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MAKING SENSE OF QUALIFIED IMMUNITY: SUMMARY JUDGMENT AND ISSUES FOR THE TRIER OF FACT

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At common law, executive, legislative, and judicial officials enjoyed some form of immunity from suit based upon their official actions.[1] "[P]ublic officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."[2] In the United States, certain officers generally retain absolute immunity, such as the President,[3] legislators performing legislative functions,[4] judges,[5] prosecutors,[6] and executive officers engaged in adjudicative functions.[7] Other government officials receive only qualified or good-faith immunity.[8]

As a general rule, government officials claiming qualified immunity are entitled to a pretrial determination of their immunity, most commonly in the form of a motion for summary judgment.[9] In certain instances, however, government officials cannot take full advantage of their immunity because of the difficulty in determining, on a motion for summary judgment, issues that could be for the jury. This article will outline the problems with using summary judgment motions to raise the defense of qualified immunity—specifically, the confusion between qualified immunity and liability on the merits. To highlight the problem, the article focuses on cases involving

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1. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

2. *Id.*

3. *See* Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982).

4. *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975).

5. *E.g.*, Stump v. Sparkman, 435 U.S. 349, 359 (1978).

6. Butz v. Economou, 438 U.S. 478, 508-12 (1978). *But cf.* Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2612 (1993) (holding that prosecutors are not absolutely immune for fabricating evidence or making false statements at a press conference).

7. *Butz*, 438 U.S. at 513-17.

8. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 238-49 (1974).

9. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

police officers alleged to have violated the Fourth Amendment and prison[10] officials who are accused of denying medical or psychiatric care to suicidal inmates.

In such cases, the standard for determining liability is vague enough that police officers and prison officials often are not able to obtain a pretrial determination of their immunity. The distinction between qualified immunity and liability on the merits frequently is lost because courts grant qualified immunity only when it is clear that the defendant could not be liable on the merits. Qualified immunity, like any other immunity, however, is meaningful only when the beneficiary is shielded from liability that would otherwise attach to his conduct.

Two possible scenarios exist in which the general summary judgment rules lead to results at odds with the purposes underlying qualified immunity—i.e., to protect "all but the plainly incompetent or those who knowingly violate the law."[11] In the first instance, the underlying facts are not in dispute, but a jury question exists over whether those facts amount to a constitutional violation. This problem is particularly acute in prison medical care and Fourth Amendment cases because the standards—deliberate indifference and probable cause—often create a jury question even on undisputed facts.[12] In the second instance, there is a genuine factual dispute. For example, the plaintiff says the defendant gave the inmate the rope to hang himself, but the defendant denies that he gave the inmate the rope. In this situation, summary judgment is generally inappropriate. If, however, the defendant ultimately proves to the trier of fact that he did not violate the plaintiff's constitutional rights, was it just to require the defendant to go to trial?[13]

When qualified immunity is raised as a defense by a government official,[14] the issue before the court with respect to that defendant should become qualified immunity, not the merits of the alleged constitutional violation. As to the first instance—in which the evidentiary facts are not in

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10. As used in this article, "prison" denotes both prisons and jails.

11. Malley v. Briggs, 475 U.S. 335, 341 (1986).

12. This is similar to negligence cases in which the trier of fact determines whether the defendant's conduct was reasonable, even if the facts are not in dispute. *E.g.*, Davidson v. Stanadyne, Inc., 718 F.2d 1334, 1338 (5th Cir. 1983) (noting that summary judgment is rarely appropriate in negligence cases even if the facts are not in dispute). *But cf.* Lampkin v. City of Nacogdoches, 7 F. 3d 430, 435 (5th Cir. 1993) (error to hold that the objective reasonableness prong of the qualified immunity standard is generally a factual question for the jury).

13. *See* Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982). One rationale of qualified immunity is to avoid the expense of litigation and the diversion of official energy. *Id.* at 814.

14. Qualified immunity is not available to private defendants. *See* Wyatt v. Cole, 112 S. Ct. 1827, 1834 (1992). As to government defendants, qualified immunity is available only for performance of discretionary functions. *See, e.g.*, Ansley v. Heinrich, 925 F.2d 1339, 1346 (11th Cir. 1991). For purposes of this argument, this article does not go into the issue of whether the defendant's actions were within the scope of his discretionary functions. Such a discussion would merit its own article. This article assumes that the actions forming the basis of the lawsuit were within the defendant's discretionary authority such that the defendant may raise the defense of qualified immunity.

dispute—if a jury question exists as to liability, then the individual defendant should be entitled to summary judgment on the issue of qualified immunity. If reasonable minds, including the defendant's, could differ about the legality of the defendant's actions, the defendant could not have violated a clearly established right of the plaintiff's. If reasonable minds could not differ as to the illegality of defendant's conduct, the defendant is not entitled to qualified immunity, and the plaintiff would necessarily prevail as a matter of law.

As to the second instance—in which the evidentiary facts are in dispute—the plaintiff should have the burden to produce evidence in support of a motion for summary judgment that, if uncontroverted, would entitle him to a judgment as a matter of law as the law existed at the time of the alleged constitutional violation.[15] If the issue of qualified immunity is not decided on summary judgment, the court should submit the issue of qualified immunity to the jury; the plaintiff would prevail at trial only if he could prove facts from which reasonable minds could not differ concerning the illegality of defendant's conduct. Any doubt as to the legality of defendant's conduct would be resolved in favor of the defendant.

