

Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims under § 1983

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When George Hinshaw walked into the sheriff's office to inquire about his son's arrest, he probably did not expect to be beaten and arrested. But after a short confrontation with the arresting officer, Mr. Hinshaw was thrown to the lobby floor. As several men held him down, the officer repeatedly stomped on his head, then arrested and jailed him for disorderly conduct. Around 2:00 a.m., Mr. Hinshaw pled guilty to a misdemeanor disorderly conduct charge, paid the fine, and went to the hospital for medical treatment.¹ Mr. Hinshaw spent two days in the hospital before leaving against medical advice. He returned to work two weeks later. At the civil trial on Hinshaw's § 1983 claim for false arrest and excessive force, he was still suffering from numbness in one arm.²

Although Mr. Hinshaw's story is an extreme example, false arrest cases frequently involve excessive force.³ Excessive force may lead to arrest, as an officer arrests his victim to cover up the illegality of his own conduct.⁴ Even where excessive force is not involved, the victim of a false arrest suffers humiliation, loss of liberty, and an arrest record.

Police officers have the power to arrest citizens without a warrant if they have probable cause.⁵ A citizen who is arrested without probable cause can bring a civil action against the officer under 42 USC

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¹ *Hinshaw v Doffer*, 785 F2d 1260, 1262, 1267 (5th Cir 1986).

² *Id* at 1267.

³ In one study, 40 percent of cases against the police contained both false arrest and excessive force issues. Kathryn E. Scarborough and Craig Hemmens, *Section 1983 Suits Against Law Enforcement in the Circuit Courts of Appeal*, 21 T Jefferson L Rev 1, 11 (1999).

⁴ See Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Charges*, 136 U Pa L Rev 851, 879–80 (1988) (arguing that police officers who have abused citizens frequently “file ‘cover charges’ as a means of justifying the violence they have perpetrated”).

⁵ See *Atwater v City of Lago Vista*, 532 US 318, 322 (2001); *United States v Watson*, 423 US 411, 418 (1976) (upholding the “ancient common law rule” that an officer may make an arrest without a warrant for misdemeanors and felonies committed in his presence and felonies not committed in his presence if he has reasonable ground for the arrest).

§ 1983 for false arrest. A false arrest is a violation of the Fourth Amendment right against unreasonable seizure of persons.⁶

A critical issue in a § 1983 false arrest case is the presence or absence of probable cause. Circuits are divided on who should bear the burden of proof on this issue: should the defendant officer be required to prove that probable cause existed, or should the plaintiff be required to prove the absence of probable cause?⁷ The debate is complicated by our federal system, in which a preliminary issue is whether federal or state law should be applied to determine the burden of proof. Three circuits apply the parallel state law on false arrest to determine where the burden of proof should be placed. If a federal standard applies, the courts must further decide who bears the burden of proof (production). The nine circuits applying a federal standard are split between assigning the burden to the plaintiff or the defendant.

The burden of proof can often determine the result in a false arrest case. Often the police officer and the plaintiff are the only two witnesses to the incident, with little or no physical evidence. If the plaintiff bears the burden of proof on the absence of probable cause, the police officer often can win the case on summary judgment.⁸ Conversely, if the defendant officer must prove that he had probable cause for the arrest, he will be required to testify at trial. Being forced to justify one's actions on the witness stand can provide an important deterrent effect on the officer's actions.

Although the burden of proof is critical in false arrest cases, as a procedural issue it is rarely the subject of focused analysis by the courts. More commonly, the circuits simply state which burden of proof applies and move on without further discussion. This Comment synthesizes the policy justifications for each position after studying cryptic or fragmentary arguments in a number of cases. Further, the Comment provides a rationale for placing the burden of proof on the defendant police officer.

Part I examines false arrest claims as they relate to 42 USC § 1983, the common law, the constitutional requirement of probable cause, and Supreme Court precedent. Part II details the current split among the circuits regarding the burden of proof, explaining the rea-

⁶ See, for example, *Hand v Gary*, 838 F2d 1420, 1427 (5th Cir 1988) ("The Fourth and Fourteenth Amendments guard against arrest without probable cause.").

⁷ The burden of proof has two components, the burden of production (the obligation to produce evidence on an issue) and the burden of persuasion or risk of nonpersuasion (the obligation to convince the factfinder that one's version of the facts is more likely true). All federal circuits place the burden of persuasion on the plaintiff, so although this Comment may refer generally to the burden of proof, it is the burden of production that is truly at issue.

⁸ See, for example, *Davis v Rodriguez*, 364 F3d 424, 428-29 (2d Cir 2004).

sons given by the circuits for their approaches. Part III explains why the courts should consistently apply one burden of proof, and why the optimal burden of proof places the burden on the defendant. Once the plaintiff makes a prima facie case of a warrantless arrest, the burden should shift to the defendant to produce evidence of probable cause. This approach yields the best balance between the competing interests of law enforcement and protection of citizens' constitutional rights. When the burden of production is placed on the defendant officer, he will be required to testify and give his version of the circumstances leading up to the arrest. This burden shift is appropriate because the defendant police officer has the best access to the information on probable cause, and because requiring the officer to present this information will deter misconduct.

I. BACKGROUND

This Part examines the background issues necessary to understand the burden of proof issue. Part I.A examines how a false arrest claim relates to § 1983. Part I.B discusses the relationship between qualified immunity and the burden of proof for probable cause. Part I.C examines the Fourth Amendment probable cause requirement and its relationship to a false arrest claim. Finally, Part I.D examines the one Supreme Court case dealing with the burden of proof for probable cause, which has been interpreted differently by the circuits.

A. False Arrest Claims under 42 USC § 1983

Under § 1983, citizens may seek redress for violations of their constitutional rights by state or local officials,⁹ including police officers. The statute guarantees that “[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory . . . subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.”¹⁰ A § 1983 action has two essential elements: that the alleged injury was committed by a person acting under color of state law, and that this conduct deprived the person of a right “secured by the Constitution and the laws” of the United States.¹¹

⁹ 42 USC § 1983 applies to state officials; federal officials may be sued under an analogous “*Bivens* action.” See *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971) (holding that the Fourth Amendment is an affirmative restraint on the conduct of federal officials and authorizing the use of money damages to enforce the restraint).

¹⁰ 42 USC § 1983 (2000).

¹¹ *Flagg Brothers, Inc v Brooks*, 436 US 149, 155–56 (1978) (holding that a private business's action as permitted under New York Uniform Commercial Code was not “under color of state law” as required for a § 1983 claim).

The primary purposes of § 1983 are “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”¹² Thus, this broad remedy protects citizens against the violation of any federal right by state officials.

Unconstitutional false arrest is a cognizable claim under § 1983, and is in fact one of the most common § 1983 claims brought against police officers.¹³ An illegal arrest is an unreasonable seizure under the Fourth Amendment,¹⁴ which protects “persons, houses, papers, and effects against unreasonable searches and seizures.”¹⁵ This guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment.¹⁶

Actions for unconstitutional false arrest generally parallel the common law action of false arrest or false imprisonment.¹⁷ At common law, the elements of a false arrest claim were (1) the detention of the plaintiff, and (2) the unlawfulness of the detention.¹⁸ Probable cause was a defense to a false arrest claim.¹⁹

¹² *Wyatt v Cole*, 504 US 158, 161 (1992), citing *Carey v Phipus*, 435 US 247, 254–57 (1978).

¹³ From 1989–1993, excessive force issues were the most common in § 1983 claims against police at 24 percent, and false arrest claims were the second most common at 22 percent. Forty percent of cases against the police involved both excessive force and false arrest. Scarborough and Hemmens, 21 T Jefferson L Rev at 11 (cited in note 3).

¹⁴ See *Hand v Gary*, 838 F2d 1420, 1427 (5th Cir 1988), quoting *Thomas v Sams*, 734 F2d 185, 191 (5th Cir 1984) (“The right to be free from illegal arrest plainly enjoys [constitutional] protection.”); *Patzig v O’Neil*, 577 F2d 841, 848 (3d Cir 1978) (“Clearly, an arrest without probable cause is a constitutional violation actionable under § 1983.”).

¹⁵ US Const Amend IV (emphasis added).

¹⁶ See *Monroe v Pape*, 365 US 167, 171 (1961).

¹⁷ See, for example, *City of Newport v Fact Concerts, Inc.*, 453 US 247, 258 (1981) (“One important assumption underlying the Court’s decisions in this area [tort liability under § 1983] is that members of the 42d Congress were familiar with common law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.”).

¹⁸ *Winn & Lovett Grocery Co v Archer*, 126 Fla 308, 171 S 214, 218 (1936) (“[T]o recover for false arrest of the person, it must be shown that the restraint was unreasonable and such as was not warranted by the circumstances.”). See also *Vorholt v Vorholt*, 111 W Va 196, 160 SE 916, 917–18 (1931) (“The gist of an action for false imprisonment is the illegal detention of a person without lawful process or by an unlawful execution of such process.”); *Gariety v Fleming*, 121 Kan 42, 245 P 1054, 1055 (1926) (“False arrest or imprisonment is any unlawful physical restraint by one of another’s liberty, whether in prison or elsewhere.”).

