



REPLY

Is Quasi-Judicial Immunity Qualified Immunity?

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Has qualified immunity finally found its roots? Scott Keller's *Qualified and Absolute Immunity at Common Law* shows the breadth and complexity of nineteenth century case law dealing with official immunities.¹ But its most important claim, for today's purposes, is the claim to find a historical basis for a doctrine of qualified immunity: an immunity from suit given to all government officials (including, but not only, the police) whenever they are sued for violating the Constitution. According to Keller, "the common law definitively accorded at least *qualified* immunity to all executive officers' discretionary duties" in 1871, when Congress passed the civil rights statute now codified as 42 U.S.C. §1983.² This would be very important if it were true. But it is not.

Let us assume that this body of nineteenth-century common law should be translated to the scope of remedies under a statutory action for violations of the Constitution.³ Even so, the common law did not recognize the doctrine of qualified immunity. It recognized a doctrine of quasi-judicial immunity, which shielded certain acts from liability for good faith mistakes. Keller does acknowledge that this nineteenth century doctrine has important differences from today's doctrine.⁴ But the differences run deeper than you would know from Keller's account.

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1. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021).
2. *Id.* at 1368.
3. *But see* James Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 164-169 (2021).
4. Keller, *supra* note 1, at 1378-1389.

A closer examination of the doctrine of quasi-judicial immunity shows just how distant it was from the modern doctrine of qualified immunity. It protected quasi-judicial acts like election administration and tax assessment, not ordinary law enforcement decisions.⁵ It allowed for harsh liability for officers who exceeded their authority.⁶ And the defense was not an immunity from suit.⁷ Thus, today's doctrine of qualified immunity owes more to modern judicial invention than it does to the common law.

I. Quasi-Judicial

The nineteenth-century good faith defense did not apply to all, or even most, official acts. Rather, it applied only to “quasi-judicial” acts. As a cousin of the doctrine of judicial immunity, quasi-judicial immunity applied to “powers very nearly akin to those of judges in the courts,”⁸ the exercise of a “discretion in its nature judicial.”⁹ Quasi-judicial acts received the kind of defense Keller describes.¹⁰ An act undertaken *without* such quasi-judicial discretion still faced liability under the ordinary positive law.¹¹ This makes the doctrine very different from modern qualified immunity, which generally applies “across the board” regardless of “the precise nature of various officials’ duties.”¹²

To be sure, the boundaries of quasi-judicial immunity were somewhat shaggy during this period, and sometimes extended to acts that do not immediately strike us as judicial today. Quasi-judicial acts included, for example, a defective certification of a notary, “in its nature a judicial act”;¹³ the “judicial powers” of the surveyor general of the United States;¹⁴ the oversight of an election “in a judicial capacity”;¹⁵ the decision that a railroad had

5. See Part I.

6. See Part II.

7. See Part III.

8. FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 636 (1890).

9. JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 786 (1889).

10. *Infra* notes 13-18.

11. *Infra* notes 19-25.

12. *Anderson v. Creighton*, 483 U.S. 635, 642-643 (1987) (citation omitted); see also *Hoggard v. Rhodes*, 141 S.Ct. 2421 (Thomas, J., dissenting from denial of certiorari) (describing (and criticizing) “one-size-fits-all” approach to qualified immunity).

13. *Henderson v. Smith*, 26 W. Va. 829, 837 (1885).

14. *Reed v. Conway*, 20 Mo. 22, 38 (1854).

15. *State v. McDonald*, 4 Del. 555, 556 (Del. O. & T. 1845); see also *Miller v. Rucker*, 64 Ky. 135, 136 (1866) (“These officers, so appointed for the purposes of holding elections and determining the rights of the elector to exercise the elective franchise, are, to all intents, for such purposes, judicial...”).

completed its construction contract, made by trustees of a township, whose “duty in this respect is of a judicial character”;¹⁶ the “quasi judicial” decisions of the California board of Pilot Commissioners;¹⁷ or allowing convicts to work unsupervised outside a prison.¹⁸

On the other hand, quasi-judicial immunity was denied, and ordinary law was applied, to many other officers: A sheriff who improperly sold levied property;¹⁹ a tax assessor whose incorrect return led to a foreclosure;²⁰ county commissioners who failed to repair a bridge;²¹ other county commissioners who failed to levy a tax necessary to pay their bonds;²² a school superintendent whose licensing decisions were “of a merely administrative character”;²³ a clerk who failed to docket a suit;²⁴ and even a justice of the peace who had not “filed the appeal papers according to law.”²⁵