GENERAL STANDARD ON MOTION FOR SUMMARY JUDGMENT

In all civil cases, including those in which qualified immunity is an issue, the court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[16] A defendant is entitled to judgment as a matter of law unless the plaintiff, the nonmovant, demonstrates that a genuine dispute exists as to an element of the plaintiff's case on which the plaintiff has the burden of proof.[17] When deciding a motion for summary judgment, the court may not weigh the evidence to determine the truth of the matter, but must simply determine whether there is an issue for trial.[18] If a reasonable factfinder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court may not grant summary judgment.[19]

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15. The conduct must be judged according to law as it existed at the time of the alleged violations. *See* Procunier v. Navarette, 434 U.S. 555, 562-65 (1978). If, based on the plaintiff's evidence alone, reasonable minds could differ as to whether defendant's conduct was illegal, the defendant should be entitled to qualified immunity.

16. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)).

17. *Id.* The burden of proof on the issue of qualified immunity is not clearly defined. *See infra* notes 57-58 and accompanying text.

18. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

19. *See, e.g.*, Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988); Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).

Although issues of qualified immunity "ordinarily should be decided by the court long before trial,"[20] the summary judgment standard is designed to weed out only cases in which there are no genuine issues of fact for the jury. The Supreme Court having never ruled directly on the issue, the determination of qualified immunity, in certain circuits, can be an issue of fact for the jury.[21] Ideally, the issue of qualified immunity should not survive to trial. Indeed, if the case goes to the jury, much of the immunity is lost because the defendant has had to go through the expense and inconvenience of litigation.[22]

In certain cases, summary judgment may be an adequate means to protect the qualified immunity of individual government officials.[23] In cases involving prison suicides and searches or seizures without probable cause, however, the standard rules as currently applied are inadequate to give government officials the full benefit of their qualified immunity because the existence of an issue of fact concerning liability often prevents a court from granting summary judgment on the issue of qualified immunity. A defendant often obtains judgment on the issue of qualified immunity only when he has not violated the plaintiff's constitutional rights and would be entitled to judgment on the merits.

GENESIS OF QUALIFIED IMMUNITY

In *Scheuer v. Rhodes*,[24] the Supreme Court had to determine what immunity from suit, if any, to which state officials, including the Governor of Ohio, would be entitled. The court of appeals held that the Governor and

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20. Hunter v. Bryant, 112 S. Ct. 534, 537 (1991) (citing Mitchell v. Forsyth, 472 U.S. 511, 527-29 (1985)); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

21. *See* Mahoney v. Kesery, 976 F.2d 1054, 1058 (7th Cir. 1992); Thorsted v. Kelly, 858 F.2d 571, 575 (9th Cir. 1988); Bledsoe v. Garcia, 742 F.2d 1237, 1239-40 (10th Cir. 1984); Bilbrey v. Brown, 738 F.2d 1462, 1466-67 (9th Cir. 1984); B.C.R. Transport Co. v. Fontaine, 727 F.2d 7, 10-11 (1st Cir. 1984); McElveen v. County of Prince William, 725 F.2d 954, 956-58 (4th Cir.), *cert. denied*, 469 U.S. 819 (1984); *see also* Llaguno v. Mingey, 763 F.2d 1560, 1576 (7th Cir. 1985) (Coffey, J., dissenting in part). *But see* Ansley v. Heinrich, 925 F.2d 1339, 1348 (11th Cir. 1991); Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985); Trejo v. Perez, 693 F.2d 482, 486-88 (5th Cir. 1982).

22. *See* Mitchell v. Forsyth, 472 U.S. 511, 525 (1985) (determining that the essence of immunity is the possessor's entitlement not to have to answer for his conduct in a civil damages action).

23. For example, a public employee who has a property interest in his job has a constitutional right to procedural due process before he may be terminated. *See* Board of Regents v. Roth, 408 U.S. 564, 569-79 (1972). Because the specifics of what process is due are unclear, *see, e.g., id.* at 570 n.7 ("some kind of hearing required"); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (indicating that the determination of due process requires a balancing of the competing interests of the employee and the government that are implicated in the termination decision), government employer defendants are entitled to qualified immunity unless the employee can show that the employee's right to due process was clearly established. *See* Davis v. Scherer, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.").

24. 416 U.S. 232 (1974).

other state officers had absolute immunity.[25] After determining that government officers need some form of immunity,[26] the Supreme Court reversed, holding that unlike judges and legislators, executive officers have no absolute immunity,[27] but are immune from liability only if acting in good faith.[28] The rationale for such immunity is:

> 1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion, [and] 2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and judgment required by the public good.[29]

The issue having been raised on a motion to dismiss in the district court, the Supreme Court did not determine whether, and under what circumstances, the defendants would be entitled to qualified immunity, but remanded the case to the district court for further factual development.[30]

Eight years later, in *Harlow v. Fitzgerald*,[31] the Supreme Court elaborated on the standard that courts must use to determine whether individual officers are entitled to qualified immunity. Because one rationale for qualified immunity is to avoid the expense of litigation and the diversion of official energy,[32] "public policy . . . mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial."[33] A standard that used the subjective good faith of the defendant would invariably create a jury question that would preclude summary judgment.[34]

In the interest of allowing defendants to raise the defense of qualified immunity successfully before trial, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[35] Because a court would base its determination on objective factors, the question of whether a defendant would be entitled to qualified immunity would be a question of law that the court could determine on a motion for summary judgment.[36] As Justice Brennan noted in his concur-

25. Krause v. Rhodes, 471 F.2d 430, 442 (6th Cir. 1972).
26. *Scheuer*, 416 U.S. at 240-42.
27. *Id.* at 243-44.
28. *Id.* at 247-48.
29. *Id.* at 240.
30. *Id.* at 250.
31. 457 U.S. 800 (1982).
32. *Id.* at 814.
33. *Id.* at 813.
34. *Id.* at 816.
35. *Id.* at 818.
36. *See id.* at 819.

rence, however, even with the objective standard, some discovery may be required.[37] Thus, even though the court might grant summary judgment, government officials could still be saddled with the expenses of litigation and the diversion of official energy.