¹⁹ *Johnson v Weiner*, 155 Fla 169, 19 S2d 699, 700 (1944) (“[I]n false imprisonment the allegation of want of probable cause is not essential, and the burden is on defendant to prove probable cause as a defense or in mitigation.”); *Agar v Kelsey*, 253 AD 726, 300 NYS 630, 631 (1937) (“Since a crime had been committed by some one, probable cause was a defense to the cause of action for false arrest.”); *Travis v Bacherig*, 7 Tenn App 638, 643 (1928) (“The defense of probable cause for false arrest must be made in good faith.”).

B. Qualified Immunity

Although § 1983 protects against violations of constitutional rights by state officials, those officials are granted qualified immunity for “acts done on the basis of an objectively reasonable belief that those acts were lawful.”²⁰ Qualified immunity is the right not to be sued at all, rather than a defense to liability,²¹ and is granted to an officer if the constitutional right violated was not clearly established at the time of the incident.²² Therefore, the plaintiff must establish that (1) a constitutional right was violated, and (2) that the constitutional right was clearly established at the time of the incident.²³ A right is clearly established if “[t]he contours of the right” are “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”²⁴

In most § 1983 actions, the limit of qualified immunity is a complex question. However, qualified immunity is not generally an issue for false arrest claims. Some circuits dispense with the qualified immunity question by observing that the “Fourth Amendment rule of warrantless arrests is ‘clearly established law.’”²⁵ Because a police officer “is ordinarily charged to know the probable cause requirement,”²⁶ a warrantless arrest without probable cause is a violation of a clearly established right. An allegation of unconstitutional false arrest is therefore generally sufficient to overcome qualified immunity to prosecution.

Alternately, some circuits have held that the probable cause inquiry subsumes the qualified immunity question. If the officer had probable cause for the arrest, he by definition has an “objectively reasonable belief” that the arrest is lawful.²⁷ Thus, to say that the officer had probable cause for the arrest is another way to say that he has qualified immunity against the false arrest claim. For a false arrest claim, probable cause for arrest and qualified immunity from prosecution involve the same question: did the officer have an objectively reasonable belief in the lawfulness of the arrest? These two approaches do not conflict. Regardless of the way the question is framed, the critical question in an unconstitutional false arrest case is probable cause, not qualified immunity.

²⁰ *Gomez v Toledo*, 446 US 635, 639 (1980).

²¹ See *Saucier v Katz*, 533 US 194, 200–01 (2001) (explaining that the principle of immunity is a right to be free from litigation).

²² See *id.* at 201.

²³ See *id.*

²⁴ *Anderson v Creighton*, 483 US 635, 640 (1987).

²⁵ *Trejo v Perez*, 693 F2d 482, 488 n 10 (5th Cir 1982).

²⁶ *Id.*

²⁷ *Escalera v Lunn*, 361 F3d 737, 743 (2d Cir 2004) (characterizing the inquiry into qualified immunity in a false arrest claim as a determination of “arguable probable cause”).

C. Probable Cause in False Arrest Claims

The existence of probable cause thus defeats a false arrest claim. Police officers may make arrests without a warrant, but the lawfulness of that arrest turns on whether there was probable cause.²⁸ For the purposes of a false arrest claim, probable cause exists where the officer had “reasonably trustworthy information” of facts and circumstances that would lead a “prudent man” to believe that an offense had been committed.²⁹ Probable cause has been described by the Supreme Court as a “practical, nontechnical” requirement that balances the competing interests of effective law enforcement and the protection of citizens’ rights.³⁰ In practical terms, a court determines whether there was probable cause by examining the circumstances of the arrest and deciding whether the “historical facts” available at the time of the arrest, “viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause.”³¹ The probable cause question is meant to be a commonsense inquiry into whether a reasonable officer would believe that the suspect had committed a crime.

For the purposes of a § 1983 action, probable cause does not depend upon what the magistrate found at the preliminary hearing or arraignment.³² If a magistrate determines that no probable cause existed to hold the suspect for the crime, that does not automatically make the officer liable in a § 1983 action. The question is whether a reasonable officer would have believed there was probable cause at the time of the arrest, regardless of what the magistrate eventually found at the probable cause hearing,³³ or what the grand jury found at the arraignment. For example, in *Rankin v Evans*,³⁴ the owner of a day care center was arrested for child molestation. The grand jury not only refused to indict him, but “affirmatively found that he was ‘completely

²⁸ *United States v Watson*, 423 US 411, 417 (1976).

²⁹ *Karr v Smith*, 774 F2d 1029, 1031 (10th Cir 1985) (discussing when an officer has probable cause to make an arrest, including the “fellow officer” rule that allows probable cause to be determined according to the collective information possessed by all officers involved).

³⁰ *Brinegar v United States*, 338 US 160, 176 (1949).

³¹ *Ornelas v United States*, 517 US 690, 696 (1996) (stating that probable cause is not a “finely-tuned standard” but instead is a fluid concept that depends on the particular circumstances of a situation).

³² *Whitley v Seibel*, 613 F2d 682, 685 (7th Cir 1980) (explaining that a court will assess the presence of probable cause in a § 1983 false arrest action using a “reasonable man standard” regardless of the magistrate’s ruling).

³³ *Id.*

³⁴ 133 F3d 1425 (11th Cir 1998).

innocent.”³⁵ The circuit court, however, found that the police officer had probable cause to make the arrest as a matter of law.³⁶

D. Precedent on Burden of Proof for Probable Cause

Although the Supreme Court has defined probable cause through a number of cases, only one Supreme Court case deals with the burden of proof for probable cause in a false arrest action—*Pierson v Ray*.³⁷ In 1961, a group of black and white Episcopal ministers were arrested for using the “whites only” waiting room and restaurant at the bus station in Jackson, Mississippi. Four years after the ministers’ arrests under the Mississippi sit-in statute,³⁸ the Supreme Court held that the statute was unconstitutional.³⁹ In reviewing the ministers’ § 1983 action for false arrest, the Fifth Circuit held that the policemen were liable solely because the statute was unconstitutional, “even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid.”⁴⁰ The issue on appeal to the Supreme Court was whether qualified immunity was available to the officers for an arrest made under an unconstitutional statute.

The Supreme Court began its analysis by restating its longstanding principle that § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”⁴¹ For police officers making an arrest, that background includes “the defense of good faith and probable cause.”⁴² The Court noted that the case involved two contested issues: (1) the good faith belief of the officers in the constitutionality of the statute, and (2) whether the officers actually had probable cause to arrest the

³⁵ Id at 1428.

³⁶ Id at 1435, 1439 (“We conclude that a cautious officer reasonably could have believed that, even if [the alleged victim’s] story was inaccurate as to the precise location of the abuse, the core of her story regarding the abuse and the identity of the abuser was trustworthy and reliable, especially in light of the medical and other evidence corroborating her story.”).

³⁷ 386 US 547 (1967).

³⁸ Miss Code § 2087.5 (1961) made it a misdemeanor to “crowd[] or congregate[] with others . . . [i]n any . . . place of business engaged in selling or serving members of the public” and refuse to leave when ordered to do so by a police officer, when a breach of the peace may result. See *Pierson*, 386 US at 549 n 2. All witnesses, including the officers, agreed that the ministers acted peacefully, but the police officers claimed that a mob had gathered and they feared that violence would erupt. Id at 553.

³⁹ *Thomas v Mississippi*, 380 US 524 (1965) (per curiam) (holding, without comment, Mississippi’s sit-in statute unconstitutional on the basis of Supreme Court precedent). See also *Pierson*, 386 US at 550 n 4 (explaining that the sit-in statute at issue in *Thomas* violated the Interstate Commerce Act).

⁴⁰ *Pierson*, 386 US at 550.

⁴¹ Id at 556, quoting *Monroe*, 365 US at 187.

⁴² *Pierson*, 386 US at 556–57.

ministers under the statute.⁴³ The ministers did not argue solely that they were arrested based on an unconstitutional statute; instead, they also argued that the officers did not have probable cause to arrest them under the statute because no crowd was present and no one threatened violence.⁴⁴ Likewise, the officers did not rest their defense solely on their good faith belief in the constitutionality of the statute, but also argued that they arrested the ministers only to prevent violence, that is, that they had probable cause for the arrest.⁴⁵ On remand, the Court instructed that the officers would be entitled to prevail only if the jury believed both that the officers had a good faith belief in the statute's constitutionality and that the officers had probable cause to arrest under the statute.⁴⁶

The Court held that “the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.”⁴⁷ For the purposes of this Comment, there are two important aspects to this holding. First, probable cause is a defense available to the officer, rather than an element of the action that the plaintiff must prove.⁴⁸ Second, the Supreme Court references underlying common law tort principles to decide the question.⁴⁹ As shown Part II, the circuits generally focus on one of these two aspects of the case—but not both—when dealing with the burden of proof for probable cause.

II. THE BURDEN OF PROOF ALLOCATION IN THE COURTS OF APPEALS

The circuits are split over which law should determine who bears the burden of proof on the issue of probable cause. Three circuits hold that the burden of proof is assigned with reference to state law, while nine circuits employ a federal rule for assigning the burden of proof. The nine circuits applying a federal rule are split as to which party should bear the burden of proof: six circuits allocate the burden to the plaintiff, and three circuits allocate the burden to the defendant.

⁴³ *Id.* at 557.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 556–57 (“Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.”).

