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DEFENDING CONSTITUTIONAL RIGHTS IN IMBALANCED COURTROOMS

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Safeguarding Fourth Amendment protections is critical to preserving individual privacy rights and fostering positive perceptions of police legitimacy within communities. Maintaining an effective accountability structure for police stops, searches, and seizures is a necessary step toward achieving these objectives. In this article, we use qualitative interviews and survey data with defense attorneys to explore—from a court community perspective— their use of discretion to uphold the Exclusionary Rule through bringing suppression motions. Data demonstrate that power dynamics within the court community lead defense attorneys to conclude that litigating rights violations is often a futile effort that interferes with favorable case outcomes and important professional relationships. As a result, they sometimes opt to refrain from filing suppression motions in exchange for favorable plea offers and career aspirations. While understandable, these decisions frustrate the ability of the judicial system to hold the police accountable for Fourth Amendment violations.

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INTRODUCTION

Protection from unreasonable searches and seizures is a fundamental right secured by the Fourth Amendment of the United States Constitution. Police violations of the Fourth Amendment not only adversely impact individual privacy rights but also erode perceptions of police legitimacy within communities more broadly.[1] Thus, deterring police from engaging in unreasonable stops, searches, and seizures is a constitutional imperative, and

[1] Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 253 (2008); Lorraine Mazerolle, Emma Antrobus, Sarah Bennett & Tom R. Tyler, *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33, 51–56 (2013); Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 765–71 (2014).

procedural safeguards, including the Exclusionary Rule,[2] have been established to encourage police compliance with Fourth Amendment mandates.[3] In theory, these safeguards should serve as an accountability structure for search and seizure related police conduct.

In the courtroom, judges and prosecutors play a role in operationalizing this accountability structure and ensuring that Fourth Amendment violations do not go unchecked. Judges may grant worthy suppression motions (i.e., motions brought by defendants to bar the prosecution from introducing improperly seized evidence at trial) and send a message to police that Fourth Amendment oversteps will not be tolerated. Prosecutors, who often collaborate with police during investigations, may proactively instruct police on Fourth Amendment mandates and make it clear to officers that illegally seized evidence may be barred from use at trial.

Yet defense attorneys arguably have the most critical role in holding the police accountable for Fourth Amendment violations. Specifically, they possess discretion to initiate suppression motions to challenge the constitutionality of police action. It is generally the defense attorney's filing of a suppression motion that fuels and directs the process of police accountability in court. In this way, defense attorneys serve as frontline defenders of Fourth Amendment rights and a check on police behavior. Notably, defense's filings of suppression motions are the primary catalysts that move other court actors to hold the police accountable for Fourth Amendment violations in that these motions are a prerequisite to judicial rulings (i.e., a suppression motion must be filed for the court to rule on it). Thus, defense attorneys hold a critical and indispensable role in operationalizing the Exclusionary Rule.

But are defense attorneys motivated to serve as a check on police conduct in court? Do dynamics within the court community complicate the desire of defense attorneys to defend their clients' Fourth Amendment rights? In this article, we seek to explore how power dynamics within the court community, concerns regarding relationships among prosecutors, judges, and police officers, and the quest for efficient and favorable case dispositions influence the manner in which defense attorneys litigate rights violations. For example, we explore: How do defense attorneys react to their clients' allegations of constitutional oversteps by police? What are the rationales behind these reactions? How do defense attorneys perceive their position within the court community and how do these perceptions influence their

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[2] The Exclusionary Rule is a judge-made rule that bars evidence obtained in violation of a defendant's constitutional rights from being used against him or her at trial.

[3] Mapp v. Ohio, 367 U.S. 643, 657 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914).

behavior? How do relationships among police officers, prosecutors, and judges play a role in the process? Are there systemic or strategic disincentives for defense attorneys to bring suppression motions?

To date, few empirical studies have explored these critical questions. However, these nuanced courtroom dynamics are central to understanding the extent to which the defense bar holds the police accountable for Fourth Amendment violations. Using in-depth interviews and surveys with two separate samples of defense attorneys, we explore the answers to these questions by studying these uniquely positioned court actors who have generally been overlooked by scholars in the criminal justice field.[4] The paper begins with a brief review of the Exclusionary Rule and suppression motions, followed by a discussion of how and why defense attorneys exercise their discretionary powers from a court community perspective. After placing our study within this theoretical framework, we share our methodology and our qualitative interview and descriptive survey results. We conclude the paper with a discussion of the challenges faced by defense attorneys in enforcing Fourth Amendment protections in profoundly imbalanced courtrooms.

I. LITERATURE REVIEW

A. THE EXCLUSIONARY RULE AND SUPPRESSION MOTIONS

The Exclusionary Rule provides a remedy for defendants whose constitutional rights have been violated by allowing them to move the court to bar the prosecution from using illegally obtained evidence at trial.[5] The primary objective is to deter unconstitutional searches and seizures by police, thereby preserving the integrity of the legal system. In the landmark Fourth Amendment case of *Mapp v. Ohio*, the Court emphasized the importance of preserving these rights: "Nothing can destroy a government more quickly than its failure to observe its own laws."[6]

Over the years, the Supreme Court has narrowed the scope of the Exclusionary Rule in a series of defining decisions. In a monumental 1984

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[4] For examples of the few empirical studies that have been conducted, see Andrew L. B. Davies & Janet Moore, *Critical Issues and New Empirical Research in Public Defense: An Introduction*, 14 OHIO ST. J. CRIM. L. 337, 337 (2017); Alissa Pollitz Worden, Kirstin A. Morgan, Reveka V. Shteynberg & Andrew L. B. Davies, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIM. JUST. POL'Y REV. 710, 720–25 (2018).

[5] *Mapp*, 367 U.S. at 650–55; *Weeks*, 232 U.S. at 390–92.

[6] *Mapp*, 367 U.S. at 659.

case,[7] the good faith exception to the Exclusionary Rule was created. The *Leon* Court held that evidence should not be excluded where an officer acted in good faith, based on an objectively reasonable reliance on a search warrant issued by a neutral judge or magistrate but later found to be invalid.[8] In 2009, the Supreme Court further limited the reach of the rule by expanding the good faith exception to police error.[9] In *Herring*, the arresting officer mistakenly believed that an arrest warrant for the defendant was still in effect due to outdated information in the police database.[10] The Court concluded that the Exclusionary Rule did not apply:

> "To trigger the [E]xclusionary [R]ule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it[] and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the [E]xclusionary [R]ule serves to deter deliberate, reckless[] or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[11]

More recently, in *Utah v. Strieff*, the Court ruled that evidence seized incident to the defendant's arrest could be used by the prosecution even though the initial stop was illegal because the illegality was "sufficiently attenuated" by a pre-existing search warrant discovered during the stop.[12] In its decision, the Court noted that the officer's errors did not rise to the level of a purposeful or flagrant violation.[13] This decision, as well as other modifications made by the Supreme Court over time, have limited the power of the Exclusionary Rule to enforce Fourth Amendment protections.[14]

In order to invoke the Exclusionary Rule, defendants may bring suppression motions alleging improper police conduct regarding stops, searches, or seizures before the court.[15] In deciding whether to grant or deny a suppression motion, judges review statements of fact and legal arguments

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[7] United States. v. Leon, 468 U.S. 897, 906–26 (1984).

[8] *Id.* at 925–26. For subsequent cases applying the good faith exception to judges and legislators, see Massachusetts v. Sheppard, 468 U.S. 981 (1984); Illinois v. Krull, 480 U.S. 340 (1987); Arizona v. Evans, 514 U.S. 1 (1995).