What unified the concept of quasi-judicial immunity was the idea that the act had been specially committed to the officer’s own judgment, with immunity from the judgments of others. That is, the officer had been given the power to make his own mistakes. As Bishop’s treatise put it, a quasi-judicial act was one where the officer was empowered to follow “the dictates of his own judgment,” so that “whether the result is correct or not, he has exactly discharged his duty.”²⁶ And Thomas M. Cooley wrote: “Judicial action implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself.”²⁷

This explains the kinship between quasi-judicial immunity and judicial immunity. Judicial power was fundamentally the power to make binding legal determinations—determinations that were no less binding even if they were wrong.²⁸ Quasi-judicial acts were those where an officer had been given a

16. *Muscatine W. R. Co. v. Horton*, 38 Iowa 33, 47 (1873).

17. *Downer v. Lent*, 6 Cal. 94, 95 (1856).

18. *See Schoettgen v. Wilson*, 48 Mo. 253, 257 (1871). Two of the defendants were inspectors of the penitentiary, and one was the warden.

19. *See Sawyer v. Wilson*, 61 Me. 529, 532 (1873) (“The justification, therefore, pleaded by the officer fails, and he must be regarded as a trespasser in selling the property.”).

20. *Raynsford v. Phelps*, 43 Mich. 342, 346, 5 N.W. 403, 405 (1880).

21. *Baltimore Cnty. Comm’rs v. Baker*, 44 Md. 1, 8 (1876).

22. *St. Joseph Fire & Marine Ins. Co. v. Leland*, 90 Mo. 177, 2 S.W. 431, 432 (1886).

23. *Elmore v. Overton*, 104 Ind. 548, 4 N.E. 197, 199 (1886).

24. *Brown v. Lester*, 21 Miss. 392, 393 (1850).

25. *Peters v. Land*, 5 Blackf. 12, 12 (Ind. 1838).

26. BISHOP, *supra* note 9, § 787.

27. THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS* § 396 (1879).

28. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1808-11, 1831 (2008); *cf.* John Harrison, *Power, Duty, and Facial Invalidity*, 16 U. PA. J. CONST. L. 501, 523 (2013) (“Judicial power is the power to be wrong.”).

similar kind of power—to make determinations that were authoritative even if they were wrong.²⁹

Translating this doctrine of quasi-judicial power to modern case law would be tricky given how much has changed. But it was much narrower in both theory and in practice than today’s qualified immunity. So while Keller suggests that quasi-judicial acts are “what we consider today essentially as discretionary policy decisions or judgments requiring the application of facts to law,”³⁰ this formulation is too broad.

For instance, in the 1868 case of *McCord v. High*, a road supervisor lacked immunity despite having substantial discretion:

It must be borne in mind that, the fact of an officer being clothed with discretion in the discharge of a duty as to the *manner* of its performance, or as to the control of circumstances and attendant acts necessarily arising in the discharge of such duty, will not give to it a judicial character. It is impossible to conceive of any ministerial duty to be performed by an officer that may not be, that is not, accompanied by circumstances which require the exercise of judgment and discretion.³¹

This basic point—that discretion was not necessarily quasi-judicial—reappears throughout the treatises and cases.³²

This gap between nineteenth-century quasi-judicial immunity and modern qualified immunity is especially apparent in the law enforcement context. Law enforcement activities make up the bulk of modern qualified immunity cases, but law enforcement activities did not receive quasi-judicial immunity in the nineteenth century.

Some courts expressly labeled law enforcement a “ministerial” act—the antipode of a quasi-judicial one.³³ Similarly, in *McCord*, the court had also argued by analogy to “a sheriff, whose duties are of a purely ministerial character.”³⁴ In executing a writ, said the court, “he exercises discretion and

29. BISHOP, *supra* note 9, § 787; *see also* MECHEM, *supra* note 8, § 638 (noting the “judicial . . . nature” or “character” of quasi-judicial powers); MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS § 533 (Chicago, T.H. Flood & Co. 1892) (same).

30. Keller, *supra* note 1, at 1346.

31. *McCord v. High*, 24 Iowa 336, 343–44 (1868).

