

Police Review Commission (PRC)

**POLICE REVIEW COMMISSION  
REGULAR MEETING  
AGENDA**

**Wednesday, May 9, 2018  
7:00 P.M.**

South Berkeley Senior Center  
2939 Ellis Street, Berkeley

- 1. CALL TO ORDER & ROLL CALL**
- 2. APPROVAL OF AGENDA**
- 3. PUBLIC COMMENT**  
*(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers. They may comment on items on the agenda or any matter within the PRC's jurisdiction at this time.)*
- 4. CHAIR'S REPORT**
- 5. PRC OFFICER'S REPORT**  
Status of complaints; other items.
- 6. CHIEF OF POLICE'S REPORT**  
Crime, budget, staffing, training updates, and other items.
- 7. ELECTION OF VICE-CHAIRPERSON (discussion & action)**
- 8. NEW BUSINESS (discussion & action)**  
Presentation by Center for Policing Equity on its report analyzing BPD vehicle stop, pedestrian stop, and use-of-force data.  
*(To be delivered.)*
- 9. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS**  
Attached.

**10. PUBLIC COMMENT**

*(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on items on the agenda at this time.)*

**11. ADJOURNMENT**

**Communications Disclaimer**

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**Communication Access Information (A.R.1.12)**

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date. Please refrain from wearing scented products to this meeting.

**SB 343 Disclaimer**

Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the Police Review Commission, located at 1947 Center Street, 1st floor, during regular business hours.

Contact the Police Review Commission at (510) 981-4950 or [prc@cityofberkeley.info](mailto:prc@cityofberkeley.info).

**PRC REGULAR MEETING ATTACHMENTS**  
**May 9, 2018**

**AGENDA-RELATED**

(Report from Center for Policing Equity – to be delivered)

**COMMUNICATION(S)**

- City Council Annotated Agenda of 4-24-18 meeting, re Accept and Acknowledge Report from the Berkeley Police Review Commission, "To Achieve Fairness and Impartiality," and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council. Page 5
- Revised Agenda Material for Supplemental Packet 1, dated 4-24-18, Item Number 38b: Accept and Acknowledge Report from the Berkeley Police Review Commission, "To Achieve Fairness and Impartiality," and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council. Submitted by Councilmember Harrison. Page 7
- Consent Calendar Item, dated 5-15-18, from Councilmembers Linda Maio, Susan Wengraf, Sophie Hahn, and Lori Droste, re Establish the City Council's tone and direction as the City moves forward with improvements in the Police Department's and Police Review Commission's policies and procedures. Page 19
- Action Calendar Item, dated 5-15-18, from Councilmember Kriss Worthington, re Consider the Police Review Commission Sub-Committee's Charter Amendment Recommendations. Page 21
- Article from [www.aclu.org](http://www.aclu.org), dated 4-20-18: The Supreme Court Gives Police a Green Light to 'Shoot First and Think Later' Page 23
- Article from Daigle Law Group, re Supreme Court Rules for Police Officer in Excessive Force Case. Page 27
- Announcement: Berkeley Forum on Access and Disability Rights, on 5-9-18, 3pm – 5pm. Page 31

KJL:mgm



- 38a. **“To Achieve Fairness and Impartiality” – Report and Recommendations from the Berkeley Police Review Commission** *(Continued from March 13, 2018)*  
**From: Police Review Commission**  
Contact: Katherine Lee, Commission Secretary, 981-4950

Tuesday, April 24, 2018

ANNOTATED AGENDA

Page 14

## Action Calendar

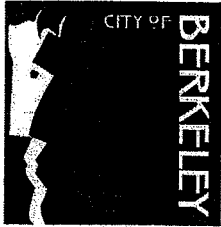
- 38b. **Accept and Acknowledge Report from the Berkeley Police Review Commission, “To Achieve Fairness and Impartiality,” and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council**  
**From: Councilmember Harrison**  
**Recommendation:**
1. Accept and acknowledge the Berkeley Police Review Commission’s (“PRC”) Report and Recommendations: “To Achieve Fairness and Impartiality.”
  2. Refer key PRC report recommendations, detailed in the Background below, to the City Manager for: a. consideration in the September 2018 City Manager Report to City Council on the Berkeley Police Department’s efforts to track yield, stop, citation, search and arrest rates by race, develop training programs to address any disparities found; and implement policy and practice reforms; and b. development, where appropriate, of new BPD policies, or further enhancement to existing BPD policies.
- Financial Implications:** Staff time  
Contact: Kate Harrison, Councilmember, District 4, 981-7140