[9] Herring v. United States, 555 U.S. 135, 147 (2009).

[10] *Id.* at 137–39.

[11] *Id.* at 144.

[12] Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

[13] *Id.*

[14] *See* Julian A. Cook III, *The Wrong Decision at the Wrong Time:* Utah v. Strieff *in the Era of Aggressive Policing*, 70 SMU L. REV. 293, 303–16 (2017); George M. Dery III, *Allowing "Lawless Police Conduct" in Order to Forbid "Lawless Civilian Conduct": The Court Further Erodes the Exclusionary Rule in* Utah v. Strieff, 44 HASTINGS CONST. L.Q. 393, 414–30 (2017).

[15] For examples of applicable procedures in different jurisdictions, see N.Y. CRIM. PROC. LAW § 710 (Consol. 2020); CAL. PENAL CODE § 1538.5 (Deering 2020).

posited by counsel.[16] At times, hearings are conducted at which police officers, defendants, and other eyewitnesses testify; judges evaluate the credibility and reliability of witnesses and determine if suppression is warranted.[17] If the judge denies the suppression motion, the prosecutor may use the challenged evidence at trial.[18] If the court grants the motion, the prosecutor is barred from using the evidence.[19] In these situations, the prosecutor may either dismiss the case if the remaining evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt, or, alternatively, proceed to trial with the remaining evidence.[20]

Since the exclusion of valuable prosecutorial evidence is an outcome that police would arguably want to avoid, the threat that the seized evidence will be suppressed should theoretically deter police conduct that violates Fourth Amendment protections. Yet, empirical studies on the rule's effectiveness have yielded mixed results,[21] and the rule has been the subject of harsh critiques.[22] For example, critics of the Exclusionary Rule argue that the rule operates under limitations and constraints that inhibit its ability to deter Fourth Amendment violations.[23] Specifically, Counselor Oaks argued that the Exclusionary Rule does not provide a direct disincentive for unconstitutional police behaviors.[24] Instead, the penalty for suppressed evidence, if imposed, more directly affects prosecutors and their work on the

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[16] Esther Nir, *Empowering the Exclusionary Rule: Using Suppression Motion Data to Improve Police Searches and Seizures in the United States*, 21 INT'L J. POLICE SCI. & MGMT. 96, 98 (2020) [hereinafter Nir, *Empowering the Exclusionary Rule*].

[17] Joëlle Anne Moreno, *Rights, Remedies, and the Quantum and Burden of Proof*, 3 VA. J. CRIM. L. 89, 131 (2015).

[18] Nir, *Empowering the Exclusionary Rule*, *supra* note 16, at 98.

[19] *Id.*

[20] *Id.*

[21] Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 688–89 (1983); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 606–07 (1983); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 743–54 (1970); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 275–77 (1973).

[22] *See, e.g.*, Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. ECON. 157, 173–74 (2003); David A. Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 210–12 (2009); Oaks, *supra* note 21, at 707; Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 COLO. L. REV. 1037, 1057–59 (1996).

[23] *See* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 652–56 (2011); Oaks, *supra* note 21, at 724–25.

[24] Oaks, *supra* note 21, at 755.

case.[25] Counselor Oaks further argued that the Exclusionary Rule fails to address the norms and expectations within police departments regarding street enforcement practice.[26] Furthermore, judicial practice in adjudicating suppression motions is often an impediment to the Exclusionary Rule's deterrent value. To illustrate, Professor Jacobi observed that many judges are reluctant to suppress evidence and choose "avoidance and contraction" as a mitigating strategy.[27] Other studies have found that judges presiding over suppression hearings are deferential to police testimony and overlook police credibility concerns.[28]

B. DEFENSE ATTORNEYS IN A COURT COMMUNITY PERSPECTIVE

In most common law nations, the daily processing of criminal cases likens to a well-oiled production line—"a conveyor belt [of] justice."[29] Such rhythmic efficiency is not possible unless each member of the team follows agreed-upon routines and procedures. Consequently, members of the court community endeavor to formulate and protect a functioning norm.[30]

Classically defined as the court community perspective, court actors (e.g., judges, prosecutors, and defense attorneys) share a common workplace. While each court actor's work is interdependent with the others', the informal relationships formed through the "community grapevine" serve an important role in the performance of formal job functions.[31] Viewed as members of this community, defense attorneys are not isolated agents. To the contrary, they are "agent-mediators" between the court and the defendant and play an indispensable part in ensuring that the plea-bargaining process runs smoothly.[32] Despite their opposing roles, defense attorneys often develop

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[25] *Id.*

[26] *Id.*

[27] Jacobi, *supra* note 23, at 657.

[28] Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 792–93 (2014); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2077–78 (2017); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 108–14 (1992); Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1378–79 (2018); Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 284–305 (2010).

[29] ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 160 (2d ed. 2005).

[30] Peter F. Nardulli, *Insider Justice: Defense Attorneys and the Handling of Felony Cases*, 77 J. CRIM. L. & CRIMINOLOGY 379, 387 (1986) [hereinafter Nardulli, *Insider Justice*].

[31] JAMES EISENSTEIN, ROY B. FLEMMING & PETER F. NARDULLI, THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS 41–42 (1988).

[32] Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15, 20 (1967).

shared values and expectations with their "adversaries" in the court community due to close working relationships they maintain with other court regulars.[33]

Nevertheless, compared to other court actors, defense attorneys are positioned in a uniquely challenging predicament within the criminal adversarial system. Specifically, they are tasked with delicately managing defendants' interests while balancing the important objective of court community cohesion.[34] A critical job expectation for defense attorneys is to protect their clients vigilantly and zealously from the overreach of government power.[35] In fact, defense attorneys are often the first courtroom actor to be exposed to allegations of rights violations; sometimes this knowledge is obtained by reading a police report that shows "the first hint of police impropriety"[36] or from their client telling their story. Yet, as "regulars" in the court community, defense attorneys inevitably share the common community mission that overall court efficiency is a priority.[37] Professor Mears argues that case resolution is the common leading motivator that directs the exercise of discretion by all court actors, including defense attorneys.[38] For defense attorneys, fulfilling this mission may be complicated by practical concerns; while bringing constitutional challenges is often a necessary aspect of effective defense work, litigating these challenges may hinder faster case disposition and reduce efficiency.[39] When such incongruity occurs, the commitment to the court organization often triumphs. In fact, it has been recognized that rights violations are sometimes overlooked for the sake of court efficiency.[40]

In addition to case resolution and courtroom efficiency, other practical concerns may influence the manner in which defense attorneys perform their

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[33] Nardulli, *Insider Justice*, *supra* note 30, at 416; ARTHUR ROSETT & DONALD R. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 104 (1976).

[34] Nardulli, *Insider Justice*, *supra* note 30, at 379.

[35] *See* MODEL CODE OF PRO. RESP. Canon 7 (AM. BAR ASS'N 1980).

[36] Orfield, *supra* note 28, at 101.

[37] Nardulli, *Insider Justice*, *supra* note 30, at 387.

[38] DANIEL P. MEARS, OUT-OF-CONTROL CRIMINAL JUSTICE: THE SYSTEMS IMPROVEMENT SOLUTION FOR MORE SAFETY, JUSTICE, ACCOUNTABILITY, AND EFFICIENCY (2017) (discussing the priorities of the criminal justice system and drastically increased occurrences of punitive outcomes).

[39] Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1238 (1975); EISENSTEIN, FLEMMING & NARDULLI, *supra* note 31, at 33; JEFFREY T. ULMER, SOCIAL WORLDS OF SENTENCING: COURT COMMUNITIES UNDER SENTENCING GUIDELINES 117 (Austin T. Turk ed., 1997) (discussing the influence of court organizational contexts on case processing and sentencing outcomes).

