

BURDENS OF PROOF AND QUALIFIED IMMUNITY

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I. INTRODUCTION

Much has been said in recent years about the need for jurists to stop speaking in “legalese” and, instead, communicate in the vernacular so that non-lawyers can understand legal institutions and processes.¹ Sometimes, though, a legal concept is so murky that even jurists are unclear as to the meaning. And sometimes, murky areas of the law intersect to create inconsistencies so wide that they span jurisdictions across the country and so deep that they resist comprehension even among otherwise astute judges and academics.

One long-standing area of confusion among the legal community is the treatment and understanding of burdens of proof. “Burden of proof” is not a phrase that is readily unpacked; instead, it has multiple possible meanings. Moreover, the purposes of the various burdens of proof are indeterminate, often no more concrete than a debater’s point among academics.

Another area of disarray is the topic of § 1983 suits and, specifically, defenses to such a suit, including qualified immunity and the defense of good-faith and probable cause. How exactly are these two defenses—one termed an immunity, the other a mere defense—related?

These two baffling areas of the law collide when courts must allocate burdens of proof for both the qualified immunity and good-faith and probable cause defense inquiries. This paper seeks to add some clarity to § 1983 suits by arguing that: courts should recognize that the good-faith and probable cause defense to warrantless arrests in § 1983 actions has been replaced by qualified immunity under modern Supreme Court jurisprudence (at least when the defendant is a government official); the burdens of proof for the defendant should therefore be aligned similarly, no matter whether the immunity defense is invoked at the pre-trial “immunity stage” or, subsequently, as essentially an affirmative defense at the “merits stage;” and the United States Supreme Court, should it revisit the issue, should

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1. See, e.g., Julie A. Baker, *And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 UMKC L. REV. 287 (2011).

place the most important burden of proof in the inquiry—whether the defendant acted objectively reasonably—on the defendant.

Part II of this Article will lay the groundwork for the rest of this piece. First, this Part will outline the burden of proof landscape, distinguishing the burdens of pleading, production, and persuasion. Next, this Part will briefly explore the nature of § 1983 actions and defenses. Lastly, this Part will set forth the meanings of affirmative defenses and qualified immunity.

Part III surveys jurisdictions² across the country to determine how they allocate the burdens of proof in the good-faith and probable cause defense context and in the qualified immunity context. Among those courts dealing with the good-faith and probable cause defense, several have explicitly discussed the burdens of proof, but few have distinguished between the different burdens of proof at issue, let alone sought to properly sort them. Similarly, among those courts dealing with qualified immunity, some have spoken generally about the burden of proof, but few have recognized the widespread disagreement on the issue and the contradictory forces at play.

Part IV will analyze the evolution of the good-faith and probable cause defense into modern-day qualified immunity over the past few decades in the Supreme Court. The historical development of the defense will shed light on its current puzzling state, concluding that, under current Supreme Court precedent, allocation of the burdens of proof in the multi-stage qualified immunity inquiry depends on the stage: some burdens are on the defendant, one burden is on the plaintiff and one burden remains unallocated.

Finally, Part V will determine, based on policy considerations, which party should bear the burdens of proof when qualified immunity is at issue.

II. LEGAL LANDSCAPE: BURDENS OF PROOF AND § 1983 ACTIONS

To begin the analysis, this Article must set forth the basic framework of the critical concepts at issue. First, this Part will unpack the burdens of proof; second, it will provide a brief background of § 1983 actions; and finally, it will sketch out the differences between an affirmative defense on the merits and an immunity defense.

2. This Article will examine only the federal Court of Appeals, under the assumption that most § 1983 suits occur in federal courts, though state courts can, and do, entertain § 1983 proceedings as well. *See Haywood v. Drown*, 556 U.S. 729, 736-41 (2009) (holding that state courts must entertain § 1983 suits).

A. Burdens of Proof

The first observation that must be made when discussing burdens of proof is that, “[l]ike many other phrases in our legal lexicon, *onus probandi*, Latin for ‘burden of proof,’ has assumed many—perhaps too many—meanings.”³ There are in fact two such burdens: the burden of production and the burden of persuasion.⁴ “The burden of proof is more frequently used to refer to the latter concept, which is also referred to as the risk of nonpersuasion.”⁵ Meanwhile, the burden of production is often framed as a duty to produce a prima facie case to the judge’s satisfaction so that the case may survive a pre-verdict adverse judgment.⁶

The burden of persuasion is simply the burden of persuading a trier of fact that the law and the disputed facts together compel a particular conclusion. The burden of persuasion does not shift; it remains on the party who carries that burden at the beginning of the case. On the other hand, although one party generally will shoulder both the burdens of persuasion and production, the burden of production does sometimes shift from party to party. Unlike the burden of persuasion, the burden of production is much more limited in its effect. A party bearing the burden of production need not prove that the facts as a whole compel some conclusion, but rather that the facts produced, if undisputed, require a particular legal result. The burden of production asks whether the party who bears that burden is entitled to have the trier of fact decide the ultimate issue in the case.⁷

Therefore, in most cases, the burden of proof is functionally singular: the party with the burden of persuasion also bears the burden of production. But one should keep in mind that this is simply the general rule, subject to exceptions. “Although the party with the burden of persuasion usually has the burden of production, situations arise which necessitate splitting the burdens.”⁸ Some believe the distinction is

3. Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L.REV. 2859, 2885 (1999) (italics added).

4. *Id.*

5. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2487, at 292 (J. Chadbourne rev. 1981); see also Candace S. Kovacic-Fleischer, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics As Substance*, 39 AM. U. L. REV. 615, 620 (1990).

6. WIGMORE, *supra* note 5, §2485, at 285; see also Thomas E. Raccuia, Note, *RLUIPA and Exclusionary Zoning: Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases*, 80 FORDHAM L. REV. 1853, 1862, (2012) (“Satisfaction of the burden of production is often referred to as making a ‘prima facie case.’ . . . [O]nce the party charged with the burden of production establishes a prima facie case, the burden of persuasion shifts to the opposing party.”).

7. Colella & Bain, *supra* note 3, at 2886-87.

8. Kovacic-Fleischer, *supra* note 5, at 623.

harmful,⁹ or, similarly, that the two burdens are actually the same.¹⁰ However, the distinction is widely recognized and applied by courts.

When confronting the difficulty in sorting out the two burdens, an obvious question presents itself: how are the burdens allocated? As it turns out, no one rule determines how either burden is allocated: policy, convenience, fairness, and probability all can play roles.¹¹

The existing literature on the burden of proof has sought the rule's reason for existence solely within the court's problem of decision making under uncertainty. Although this search has yielded many insights, it has been less successful in providing a compelling explanation for why uncertainty in the court's final assessment should act to the detriment of one party rather than the other.¹²

The need for a burden of persuasion as a tie-breaker seems obvious, as does the need for a burden of production to expedite litigation; the controversy begins when assigning the burdens, as will be seen in Part III. Before moving on, let it be noted that this Article will use the phrase "burdens of proof" to mean both the burden of persuasion and the burden of production.

B. Section 1983 Actions

Turning to the substantive law at issue in this Article, originally enacted under section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983 allows for suits against public officials for violations of civil rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's

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9. See generally Ronald Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151 (1972).
 10. See generally John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955).
 11. Kovacic-Fleischer, *supra* note 5, at 622-23.
 12. Chris William Sanchirico, *The Burden of Proof in Civil Litigation: A Simple Model of Mechanism Design*, 17 INT'L REV. L. & ECON. 431, 431 (1997).

judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.¹³

Much has been written about § 1983 actions, as they have been the subject of debate in courtrooms and classrooms for years, even involving issues as grand as the Eleventh Amendment.¹⁴ Despite this effort, qualified immunity law remains a mess.¹⁵ This Article is concerned primarily with one of the messier areas: defenses to § 1983 suits and, specifically, qualified immunity and the good-faith and probable cause defense.

As a general matter, “[w]hen qualified immunity is asserted as a defense, the critical issue is whether the defendant official violated federal law that was clearly established at the time she acted.”¹⁶

In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Supreme Court articulated a mandatory two-step sequence for resolving government officials’ qualified immunity claims. “*Saucier* required that lower courts consider first, whether the challenged conduct, viewed in the light most favorable to the plaintiff, would actually amount to a violation of [constitutional or] federal law, and second, if a violation has been alleged, whether the right was clearly established at the time of the alleged government misconduct.” *Wernecke v. Garcia*, 591 F.3d 386, 392 (5th Cir. 2009) (internal citations and quotation marks omitted). In *Pearson v. Callahan*, the Court reconsidered the *Saucier* procedure, determined that “while the [two-step] sequence . . . is often appropriate, it should no longer be regarded as mandatory,” and gave lower courts “permi[ssion] to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” 555 U.S. 223, 236, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009).¹⁷

Whether the law is clearly established depends not only on whether the legal precedent was clear,¹⁸ but also on whether a reasonable officer could have been mistaken as to the law.¹⁹ As the Supreme Court stated in

13. 42 U.S.C. § 1983 (2012).

14. See, e.g., *Howlett By and Through Howlett v. Rose* 496 U.S. 356, 365 (1990).

15. John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 204 (2008) (“Given the byzantine nature of its ground rules, it will come as no surprise that constitutional tort law is beset with disputes that devour judicial resources but frequently have little bearing on the ultimate liability question that prompted the lawsuit in the first place.”).

16. Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 866 PLI/Lit 31, 88 (2011).

17. *Cantrell v. City of Murphy*, 666 F.3d 911, 919 (5th Cir. 2012).

18. See, e.g., *Osolinski v. Kane* 92 F.3d 934, 936 (9th Cir. 1996) (“Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established.”).