**Action:** Moved to Consent Calendar. Adopted recommendation as revised in Supplemental Packet #1 and further revised as below:

- The process to develop the department action plan will not start until the final CPE report is issued.
- The work group will have one year to report back on the action plan.
- Process to be run by a professional mediator/facilitator.
- Other referred items will be reported back earlier if possible (some may be reported in September 2018).

Some provisions of the referred items may be subject to the meet and confer process with the Berkeley Police Association.





Kate Harrison  
Councilmember District 4

## **REVISED AGENDA MATERIAL for Supplemental Packet 1**

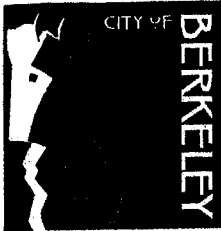
**Meeting Date:** April 24, 2018

**Item Number:** 38b

**Item Description:** **Accept and Acknowledge Report from the Berkeley Police Review Commission, "To Achieve Fairness and Impartiality," and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council**

**Submitted by:** Councilmember Harrison

Adds detail about how the action plan should be developed and makes other minor edits.



Kate Harrison  
Councilmember District 4

ACTION CALENDAR  
April 24, 2018

To: Honorable Mayor and Members of the City Council  
From: Councilmember Harrison  
Subject: Accept and Acknowledge Report from the Berkeley Police Review Commission, "To Achieve Fairness and Impartiality," and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council.

RECOMMENDATION

1. Accept and acknowledge the Berkeley Police Review Commission's ("PRC") Report and Recommendations: "To Achieve Fairness and Impartiality."
2. Refer key PRC report recommendations, detailed in the Background below, to the City Manager ~~for~~to:
  - a. ~~consideration~~ in the September 2018 City Manager Report to City Council on the Berkeley Police Department's efforts to track yield, stop, citation, search and arrest rates by race, develop training programs to address any disparities found; and implement policy and practice reforms; and
  - b. ~~development~~, where appropriate, ~~of~~-new BPD policies, or further ~~enhancement to~~-existing BPD policies.

BACKGROUND

The City of Berkeley and its police department are internationally recognized as having contributed to the development of modern law enforcement policies, practices and accountability measures. In the first decades of the twenty-first century, renewed community engagement in the issue of police disparities has focused attention on improving accountability in policing across departments in the Bay Area and the country.

In response to the findings from the Center for Policing Equity and the PRC, on November 14, 2017, the City Council passed a referral directing the City Manager to:

[T]rack yield, stop, citation, search and arrest rates by race, develop training programs to address any disparities found, and implement policy and practice reforms that reflect cooperation between the Berkeley Police Department ("BPD"), the Police Review Commission ("PRC") and the broader



Berkeley community. The City Manager will report findings in September 2018 and annually thereafter, using anonymized data.

On January 23, 2018, the PRC submitted to the Council, the final report of its Fair and Impartial Policing Subcommittee, which was formed in January 2016. The independent report, unanimously adopted by the full PRC, examined testimony from community members regarding racially-based disparate treatment of civilians by the BPD, and also offered a range of specific policy, process, and practice recommendations. Council continued consideration of the report to the April 24, 2018 meeting.

This Council item accepts the report and acknowledges the important work of the PRC.

Many of the PRC's policy, process, and practice recommendations are already incorporated in the November 14, 2017 Council referral to the City Manager. The November referral is an important step in the right direction. However, there are some key recommendations that were not included in the November referral.

The policy goals of the Council, City, and the community would be well served if these additional set of recommendations are referred to the City Manager for policy development and further consideration in the September 2018 City Manager Report to City Council on racial disparities in policing.

The following PRC policy recommendations should be referred to the City Manager:

### **1. Create, Present and Execute a Departmental Action Plan**

A written departmental action plan should be an important part of the City Manager and Department's efforts to study and address racial disparities.