[40] PAT O'MALLEY, LAW, CAPITALISM AND DEMOCRACY: A SOCIOLOGY OF AUSTRALIAN LEGAL ORDER 127 (Ronald Wild ed., 1983).

roles. For example, Professor Blumberg regarded the defense attorneys' priorities of "maximum production and the particularistic career designs of organizational incumbents" as the "higher claim" than due process protection[41] and maintained that any conflicts of interest are often resolved "in favor of the organization which provides [the defense attorney] with the means for his [or her] professional existence."[42] Furthermore, informal relationships between defense attorneys and other court actors in the community may interfere with the construction and implementation of a zealous defense. In her research, Professor Walker Wilson found that the ability of defense attorneys to work closely and efficiently with other court actors is inversely related to their ability to critically examine case processing and its effect on their clients.[43]

The power differential in the court community may also influence the way in which defense attorneys choose to perform their roles. Unlike judges and prosecutors who "possess an effectively unreviewable power over sentencing,"[44] defense attorneys hold the least amount of discretionary power: "In a system where discretion is the coin of the realm, defense attorneys are paupers."[45] Perceptions of powerlessness and assessments of likely case outcomes may play a role in strategic defense decisions.[46] For example, in determining whether to advise a client to file a suppression motion, defense attorneys may consider the chances of the motion being granted,[47] the likelihood of damage to the defense position by raising the challenge (e.g., receiving undesirable plea offers),[48] and reputations of the

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[41] Blumberg, *supra* note 32, at 19.

[42] *Id.* at 38.

[43] Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 KAN. L. REV. 271, 272 (2016).

[44] Alschuler, *supra* note 39, at 1252.

[45] Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2257 (2014).

[46] *See* Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019) (discussing "trial tax" and the cost of exercising constitutional rights).

[47] *See* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1245 (2005).

[48] *See* Oaks, *supra* note 21, at 748; *see also* THE SPANGENBERG GROUP, THE STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I 90 (2003) (discussing defense attorneys' concerns about their work in court when considering filing motions and appearing zealous).

prosecutor and the judge,[49] among other factors. Moreover, for public defenders, caseload may determine how much time and attention can realistically be devoted to each case, contributing to the metaphor of "assembly-line justice."[50] These analyses are often developed based on defense attorneys' perceptions of court community dynamics and their perceived ability to navigate those dynamics effectively. In this way, the assessment of the client's best interest becomes a balance of obtaining minimal punishment and the need for rights protection, reasonable to "the norms and understandings" of the court community.[51]

C. DEFENSE ATTORNEYS' PERCEPTIONS OF THE POLICE AS PART OF THE COURT COMMUNITY

In its original theoretical framework, the court community perspective does not specifically include the police. Instead, when discussing the members of the court community, Professor Eisenstein and his colleagues wrote: "All are lawyers, sharing the relatively high status that this profession accords its members and the common experience of attending law school and practicing law."[52] While Professor Eisenstein and colleagues referenced nonlawyers in the courtroom, this discussion touched on the "courtroom staff, clerks, office secretaries, and court administrators" (without reference to the police) and the role they play in contributing to the community grapevine.[53]

Few studies have identified that police officers play a notable role in courtroom dynamics,[54] and existing literature regarding this role is somewhat scarce and vague. Some scholars have indirectly touched on the relationships between police and other powerful court actors by exploring judicial and prosecutorial deference to police.[55] As members of the courtroom workgroup, defense attorneys observe the interactions between police and judges, including the tendency of judges to defer to the police.[56] Through

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[49] *See* Alschuler, *supra* note 39 (discussing defense attorneys' calculations of how trial judges and prosecutors would meet their strategies and how they effectively advise their clients by thinking about the risks of losing).

[50] Argersinger v. Hamlin, 407 U.S. 25, 58 (1972).

[51] *See* Nardulli, *Insider Justice*, *supra* note 30, at 415 (discussing the role of attorneys who are court regulars in sustaining the norms and status quo of the court).

[52] EISENSTEIN, FLEMMING & NARDULLI, *supra* note 31, at 34.

[53] *Id.*

[54] *But see* JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977) (discussing environmental forces in the court).

[55] *See* Laurin, *supra* note 28, at 787–88; Lvovsky, *supra* note 28, at 2000; Moran, *supra* note 28, at 1344.

[56] *See* Wilson, *supra* note 28, at 287.

witnessing verbal and nonverbal communications, defense attorneys internalize the often favorable judicial attitude toward police and integrate these observations into their rational prediction of case outcomes; these predictions influence the manner in which they formulate defense strategies.[57] For example, using survey data of defense attorneys, Professor Kittel described that defense attorneys believe that police perjury is prevalent and that they are "forced to take such perjury into account" in their defense work.[58] As one defense attorney in Alschuler's study stated: "That policeman has a shield to back his story. What have you got? Are you employed? Don't you have a record?"[59] Defense attorneys may also observe some of the interactions between prosecutors and police, including the influential role that the arresting officer plays in charging decisions.[60]

Indeed, when considering potential Fourth Amendment challenges, defense attorneys may consider whether pursuing such action would serve the best interest of their client or their own status in the court community. Particularly when protecting procedural rights of defendants is not prioritized or valued in a court community,[61] defense attorneys may perceive that bringing constitutional challenges is harmful to their clients. For example, while a decision to file a suppression motion may help the greater universe of defendants by establishing critical case law to guide future court decisions,[62] continuing to pursue Fourth Amendment challenges when favorable plea offers are presented may entice even innocent defendants to accept "an almost irresistible bargain" to avoid the risk of less favorable dispositions. [63]

In sum, a review of scholarship to date establishes that the effectiveness of the Exclusionary Rule is limited, and that its efficiency to deter Fourth Amendment violations by police is questionable. While some scholarship explores the weak positioning of the defense attorney within the court community and the influence of court community dynamics on defense advocacy decisions, little empirical work exists that builds a direct

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[57] Nardulli, *Insider Justice*, *supra* note 30 (discussing the active role of defense attorneys in contributing to the norms of the court community and their tendency to avoid deviating from those norms).

[58] Norman G. Kittel, *Police Perjury: Criminal Defense Attorneys' Perspective*, 11 AM. J. CRIM. JUST. 11, 19–20 (1986).

[59] Alschuler, *supra* note 39, at 1192.

[60] *See* David W. Neubauer, *After the Arrest: The Charging Decision in Prairie City*, 8 L. & SOC'Y REV. 495, 498–99 (1974) (discussing the role arresting officers may play in the setting of initial charges).

[61] Blumberg, *supra* note 32, at 19; MEARS, *supra* note 38, at 204.

[62] *See* Etienne, *supra* note 47, at 1241–42.

[63] Oaks, *supra* note 21, at 748.

connection between court community dynamics and defense attorneys' decisions to file suppression motions and pursue Fourth Amendment challenges. Our study intends to fill this gap.

II. DATA AND SAMPLING

A. INTERVIEW SAMPLE

The interview data for this study were drawn from in-depth interviews with a sample of forty criminal defense attorneys practicing criminal law in a U.S. state. To "ensure that the same basic lines of inquiry were pursued with each person,"[64] we used semi-structured interviews. Data was analyzed using an inductive, grounded theory approach and theoretical categories were used "[to] place the . . . data into a more general or abstract framework."[65] Numerous themes emerged including a perceived reluctance of judges to grant suppression motions, a perceived tendency of prosecutors to protect the police, and feelings of exclusion or being "the odd person out" by defense attorneys, among others. Data from newer interviews were consistently compared with prior interviews and emerging themes were continuously refined to reflect the complete body of data.

