, much less concerned itself with the circumstances of the local community or professional needs of the police. Justice Brennan's concurring opinion in *New York Times Co. v. United States*, (403 U.S. 713 (1971)) said it all: "But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." This is definitely not a utility calculus exercise. Such a process is best performed by archeologists than economists, philosophers than social scientists and lawyers than managers.

When the Court is asked to declare the consensual rights of the individual, it looks at the relevant political community for the settlement of rights arrived at. The Court seeks to discover the accommodation reached concerning the scope of individual rights, e.g. liberty, in the face of competing social interests, e.g. order. This is exemplified by the Court's approach in *New York v. Quarles*. Justice Rehnquist speaking for the Court stated: "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." (467 U.S. 649 (1984)). In all cases when the Court is required to find a solution to such conflicts of rights, it has to conduct a delicate balancing act.

The Court has developed a number of balancing of interests tests to scrutinize state and federal actions affecting individual rights: the "minimal rationality test" in *Rinaldi v. Yeager* (384 U.S. 305, 308-309(1966)) and the "strict scrutiny test" in *Korematsu v. United States* (323 U.S. 214 (1944)). The First Amendment jurisprudence provided a rich background for our reflection in how such balancing would work. In asserting the primacy of individual rights to absolute free speech, the Court was hard pressed to come up with legitimate doctrines for the meaningful restriction of free speech. The Court has shifted and oscillated between a categorical labeling approach, e.g. the "bad tendency test" (only speech which have good effect are protected) espoused in *Gitlow v. New York*, 268 U.S. 652 (1925) or a "clear-and-present- danger test" (speech which created substantial and proximate harm are not protected) as enunciated in *Schenck v. United States* (249 U.S. 47 (1919)) and a balancing approach (disregarding the preferred position of the free speech and performed a case by case balancing of competing claims of rights, e.g. *Kovacs v. Cooper* (1949)). Whichever the approach and test being used the Court consistently recognized the right of the individual to enjoy free speech. Such right to free speech has an independent potency in the decision making matrix and calculus.

This kind of balancing however, should not be confused with the utilitarian approach discussed earlier and used by the police. Balancing individual rights against collective interests starts with an assumption that certain inalienable individual rights existed. Indeed to be successful, a litigant challenging properly enacted legislation must first demonstrate that the laws had infringed on his/her right to equal treatment under the law and or unduly restricted his/her fundamental rights without any "compelling state interests." (Tribe 1978: 991-1012). This framework of analysis is embraced by the social contract theorists as the sole justification of any government imposition (Barker 1947: Introduction).

On the other hand, the utilitarian analysis does not postulate any prior existing individual rights. No rights are absolute in the face of competing public interests. Rights of individual come as a pronouncement of the final settlement to an utilitarian accounting process when all the cost and benefit factors deemed material to the society's well being (including the legitimate expectations of each social members, e.g. privacy) are properly accounted for: identified, weighted and considered. In the words of Bentham:

"As to the general and ultimate end (of law), this upon the principle of utility can be no other than the greatest good of the whole community. But the good of the community is the sum of the several particular goods (if the term may be employed) of the several individuals of which it is composed: so that to augment the good of any one such individual is pro tanto to augment the good of the whole community." (Bentham 1959: 2751)

The individual rights of the Kantian kind (Kant 1785) are dispensable commodities in the face of countervailing social interests. In this context, individual rights take on a new meaning. It no longer categorizes pre-existing rights but describes settled entitlement. The ideal settlement once arrived at, with or without the participation or agreement of the parties involved, is imposed upon the parties and society. This is quite unlike the consensual approach, where agreement of the affected parties are made the basis for the eventual distribution of individual rights.

(2) Entrenched legal culture within the courts system:

The entrenched legal culture of the courts require the judges to be independent and impartial (Federalist Paper 78). Such judicial values are inimical to efficient government has been long recognized (Wilson, 1887). Independence and impartiality allows the courts to liberate itself from the demands of life circumstances and shelter itself from the influence of the political pressures. The impartiality and independence of the Court is there to foster a neutral and impartial disposition towards Constitutional adjudication, thus assuring a dispassionate reading and fair application of the Constitution in the face of competing claims.