19. See, e.g., *Kuha v. City of Minnetonka*, 365 F.3d 590, 601-02 (8th Cir. 2004).

The second step of the qualified immunity inquiry will still shield the officers from suit, however, if their conduct was objectively legally reasonable in light of the

Anderson v. Creighton, “whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action.”²⁰ The Court further explained:

[Supreme Court] cases establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.²¹

Some courts and commentators have confused where the “objectively legally reasonable” test comes into play,²² but after *Pearson*, there can be no doubt: it is part of the “clearly established law” prong. “An officer . . . is entitled to qualified immunity where clearly established law does not show that [the action] violated the [constitution]. This inquiry turns on the ‘objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.’”²³

Beyond these two famous steps (which this Article will refer to as the *Pearson* steps), there are two other qualified immunity inquiries: the

information they possessed at the time of the alleged violation Kuha's right to a verbal warning in this case was not clearly established at the time of the seizure.

Id.

20. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).
21. *Id.* at 640; *see also, e.g.*, *Taravella v. Town of Wolcott*, 599 F.3d 129, 133 (2d Cir. 2010) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (“To be clearly established, [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”); *Id.* (quoting *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 66 (2d Cir. 1999)) (“An official is therefore entitled to immunity if his action was ‘objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken.’”).
22. *See, e.g.*, Eve Gates, *Tell It to the Judge: Brady, Baker, and the First Circuit Decision Allowing Police to Detain Suspects They Know to Be Innocent*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 229 n.43 (splitting the “clearly established” prong from the “objectively legally reasonable prong”). In addition, the United States Court of Appeals for the First Circuit has stated:

This Court has identified a three-step process for evaluating qualified immunity claims: (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.
23. *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 141 (1st Cir. 2001).
23. *Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009) (citations omitted). The First Circuit has since noted, though, that this splitting of the “clearly established” and “objectively reasonable” prongs does not change the analysis as dictated by the Supreme Court. *Jennings v. Jones*, 499 F.3d 2, 10-11 (1st Cir. 2007) (“Although this inquiry subdivides the second prong of the *Saucier* analysis into two separate questions, it is functionally identical to that analysis.”).

threshold question of whether a particular defendant is entitled to assert the immunity defense²⁴ and the final question (if raised by the defendant) of whether a defendant has extraordinary circumstances excusing him or her from otherwise failing the qualified immunity test.²⁵ These lesser-known inquiries will also be dealt with in this Article.

Finally, with regard to the good-faith and probable cause defense, the critical issue is whether the defendant-official acted either without malice or with probable cause.²⁶ It remains unclear whether the analysis of the defendant is a subjective state-of-mind inquiry or, instead, an objective reasonable belief examination.²⁷

C. Affirmative Defenses and Immunity Defenses

Having broached the topics of the good-faith and probable cause defense and qualified immunity, this Article should briefly note the general differences between a defense from liability and a defense from suit. A defense from suit often comes in the form of an affirmative defense that admits the elements of the claim but seeks to justify, excuse, or mitigate the commission of the act.²⁸ This is in contradistinction to the old pleading device, the traverse, which denied one or more of the elements of the plaintiff's case.²⁹ Thus, affirmative defenses are a defense to liability, not a defense from suit.

Qualified immunity, in contrast, is supposed to operate before the merits arise.³⁰ “The qualified immunity defense has come to represent not

24. *Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) (determining whether certain defendants are entitled to assert qualified immunity).

25. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (“[I]f the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.”); *but see* John M. Greabe, *Objecting at the Altar: Why the Herring Good Faith Principle and the Harlow Qualified Immunity Doctrine Should Not Be Married*, 112 COLUM. L. REV. SIDEBAR 1, 11 (2012) (questioning whether the “extraordinary circumstances” step remains good law given that it has not been invoked even once by the Supreme Court since *Harlow*, and further noting that its inevitably subjective focus is at odds with the rest of the qualified immunity analysis).

26. Mark N. Ohrenberger, Note, *Prison Privatization and the Development of a “Good Faith” Defense for Private-Party Defendants to 42 U.S.C. § 1983 Actions*, 13 WM. & MARY BILL RTS. J. 1035, 1045 (2005).

27. *Id.* at 1055.

28. *See, e.g.*, *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011); *Friolo v. Frankel*, 28 A.3d 752, 782 (Md. App. 2011); *Belt v. Wright County, Mo.*, 347 S.W.3d 665, 669 (Mo. Ct. App. 2011).

29. BLACK’S LAW DICTIONARY (9th ed. 2009) (defining traverse as a common-law pleading that formally denies a factual allegation in the other party’s pleading).

30. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

just a defense to liability, but a defense from suit.”³¹ As will be seen later, though, qualified immunity often fails to defend officials from suit and, instead, becomes simply another defense on the merits.

Despite these (at least theoretical) differences between an affirmative defense on the merits and a qualified immunity from suit, the two concepts are often interchanged, if not outright conflated. Many circuits denote qualified immunity as an affirmative defense,³² and the Supreme Court has even done so on occasion.³³ If qualified immunity is, at least in some instances, an affirmative defense, what does that entail regarding the burdens on litigants? Must the defendant take on the burden to plead, and perhaps the burdens of proof?³⁴ We turn now to the answers as currently given in the federal circuits across the nation.

III. BURDEN ALLOCATION AND CHARACTERIZATION OF THE DEFENSES BY JURISDICTION

There is no doubt that governmental officials who find themselves defendants in § 1983 suits can defend themselves by invoking qualified immunity. But in other cases, government officials have invoked an apparently different creature: the good-faith and probable cause defense. Adding to the complexity, the allocation of the burdens of proof for either the immunity or the defense is a question with different answers, depending on jurisdiction. The first section of this Part will examine the allocation of the burdens of proof in cases examining qualified immunity, and the second will look at the allocation of burdens of proof in cases examining the good-faith and probable cause defense.

A. Qualified Immunity in the Circuits

The Supreme Court may have smoothed out some of the edges of qualified immunity law over time, but it has left the law regarding burdens of persuasion and production quite nebulous. “The Supreme Court has never clarified whether the plaintiff or the defendant bears the burden of

31. Maia R. Albrecht, Comment, *Defining Qualified Immunity: When is the Law “Clearly Established?”* (Herring v. Keenan, 218 F.3d 1171 (10th Cir. 2000)), 40 WASHBURN L. J. 311, 318 (2001).

32. See, e.g., Lore v. City of Syracuse, 670 F.3d 127, 149 (2d Cir. 2012); Beers-Capitol v. Whetzel 256 F.3d 120, 142 (3d Cir. 2001); Holland *ex rel.* Overdorff v. Harrington 268 F.3d 1179, 1185 (10th Cir. 2001).

33. Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (“This option exists even if the official chooses not to plead the affirmative defense of qualified immunity.”).

34. See *infra* Part III.A.

persuasion on the defense of qualified immunity.”³⁵ At one time, it appeared that all of the circuits agreed that the defendant had the burden.³⁶ As might be expected, though, a circuit split has formed over time. Commentators have pointed out this open issue for over two decades, citing conflicting decisions among the federal courts, but the disarray continues.³⁷

The allocation of the burden of persuasion varies by circuit and sometimes even step by step, though the burden of pleading at least seems always to be on the defendant³⁸ and the burden of production apparently has not been an issue in the qualified immunity context, presumably because courts have not sought to separate the burdens of proof in this situation.

[T]he circuits disagree as to which party has the ultimate burden of proof. The majority of circuits hold that once the defendant has raised the qualified immunity defense, the burden then shifts to the plaintiff to demonstrate that the defendant violated a constitutional right that was clearly established at the time of the alleged conduct.³⁹

We should now determine whether this tally is current.

1. *Burden of Persuasion on Plaintiff*

Currently, it appears that five circuits place the burden of persuasion as to both of the major *Pearson* steps in the qualified immunity inquiry on

35. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 91 (1997).

36. Gary S. Gildin, *The Standard of Culpability in Section 1983 Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 596 n.214 (1983).

37. Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 634-37 (1989); David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 207 (1994) (“The burden of proof on qualified immunity, however, presently is unclear.”); A. Allise Burris, Note, *Qualifying Immunity in Section 1983 & Bivens Actions*, 71 TEX. L. REV. 123, 165-68 (1992) (noting confusion about burden of persuasion for qualified immunity); Kathryn Dix Sowle, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion*, 55 TUL. L. REV. 326, 340 (1981). Another commentator has stated:

It is noteworthy that while the lower courts have struggled to modify summary judgment procedures to fit the special case of qualified immunity, they have failed to address a foundational question at the heart of summary judgment: where and how to allocate the burden of persuasion on a qualified immunity defense The Supreme Court has never clarified whether the plaintiff or the defendant bears the burden of persuasion on the defense of qualified immunity.

Chen, *supra* note 35, at 90-91.

38. Regarding absolute immunity, the burden is also on the defendant to plead the defense, or else waive it. *See, e.g., Cozzo v. Tangipahoa Parish Council-President Gov’t*, 279 F.3d 273, 283 (5th Cir. 2002). At least one commentator believes, though, that, under a certain reading of Supreme Court precedent, absolute immunity is not able to be waived because it is an argument that the plaintiff has not stated a claim on which relief may be granted. Greabe, *supra* note 15, at 208 n.98.

39. Rebecca Aviel, *Restoring Equipose to Child Welfare*, 62 HASTINGS L.J. 401, 440 n.203 (2010).

the plaintiff: the Fifth,⁴⁰ Sixth,⁴¹ Seventh,⁴² Tenth,⁴³ and Eleventh⁴⁴ Circuits. While these circuits may not break down the allocation of the burden of proof either by the two burdens in play (persuasion and production) or by the two steps involved in the immunity inquiry, it is reasonable to assume that both burdens are on the plaintiff for both steps.

