RECENT CASES

FOURTH AMENDMENT — QUALIFIED IMMUNITY — THIRD CIRCUIT HOLDS THAT POLICE OFFICER'S GOOD FAITH RELIANCE ON LEGAL ADVICE CREATES A PRESUMPTION OF REASONABLENESS. — *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010).

In suits arising under 42 U.S.C. § 1983, certain individual government actors are entitled to qualified immunity from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[1] Although the Supreme Court originally announced a good faith standard for this affirmative defense,[2] it has since sought to reduce courts' inquiries into officials' subjective intent by endorsing a standard of objective reasonableness.[3] Federal circuit courts have generally considered reliance on a prosecutor's legal advice as one factor to be weighed in assessing the objective reasonableness of a police officer's action.[4] Recently, in *Kelly v. Borough of Carlisle*,[5] the Third Circuit rejected the totality of the circumstances approach and instead established a presumption of reasonableness in favor of the officer who has relied in good faith on a prosecutor's advice.[6] Rather than creating benefits by increasing legal consultations, as the court expects, the decision will impose significant costs, permitting courts to relieve police officers of their independent decisionmaking responsibility and placing an additional burden on civil rights plaintiffs.

On May 24, 2007, police officer David Rogers pulled over a truck driven by Tyler Shopp in Carlisle, Pennsylvania.[7] Brian Kelly, Shopp's passenger, began to record Rogers with a handheld video

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[1] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). State and federal law enforcement officers are among those entitled to the defense of qualified immunity. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967); *see also* Malley v. Briggs, 475 U.S. 335, 340 (1986).

[2] *Pierson*, 386 U.S. at 557.

[3] *Harlow*, 457 U.S. at 815–19.

[4] *See, e.g.*, Stearns v. Clarkson, 615 F.3d 1278, 1284 (10th Cir. 2010); Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004); Dixon v. Wallowa Cnty., 336 F.3d 1013, 1019 (9th Cir. 2003); Wadkins v. Arnold, 214 F.3d 535, 542 (4th Cir. 2000). Some circuit courts treat reliance on legal advice as one of the "extraordinary circumstances" that the Court in *Harlow* suggested could sustain an official's qualified immunity defense even if the relevant law was clearly established. *See Harlow*, 457 U.S. at 819. Even those courts, however, have acknowledged that consultation with legal counsel is a common practice and have refused to grant qualified immunity based on a police officer's "'mere reliance on attorney's advice' or 'attorney's advice without more.'" V-1 Oil Co. v. Wyo. Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) (quoting *id.* at 1490, 1491 (Ebel, J., dissenting)); *see also* Lawrence v. Reed, 406 F.3d 1224, 1230–31 (10th Cir. 2005); Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998).

[5] 622 F.3d 248 (3d Cir. 2010).

[6] *Id.* at 255–56.

[7] Kelly v. Borough of Carlisle, No. 1:07-cv-1573, 2009 WL 1230309, at *1 (M.D. Pa. May 4, 2009).

camera in his lap.[8] After retrieving Shopp's license, registration, and insurance card, Rogers completed the speeding citation at his vehicle and then returned to Shopp's truck.[9] Only at that point, Rogers claimed, did he notice that Kelly was recording him.[10] Believing that Kelly's unannounced recording of him violated the Pennsylvania Wiretapping and Electronic Surveillance Control Act[11] (Wiretap Act), Rogers ordered Kelly to turn the camera over to him, and Kelly complied.[12] From his police car, Rogers called Assistant District Attorney John Birbeck to verify that Kelly's recording violated the Wiretap Act.[13] Birbeck reviewed the statute and approved the arrest.[14] Rogers, with assistance from additional officers who responded to his call for a backup unit, arrested Kelly.[15] Kelly was arraigned and, unable to make bail, spent twenty-seven hours in the Cumberland County Prison.[16] Although a magisterial district judge approved Rogers's criminal complaint and affidavit of probable cause, the District Attorney dropped the charges against Kelly.[17]

Kelly then filed suit against Rogers under § 1983, claiming, inter alia, that the arrest had violated his First and Fourth Amendment rights.[18] The district court granted Rogers's motion for summary judgment on all constitutional claims, ruling that he was entitled to qualified immunity.[19] On Kelly's First Amendment claim, the court concluded that there was no clearly established right to videotape a police officer during a traffic stop.[20] Regarding Kelly's Fourth Amendment claim of false arrest, the court found "that a reasonable officer acting in Defendant Rogers' position would have likewise followed the advice of the ADA and arrested Plaintiff."[21]

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[8] *Kelly*, 622 F.3d at 251. Kelly stated that the video camera was in plain sight; Rogers reported that it was hidden by Kelly's hands. *Id.* Rogers believed that he was also recording the traffic stop, but his equipment malfunctioned. *Id.* at 251 n.1.