A. Circuits Basing the Burden of Proof Allocation on State Law

The Second Circuit, the D.C. Circuit, and the Eighth Circuit generally follow the applicable state law in determining where to place the burden of proof for probable cause.⁵⁰ For example, when judging a New York false arrest case, the Second Circuit has required the defendant to prove probable cause as an affirmative defense,⁵¹ but when judging a Connecticut case the court has required the plaintiff to prove lack of probable cause.⁵² In a recent case, however, the Second Circuit declared that the burden of proof for probable cause “remains an open question” in that circuit.⁵³ Similarly, the D.C. Circuit follows District of Columbia common law in allocating the burden of proof to the officer, under which an arrest is presumed to be unlawful if it is made “without process,” that is, without a warrant.⁵⁴ Once this allegation is made, the burden shifts to the defendant to show probable cause.⁵⁵ In the D.C. Circuit, the burden of proof for a § 1983 false arrest action is “identical” to the burden in a D.C. common law action.⁵⁶

Although its precedents are murky, the Eighth Circuit appears to follow the relevant state law in determining the appropriate burden of proof. The Eighth Circuit has stated that the test for “lawful arrest” under state and federal law is “similarly grounded on the existence of good faith and probable cause”⁵⁷ without affirmatively stating that the

⁵⁰ See, for example, *Davis v Rodriguez*, 364 F3d 424, 433 (2d Cir 2004); *Barber v Keller*, 557 F2d 192, 194 (8th Cir 1986); *Dellums v Powell*, 566 F2d 167, 175 (DC Cir 1977).

⁵¹ See *Curry v City of Syracuse*, 316 F3d 324, 335 (2d Cir 2003) (applying New York law to a § 1983 false arrest claim, under which the “defendant has the burden of raising and proving the affirmative defense of probable cause”).

⁵² See *Doe v Bridgeport Police Dept*, 198 FRD 325, 335–36 (D Conn 2001) (citing state court decisions requiring the plaintiff to prove lack of probable cause as grounds for requiring the same in federal court).

⁵³ *Davis*, 364 F3d at 435. The court assumed, without deciding, that the plaintiff bore the overall burden of proof on the issue of probable cause, following Connecticut law. The court held that where the defendant officers withhold information about the original charges (by charging only for resisting arrest), the plaintiff does not have to identify the charges upon which he was arrested to make a prima facie case. *Id.* at 434. Where no charges are filed, the plaintiff satisfies his initial burden of production by testifying that he was not doing anything wrong. If the defendants identify a charge during their case, then the burden shifts back to the plaintiff to rebut the charge. The plaintiff retains the burden of persuasion on the issue. To require the plaintiff to identify the charges would run “counter to both logic and fairness,” because it would allow an officer to “immunize himself from suit simply by remaining silent or uninformative as to the reasons for the arrest.” *Id.*

⁵⁴ *Dellums*, 566 F2d at 175–76 (“In the instant case it is undisputed that members of the plaintiff class were arrested without a warrant. Thus the unlawfulness of the plaintiffs’ subsequent and admitted imprisonment is presumed as a matter of law.”).

⁵⁵ *Id.* at 175.

⁵⁶ *Id.*

⁵⁷ *Washington v Simpson*, 806 F2d 192, 194 (8th Cir 1986) (holding that there was no reason to remand a § 1983 claim for reconsideration as it factually mirrored a state law claim).

burden of proof for § 1983 claims is taken from the relevant state law. Other Eighth Circuit cases, although not definitive, strongly suggest that the Eighth Circuit generally appropriates the relevant state law for § 1983 claims. The legality of the arrest is determined by applying the “state law [that] governs arrest procedures” in accordance with the federal constitutional standards requiring probable cause for arrest.⁵⁸ Similarly, in determining where to place the burden of proof for the good faith defense, the district courts of the Eighth Circuit have relied on state law to place the burden on the plaintiff.⁵⁹ In general, then, the Eighth Circuit seems to rely on the relevant state law in determining where to place the burden of proof.

In basing the burden of proof on state law, these circuits are following a general principle of deference to state law in certain situations. With regard to § 1983, these circuits hold that the court should follow state or common law when the federal statute does not specify what the burden of proof should be. This general principle is based on their assumptions about Congress’s intentions in passing § 1983, their interpretation of 42 USC § 1988, their interpretation of *Pierson*, and the desire for consistency with pendent state law false arrest claims.

First, these circuits base the allocation of the burden of proof on state law because they assume that Congress was familiar with common law principles and intended those principles to apply to § 1983 “absent specific provisions to the contrary.”⁶⁰ Thus, these circuits assume that the burden of proof for state law actions is a background common law principle that should apply to § 1983 actions unless Congress specifically changes the rule by statute.⁶¹ This argument traces back to the Supreme Court’s statements in *Pierson* that “[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities”⁶² and that § 1983 “should be read against the background of tort liability.”⁶³

⁵⁸ *Barber*, 557 F2d at 630 (requiring application of Arkansas state law to a warrantless arrest claim so that it satisfies constitutional standards). See also *United States v Berryhill*, 466 F2d 621, 624 (8th Cir 1972) (“We explore such legality by looking to the applicable provisions of state law governing arrest procedures, and applying those provisions consistently with the federal constitutional standard of probable cause.”); *Bazinet v Knox*, 462 F2d 982, 986 (8th Cir 1972) (“The legality of an arrest is to be determined according to state law, consistent with constitutional requirements.”).

⁵⁹ *Nebraska Dept of Roads Employees Assn v Dept of Roads, State of Nebraska*, 364 F Supp 251, 257 (D Neb 1973) (“[I]t is reasonable . . . to rely [] upon the common law of the State of Nebraska as to the burden of proof, although the matter of pleading remains under federal law.”).

⁶⁰ *Davis*, 364 F3d at 433 n 7, quoting *City of Newport v Fact Concerts, Inc*, 453 US 247, 258 (1981).

⁶¹ *Davis*, 364 F3d at 433 n 7, quoting *City of Newport*, 453 US at 258.

⁶² 386 US at 554.

⁶³ *Id* at 556, quoting *Monroe v Pape*, 365 US 167, 187 (1961).

These circuits also reason that application of the state law on the burden of proof comports with § 1988,⁶⁴ so that state law should be used to fill any gaps in § 1983. Section 1983 does not mention damages, statutes of limitation, immunities, or, of course, which party bears the burden of proof. Section 1988, however, seems to fill these gaps by providing that the federal courts' "jurisdiction" over civil rights claims

shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall . . . govern the said courts in the trial and disposition of the cause.⁶⁵

These circuits hold that the federal law is deficient in terms of specifying who bears the burden of proof, and that § 1988 mandates following the relevant state law on the burden of proof.

As one of its reasons for aligning the common law and constitutional burdens, the D.C. Circuit relies on its interpretation of *Pierson*. In *Dellums v Powell*,⁶⁶ the court interpreted *Pierson* to stand for the principle that constitutional tort actions should be "shaped by reference to the parallel common law."⁶⁷ Because the Supreme Court in *Pierson* looked to the common law in Mississippi, the D.C. Circuit interprets *Pierson* to mean that the burdens for the § 1983 action should parallel the burdens in the D.C. common law. Both the Mississippi common law in *Pierson* and the D.C. common law place the burden of proof on the defendant.

This approach also ensures conformity with pendent state false arrest claims. Plaintiffs filing an unconstitutional false arrest claim under § 1983 generally also plead a common law or state law false arrest claim. Because the two claims are based on a "common nucleus of operative fact"⁶⁸ (the arrest), the plaintiff would generally be expected to try the two claims at the same time.⁶⁹ Thus, the plaintiff may

⁶⁴ See *Davis*, 364 F3d at 433 n 7.

⁶⁵ 42 USC § 1988(a) (2000).

⁶⁶ 566 F2d 167 (DC Cir 1977).

⁶⁷ Id at 175, citing *Pierson*, 386 US at 556–57.

⁶⁸ *United Mine Workers of America v Gibbs*, 383 US 715, 725 (1966) (holding that federal courts may exercise pendent jurisdiction over state claims resulting from the same events as the federal claim).

⁶⁹ Id.

bring both the federal false arrest claim and the common law or state law false arrest claim in the same federal proceeding based on the supplemental jurisdiction of the federal district court.⁷⁰ Different rules for a § 1983 false arrest claim and the pendent state false arrest claim could make it confusing and difficult to try the two claims together.⁷¹

B. Circuits Allocating the Burden of Proof to the Plaintiff

The majority of the federal circuits allocate the burden of proof based on a federal rule. These circuits are divided, however, as to whether the burden should be allocated to the plaintiff or the defendant. The First, Fourth, Fifth, Sixth, Seventh, and Eleventh circuits place the burden of proof on the plaintiff to prove lack of probable cause as an element of the plaintiff's prima facie case.⁷² These circuits place the burden of proof on the plaintiff even when that allocation is in direct conflict with the analogous state law.⁷³ This allocation is apparently based on the principle that the plaintiff bears the burden of production in most cases. For example, the Fifth Circuit analogizes an illegal search case to a claim for false arrest without a warrant and

⁷⁰ 28 USC § 1367(a) (2000):

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

⁷¹ See *Dellums*, 566 F2d at 176 n 9 (explaining that because “plaintiffs can be expected to plead common law false arrest as a pendent claim in constitutional suits, different rules would merely lead to confusion”).