In November, the Council directed the City Manager to "report findings" to the Council by fall 2018, but it did not require an action plan to follow on those findings. To be effective and broadly accepted, the action plan should be developed by a task force appointed by the City Manager to include representatives of the BPD, Berkeley Police Association, PRC, interested community organizations (particularly of constituencies of color), and academic experts. The plan, presented to the PRC for consideration and then the Council within six months of the above findings, would detail solutions to the problem, measures to address racial disparities, taking into account the action plan recommendations contained in the PRC and CPE reports.

### **2. Officer Identification**

Develop a policy requiring officers to identify themselves by their full name, rank

and command and provide it writing (e.g. a business card) to individuals they have stopped, as in Oakland, New York, Providence, and San Jose.

### **3. Review and Update BPD Policy Surrounding Inquiries to Parole and Probation Status**

The City Manager and BPD review existing policies surrounding asking the community members whether they are on probation or parole.

### **4. Enhance Search Consent Policies**

The City Manager and the department create a policy that officers state the reason for a stop and/or search, obtain consent before initiating a search, and explain that a person has a right to refuse consent when there is no probable cause or warrant (except when the officer has reason to believe there is an immediate safety concern and conducts a pat search). Ideally, officers should obtain written acknowledgement that they have sought consent.

~~The~~ Oakland and New York City require officers to get written or audio recorded consent before searching a person without a legal basis.

The following PRC policy recommendations enhancing the utility of existing technological systems should be referred to the City Manager:

### **5. Reporting Data on the Public Data Portal**

The City Manager should consider the PRC's recommendation that the BPD integrate existing and planned data collected by the BPD, such as that related to use of force; handcuff, frisked/pat-search use; discovery of contraband; and beat/neighborhood and unit, into the *public* data portal.

The Council's November 14, 2017 referral was internally focused and required nothing specifically to be reported into data portal. Ongoing efforts to address racial disparities will be enhanced by further public transparency and easier to use data.

### **6. Simplifying Public Data Portal Data Structure**

Insure that data columns in the online portal include distinct data points. This

would be a change from the current practice, where certain columns include multiple fields. This change would enhance the readability of the data set.

## **7. Collect Data on Frisks and Summons**

The City Manager should consider the PRC's recommendation that the BPD collect data on all BPD detentions including, frisks and summons.

The Council did not require that these important data points be included in expanded data collection. However, adding these points would greatly enhance the city's understanding of the scope of racial disparities.

The following longer-term PRC technological recommendations should be referred to the City Manager:

## **8. BPD Data Dashboard**

The City Manager should explore the establishment of a data dashboard from which BPD leadership can view real-time data about racial disparities and other policing data, as well as provide accessible graphs and charts reflecting relevant data analysis.

In the last budget referral, money was appropriated by Council for a BPD data analyst. The dashboard would represent an important venue through which the Data Analyst could present their findings to department leadership.

## **9. Enhance Existing "Early Warning" Systems**

Enhance existing BPD "early warning" system to identify and mitigate issues of bias by department staff for internal performance review and intervention.

### FINANCIAL IMPLICATIONS

Staff time would be necessary for considering these additional proposals and developing new policies to satisfy their intent.

### ENVIRONMENTAL SUSTAINABILITY

No Ecological Impact

### CONTACT PERSON

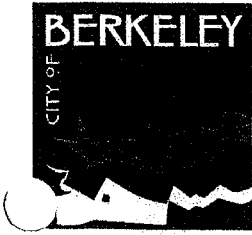
Councilmember Kate Harrison, Council District 4, 510-981-7140

### ATTACHMENT

Accept and Acknowledge Report from the Berkeley Police Review Commission, "To Achieve Fairness and Impartiality," and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council.