[9] *Kelly*, 2009 WL 1230309, at *1.

[10] *Id.*

[11] 18 PA. CONS. STAT. ANN. §§ 5701–5782 (West 2000 & Supp. 2009). The statute covers "[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 5702 (West Supp. 2009).

[12] *Kelly*, 622 F.3d at 251–52.

[13] *Id.* at 251.

[14] *Id.* at 252.

[15] *Id.*

[16] *Id.*

[17] Kelly v. Borough of Carlisle, No. 1:07-cv-1573, 2009 WL 1230309, at *1 (M.D. Pa. May 4, 2009).

[18] *Kelly*, 622 F.3d at 252. Kelly's complaint also included related claims against the Borough of Carlisle. *Id.*

[19] *Kelly*, 2009 WL 1230309, at *5, *7, *9, *11. The court also granted summary judgment to the Borough. *Id.* at *11.

[20] *Id.* at *8–9.

[21] *Id.* at *5.

The Third Circuit affirmed the district court's ruling on the First Amendment claim against Rogers[22] but vacated the lower court's judgment on the Fourth Amendment claim and remanded for further factfinding and for application of the correct legal standard.[23] Writing for a unanimous panel, Judge Hardiman[24] noted that the effect of an officer's reliance on legal advice was a question of first impression in the Third Circuit.[25] The proper rule, the court concluded, was a rebuttable presumption of reasonableness in favor of a police officer who has relied on a prosecutor's legal advice.[26]

Judge Hardiman began by noting that the Supreme Court had considered an analogous situation in *Malley v. Briggs*.[27] In *Malley*, the Court ruled that a police officer was not shielded from an unlawful arrest claim by a magistrate's issuance of an unconstitutional arrest warrant because the officer had an independent responsibility to know "that his affidavit failed to establish probable cause and that he should not have applied for the warrant."[28] The Third Circuit acknowledged that *Malley* foreclosed ruling "that a police officer's decision to contact a prosecutor for legal advice is *per se* objectively reasonable," but it underscored the importance of such consultation given "the proliferation of laws and their relative complexity in . . . a rapidly changing world."[29]

The Third Circuit next looked to other circuit courts that had considered the role of a prosecutor's advice in qualified immunity rulings for police officers.[30] Judge Hardiman paid special attention to the First Circuit's opinion in *Cox v. Hainey*,[31] which had itself surveyed other circuit courts[32] and had agreed that the inquiry into the objective reasonableness of an officer's belief that probable cause existed should be based on the totality of the circumstances, including consideration of "both the fact of a pre-arrest consultation and the purport of

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[22] *Kelly*, 622 F.3d at 263. The Third Circuit also affirmed the district court's rulings on the claims against the Borough of Carlisle. *Id.* at 264–66.

[23] *Id.* at 259.

[24] Judge Hardiman was joined by Chief Judge McKee and Senior District Judge Pollak, sitting by designation.

[25] *Kelly*, 622 F.3d at 251.

[26] *Id.* at 255–56.

[27] 475 U.S. 335 (1986); *see Kelly*, 622 F.3d at 254.

[28] *Malley*, 475 U.S. at 345.

[29] *Kelly*, 622 F.3d at 255.

[30] *Id.*

[31] 391 F.3d 25 (1st Cir. 2004).

[32] *Id.* at 34–35 (discussing Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004); Dixon v. Wallowa Cnty., 336 F.3d 1013, 1019 (9th Cir. 2003); Wadkins v. Arnold, 214 F.3d 535, 542 (4th Cir. 2000); E-Z Mart Stores, Inc. v. Kirksey, 885 F.2d 476, 478 (8th Cir. 1989); and Lavicky v. Burnett, 758 F.2d 468, 476 (10th Cir. 1985)); *see Kelly*, 622 F.3d at 255.

the advice received."[33] The Third Circuit, however, ultimately rejected that approach, arguing that it underemphasized the virtues of encouraging police officers to seek legal advice.[34] The court concluded that "a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause."[35] The plaintiff may rebut the presumption with evidence that "a reasonable officer would not have relied on the prosecutor's advice."[36]