32. *See, e.g.*, MECHEM, *supra* note 8, § 643; THROOP, *supra* note 29, § 538; *Brock v. Hopkins*, 5 Neb. 231, 235 (1876) (rejecting quasi-judicial immunity even though it was “true that in the performance of his duty . . . the clerk is required to exercise his judgment to a certain extent”); *see also infra* notes 57–58 and accompanying text.

33. *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 71 (1820) (describing a justice of the peace as a “judicial officer” but a constable as a “ministerial officer” in a suit against both); *Sumner v. Beeler*, 50 Ind. 341, 342 (1875) (describing the defendants in a false arrest suit as “ministerial officers”).

34. *McCord*, 24 Iowa at 344.

judgment, and is liable for errors and mistakes that may result in loss to others, though they were the result of the deliberate exercise, in good faith, of such discretion and judgment.”³⁵

Other courts that did not use the label nonetheless demonstrated that law enforcement activities were not quasi-judicial and were subject to ordinary law: A sheriff who lawfully entered property to seize one man’s sheep was held liable for seizing another man’s sheep when they had become intermixed.³⁶ So too a deputy sheriff who had mistakenly seized a man’s property that the man had lent for use in his brother-in-law’s tavern.³⁷ And so too a sheriff who mistakenly seized property from the wrong one of two corporations with identical names.³⁸ There was even liability for an appointed fugitive recovery agent who may have arrested the *right* person, but under a warrant that had the *wrong* name.³⁹

And in an especially close analogue to modern cases, the Illinois Supreme Court upheld a jury verdict for wrongful arrest against a Chicago police officer.⁴⁰ The officer objected that there was no evidence of malice or unreasonableness.⁴¹ The court answered:

This is sufficiently answered by reference to the form of the action. The suit is not for malicious prosecution, but for assault and battery, and false imprisonment. If the plaintiff was assaulted and beaten, or imprisoned, by the defendant, without authority of law, it can not be doubted that he is entitled to recover, whatever may have been the defendant’s motives.⁴²

The bottom line is this: *Law enforcement officers did not receive quasi-judicial immunity for their mistakes.* The closest examples Keller can point to for law

35. *Id.*

36. *Kingsbury v. Pond*, 3 N.H. 511, 513 (1826) (“[T]he officer was bound at his peril to see that he took no sheep belonging to the plaintiff; and as he did take the plaintiff’s sheep, it was an abuse of his process, which made him a trespasser *ab initio*, and his entry unlawful.”).

37. *Walcot v. Pomeroy*, 19 Mass. (2 Pick.) 121, 129-30 (1824).

38. *President of Hallowell & Augusta Bank, Inc. v. Howard*, 14 Mass. 181, 183 (1817) (“The ignorance of the officer does not excuse him; for in such a case he is not bound to serve the precept upon either, without the express direction of the creditor, and an indemnifying engagement from him.”).

39. *Johnston v. Riley*, 13 Ga. 97, 137 (1853); *cf.* Fugitive Slave Act of 1793, ch. 7, § 1, 1 Stat. 302, 302 (repealed 1864) (requiring interstate fugitives “to be delivered” to “the agent of such [executive] authority appointed to receive the fugitive”).

40. *Shanley v. Wells*, 71 Ill. 78, 79 (1873).

41. *Id.* at 80-81.

42. *Id.* at 81; *see also* BISHOP, *supra* note 9, § 212 (citation omitted) (“In false imprisonment proper, as distinguished from malicious prosecution, malice is not required.”).

enforcement immunities fall into two categories: reliance on others, and non-immunity cases.⁴³

First, there is a small set of contested cases where law enforcement acts received immunity: where officers relied on a defective warrant that seemed lawful on its face⁴⁴ or a statute subsequently held unconstitutional.⁴⁵ These are both cases where officers were relying on the mistaken constitutional analysis of *other* officials. These are potentially sympathetic scenarios, and it might well be good policy to provide immunity when an officer relies in good faith on somebody else's mistake.⁴⁶ But even in these scenarios, the courts were quite split. For instance, there were at least as many courts finding that an unconstitutional statute is void and therefore can provide no immunity.⁴⁷ Thus, even this more limited immunity was not well established in 1871.