In *Mitchell v. Forsyth*,[38] the Supreme Court made clear that qualified immunity protects individuals from suit, not just liability. The Court held that the denial of a motion for summary judgment for qualified immunity is an appealable collateral order[39] because the defendant's right not to stand trial would be forever lost if not determined before trial.[40] Summary judgment is appropriate if the plaintiff fails to produce evidence that the defendant committed an unconstitutional act.[41] The Court further made clear that the question of whether the defendant's actions were clearly unconstitutional must be made in the context of the law at the time of the alleged constitutional deprivation.[42]

The contours of qualified immunity were further refined in *Anderson v. Creighton*,[43] in which the Court reasoned that the determination of whether a constitutional right was clearly established depended on the specific facts of the case, not broad generalizations of constitutional law.[44] In *Anderson*, an FBI agent conducted a warrantless search of a residence because the agent believed that a man suspected of committing a bank robbery earlier in the day was at the residence.[45] After the homeowners filed suit, the agent moved for summary judgment on the issue of qualified immunity.[46]

The district court granted summary judgment, holding that the undisputed facts revealed that the agent had probable cause to search and that his failure to obtain a warrant was justified by exigent circumstances.[47] The court of appeals reversed, determining that unresolved issues of fact made it impossible to determine whether the search had been supported by probable cause and exigent circumstances.[48] The court of appeals held that the agent was not entitled to qualified immunity because the right he allegedly

37. *See id.* at 821 (Brennan, J., concurring).

38. 472 U.S. 511 (1985).

39. *Id.* at 525-26.

40. "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526.

41. *See id.*

42. *See id.* at 535. Although the plaintiff must show a violation of clearly established law, the court must determine what the law was at the time of the violation. *See* Elder v. Holloway, 62 U.S.L.W. 4149 (U.S. Feb. 23, 1994).

43. 483 U.S. 635 (1987).

44. *See id.* at 640 n.2.

45. *Id.* at 637.

46. *Id.*

47. *Id.*

48. *Id.* at 637-38.

violated—the right to be free from unreasonable searches—was clearly established.[49]

The Supreme Court reversed. The Court held that law enforcement officers who reasonably, but mistakenly, conclude that probable cause is present should not be held personally liable.[50] As the Court had previously noted, police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application.[51] The relevant question with which to determine qualified immunity is whether a reasonable officer could have concluded that the search in question was lawful.[52] If reasonable doubt about the legality of the search exists—based on the undisputed facts, the defendant would be entitled to summary judgment on his defense of qualified immunity.[53]

Although there is a societal interest in giving qualified immunity to government officials, qualified immunity is an affirmative defense.[54] Thus, the bad faith of the defendant is generally not an element that the plaintiff must plead[55] in an action under 42 U.S.C. § 1983.[56] The burden of proof on qualified immunity, however, presently is unclear.[57] Prior to *Harlow* and *Anderson*, the burden of proof was on the government official to prove entitlement to immunity.[58] Since the Court changed the standard for determining entitlement to qualified immunity, it has remained silent on the issue of the burden of proof.

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49. *Id.* at 638.

50. *Id.* at 641 (citing Malley v. Briggs, 475 U.S. 335, 344-45 (1986)).

51. Malley v. Briggs, 475 U.S. 335, 344-45 (1986).

52. *Anderson,* 483 U.S. at 641.

53. *Id.; see also* Hunter v. Bryant, 112 S. Ct. 534, 537 (1991) ("Immunity ordinarily should be decided by the court long before trial" if the defendant could reasonably have believed probable cause existed). *But see* Navarro v. Barthel, 952 F.2d 331, 333 (9th Cir. 1991) (question for jury whether defendant's actions were reasonable in carrying out search), *cert. denied,* 112 S. Ct. 1920 (1992).

54. Gomez v. Toledo, 446 U.S. 635, 640-42 (1980).

55. The Supreme Court has, however, left open the possibility that the defense of qualified immunity could require heightened pleading on the part of persons suing government officials. Leatherman v. Tarrant County, 113 S. Ct. 1160, 1162 (1993).

56. *Gomez,* 446 U.S. at 639-40. Qualified immunity is equally available to federal officials sued pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See, e.g.,* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

57. *See, e.g.,* Guffey v. Wyatt, 1994 WL 70532, at *1 (10th Cir. Mar. 9, 1994) ("when a defendant raises qualified immunity, the burden shifts to the plaintiff to establish the defendant violated clearly established constitutional rights;" to obtain summary judgment, the defendant would then have the burden to prove that "no material issues of fact remain as to whether the defendant's actions were objectively reasonable.").

58. *See* Dennis v. Sparks, 449 U.S. 24, 29 (1980) (citing Butz v. Economou, 438 U.S. 478, 506 (1978)).

APPLICATION OF QUALIFIED IMMUNITY

Probable Cause

In some cases, the broad standard for determining whether a police officer is entitled to qualified immunity with respect to probable cause for a search or arrest does not allow the officer to avoid the expense and energy of a trial. In *Malley v. Briggs*,[59] the Supreme Court considered the immunity of a police officer who allegedly applied for a search warrant without probable cause. The Court reiterated the broad scope of qualified immunity,[60] yet remanded the case for trial. As Justice Powell noted in his partial dissent, summary judgment as to qualified immunity is appropriate if reasonable officers in the defendant's position could disagree about whether probable cause for a search existed.[61] In this situation, summary judgment should have been granted on the issue of qualified immunity, although such a doubt about the existence of probable cause would preclude summary judgment on the underlying issue of whether the defendant's conduct was unconstitutional.[62]

Because the standard for determining probable cause is similar to that for determining qualified immunity—i.e., reasonableness—some courts treat the lack of probable cause to search or arrest as a basis to deny qualified immunity.[63] Because the right to be free from searches and seizures without probable cause has been long established, a police officer will have difficulty arguing that the law making his conduct unconstitutional was not clearly established at the time of the arrest or search. Thus, a court could conclude, as did a panel of the Seventh Circuit, that the issue of whether an arrest was without probable cause is one and the same with the issue of whether the arresting officer would be entitled to qualified immunity.[64]

In *Mahoney v. Kesery*,[65] after asserting that the issue of liability and qualified immunity is one and the same, Judge Posner stated that district courts have two options to resolve the question of the officer's immunity: the

59. 475 U.S. 335 (1986).