ACTION CALENDAR  
April 24, 2018

1. Chart Comparing November 14, 2017 Council Referral to City Manager to April 24, 2018 Key Recommendations to the City Manager



Kate Harrison  
Councilmember District 4

**Chart Comparing November 14, 2017 Council Referral to City Manager to  
April 24, 2018 Key Recommendations to the City Manager**

Council Referral to City Manager (11/14/17)	Key Recommendations to the City Manager (4/24/18)
<p><b>Action:</b> 24 speakers. M/S/C (Bartlett/Wengraf) to approve the following recommendation.</p> <p>Direct the City Manager to track yield, stop, citation, search and arrest rates by race, develop training programs to address any disparities found, and implement policy and practice reforms that reflect cooperation between the Berkeley Police Department ("BPD"), the Police Review Commission ("PRC") and the broader Berkeley community. The City Manager will report findings in September 2018 and annually thereafter, using anonymized data.</p> <p>1. Tracking yield rates (i.e., the percentage of citations or arrests per traffic or pedestrian stop and the ratio of contraband found by search conducted) by individual officer, by patrol and by the department as a whole disaggregated by the race of the individual(s) stopped. This will include analyzing whether police actions were officer-initiated or in response to calls for service or</p>	<p>The following PRC policy recommendations should be referred to the City Manager:</p> <p><b>1. Create, Present and Execute a Departmental Action Plan</b></p> <p>A written departmental action plan should be an important part of the City Manager and Department's efforts to study and address racial disparities.</p> <p>In November, the Council directed the City Manager to "report findings" to the Council by fall 2018, but it did not require an action plan to follow on those findings. To be effective and broadly accepted, the action plan should be developed by a task force appointed by the City Manager to include representatives of the BPD, Berkeley Police Association, PRC, interested community organizations (particularly of constituencies of</p>

<p>warrants. This data will focus BPD examination of the reasons for disparate racial treatment and to identify any outliers.</p> <p>2. Considering any other criteria which would contribute to a better understanding of stops, searches, citations and arrests and the reasons for such actions.</p> <p>3. Developing training programs to address the organizational causes of any disparate treatment and outcomes by race uncovered in #1 above and, in accordance with the City's body worn camera policy, through examination of footage on police body cameras (e.g., more scenario-based training on procedural justice and the roots of disparate treatment, expanded de-escalation training).</p> <p>4. Consulting and cooperating with the broader Berkeley community, especially those communities most affected by observed racial disparities, to develop and implement policy and practice reforms that reflect these shared values. Work closely with the PRC, providing the commission all legally available information that may be helpful to designing reforms.</p> <p>5. Once released, BPD should analyze the final Center for Policing Equity report and propose improvements as needed. Departmental, personnel and training issues will be easier</p>	<p>color), and academic experts. The plan, presented to the PRC for consideration and then the Council within six months of the above findings, would detail measures to address racial disparities, taking into account the action plan recommendations contained in the PRC and CPE reports.</p> <p><b>2. Officer Identification</b></p> <p>Develop a policy requiring officers to identify themselves by their full name, rank and command and provide it writing (e.g. a business card) to individuals they have stopped, as in Oakland, New York, Providence, and San Jose.</p> <p><b>3. Review and Update BPD Policy Surrounding Inquiries to Parole and Probation Status</b></p> <p>The City Manager and BPD review existing policies surrounding asking the community members whether they are on probation or parole.</p> <p><b>4. Enhance Search Consent Policies</b></p> <p>The City Manager and the department create a policy that officers state the reason for a stop and/or search, obtain consent before initiating a</p>
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to address with accessible and granular empirical data.

**Vote:** All Ayes.

search, and explain that a person has a right to refuse consent when there is no probable cause or warrant (except when the officer has reason to believe there is an immediate safety concern and conducts a pat search). Ideally, officers should obtain written acknowledgement that they have sought consent.

Oakland and New York City require officers to get written or audio recorded consent before searching a person without a legal basis.

The following PRC policy recommendations enhancing the utility of existing technological systems should be referred to the City Manager:

#### 5. Reporting Data on the Public Data Portal

The City Manager should consider the PRC's recommendation that the BPD integrate existing and planned data collected by the BPD, such as that related to use of force; handcuff, frisked/pat-search use; discovery of contraband; and beat/neighborhood and unit, into the *public data* portal.