⁷² See *St. John v Hickey*, 411 F3d 762, 769 (6th Cir 2005) (“[T]he plaintiff . . . bears the burden of proving the absence of probable cause.”); *Brown v Gilmore*, 278 F3d 362, 367 (4th Cir 2002) (“To establish an unreasonable seizure under the Fourth Amendment, [the plaintiff] needs to show that the officers decided to arrest her for disorderly conduct without probable cause.”); *Rankin v Evans*, 133 F3d 1425, 1436 (11th Cir 1998) (distinguishing between the defendant’s responsibility to prove probable cause under a Florida state law false arrest claim and the plaintiff’s responsibility to prove lack of probable cause in a federal § 1983 claim); *Tatro v Kevin*, 41 F3d 9, 14 (1st Cir 1994) (“In the present case, [the plaintiff] had to prove by a preponderance of the evidence that the police officers violated his Fourth Amendment rights by arresting him without probable cause.”); *Crowder v Sinyard* 884 F2d 804, 824 (5th Cir 1989) (explaining that “[t]he plaintiff must prove the existence of each element” of a § 1983 claim, including lack of probable cause); *Whitley v Seibel*, 613 F2d 682, 685 (7th Cir 1980) (noting that the plaintiff bears the burden of proving lack of probable cause).

⁷³ See *Rankin*, 133 F3d at 1436. In *Rankin*, the only difference between the federal § 1983 claim and the pendent state claim was the placement of the burden of proof—under Florida law, probable cause was an affirmative defense, while in the Eleventh Circuit, the “plaintiffs had the burden of demonstrating the absence of probable cause in order to succeed in their § 1983 claim.” See also *Zurkowski v D’Oyley*, 46 F Supp 2d 87, 88 (D Mass 1999) (stating that the only difference between the federal and state causes of action was the burden of proof for probable cause).

insists that the police action without a warrant does not shift the burden of proof to the defendant officer.⁷⁴

[W]e cannot agree that the burden of proof in a section 1983 case based upon an alleged fourth amendment violation should be shifted to state officials once the plaintiff establishes that the officials' actions were not authorized by a warrant. The plaintiff has alleged, and must prove, that the state officials have committed a wrongful act; both law and common sense instruct us that the police, in a great number of cases do not commit such a wrongful act merely because they act without a warrant.⁷⁵

Thus, the plaintiff must prove both that the officer acted without a warrant “*and* without authorization”⁷⁶ under an exception to the warrant requirement, such as arresting for probable cause.

However, the reasoning that the plaintiff must prove all elements of his claim is circular, because the issue is whether the plaintiff must prove lack of probable cause as an element of his claim or if the defendant must prove the presence of probable cause as a defense. These circuits have not articulated their reasons for placing the burden on the plaintiff, but they may be relying on the *Harlow v Fitzgerald*⁷⁷ immunity test as a basis for the rule.⁷⁸ Additionally, the burden placed on the plaintiff may be fairly light in practice.⁷⁹

Historically, the Fifth Circuit relied on *Pierson* and placed the burden of proof on the defendant, so that police officers making an arrest had “a defense of good faith and probable cause.”⁸⁰ The Fifth Circuit’s change of rule seems to trace back to its interpretation of the Supreme Court’s decision in *Harlow*. In *Harlow*, the Supreme Court held that executive officials (including police officers) have qualified immunity to the extent that their actions do not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”⁸¹ The *Harlow* test focuses on the objective reasonableness of the officer’s conduct, rather than his subjective motivations.⁸²

⁷⁴ *Crowder*, 884 F2d at 825.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 457 US 800 (1982).

⁷⁸ See notes 80–87 and accompanying text.

⁷⁹ See notes 90–93 and accompanying text.

⁸⁰ *Whirl v Kern*, 407 F2d 781, 790 (5th Cir 1969), quoting *Pierson*, 386 US at 556 (discussing the applicability of the “good faith” defense to a false imprisonment claim).

⁸¹ *Harlow*, 457 US at 818.

⁸² *Id.* (noting that objective reasonableness is to be “measured by reference to clearly established law”).

Shortly after *Harlow* was decided, the Fifth Circuit had to decide whether an officer was still entitled to a “good faith” defense for his reliance on a statute that was later ruled unconstitutional.⁸³ The court concluded that the pre-*Harlow* “good faith” defense was essentially the same as the probable cause defense.⁸⁴ The good faith defense was “largely an illusion in legal concept if not in practical fact” because it presented no jury question “beyond the existence of probable cause.”⁸⁵ Before *Harlow*, then, probable cause was the officer’s “only defense in the context of a warrantless arrest.”⁸⁶ The court held that *Harlow* did not significantly change this test with regard to false arrest cases—the “objective immunity standard” of *Harlow* would not “differ in application from the objective probable cause test for validity of a warrantless arrest.”⁸⁷ Moreover, the Fifth Circuit did not state that *Harlow* made any change to the burden of proof for probable cause. However, later Fifth Circuit cases seem to assume that the *Harlow* objective immunity test shifts the burden of proof on probable cause to the plaintiff,⁸⁸ but this is neither explicit nor obvious in *Harlow* or other Fifth Circuit cases.

Additionally, it is important to note that in practice, the burden on the plaintiff seems to be relatively light. Another Fifth Circuit case that has been cited for the proposition that the plaintiff bears the burden of proof is a district court opinion that the appellate court affirmed and adopted as its own.⁸⁹ Although this case does not directly discuss the burden of proof for probable cause,⁹⁰ it provides some insight into how the burden of proof issue actually operates on the trial level. The first plaintiff won his case based on his un rebutted testimony that he was not doing anything wrong at the time of his arrest.⁹¹ Similarly, the court found that there was “absolutely no legal basis

⁸³ *Trejo v Perez*, 693 F2d 482, 486–88 (5th Cir 1982).

⁸⁴ *Id.* at 487:

If an officer had probable cause for an arrest, there were reasonable grounds to believe the actions were within his lawful authority; if there was no probable cause, there were no reasonable grounds. Illegality [under the good faith defense] and lack of immunity [under the probable cause defense] coincided or nearly so.

⁸⁵ *Id.*

⁸⁶ *Id.* at 487 n 8 (emphasis added).

⁸⁷ *Id.* at 488.

⁸⁸ See, for example, *Hinshaw v Doffer*, 785 F2d 1260, 1266 (5th Cir 1986), citing *Trejo*, 693 F2d 482, for the proposition that a § 1983 false arrest plaintiff “must prove that the officer made the arrest without probable cause.”

⁸⁹ *Vela v White*, 703 F2d 147, 148 (5th Cir 1983) (per curiam).

⁹⁰ *Id.* at 149 (noting in passing that “the Court is satisfied that the Plaintiff proved his contentions by the preponderance of the evidence”).

⁹¹ *Id.* (noting that the defendants testified that they “could [] remember nothing of the incident.”).

whatever” for the arrest of another plaintiff in the same case based on her testimony and that of her witnesses.⁹² Because none of the defendants could explain why the second plaintiff was arrested, her un rebutted evidence that she was doing nothing to justify arrest established her cause of action under § 1983.⁹³ Although the Fifth Circuit cites this case for placing the burden of proof on the plaintiff, in reality the district court seems to require the defendant to produce evidence that he acted with probable cause.

C. Circuits Allocating the Burden of Proof to the Defendant

The Third, Ninth, and Tenth circuits place the burden of proof for probable cause on the defendant.⁹⁴ The initial burden is on the plaintiff to establish “an invasion of his rights,” that is, “an illegal arrest,”⁹⁵ and the plaintiff can make a prima facie case “simply by showing that the arrest was conducted without a valid warrant.”⁹⁶ Once the plaintiff makes a prima facie case, the burden shifts to the defendant to produce evidence of probable cause.⁹⁷ An arrest made without a warrant is presumptively unlawful if the defendant “is unable to or refuses to come forward with any evidence that the arresting officers had probable cause.”⁹⁸

Thus, the defendant bears the burden of production, and must introduce enough evidence on the issue of probable cause so that the issue can be decided by the factfinder rather than on summary judgment. However, the plaintiff retains the “risk of nonpersuasion on the issue of lack of probable cause.”⁹⁹ The burden of persuasion means that the plaintiff must convince the factfinder of his view of the facts, by a preponderance of the evidence. So the defendant must produce evidence showing probable cause, but the plaintiff retains the burden of persuading the jury that the arrest was illegal.

⁹² *Id.* at 151.

⁹³ *Id.* at 152.

⁹⁴ See *Dubner v City and County of San Francisco*, 266 F3d 959, 965 (9th Cir 2001) (explaining that the arresting officer has the burden of showing probable cause once the plaintiff makes a prima facie case of unlawful arrest); *Losch v Borough of Parkesburg, Pennsylvania*, 736 F2d 903, 909 (3d Cir 1984) (“[T]he defendant has the burden of pleading and proving qualified immunity.”); *Martin v Duffie*, 463 F2d 464, 468–69 (10th Cir 1972) (interpreting *Pierson* as “mak[ing] clear that the explanations for the arrests . . . must be put forward by the [defendant] officers as defenses”). See also *Patzig v O’Neil*, 577 F2d 841, 849 n 9 (3rd Cir 1978) (“[T]he burden of proof as to the existence of probable cause may well fall upon the *defendant*, once the plaintiff has shown an arrest and confinement without warrant.”).