Data collection began on September 26, 2017 and concluded on July 1, 2019. We accessed the names and contact information for our interviewees through online research, personal contacts, referrals from interviewees, and cold-calling methods.[66] Our interviewees regularly interact with defendants, police officers, prosecutors, and judges. Among other responsibilities, these attorneys conduct suppression hearings and trials, and cross-examine police officers during the course of these proceedings. Of the forty attorneys interviewed, fifteen currently serve as public defenders while twenty-five are engaged in private practice. Years of legal experience range from two to forty-one years. Six attorneys are former prosecutors and twenty-nine of the forty attorneys served as a public defender during some point in their careers. Interviews were conducted in the attorneys' offices and generally lasted for one hour. The demographic statistics for both our survey and interview samples are presented in Table 1.

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[64] MICHAEL QUINN PATTON, QUALITATIVE RESEARCH & EVALUATION METHODS 343 (3d ed. 2002).

[65] JOSEPH A. MAXWELL, QUALITATIVE RESEARCH DESIGN: AN INTERACTIVE APPROACH 97 (2d ed. 2005).

[66] Esther Nir, *Approaching the Bench: Accessing Elites on the Judiciary for Qualitative Interviews*, 21 INT'L J. SOC. RES. METHODOLOGY 77, 80 (2018).

B. SURVEY SAMPLE

The survey was designed by the authors as part of a larger project on defense attorney perceptions of the police. The survey includes questions regarding professional experience in criminal law practice, experience in Fourth Amendment challenges, and perceptions of police practice in general.[67] Survey data for this study were collected by reaching out to members of an Association of Criminal Defense Lawyers in the same state, which contained approximately 900 members at the time of collection. An invitation email with a Qualtrics survey link was circulated to the member list and three reminder emails were sent to complete the survey. To improve participation, follow up phone calls were used to encourage members to participate in our project. In addition to this organization, chief public defenders in every county in the state were reached via phone calls. Twelve percent of the counties agreed to participate and circulate our survey within their offices. We also used a snowball sampling technique and encouraged all participating lawyers to forward the link to their peers and colleagues via email; this respondent-based sampling method enabled us to reach a subpopulation who is typically hard to reach.[68]

The survey administration commenced in May 2018, and by the end of the survey data collection in April 2019, we received 124 completed surveys and twenty-nine partially completed surveys (ranging from 2% to 41% of completion). We excluded the data of thirteen respondents who had previously participated in our interviews, making our survey and interview samples mutually exclusive. Thus, our final survey sample size is 140 with seventy-three respondents (52%) reported as public defenders, eleven of whom (15%) also accept court-appointed work or have a private business, and thirty-six respondents (26%) as private attorneys, seventeen of whom (12%) accept court-appointed work. Thirty-five respondents (25%) did not report their profession.

Our survey data is limited. While presented as supplemental descriptive results to the qualitative interview data, the survey sample is relatively small. When larger, multi-level data are available, more statistical analyses could be performed to examine the variations in relevant perceptions between different groups of attorneys by level of experience, case type, jurisdiction, and courtroom. Similarly, future studies should examine differences in perceptions between private and public defense attorneys, and the statistical relationship between perceptions (on court community dynamics and client

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[67] Two practicing attorneys reviewed an earlier version.

[68] Douglas D. Heckathorn & Christopher J. Cameron, *Network Sampling: From Snowball and Multiplicity to Respondent-Driven Sampling*, 43 ANN. REV. SOC. 101, 105 (2017).

interest) and specific strategic decisions. Given the critical role that court actors play in protecting Fourth Amendment rights, enhancing our understanding of nuanced court community dynamics is critical to effective police accountability.[69] Additionally, while fifteen percent of our interview sample reported having a prior legal background (e.g., former prosecutor), our data are restricted to defense attorneys and cannot speak to perceptions by prosecutors or judges. Future studies should extend this discussion to other courtroom actors.

Table 1 Descriptive statistics of survey and interview samples

Variables	**Samples**			
	Survey (n=140)		**Interview (n=40)**	
Practicing county size (by population[a])				
<200,000	20	14%	2	5%
200,000~500,000	46	33%	31	78%
500,000~1,000,000	24	17%	0	0%
>1,000,000	19	14%	7	18%
Legal experience				
5 years or less	21	15%	10	25%
6 to 10 years	24	17%	9	23%
11 to 20 years	19	14%	10	25%
21 to 30 years	15	11%	2	5%
more than 30 years	24	17%	8	20%
*Prior relevant experience**				
None reported	106	76%	30	75%
Prosecutor	22	16%	6	15%
Court clerk	9	6%	2	5%
Social worker	2	1%	1	3%
Judge	1	1%	0	0%
Police or Investigator	1	1%	1	3%

[69] Gregory D. Russell, *The Political Ecology of Police Reform*, 20 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 567, 571 (1997).

Note: Sums of categories may not add up to 100% due to missing cases. Prior relevant experience may exceed 100% due to multiple selection allowed.
[a] Population data is retrieved from the 2010 Census.
*Many respondents have extensive prior criminal public defender or private defense experience.

III. RESULTS

A. PERCEIVED POWER IMBALANCE IN THE COURT COMMUNITY

The vast majority of criminal defense attorneys in the interview sample perceive a profound power imbalance in the court community. Specifically, most sampled attorneys regard themselves as weak members of the court community, standing against a powerful coalition of judges, prosecutors, and police who largely possess unified interests that are averse to the defense position. Notably, the majority of our respondents perceive that this imbalance is exacerbated by prosecutors and judges who are inclined to believe, favor, and protect police from defense allegations of police misconduct or mistake, even in situations where such support is blatantly unjustified. These prevalent and deeply rooted perceptions revolve around defense attorneys' impressions of (1) judicial favoritism toward police and prosecutors; (2) close and protective relationships between prosecutors and police; and (3) the disrespected outsider position of the defense attorney in the courtroom work group. In this section, we report on these perceptions that contribute to defense attorneys' beliefs that they are mostly powerless to hold the police accountable for constitutional violations in profoundly imbalanced court communities.

1. Perceptions of Judicial Favoritism Toward Police

The majority of defense attorneys interviewed perceive that judges regularly display favoritism toward police officers. According to these attorneys, the tendency of judges to believe and protect police reduces police accountability and (at times) impedes defense counsels' efforts to defend their clients' constitutional rights.

i. Credibility Calls Favor the Police

Nearly twenty percent of attorneys interviewed perceive that judges are conditioned to believe police officer testimony, even when other case evidence indicate that the officer is not being truthful. As one attorney stated, "God himself can come down and say, 'Judge, that officer is lying,' and it

doesn't matter."[70] Other attorneys perceive that credibility contests between police officers and defendants typically resolve in the officer's favor, whether or not the officer appears credible in court. For example, one attorney lamented that "it is almost guaranteed that whatever the cop says is gold and whatever my client says is not"[71] and another explained the inevitable disadvantage that some criminal defendants face:

> You put somebody in uniform and they look bright and shiny in the public and the judge loves them, and then you have your client who's a 23-year-old drug addict, and who are you going to believe? The officer or your client? Of course, they are going to believe the officer, even if the officer has a shitty reputation. It's not fair game, and they intentionally don't let it be fair.[72]

Moreover, almost twenty percent of the interviewed attorneys described instances where particular judges found an officer credible, despite the respondents' perceptions that blatant case facts demonstrated a lack of officer trustworthiness: "[Judges] tend to just kind of overlook police inconsistencies in their stories more times than not in my experience and give them the benefit of the doubt."[73] Another attorney equated judicial overconfidence in police credibility with hero worship in certain locations:

> In the counties it's more like hero worship than deference. It's completely different. It's not just a matter of deference, it's a matter of they're shocked that you could accuse a police officer of not telling the truth. They're like, "What are you talking about? He's a police officer."[74]

ii. Judges are protective of the police

Several interviewed attorneys shared their perceptions of specific instances in which judges attempted to "protect" testifying police officers. For example, one attorney described a situation where the judge scolded the attorney for impeaching an officer's credibility:

> "When are you going to knock this off?" He goes, "Do you think you are trying a murder case?" And I said to him. I said, "Well no, it's not a murder case but it's the case I am trying." And he said, "Well, you've already got this guy because what he's described is obviously incredible. Why don't you just stop where you're at. You've got enough to win."[75]

Another attorney recounted a time when the judge thanked her for refraining from exposing an officer's missteps during cross-examination: "I

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[70] Interview with Respondent T12 (confidential interview on file with the authors).
[71] Interview with Respondent T13 (confidential interview on file with the authors).
[72] Interview with Respondent T16 (confidential interview on file with the authors).
[73] Interview with Respondent T23 (confidential interview on file with the authors).
[74] Interview with Respondent T27 (confidential interview on file with the authors).
[75] Interview with Respondent T21 (confidential interview on file with the authors).

(Judge) really appreciate that you didn't attack the cops in this case."[76] A few attorneys noted that some judges avoid "calling out" officers in court, even in situations where the given judge finds that the officer violated constitutional search and seizure protections:

> Our judges are cowardly. A lot of the judges will not rule on the bench because they don't want to rule against a police officer. So, when those cases come around, they'll say, "Oh, well, I'll take it under consideration," and four months later they will show an opinion. And that officer doesn't know until the prosecutor tells the officer that "we lost that case." Nothing is done. The judge will never say anything to the officer.[77]

2. Prosecutorial Favoritism Toward the Police

A majority of defense attorneys in our interviews perceive that prosecutors display favoritism toward police officers during criminal case processing. First, several attorneys perceive that, similar to judges, prosecutors are overconfident in the credibility of police officer testimony:

> Most of the prosecutors don't seem to believe that police officers would lie . . . You could catch a cop in a lie, and they still believe in all of the other stuff that cop said and did. They can't look at a cop, know their name, know they are going to call them (the officers) to the stand and admit that they could be lying about something. They just can't do it.[78]

Several attorneys perceive that prosecutors avoid admonishing police officers, even when the circumstances warrant such action:

> I had a case once where I filed a suppression motion for a trooper that I believe did something illegal. Off record, the DA basically said, "Yeah, I know that he is constantly doing this," but they didn't want to be the one to admonish him. They didn't want to get off that façade of buddy-buddy with the police.[79]

A number of defense attorneys perceive that prosecutors often allow police officers to dictate how a case will be handled in court: "A lot of the DAs will listen to the cop, and if the cop says, 'absolutely not, no deals,' then at the prelim[inary hearing] my client is not getting a deal."[80]

About a third of our respondents shared their perceptions that this favoritism may be due to the nature of the relationships between prosecutors and police officers, both in and out of the workplace. First, police officers and prosecutors generally have strong professional partnerships:

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[76] Interview with Respondent T3 (confidential interview on file with the authors).
[77] Interview with Respondent T17 (confidential interview on file with the authors).
[78] Interview with Respondent T26 (confidential interview on file with the authors).
[79] Interview with Respondent T8 (confidential interview on file with the authors).
[80] Interview with Respondent T13 (confidential interview on file with the authors).

> Prosecutors are overwhelmingly pro police. I mean, they work in concert. Prosecutors don't necessarily see themselves as being, you know, independent of the police. They see themselves as working hand in hand with the police, and they develop these very strong relationships.[81]

In addition to being close work partners, prosecutors and police officers often have personal relationships, as well as professional ones:

> They are in basketball leagues together and they go out together and I just think sometimes when you're prosecuting a case it's hard to believe that this officer is doing wrong when . . . you are like socializing with them and stuff.[82]

And another noted:

> A lot of them actually date and um, I think that the prosecutors feel like they represent the police. So, if your client wants a deal, they have to contact the police officer and if your client ticked off the police officer, you're probably not going to get a deal. Things of that nature.[83]

3. The Defense Position: "Lowest Rung on the Ladder"

A majority of interviewed defense attorneys perceive themselves as the weakest member of the courtroom work group, positioned against a powerful alliance of prosecutors, police, and, at times, even judges: "You don't get the same respect that the prosecution gets. You're kind of seen as like bottom of the totem pole."[84] A second defense attorney noted:

> I'm like one step above my client, and we're on the bottom end. Yeah, the court gives deference to the district attorney usually, and then they will also treat the police officers, probation officers . . . with a bit more respect, and then they'll get to us and it's like, "Oh, by the way, you two are still here. Great! What do you want?"[85]

Another attorney described the emotional ramifications arising from these perceived courtroom dynamics: "It can feel like multiple people against you and you almost get this weird kind of feeling in your stomach like high school. Like the cool kids and the outsiders."[86]

In describing the power differential between defense attorneys and other court actors, one attorney expressed, "The only power I have derives from the Constitution and how I can implement it in individual cases."[87] Yet, another attorney noted that defense attorneys are only one check (and, at

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[81] Interview with Respondent T23 (confidential interview on file with the authors).
[82] Interview with Respondent T2 (confidential interview on file with the authors).
[83] Interview with Respondent T8 (confidential interview on file with the authors).
[84] *Id.*
[85] Interview with Respondent T16 (confidential interview on file with the authors).
[86] Interview with Respondent T7 (confidential interview on file with the authors).
[87] Interview with Respondent T28 (confidential interview on file with the authors).

times, an ineffective one) on police power to ensure that constitutional mandates are followed:

> I think it's just the unchecked power. And I feel that often times defense attorneys are considered to be that check in power. And we are, but we're just one check. And the struggle becomes that the DAs office, in my opinion, is not checking the police the way they should . . . there's a failure in recognizing that we're all in this together, and that we all serve as checks and balances to each other. And so there is an alignment that I feel out of. And so it can feel overwhelming, and it adds to those feelings of isolation**,** when you feel like you have to overcompensate for the checks and balances that aren't happening from the other professionals.[88]

During our interviews, several attorneys lamented that police officers often treat defense attorneys with a lack of respect that weakens the defense position:

> I have had officers in cross-examination not respond to my question but return my question with a question back at me. [They] know that's not allowed. They are professional witnesses . . . [The judge] made a joke of it . . . it encourages that kind of nonresponsiveness.[89]

Other attorneys described situations where police officers made derogatory comments regarding their clients, such as, "Your client is a piece of shit,"[90] and treated the attorney with distain.

B. PERCEIVED IMPORTANCE OF GETTING ALONG WITH PROSECUTORS, JUDGES, AND POLICE

As the weakest member of the courtroom work group, defense attorneys must navigate carefully to foster productive connections with court community stakeholders that will enable them to achieve the best possible outcomes for all of their clients. Getting along with prosecutors, judges, and even police officers is often necessary to build and maintain needed working relationships.

In our sample, over a third of our respondents expressed the importance of developing positive relationships—or repairing damaged ones—with judges and prosecutors:

> I think it's in my professional interest to serve my clients as best as possible to have a good relationship with prosecutors and with judges, so as a professional, I try to cultivate a good relationship with prosecutors and also with the judges that will be hearing my cases.[91]

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[88] Interview with Respondent T7 (confidential interview on file with the authors).