2. *Burden of Persuasion on Defendant*

On the other side of the ledger, it appears that five circuits place the burden of persuasion as to the *Pearson* steps in the qualified immunity inquiry on the defendant: the First,⁴⁵ Second,⁴⁶ Third,⁴⁷ Ninth,⁴⁸ and D.C.⁴⁹

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40. *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) (“Although nominally an affirmative defense, the plaintiff has the burden to negate the assertion of qualified immunity once properly raised.”); *Calton v. Livingston*, 2011 WL 2118700, at *9 (S.D. Tex. 2011) (“An official need only plead his good faith, which then shifts the burden to the plaintiff, who must rebut the defense by establishing that the official’s allegedly wrongful conduct violated clearly established law.”).
41. *Tindle v. Enochs*, 420 F. App’x 561, 563 (6th Cir. 2011). The court held:
 The plaintiff bears the burden of proof in showing that the defendant is not entitled to qualified immunity by proving “both that, viewing the evidence in the light most favorable to [the plaintiff], a constitutional right was violated and that the right was clearly established at the time of the violation.”
Id.
42. *Erwin v. Daley*, 92 F.3d 521, 525 (7th Cir. 1996) (“Once a public official raises the defense of qualified immunity, the plaintiff bears the burden of proof on the issue.”).
43. *Justus v. Maynard*, 1994 WL 237513, at *1-2 (10th Cir. 1994) (“Although qualified immunity is a defense which must be pleaded by the defendant, once the defendant raises qualified immunity, the burden of proof is on the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct.”) (citations omitted).
44. *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) (“Once an officer or official has raised the defense of qualified immunity, the burden of persuasion as to that issue is on the plaintiff.”).
45. *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 35 (1st Cir. 2001) (“Qualified immunity is an affirmative defense, and thus the burden of proof is on defendants-appellants.”).
46. *Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011) (“Qualified immunity, an affirmative defense as to which the defendants have the burden of proof . . .”).
47. *Reiff v. Marks*, 2011 WL 666139, at *5 (E.D. Pa.2011) (“Qualified immunity is an affirmative defense for which the defendants bear the burden of proof.”).
48. *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005) (“Because the moving defendant bears the burden of proof on the issue of qualified immunity, he or she must produce sufficient evidence to require the plaintiff to go beyond his or her pleadings.”). On prior occasions, though, the Ninth Circuit split the burden of proof as between the elements. *See, e.g., DiRuzza v. Cnty. of Tehama*, 206 F.3d 1304, 1313 (9th Cir. 2000) (“While the plaintiff bears the burden of proof regarding whether the right is clearly established, a defendant must prove that his or her conduct was reasonable.”). Fittingly, the district courts in the circuit are at odds. *Compare Jones v. Martel*, 2011 WL 720066, at *6 (E.D. Cal. 2011) (“Because qualified immunity is an affirmative defense, the burden of proof initially lies with the official asserting the defense.”), *Benigni v. City of Hemet*, 879 F.2d 473, 479-80 (9th Cir. 1989), *and Dupris v. McDonald*, 2012 WL 210722, at *3 (D. Ariz. 2012) (“Qualified immunity is an affirmative defense. The defendant asserting qualified immunity bears the burden of both pleading and proving the defense.”), *with Bell v. City of Los Angeles*, 835 F. Supp. 2d 836, 844 (C.D. Cal. 2011) (“Although it is defendants who interpose the defense or privilege of qualified immunity, the plaintiff has the burden of proof on these two elements.”).

circuits. Again, while these circuits may not break down the allocation of the burden of proof either by the two burdens in play (persuasion and production) or by the two steps involved in the immunity inquiry, it seems reasonable to assume that both burdens are on the defendant for both steps.

3. *Split Burden of Proof*

Finally, two circuits appear to split the two major steps as between the parties: the Fourth⁵⁰ and the Eighth Circuits.⁵¹ In yet another twist, the two circuits allocate the two steps differently, with the Fourth Circuit placing the burden of establishing that the law was clearly established on the defendant and that the defendant did not violate a constitutional right on the plaintiff, and the Eighth Circuit doing just the opposite.

4. *Final Tally on Qualified Immunity*

To sum up the qualified immunity tally: on the one side are the First, Second, Third, Fourth, Ninth, and D.C. Circuits, placing the burdens of proof for both major steps on the defendant; on the other side are the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, placing the burdens of proof for both major steps on the plaintiff; and in between are the Fourth and Eighth Circuits, splitting the burdens by step, but differently from each other.⁵²

49. *Reuber v. United States*, 750 F.2d 1039, 1057 n.25 (D.C. Cir. 1984) (“Qualified immunity is an affirmative defense based on the good faith and reasonableness of the actions taken and the burden of proof is on the defendant officials.”).

50. *Bryant v. City Of Cayce*, 332 F. App’x 129, 132 (4th Cir. 2009). The court held:
 When government officials properly assert the defense of qualified immunity, they are entitled to summary judgment if either (1) the facts the plaintiff has alleged or shown do not make out a violation of a constitutional right—a question on which the plaintiff bears the burden of proof; or (2) the right at issue was not “clearly established” at the time of the defendant’s alleged misconduct—a question on which the defendant bears the burden of proof.

Id.; but see *Henry v. Purnell* 501 F.3d 374, 378 n.4 (4th Cir. 2007) (recognizing intra-circuit conflict as to which party bears the burden in proving or disproving that the law was clearly established); see also Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 20-22 (2009) (noting that the Fourth Circuit has adopted the “earliest-decided rule,” in which the earliest precedent on an intra-circuit split issue controls over the later precedent).

51. *Wagner v. Jones*, 664 F.3d 259, 273 (8th Cir. 2011) (“Qualified immunity is an affirmative defense for which the defendant carries the burden of proof. The plaintiff, however, must demonstrate that the law is clearly established.”); see also Mary A. McKenzie, *The Doctrine of Qualified Immunity in Section 1983 Actions: Resolution of the Immunity Issue on Summary Judgment*, 25 SUFFOLK U. L. REV. 673, 696-97 (1991).

52. For a similar tally, see Brett Dignam, 224 PLI/Crim 321, 333-334 (2010). Dignam noted:
 Qualified immunity is considered an affirmative defense, which implies that the defendant bears the burden of pleading and proving it. However, several circuits have adopted a more nuanced approach. On one extreme are the Seventh and Tenth Circuits,

B. The Good-Faith and Probable Cause Defense in the Circuits

If the circuits are in disarray as to which party bears the burden of proof on the major steps in a qualified immunity inquiry, then the situation is, if anything, worse when it comes to allocating the burden of proof in a good-faith and probable cause defense inquiry. “[T]here is a difference of opinion in the federal courts as to the burden of proof applicable to § 1983 unconstitutional false arrest claims.”⁵³ The same situation arises for private defendants, as “[a] point of contention among courts ruling on a good faith defense for private § 1983 defendants is determining where to place the evidentiary burdens.”⁵⁴ The circuits disagree not only as to which party should bear the burdens of proof, but also as to how the two distinct burdens of proof should be split (if at all) between the parties.

1. *Burden of Persuasion on the Plaintiff, Burden of Production Unallocated*

It appears that the Fifth and Eleventh Circuits are in favor of placing the burden of persuasion on the plaintiffs.⁵⁵ The Fifth Circuit case of *Crowder v. Sinyard*, written strongly in favor of the government’s position, would suggest that both burdens of proof should be thrust upon the plaintiff, but the case apparently deals only with the burden of persuasion, as the case concerns jury instructions.⁵⁶ Similarly, the Eleventh Circuit case of *Rankin v. Evans* apparently concerns only one burden, the burden of persuasion, as the case concerned a *judgment non obstante verdicto* (JNOV).⁵⁷ Granted, when dealing with a JNOV, or a directed verdict for

which have stated that the plaintiff has the burden of proof in qualified immunity cases. On the other end are the First, Second, Fourth, and Ninth Circuits, which place the burden of both pleading and proving an entitlement to qualified immunity on the defendant. In between are the circuits that have adopted burden-shifting frameworks. In the Fifth, Sixth, and Eleventh Circuits, once the defendant asserts the defense by showing that the defendant was acting within his discretionary authority at the time of the alleged unlawful conduct, or that he acted in good faith, the burden of proof “shifts . . . to the plaintiff to show that the defendant is not entitled to qualified immunity.”

Id. While this taxonomy of the courts generally mirrors mine, I find that the crucial difference is that the author of the cited article in this footnote apparently presumed that the Seventh and Tenth Circuits actually placed the “entitlement” burden on the plaintiff. But I could not find any precedent in any Circuit suggesting that the plaintiff must prove that a defendant does not have job meriting qualified immunity protection. This issue is discussed further in Part III.B, *infra*.

53. *Davis v. Rodriguez*, 364 F.3d 424, 434 n.8 (2d Cir. 2004).

54. *Ohrenberger*, *supra* note 26, at 1051.

55. *Crowder v. Sinyard* 884 F.2d 804, 825 (5th Cir. 1989); *Rankin v. Evans* 133 F.3d 1425, 1436 (11th Cir. 1998).

56. *Crowder*, 884 F.2d at 824.

57. *Rankin*, 133 F.3d at 1435.

that matter, either burden of proof can be at issue.⁵⁸ Yet the context of the JNOV discussion indicates that the JNOV was granted based on the weight of the evidence, not on a failure to produce.⁵⁹

2. *Burden of Persuasion on Plaintiff, Burden of Production on Defendant*

Moving along, the Ninth and Tenth Circuits place the burden of production on the defendant while keeping the burden of persuasion on the plaintiff.⁶⁰ The Second and Seventh Circuits may also adopt this position, though this cannot be said for certain. These latter two circuits are clear that the burden of persuasion remains with the plaintiff, but allocation of burden of production is not firmly set. A close reading of relevant precedent suggests, though, that the burden is probably with the defendant.⁶¹

3. *Both Burdens on Defendant*

No federal case has explicitly shifted both burdens onto the defendant. However, there is precedent that comes close to this position. First, the Third Circuit nearly adopted this position, speaking favorably so in dicta,⁶² and might have actually done so in a later case,⁶³ though the opinion leaves room for doubt. At least one court believes the Third Circuit has “undisputably” thrust both burdens onto the defendant,⁶⁴ but this author hesitates to use such unequivocal language. Second, the Sixth Circuit may have thrust the entire burden of proof upon the defendant, though the case did not ever mention the good-faith and probable cause defense.⁶⁵

58. Compare Michael A. Mugmon, *Allocation of the Burden of Proof in Individuals with Disabilities Education Act Due Process Challenges*, 29 VT. LAW REV. 951, 956 n.26 (2005) (“For example, it encompasses the burden of production, which requires the plaintiff to produce sufficient evidence during his case-in-chief on each element of his claim or otherwise suffer an adverse directed verdict”), with Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 128 (2002) (“If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial.”) (footnote omitted).

