Statement of the Constitutional Accountability Center

Hearing on "Examining Civil Rights Litigation Reform, Part I: Qualified Immunity"

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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The Constitutional Accountability Center (CAC) is a non-profit law firm, think tank, and action center dedicated to the text, history, and values of the Constitution. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all and to protect our judiciary from politics and special interests. Through our expert commentary, issue briefs, narratives, and testimony to Congress, we provide the public and America's elected leaders with analysis of pressing topics in modern constitutional and federal law.

CAC submits this testimony to the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties to make two points.

First, Congress has broad powers to curb unjustified police use of force pursuant to its express constitutional power to enforce the Fourteenth Amendment. Indeed, as explained below, the Fourteenth Amendment was passed by Congress and ratified by the American people against the backdrop of horrific massacres in which law enforcement officers killed hundreds of African Americans in cold blood. Eliminating police killing and brutality is one of the critical purposes of the Fourteenth Amendment. But the courts have never given this part of the Fourteenth Amendment its due. The Supreme Court has never once recognized that the Fourteenth Amendment was ratified against the backdrop of brutal killings of people of color by the police. Getting this history right is essential to correcting police abuses today.

Second, far too often, individuals cannot obtain redress for brutal police conduct because of the judicially invented doctrine of qualified immunity. Section 1983, one of the most important civil rights laws enacted by Congress, has been rewritten by the Supreme Court to keep many suits against the police out of court. Because of this doctrine, when individuals go to court to redress police abuse of power, they almost always find that the courthouse doors are bolted shut. We at CAC believe that Congress should eliminate qualified immunity, which has eroded the enforcement of constitutional rights, undermined the rule of law, and denied justice to those victimized by the police and other governmental actors.

I. Racial Police Violence and the Text and History of the Fourteenth Amendment

The Fourteenth Amendment was the nation's response to abuses in the South in the wake of the end of chattel slavery. In the aftermath of the Civil War, the South sought to reimpose the racist oppression of chattel slavery—though the institution itself had been formally abolished by the Thirteenth Amendment—and to deny African Americans their newly won freedom. Police abuse lies at the historical core of what the Fourteenth Amendment sought to prohibit, as CAC has detailed in a recent paper.[1] Police aggressively enforced vagrancy laws contained in Black Codes, making mass arrests to keep African Americans in subordinate status.[2] Police broke into the homes of African Americans and sought to steal their guns and personal property.[3] Police beat and killed African American people, while turning a blind eye to crimes committed against them.[4] The Fourteenth Amendment's substantive guarantees of liberty and equality were a response to these abuses of official authority, designed to vindicate the demands of African Americans newly freed from bondage that "now that we are free we do not want to be hunted," we want to be "treated like human[] beings."[5]

Congress' Joint Committee on Reconstruction, which authored the Fourteenth Amendment, catalogued the conditions in the South that necessitated new constitutional guarantees to secure "the civil rights and privileges of all citizens in all parts of the republic."[6] The Joint Committee's report laid out, often in gruesome detail, how white police officers were engaged in a campaign of unending violence against African Americans. Even these horrific instances were just a fraction of the violence visited on those seeking to enjoy freedom for the first time in their lives. As historian Leon Litwack has written, "[h]ow many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known."[7]

Witness after witness recounted gratuitous, violent seizures by police officers, who were a "terror to . . . all colored people or loyal men."[8] In North Carolina, the Joint Committee learned, the police "have taken negroes, tied them up by the thumbs, and whipped them unmercifully."[9] A federal officer, who worked for the Freedman's Bureau, which was charged with protecting the rights of the newly freed people in the South, recounted an incident in which "[a] sergeant of the local police . . . brutally wounded a freedmen when in his custody, and while the man's arms were tied, by striking him on the head with his

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[1] David H. Gans, *"We Do Not Want to be Hunted": The Right to be Secure and Our Constitutional Story of Race and Policing,* 11 Colum. J. Race & L. 239 (2021).

[2] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 199-202 (1988).

[3] William McKee Evans, *Ballots and Fence Rails: Reconstruction on the Lower Cape Fear* 71-72 (1967).

[4] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* 79 (2019) (observing that "in the context of the violence sweeping the postwar South, the word 'protection,' in the Fourteenth Amendment conjured up not simply unequal laws but personal safety").

[5] Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), *reprinted in Freedom: A Documentary History of Emancipation, 1861-1867*, *ser. 3: vol. 1 Land and Labor, 1865*, at 857 (Steven Hahn et. al. eds., 2017).