60. *Id.* at 341 (reasoning that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

61. *Id.* at 349 (Powell, J., concurring in part and dissenting in part). The majority opinion states that "if officers of reasonable competence could disagree, immunity should be recognized." *Id.* at 341. "Only where the warrant application is so lacking in indication of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost." *Id.* at 344-45 (citation omitted). Phrased differently, the police officer gets no immunity if no officer of reasonable competence would have requested the warrant. *Id.* at 346 n.9.

62. *Cf.* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (finding that officers may reasonably, but mistakenly, believe probable cause exists).

63. *See, e.g.*, Mahoney v. Kesery, 976 F.2d 1054, 1057 (7th Cir. 1992); Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985).

64. *See, e.g.*, *Mahoney*, 976 F.2d at 1057.

65. 976 F.2d 1054 (7th Cir. 1992).

court could hear the evidence and then rule on the question of immunity, or the jury could rule on the issue.[66] This assumes that the jury is competent to rule on the question of qualified immunity.[67] Either option effectively prevents the defendant from successfully raising the shield of qualified immunity before trial, making qualified immunity available only when no liability exists.

The law of other circuits concerning the assertion of qualified immunity by police officers charged with unreasonable arrests or searches makes it difficult for the defendant to raise the issue successfully before trial. In the Ninth Circuit, the burden is on the defendant to prove that his conduct was justified by an objectively reasonable belief that his actions were lawful under existing law.[68] If there are issues of fact concerning the reasonable belief of the defendant that the search is lawful, the immunity issue, as well as that of liability, is for the jury.[69]

In *Golino v. City of New Haven*,[70] the Second Circuit affirmed the district court's denial of a motion for summary judgment on the question of qualified immunity. The plaintiff, who had been arrested for a notorious murder, sued various city defendants, including the officers who applied for the arrest warrant, for malicious prosecution.[71] After determining that a malicious prosecution under 42 U.S.C. § 1983 is an arrest or prosecution without probable cause, the district court held that it could not rule as a matter of law that it was objectively reasonable for the officers to believe that their actions were lawful.[72] In affirming, the court of appeals held that to get summary judgment, the officer must adduce facts so that no reasonable jury, viewing all the facts in the light most favorable to the plaintiff, could conclude it objectively unreasonable for the officer to believe probable cause existed.[73]

Courts that view qualified immunity as a question of law are not necessarily more sympathetic to the police officer alleged to have made an arrest or search without probable cause. In the Eleventh Circuit, the issue of

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66. *Id.* at 1058. In *Mahoney,* the district court judge followed the first alternative. *Id.* Because both the judge and jury reached the same conclusion that the officer's arrest was unreasonable—i.e., without probable cause, Judge Posner did not state which alternative he preferred. *Id.* at 1059.

67. *But see* Ansley v. Heinrich, 925 F.2d 1339, 1348 (11th Cir. 1991); Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985); Trejo v. Perez, 693 F.2d 482, 486-88 (5th Cir. 1982).

68. *See* Thorsted v. Kelly, 858 F.2d 571, 575 (9th Cir. 1988).

69. *Id.* (citing Bilbrey v. Brown, 738 F.2d 1462, 1467 (9th Cir. 1984)). In this case, there was no dispute over defendant's conduct, yet the defendant never moved to dismiss or for summary judgment. *Id.* at 572.

70. 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992).

71. *Id.* at 866.

72. Golino v. City of New Haven, 761 F. Supp. 962, 971-72 (D. Conn.), *aff'd*, 950 F.2d 864 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 3032 (1992).

73. *Golino*, 950 F.2d at 870 (citing Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987)). In *Golino,* there were disputed facts concerning whether the officers deliberately misrepresented facts to the magistrate who issued the arrest warrant.

qualified immunity is a question of law to be determined on a motion to dismiss for failure to state a claim upon which relief may be granted, a motion for judgment on the pleadings, or a motion for summary judgment.[74] To avail himself of qualified immunity, the defendant must prove that his wrongful actions were within his discretionary authority.[75] The burden then shifts to the plaintiff to prove lack of good faith.[76] "[O]nce the defense of qualified immunity has been denied pretrial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity."[77] Thus, if the plaintiff can survive the motion for summary judgment by creating a genuine issue of material fact, the defense of qualified immunity would be lost forever if the defendant has no further opportunity to raise it.[78]

The Eighth Amendment Right to Medical/Psychiatric Care

The guarantee of the Eighth Amendment against cruel and unusual punishment protects prison inmates against unnecessary infliction of pain and suffering.[79] "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[80] This indifference may be manifested by prison doctors in response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care.[81] Pretrial detainees have rights under the Fourteenth Amendment at least equivalent to those enjoyed by convicted persons under the Eighth Amendment.[82]

The right to be free from deliberate indifference with respect to serious medical needs encompasses the right to care for serious psychiatric needs.[83] Accordingly, prison officials who display deliberate indifference to the psychiatric needs of a suicidal prisoner or detainee may be liable if the

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74. Ansley v. Heinrich, 925 F.2d 1339, 1347 (11th Cir. 1991) (citing Bennett v. Parker, 898 F.2d 1530, 1535 n.2 (11th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991)).