59. *Rankin*, 133 F.3d at 1435.

60. *Dubner v. City & Cnty. of S.F.*, 266 F.3d 959, 965 (9th Cir. 2001); *Martin v. Duffie*, 463 F.2d 464, 469 (10th Cir. 1972).

61. *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991); *Bogan v. City of Chicago*, 644 F.3d 563, 570 n.4 (7th Cir. 2011).

62. *Patzig v. O’Neil*, 577 F.2d 841, 849 n.9 (3d Cir. 1978).

63. *Losch v. Borough of Parkesburg, Pa.*, 736 F.2d 903, 909 (3d Cir. 1984).

64. *Der v. Connolly*, No. 08-CV-6409, 2011 WL 31498, at *2 (D. Minn. Jan. 5, 2011).

65. *Tarter v. Raybuck*, 742 F.2d 977, 978-79 (6th Cir. 1984).

Moreover, the Ninth Circuit, in applying Arizona law, found that the defendant bears the burdens of both production and persuasion.⁶⁶

4. *Final Tally on Good-Faith and Probable Cause Defense*

To sum up the good-faith and probable cause defense tally: the Fifth and Eleventh Circuits place at least the burden of persuasion, and possibly the burden of production, on the plaintiff; the Ninth, Tenth, and probably the Second and Seventh Circuits place the burden of persuasion on the plaintiff, but place the burden of production on the defendant; and the Third and Sixth Circuits might place both burdens on the defendant, leaving the First, Fourth, Sixth, Eighth,⁶⁷ and D.C. Circuits unaccounted for.⁶⁸

IV. AFFIRMATIVE DEFENSE OR IMMUNITY DEFENSE?

Having now surveyed the circuits' positions on the qualified immunity and good-faith and probable cause defenses with regard to the burden(s) of proof, we now turn to mining Supreme Court precedent in the hopes of finding precedent that settles the issue, at least as a matter of doctrine, leaving the policy issues for the final Part of this Article.

A. The Good-Faith Defense Is Born

The dawn of the good-faith and probable cause defense, and thus the germ of qualified immunity, came in *Pierson v. Ray*.⁶⁹ In that case, police officers had arrested ministers for congregating with others in a public place under such circumstances that a breach of peace may be occasioned thereby and refusing to move on when ordered to do so by a police officer.⁷⁰ After being convicted in a municipal court, the ministers

66. *Gasho v. United States*, 39 F.3d 1420, 1427 (9th Cir. 1994).

67. The Eighth Circuit passed on the issue, but left mixed signals. *See Der*, 2011 WL 31498, at *2. In *Der*, the United States District Court for the District of Minnesota noted that:

The Eighth Circuit has not expressly decided who bears the burden of proof in a § 1983 action for a warrantless arrest or search, and language in *Creighton v. City of St. Paul*, 766 F.2d 1269 (8th Cir. 1985), can be read to support placing the burden on either the plaintiff or the defendant. *Compare id.* at 1272-73 (holding that defendant police officer “was not entitled to summary judgment because he has not proved . . . that he had probable cause” for a warrantless entry) *with id.* at 1277 (“If the [plaintiffs] can prove that the officers did not ask for permission to enter and did not explain their mission . . . then . . . the jury could find that the entry was not peaceable.”).

Id.

68. For a similar tally, *see id.* at *2 n.2.

69. *Pierson v. Ray*, 386 U.S. 547 (1967).

70. *Id.* at 549.

prevailed in a trial de novo in county court⁷¹ and proceeded to file a § 1983 action against the police officers in federal district court.⁷² Following a jury verdict in favor of the officers, the ministers appealed to the Fifth Circuit, which ultimately held that the officers could not rely on the defense of acting in good faith and with probable cause in making the arrest.⁷³ Certiorari was granted by the Supreme Court to review this holding.⁷⁴

The Supreme Court reversed the Fifth Circuit, holding that the defense of good faith and probable cause was available to officers in a § 1983 action.⁷⁵ In reaching this conclusion, the Court noted that this defense was also available to the analogous false arrest and imprisonment claim brought in the same suit.⁷⁶ After a thorough discussion of the incorporation of the common law into § 1983 jurisprudence, the Court determined that judicial immunity was a § 1983 defense.⁷⁷ Examining the history of the statute, the Court found that Congress did not indicate that it was abolishing the common-law immunities to false arrest claims: “The legislative record gives no clear indication that Congress mean to abolish wholesale all common-law immunities.”⁷⁸

This incorporation of the common law into § 1983 suits actually began prior to *Pierson*. For instance, *Pierson* itself cited *Monroe v. Pape*, in which the Supreme Court decided the mens rea applicable to § 1983 suits.⁷⁹ In *Monroe*, the Court determined that § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”⁸⁰ Many other Supreme Court cases affirmed the validity of looking to the common law when interpreting § 1983.⁸¹ Included among these are *Imbler v. Pachtman* and *Smith v. Wade*. *Imbler*, in finding that state prosecutors were absolutely immune from § 1983 suits, so long as they acted within the scope of their duties, stated that § 1983 “is to be read in harmony with general principles of tort

71. *Id.* at 549-50.

72. *Id.* at 550.

73. *Id.*

74. *Id.* at 551-52.

75. *Id.* at 557.

76. *Id.*

77. *Id.* at 553-56.

78. *Id.* at 554. Some commentators believe that *Pierson* may have gotten common law wrong. James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Law, 114 PENN. ST. L. REV. 1387, 1395 n.56 (2010) (“The Maine Supreme Court’s decision in *Merriam v. Mitchell* casts some doubt on the accuracy of the Court’s reconstruction of common law norms.”); Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 505 (2009).

79. *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

80. *Id.*

81. See Practising Law Institute, *Parallel Proceedings in Securities Cases*: United States v. Stein, 1644 PLI/Corp 165, 230 n.183 (2008) (collecting cases); but see United States v. Fausto, 484 U.S. 439, 454-55 (1988) (declining to apply the canon against derogation of the common law).

immunities and defenses, rather than in derogation of them.”⁸² Similarly, *Smith*, in finding that punitive damages are available in a § 1983 action, in part because individual public officers were liable in tort for such damages, advised that, “[i]n the absence of more specific guidance, we look[] first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute.”⁸³ These and other like-minded cases can ultimately be traced back to *Tenney v. Brandhove*, which first looked to the common law in interpreting § 1983 actions.⁸⁴ To explain the Court’s reference of the common law, one need only look to the judicial canon against the derogation of the common law.⁸⁵

Establishing that tort principles should inform a construction of § 1983 left many details to be sorted, though. The Court did clarify some points, such as that the defense of good faith and probable cause in § 1983 actions is “coextensive” with the defense as it existed at common law for false arrest actions.⁸⁶ But that still left multiple questions unanswered. Should we look more to the date of enactment in 1871 or to modern tort law? And, if jurisdictions were not in full agreement as to the particulars of the defense, how should we decide which jurisdiction’s requirements to adopt? In *Tenney* and *Pierson*, the Court looked to the common law as of 1871.⁸⁷ However, in *Imbler*, the Court relied on immunity that developed post-1871, citing a case from 1896 in Indiana.⁸⁸ Concerning the question of what is *the* common law, the Court has offered some clues. In *Imbler*, the Court invoked a majoritarian principle.⁸⁹

Going forward though, the Supreme Court is unlikely to use the common law as a source of law for the good-faith and probable cause defense. In *Harlow v. Fitzgerald*, the Court explicitly moved away from the common law, and towards policy considerations, in reformulating the defense of executive officials against § 1983 claims.⁹⁰ By the time of

82. *Imbler v. Pachtman* 424 U.S. 409, 419 (1976).

83. *Smith v. Wade* 461 U.S. 30, 34 (1983).

84. *Tenney v. Brandhove* 341 U.S. 367, 376 (1951).

85. *See Imbler*, 424 U.S. at 418 (“The decision in *Tenney* established that s [sic] 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.”); *see also, e.g., Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) (citing *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. 603, 604 (1812)).

86. *Imbler*, 424 U.S. at 418-19.

87. Anthony Meier, Note, *Prosecutorial Immunity: Can § 1983 Provide an Effective Deterrent to Prosecutorial Misconduct*, 30 ARIZ. ST. L.J. 1167, 1175 (1998).

88. *Id.*

89. *See Imbler*, 424 U.S. at 422 (“The Griffith view on prosecutorial immunity became the clear majority rule on the issue.”).

90. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

Harlow, the good-faith and probable cause defense had already evolved into a new creature, at least for government officials.

B. The Good-Faith Defense Evolves into Qualified Immunity

It was several years before *Harlow*, in the case of *Scheur v. Rhodes*,⁹¹ that the Court first held (or at least suggested) qualified immunity to § 1983 suits for officers of the executive branch, including the governor.⁹² *Wood v. Strickland*⁹³ then extended *Scheur*, adopting qualified immunity for school officials.⁹⁴ Next, *Imbler v. Pachtman*⁹⁵ granted qualified immunity to prosecutors.⁹⁶ The landscape of officials with immunity was becoming increasingly populated, with absolute immunity for judges⁹⁷ and qualified immunity for many executive officials. But how did the old-fashioned good-faith and probable cause defense fit into this picture? *Wood*, for instance, discussed this defense as it pertained to police officers before moving onto the qualified immunity discussion as regarding school officials.⁹⁸ It was plausible that some government officials had qualified immunity, while others, such as police officers, only had a good-faith defense on the merits.

Suddenly, in *Malley v. Briggs*,⁹⁹ the Court claimed that it had held in *Pierson* that police officers were eligible for qualified immunity.¹⁰⁰ Apparently, the species of good-faith and probable cause defense for government officials had evolved, *sub silentio*, into the much different, and more potent, animal of qualified immunity. While this development occurred without explanation, the distinction between the two species of defenses would soon be illuminated.