[89] *Id.*

[90] Interview with Respondent T3 (confidential interview on file with the authors).

[91] Interview with Respondent T29 (confidential interview on file with the authors).

A second attorney expressed the importance of repairing damaged relationships with prosecutors for the sake of future clients:

> I've had experiences where a relationship has gone south. We have a case that we just can't see eye-to-eye . . . but then ultimately, out of necessity, the relationships are again repaired at some point because for the next client you may have to try and work out a deal and you don't want the district attorney pissed off at you."[92]

Cognizant of the need to be viewed as a "reasonable" advocate, several attorneys discussed the wisdom of "looking at the bigger picture" and letting issues go for the greater good: "I mean, there was definitely a feeling at the public defender's office when I was there that you should choose your battles rather than be an office that is aggressively fighting every issue."[93] For example, one attorney was concerned about potential repercussions from filing too many suppression motions before the same judge: "I went through a phase where I filed like seven suppression motions in a month or something . . . and it's like, I don't want to hurt my own credibility with the judge because they are all going in front of the same judge."[94] And another defense attorney stated:

> I have a reputation that I have to build on. If I want to have a dog fight every time I have a case, then I can build that reputation, or if I want to be able to work things out, I still have to maintain some sort of level. So my policy is to lead with sugar and then go to cinnamon if I need to.[95]

In addition to feeling a need to develop effective working relationships with judges and prosecutors, some attorneys discussed the importance of getting along well with the police since prosecutors often defer to police:

> I can tell you from a strategic standpoint, one of the first things that I tend to do is get the cop on my side. Cause if I have the cop, then I am three quarters of the way to getting the prosecutor where I need them to be.[96]

A handful of defense attorneys shared techniques and war stories regarding how they "won over" police officers. One respondent described the effectiveness of disparaging his own client in forging positive relationships with police officers:

> If they hear me make fun of a client—I hate to say it that way—that makes me look more reasonable to them, because they think "how can you defend these bad guys through and through?" So if I show myself as being a little bit reasonable in their eyes,

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[92] Interview with Respondent T16 (confidential interview on file with the authors).
[93] *Id.*
[94] Interview with Respondent T6 (confidential interview on file with the authors).
[95] Interview with Respondent T12 (confidential interview on file with the authors).
[96] Interview with Respondent T15 (confidential interview on file with the authors).

> then I can get them to meet me halfway. It works with a lot of them, and some of them, it doesn't work at all.[97]

This defense attorney further shared his strategy of capitalizing on existing relationships with prosecutors and judges to build credibility with the police:

> The cops are like the hardest ones for me to reach. Because I know they don't like me immediately, but if I can be like shooting the shit with the DA and the judge while we're just sitting there, inevitably a cop or two will start to join, because they like the judge and they like the prosecutor. They're not going to be sure about me, but if I can, I try to get them to like me.[98]

A few defense attorneys described how positive relationships with police officers lead to better results for their clients. For example, one stated:

> There's a public defender that works here that's getting married on Friday to a police officer. He goes to a lot of our office functions. We really like him a lot. It actually has strengthened our relationship in dealing with cases because of her. Before we knew him on a personal level, that police officer had the reputation of being a little aggressive with our clients. Then, whether it's a product of dating her, or her telling him war stories, that seems to have stopped. At least, I don't hear it anymore and he's a lot more reasonable to work with.[99]

C. PERCEIVED CHALLENGES IN HOLDING THE POLICE ACCOUNTABLE

Given the perceived power imbalance in the court community and the goal of many defense attorneys to promote positive relationships with prosecutors, judges, and police, the decision of whether and how to hold the police accountable for constitutional violations is often difficult. In their professional roles, defense attorneys should provide a check on illegal search and seizure activity by police. Yet, the need for favorable case resolution *and* effective career management often dictates letting valid suppression issues go in exchange for better case outcomes and positive long-term relationships with powerful court actors. In this section, we explore how perceived courtroom dynamics lead defense attorneys to conclude that holding police accountable for constitutional violations is sometimes inadvisable, even in situations where they perceive that the police clearly violated their client's constitutional rights. Prevalent considerations include perceptions of lack of judicial receptivity toward granting suppression motions; career concerns due to pressure by judges and prosecutors to refrain from bringing suppression motions; and fear of loss of favorable plea offers.

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[97] Interview with Respondent T6 (confidential interview on file with the authors).

[98] *Id.*

[99] Interview with Respondent T3 (confidential interview on file with the authors).

1. Lack of Judicial Receptivity

A majority of defense attorneys we interviewed perceive that it is extremely difficult and rare to win a suppression motion in court. Specifically, nearly half of attorneys perceive that most judges are reluctant to suppress evidence—regardless of the circumstances. "Judge [X]—you just won't win a suppression in there at all . . . just don't even bother filing . . . other than to preserve appeal rights and what not."[100] Attorneys perceive variations in judicial receptivity to suppression motions, ranging from judges that approach the process with an open mind, to those that never grant suppression. A judge's reputation often guides defense decisions regarding whether or not to file a motion:

> Some judges are far more receptive to this than others; a case that you might roll the dice and file a suppression in front of one judge, you know it is going to be denied without really any reasoning by another, it really influences what you do with the case and how you advise your clients.[101]

More than half of the attorneys interviewed believe that suppression motion decisions are heavily influenced by judges' prior careers:

> [If] they're a former prosecutor, it is hard for them to say suppression because they spent their career as a prosecutor. Traditionally in [X] County and most of the counties in central [X] State, your judges are former prosecutors. They're elected from the DA's Office, so it is very hard for them. They become friendly with the police because they work closely with them. They know most of the chiefs of police in the local police departments. Candidly, it's just very difficult for them to set aside some of that sometimes.[102]

Five attorneys in our interviews explained their perceptions that judges are hesitant to "cancel cases" by granting suppression: "Rather than looking at what the case law says and granting it, I think they have a hard time suppressing evidence in general as a notion of cancelling the cases because of a little bit of waywardness in the way it was handled."[103]

2. Penalties for Bringing Suppression Motions

In addition to their own internal analyses regarding whether to fight a given courtroom battle or strategically relent, a minority of attorneys interviewed stated that they sometimes feel pressured by prosecutors or judges to refrain from bringing suppression motions: "The fact that you could call an officer's testimony into credibility and that comes back on the defense

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[100] Interview with Respondent T5 (confidential interview on file with the authors).

[101] Interview with Respondent T14 (confidential interview on file with the authors).

[102] Interview with Respondent T24 (confidential interview on file with the authors).