⁹⁵ *Martin*, 463 F2d at 469.

⁹⁶ *Dubner*, 266 F3d at 965.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Martin*, 463 F2d at 469.

Rather than simply assuming that federal law should apply, these circuits have affirmatively held that federal rather than state substantive law applies to § 1983 false arrest claims; the idea that the “state substantive law is somehow assimilated in the § 1983 claim is wholly without merit.”¹⁰⁰ The Tenth Circuit has stated that

[t]he Supreme Court has given clear recognition to the proposition that the rights under this statute and the rights arising under the state common law, although similar, are nonetheless distinct remedies. The same set of facts may give rise to violations of both the federal statute and the state common law, but the rights are not necessarily coterminous and the essential criteria are not necessarily the same.¹⁰¹

In reaching this conclusion, the Tenth Circuit examined *Monroe v Pape*,¹⁰² in which the Supreme Court concluded that the purpose of § 1983 was “to afford a federal right in federal courts”¹⁰³ when state laws might not be enforceable because of “prejudice, passion, neglect, intolerance or otherwise.”¹⁰⁴ As the Tenth Circuit interpreted *Pierson*, the Supreme Court had “stressed the federal remedy as opposed to that of the state and thus recognized the applicability of federal common law.”¹⁰⁵ Finally, there are “numerous other decisions” in the other circuits recognizing that “the vindication of federal civil rights guaranteed by the Constitution is peculiarly subject to federal substantive law.”¹⁰⁶ Although federal courts may consider state decisions in formulating a federal standard for civil rights actions, “[t]he important point is that federal courts are not bound by the decisions of the state court” as they might be in “a diversity action or a pendent jurisdiction case.”¹⁰⁷

Having established that the federal rather than state substantive law should apply to the burden of proof allocation, these circuits place the burden of proof for probable cause on the defendant based on their interpretation of *Pierson*, the common law, and policy justifications.

First, these circuits rely on *Pierson* for their rule that the defendant bears the burden of “proving the defense of good faith and prob-

¹⁰⁰ *Id.* at 467.

¹⁰¹ *Id.*

¹⁰² 365 US 167 (1961).

¹⁰³ *Id.* at 180.

¹⁰⁴ *Id.*

¹⁰⁵ *Martin*, 463 F2d at 467, citing *Pierson*, 386 US 547.

¹⁰⁶ *Martin*, 463 F2d at 467, citing *Whirl*, 407 F2d 781, *Caperci v Huntoon*, 397 F2d 799 (1st Cir 1968), *Lefton v City of Hattiesburg, Mississippi*, 333 F2d 280 (5th Cir 1964), and *Marland v Heyse*, 315 F2d 312 (10th Cir 1963).

¹⁰⁷ *Martin*, 463 F2d at 468.

able cause.”¹⁰⁸ These circuits interpret *Pierson* as mandating that the burden of proof for probable cause falls squarely on the defendant, noting that the Supreme Court describes good faith and probable cause as “*defenses* to a § 1983 action for unconstitutional arrest.”¹⁰⁹ Additionally, these circuits reject any rule requiring the plaintiff to “search out the subjective viewpoints of the arresting officers in a quest for information as to whether probable cause in a practical sense existed.”¹¹⁰ The idea that the plaintiff has the burden of refuting probable cause is not supported by the cases, especially not *Pierson*. The Supreme Court in *Pierson* “repeatedly recognized good faith and probable cause as defenses, characterizing them as such, and in its decision it was nowhere suggested that the [plaintiff] had the burden of wholly negating the existence of such defenses.”¹¹¹ The Supreme Court’s decision “makes it clear that the explanations for arrests which have apparent invalidity must be put forward by the officers as defenses.”¹¹² The defendant officers must provide evidence to show that probable cause existed.¹¹³

As additional justification, these circuits point to traditional common law principles, which placed the burden on the defendant, so that probable cause was a defense to a false arrest claim.¹¹⁴ The common law shifted the burden to the defendant to show justification, such as probable cause, once the plaintiff proved an arrest without a warrant.¹¹⁵ Similarly, both the Third Circuit and the Ninth Circuit cite their own precedents and cases from other circuits reflecting the common law understanding that the burden of proof falls on the defendant to show probable cause.¹¹⁶

Finally, as its primary justification for the rule, the Ninth Circuit advances a policy rationale—that the defendant officers should bear the burden of production because they have the best access to the

¹⁰⁸ *Losch*, 736 F2d at 909, citing *Pierson*, 386 US at 556–57.

¹⁰⁹ *Patzig*, 577 F2d at 849 n 9.

¹¹⁰ *Martin*, 463 F2d at 468.

¹¹¹ *Id.*, citing *Pierson*, 386 US 547.

¹¹² *Martin*, 463 F2d at 468, citing *Pierson*, 386 US 547.

¹¹³ *Martin*, 463 F2d at 469 (noting the failure of the defendant officers to proffer any evidence that would show probable cause).

¹¹⁴ See note 19 and accompanying text.

¹¹⁵ See *Patzig*, 577 F2d at 849 n 9, citing Restatement (Second) of Torts § 10 (1965) and William L. Prosser, *Prosser on Torts* § 26 at 132 (4th ed 1971).

¹¹⁶ See *Dubner*, 266 F3d at 965, citing *Patzig*, 577 F2d at 849 n 9, *Gilker*, 576 F2d at 246, and *Dellums*, 566 F2d at 175–76; *Martin*, 463 F2d at 467; *Patzig*, 577 F2d at 849 n 9, citing *Dellums*, 566 F2d at 167 and *Martin*, 463 F2d at 464.

evidence that would tend to prove or disprove probable cause.¹¹⁷ For example, when a photographer was arrested at an animal rights protest, the defendant officers claimed that none of them had actually arrested the plaintiff—the police department’s policy was to put the name of the first officer on the scene on all the arrest reports, rather than recording the names of the actual arresting officer on each arrest report.¹¹⁸ The trial court found that “the City’s practice of not identifying the actual arresting officers on the arrest report seems deliberately designed to frustrate the efforts of potential plaintiffs in false arrest cases to establish probable cause.”¹¹⁹

In this case, the Ninth Circuit held that the plaintiff did everything she could by obtaining an arrest report and requesting all information in discovery. At this point, she could reasonably assume she had named the right officers. By shifting the burden of production to the defendants, the Ninth Circuit aims to “prevent this exact scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire.”¹²⁰ Thus, the Ninth Circuit places the burden of production on the defendant officers because they, not the plaintiffs, have the best access to the information and can most cost-effectively produce this evidence at trial.

In summary, of the twelve federal circuits to address the issue, three circuits allocate the burden of proof based on state law, and nine allocate the burden of proof according to a federal rule. Of the circuits using a federal rule, six allocate the burden to the plaintiff and three allocate the burden to the defendant. Part III considers which of these approaches optimally allocates the burden of proof.

III. THE OPTIMAL BURDEN OF PROOF ALLOCATION

There are two questions involved in deciding the optimal burden of proof allocation: (1) whether state or federal law should control and (2) whether the plaintiff or defendant should bear this burden. This Comment concludes that federal law should control to ensure a uniform allocation of the burden of proof across states. Furthermore, the defendant should bear the burden of production on this issue, with the plaintiff retaining the burden of persuasion.

¹¹⁷ See *Dubner*, 266 F3d at 965 (“This minimal burden shifting forces the police department, which is in the better position to gather information about the arrest, to come forward with some evidence of probable cause.”).

¹¹⁸ *Id.* at 964.

¹¹⁹ *Id.* at 965.

¹²⁰ *Id.* The court determined that the plaintiff made her prima facie case and remanded the case to determine whether the named officers in the suit could “reasonably be held liable for the unlawful arrest.” *Id.* at 968.

A. Federal Law Should Control the Burden of Proof Allocation

The burden of proof on probable cause in a § 1983 action should be controlled by one federal rule to provide for consistent protection of constitutional rights. The federal system needs a consistent burden of proof to fulfill the purpose of § 1983 and to adequately vindicate constitutional rights. A consistent federal constitutional standard is used to define probable cause itself because probable cause is a Fourth Amendment requirement.¹²¹ If the burden of proof on the issue of probable cause is applied inconsistently among states, then in a practical sense the probable cause requirement varies as well. Thus, in states that require the plaintiff to prove lack of probable cause, citizens effectively have less protection of their constitutional rights than in states where the defendant must prove probable cause.

Because § 1983 vindicates constitutional rights, § 1983 claims are necessarily different from state tort claims:

The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.¹²²

Section 1983 protects Fourth Amendment rights against unreasonable search and seizure rather than common law or state law rights to avoid false arrest. As the Tenth Circuit has recognized, although these actions may be similar, they “are nonetheless distinct remedies.”¹²³ The Tenth Circuit is correct that “the vindication of federal civil rights guaranteed by the Constitution is peculiarly subject to federal substantive law.”¹²⁴ The burden of proof in a § 1983 case should therefore be allocated consistently across states to help ensure that citizens of each state have the same constitutional rights, thus ensuring equal protection of the laws for all.¹²⁵

Still, there are a number of good arguments in favor of basing the burden of proof on state law. These arguments include Congress’s

¹²¹ See *Gerstein v Pugh*, 420 US 103, 120 & n 21 (1975) (explaining that a probable cause determination by a magistrate is “required by the Fourth Amendment” and that this standard is the same as the probable cause required for arrest). See also *Brinegar v United States*, 338 US 160, 176 (1949) (defining the Fourth Amendment probable cause standard).