	<p>The Council's November 14, 2017 referral was internally focused and required nothing specifically to be reported into data portal. Ongoing efforts to address racial disparities will be enhanced by further public transparency and easier to use data.</p> <p><b>6. Simplifying Public Data Portal Data Structure</b></p> <p>Insure that data columns in the online portal include distinct data points. This would be a change from the current practice, where certain columns include multiple fields. This change would enhance the readability of the data set.</p> <p><b>7. Collect Data on Frisks and Summons</b></p> <p>The City Manager should consider the PRC's recommendation that the BPD collect data on all BPD detentions including, frisks and summons.</p> <p>The Council did not require that these important data points be included in expanded data collection. However, adding these points would greatly enhance the city's understanding of the scope of racial disparities.</p> <p>The following longer-term PRC technological recommendations should be referred to the City</p>
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	<p>Manager:</p> <p><b>8. BPD Data Dashboard</b></p> <p>The City Manager should explore the establishment of a data dashboard from which BPD leadership can view real-time data about racial disparities and other policing data, as well as provide accessible graphs and charts reflecting relevant data analysis.</p> <p>In the last budget referral, money was appropriated by Council for a BPD data analyst. The dashboard would represent an important venue through which the Data Analyst could present their findings to department leadership.</p> <p><b>9. Enhance Existing "Early Warning" Systems</b></p> <p>Enhance existing BPD "early warning" system to identify and mitigate issues of bias by department staff for internal performance review and intervention.</p>
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**LINDA MAIO**  
**COUNCILMEMBER**



CONSENT CALENDAR  
May 15, 2018

**TO:** Honorable Mayor and Members of the City Council

**FROM:** Councilmembers Linda Maio, Susan Wengraf, Sophie Hahn, and Lori Droste

**SUBJECT:** Establish the City Council's tone and direction as the City moves forward with improvements in the Police Department's and Police Review Commission's policies and procedures.

**RECOMMENDATION**

That the Council clearly establish a positive tone for the public, the Police Review Commission (PRC), and staff. As we move forward to further advance fairness and accountability in policing that we affirm the following:

1. Berkeley's Police Department is one of the finest in the nation.<sup>1</sup>
2. The Police Department has been engaged in continuous improvement and commissioned the Center for Policing Equity (CPE) Draft Report for that purpose.
3. The parties (Council, PRC, and others engaged) rely solely on factual data and refrain from promulgating data that is outdated and not been verified.

In addition, Council should take under advisement and solicit general policy suggestions from progressive criminologists in our community, such as has been provided by Dr. Barry Krisberg, a resident and national expert in criminology:

- a. The keys to effective policing are core principles of community policing, restorative justice and the sincere attempt to employ control strategies that are guided by the value of the least restrictive alternative consistent with public safety. Related to this is resistance to militarization of the department.
- b. The Department should have meaningful positive rewards for officers who meet the highest standards.
- c. Police morale is very important.
- d. Due process, rights of citizens and police, should receive the highest levels of support.

**BACKGROUND**

Berkeley's police department, widely considered one of the best in the nation (see Center for Police Equity draft report) is engaged in continuous improvement under the direction of Chief Greenwood. Toward that end, the Department solicited a study and

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<sup>1</sup> Center for Policing Equity Draft Report (<https://www.cityofberkeley.info/CPEDraftInterimReport.aspx>)

report from an independent research group, The Center for Policing Equity, and we have received a draft report.

The report contained some inaccurate outdated data and is in the process of being revised. Unfortunately, rather than wait for the final report, some parties have promulgated incorrect outdated information from the draft report, which is insupportable and has done damage to our internal processes and staff morale. Instead of proceeding in recognition of our Police Department's stellar reputation and efforts to engage in self-improvement in a collaborative manner, several official and unofficial actions taken recently were not only inappropriate but also set a negative and combative tone in their conveyance.

The Police Review Commission has not included Chief Greenwood in discussions about how the changes they would like to make will result in a positive or quantitative difference in their processes and outcomes. On his part, the Chief has shared the Department's principles in interacting with the community, each other, and which can be useful in the PRC's interactions as well:

- give people voice;
- be neutral in how you engage with people/situations;
- treat people with respect; and
- operate with transparency.