75. *Id.* at 1346.

76. *Id.*

77. *Id.* at 1348.

78. However, some courts, without addressing specific procedures, have held that the defense of qualified immunity can be raised at any time, including trial. Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991) (the defendant may reassert the defense at trial after factual disputes are resolved); Figeroa-Rodriguez v. Aquino, 863 F.2d 1037, 1041 n.5 (1st Cir. 1988).

79. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976).

80. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citation omitted).

81. *Id.* at 104-05.

82. *See, e.g.*, Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983); Bowen v. City of Manchester, 966 F.2d 13, 16 (1st Cir. 1992); Danese v. Asman, 875 F.2d 1239, 1243 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1186-87 (5th Cir. 1986); Loe v. Armistead, 582 F.2d 1291, 1294 (4th Cir. 1978), *cert. denied*, 446 U.S. 928 (1980).

83. *See, e.g.*, Greason v. Kemp, 891 F.2d 829, 833-34 (11th Cir. 1990); Wellman v. Faulkner, 715 F.2d 269, 272-73 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

prisoner commits suicide in custody.[84] As a general rule, jailers can be held liable for an inmate's suicide only when the inmate has previously attempted suicide or expressed an intention to commit suicide.[85] If the jailer knows the inmate to be suicidal, whether the jailer's conduct displayed deliberate indifference to the inmate's psychiatric needs is often a question for the trier of fact.[86]

Because the standard for determining whether an inmate suicide was the result of a constitutional violation is somewhat undefined, the standard for determining whether a defendant is entitled to qualified immunity often blurs the distinction between the merits and qualified immunity.[87] In *Greason v. Kemp*,[88] the Court of Appeals for the Eleventh Circuit affirmed the denial of summary judgment to two prison physicians.[89] Although the facts were not in dispute, the court determined that a reasonable juror could conclude from those facts that the defendants displayed deliberate indifference to the suicidal decedent's psychiatric needs.[90] The issue in *Greason* turned on the differing expert opinions concerning the defendant's responsibilities.[91] Because the expert testimony could be the basis for substantive liability, the defendants were not able to obtain summary judgment on the issue of qualified immunity.

In *Gordon v. Kidd*,[92] the Court of Appeals for the Fourth Circuit held that summary judgment is not appropriate "even when there is no dispute as to the evidentiary facts, but only as to the conclusions to be drawn therefrom."[93] In affirming the denial of summary judgment on behalf of one defendant, the court determined that "the district court properly concluded that the facts and inferences reasonably drawn from the facts did not establish as a matter of law that [his] conduct was objectively reasonable."[94] Thus, in order for an individual defendant to obtain summary judgment on the basis

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84. *See, e.g.*, Gordon v. Kidd, 971 F.2d 1087, 1097 (4th Cir. 1992); Edwards v. Gilbert, 867 F.2d 1271, 1276 (11th Cir. 1989).

85. *See* Schmelz v. Monroe County, 954 F.2d 1540, 1544-45 (11th Cir. 1992) (holding that no individual liability if inmate had never shown indication of suicidal tendency).

86. *See Gordon*, 971 F.2d at 1097; *Greason*, 891 F.2d at 835 (citing Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989)).

87. *Greason*, 891 F.2d at 841-42 (Edmonson, J., dissenting) ("The merits of plaintiff's case and the question of qualified immunity are separate questions; we must avoid allowing the ideas to be blurred.").

88. 891 F.2d 829 (11th Cir. 1990).

89. *Id.* at 840.

90. *Id.* at 835 (citing *Waldrop*, 871 F.2d at 1033).

91. *See id.* at 842 (Edmonson, J., dissenting) (reasoning that qualified immunity should not be defeated by the plaintiff's production of an expert opinion on the defendant's conduct).

92. 971 F.2d 1087 (4th Cir. 1992).

93. *Id.* at 1093 (citing Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979)).

94. *Id.* at 1097. The court reversed the denial of summary judgment as to the other defendants because the court concluded that they were not "deliberately indifferent" to the decedent's psychiatric needs. *Id.* at 1095. Thus, these defendants were entitled to qualified immunity because they had no substantive liability.

of qualified immunity, he must prove that there was no violation of the plaintiff's rights as a matter of law.

Other courts have applied a similar standard—i.e., could a jury find the defendant liable on the merits—when deciding a motion for summary judgment concerning whether an individual defendant is entitled to qualified immunity.[95] Although the Eighth Circuit has stated that "to provide its fullest and best use, qualified immunity ideally is addressed by summary judgment,"[96] the same opinion granted the defendants qualified immunity because there was in effect no constitutional violation.[97] Thus, a prison guard would be entitled to summary judgment on qualified immunity only if the plaintiff fails "to adduce any evidence to lead a reasonable juror to infer that [the defendant] had actual knowledge, or willfully blinded himself, to the unusual and large possibility that [the inmate] would commit suicide."[98]

Toward a Solution

As Judge Edmonson of the Eleventh Circuit has noted, if qualified immunity were available only when a jury could not find a constitutional tort, the doctrine of qualified immunity would be superfluous.[99] Qualified immunity is meaningful only if it shields government officials from trial and liability when they would otherwise be liable. This is not to say that qualified immunity is necessarily desirable, but that in many situations qualified immunity does not meet its putative objective: allowing government officials to function without undue fear of liability or litigation.

When the facts are not in dispute, but only the inferences to be drawn from those facts, summary judgment may be appropriate on the issue of qualified immunity if not on the merits. Even if the judge has no role to play in resolving the facts, any doubt concerning the legality of a defendant's conduct should be resolved in favor of the defendant on the issue of qualified immunity.[100] In the case of a prison suicide or a search or arrest without probable cause, liability necessarily means that the official acted with deliberate indifference (suicide) or unreasonably (lack of probable cause).