¹²² *Monroe*, 365 US at 196 (Harlan concurring).

¹²³ *Martin v Duffie*, 463 F2d 464, 467 (10th Cir 1972).

¹²⁴ *Id.*

¹²⁵ Consider *Adarand Constructors, Inc v Pena*, 515 US 200, 231–32 (1995) (“[T]he Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws.”).

supposed intention to rely on the common law, the application of 42 USC § 1988, the advantages of consistency between the federal claim and pendent state law claims, and honoring the federal system. Ultimately none of these arguments is persuasive.

First, Congress's purposes in enacting § 1983 favor having one consistent federal law govern the burden of proof for probable cause. The primary argument for relying on the relevant state law to determine the burden of proof is the general assumption that Congress knew the common law and meant for it to apply "absent specific provisions to the contrary."¹²⁶ Any federal statute, including § 1983, must be "read against the background of tort liability."¹²⁷ Proponents argue that if Congress intended common law to apply to the statute, then courts should rely upon current state law, which represents either the codification or replacement of older common law decisions.

However, given the legislative history of § 1983, it is not a foregone conclusion that Congress meant for the state law to apply to § 1983 claims. Consider Justice Douglas's dissenting opinion in *Pierson*:

Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the "common law before the making of the Act." But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law. It cannot be presumed that the common law is the perfection of reason, is superior to statutory law, and that the legislature always changes law for the worse.¹²⁸

Moreover, even if Congress meant for the common law to supply some of the provisions of § 1983, that intention must be interpreted in light of the common law at the time the statute was enacted. At that time, the common law placed the burden of proof squarely on the defendant.¹²⁹ Thus, Congress may not have intended for the common law to govern. Even if the common law was intended, Congress may have meant to rely on the common law at the time of enactment, which placed the burden of proof on the defendant.

Additionally, the circuits that favor using state law allocation rules point to 42 USC § 1988. Section 1988 provides that jurisdiction over certain civil and criminal matters for the protection and vindication of civil rights shall be "exercised and enforced" according to federal law, but that where the federal law is "not adapted to the object,

¹²⁶ *Davis v Rodriguez*, 364 F3d 424, 433 n 7 (2d Cir 2004), quoting *City of Newport v Fact Concerts, Inc*, 453 US 427, 258 (1981).

¹²⁷ *Pierson*, 386 US at 554, quoting *Monroe*, 365 US at 187.

¹²⁸ 386 US at 561 (Douglas dissenting) (internal citations omitted).

¹²⁹ See note 19 and accompanying text.

or [is] deficient in the provisions necessary to furnish suitable remedies and punish offenses,” then the common law, as modified by state law, shall govern the case.¹³⁰ The Second Circuit interprets this provision as directing that state law should dictate burden of proof rules.¹³¹

Because § 1988 is a valid, duly enacted, seemingly clear statute, the use of state law to determine the burden of proof would seem to be a foregone conclusion. However, the Supreme Court has not applied § 1988 consistently to procedural issues. Indeed, where the rule is viewed as critical, the Court has more often devised or invoked a consistent federal rule. For example, the Court has formulated consistent federal immunity rules for judges,¹³² state legislators,¹³³ and executive officers¹³⁴ without even looking at the state law. The Court has similarly fashioned consistent federal rules for the calculation of damages in § 1983 cases.¹³⁵ So although it has sometimes applied a state law to determine an issue of survivorship¹³⁶ and statutes of limitations,¹³⁷ the Supreme Court has not made the use of state law mandatory for all procedural issues.

Furthermore, even in the text of § 1988 itself, federal law generally governs; its use is “the rule and not the exception.”¹³⁸ Section 1988 “authorizes resort to the state statute only if the federal laws ‘are not adapted to the object’ . . . or are ‘deficient in the provisions necessary to furnish suitable remedies.’”¹³⁹ The absence of a rule like the burden of proof from the statute does not make the federal law unsuitable or deficient.¹⁴⁰ Since nine circuits have followed federal common law on the burden of proof issue, § 1983 is arguably not deficient in this situation—the federal common law is sufficient to provide a rule. Even if § 1983 is “deficient” in this respect, basing the burden of proof on state law would be “inconsistent with the Constitution and laws of the United

¹³⁰ 42 USC § 1988(a).

¹³¹ See notes 53–55 and accompanying text.

¹³² See *Pierson*, 386 US at 554–55.

¹³³ See *Tenney v Brandhove*, 341 US 367, 372 (1951) (holding state legislators immune from liability “for what they do or say in legislative proceedings”).

¹³⁴ See *Owen v City of Independence, Missouri*, 445 US 622, 638 (1980).

¹³⁵ See *Sullivan v Little Hunting Park, Inc.*, 396 US 229, 239 (1969) (“Compensatory damages for deprivation of a federal right are governed by federal standards.”).

¹³⁶ See *Robertson v Wegman*, 436 US 584, 593 (1978) (observing that § 1988 “quite clearly instructs us to refer to state statutes”).

¹³⁷ See *Owens v Okure*, 488 US 235, 248–50 (1989) (reasoning that because state statutes of limitation are clearly stated and easily locatable they should apply).

¹³⁸ *Robertson*, 436 US at 595 (Blackmun dissenting) (arguing that state law should only be applied under § 1988 if federal law is deficient in some way).

¹³⁹ *Id.*, quoting 42 USC § 1988.

¹⁴⁰ Consider *Robertson*, 436 US at 595 (concluding that the absence of federal law on survivorship of a civil rights action under § 1983 does not mean that federal law is deficient).

States”¹⁴¹ because a burden of proof for § 1983 actions that varies from state to state would be inconsistent with the purposes of § 1983.¹⁴²

Finally, Congress may not have meant for § 1988 to apply to § 1983 actions at all. Professor Theodore Eisenberg notes that § 1988 was originally enacted as part of a jurisdiction statute providing for removal of certain claims brought under state law.¹⁴³ In a general statutory revision, § 1988 was separated from the rest of the statute,¹⁴⁴ giving § 1988 the appearance of greater applicability.¹⁴⁵ Under this view, “[f]ederal law is deficient within the meaning of section 1988 only when a substantive state rule, civil or criminal, is the source of the action.”¹⁴⁶ When federal law is the source of the action, as in § 1983, then § 1988 does not apply.¹⁴⁷

Proponents of using the state law also argue that because plaintiffs will almost always bring a pendent state false arrest claim in addition to their § 1983 claim, it would be more convenient for the judge and the parties if the burden of proof were the same for both claims.¹⁴⁸ If the state and federal claims have different burdens of proof, this might require severance of the two claims as a practical matter. However, the attachment of a pendent state law claim should not dictate the burden for the federal claim. The desire for consistency between § 1983 claims and state law claims is a poor basis for allocating a burden of proof that directly affects citizens’ constitutional rights because § 1983 protects different interests than the state claims. Section 1983 is the primary means for protecting constitutional rights—the state claims are “merely cumulative,” because the citizens’ right “to recover for an invasion of their civil rights . . . is adequately secured by § 1983.”¹⁴⁹ Congress meant § 1983 to be the primary civil means for protecting constitutional rights, and that intention should not be overridden or controlled by the individual states’ choices.

¹⁴¹ 42 USC § 1988(a).

¹⁴² See notes 125–126 and accompanying text.

¹⁴³ Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U Pa L Rev 499, 533 (1980) (discussing the legislative history of § 1988).

¹⁴⁴ Section 1988 was enacted as part of the Civil Rights Act of 1866, 14 Stat 27. Section 1 of the Act is now codified as 42 USC §§ 1981–82 (2000). Section 3 of the Act was split into two parts during the recodification, 28 USC § 1443 (2000) (providing for removal of civil rights cases from state courts) and 42 USC § 1988.

¹⁴⁵ Eisenberg, 128 U Pa L Rev at 540–41 (cited in 143) (discussing the supposedly nonsubstantive revision of the U.S. Code that resulted in broader applicability of § 1988).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 500 (“[W]hen the cause of action is federal, as it is, for example, in cases brought under section 1983, . . . section 1988’s instruction to apply state law is inapplicable.”).

¹⁴⁸ See, for example, *Dellums*, 566 F2d at 176 n 9 (explaining that because “plaintiffs can be expected to plead common law false arrest as a pendent claim in constitutional suits, different rules would merely lead to confusion”).

¹⁴⁹ *Pierson*, 386 US at 558 n 12.

The final argument for following state law involves honoring our federal system. If states have made different choices about the burden of proof allocation, these varying allocations may represent valid policy choices based on the different problems faced in the different states that should be honored in federal court. For example, in one state the legislature may allocate the burden of proof to the plaintiff to discourage frivolous lawsuits against the police. This “states as laboratories” view was first advanced by Justice Brandeis: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁵⁰

But federalism can be honored without following the states’ burden of proof allocation for § 1983 actions. Each state is still perfectly free to experiment in placing the burden of proof for its state law tort claims, but that freedom to experiment should not be extended to actions to protect federal constitutional rights. One of the primary purposes of § 1983 was to provide a remedy “where state law was inadequate.”¹⁵¹ If the state law is potentially inadequate to protect our constitutional rights, then federalism does not require copying that inadequate state law to enforce a federal right.