Second, the other set of cases cited by Keller are a category error. The seemingly strongest of these is *Mayo v. Sample*,⁴⁸ but *Mayo* is not a law enforcement immunity case. It is not an immunity case because it was an action for slander against the mayor, in which the mayor invoked a well-established privilege for comment by public officials; this privilege was part of the law of slander, not a freestanding immunity.⁴⁹ And for what it is worth, it is barely a law enforcement case, for the mayor's connection to law enforcement was simply that he was "by virtue of said office, the head of the police department of the city of Keokuk."⁵⁰

43. Keller, *supra* note 1, at 1348-49, 1353-55, 1372 n.211.

44. See *Savacool v. Boughton*, 5 Wend. 170, 172 (N.Y. 1830); *Watson v. Watson*, 9 Conn. 140, 146 (1832); *Norcross v. Nunan*, 61 Cal. 640, 642 (1882).

45. *Henke v. McCord*, 7 N.W. 623, 625-26 (Iowa 1880) (warrant issued pursuant to unconstitutional statute); *Brooks v. Mangan*, 49 N.W. 633, 634 (Mich. 1891) (same); see also *State v. McNally*, 34 Me. 210, 221 (1852) ("It was no part of the officer's duty to examine into and decide upon the constitutionality or construction of the statute which authorized his warrant.").

46. Compare *United States v. Leon*, 468 U.S. 897, 913 (1984), and *Illinois v. Krull*, 480 U.S. 340, 342 (1987), recognizing good faith exceptions to the exclusionary rule in these contexts.

47. See *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 71 (1820); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 44-46 (1854); *Barling v. West*, 29 Wis. 307, 316 (1871); *Campbell v. Sherman*, 35 Wis. 103, 110 (1874); *Sumner v. Beeler*, 50 Ind. 341, 342 (1875); *Gross v. Rice*, 71 Me. 241, 252 (1880). The case of the facially valid warrant issued by a court of competent jurisdiction may have been more clearly established. See *supra* note 45. It is not clear that the arresting officer has even committed a legal wrong in such a case.

48. *Mayo v. Sample*, 18 Iowa 306 (1865).

49. See, e.g., *Libel—Privileged Communication*, 17 HARV. L. REV. 60-61 (1903) (describing this rule and citing *Mayo*); *Smith v. Howard*, 28 Iowa 51, 57 (1869) (same); Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner*, 44 DRAKE L. REV. 639, 658 (1996) (describing the same rule under Iowa's modern law of defamation).

50. *Mayo*, 18 Iowa at 307 n.1 (quoting defendant's plea, which was "found . . . true in point of fact," *id.* at 310).

The other cases are even further afield. One set of them are cases about the law of arrest holding that public officials can arrest on the basis of probable cause, which is now part of substantive Fourth Amendment doctrine.⁵¹ Another set are cases saying that law enforcement officers could not be sued for duties owed to the general public, only for duties owed to individuals.⁵² This too is irrelevant to qualified immunity. The duties for which modern constitutional suits are brought, like the duty not to unreasonably search and seize,⁵³ and not to deprive people of liberty without due process of law,⁵⁴ are owed to individuals. Today one indeed cannot sue an officer for a duty owed to the general public, but this is for other reasons⁵⁵ which have nothing to do with immunity.

More fundamentally, Keller's invocation of these cases betrays his general conflation of "discretion" with what he calls "the broader concept of quasi-judicial immunity."⁵⁶ But, to repeat, quasi-judicial immunity was not simply a result of legal discretion. An officer could have discretion without immunity. One of the treatises Keller relies on is Throop's, which has a section titled "When an act, requiring an exercise of judgment or discretion, may still be ministerial."⁵⁷ It explains: an "act is not necessarily taken out of the class styled ministerial, because the officer performing it is required to judge, whether the contingency has occurred, in which he is empowered or bound to act . . ."⁵⁸ This is exactly how we would describe a nineteenth-century officer's factual determination that there were reasonable grounds to make an arrest.⁵⁹

51. For examples, see *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281, 283-84 (1850); *Winkler v. State*, 32 Ark. 539, 548 (1877); and *O'Connor v. Bucklin*, 59 N.H. 589, 591 (1879), all cited in Keller, *supra* n. 1, at 1372 n.211. For contemporary doctrine, see *United States v. Watson*, 423 U.S. 411, 418 (1976) ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest . . . for a felony not committed in his presence if there was reasonable ground for making the arrest.").