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95. *See, e.g.*, Nelson v. Overberg, 999 F.2d 162, 166 (6th Cir. 1993); Bowen v. City of Manchester, 966 F.2d 13, 17 (1st Cir. 1992); Heflin v. Stewart County, 958 F.2d 709, 717 (6th Cir. 1992); Schmelz v. Monroe County, 954 F.2d 1540, 1544-45 (11th Cir. 1992); Rellergert v. Cape Girardeau County, 924 F.2d 794, 797-98 (8th Cir. 1991); Belcher v. Oliver, 898 F.2d 32, 34 (4th Cir. 1990).

96. *Rellergert*, 924 F.2d at 796.

97. *Id.* at 797 (holding defendants' actions "cannot be said to have been known to them as deliberately indifferent").

98. *Bowen*, 966 F.2d at 17.

99. Greason v. Kemp, 891 F.2d 829, 841 (11th Cir. 1990) (Edmonson, J., dissenting).

100. *See* Ellis v. Wynalda, 999 F.2d 243, 246 n.2 (7th Cir. 1993) (when reasonable minds could differ, the summary judgment balance should favor the party claiming qualified immunity). Even in *Ellis*, however, the court determined that the case should go to the jury even though it did not "foreclose the possibility that Wynalda did not use excessive force." *Id.* at 247. The jury was thus left to determine whether the officer's actions were "reasonable."

Thus, one could argue that an officer who displays deliberate indifference to an inmate's medical needs cannot claim qualified immunity.[101] The same argument can be made with respect to an officer who makes an unreasonable search or arrest.[102] Because determinations of probable cause are difficult, however, an officer can act objectively reasonably even though he is in violation of the Fourth Amendment.[103] The standard for determining deliberate indifference is similarly vague. Individuals should not be held personally liable for actions that, in hindsight, are found to violate the constitution if fair doubt about the constitutionality of their actions existed at the time.[104]

Greason v. Kemp[105] and *Gordon v. Kidd*[106] are examples of the situation in which hindsight prevents a defendant from claiming qualified immunity on a motion for summary judgment. In *Greason*, the court relied on the plaintiff's expert to determine that a trier-of-fact could conclude that the defendant physicians were deliberately indifferent to the inmate's psychiatric needs because they provided sufficiently inadequate psychiatric care.[107] Just as the experts in *Greason* disagreed about whether the defendants' conduct constituted deliberate indifference, reasonable physicians could disagree. Thus, how could the defendants have violated a clearly established right if it is not clear that they violated the plaintiff's rights at all?

In *Gordon v. Kidd*, another suicide case, the Fourth Circuit reversed the denial of summary judgment as to some defendants because the court concluded on the evidence that they were not deliberately indifferent.[108] As

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101. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 57-58 (1989) (deliberate conduct should not allow a defendant to rely on qualified immunity).

102. *See* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L. J. 447, 460 (1978) ("Surely the officer could not *reasonably* believe there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe that there was probable cause."). The argument also arises in cases involving police officers' use of excessive force. *See, e.g.*, Guffey v. Wyatt, 1994 WL 70532, at *4 (10th Cir. Mar. 9, 1994) ("[i]f a plaintiff alleges a police officer has used excessive force in violation of the Fourth Amendment, the qualified immunity inquiry becomes indistinguishable from the merits of the underlying action"). *But see Ellis*, 999 F.2d at 246 n.2 (when reasonable minds could differ, the balance favors the movant in the qualified immunity context even though the balance would favor the plaintiff on the underlying claim).

103. Anderson v. Creighton, 483 U.S. 635, 643-44 (1987).

104. *Cf.* Hunter v. Bryant, 112 S. Ct. 534, 537 (1991) (holding that the issue is whether the defendants acted reasonably under settled law, not whether, in hindsight, the defendants could have been more reasonable).

105. 891 F.2d 829 (11th Cir. 1990).

106. 971 F.2d 1087 (4th Cir. 1992).

107. *Greason*, 891 F.2d at 835. The dissent contended that the right to be free from inadequate psychiatric care was not clearly established until this case. *Id.* at 841 (Edmonson, J., dissenting). For purposes of the summary judgment standard, this article addresses the situation in which the law was clearly established at the time of the incident, but the issue remained for the jury whether the defendants' conduct violated that clearly established law.

108. *Gordon*, 971 F.2d at 1095.

to the remaining defendant, the court affirmed the denial of summary judgment because the facts—which were not in great dispute, and the inferences reasonably drawn from those facts, did not establish *as a matter of law* that defendant's conduct was objectively reasonable.[109] In order to obtain summary judgment on the issue of qualified immunity, the defendant must prove as a matter of law that there was no constitutional violation. Any doubt about the matter would be resolved against the defendant; he would have to go through the expense and diversion of official energy related to a trial.

With respect to cases involving alleged violations of the Fourth Amendment, there is similarly sometimes no distinction between liability on the merits and qualified immunity. In *Mahoney v. Kesery*,[110] Judge Posner, writing for the court, stated that there the issue of immunity and the merits were one and the same.[111] In so doing, the court stated that an officer cannot reasonably believe his actions to be reasonable if they are, in fact, unreasonable.[112] In *Golino v. City of New Haven*,[113] a defendant charged with making an arrest without probable cause did not get summary judgment on the issue of qualified immunity because the court could not rule as a matter of law that his actions were objectively reasonable.[114] In the Second Circuit, an officer moving for summary judgment on the issue of qualified immunity must adduce facts so that no reasonable jury could conclude it unreasonable for the officer to believe probable cause existed.[115] As in the suicide cases, any doubt about the legality of the action—even on undisputed facts—is resolved against the defendant. The defendant would win a motion for summary judgment on qualified immunity only if there was no possible liability on the merits.