Much confusion and negativity has ensued from the mishandling of information and lack of collaboration. It would be helpful for the Council to take leadership in establishing a positive path forward, one that seeks to collaborate widely, works in concert with our Police Department, and bases our actions forward on facts and sound research, transparency, and respect. As is noted in point "c" above, police morale is very important and the degree to which the Council expresses its support of and confidence in our police department as we move forward is a message in itself.

ENVIRONMENTAL SUSTAINABILITY

No environmental sustainability impact.

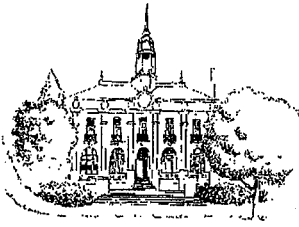
FINANCIAL IMPLICATIONS

None.

CONTACT

Councilmember Linda Maio, District 1, 510-981-7110

Councilmember Susan Wengraf, District 6, 510-981-7160



## Kriss Worthington

Councilmember, City of Berkeley, District 7  
2180 Milvia Street, 5<sup>th</sup> Floor, Berkeley, CA 94704  
PHONE 510-981-7170, FAX 510-981-7177, EMAIL  
kworthington@cityofberkeley.info

### ACTION CALENDAR

May 15, 2018

To: Honorable Mayor and Members of the City Council  
From: Councilmember Kriss Worthington  
Subject: Consider the Police Review Commission Sub-Committee's Charter Amendment Recommendations

#### RECOMMENDATION:

That the Council consider adopting the PRC Sub-Committee Charter Amendment Recommendation, and initiate a process towards placing a measure on the November ballot.

#### BACKGROUND:

In the recent Subcommittee meeting, the Berkeley Police Review Commission has created a draft charter amendment to better facilitate independent, objective, and civilian oversight of the Berkeley Police Department. The PRC does this by promoting public trust through police accountability and transparency, by ensuring that police policies and practices reflect the values of the local community, and by helping the Department obtain the resources and training necessary to carry out its duties. To see the specific language as of now, see the link for PRC subcommittee proposal. When the complete PRC Commission takes action we will add that to the item to be also be considered

[https://www.cityofberkeley.info/uploadedFiles/Police\\_Review\\_Commission/Commissions/2018/Charter%20Amendment%20Police%20Commission%20-%20passed%20by%20Subcomm%204-19-18%20\(003\).pdf](https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2018/Charter%20Amendment%20Police%20Commission%20-%20passed%20by%20Subcomm%204-19-18%20(003).pdf)

#### FINANCIAL IMPLICATIONS:

Minimal

#### ENVIRONMENTAL SUSTAINABILITY:

Consistent with Berkeley's Environmental Sustainability Goals and no negative impact.

#### CONTACT PERSON:

Councilmember Kriss Worthington  
Toby Simmons

510-981-7170  
robert.simmons@berkeley.edu





Published on *American Civil Liberties Union*  
(<https://www.aclu.org>)

## The Supreme Court Gives Police a Green Light to ‘Shoot First and Think Later’ <sup>[1]</sup>

### Author(s):

Emma Andersson

The Supreme Court just ruled that a police officer could not be sued for gunning down Amy Hughes. This has vast implications for law enforcement accountability. The details of the case are as damning as the decision. Hughes was not suspected of a crime. She was simply standing still, holding a kitchen knife at her side. The officer gave no warning that he was going to shoot her if she did not comply with his commands. Moments later, the officer shot her four times.

“Shoot first and think later” <sup>[2]</sup>, according to Justice Sonia Sotomayor, is what the officer did.

As Sotomayor argued in dissent, the court’s decision in *Kisela v. Hughes* <sup>[2]</sup> means that such “palpably unreasonable conduct will go unpunished” <sup>[2]d.</sup> According to seven of the nine Justices, Hughes’ Fourth Amendment right to not be shot four times in this situation is less protected than the officer’s interest in escaping accountability for his brazen abuse of authority. According to Justice Sotomayor <sup>[2]</sup>, “If this account of [the officer’s] conduct sounds unreasonable, that is because it was. And yet, the Court ... insulates that conduct from liability under the doctrine of qualified immunity.”

Worse yet, this decision wasn’t a surprise. And it certainly isn’t an aberration.