52. Keller, *supra* note 1, at 1348-49.

53. U.S. CONST. amends. IV, XIV, § 1.

54. U.S. CONST. amend. V, XIV, § 1.

55. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 194-97 (1989) (no duty); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992) (no standing).

56. Keller, *supra* note 1, at 1372 n. 211.

57. THROOP, *supra* note 29, § 538; see also Keller, *supra* note 1, at 1337 et seq. (noting reliance on Throop).

58. THROOP, *supra* note 29, § 538.

59. By contrast, under modern doctrine, an officer who makes a mistake about probable cause can get qualified immunity. See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable.").

There is much to be said about quasi-judicial immunity, but it was not today's qualified immunity. That is why there are no cases cited by Keller or the treatises where an illegal act of law enforcement received immunity for the official's own mistake.

II. Scope of Discretion

Even as to quasi-judicial acts, immunity was further limited. It applied only to cases within the jurisdiction of the officer.⁶⁰ Keller notes this important limitation, but minimizes it by arguing that “officers exercising discretionary duties lacked immunity under this exception only when there was a *clear absence*—not just when they acted in excess—of authority.”⁶¹ Even so it is worth emphasizing how harshly it applied in practice, so that the phrase “clear absence” does not mislead us. Consider, for instance, the many cases about tax assessors: They usually received immunity even when they illegally taxed somebody,⁶² yet they would still be held strictly liable for taxing in the wrong area,⁶³ even when there was a good faith dispute about which town a taxpayer resided in.⁶⁴

Liability for jurisdictional error was strict even if the error involved a tricky question of law. For instance, in the 1877 Supreme Court case of *Bates v. Clark*, two customs collectors seized liquor in what they thought to be Indian Country.⁶⁵ But they were wrong, so they had no good faith defense. It was true, as the Court explained sympathetically, that the definition of Indian Country was quite confusing as a legal matter, so the officials may well have acted reasonably, and in good faith.⁶⁶ But they were “utterly without any authority in the premises; and their honest belief that they had is no defence [sic] in their case more than in any other.”⁶⁷

60. Keller, *supra* note 1, at 1350-53.

61. *Id.*

62. *Vail v. Owen*, 19 Barb. Ch. 22, 29 (N.Y. Ch. 1854); *Gould v. Hammond*, 10 F. Cas. 874, 875 (C.C.N.D. Cal. 1857); *Barhyte v. Shepherd*, 35 N.Y. 238, 242 (1866); *McDaniel v. Tebbetts*, 60 N.H. 497, 497 (1881); COOLEY, *supra* note 27, at 411; THROOP, *supra* note 29, §541; *but see* *Suydam v. Keys*, 13 Johns. 444, 446 (N.Y. Sup. Ct. 1816); *Gage v. Currier*, 21 Mass. 399, 421 (1826).

63. *Freeman v. Kenney*, 32 Mass. 44, 46-47 (1833) (noting liability but holding plaintiff should have sued in trespass rather than case); *Mygatt v. Washburn*, 15 N.Y. 316, 321 (1857); THROOP, *supra* note 29, §541.

64. *Dorn v. Backer*, 61 N.Y. 261, 263 (1874).

65. *Bates v. Clark*, 95 U.S. 204, 204-05 (1877).

66. *Id.* at 209.

67. *Id.*

Once again, it is not clear how to translate this concept of jurisdiction or authority to modern-day officers. But one natural possibility is to say that an official who violates the Constitution acts without authority. Sina Kian has argued that the common law recognized a fundamental “distinction between unauthorized acts and discretionary acts,”⁶⁸ consistent with Keller. But according to Kian, the result of this distinction was “strict liability for acting outside of the authority enumerated by the Constitution.”⁶⁹ Or to quote Jim Pfander: “The Constitution thus set a limit to lawful official action, and officials who exceeded constitutional limits (however well-intentioned) were thought to enjoy no residual discretion within which to act lawfully or, in Keller’s terms, no immunity from suit.”⁷⁰

And indeed, some courts did describe the enforcement of an unconstitutional statute as an act without jurisdiction. As the Kentucky Supreme Court put it when an African-American man was unconstitutionally denied the right to self-defense:

It is very true, that a judicial officer can not be punished for errors in judgment, on subjects within the scope of his authority, and over which he has jurisdiction. But this does not hold good when he attempts to exercise authority when he has none, and assumes jurisdiction without any power. . . . If this doctrine be correct, in the case of an illegal warrant, how much more so ought it to be in a case where the constitution is violated? It is an instrument that every officer of government is bound to know and preserve, at his peril, whether his office be judicial or ministerial . . .⁷¹

Though I have mostly left Keller’s discussion of absolute immunity to the side, it is worth noting that this same reasoning shows why it is hard to infer (as Keller does)⁷² from *Spalding v. Vilas*⁷³ an absolute immunity for high-ranking executive officials from constitutional claims. In holding that the postmaster general could not be sued for libel, the Court first spent several

68. Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 154 (2012).

69. *Id.* at 155.

70. Pfander, *supra* note 3, at 167 (discussing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

71. *Ely v. Thompson*, 10 Ky. 70, 76 (1820). See also, e.g., *Kelly v. Bemis*, 70 Mass. 83, 84 (1855) (“Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute. He therefore acted without any jurisdiction; and, upon familiar and well settled principles, is liable in this action.”).

72. Keller, *supra* note 1, at 1379-80.

73. *Spalding v. Vilas*, 161 U.S. 483 (1896).

pages painstakingly establishing that his action “was not unauthorized by law, nor beyond the scope of his official duties.”⁷⁴ If the postmaster’s actions had violated a legal constraint imposed by the Constitution, it would have been impossible to say that. Indeed, the Court specifically upheld the constitutionality of the underlying statute first.⁷⁵

III. Immunity

Finally, even where it did apply, the common law defense was one of good faith. Even as to quasi-judicial acts within the bounds of jurisdiction, this is not the same thing as the modern doctrine of qualified immunity. Again, Keller acknowledges this,⁷⁶ but focusing on it lets us see for a third time how far modern qualified immunity is from common law quasi-judicial immunity.

First, the modern doctrine of qualified immunity was deliberately engineered to go beyond a traditional good faith defense. In *Harlow*, the Court self-consciously enacted “an adjustment of the ‘good faith’ standard” and instead crafted a test that turned on “objective reasonableness . . . as measured by reference to clearly established law.”⁷⁷ The fruits of this choice are apparent in more recent qualified immunity cases, where for instance an officer has been given immunity even though he was inexperienced and ignored the instructions of his supervisor.⁷⁸

Second, this leads to an important implication that Keller does not mention: Justifying qualified immunity as a good faith defense would require the abandonment of qualified immunity’s distinctive *procedural* features. Under modern Supreme Court doctrine, the qualified immunity defense can produce two separate interlocutory appeals for the defendant, and also stop all discovery while the motion to dismiss is being resolved (and appealed).⁷⁹

These special privileges are justified under the theory that qualified immunity is a special form of an “immunity *from suit* rather than a mere defense to liability.”⁸⁰ Yet, most nineteenth century official liability cases were on

74. *Id.* at 489-93.

75. *Id.* at 490 (“No one will question the power of congress to enact legislation that would effect such an object.”).

76. Keller, *supra* note 1, at 1390-96.

77. *Harlow v. Fitzgerald*, 457 U.S. 800, 814-15, 818 (1982); *see also* Keller, *supra* note 1, at 1393-96 (criticizing *Harlow*).

78. *Mullenix v. Luna*, 136 S. Ct. 305, 307 (2015). Keller does argue that *Harlow* itself could have been properly decided under a nineteenth century presumption of good faith. Keller, *supra* note 1, at 1396-99. But the evidence in *Mullenix* could have rebutted such a presumption.

79. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 84 (2018).

80. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original).

appeal from a final judgment. Even where the reviewing court found an immunity from liability to exist, no court held it to be an immunity *from suit*. So even if Keller is right about how to ground qualified immunity, these privileges would lack any foundation.

Conclusion

For the most part, the task of courts is to apply the law without indulging additional sympathies for powerful persons. Keller is right that the common law itself recognized some official immunities from the law, including for certain officials acting in good faith. But one should not mistake that exception for the modern doctrine of qualified immunity.

The quasi-judicial immunity known to the common law protected certain acts of tax assessors, election judges, and the like acting within their jurisdiction. Today's qualified immunity protects all officials, especially including the police, who violate any constitutional limit. What brought us from there to here was judicial creativity, not any reasonable interpretation of the law laid down in 1871.