PROPOSAL

Undisputed Evidentiary Facts

The defense of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[116] With respect to probable cause determinations, if officers of reasonable compe-

109. *Id.* at 1097 (emphasis added).
110. 976 F.2d 1054 (7th Cir. 1992).
111. *Id.* at 1057.
112. *Id.* at 1058.
113. 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992).
114. *Id.* at 870.
115. *Id.* at 870 (citing Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987)); *see also* Frank v. Relin, 1 F.3d 1317, 1328 (2d Cir. 1993).
116. Malley v. Briggs, 475 U.S. 335, 341 (1986).

tence could disagree, immunity should be recognized.[117] Therefore, if reasonable jurors, with the benefit of hindsight and time, could disagree, the officer should be entitled to the shield of immunity. This should be true in all cases involving the defense of qualified immunity, including prison suicides. When the facts are not in dispute, but a reasonable finder of fact would not necessarily find a constitutional violation from those facts, any doubt should be resolved in favor of the defendant.

To give the defendant the benefit of the doubt, on a motion for summary judgment when the evidentiary facts are not in dispute, the defendant should be entitled to qualified immunity unless the plaintiff can prove a constitutional violation (as the law existed at the time of the violation) as a matter of law. The defendant loses his shield of immunity not when the plaintiff can create a question about which reasonable minds could differ, but when the facts are sufficiently egregious so that reasonable minds, including the defendant's, could not differ as to the legality of the defendant's actions. If the court denies summary judgment, the plaintiff would necessarily be entitled to judgment as a matter of law on the merits.[118]

Disputed Facts

If the facts are in dispute, the inquiry generally revolves around whether, under the plaintiff's version of the facts, the defendant's conduct violated a clearly established constitutional right.[119] Thus, if the law is clearly established that a law enforcement officer must seek a warrant for arrest if he has ample opportunity to procure a warrant, the defendant cannot prevail on a motion for summary judgment if the plaintiff produces evidence that the defendant had ample time to procure a warrant.[120] In this situation, the defendant will have to go to trial, thereby effectively losing any immunity because the immunity question will rise and fall with the jury's determination on the merits.

In some circumstances, a genuine dispute as to the facts will preclude summary judgment on the issue of qualified immunity. If the facts are in dispute, in order to survive a motion for summary judgment, the plaintiff should have to produce evidence that, if uncontroverted, would support judgment as a matter of law as the law existed at the time of the alleged violation.[121] If the plaintiff's evidence would be sufficient simply to create

117. *Id.*; *see also id.* at 349-50 (Powell, J., concurring in part and dissenting in part) (because reasonable officers could disagree, the defendant should not have to go to trial).

118. *See* Mitchell v. Forsyth, 472 U.S. 511, 545 (1985) (Brennan, J., dissenting in part) ("[A] necessary implication of a holding that Mitchell was not entitled to qualified immunity would be a holding that he is indeed liable.").

119. *See, e.g.*, Herren v. Bowyer, 850 F.2d 1543, 1547 (11th Cir. 1988).

120. *Id.*

121. This is the same standard as should apply in cases in which the evidentiary facts are not in dispute.

a question for the trier of fact as to the merits, the defendant should be entitled to summary judgment because reasonable minds could differ as to the legality of defendant's conduct. If the plaintiff produces evidence from which no reasonable juror could conclude the defendant's actions to be lawful under then existing law,[122] the motion for summary judgment should be denied because in such a situation, the resolution of the issue of qualified immunity requires findings of fact.

If the court denies summary judgment to the defendant because the plaintiff has produced sufficient evidence to create an issue of fact on qualified immunity, the defendant has effectively lost much of the protection of qualified immunity. Nonetheless, the standard for summary judgment precludes the court from preventing the case from going to trial because the court may not resolve genuine issues of material fact on a motion for summary judgment.[123] The defendant should nonetheless be allowed at trial to raise the defense of qualified immunity. Some courts apparently disagree with this proposition.[124] If the defendant cannot raise the defense of qualified immunity at trial, he risks having judgment entered against him on the merits even if the evidence at trial fails to show that the defendant violated a clearly established right of which a reasonable person would have known, but merely creates a question for the jury concerning liability.

To avoid this potential unfairness, the court must determine whether the evidence adduced at trial, when viewed in the light most favorable to the plaintiff, would entitle the plaintiff to judgment as a matter of law as the law existed at the time of the alleged violation; if not, the judge should enter judgment based on qualified immunity. The problem arises if the evidence of whether defendant's conduct was egregious enough to violate a clearly established constitutional right remains disputed at the end of the trial.[125] There are a number of possibilities in this situation: the judge could resolve the factual disputes that concern qualified immunity, the jury could resolve—with special interrogatories—the factual issues about both qualified immunity and the merits, the jury could resolve the merits without any consideration of qualified immunity, or the jury could be instructed only on qualified immunity.

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122. *Cf.* Wardlaw v. Pickett, 1 F.3d 1297, 1303 (D.C. Cir. 1993) ("a defendant's motion for summary judgment is to be denied only when, viewing the facts in the record and all reasonable inferences derived therefrom in the light most favorable to the plaintiff, a reasonable jury could conclude that the excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions"). This standard, however, falls short in a situation in which a question exists for the jury as to whether the force was unduly excessive.

123. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

124. *See, e.g.*, Ansley v. Heinrich, 925 F.2d 1339, 1348 (11th Cir. 1991). ("[O]nce the defense of qualified immunity has been denied pretrial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity."). *But see supra* note 78.

125. That is, the plaintiff's evidence, if uncontroverted, would entitle the plaintiff to judgment as a matter of law, but the evidence is contradicted by defendant's evidence.