In fact, it is just the latest in a long line of cases in which the Supreme Court has decimated our ability to vindicate constitutional rights when government actors overstep. And when law enforcement oversteps, as was the case with Hughes, the consequences can be devastating.

As Professor William Baude explains <sup>[3]</sup>, “[t]he doctrine of qualified immunity prevents government agents from being held personally liable for constitutional violations unless the violation was of ‘clearly established’ law.” If any reasonable judge might have deemed the action permissible, the law is not “clearly established.” Essentially, if you want to sue a police officer who you think violated your constitutional rights, you first have to convince the court that what happened to you was so outrageous that no reasonable person could have thought it was okay.

This makes excessive force cases a steep uphill battle. Such cases turn on the Fourth Amendment — a constitutional right that is notorious for its murky and context-specific contours. So proving a Fourth Amendment violation is hard enough on its own. When you

have to prove a “clearly established” violation, the task becomes all but impossible because the Supreme Court keeps raising the bar. This further disempowers those injured or killed by police, and their surviving families.

Let’s examine the evolution of the term.

In 1982 [4] it meant that “a reasonable person would have known” an action was unlawful. Fast forward to 2010 [5] and “clearly established” meant that “every ‘reasonable official would have understood that what he is doing violates that right.’” The difference between “a” and “every” may seem technical, but, as Dean Chemerinsky and the late [6] Judge Stephen Reinhardt [7] explained, this change marks the difference between a measured fair notice standard under which it was possible to hold law enforcement accountable and what we have now: a system that [5] “protects all but the plainly incompetent or those who knowingly violate the law.”

Qualified immunity has become a misnomer. It should be called what it is, as Justices Sotomayor and Ginsberg did in their dissent from last week’s opinion. It is an “absolute shield.” [2]

This absolute shield subverts the basic principles of our legal system. It’s supposed to be harder to hold someone criminally liable than civilly liable, but is it? If you unknowingly commit a crime and the government wants to put you in prison for it, you can’t use your ignorance of the law as a defense. But if an officer makes “a mistake of law” [8] by unreasonably gunning you down in your own backyard, that officer gets to use the defense of qualified immunity to avoid paying damages in a civil case.

It doesn’t take a law degree to know this is absurd.

Furthermore, it turns out the doctrine of qualified immunity has no legal basis [3] in the first place — the courts simply made it up. So how can it possibly be justified?

The Supreme Court has told us [8] that the doctrine “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” That maybe sounds okay in theory, but Hughes’ case is just the latest to show us that in reality, there is no balance and there is no accountability.

The court’s qualified immunity doctrine contributes to the deep deficit in police accountability throughout our country, which disproportionately threatens and ends the lives of people of color, people with mental or physical disabilities, and members of LGBTQ communities. We are collectively holding law enforcement to the lowest standard of performance, when we should instead incentivize better, smarter, and more humane policing.

The result of the court’s decision is clear. Our right to not be unreasonably shot by the police is less protected, and therefore less important, than the court’s interest in shielding police officers from civil liability for their abuses of authority.

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**Source URL:** <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/supreme-court-gives-police-green-light-shoot>

**Links**

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### SCOTUS Rules for Police Officer in Excessive Force Case

This week the Supreme Court of United States decided *Kisela v. Hughes*, 584 US \_\_\_\_ (2018), and the opinion is already the center of a debate. In this case, not only did the majority find that Officer Kisela was entitled to qualified immunity for his use of deadly force, but it also went on to criticize (to the point of expressing disappointment) the Ninth Circuit Court of Appeals for its reasoning. The case also includes a passionate dissenting opinion made by Justices Sotomayor and Ginsburg that it is also worth discussing. Let's start with the facts of the case.

In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Officers Kisela and Garcia heard 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 the woman had been acting erratically. About the same time, Officer Kunz also arrived to the scene.

Garcia spotted a woman, later identified as Chadwick, standing next to a car in the driveway of a house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw Hughes emerge from the house carrying a large knife at her side. 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. 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, 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. She was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots. All three of the officers later said that at the time of the shooting they subjectively believed Hughes was a threat to Chadwick.

In an 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. This information, however, was unknown to the officers at the time of the incident.