[6] *Rep. of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. xxi (1866).

[7] Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 276-77 (1979).

[8] *Rep. of the Joint Committee on Reconstruction*, pt. II, at 271.

[9] *Id.* at 185.

gun, coming up behind his back; the freedman having committed no offense whatsoever."[10] This beating was so bad that "[t]his freedman lay in the hospital . . . at the point of death, for several weeks."[11] The same sergeant, after a search of a freedman's house turned up no evidence of wrongdoing, "whipped him so that from his neck to his hips [to] his back was one mass of gashes."[12] Another witness told the Joint Committee about how a "policeman felled [a] woman senseless to the ground with his baton" and about another incident in which a "negro man was so beaten by . . . policemen that we had to take him to our hospital for treatment."[13] A Freedman's Bureau officer from New Orleans recounted, to rousing cheers, that "one of the police officers of the city, in front of the same block where my headquarters were, went up and down the street knocking in the head every negro man, woman, and child that he met, tumbling some of them in the gutter, and knocking others upon the sidewalks."[14]

Police brutality and murder flared up in the summer of 1866 as Congress completed its work on the Fourteenth Amendment and the American people considered whether to ratify the Amendment. These tragic events served as a reminder that state governments would not respect the fundamental rights of African Americans and that racial violence and discriminatory policing would continue unchecked without new constitutional protections. These bloody events convinced the American people that the Fourteenth Amendment was necessary to vindicate our bedrock constitutional promises of liberty and equality. The Fourteenth Amendment emerged out of these horrific incidents of murder and brutality.

In Memphis, Tennessee, on May 1, 1866, clashes between recently discharged Black Civil War soldiers and white police officers exploded in three days of racial violence. The result was a killing spree led by the Memphis police force to destroy African Americans and the community they had built. The conflict, as a subsequent congressional investigation concluded, "was seized upon as a pretext for an organized and bloody massacre of the colored people of Memphis" and was "led on by sworn officers of the law."[15] The congressional investigation highlighted the gruesome attacks perpetrated by the Memphis police, an all-white police force that had long abused African Americans in the city.[16] As the House report explained, "[t]he fact that the chosen guardians of the public peace . . . were found the foremost in the work of murder and pillage, gives a character of infamy to the whole proceeding which is almost without parallel in all the annals of history."[17] It detailed one unspeakable act after another: "policemen firing and shooting every Negro they met," "policemen shooting" at Black people and "beating [them] with their pistols and clubs," high-ranking police officers exhorting the mob that African Americans "ought to be all

[10] *Id.* at 209.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 271.
[14] *Id.*, pt. IV, at 80.
[15] *Memphis Riots and Massacres*, H.R. Rep. No. 39-101, at 5 (1866).
[16] *Id.* at 6 ("[W]henever a colored man was arrested for any cause, even the most frivolous, and sometimes with cause by the police, the arrest was made in a harsh and brutal manner, it being usual to knock down and beat the arrested party."); *id.* at 30 (describing a case in which "a negro was most brutally and inhumanely murdered publicly in the streets by a policeman"); *id.* at 156 (testimony that "[w]hen the police arrested a colored man they generally were brutal towards him. I have seen one or two arrested for the slightest offence, and instead of taking the man quietly to the lock-up, as officers should, I have seen them beat him senseless and throw him into a cart.").
[17] *Id.* at 34.

killed," and policemen "firing into a hospital."[18] Under pretext of effectuating arrests or searching for weapons, police officers brutally raped African American women.[19] The police ransacked houses, broke open doors and trunks, robbed people of hard-earned money, and burnt down schoolhouses and churches.[20] In all these ways "the Memphis massacre had the sanction of official authority; and it is no wonder that the mob, finding itself led by officers of the law, butchered miserably and without resistance every negro it could find."[21]

Twelve weeks later, in New Orleans, local police led another massacre of African Americans, this one growing out of an attempt to reconvene the Louisiana constitutional convention of 1864 in order to guarantee voting rights to Black Louisianans and establish a new state government. On July 30, 1866, a small cadre of delegates gathered at the Mechanics Institute, joined by a group of African American supporters. Under the pretext of quashing what they viewed as an illegal assembly, the police, joined by a white mob, mercilessly murdered innocent Americans. It was, as Major General Phillip H. Sheridan wrote, "an absolute massacre by the police," in which Black people were brutally gunned down, even as they attempted to surrender.[22] By the time federal troops arrived, more than one hundred and fifty African Americans and twenty of their white allies had been killed or wounded.