The Court distinguished qualified immunity from the good-faith and probable defense in *Wyatt v. Cole*.¹⁰¹ The six-member majority, in holding that private defendants did not qualify for qualified immunity, noted that they might still qualify for a good-faith defense upon remand.¹⁰² In a dissenting opinion, Chief Justice Rehnquist went further in fleshing out qualified immunity from good-faith defense, stating that while *Pierson* was

91. 416 U.S. 232 (1974).

92. *Id.* at 247-48.

93. 420 U.S. 308 (1975).

94. *Id.* at 320-21.

95. 424 U.S. 409, 418-22 (1976).

96. *Id.* at 420-22.

97. *Butz v. Economu*, 438 U.S. 478 (1978).

98. *Wood*, 420 U.S. at 317-19.

99. 475 U.S. 335 (1986).

100. *Id.* at 340.

101. 504 U.S. 158 (1992).

102. *Id.* at 168-69.

ambiguous as to whether officers had good-faith “defense” or “immunity,” subsequent case law made clear that officers possess an immunity defense.¹⁰³

After *Wyatt*, then, we have qualified immunity for government officials on the one hand and the good-faith and probable cause defense for private parties on the other hand. What do the various opinions say about the allocation of the burden of proof for qualified immunity? The majority did not seem to speak to it, but the other opinions did. Both Justice Kennedy in his concurrence and Chief Justice Rehnquist in his dissent stated that the burden of proof in a qualified immunity inquiry is on the defendants. Justice Kennedy, speaking also for Justice Scalia, declared this, saying: “[T]he immunity diverges from the common-law model by requiring the defendant, not the plaintiff, to bear the burden of proof on the probable-cause issue.”¹⁰⁴ Chief Justice Rehnquist, speaking also for Justices Souter and Thomas, echoed this sentiment: “[O]n remand[,] Respondents [defendants below] presumably will be required to show the traditional elements of a good-faith defense—either that they acted without malice *or* that they acted with probable cause. [T]his is precisely the showing that entitles a public official to immunity.”¹⁰⁵ Thus, even though he believed that the good-faith and probable cause “defense” at common

103. *Id.* at 176 n.1 (Rehnquist, C.J., dissenting); see Greabe, *supra* note 15, at 206 n.91 (“For example, at common law, the plaintiff needed to establish that the defendant acted with malice and without probable cause in order to make out a viable malicious prosecution or abuse-of-process claim.”) (citing *Wyatt*, 504 U.S. at 176 n.1 (Rehnquist, C.J., dissenting)); see also Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 187 (2008); Ohrenberger, *supra* note 26, at 1051. One commentator claims that, at least in the false arrest context, the good-faith and probable cause defense, as opposed to qualified immunity, is paramount. See Sarah Hughes Newman, Comment, *Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims Under § 1983*, 73 U. CHI. L. REV. 347, 351 (2006). (offering *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004), for the proposition that “the probable cause inquiry subsumes the qualified immunity question.”). However, *Escalera* actually states that:

Even if probable cause to arrest is ultimately found not to have existed, an arresting officer will still be entitled to qualified immunity from a suit for damages if he can establish that there was ‘arguable probable cause’ to arrest. . . . Thus, the analytically distinct test for qualified immunity is more favorable to the officers than the one for probable cause; ‘arguable probable cause’ will suffice to confer qualified immunity for the arrest.

Escalera, 361 F.3d at 743; see also Newman, *supra*, at 488 n.10 (offering *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982), for the proposition that, in the false arrest context, a probable cause inquiry is the same as a qualified immunity inquiry because the “Fourth Amendment rule on warrantless arrests is ‘clearly established law.’”). However, this no longer appears to be good law after *Anderson v. Creighton*, 483 U.S. 635 (1987), for the reason stated in *Escalera*: an officer can lack probable cause and still win on qualified immunity. *Escalera*, 361 F.3d at 743.

104. *Wyatt*, 504 U.S. at 172 (Kennedy, J., concurring).

105. *Id.* at 177 (Rehnquist, C.J., dissenting).

law actually put the burden on the plaintiff,¹⁰⁶ Chief Justice Rehnquist indicated his agreement with the proposition that the defendant carries the burden of proof under modern jurisprudence, whether framed as an immunity defense or a lesser defense.¹⁰⁷ Thus, five justices appear to place the burden on the defendant, and, while the other four justices (all in the majority) did not address this issue, one would not have expected at least two of them, Justices Stevens and Blackmun, constituting part of the liberal wing of the court at the time, to have disagreed.

As for the allocation of the burdens of proof for the modern good-faith and probable cause defense, which still applies to private defendants, the majority implies that the burdens of proof for good-faith defense is on defendant by calling it an “affirmative defense,” though the concurrence and dissent noted that the “defense” of good faith and probable cause was actually an element of the plaintiff’s case at common law.¹⁰⁸ But, as indicated above, even the dissent apparently accepted that the good-faith defense, notwithstanding the common law approach, was now an affirmative defense under § 1983 litigation, requiring the defendant to bear the burden of proof.¹⁰⁹ Thus, the signs in *Wyatt* pointed toward the good-faith and probable cause defense placing the burden on the defendant.

C. The Supreme Court’s Allocation of Burdens of Proof for Qualified Immunity

However, notwithstanding indications in *Wyatt* to the contrary, the Supreme Court, several years earlier, stated that the plaintiff has the burden of proof in the second *Pearson* qualified immunity step. In *Davis v. Scherer*, the Court declared that “[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.”¹¹⁰ The lower courts may

106. *Id.* at 176 n.1. Some have noted that placing the burden of proof on the defendant would accord with the common law rule that a warrantless arrest or seizure is *prima facie* illegal. See, e.g., Edmund L. Carey, Jr., Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1566 n.115 (1985). However, an attack on the validity of an arrest is a different issue than a cause of action against the arresting officer, and the burdens of proof need not be allocated similarly.

107. *Wyatt*, 504 U.S. at 177 (Rehnquist, C.J., dissenting) (“I think our prior precedent establishes that a demonstration that a good-faith defense was available at the time § 1983 was adopted does, in fact, provide substantial support for a contemporary defendant claiming that he is entitled to qualified immunity in the analogous § 1983 context.”).

108. *Id.* at 172 (Kennedy, J., concurring).

109. *Id.* at 177 (Rehnquist, C.J., dissenting) (“Respondents presumably will be required to show the traditional elements of a good-faith defense—either that they acted without malice or that they acted with probable cause.”).

110. 468 U.S. 183, 197 (1984).

not agree on this issue,¹¹¹ but the Supreme Court's language is clear and appears as part of the holding at the very end of the opinion.¹¹² The answer to the first step of the *Pearson* inquiry, though, remains elusive.

Courts and academics have looked to several other Supreme Court cases for answers as to the allocation of the burdens of proof for qualified immunity, but, as this Article will show, none of them actually answers the question. In *Dennis v. Sparks*¹¹³ the Court noted that “[t]he immunities of state officials that we have recognized for purposes of § 1983 are the equivalents of those that were recognized at common law . . . and the burden is on the official claiming immunity to demonstrate his entitlement.”¹¹⁴ While this declaration may appear to answer the question of this article, there are two reasons for caution. First, given that the common law no longer controls § 1983 jurisprudence,¹¹⁵ *Dennis*'s precedential value is diminished. Second, as used in *Dennis*, demonstrating “entitlement” to immunity is not “proving” immunity in the sense of proving the two critical steps from the *Pearson* or, at that time, *Harlow* inquiry. *Harlow* was not decided until after *Dennis*. Moreover, the context of the statement shows that *Dennis* meant “entitlement” in the sense of whether a defendant had a right to plead immunity before the court.¹¹⁶ The citation backing up the statement placing the entitlement burden on the official was *Butz v. Economou*,¹¹⁷ an absolute immunity case.¹¹⁸ With absolute immunity, the only question is entitlement: if the defendant proves entitlement, the defendant wins; if not, then the case proceeds like any other case. The context also shows that the entitlement inquiry is focused on the type of person who can invoke immunity: “Here, petitioner has pointed to nothing indicating that, historically, judicial immunity insulated from damages liability those private persons who corruptly conspire with the judge.”¹¹⁹

111. *Id.*

112. At least one commentator dismisses the language. See Kinports, *supra* note 37, at 640 (“This sentence cannot be considered dispositive, however, given that it appears in the summation paragraph at the very end of an opinion that did not directly discuss the issue.”). Granted, the *Davis* Court did not discuss the issue, but the language is there and the meaning is clear.

113. 449 U.S. 24 (1980).

114. *Id.* at 29 (citations omitted).

115. Pfander, *supra* note 78, at 1396 (“The Court completed its transformation of immunity law in *Harlow v. Fitzgerald*, defining immunity entirely by reference to the existence of a clearly established constitutional right and abstracting away from any inquiry . . . into the common law’s handling of analogous legal claims or defenses.”).

116. Granted, many cases use the term “entitle” as a substitute for “proved,” i.e., asking whether a defendant is “entitled” to qualified immunity is the same as asking whether a defendant has “proven” qualified immunity applies. See, e.g., *Tindle v. Enochs*, 420 F. App’x 561, 563 (6th Cir. 2011).

117. *Dennis*, 449 U.S. at 29.

118. See *Butz v. Economou*, 438 U.S. 478, 480 (1978).

119. *Dennis*, 449 U.S. at 29.

Another case to examine is *Gomez v. Toledo*,¹²⁰ in which the Court came close to allocating the burden of proof for qualified immunity, but ultimately did not reach the issue. Rather, the Court merely held that the burden of *pleading* is on party asserting claim of immunity.¹²¹ While that does not decide the issue in this paper, its rationale is worth examining for clues regarding the allocation of the burdens of proof.¹²² *Gomez* noted that the subjective prong of the defense would put at issue matters peculiarly within the defendant's knowledge.¹²³ Unfortunately, with *Harlow* eliminating that prong, this rationale for allocating the burden of pleading onto the defendant is removed and cannot justify allocating the burden of proof onto the defendant.¹²⁴ The other supporting rationales are dead-ends as well. The Court also relied on both the codification of this principle in Rule 8(c) of the Federal Rules of Civil Procedure and a treatise,¹²⁵ but neither of these bases sheds any light on the placement of the burden of proof.