Hughes sued Kisela alleging that he had used excessive use of force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed on the following grounds:

- 1) The record was sufficient to demonstrate that Kisela violated the Fourth Amendment.
- 2) The constitutional violation was clearly established because, in its view, the constitutional violation was obvious and there was Circuit precedent that the court perceived to be analogous.

Kisela appealed to the Supreme Court and the Court REVERSED the Appellate Court's decision on the following grounds:

- 1) While the Appellate Court found that Kisela violated the 4<sup>th</sup> Amendment, the Supreme Court stated it need not, and did not, decide whether a Fourth Amendment violation occurred (a proposition the Court found was not at all evident), — based on the facts of the case, however, Kisela was at least entitled to qualified immunity.
- 2) “‘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.” *White v. Pauly*, 580 U.S. \_\_\_, \_\_\_ (2017)(slip op, at 6)
- 3) “Reasonableness is judged against the backdrop of the law at the time of the conduct.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)
- 4) While the analysis does not require a case directly on point, “existing precedent must have placed the statutory or constitutional question beyond debate.” *White*, 580 U.S. at \_\_\_\_.
- 5) The Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a “high level of generality.”
- 6) “Use of excessive force is an area of law ‘in which the result depends very much on the facts of each case,’ and thus police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.” *Mullenix v. Luna*, 577 U.S. \_\_\_, \_\_\_ (2015)(slip op., at 12)
- 7) Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness.
- 8) An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.
- 9) Kisela shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking atree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down the officers. Kisela was separated from Hughes and Chadwick by a chain-link fence, Hughes had moved to within a few feet of Chadwick; and she 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. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.
- 10) The Court ended its analysis criticizing the Ninth Circuit for relying on a case that happened after the incident, and cases that were not similar to the case at bar, finding that not one of the cases on which the Appellate Court relied supported a denial of qualified immunity as to Kisela.

It is important to note that the Supreme Court relied on *Tennessee v. Garner* 471 US 1 (1985) and *Graham v. Connor* 490 US 386 (1989), in their ruling.

The Dissenting Opinion

The perspective of Justice Sotomayor and Justice Ginsburg in their dissenting opinion is worth discussing here. In essence, they concluded that Kisela's conduct was unreasonable for the following reasons:

1. The police officers themselves never witnessed any erratic conduct.
2. Hughes stood stationary about six feet away from Chadwick.
3. Hughes appeared composed and content and held a kitchen knife down at her side with the blade facing away from Chadwick.
4. Hughes never made any aggressive or threatening movements.
5. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else.
6. One of the officers testified that he wanted to continue trying verbal commands and see if that would work.
7. There is significant doubt as to whether she was aware of the officers' presence at all, and evidence suggests that Hughes did not hear the officers' swift commands to drop the knife.
8. The record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force. Kisela should have used his Taser.

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# BERKELEY FORUM ON ACCESS AND DISABILITY RIGHTS

Progress on and challenges to access  
for persons with disabilities who visit,  
live, and work in Berkeley



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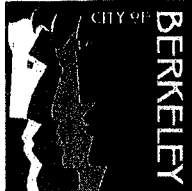
## Panelists

**Karen Nakamura**,  
Haas Distinguished  
Chair in Disability  
Studies, U.C.  
Berkeley

**Silvia Yee**, Senior  
Staff Attorney,  
DREDF

**Rita Maran**,  
Moderator and  
Subcommittee  
Chair CRPD

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Commission's Subcommittee  
on the UN Convention on the  
Rights of Persons with  
Disabilities, the Commission  
on Disability, and in  
coordination with the  
Disability Rights Education  
and Defense Fund (DREDF),  
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**PEACE & JUSTICE COMMISSION SUBCOMMITTEE:  
CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES  
MEETING AGENDA**

**Wednesday, May 9, 2018 at 3:00pm-5:00pm  
Ed Roberts Campus, 3075 Adeline St, Berkeley, CA, 94703**

**AGENDA**

1. Roll Call; Quorum check; Call to Order
2. Announcements; Members' Reports; Introductions
3. Minutes of last meeting
4. Panel: Berkeley Forum on Access and Disability Rights
5. Comments from the Public.
6. Select Next Subcommittee Meeting date
7. Adjourn

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