The disassociation of the judges from grassroots political pressures and local concerns however promotes another kind of more insidious institutional bias. Independence makes the Court unaccountable to local needs. Impartiality allows the Court to be insensitive to grassroots values. Cool detachment assures that the decisions made are based more on metaphysical than materialistic considerations; more rational than affective.

The judges are to use his experience as the yard-stick for decision making and his conscience as the ethical guideline for judgment (Silverstein 1984: Chapter 2). Instead of being informed by local needs and impelled by community interests, the judges are driven by their own social agenda within a personal value system as mediated by the judiciary as an institution and lawyer as a profession. The social reform undertaken by Chief Justice Warren was just one such example (Cox 1968). Instead of honoring the values at the grassroots, it promotes a

higher ideal. Instead of preserving local customs (communal ordering), it imposes a better conception "ordered liberty" (Constitutional ordering) (*Palko v. Connecticut* (302 U.S. 319 (1937)). Instead of accepting legal pluralism, it insists upon a uniform justice (*Duncan v. Louisiana*, 391 U.S. 145 (1968)).

(3) Institutional role of the courts:

The institutional role of the courts is a self-assumed one (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). In its self-anointed role as the guardian of the Constitution, it serves two critical functions. The first is to place limits on the government; to hold it in check against any gross abuse of power. This derived from the understanding that power corrupts and absolute power corrupts absolutely. The other role requires it to be the champion of individual rights; especially those of political varieties and minority kind. This resulted from a concern with the tyranny of the majority. Both of these roles require the courts to defend the aggrieved individual against the omnipotent government authority; either as an abusive institution or as an oppressive instrument (Rossum and Tarr 1983:14-18).

The adversary relationship between the people and the government or the minority and the majority is a given fact of life in the constitutional frame-work. The courts have to balance the rights at best one can. In this balancing process, few attentions is given to the local circumstances and community needs. The mind-set of the judges are one of protecting the negative rights (e.g. right to be left alone) of the individual and not to promote the positive rights of the society (e.g. right not to be harm or hurt). The later is to be protected by the political process writ large (Chopper: 1985).

Another significant aspect of the courts' institutional role, is that of an arbiter of disputes. In this role the courts are required to preside over competing claims. The courts are asked to do justice for the parties. The primary concern of the courts is to resolve the disputes of facts and conflicts of rights in light of circumstances of each case situation before it. The courts in seeking to promote justice and protect rights of parties, are not supposed to consider the needs of the community or impact of its ruling (Horowitz 1977: 34-5; Cooper 85: 644-646).

The adversary system of justice as a dispute resolution process is built upon a confrontation model. The problem or issues for resolution is presented within the context of two or more contending parties. It postulates that there will eventually be winners and losers. Often time,

that means a zero sum game (Posner 1977: 434-441). All other people's interests, not party to the law suit, are either deemed irrelevant or made to play secondary role (Barrett and Cohen 1985: 80-115). Thus when a robber is shot and injured by the police in the course of a felony arrest illegally, the thief will sue the police for damages claiming pain and suffering. The interest to be adjusted is between the thief as against the police officer. The organizational, departmental, community needs are deemed irrelevant. The resource constraints of the local government to deal the future shooting incident are deemed irrelevant. The emotional trauma suffered by the victim of robber is deemed irrelevant. The fear of crime of the public resulting from possible abscond felon are deemed irrelevant.

More significantly under the current system of adversary justice, the rights of the parties must be adjusted instantaneously, here and now. It is of no moment for the courts to suggest that the aggrieved person having received the benefit of police protection for the past 15 year is now required to bear the brunt of police misconduct. Nor, will the courts likely to ask the individual to forgo his/her lawsuit claim to maximum welfare and security of the community. Individual and situational justice is preferred over social and distribution justice of a more comprehensive and holistic kind.

In making decisions, the courts are confined to the case before it. It looks at the problems and issues from the eyes of the litigants. It is primarily interested in doing justice to the immediate parties and less concern about solving all the problems in a day.