The Third Circuit proceeded to review the district court's analysis of Rogers's determination that Kelly's behavior violated the Wiretap Act.[37] Judge Hardiman highlighted two state court decisions interpreting the Wiretap Act that the district court had not considered[38]: In 1989, the Pennsylvania Supreme Court declared that covertly recording a police officer's interrogation of a suspect did not violate the Wiretap Act.[39] And in 1998, the Pennsylvania Supreme Court clarified that interception of a person's oral communication violated the Wiretap Act only if that person had a reasonable expectation of privacy.[40] The Third Circuit concluded that "these critical precedents" had clearly established that "covertly recording police officers was not a violation of the Act" and "that police officers do not have a reasonable expectation of privacy when recording conversations with suspects."[41] Still, the Third Circuit could not assess from the record whether Rogers's reliance on Birbeck's faulty advice was objectively reasonable and therefore left that determination to the district court on remand.[42]

In its decision to provide presumptive protection to police officers who have consulted with prosecutors, the Third Circuit failed to consider the existing breadth of the qualified immunity defense or the incentives already in place that encourage police to seek legal advice. The judicially created presumption will generate little, if any, benefit. Instead, it will produce serious negative effects: it will allow courts to relax the expectation that police officers take responsibility for their professional judgments, and it will place unnecessary burdens on civil

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[33] *Cox*, 391 F.3d at 35.

[34] *Kelly*, 622 F.3d at 255.

[35] *Id.* at 255–56.

[36] *Id.* at 256.

[37] *Id.* at 254–59.

[38] *Id.* at 256–58.

[39] Commonwealth v. Henlen, 564 A.2d 905, 906 (Pa. 1989).

[40] Agnew v. Dupler, 717 A.2d 519, 523 (Pa. 1998). *Agnew* also involved surveillance of a police officer acting in his official capacity, albeit by the chief of police. *See id.* at 521.

[41] *Kelly*, 622 F.3d at 258.

[42] *See id.* at 258–59.

rights plaintiffs, who are already hampered by limitations on pretrial discovery.

The qualified immunity doctrine has evolved to offer "ample protection [from damages liability] to all but the plainly incompetent or those who knowingly violate the law."[43] In its extension of immunity to government officials who have infringed individuals' constitutional rights, the Supreme Court has acknowledged the trade-off it is making: "Implicit in the idea that officials have some immunity . . . is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."[44] Because money damages are often the only relief that plaintiffs can realistically hope to secure when officials have violated their constitutional rights,[45] the more the qualified immunity defense expands, the less likely it is that such violations will be redressed at all.[46] Despite these concerns, the Third Circuit further expanded the defense in *Kelly*.

Although the doctrine of qualified immunity assumes that government officials are aware of clearly established law,[47] there is a tension between the reasonableness of expecting that police officers "know the

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[43] Malley v. Briggs, 475 U.S. 335, 341 (1986); *see also* Burns v. Reed, 500 U.S. 478, 494 (1991) (observing that "the qualified immunity standard [has become] more protective of officials").

[44] Scheuer v. Rhodes, 416 U.S. 232, 242 (1974); *see also* John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 470–71 (1990).

[45] For example, in a § 1983 police misconduct class action suit, the Third Circuit affirmed the district court's grant of injunctive relief, directing the police commissioner to implement a more effective citizen complaint process, but the Supreme Court reversed, ruling that the injunction "represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to [city and police officials] by state and local law to perform their official functions." Rizzo v. Goode, 423 U.S. 362, 365–66 (1976); *see also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) ("It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. . . . For people in Bivens' shoes, it is damages or nothing."). There are no systematic national data on police civil liability, but older scholarly studies provide some insight into outcomes in specific districts. *See, e.g.*, David K. Chiabi, *Police Civil Liability: An Analysis of Section 1983 Actions in the Eastern and Southern Districts of New York*, 21 AM. J. CRIM. JUST. 83, 92 (1996) (reporting that, of 465 civil rights cases filed against police in two New York districts, 19% resulted in monetary damages for plaintiffs, with a median award of $15,000; 32% were settled, usually resulting in monetary damages for plaintiffs); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 735 tbl.5 (1988) (reporting that, of 156 constitutional tort cases filed against police in three districts in California, Pennsylvania, and Georgia, 60% resulted in a favorable judgment or settlement for the plaintiff, 3% of plaintiffs received a money judgment, and 9% received a money settlement).

[46] *See* David Rudovsky, Saucier v. Katz*: Qualified Immunity as a Doctrine of Dilution of Constitutional Rights*, *in* WE DISSENT 172, 174 (Michael Avery ed., 2009).