Others believe that *Harlow* itself holds the answer, claiming that it allocated the burdens of proof for qualified immunity. As Mary McKenzie contended:

In the first and third inquiries [whether the defendant is such a person as to be entitled to qualified immunity and whether an extraordinary exception to the objective legal reasonableness step applies], the defendant bears both the burden of proof and the burden of pleading. The burden of

120. 446 U.S. 635 (1980).

121. *Dennis*, 449 U.S. at 29; see also *Butz*, 438 U.S. at 506 (absolute immunity).

122. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 n.24 (1982) (citing *Gomez*, 446 U.S. at 640).

123. *Gomez*, 446 U.S. at 641.

124. Burris, *supra* note 37, at 165-66 (footnotes omitted). Burris noted:

The only case squarely addressing the placement of the burdens, *Gomez v. Toledo*, held that the burden of pleading qualified immunity fell on the defendant. Justice Rehnquist's concurrence read the majority's opinion as leaving the burden of proof open, and this has been the generally accepted stance since, although that reading contradicts the "affirmative defense" language of the opinion of the Court. *Gomez* relied on facts peculiarly within the defendant's knowledge as the rationale for its placement of the pleading burden. However, *Gomez* was decided in 1980, when the *Wood v. Strickland* standard prevailed and the defendant's subjective intent was still a highly relevant inquiry.

Id.; Greabe, *supra* note 15, at 207 n.92. Greabe stated that:

When there were subjective elements to the qualified immunity inquiry, there also were policy reasons for making qualified immunity an affirmative defense as to which the individual defendant bore the burden of proof But with *Harlow*'s transformation of qualified immunity into a wholly objective inquiry, . . . this reason for making qualified immunity an affirmative defense has disappeared.

Id.

125. *Gomez*, 446 U.S. at 640.

persuading a court that the law was clearly established at the time of the official's action, however, rests with the plaintiff.¹²⁶

But this author is not convinced that *Harlow* holds the key. *Harlow* did thrust one burden onto the defendant, but not for either of the two major *Pearson* steps in the inquiry. Rather, the Court required the defendant to prove the “third step,” i.e., the oft-overlooked exception (noted above in section I.B) that allows a defendant to prevail on immunity grounds even if he fails the first two steps.¹²⁷ *Harlow* also affirmed what the Court said in *Dennis* and *Butz*, in stating that defendants must prove that they were acting within the scope of their office.¹²⁸ Regrettably, though, *Harlow* did not indicate whether assigning the burden of proof regarding whether federal law was violated to the defendant is consistent with the rest of the immunity jurisprudence.

Many commentators cite yet another case, *Crawford-El v. Britton*,¹²⁹ as containing the answer. They point to the following: “Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff’s burden of proving a constitutional violation.”¹³⁰ This statement could be taken to mean that qualified immunity cannot shift the burden of proving a violation of constitutional law from the plaintiff onto the defendant. However, the context of the *Crawford-El* statement is far afield from our concerns here. In that case, the constitutional tort possibly required evidence of malice or improper motive.¹³¹ Thus, the plaintiff’s affirmative case possibly involved a subjective component, which cannot be part of the qualified immunity analysis. The Court’s statement, then, was clarifying that the *elements* (loosely called burdens) of a plaintiff’s case do not change simply because the *elements* of qualified immunity are different. This says nothing about whether the *burdens of proof* in a plaintiff’s case change because of the invocation of qualified immunity. Moreover, this Article does not claim that the plaintiff’s burden in proving a constitutional tort actually changes because a defendant pleads qualified immunity; instead, this Article suggests the possibility that the defendant, within the qualified immunity context, might bear the burden of proof on the very same issue (proving the violation of a clearly established constitutional right) that the plaintiff would, within the affirmative case context, does not

126. McKenzie, *supra* note 51, at 696 (footnote omitted).

127. *Harlow*, 457 U.S. at 819 (“[I]f the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.”).

128. Carey, *supra* note 106, at 1568-69.

129. *Crawford-El v. Britton*, 523 U.S. 574 (1998).

130. *Id.* at 589.

131. *Id.* at 588-89.

“change . . . the nature of the plaintiff’s burden of proving a constitutional violation.”

To sum up the Supreme Court’s answers as to the qualified immunity inquiry, we can most easily digest the answers by dividing the inquiry into four steps (at least under Supreme Court, and most other, precedent), with the middle two being the major steps most often discussed: (1) is the defendant entitled to qualified immunity, i.e., entitlement; (2) did a constitutional violation occur; (3) was the right clearly established, i.e., did the defendant act objectively legally reasonably; and (4) do any exceptional circumstances nonetheless excuse the defendant for being objectively legally unreasonable? The Supreme Court has stated that the defendant must prove steps one and four and that the plaintiff must prove step three. Insofar as step three asks whether the law in the courts was settled, it may not make any sense to allocate the burden, or at least it would be a purely academic question, as it is a question of law answered by reviewing judicial decisions.¹³² But insofar as this inquiry asks “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,”¹³³ or put another way, whether the officer’s determinations are “objectively legally reasonable,”¹³⁴ it is a “reasonableness” inquiry.¹³⁵ As to the question of whether a violation occurred, the Supreme Court has not stated who bears the burden.

D. Immunity Defense as a Defense on the Merits

Before moving onto the question of whether the Supreme Court’s allocation of the burdens of proof for the qualified immunity inquiry is ideal as a matter of policy, rationalizing the evolution of the good-faith and probable cause defense into qualified immunity, at least for government officials, is imperative, as many courts continue to apply both defenses to the same type of defendant. As it turns out, qualified immunity easily assimilates the good-faith and probable cause defense through existing immunity doctrine. According to the current taxonomy of immunity litigation, there are three types of immunity: pretrial litigation immunity,

132. Chen, *supra* note 35, at 95; 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.19 (3d ed. 1991) (“As to the question of the existence of clearly settled law, to speak of a burden of proof with its evidentiary emphasis appears misplaced.”).

133. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

134. *Id.* at 215 (Ginsburg, J., concurring) (quoting *Anderson v. Creighton*, 483 U.S. 635, 644 (1987)).

135. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 235 (2006); *see also Saucier*, 533 U.S. at 205 (“An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.”).

accomplished through pleading motions; trial immunity, accomplished through summary judgment motions; and liability immunity, accomplished through substantive defenses.¹³⁶ Qualified immunity, as a hybrid immunity, can be any one of these types.¹³⁷ Many courts appear to think of qualified immunity as simply pretrial litigation immunity, but it can be trial or liability immunity just as easily.¹³⁸ If the defendants fail to raise the immunity in the pleadings (typically through the answer as the basis for motion for judgment on the pleadings),¹³⁹ the defendants can raise the issue at the summary judgment stage,¹⁴⁰ at trial,¹⁴¹ after the close of evidence,¹⁴² and even after verdict.¹⁴³ Some courts allow the trial judge to determine whether the immunity has been waived, though, indicating that pleading the immunity as early as possible is not simply a matter of invoking the immunity at its most potent, but possibly saving the defense altogether.¹⁴⁴ As it turns out, many, if not most, qualified immunity claims have to go to trial because of fact-intensive issues.¹⁴⁵

Should the circuits recognize that the good-faith defense does not stand alone from qualified immunity in cases involving government officials, disparities between the allocation of the burden(s) of proof in one and the other can be squarely addressed and resolved. For instance, the Second and Ninth Circuits place the burden of proof on the defendant in the immunity context, but place the burden of persuasion (and in the Second Circuit's case, maybe the burden of production as well) on the plaintiff in the good-faith defense context.¹⁴⁶ Conversely, the Sixth Circuit places the

136. Chen, *supra* note 35, at 70-71.

137. *Id.*

138. Snyder v. Trepagnier, 142 F.3d 791, 800 (5th Cir. 1998) (“While qualified immunity ‘ordinarily should be decided by the court long before trial,’ if the issue is not decided until trial, the defense is not waived but goes to the jury, which ‘must determine the objective legal reasonableness of [the] officer’s conduct by construing the facts in dispute.’”) (citations omitted).

139. Brown v. Montoya, 662 F.3d 1152, 1160 n.4 (10th Cir. 2011).

140. Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993) (holding that the qualified immunity affirmative defense may be raised for the first time at summary judgment, where there is no prejudice to the plaintiff).

141. English v. Dyke, 23 F.3d 1086, 1089 (6th Cir. 1994) (“[A] qualified immunity defense can be raised at various stages of the litigation including at the pleading stage in a motion to dismiss, after discovery in a motion for summary judgment, or as an affirmative defense at trial.”).

142. Philip v. Cronin, 537 F.3d 26, 28-29 (1st Cir. 2008).

143. Dominguez v. Hendley, 545 F.3d 585, 589 (7th Cir. 2008) (“It is technically possible, however, to raise the defense after a jury verdict, if the immunity question itself depended on disputed issues of material fact.”).

144. King v. Betts, 354 S.W.3d 691, 708 n.26 (Tenn. 2011) (collecting federal circuit cases allowing trial court discretion on waiver issue).

145. Halcomb v. Washington Metro. Area Transit Auth., 526 F. Supp. 2d 20, 22 (D.D.C. 2007) (citing Warren v. Dwyer, 906 F.2d 70, 74 (2d Cir.1990)) (“[P]re-trial resolution of the [qualified immunity] defense . . . may be thwarted by a factual dispute.”).

146. See Jackler v. Byrne, 658 F.3d 225, 242 (2d Cir. 2011); Moreno v. Baca, 431 F.3d 633, 638 (9th Cir. 2005); Dubner v. City & Cnty. of S.F., 266 F.3d 959, 965 (9th Cir. 2001).

burden of proof on the plaintiff in the immunity context, but arguably places the burden of proof on the defendant in the good-faith defense context.¹⁴⁷ These courts would have to confront the incoherent precedent and settle on one party or the other.