Finally, the courts are concerned about following institutional norms and preserving traditional conventions, e.g. judicial integrity. The courts are as concerned about making a correct decision as they are concerned about making rules that will be enhance the institutional standing of the courts. These two considerations require the courts to look at two set of factors: What are the rights of the parties? What impact would the decision has on the court's institutional authority, legitimacy, and effectiveness. For example, there is a standing doctrine that the Court will exercising judicial restraint in not entertaining political question (Baker v. Carr, 369 U.S. 186, 217 (1962)). The courts also prefers stability and certainly over change and indeterminacy in deciding a case. Accordingly Justice Brandeis remarked: "stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right. " (Emphasis supplied.) (Burnett v.

Coronado Oil and Gas Co., 285 U.S. 293 (1932). In so doing, the rights of the parties and interests of communities are being compromised.

(4) Organizational influence on the courts:

The Court is organized to divorce and insulate itself from political, social and personal pressures of any kind. It is structured such that it can make judgment in a reflective and informed manner. The institution is staffed by lawyers. The hearing is conducted in an orderly fashion and deliberation done in isolation. The judges are appointed. They serve the office for life. They are socially isolated from the general public as a result of social economic status. The courts as currently organized approaches the Platonic ideal of autocratic rule by philosopher king (Popper 1964).

(5) Judicial philosophy of the courts:

Ultimately judicial philosophy plays a great part in the courts' decision making. (Abraham 1965: 174-5) The judicial philosophy of the courts is influenced in part by the sentiments of the time. These sentiments are reflective of the national mood and not of local origin. The distillation process through which the sentiments of the nation take hold is heavily distorted in favor of the rich, powerful and intellectual. The judges also shared philosophy as an elite group that is not accessible to the people. The judges are concerned about the growth of a body of law, about the role of the judges, about the craftsmanship of decision making, about the continuity of the law, about the abstract notion of justice. All these are far from the mind of the common man in the street.

How police make decisions

(1) Political mandate of local police

Police are grass root agencies. Created by state charter and sustained by local resources, police agencies are servants of the local community. They are responsive to and held accountable to meeting the local people's needs and wants. If the community desire, the police must deliver. Since, the police will be judged, approved, supported and funded according to how well they satisfy the people in the community (Wilson 1968: Chapter 8). This requires the police to engage in cost-benefit analysis not unlike those shared by the economists. For example:

The late Professor Needham suggested a four step approach to calculating beneficial effect of a regulation:

- (a) valuating and aggregating effects perceived by an individual
- (b) aggregating people's evaluations of effects
- (c) valuating and aggregating effects that occur at different times
- (d) interdependence between perceived effects and people's evaluation

He then suggested five cost concepts to evaluate any regulation:

- (1) expenditures by regulatory agencies
- (2) expenditures by firms that are attributable to regulation
- (3) reductions in satisfaction experienced by some members of society as a result of regulation
- (4) ignored or unintended effects of regulation
- (5) costs of demand-revealing activities

(Needham 1983: 45)

In theory, this approach relegates the rights of the individual, whether they are natural in origin or constitutional in nature, to the overriding needs of the community as a whole. In practice, the rights of the suspects and defendants do not occupy a primary position, much less a preferred one, in the police's operations decision matrix. They are only considered when recognized by the local community as important and only to the extent that they are not incompatible with the community's many other wants and needs. More significantly, the formal rights of individuals are subjected to the informal norms and customs of the local community.

(2) Traditional role of local police

The historical role of the police is one of maintaining law and order (Chapman 1970: Chapter One) and securing public safety and welfare (Johnson et. al: Chapter 3). Their more contemporary mission is to provide for community service. The police are not at liberty to disregard these pre-defined role and missions. Police conduct will be judged according to how effective they are in achieving these objectives. The issue of individual rights will be a secondary consideration and of tangential concern, if at all. Their relevancy and importance are determined in the context of achieving overall police efficiency and effectiveness; in meeting communal expectations or situational needs. (Klockars 1985: Chapter 6; Muir 1977).

