



## Does the doctrine of qualified immunity now protect even unreasonable conduct?



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In *Kisela v. Hughes*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 1148 (2018), the United States Supreme Court was asked to wade into the arena of qualified immunity. Specifically, the Supreme Court was asked to review under what circumstances a police officer may be protected from liability, under the doctrine of qualified immunity, against a claim that the officer used excessive force in violation of a suspect's Fourth Amendment rights. The relevant facts are as follows.

Andrew Kisela, a police officer in Tucson, Arizona, shot Amy Hughes in May 2010. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. The officers were only there a few minutes, perhaps just a minute, when Kisela fired his weapon. Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so.

As a result of seeing Hughes acting erratically and holding a large knife, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later, the person who had called 911 flagged down the officers, gave them a description of the woman with the knife, and told them that the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife, and Chadwick said, "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, and so, he dropped to the ground and shot Hughes four times through the fence. Then, the officers jumped the fence, handcuffed Hughes, and called paramedics who transported her to a hospital. Hughes received treatment for non-life-threatening injuries at the hospital. Less than a minute had transpired from the moment that the officers saw Chadwick to the moment that Kisela fired shots.

All three of the officers later said that, at the time of the shooting, they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a \$20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting, her boyfriend had told her that Hughes was threatening to kill Chadwick's dog. Chadwick came home to find Hughes

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“somewhat distressed,” and Hughes was in the house holding Chadwick’s dog “in one hand and a kitchen knife in the other.” Hughes asked Chadwick if she “wanted [her] to use the knife on the dog.”

However, the officers were not aware of any of these facts prior to the shooting. Chadwick went outside to get \$20 from her car which is when the officers first saw her. In her affidavit, Chadwick said that she did not feel endangered at any time. Based on her experience as Hughes’ roommate, Chadwick stated that Hughes “occasionally has episodes in which she acts inappropriately,” but “she is only seeking attention.”

Hughes subsequently sued Kisela in Federal District Court, under 42 U.S.C. § 1983, alleging that Kisela had used excessive force in violation of her Fourth Amendment rights. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit first held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment. The Ninth Circuit next held that the violation was clearly established because, in its view, the Constitutional violation was obvious and because of Circuit precedent that the Ninth Circuit perceived to be analogous. Kisela, then, filed a petition for certiorari with the Supreme Court that the Supreme Court granted.

The Supreme Court began its consideration of Kisela’s appeal by noting that, where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not Constitutionally unreasonable to prevent escape by using deadly force. The Supreme Court further explained that the question of whether an officer has used excessive force requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

In this case, the Supreme Court stated that it need not, and would not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes because, even assuming a Fourth Amendment violation occurred, Kisela was entitled to qualified immunity.

The Supreme Court explained that qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. For a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.

Here, Kisela testified that he shot Hughes because, although he did not believe that the officers were in danger, he believed that Hughes was a threat to Chadwick. Notably, Kisela had mere seconds to assess the potential danger that Hughes posed to Chadwick. Hughes had just been seen hacking a tree with a large kitchen knife and had been seen acting erratically enough to cause a concerned by-stander to call 911 and, then, flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and Hughes failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them.

Accordingly, the Supreme Court held that this was far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment. As such,

the Supreme Court reversed the Ninth Circuit's decision and held that Kisela was immune from this suit and from Hughes' Fourth Amendment excessive force claim based upon the doctrine of qualified immunity. Justice Sotomayor wrote a dissenting opinion in which Justice Ginsburg joined. In Justice Sotomayor's opinion, Kisela acted unreasonably in using deadly force under the circumstances, and a reasonable jury could conclude that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force without even so much as giving a warning that he would open fire if she did not comply with the officers' other warnings. As Justice Sotomayor put it: "If this account of Kisela's conduct sounds unreasonable, that is because it was." Therefore, she and Justice Ginsburg dissented.