A congressional committee once again investigated and issued a comprehensive report detailing how, on the morning of the convention, "the combined police headed by officers and firemen, . . . rushed with one will from the different part of the city towards the Institute, and the work of butchery commenced."[23] Police officers, who had been armed that morning, were instructed to shoot to kill,[24] and "the slaughter was permitted until the end was gained."[25] As the report laid out in sickening detail, "[f]or several hours, the police and mob, in mutual and bloody emulation, continued the butchery in the hall and on the street, until nearly two hundred people were killed and wounded."[26] "[M]en who were in the hall, terrified by the merciless attacks of the armed police, sought safety by jumping from the windows, . . . , and as they jumped were shot by police or citizens. Some, disfigured by wounds, fought their way down to the street, to be shot or beaten to death on the pavement. Colored persons, at distant points in the city, peaceably pursuing their lawful business, were attacked by the police, shot and cruelly beaten."[27] The scale of the cruelty and terror inflicted is hard to fathom. "[M]en were shot while waving handkerchiefs in token of surrender and submission; white men and black, with arms uplifted praying for life, were answered by shot and blow from knife and club."[28] Without new protections, the report

[18] *Id.* at 8, 9, 10.
[19] *Id.* at 13-15.
[20] *Id.* at 10, 25.
[21] *Id.* at 34.
[22] *New Orleans Riots*, H.R. Exec. Doc. 39-68, at 11 (1867).
[23] *New Orleans Riots*, H.R. Rep. No. 39-16, at 17 (1867).
[24] *Id.* at 143 ("[W]e were ordered to march double-quick, and everybody commenced firing at the Institute, and at the negroes in the street, no matter whether they were innocent or not; and when a negro ran, they followed him till they killed him.").
[25] *Id.* at 17.
[26] *Id.* at 11.
[27] *Id.* at 10.
[28] *Id.*

concluded, "the whole body of colored people" would continue to be "hunted like wild beasts, and slaughtered without mercy and with entire impunity from punishment."[29]

The American people ratified the Fourteenth Amendment against the backdrop of these horrific instances of police beatings and murder, recognizing that new constitutional protections were necessary to ensure the right to life, basic dignity, and personal security for all, regardless of race. As this history shows, ending unjustified racial police violence lies at the core of the Fourteenth Amendment. The Fourteenth Amendment's guarantees of liberty and equality require eliminating the unjustified police violence that has long been visited disproportionately on communities of color. Congress can and should use its enforcement powers to enact reforms to ensure that governmental actors, including the police, are held accountable when they violate our most basic rights.

II. ***The Qualified Immunity Doctrine Invented by the Supreme Court Closes the Courthouse Door to Victims of Police Violence***

Under 42 U.S.C. § 1983, a person whose constitutional rights were violated by state or local officials can sue those officials in federal court for damages. Congress enacted this law nearly a century and a half ago—a mere three years after ratifying the Fourteenth Amendment—to deter constitutional violations by imposing financial liability on the offenders. Yet the modern Supreme Court has made it nearly impossible for many victims to seek redress under Section 1983.[30] The qualified immunity doctrine now enables officials to have such suits dismissed at the outset, as long as their conduct did not violate "clearly established statutory or constitutional rights."[31] In practice, this has come to mean that injured plaintiffs cannot proceed with their suits unless they can point to a prior decision establishing that precisely the same conduct violates the law.[32] Worse still, when a court determines that the illegality of an official's conduct is not "clearly established," the court can dismiss the suit without determining whether that conduct actually violated the law.[33] This means that the next time an official harms someone through the same conduct, there will still be no clearly established law for the victim to rely on—and it will still be impossible to hold anyone liable for violating the Constitution. As a result, the law remains frozen in place and justice is denied to victims of police abuse of power.