(3) Functional requirements of police

Police are problem solver. This means that they prefer practical discussion over what can be done than abstract debate over why things cannot be done. This also means that they think about a problem in an integrative and holistic manner than in a discrete and piecemeal issue by issue fashion. More significant, as pragmatists, they are more inclined to argue that the end justifies the mean. The courts, as idealists, are more inclined to argue that the legal process is the law itself.

Table I: Comparing decision making by the courts and the police in key dimensions

Dimension	Courts	Police
Role	Defend Constitution	Maintain order
Mission	Protect rights	Solve problem
Accountability	Constitution: Rule of law	Political: Will of the people
Conduct norm	Constitutional	Customary
Framework of analysis	Closed framework: Right based Essentialistic (based on rights of parties, e.g. due process) Particularistic (confined to parties and issues, e.g. defendant’s right)	Open framework: Utility driven Comprehensive (based on all relevant considerations bearing on or affected by the case, e.g. victim’s plight) Holistic (integration of all relevant factors, e.g. effect of crime on victim? community? police?)
Style of thinking	Classical: Ideological Idealistic Rational Metaphysical Abstract Categorical Absolute Principled Act based Backward looking Non-probabilistic	Positive: Realistic Pragmatic Affective Material Concrete Relative Contingent Contextual Character based Backward, present and forward looking Probabilistic

VII. Conclusion

The public has a right to be concerned about police misconduct. The federal courts have a vested interest in seeing to it that the police operate within the Constitution. However, as this article points out, a large part of the federal courts' difficulties in supervising and controlling the police is due in due to laden structural conflicts of value as reflected in their respective decision making process.

Particularly, in making judicial decisions, the courts have the luxury of hindsight and reflective judgment. The police officers can ill afford such detached contemplation, cool thinking, and metaphysical consideration. The police have to labor under a different working reality; a world that is neither shared nor understood by the justices. The police world is one of ever becoming material circumstances where social forces are many and alternatives are few, where actions are judged more by tangible results than abstract theories and where rights are conferred privilege and not inalienable rights. The police have many masters to serve and multiple missions to achieve. They are held accountable for the needs of a broad-base, diverse, and often competing if not conflicting, constituents and interests. They are faced with varied and ever changing life circumstances and constantly evolving situational dynamics. All these make the use of fixed rule approach and the adoption of absolute rights analysis as basis for decision making too sterile and academic; in practical terms irrelevant and unrealistic.

At a more structural level, traditionally and by design the federal judiciary is organized as an anti-majoritarian institution. They are made to stand aloof – independent and autonomous - from the people. The judges are not elected and can only be removed from office for cause. They are held accountable only to law and not the political process. This is to be contrasted with the police, which are created by and for the people. They are funded by the local communities and amendable to ideological (e.g. party membership); political (e.g. election), economical (e.g. budget), social (e.g. press); and personal (e.g. personal) accountability. In terms of role and functions, the courts promote the rule of law. The police answer to the will of the people. The courts aspire to the higher morality of the Constitution. The police cater to the basic needs of the community. As an ideal, the court considers constitutional restrictions on law enforcement effort as necessary and desirable check and balance against official abuse and majority oppression. The police consider constitutional interference a hindrance on community well being and necessary police practice in the face of criminality.

The conflict in ideas of justice (legal vs. moral), the difference in analytical approach (classical vs. positive), the dissimilarity in organization framework (constitutional accountability vs. political accountability) and the opposition in institutional missions (due process vs. crime control) all contributed to the chronic disharmony and occasional animosity existing between the two institutions. This is to observe that there is an on-going struggle for dominance between Constitutional ordering and community ordering.

In sum and as observed, there are substantial differences between the court and the police as distinctive but interdependent social control institutions in the criminal justice system. The differences in decision making method, process and standard - allow the courts and the police to view and judge police conduct in completely different light. Looking from the vantage point of the courts, police misconduct may be unconstitutional and illegal. Looking from the vantage point of the community, police misconduct may be customary required and functional necessary, i.e. normative.

In the ultimate analysis, it must be remembered that the courts and the police are set up to serve different masters and thus share different value orientations and frame of reference. The conflicts in values and process, more so than any personal abnormality or organizational failure, are the true cause of perceived police misconduct in the U.S. federalism context.

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