[103] Interview with Respondent T30 (confidential interview on file with the authors).

attorney is very strange to me. But it is also very common." A considerable portion of attorneys (38%) in our interview sample described situations where they were chastised by judges for challenging the police officer by bringing a suppression motion. Others expressed being "warned" by the prosecutor of possible repercussions should their client reject the plea and file a motion: "I had a DA tell me that if a specific client didn't take a deal that she would take the deal off of the table for another client that was completely unrelated."[104]

3. Shorter Sentences Over Police Accountability

A majority of defense attorneys we interviewed noted that bringing suppression motions often necessitates walking away from favorable plea offers by the prosecution:

> If you filed a suppression motion, and argued it, any plea negotiations went off of the table. Like your client might have a really good motion but if he fought it and you lost, the DA would then pull all deals, kind of like a punishment for exercising your right.[105]

As a result, some defense attorneys reported that they regularly advise their clients to plead guilty in place of filing a suppression motion since this course of action will likely result in a lighter sentence:

> So I am sitting there talking to my client saying, "Yeah, you have a good suppression issue. But you're going to lose. But the DA's offering you nine months. They're going to take it because they are guilty. Because they had the drugs, they were selling the drugs, but the stop was bad. So they know in their minds, 'I don't want to do five years in prison.'[106]

And another attorney stated, "There are situations where my clients have said: 'Listen, I want to get out of prison. I'll plead to anything. I am not interested in you filing a suppression motion.'"[107]

About a third of our respondents noted that cases involving the most egregious police stops, searches and/or seizures often receive particularly favorable plea offers. Several attorneys expressed their perceptions that these offers are due to efforts by prosecutors and, at times, even judges, to avoid suppression motions. For example, several attorneys discussed situations where judges attempted to broker a plea deal between the prosecution and the defense in order to avoid a suppression hearing:

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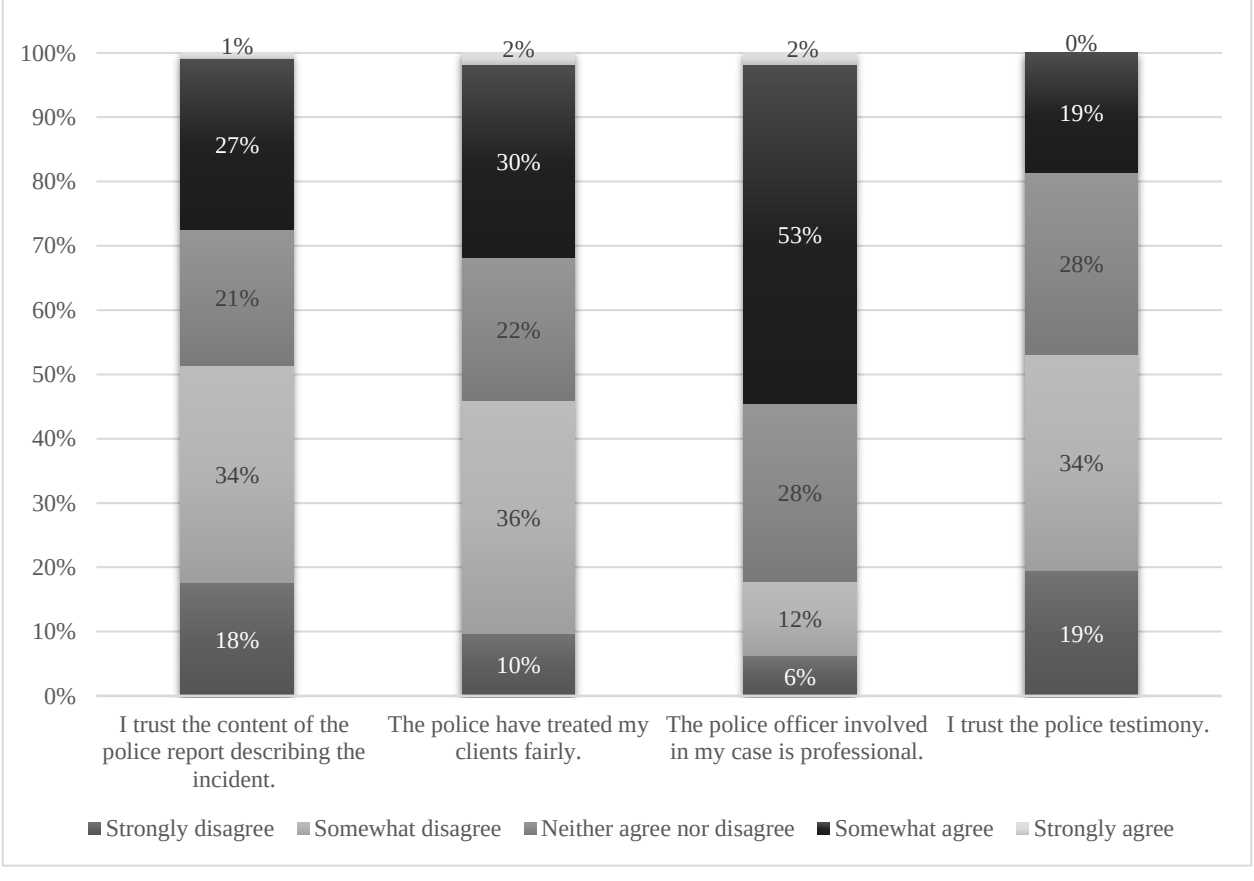
[104] Interview with Respondent T15 (confidential interview on file with the authors).
[105] Interview with Respondent T14 (confidential interview on file with the authors).
[106] Interview with Respondent T10 (confidential interview on file with the authors).
[107] Interview with Respondent T20 (confidential interview on file with the authors).

> Judges will attempt to even work deals in chambers of, "What does your client want? Are you willing to do that? If he pleads, are you [i.e., prosecutor] willing to give that lighter sentence, so that a suppression hearing doesn't go through?[108]

A few defense attorneys further noted their perceptions that prosecutors extend the best offers in cases with significant Fourth Amendment violations in order to hide police transgressions and protect the case. Regardless of the prosecutor's motivation in extending a particularly favorable plea offer, it is often in their client's best interest to take the plea. Consequently, defense attorneys sometimes choose to refrain from holding the police accountable for constitutional oversteps in court in some of the most blatant and egregious cases.

D. SURVEY RESULTS

Figure 1 Defense attorneys' perception of police expertise



[108] Interview with Respondent T18 (confidential interview on file with the authors).

Note: Except the item on professionalism which includes 112 valid answers, all other three items include 113 valid answers from the study sample.

1. Perceptions of Police Expertise

In Figure 1, we present our survey participants' responses to the level of trust they possess regarding police expertise in the areas of accuracy in police reports, fair treatment to citizens, professionalism, and testimony in court.

While more than half of our respondents in the survey sample who provided valid answers (55%) either somewhat agree or strongly agree that police perform their work in a professional manner, more than 50% voiced distrust in the truthfulness of police reports and police testimony. Furthermore, 46% of responding attorneys either somewhat disagree or strongly disagree that police treat their clients fairly.

2. Perceptions of Judges and Prosecutors

We further sought attorneys' perceptions regarding whether or not judges and prosecutors are protective of the police. Of the 101 attorneys who answered this item, 79% "somewhat agree" or "strongly agree" that judges are protective of police officers on the stand; 87% indicated that they "somewhat agree" or "strongly agree" that judges are often pro-prosecution. Among the 140 respondents participating in our survey, 106 (76%) have experience representing clients on Fourth Amendment challenges; 62% reported that they "never" feel pressured by prosecutors to refrain from filing a suppression motion where there is substantial evidence supporting a Fourth amendment violation, while 27% reported that this "sometimes" happens. Moreover, 81% reported that they "never" feel pressured by the judge to refrain from filing a suppression motion where there is substantial evidence supporting a Fourth Amendment violation, while 15% reported this "sometimes" happens.

3. Factors in Filing Suppression Motions

In our survey, we asked respondents how important some factors are in the defense attorney's consideration of filing a suppression motion. Table 2 shows that evidentiary strength, strategic utility, and will of the client are the top three most important factors in determining whether to file a suppression motion. Some respondents typed in additional considerations. We analyzed the content of the text which shows additional factors, such as the applicability of case law to the case (eight respondents), the additional expense (five respondents), the time it will add to the processing (two respondents), the likelihood of the client entering a special DUI rehabilitation

program (two respondents) which is conditioned on not filing, and two respondents wrote that the decision is also dependent on whether the officer in the case was previously involved in similar Fourth Amendment allegations. Relatedly, we also asked all survey respondents whether they have witnessed the same officers being challenged more than once on Fourth Amendment issues; 57% in the survey sample reported "yes." When asked further for an estimate of the number of officers involved, thirty-three respondents typed in a number of five or fewer, or "very few," "5-10%," including one who stated, "Three to four officers have been deemed 'walking suppression motions,'" and another who stated, "At least three particular officers I am aware of get challenged consistently." Sixteen of them wrote in a number larger than five, with many writing along the lines of "too many to count," "dozens," "many," "quite a few," and so on.