Ultimately none of the arguments in favor of using state law is persuasive. To fulfill the important purposes of § 1983 and to fully protect the constitutional rights of citizens in every state, the burden of proof should be applied consistently in § 1983 actions.

B. Optimal Allocation Places the Burden of Proof on the Defendant

The optimal allocation of the burden of proof in a § 1983 unconstitutional false arrest case places the burden of proof on the defendant to show probable cause for the arrest. This allocation comports

¹⁵⁰ *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting) (discussing the importance of state experimentation and noting the “grave responsibility” the Court has in wielding the authority to limit state experimentation). See also *Blakely v Washington*, 542 US 296, 326 (2004) (Kennedy dissenting) (“[T]he case here implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment.”); *Grutter v Bollinger* 539 US 306, 342 (2003) (“Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.”); *United States v Lopez*, 514 US 549, 581 (1995) (Kennedy concurring) (“In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”).

¹⁵¹ *Monroe*, 365 US at 173.

with the common law and the majority of circuits that have considered the issue, and it best balances the purposes underlying § 1983.

1. The defendant has the best access to the information.

It is very difficult for the plaintiff to prove the absence of probable cause. All the plaintiff can realistically do is testify that he was not doing anything to justify arrest. The defendant officer has far better access to the relevant evidence on probable cause, especially because most of this evidence will be the officer's testimony. This is especially true because facts that may constitute probable cause based on an officer's experience may not appear to be probable cause to a layperson.¹⁵² If the plaintiff has the burden of production, the defendant officer can effectively shut down the plaintiff's case simply by refusing to provide the relevant information on probable cause. The cases discussed in Part II provide two good examples of this problem. In *Davis v Rodriguez*,¹⁵³ the officers refused to identify the charges for which the plaintiff was originally stopped.¹⁵⁴ Similarly, in *Dubner v City and County of San Francisco*,¹⁵⁵ the arrest reports did not identify the arresting officers. In both cases, only the defendant officers had access to the information about probable cause.¹⁵⁶ In both cases, the plaintiffs lost their cases in district court because they could not produce this information.¹⁵⁷ When the defendant can more easily and cheaply gather evidence, this factor tilts the optimum burden of proof toward the defendant.¹⁵⁸

2. This approach deters police officers from making arrests without probable cause.

Furthermore, placing the burden of proof on the defendant officer is a necessary means of limiting the police officer's broad discretion to make warrantless arrests. As Justice McReynolds observed in 1925, "If persons can be restrained of their liberty, and assaulted and imprisoned . . . without complaint or warrant, then there is no limit to

¹⁵² See, for example, *Ornelas v United States*, 517 US 690, 699–700 (1996) ("[A] police officer views the facts through the lens of his police experience and expertise. . . . [O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists.").

¹⁵³ 364 F3d 424 (2d Cir 2004).

¹⁵⁴ *Id.* at 429 (recounting the plaintiff's inability to draw out the basis for his arrest from the defendant for an excessive force claim after his false arrest claim had been dismissed). See Part II.A.

¹⁵⁵ 266 F3d 959 (9th Cir 2001).

¹⁵⁶ *Davis*, 365 F3d at 429; *Dubner*, 266 F3d at 965 (noting that the plaintiff was unable to obtain information about the arresting officer's probable cause despite requesting such information from the police).

¹⁵⁷ *Davis*, 364 F3d at 429; *Dubner*, 266 F3d at 965.

¹⁵⁸ See Bruce L. Hay, *Allocating the Burden of Proof*, 72 Ind L J 651, 678 (1997).

the power of a police officer.”¹⁵⁹ There are indications that some police officers misuse this power to make arrests for purposes other than legitimate law enforcement, such as “maintain[ing] respect for the police or . . . giv[ing] the impression of ‘full enforcement.’”¹⁶⁰ Even an arrest that is not accompanied by the use of force is a serious violation of liberties in itself.¹⁶¹ Moreover, even if charges are dismissed, the arrest and indictment may damage “the defendant’s reputation, personal relationships, and ability to earn a living” to the point that “he may never be able to return to the life he knew before being accused.”¹⁶² Requiring the officer to prove probable cause provides some deterrent to making frivolous or pretextual arrests.

Further, there is empirical evidence that police officers who have abused citizens “frequently file ‘cover charges’ as a means of justifying the violence they have perpetrated.”¹⁶³ Studies of police practices in Philadelphia and New York found that false charges by police were pervasive and were frequently used to cover street abuse.¹⁶⁴ To deter police misconduct, the plaintiff must be able to lodge and prove both excessive force and false arrest. Deterrence of police misconduct is of

¹⁵⁹ *Carroll v United States*, 267 US 132, 165 (1925) (McReynolds dissenting), quoting *Pinkerton v Verberg*, 78 Mich 573, 44 NW 579, 582 (1889).

¹⁶⁰ Surell Brady, *Arrests without Prosecution and the Fourth Amendment*, 59 Md L Rev 1, 28 (2000) (discussing the practice of “show arrests”).

¹⁶¹ See *Atwater v City of Lago Vista*, 532 US 318, 364–65 (2001) (O’Connor dissenting) (internal citations omitted):

A custodial arrest exacts an obvious toll on an individual’s liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well. The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

¹⁶² Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw U L Rev 1297, 1299 (2000) (discussing the substantial burdens placed on defendants despite being innocent and having been acquitted).

¹⁶³ Kreimer, 136 U Pa L Rev at 879–80 (cited in note 4).

¹⁶⁴ See *Council of Organizations on Philadelphia Police Accountability and Responsibility v Rizzo*, 357 F Supp 1289, 1316 (ED Pa 1973) (finding that, from January 1, 1968, to July 1, 1970, in 2,709 cases disposed of in Philadelphia, which included charges of resisting arrest or assault and battery on a police officer, 78 percent of defendants were exonerated); George F. Cole, *The American System of Criminal Justice* 255 (Wadsworth 4th ed 1986) (“[T]he police review board found that it was standard practice to lodge a charge of resisting arrest or disorderly conduct against anyone who accused the police of brutality.”). See also Paul Chevigny, *Police Power: Police Abuses in New York City* 142–46 (Pantheon 1969) (discussing the practice of leveling cover charges to avoid false arrest claims).

course one the primary policies underlying § 1983.¹⁶⁵ “The police officer presumably has relatively strong incentives to arrest and relatively weak incentives to delay until he can develop additional or more accurate information linking the suspect to the crime at issue. Liability for wrongful arrest will provide a counterweight to his imbalance in incentives.”¹⁶⁶ Indeed, the U.S. Civil Rights Commission has concluded that “lawsuits against individual police officers may help deter police misconduct.”¹⁶⁷

Of course, imposing the burden of proof on defendant officers might result in overdeterrence. The deterrent effect from liability “ideally should be just enough to discourage arrest whenever the social costs of an arrest exceed the social benefit. Any greater expected damage penalty will discourage arrests in situations where the social benefits of such action exceed its cost.”¹⁶⁸ The burden of proof should not discourage police officers from making valid arrests because they fear personal liability. However, because police officers already have qualified immunity from prosecution, placing the burden of proof on the plaintiff arguably would result in underdeterrence for the officers. Therefore, placing the burden of proof on the defendant produces the right balance of incentives for the police officer.

This allocation of the burden to the officer is particularly important because the exclusionary rule does not deter police officers from making illegal arrests. The exclusionary rule, which excludes illegally seized evidence from being used at trial,¹⁶⁹ does not apply to arrests in which there was no seized evidence or to arrests that do not lead to formal charges. Because it focuses only on evidence seized, and not the fact of arrest itself, the exclusionary rule cannot deter police officers from making arrests without probable cause. Of course, the rule is not the only deterrent available to keep police officers from engaging in misconduct. Training, internal police department discipline, and

¹⁶⁵ See *Wyatt v Cole*, 504 US 158, 161 (1992) (explaining that the purpose § 1983 is “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails”), citing *Carey v Phipus*, 435 US 247, 254–57 (1978).

¹⁶⁶ Ronald A. Cass, *Damage Suits against Public Officers*, 129 U Pa L Rev 1110, 1153–54 (1981) (discussing the need to calibrate penalties correctly so as to eliminate the imbalance in incentives facing a police officer).

¹⁶⁷ U.S. Civil Rights Commission, *Revisiting Who Is Guarding the Guardians: A Report on Police Practices* § 5 (2000), online at <http://www.usccr.gov/pubs/guard/ch5.htm> (visited Jan 10, 2006).

¹⁶⁸ Cass, 129 U Pa L Rev at 1154 (cited in note 166) (arguing for a policy of official liability that will maximize societal welfare).

¹⁶⁹ *Mapp v Ohio*, 367 US 643, 655 (1961) (holding that the exclusionary rule applies in state courts).

§ 1983 actions all serve as deterrents to misconduct.¹⁷⁰ The § 1983 false arrest claim is critical to maintaining the rights to liberty and privacy, and placing the burden of proof on the defendant officer helps to ensure that the plaintiff will have his day in court.

Additionally, shifting the burden of proof to the defendant police officer in a civil case based on a warrantless arrest may provide some of the same incentives that the warrant procedure does. The magistrate granting a warrant often does little more than ratify the conclusions of the police—magistrates rarely question the affiant or ask to hear witnesses.¹⁷¹ However, this does not mean that the warrant procedure is worthless. The need to obtain an arrest warrant motivates the police officer to gather sufficient evidence of probable cause before making an arrest. Shifting the burden of proof to the police officer when that officer makes an arrest without obtaining a warrant adds costs in a way that is very similar to the warrant requirement itself.