[47] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

basic elements of the laws they enforce"[48] and the unfairness of requiring that they "be as conversant in the law as lawyers and judges who have the benefit not only of formal legal training, but also the advantage of deliberate study."[49] The Third Circuit, apparently motivated by this tension, concluded that establishing a presumption of reasonableness was necessary to induce law enforcement officers to consult with those who have had such legal training and engaged in such deliberate study. The court was no doubt correct that legal consultation serves the "salutary purpose[s]"[50] of increasing correct policing decisions and decreasing constitutional violations. Yet such consultation was already widely encouraged by extant legal rules.[51] Indeed, police advisors have specifically recognized that the totality of the circumstances approach adopted by the First Circuit in *Cox* provides departments with sufficient incentive to encourage officers to seek legal advice.[52] Moreover, the judicially created presumption would have had no effect in the Borough of Carlisle; it was already departmental policy for officers to seek a prosecutor's advice under such circumstances.[53]

Further, in *Kelly*, the benefits of consultation were not realized: far from counseling the police officer on the correct application of the Wiretap Act, the prosecutor merely reinforced the officer's inaccurate interpretation of the statute. Nonetheless, the Third Circuit declared without hesitation that the law was clearly established.[54] The Supreme Court in *Malley* ruled that police officers in such situations re-

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[48] *Kelly*, 622 F.3d at 258.

[49] *Id.* at 255; *see also* Lawrence v. Reed, 406 F.3d 1224, 1237 (10th Cir. 2005) (Hartz, J., dissenting) ("The statement in *Harlow* that reasonably competent public officials know clearly established law . . . is a legal fiction." (citing *Harlow*, 457 U.S. at 818–19)); *cf.* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 624–25 (1998) (explaining that the fairness argument for qualified immunity uses notice of the relevant law as a proxy for fault). *But see* Dawn M. Diedrich, *"Rigid Order of Battle": A Police Training Perspective on the Qualified Immunity Analysis*, POLICE CHIEF, July 2008, at 12, 12 (acknowledging that "professional police officer[s] must have an understanding of basic constitutional principles relating to arrest, search and seizure, and the lawful use of force in accordance with the Fourth Amendment").

[50] *Kelly*, 622 F.3d at 255.

[51] *See, e.g.*, United States v. Merritt, 361 F.3d 1005, 1012 (7th Cir. 2004) (observing that "volumes of case law encourage this sort of cooperation between the prosecutor and law-enforcement officers").

[52] *See, e.g.*, Elliot B. Spector, *A Little Advice May Buy You Immunity*, POLICE CHIEF, May 2005, at 10, 10.

[53] *See* Kelly v. Borough of Carlisle, No. 1:07-cv-1573, 2009 WL 1230309, at *4 (M.D. Pa. May 4, 2009) (noting that Rogers "followed police policy in calling the ADA to confirm that there was probable cause to make an arrest under the Wiretap Act"); *see also id.* at *10.

[54] *Kelly*, 622 F.3d at 258. The court no doubt felt confident in this conclusion given the similarity between the facts in *Kelly* and those in *Commonwealth v. Henlen*, 564 A.2d 905 (Pa. 1989), in which the Pennsylvania Supreme Court held that a suspect's secret recording of a police officer's interrogation did not violate the Wiretap Act. *See id.* at 906. This factual similarity easily meets the U.S. Supreme Court's requirement "that in the light of pre-existing law the unlawfulness must be apparent." *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

tain responsibility even though authoritative third parties have validated their judgments.[55] Recognizing the possibility that "a magistrate, working under docket pressures, will fail to perform as a magistrate should,"[56] the Court found "it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment."[57]

In most cases, however, it is fair to assume that prosecutors, like magistrates, are more aware of the relevant law than are police officers in the field. Yet there is a key difference between district attorneys and judges: the latter are independent and neutral, whereas the former have a stake in law enforcement. It was precisely this interdependence of police officers and prosecutors that motivated the First Circuit in *Cox* to conclude that legal consultation should be weighed as only one factor in the objective reasonableness assessment: "prosecutors work hand in glove with law enforcement officers, so a prosecutor's advice, under the best of circumstances, cannot carry the same presumption of reliability that accompanies the detached scrutiny of a neutral magistrate."[58] Accordingly, other courts that have granted qualified immunity to police officers acting in reliance on incorrect legal advice have typically done so only after determining that, based on other considerations, the officer was objectively reasonable in taking the action.[59]

Given the expansiveness of the qualified immunity doctrine, civil rights plaintiffs often have little chance of surviving summary judgment. In addition, defendant officials have the right to resist discovery

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[55] Malley v. Briggs, 475 U.S. 335, 345–46 (1986).