Qualified immunity lets police officers commit flagrant constitutional violations with impunity. In one recent case, *Jessop v. City of Fresno*,[34] individuals sued police officers in Fresno, California, alleging that the police had stolen their property in the course of executing a search warrant. The federal court of appeals refused to permit the case to go forward, reasoning that there was no case that told the officers that stealing property violated the Constitution. The Supreme Court refused to review the decision. There are a number of rulings awaiting Supreme Court review with similarly egregious fact patterns, but

[29] *Id.* at 35.
[30] David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 Cardozo L. Rev. de novo 90.
[31] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Mullenix v. Luna*, 577 U.S. 7, 11 (2015); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018).
[32] *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (stating that qualified immunity permits liability only when "existing precedent" is so clear that the "constitutional question" is "beyond debate").
[33] *Pearson v. Callahan*, 555 U.S. 223 (2009).
[34] *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 2020 WL 2515813 (U.S. May 18, 2020).

the Supreme Court so far has been unwilling to grant review in a case and reconsider its qualified immunity doctrine. And the vast majority of qualified immunity rulings from the Roberts Court end the same way: the police are immune and cannot be sued. Indeed, during the Supreme Court's current term, the Justices used the Court's "shadow docket" to expand significantly the reach of qualified immunity and to suggest that police officers cannot be sued for using excessive force unless there is a prior Supreme Court precedent with nearly identical facts.[35] The Court is far too often unwilling to permit the police to be held liable, even for brutal conduct.

Qualified immunity allows many types of flagrant conduct by governmental actors to go unchecked, but its effects are especially pernicious when it comes to unjustified shootings and other abuses committed by police officers, as a report by Reuters demonstrated.[36] These types of incidents involve a myriad of factual variations, making it extremely difficult for victims to identify a previous case involving the exact same scenario. The result is a nearly impenetrable barrier to recovery for people who are harmed without justification during police encounters. And because states and localities rarely have to shell out money in damages for the actions of their law enforcement officers, they have little financial incentive to institute the kinds of trainings and policies that might prevent unnecessary shootings and other incidents of excessive force. As dissenting opinions by Justice Sonia Sotomayor have argued, qualified immunity has become "an absolute shield for law enforcement officers,"[37] and it has sanctioned "a 'shoot first, think later' approach to policing."[38] This result has no basis in Section 1983. Rather, as Justice Clarence Thomas has observed, the Court "substitute[d] . . . [its] own policy preferences" and disregarded the "mandates of Congress" reflected in Section 1983.[39]

Congress enacted Section 1983 several years after the Fourteenth Amendment's ratification, finding that southern states continued to "permit the rights of citizens to be systematically trampled upon."[40] Recognizing that a means of enforcing the constitutional rights guaranteed by the Fourteenth Amendment was needed, Congress passed "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes,"[41] the first section of which is codified as 42 U.S.C. § 1983. To safeguard fundamental liberties, lawmakers concluded that the nation needed to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired."[42] Against the backdrop of systemic discrimination in the criminal

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[35] *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) (summarily reversing the denial of qualified immunity because "[n]either Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here"); *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam) (summarily reversing denial of qualified immunity where "[n]either the panel majority nor the respondent has identified a single precedent finding a Fourth Amendment violation under similar circumstances").
[36] Andrew Chung et al., *For Cops Who Kill Special Supreme Court Protection*, Reuters (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.
[37] *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).
[38] *Mullenix*, 577 U.S. at 26 (Sotomayor, J., dissenting).
[39] *Ziglar v. Abassi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J, dissenting from the denial of certiorari).
[40] Cong. Globe, 42d Cong., 1st Sess. 375 (1871).
[41] 17 Stat. 13 (1871).
[42] Cong. Globe, 42d Cong., 1st Sess. 376 (1871).

justice system,[43] Congress provided that an "injured party should have an original action in our federal courts, so that by injunction or by the recovery of damages, he could have relief against the party who under color of law is guilty of infringing his rights."[44] This would "carry into execution the guarantees of the Constitution in favor of personal security and personal rights."[45] Section 1983 reflected the idea—fundamental to the rule of law—that "judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government."[46]

The qualified immunity doctrine invented by the Supreme Court does not serve this purpose and has no basis in law. The text of Section 1983 does not provide any immunity from suit. This was a conscious choice. The members of the 42nd Congress insisted that "whoever interferes with the rights and immunities granted to the citizen by the Constitution of the United States, though it may be done under State law or State regulation, shall not be exempt from responsibility to the party injured when he brings suit for redress either at law or in equity."[47] Indeed, Section 1983 was modeled on Section 2 of the Civil Rights Act of 1866, which created a federal criminal remedy that could not be overcome by a claim of immunity. In debates preceding the enactment of the Civil Rights Act of 1866, legislators repeatedly rejected the notion that persons acting under color of law should be entitled to immunity because of their status as officers of the government. This, Senator Lyman Trumbull urged, was "akin to the maxim of the English law that the King can do no wrong."[48] Senator Trumbull argued that such a claim of immunity improperly "places officials above the law."[49] Section 1983 incorporated this identical remedial framework.