V. WHO SHOULD BEAR THE BURDENS OF PROOF?

This Article has thus far determined that the qualified immunity inquiry is the only one that matters anymore for government officials, as the good-faith and probable cause defense has been incorporated therein and that the Supreme Court has allocated most of the steps in the qualified immunity inquiry, though it has left one of the two critical *Pearson* steps unallocated. Possibly the most important question remains, though: who *should* bear the burdens of proof in the qualified immunity analysis?

A. Policy Implications of Burden Allocations

When it comes to allocating burdens of proof, there is no universal rule on the issue. The picture does not become any clearer when the subject is qualified immunity. “Neither the Supreme Court nor the lower courts has provided a coherent explanation of the parties' evidentiary burdens in the adjudication of immunity claims.”¹⁴⁸ And, as noted above, some commentators think it does not even make sense to talk about allocating burdens for the second *Pearson* step because the question of “clearly established law” is *de novo*.¹⁴⁹ Based on my review of the literature, commentators are mostly, but not universally, in favor of placing the burden on the defendant. Among those advocating that the defendants assume the burden of proof are Kit Kinports¹⁵⁰ and Sarah Hughes Newman.¹⁵¹ In contrast is Edmund Carey, who argues that the plaintiff should assume the burden of proof.¹⁵² Finally, Alan Chen remains agnostic on the issue, believing that underlying issues must be resolved first, including the often-paramount summary judgment concerns animating many Supreme Court opinions on qualified immunity.¹⁵³

First, this section will look for an answer in broadly-applicable theories of burden allocation. Next, this section will turn to specific considerations that apply to the qualified immunity context.

147. See *Tindle v. Enochs*, 420 F. App'x 561, 563 (6th Cir. 2011); *Tarter v. Raybuck*, 742 F.2d 977, 978-79 (6th Cir. 1984).

148. Chen, *supra* note 35, at 9.

149. *Id.* at 95.

150. Kinports, *supra* note 37, at 634-41.

151. Newman, *supra* note 103, at 369-70.

152. Carey, *supra* note 106, at 1569-70.

153. Chen, *supra* note 35, at 68-70.

1. Fitting Qualified Immunity Burdens of Proof into Contemporary Theories of Allocation

Several academics have attempted to explain the allocation of burdens of proof in the modern way, i.e., through economic models. Bruce Hay and Kathryn Spier argue that the default rule of placing the burden of production on the plaintiff should be adhered to, as long as the plaintiff's burden in producing the evidence is not substantially greater than the defendant's and the defendants generally comply with the law.¹⁵⁴

Meanwhile, Thomas Lee put forth theories for both the burden of pleading and the burdens of proof.¹⁵⁵ Regarding the burden of pleading, he put forth the "probability theory," which "assigns the burden of pleading to the defendant on issues considered unlikely to arise,"¹⁵⁶ and the "relative-cost-of-pleading theory," which:

[A]ssign[s] the burden of pleading to the party whose version of an issue is inherently more narrow allows the parties to more effectively fulfill the signaling function of pleading rules . . . [and] when his allegation is more narrowly focused economizes on the direct costs associated with investigating the factual basis of the claim.¹⁵⁷

Under the "probability theory," most affirmative defenses are so because they are rare, and under the "relative-cost-of-pleading theory," most affirmative defenses are so because they are easier to distill (particularize) coming from the defendant rather than the plaintiff.

Although the focus of this paper is on qualified immunity's burdens of proof, and not burdens of pleading, it is noteworthy that Lee's justifications for placing the burden of pleading on the defendant do not seem salient in the qualified immunity context. The probability that an executive officer, when sued in a § 1983 action, will rely on qualified immunity, is sufficiently high that we might expect plaintiffs to plead the matter in their petitions. Furthermore, the cost of pleading to the parties seems similar, as the issues raised in the qualified immunity inquiry are largely similar to those in the underlying suit, and those that are distinct, including the "clearly established law" inquiry, are as easy to spot for the plaintiff as for the defendant. Yet the same lack of justifications for shifting the burden of pleading from the plaintiff to the defendant would seem to apply to the affirmative defense of absolute immunity, but the defendant bears that

154. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 415, 424 (1997).

155. Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 3 (1997).

156. *Id.* at 7.

157. *Id.* at 8.

burden of pleading. It should be obvious to a plaintiff that suing a judicial officer will entail an absolute immunity inquiry and should be just as obvious as what that inquiry entails, but the defendant bears the burden nonetheless.¹⁵⁸

Lee also has theories about the burden of proof allocation. First, he justifies the default rule for putting the burden of proof on the plaintiff: to generally minimize the costs that come with a victory by the plaintiff, in which the defendant must transfer wealth or perform certain actions and to avoid these costs in close cases, all other considerations being equal.¹⁵⁹ Thus, the plaintiff's victory comes with certain costs that the defendant's victory never does, thus requiring a thumb on the scale as a general matter, and especially in coin-flip cases, in favor of the defendant. What justifies shifting the burden, though? Three possibilities are offered: least cost avoider, opting for errors favoring the plaintiff over errors favoring the defendant and determining that the defendant is probably liable in most of the cases at issue.¹⁶⁰

Putting these authors together, we see common considerations in determining when to opt out of the default rule: least cost avoider and an assumption about who is probably liable. Lee also adds a consideration about which type of error is easier to swallow.¹⁶¹ These factors do not seem to decide the allocation question in the qualified immunity area. Who has better access to the evidence? As far as the objective legal reasonableness inquiry goes, would not a defendant know better what an executive official should know about the state of the law? Is the defendant probably liable, or is the plaintiff probably making it up? Without empirical data, judges and academics can only speculate from the armchair. The other question—which error do we prefer, violations of constitutional rights or meritless suits?—also appears intractable. While the Supreme Court may seem to favor the former error in their push for ease of summary judgment, the Court justified its streamlining of summary judgment in favor of the defendants based on meritless litigation that would paralyze government officials. Allowing for the easier disposal of meritless suits, though, is not the same as claiming that most suits are meritless. We simply do not know whether most § 1983 suits have merit and, without data to back up a claim either way, neither would the Supreme Court.

158. *See, e.g., Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986) (“[I]mmunity, whether qualified or absolute, is an affirmative defense which must be affirmatively pleaded”); *but cf. Wyman v. Mo. Dept. of Mental Health*, 376 S.W.3d 16, 19 n.1 (Mo. App. W.D. 2012) (“The liability of a public entity for torts is the exception to the general rule of immunity for tort and it is incumbent upon a plaintiff who seeks to state a claim for relief to specifically allege facts establishing that an exception applies.”).

159. Lee, *supra* note 155, at 12-15.

160. *Id.* at 16-28.

161. *See id.* at 18.

2. *Reasons to Put the Burdens on the Defendant*

Given that we simply do not know whether most § 1983 suits have merit, broad theories like those of Hay and Spier's and Lee's, while enlightening, cannot answer our question. In light of our empirical vacuum, we turn to other, qualified immunity-specific considerations and will now review the best arguments in favor of placing the burden on the defendant, presenting them in order of least to most persuasive.

First, at least some academics believe that placing the burdens on the defendants would accord with the practice at common law for similar actions.¹⁶² Yet this not only disagrees with the Supreme Court's history on the matter as presented in *Wyatt*, but seems to border on the irrelevant after *Harlow* unmoored qualified immunity jurisprudence from its common law roots.

Second, § 1983 is a remedial statute, and placing the burdens of proof on the defendant would advance this aim.¹⁶³ As such, when it comes to an open question of construction such as the allocation of the burdens of proof, a presumption in favor of the plaintiff might be in order. Then again, the reformulation of qualified immunity in *Harlow* cut strongly against plaintiffs, casting doubt on how much power the remedial canon of statutory construction has in this context. After all, it does not appear to have been invoked in this area to date.

Third, the "burden of proof" for absolute immunity is on the defendants.¹⁶⁴ But "proof" for absolute immunity is just a matter of showing entitlement, and that burden is on the defendant in this context under *Harlow*.¹⁶⁵ That it would be more difficult for someone asserting qualified, as opposed to absolute, immunity is an intuitive proposition.

Fourth, qualified immunity is like other federal affirmative defenses that place the burdens of proof on defendants.¹⁶⁶ Good-faith defenses under the Fair Labor Standards Act (FLSA), Robinson-Patman Act, Internal Revenue Code, and stockholder derivative suits all require that the defendant prove the issue.¹⁶⁷ But the Supreme Court has not ruled on these

162. See generally Sowle, *supra* note 37, at 398 ("It is submitted, however, that stronger . . . common law precedents can be advanced to support placement of the entire burden [of pleading qualified immunity in § 1983 actions] on the defendant.").

163. Kinports, *supra* note 37, at 637-38 (citing *Gomez v. Toledo*, 446 U.S. 635, 639 (1980)); see also *Gomez*, 446 U.S. at 639 ("As remedial legislation, § 1983 is to be construed generously to further its primary purpose.").

164. Kinports, *supra* note 37, at 641 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982); *Butz v. Economu*, 438 U.S. 478, 506 (1978)).

165. See, e.g., *Poe v. Haydon* 853 F.2d 418, 425 (6th Cir. 1988) ("[T]he official [invoking qualified immunity] must plead facts which, if true, would establish that he was acting within the scope of his discretionary authority when the challenged conduct occurred.").

166. Gildin, *supra* note 36, at 594 n.206.

167. *Id.* at 598.

issues, and furthermore, with the exception of the derivative suits, each of these types of suit derive from different black letter law, whereas the qualified immunity doctrine has been created by the Supreme Court without a textual basis in § 1983. The FLSA and Robinson-Patman statutes are explicit in placing the burden on the defendant.¹⁶⁸ Similarly, the Internal Revenue Code example makes it clear that the defendant bears by the burden by phrasing the showing that must be made in terms of what the defendant would like to prove.¹⁶⁹ Still, interpreting these good-faith defenses similarly to qualified immunity, which descended from a good-faith defense, could be considered a reasonable application of *in pari materia* at a broad level. Furthermore, in the derivative suit context, it appears that courts fashioned the answer for themselves,¹⁷⁰ which is what the Supreme Court has been doing with qualified immunity.