Thus, shifting the burden of proof provides additional protection to the citizen's constitutional rights. At the very least, shifting the burden ensures that the defendant officer will not be able to win the § 1983 case on summary judgment. The officer will at minimum be required to testify as to probable cause. Obtaining a warrant requires the officer to justify the arrest before it is made; imposing the burden of proof requires the officer to justify the arrest after it is made. Because police officers have the power to make arrests without warrants, shifting the burden of proof to the officer helps to moderate this power and provides incentives to the officer not to make arrests without probable cause.

Placing the burden of proof on the defendant also gives the city or county greater incentives to train, monitor, and control its police officers. Although the plaintiff in a § 1983 case typically sues the police officer individually for unconstitutional false arrest, the police officer rarely pays any damages awarded. States and cities frequently indemnify police officers in § 1983 cases.¹⁷² The burden of proof in a § 1983 action, and even the § 1983 action itself, may provide little deterrent effect to the police officer who will not actually have to pay damages.

However, the fact that the city will pay damages resulting from the action gives the city an incentive to control the officer's behavior on the job. Before any incident occurs, the city will develop clear poli-

¹⁷⁰ Placing the burden of proof on the defendant officer can encourage police departments to provide better training, supervision, and discipline. See notes 173–74 and accompanying text.

¹⁷¹ Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 NYU L Rev 1173, 1187 (1987).

¹⁷² See Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 Iowa L Rev 1209, 1211 (2001).

cies and give police officers adequate training in the law so that those officers will not make arrests unsupported by probable cause. Although such training may not stop an officer bent on misconduct, increased training in the required elements of each crime may prevent a well-intentioned officer from mistakenly making a false arrest.¹⁷³ After an incident, the city will discipline and/or fire any officers engaging in misconduct. Indeed, if the city does not develop such policies and train and discipline its officers, then the city itself is vulnerable to suit under § 1983 for its official policies.¹⁷⁴ The officer, in turn, will be deterred from misconduct by the threat of losing his job or facing discipline from the city.

3. Common law and precedent favor this approach.

Additionally, the burden of proof on the issue of probable cause should be placed on the defendant because this is the longstanding majority rule. The common law placed the burden of proof on the defendant to justify a warrantless arrest.¹⁷⁵ The rule that an allegation of a warrantless arrest shifts the burden to the defendant to prove probable cause was “the majority rule in this country.”¹⁷⁶ The one Supreme Court case dealing with the issue, *Pierson*, held that probable cause was a defense to a § 1983 action for false arrest.¹⁷⁷ The Tenth Circuit, Third Circuit, and Ninth Circuit all assign the burden of proof for probable cause to the defendant.¹⁷⁸ This approach also conforms to the D.C. Circuit’s approach because it assigns the burden of proof to the defendant based on D.C. common law.¹⁷⁹ Effectively, the D.C. Circuit applies the same rule using a different justification.

Finally, recent cases suggest that the Second Circuit would be willing to reconsider its allocation of the burden of proof. In *Davis*, the Second Circuit describes the burden of proof for probable cause as “an open question in this circuit.”¹⁸⁰ The *Davis* court assigns the burden of proof to the defendant, at least in requiring the defendants to

¹⁷³ See U.S. Civil Rights Commission, *Revisiting Who Is Guarding the Guardians* at 13 (cited in note 167) (noting that officers with limited experience and training “tend to rely on force to achieve order”).

¹⁷⁴ See *Monell v Department of Social Services of the City of New York*, 436 US 658, 690–91 (1978) (explaining that a municipality can be held liable under § 1983 for its “official polic[ies]” or “custom[s]” that infringe individuals’ civil rights).

¹⁷⁵ See note 19 and accompanying text.

¹⁷⁶ *Dellums*, 566 F2d at 176 (finding that there would be no purpose in changing the “definition of a *prima facie* case in constitutional litigation” from that established under common law).

¹⁷⁷ *Pierson*, 386 US at 557. See Part I.D.

¹⁷⁸ See Part II.C.

¹⁷⁹ See text accompanying notes 50, 54–56.

¹⁸⁰ 364 F3d at 435.

identify the charge on which the arrest was based.¹⁸¹ Furthermore, the *Davis* court indicates that it might favor such an approach to the probable cause question in general, especially since it favorably cites *Gilker v Baker*,¹⁸² a Ninth Circuit case assigning the burden of proof to the defendant.¹⁸³

In summary, the historical common law, the only directly relevant Supreme Court precedent, and the precedents with more thorough reasoning all favor placing the burden of proof for probable cause on the defendant.

4. The plaintiff retains the risk of nonpersuasion.

Although the defendant bears the burden of production, the plaintiff still retains the burden of persuasion, also called the risk of nonpersuasion. The defendant officer must produce enough evidence on the issue of probable cause for the jury to make a decision on the issue. In turn, the plaintiff must prove his overall case by the preponderance of the evidence, and if the evidence is in equipoise, the plaintiff will lose.

This allocation of the burdens of proof helps to strike the correct balance if we are concerned that placing the burden of proof on the defendant may encourage frivolous or nuisance suits against the police. However, although “government lawyers tend to report a high rate of frivolous cases against police . . . what little empirical data exists suggests a large stock of meritorious cases.”¹⁸⁴ A study of Los Angeles civil rights cases in 1975 and 1976 found that defendant officers prevailed far less frequently than did defendants in nonpolice cases.¹⁸⁵ Similarly, in an intensive survey of 1980–1981 filings in the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia, “cases brought against the police [were] the largest and most

¹⁸¹ *Id.* (explaining that a plaintiff meets the burden of production where the defendant officers “have yet to identify the charges [they] had in mind” when the plaintiff was arrested).

¹⁸² 576 F2d 245 (9th Cir 1978).

¹⁸³ *Davis*, 364 F3d at 435 (“If, of course, defendants then identify an intended charge during their own case, the burden would shift back to the plaintiff to enter some evidence rebutting that charge.”).

¹⁸⁴ Kreimer, 136 U Pa L Rev at 877–78 n 111 (cited in note 4) (comparing statements of government lawyers that there is a perception that frivolous lawsuits against police officers are “a major problem” with an empirical study showing that police were only successful at defending themselves 41 percent of the time, and another study showing that plaintiffs were successful against the police 57 percent of the time).

¹⁸⁵ *Id.*, citing Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L Rev 482, 550–51 (1981). Defendants prevailed either by motion or at trial in the disposition of 41 percent of cases involving claims of false arrest, excessive force, improper search, seizure, and police harassment, in contrast to a defendant’s success rate of 68 percent in nonpolice cases brought under § 1983. Kreimer, 136 U Pa L Rev at 877–78 n 111 (cited in note 4).

successful class of constitutional tort litigation.”¹⁸⁶ In general, police misconduct cases have a significantly greater chance of success than other § 1983 cases.¹⁸⁷ Additionally, although there is little data on the number of unreported police misconduct cases, the studies undertaken in Philadelphia suggest that the number of unreported cases may be quite large.¹⁸⁸ The difficulty in measuring the number of unreported cases is compounded by an increasingly common police practice: the police offer to drop the charges in return for the citizen waiving his right to sue.¹⁸⁹ These studies indicate nuisance suits are not a significant problem in the false arrest context. Placing the burden of persuasion on the plaintiff will further discourage frivolous suits. Additionally, summary judgment is still available for the defendant officer at the end of the plaintiff’s case if the testimony from the plaintiff’s own witnesses proves the existence of probable cause.¹⁹⁰

CONCLUSION

The optimal allocation of the burden of proof in a § 1983 unconstitutional false arrest case consistently places the burden of proof on the defendant to show probable cause for the arrest. Once the plaintiff has demonstrated an arrest without a warrant, the burden shifts to the defendant to provide evidence of probable cause for the arrest. If the defendant demonstrates probable cause, then the burden shifts back to the plaintiff to rebut the evidence of probable cause if possible. This allocation of the burden of proof comports with the common law and the majority of circuits to consider the issue. Further, this allocation best serves the policies underlying § 1983, because it provides the optimal level of deterrence for police officers while allowing citizens to vindicate their constitutional rights.

¹⁸⁶ Stewart J. Schwab and Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L Rev 719, 734–35 (1988). In the study, constitutional tort cases in general were successful only 12.6 percent of the time, but constitutional tort cases against the police were successful in 60 percent of the cases filed. *Id.* at 728, 735.

¹⁸⁷ Theodore Eisenberg and Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L Rev 641, 690–91 (1987). In the study, the two most successful constitutional tort actions were those against police, with a 57 percent success rate, and employment discrimination actions, with a 62 percent success rate. The average success rate for all other constitutional tort actions was 30 percent.

¹⁸⁸ See, for example, *Council of Organizations on Philadelphia Police Accountability and Responsibility*, 357 F Supp at 1294–1315 (finding evidence of numerous violations of citizens’ rights by police).

¹⁸⁹ Consider Kreimer, 136 U Pa L Rev at 851 (cited in note 4) (explaining the practice of release agreements).

¹⁹⁰ See *Gilker*, 576 F2d at 246.