Congress wrote Section 1983 to enforce the Fourteenth Amendment by holding state officials accountable for the violation of constitutional rights, not to give them a free pass. It sought to remedy constitutional wrongs, not immunize officers bent on denying African Americans the promise of freedom and equal citizenship. But the sweeping grant of immunity created by the Supreme Court guts the congressional objective to make the Fourteenth Amendment's guarantees that safeguard the individual from oppression at the hands of state authorities a reality. Further, the clearly established law requirement ignores the context in which the statute was passed. In 1871, the Fourteenth Amendment was only a few years old and the Supreme Court had not yet interpreted its sweeping guarantees. The idea that victims of abuse of power would be required to show that those acting under color of law violated clearly established legal precedents would have strangled the statute at birth.

The Supreme Court established the defense of qualified immunity based on the idea that the Congress that enacted Section 1983 gave "no clear indication" that it "meant to abolish wholesale all common-law immunities."[50] But the contours of qualified immunity have nothing to do with the common

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[43] Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 1013 (1983) (discussing the Reconstruction Congress's "repeated familiar complaints concerning the widespread, systemic breakdown in the administration of southern justice").
[44] Cong. Globe, 42d Cong., 1st Sess. 501 (1871).
[45] *Id.* at 374.
[46] *Id.* at 578.
[47] *Id.* at app. 310.
[48] Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).
[49] *Id*.
[50] *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

law. In the early Republic, government actors were strictly liable for their legal violations, a principle grounded in English common law. No good faith defense existed at the time of Section 1983's enactment.[51] Strict liability did not typically require officials acting in good faith to personally bear the brunt of compensating their victims. Rather, these officials were generally indemnified.[52] The Supreme Court displaced our constitutional system of government accountability—an idea that was foremost in the minds of the Reconstruction Congress that enacted Section 1983—with one designed to keep suits against the police out of court.

By insulating officials from accountability for constitutional violations, the modern qualified immunity doctrine subverts a key aim of the Fourteenth Amendment: checking state-sponsored racial police violence. Notably, people of color are hit particularly hard by the effects of qualified immunity, as they continue to be disproportionately victimized by police misconduct. Today, for example, Black people are more likely than white people to be the victims of excessive force by police officers.[53] Thus, qualified immunity closes the courthouse doors to the very group of people that Congress was focused on helping when it passed Section 1983. And in so doing, it prevents enforcement of a critical part of the Fourteenth Amendment.

III. Conclusion

In our view, the best way to reform qualified immunity is to end it completely. Ending the qualified immunity doctrine would make the promise of the Fourteenth Amendment closer to a reality, enhance government accountability, encourage courts to play their historic role of redressing abuse of power, punish wrongdoing by those sworn to uphold the law, and create an incentive for governments to properly train their officers to avoid unnecessary use of force. If the judiciary is unwilling to fix its own mistake, Congress must step in to make clear that governmental actors should be held accountable when they violate people's constitutional rights. That is why CAC endorsed the Ending Qualified Immunity Act in the 116th Congress and still supports that legislation today.

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[51] David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 19 (1972) (discussing the "insistence of nineteenth century courts upon [a] strict rule of personal official liability" and noting that the fact that "an officer personally could be separately liable *where the wrong was equally a wrong by the state*, is what gave the principal of personal official liability its major importance"); Albert Alschuler, Herring v. United States*: Minnow or Shark?*, 7 Ohio St. J. Crim. L. 463, 501 (2009) (observing that at the time of the framing of the Fourth Amendment, "officers who conducted illegal searches and seizures were held strictly legal in damages" and "had no immunity from civil lawsuits").

[52] James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1906-07 (2010) (surveying early petitions to Congress for indemnification and finding that where officers acted in good faith and within the boundaries conferred by law or their instructions, "Congress concluded that the government should bear responsibility for the loss").

[53] Phillip Atiba Goff et al., Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force* 21 (July 2016), https://bit.ly/2wJdTMW; *see, e.g.*, U.S. Dep't of Justice Civil Rights Division & U.S. Attorney's Office Northern District of Illinois, *Investigation of the Chicago Police Department* 145 (Jan. 13, 2017), https://bit.ly/2wHvzIW ("the raw statistics show that CPD uses force almost ten times more often against blacks than against whites"); U.S. Dep't of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* 62 (Mar. 4, 2015), https://bit.ly/ 2TRWNog ("African Americans have more force used against them at disproportionately high rates, accounting for 88% of all cases").