Fifth, the burdens of proof typically follow the burden of pleading, and the burden of pleading is assuredly on the defendant for qualified immunity.¹⁷¹ This argument has some weight, as it represents the default rule on the matter, though a default rule, by its nature, is susceptible to exceptions.¹⁷²

Sixth, Kinport has claimed that the defendant has readier access to the relevant facts in the objective legal reasonableness inquiry.¹⁷³ This argument appears to correspond more closely with the burden of production than the burden of persuasion. While both parties may be able to research relevant case law equally, the question of whether an executive officer should have made a certain mistake of law is obviously a topic that an executive officer should be in a better position to discuss, at least initially. This argument may not be as powerful as it would be in a pre-*Harlow* world, where the subjective mindset of the defendant was at issue, but a defendant would still be making a showing regarding similarly-situated

168. See 29 U.S.C. § 260 (2012) (“[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938”); 15 U.S.C. § 13(b) (2012) (“[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor”).

169. See I.R.C. § 6651(a)(1) (2012) (providing a penalty for failure to timely file “unless it is shown that such failure is due to reasonable cause and not due to willful neglect”).

170. See, e.g., *Cohen v. Ayers*, 596 F.2d 733, 739-40 (7th Cir. 1979) (citing only case law); *Gottlieb v. Heyden Chemical Corp.*, 90 A.2d 660, 663 (Del. 1952) (citing only case law and secondary sources).

171. Kinports, *supra* note 37, at 638-39; *Gildin*, *supra* note 36, at 597; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 785 (1972) (“In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well.”).

172. *Lee*, *supra* note 155, at 28 (“[I]n federal court, defendants must plead contributory negligence and assumption of risk, but state law often places the burden of proof on plaintiff.”).

173. Kinports, *supra* note 37, at 636-37.

defendants, as opposed to a plaintiff struggling to step into the shoes of defendants.

Seventh, and finally, if the burden was placed on the plaintiffs, they would have to prove more in defeating the defense than they would in proving the case-in-chief because of the “objectively legally reasonable” step.¹⁷⁴

3. *Reasons to Put the Burdens on the Plaintiff*

Now, we turn to the best arguments in favor of placing the burdens of proof on the plaintiff. Again, the claims are reviewed in order of least to most persuasive.

First, some have argued that the burden of persuasion, in particular, should be on the plaintiff to make it easier to grant defendants’ motions for summary judgment.¹⁷⁵ While the Supreme Court has been solicitous about frivolous suits proceeding against officials, courts should only set out to make it easier for one side to win if we have data showing that one side typically wins, but we do not have such data at this point.

Second, it is posited that, since the facts substantially overlap for the suit and the defense,¹⁷⁶ one should not change the burden of persuasion. Yet the inquiries are not exactly the same; the objectively legal reasonable inquiry sets the two apart in a significant way. Many defenses overlap, in what must be proven, with the underlying suit, but that does not justify forcing the plaintiff to prove the defense as well.

Third, defendants would have to prove more on step one than they would in their cases-in-chief, i.e., would have to prove by a preponderance that they did not violate a constitutional right, which is more than simply arguing that plaintiff has not met her burden on this issue.¹⁷⁷ Again, this does not seem unfair to the defendant at all. It is not as if the defendant loses the case-in-chief by taking on this greater burden, which is in contrast to the scenario where the plaintiff must take on the additional burdens of proof in the qualified immunity inquiry, where the plaintiff will indeed lose the entire case by failing to prevail. More importantly, the fact that the

174. Chen, *supra* note 35, at 96-97.

175. *Id.* at 66. Chen pointed out:

When the moving party would bear the burden of persuasion on the trial issue to be adjudicated on summary judgment, the Court has established quite different standards. Here, the stakes are different, as the moving party must establish a strong enough case to justify finding in its favor without a trial and denying the nonmoving party her opportunity to put on a defense.

Id.

176. *Id.* at 74 (“The facts relevant to the immunity issue will be precisely the same facts necessary for the evaluation of liability.”).

177. *Id.* at 97.

defendant would have to prove something more or different during a defense than in the case-in-chief is not unfair; any affirmative defense, as opposed to a traverse, is like that. If defendants do not want to prove anything additional, they should not raise the defense and simply litigate the underlying claim.

Fourth and finally, having the defendant take the burden on step two would confuse the jury because those issues are intertwined with what the plaintiff must prove in the case-in-chief.¹⁷⁸ But a good-faith, reasonableness defense instruction is given in the above-cited contexts where the defendant bears the burdens of proof, and there does not seem to have been an outcry about overmatched juries. If qualified immunity becomes a liability immunity, then the jury must simply be told the following: “the defendant is not liable if she proved, by a preponderance of the evidence, either that she did not violate the plaintiff’s constitutional rights or that she was objectively legally reasonable in doing so.” If the jury finds qualified immunity not to apply, then it would simply instruct on the underlying claim: “the defendant is liable if the plaintiff proved, by a preponderance of the evidence, that her constitutional right was violated.” The first *Pearson* step and the element of the plaintiff’s cause of action, while based on the same issue (whether the facts amounted to a constitutional tort), would require separate instructions because of the different burdens of proof. It is possible, after all, that a jury could reject both qualified immunity and the plaintiff’s underlying claim because the evidence was in equipoise.

Chen is concerned at this point that this instructional scenario leaves the jury answering a question of law (the legal reasonableness issue),¹⁷⁹ but that is an issue about the allocation of actual and legal matters as between judges and juries, not a question of the allocation of burdens of proof as between plaintiffs and defendants. Even if the plaintiff had the burden of proving that the defendant was not objectively legally reasonable, the jury would still be both confronting multiple burdens (defense and case-in-chief) and making a legal determination. The instruction would simply read: “the defendant is liable if he violated the plaintiff’s constitutional right unless the plaintiff failed to show that the defendant was objectively legally unreasonable.” This instruction also has the potential to confuse, but it does not fix the problem with handing the jury a legal issue.

178. *Id.* at 97-98.

179. Chen, *supra* note 35, at 75.

4. *The Burdens of Proof Should Be Placed on the Defendant*

Of all the above arguments, the decisive one seems to be the seventh one listed in favor of placing the burdens of proof on the defendant: what sense does it make for plaintiffs to have to prove more in their case-in-chief depending on a defense asserted by the defendant? It may have been the case at common law, as opined by Chief Justice Rehnquist in *Wyatt*, that a private plaintiff suing a government official would have to prove the presence of malice or the absence of probable cause,¹⁸⁰ but even he, as well as the other conservative members of the dissenting and concurring opinions in that case, granted that the burden in the “objective legal reasonableness” prong was now on the defendants.¹⁸¹ The inquiries in the suit and the defense may greatly overlap, but that is no reason to say that, where the two inquiries do not overlap, the plaintiff should bear the burden. The plaintiff’s burden of proving the case should not be increased according to the defense pled. Moreover, the defendant would have an easier time, as opposed to the plaintiff, in procuring the relevant facts in the objective legal reasonableness inquiry, because it is the defendant’s conduct that is central to that issue.

VI. CONCLUSION

Much like the rest of § 1983 jurisprudence, qualified immunity remains a mess. The Supreme Court has not only expressly refrained from deciding wholesale which party bears the burdens of proof in the inquiry, but it has also sent conflicting signals over the decades on the issue. As it stands, it appears that: the defendants bear the burden in showing that, based on their employment, they are entitled to assert qualified immunity; the plaintiffs bear the burden in showing that the defendants were objectively legally unreasonable in their actions/determinations, i.e., that the law was “clearly established;” and the defendants must show any exceptional reason that they were objectively legally unreasonable. This leaves the question of who bears the burden of whether there was a violation of a constitutional right unanswered.

Although these appear to be the current positions of the Supreme Court, the circuits have proceeded to drift in several directions. Should the Supreme Court decide to reconcile the splits, it should first recognize that government officials have qualified immunity, not simply the good-faith and probable cause defense, which would simplify the inquiry. Second, having abandoned the common law approach, the Court should weigh all of

180. *Wyatt v. Cole*, 504 U.S. 158, 177 (1992) (Rehnquist, C.J., dissenting).

181. *Id.* at 178.

the policy considerations it finds relevant, including any of those noted above.

Upon analysis of which party should bear the burdens of proof, it appears difficult to allocate the burdens in the qualified immunity analysis based on predictions of which party should prevail. Thus, other considerations must be examined. In allocating the “objectively legally reasonable prong,” the popular consideration of least cost avoider, i.e., which party has the best and easiest access to the relevant information, is instructive. The defendant, being a government agent, likely should have the burden of proof when the inquiry is “was the government agent’s conduct objectively legally reasonable.” Another reason for placing this particular burden on the defendant is that a plaintiff should not have to prove more (because of the shifting of the preponderance burden from defendant to plaintiff) to prevail on a claim depending on the defense invoked by the defendant. This author cannot think of any defense besides that of qualified immunity that actually creates burdens of proof for the plaintiff, thereby requiring the plaintiff to prove more than before the defense was pled. If defendants wish to shield themselves with qualified immunity, they should at least be expected to bear the burden in doing so.

Turning to the other *Pearson* step, plaintiffs must already prove in their cases-in-chief that a constitutional violation occurred; thus, placing this burden on the plaintiff would not place any greater substantive obligation on plaintiffs. However, forcing the plaintiffs to prove their cases that much earlier because the defendant chose to plead a certain defense is unfair. It would be an odd situation indeed if defendants were able to force plaintiffs to prove their case pre-trial. Finally, given that the courts already seem to unanimously agree that the burdens of pleading entitlement and exceptional circumstances are on the defendant, the defendant should therefore bear all of the burdens of proof when invoking qualified immunity.