The first three of these possibilities have problems. To allow the judge to make the factual determination would make the judge and the jury both triers-of-fact, which would give the defendant two bites at the apple.[126] To allow the jury to determine both the issue of qualified immunity and liability risks confusing the jury. The jury would potentially have to apply different legal standards if the law that would apply at time of trial was not clearly established at the time of the incident. To allow the matter to go to the jury without regard to qualified immunity would allow defendants to be held liable for conduct that did not violate clearly established constitutional rights. This would inhibit the ability of these government officials to perform their official duties.[127]

The best alternative is to leave the issue of qualified immunity to the jury, which would protect the potential immunity of the defendant and the plaintiff's right to vindication. Although there is the danger of confusing the issues, the court can reduce this possibility by submitting specific interrogatories to the jury to determine whether the jury found the facts as would be necessary to defeat the defense of qualified immunity.[128] The better alternative, however, would be to bifurcate the trial to allow the jury to determine the facts concerning qualified immunity. If the jury finds for any defendant concerning qualified immunity, the case is over with respect to that defendant because that defendant would be entitled to qualified immunity. If the jury finds against any defendant on the issue of qualified immunity—i.e., that the defendant's actions clearly violated the plaintiff's constitutional rights, the court would then enter judgment in favor of the plaintiff against that defendant. The court could then conclude the trial on the merits with respect to any remaining defendants who did not, or could not,[129] raise the qualified immunity defense.

Criticism

This proposal is not without its criticism. By definition, qualified immunity "directly limits individual liability for Constitutional violations by

126. The law could require the judge to determine, at the close of the evidence, whether the plaintiff has proved by a preponderance of the evidence that the defendant's conduct violated a clearly established constitutional right of which a reasonable person would have known; if so, the defendant would not be entitled to qualified immunity. Normally, the merits should then be submitted to the jury. In that situation, however, the judge would have ruled as a factual matter that the defendant should be liable. To submit the matter to the jury risks the possibility of inconsistent findings. To allow the judge to enter judgment on the merits would make the jury superfluous.

127. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

128. The court must determine the state of the law and what facts would entitle the plaintiff to judgment as a matter of law, i.e., facts upon which reasonable minds could not disagree that there was a constitutional violation.

129. For example, municipal defendants may not assert qualified immunity. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

denying a damage remedy for conduct that violates the constitution."[130] However, in order to be meaningful, qualified immunity must give protection to individuals who would otherwise be liable.[131] This proposal seeks only to make the doctrine of qualified immunity achieve its stated objectives of shielding government officials from liability to allow them to perform their discretionary functions effectively. Whether maintaining the defense of qualified immunity to constitutional torts is good policy is not an issue this article addresses.

A second criticism is that if the court grants qualified immunity pretrial, it would avoid ruling on the merits. Thus, courts might not create many new clearly established rights.[132] This would not necessarily be true in the two situations discussed above. With respect to Fourth Amendment rights, criminal defendants routinely challenge searches and seizures on motions to suppress evidence without respect to qualified immunity. With respect to the prison suicide cases, the argument holds more water because the only way in which the law could become clearly established would be through civil suits in which the individual defendants could raise qualified immunity. Nonetheless, in cases in which the facts are sufficiently egregious, the defendant is not entitled to qualified immunity even if there are no cases addressing that exact set of facts.[133] Although municipalities cannot be held liable through respondeat superior,[134] they are not entitled to qualified immunity.[135] Thus, law concerning the operation of prisons continues to be established. Furthermore, the defense of qualified immunity bars only monetary relief, not declaratory or injunctive relief.[136]

CONCLUSION

On a motion for summary judgment concerning qualified immunity, the court should consider evidence with respect to qualified immunity differently than with respect to the merits. Even if the plaintiff produces sufficient evidence to create a jury question on the merits, the defendant should be entitled to qualified immunity if the plaintiff cannot produce evidence to support a judgment as a matter of law against the defendant—i.e., sufficient to show that the defendant violated a clearly established right of which a reasonable person would have known.

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130. Rudovsky, *supra* note 101, at 27.

131. *See* Greason v. Kemp, 891 F.2d 829, 841 (11th Cir. 1990) (Edmonson, J., dissenting).

132. *See* Rudovsky, *supra* note 101, at 53-56.

133. *See, e.g.*, Lewis v. Parish of Terrebone, 894 F.2d 142, 145-46 (5th Cir. 1990) ("One need not find a 'goose case' to imbue a warden at a jail with a constitutional duty to protect a prisoner prone to suicide from self-destruction."); Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987) (to determine what a reasonable person should know, "it is not necessary to point to a precedent which is factually on all-fours with the case at bar").

134. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978).

135. Owen v. City of Independence, 445 U.S. 622, 625 (1980).

136. *E.g.*, Newman v. Burgin, 930 F.2d 955, 957 (1st Cir. 1991).

If the ruling on the issue of qualified immunity mimics the ruling on the merits, the defense of qualified immunity is superfluous because it would be available only when the plaintiff would be unable to prove liability. The only protection left to the defendant is the ability to file an interlocutory appeal to argue that the plaintiff would be unable to prove liability on the merits. Because qualified immunity should be denied only when the plaintiff can prove as a matter of law that the defendant violated a constitutional right, the merits should never become an issue with respect to that defendant. If the defendant loses qualified immunity, he would necessarily be liable on the merits.

By making qualified immunity the only issue, the court can focus the litigation so that qualified immunity can serve its purpose of protecting officials from the injustice of subjecting them to liability in the absence of bad faith and the diversion of official energy associated with defending a lawsuit. Thus, qualified immunity would truly be a shield to all but the truly incompetent and those who knowingly violate the law.