[56] *Id.*

[57] *Id.* at 346.

[58] Cox v. Hainey, 391 F.3d 25, 35 n.4 (1st Cir. 2004); *see also* United States v. Chadwick, 433 U.S. 1, 9 (1977) (noting that "the detached scrutiny of a neutral magistrate" provides "a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime'" (quoting Johnson v. United States, 333 U.S. 10, 14 (1948))); Adam L. Littman, Note, *A Second Line of Defense for Public Officials Asserting Qualified Immunity*, 41 SUFFOLK U. L. REV. 645, 667–68 (2008). Prosecutors, although they are normally entitled to absolute immunity from § 1983 damages suits, are accorded only qualified immunity from liability for giving faulty legal advice to the police. *See* Burns v. Reed, 500 U.S. 478, 496 (1991).

[59] *See, e.g.*, Armstrong v. City of Melvindale, 432 F.3d 695, 702 (6th Cir. 2006) (granting qualified immunity to officers who consulted with a prosecutor because the officers "exercised reasonable professional judgment in applying for the warrant and because reasonable officers in Defendants' position might have believed that the warrant should have issued"); Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998) (granting officers qualified immunity because the lawyer they consulted was responsible for providing the police department with the type of advice the officers were seeking; because he gave them specific advice based on all the circumstances, which they followed promptly; and because "the police had no reason to believe that [the] advice was erroneous" based on Supreme Court precedents); Littman, *supra* note 58, at 667 ("[T]he circuit courts properly require government officials to ignore advice from counsel that is plainly unconstitutional. . . . While resulting personal liability may be a harsh result in some cases, the advice of an attorney does not command . . . presumptive weight . . . ." (footnote omitted)).

until the issue of qualified immunity is decided.[60] The Third Circuit had previously allocated the burdens of production reasonably: once the plaintiff established a prima facie case of wrongful arrest, the court required the police officer defendant to show probable cause,[61] and it required the defendant to prove his or her qualified immunity defense.[62] This arrangement accommodated the plaintiff's limited right to pretrial discovery and the officer's information advantage regarding the plaintiff's arrest.[63] The court's opinion in *Kelly* will upset this sensible allocation in cases in which the police officer has consulted with a prosecutor: the plaintiff will now have the burden of showing that the officer was objectively unreasonable in following the advice.

Kelly is representative of the plaintiffs on whom this burden will fall. He was neither committing nor about to commit a crime. A police officer nonetheless arrested him, and he went to jail. Because the arrest was made without probable cause, it violated Kelly's Fourth Amendment right. Moreover, the law was clearly established in the relevant jurisdiction that the officer's basis for arresting Kelly did not constitute probable cause. Thus, a reasonable officer would have known that he was violating Kelly's rights. Yet, solely because a prosecutor confirmed the police officer's inaccurate interpretation of the law, Kelly (and similarly situated civil rights plaintiffs) will now be required to produce evidence to rebut the judicially mandated inference that the police officer's violation of his clearly established constitutional right was objectively reasonable. This presumption is unlikely to increase legal consultation; instead, it will allow courts to relieve law enforcement officers of their responsibility to exercise independent professional judgment and will decrease the likelihood that constitutional violations will be redressed.

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[60] *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 598 (1998) ("[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery." (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

[61] *See* Patzig v. O'Neil, 577 F.2d 841, 849 n.9 (3d Cir. 1978) (suggesting that "the same pleading and proof rules apply to constitutional false arrest claims as common law false arrest claims" and observing that, at common law, "once a plaintiff showed arrest and imprisonment without process, the burden shifted to the defendant to show justification, such as probable cause").

[62] Losch v. Borough of Parkesburg, 736 F.2d 903, 909 (3d Cir. 1984); *cf.* Thomas v. Independence Twp., 463 F.3d 285, 293 (3d Cir. 2006) ("[T]he burden of pleading a qualified immunity defense rests with the defendant, not the plaintiff." (citing *Crawford-El*, 523 U.S. 574)).

[63] *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, 369–70 (2006); *see also* Dubner v. City of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001) ("This minimal burden shifting forces the police department, which is in the better position to gather information about the arrest, to come forward with some evidence of probable cause.").