Table 2 Factors in deciding whether to file a suppression motion reported by defense attorneys

Item content	Average score	Std. Dev.
The strength of supporting evidence	3.71	1.02
The potential strategic benefit of this action in the plea negotiation	3.46	1.07
The will of the client	3.36	1.26
The potential of case going to trial	3.08	1.33
The likelihood of this motion being granted	2.86	1.28
How this decision will affect my relationship with my client	2.86	1.25
The practicality of motion preparation (e.g., time and resources)	1.86	1.03
How this decision will affect my relationship with the DA's office	1.24	0.56
How this decision will affect my relationship with the judge	1.22	0.53

Note: 114 respondents reported on this item. The variable is coded as 1=Not at all important, 2=Slightly important, 3=Moderately important, 4=Very important, 5=Extremely important.

DISCUSSION AND CONCLUSION

Improving police compliance with Fourth Amendment mandates protects individuals from unreasonable searches and seizures and helps to preserve the overall integrity of the criminal justice system;[109] maintaining

[109] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

an effective accountability structure for Fourth Amendment-related police behavior is a critical step toward achieving these goals. At present, police accountability for improper searches and seizures usually involves aggrieved defendants bringing suppression motions in court.[110] Conceptually, the threat of suppression should deter unlawful police action because officers want to prevent the loss of probative prosecution evidence as well as avoid being reprimanded and embarrassed in court.[111] In theory, all members of the courtroom work group serve as checks on Fourth Amendment related police conduct in a process primarily initiated by the defense.[112] However, in practice, history has shown that many police officers are not deterred by the possibility of suppression and search and seizure violations occur on a regular basis.[113]

We add to this literature by exploring how perceived power dynamics within the court community often lead defense attorneys to conclude that efforts to defend rights violations are not only futile but also sometimes harmful to their clients' cases, their own relationships with judges and prosecutors, and ultimately their professional status within the court community. We argue that these perceived environmental conditions sometimes guide defense attorneys to rationally walk away from their critical role in police accountability for the sake of favorable case resolutions and career concerns, even in cases with seemingly egregious stop, search, or seizure violations. Our work contributes a new dimension to existing scholarship that illustrates that the Exclusionary Rule—as currently operationalized by court actors—is a weak check on the constitutionality of police behavior.

Furthermore, we add to the court community perspective regarding the role of police in the community. We argue that defense attorneys perceive the police as a critical part of the court community who hold more power than themselves. As our respondents expressed, defense attorneys observe the interactions of the police with other courtroom actors and regularly witness prosecutorial and judicial deference and protection of police.[114] They perceive that judicial credibility determinations favor police. Moreover, defense attorneys witness the personal relationships that many prosecutors, police officers, and judges share, and some defense attorneys perceive that

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[110] Nir, *Empowering the Exclusionary Rule*, *supra* note 16, at 98.

[111] *See Mapp*, 367 U.S. at 656.

[112] Nir, *Empowering the Exclusionary Rule*, *supra* note 16, at 98.

[113] Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 470 (2017).

[114] *See* Laurin, *supra* note 28, at 792–93; Lvovsky, *supra* note 28, at 2077–78; Wilson, *supra* note 28, at 288–89.

these relationships result in judicial and prosecutorial favoritism toward police. In addition, as police officers attend court proceedings frequently, defense attorneys may perceive them as "courtroom regulars" as defined by the court community perspective.[115] We argue that these perceptions help guide defense attorneys' actions and are critical to understanding court community dynamics. In this regard, the fact that these perceptions are prevalent among our respondents is significant in and of itself, regardless of whether or not these perceptions are entirely accurate (e.g., perceived judicial deference to police may deter defense attorneys from bringing suppression motions, even if the perception is exaggerated due to bias).

As our data show, defense attorneys are concerned about their position in the court community and may see the need to be accepted by court community members more saliently and urgently than those who already stand on the upper rung of the power ladder (e.g., prosecutors). Indeed, a number of our respondents expressed the importance of forging and maintaining positive relationships with prosecutors, judges, and police; several attorneys even described steps that they take in order to achieve these objectives. Apart from their own career concerns, it is in the best interests of their clients for defense attorneys to get along with other court actors.[116] Consequently, zealous client advocacy may preclude asserting allegations of police misconduct when such action can be viewed as "rocking the boat."[117] These decisions pose serious barriers to police accountability in court, particularly in courtroom cultures where allegations of constitutional violations could result in reprimand or retribution by more powerful members of the court community.[118]

Our research further demonstrates that defense attorneys sometimes refrain from filing suppression motions when they believe that bringing these motions may jeopardize their ability to obtain a favorable case disposition for their client. Many attorneys represent clients who are incarcerated or face long periods of imprisonment if convicted. Rolling the dice by rejecting a plea offer and bringing a suppression motion is risky. Many attorneys believe that the chances of prevailing—even on a strong motion—are minimal because of the unity between police officers, prosecutors, and judges, and the

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[115] For a related discussion, see EISENSTEIN, FLEMMING & NARDULLI, *supra* note 31, at 25; Nardulli, *Insider Justice*, *supra* note 30, at 379–80.

[116] ULMER, *supra* note 39 (discussing the influence of court organizational contexts on case processing and sentencing outcomes).

[117] Alschuler, *supra* note 39, at 1238; EISENSTEIN, FLEMMING & NARDULLI, *supra* note 31, at 33; ULMER, *supra* note 39, at 117.

[118] Alschuler, *supra* note 39, at 1240; Blumberg, *supra* note 32, at 30.

hesitancy of judges and prosecutors to question the credibility of police.[119] Even in cases where the evidence screams suppression, a choice has to be made: attempt to hold the police accountable in a system where challenging the police is highly discouraged—and, at times, even punished—or produce the best practical outcome for the defendant (e.g., a lighter sentence by accepting a favorable plea deal).

Our qualitative interviews are corroborated by our survey results. The survey provides an additional source of data that demonstrates that defense attorneys take numerous factors relating to court community dynamics into account in their decision-making processes regarding whether or not to bring suppression motions. Strategic decisions—documented in both our surveys and interviews—support the notion that perceptions of power dynamics within the court community play an unmistakable and salient role in defense attorney decisions to litigate rights violations.

In sum, our study demonstrates that while defense attorneys may desire or even believe that it is their duty to expose rights violations, these sentiments are often dwarfed by practical case resolutions or career considerations resulting largely from perceptions of a profoundly imbalanced court community that protects police. These findings pose serious concerns regarding the ability of the current system to hold the police accountable for constitutional violations. Defense attorneys play a critical role in protecting rights violations; some may argue that their role in police accountability is more essential than that of any other court actor.[120] The Exclusionary Rule can only be effective if court actors uphold it. Though choices to refrain from bringing suppression motions to ensure more favorable case outcomes for individual defendants or to protect important court community relationships are understandable and rational in the current system, they highlight the need for improved police accountability structures within the courts that deter search and seizure violations and protect overall system integrity.

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[119] Orfield, *supra* note 28, at 117–18; Moran, *supra* note 28, at 1343–44.

[120] *See generally* Wilson, *supra* note 28 (discussing that the judge could do little when the defense fails to raise police perjury issues).