



The Leadership Conference
Education Fund



A Matter of Life and Death:

The Importance of the Death

in Custody Reporting Act

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A Matter of Life and Death: The Importance of the Death in Custody Reporting Act

is a project of The Leadership Conference Education Fund (The Education Fund) and the Project on Government Oversight (POGO). The Education Fund was founded in 1969 as the education and research arm of The Leadership Conference on Civil and Human Rights, the nation's oldest and largest civil and human rights coalition of more than 230 national organizations. POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

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A Matter of Life and Death: The Importance of the Death in Custody Reporting Act builds on earlier advocacy from The Leadership Conference on Civil and Human Rights and POGO focused on the full implementation of the Death in Custody Reporting Act (DCRA). This report also builds on the Biden administration's Executive Order 14074, which highlights the importance of collecting complete and accurate information on deaths in custody — the first step in reducing preventable deaths in United States jails, state prisons, and federal prisons.

This report makes specific recommendations about how the Department of Justice can fully realize the spirit of the current DCRA statute with the administrative tools currently available. We hope our colleagues across the country and our nation's policy decisionmakers benefit from the report as we work toward an America as good as its ideals, which includes respect for the human rights of all individuals who are in government custody.



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Executive Summary

Deaths in custody have long been, and remain, a national crisis. Far too many of these deaths are caused by excessive violence from law enforcement, including dangerous and unnecessary use of force by police and the abuse and neglect of incarcerated people.

The United States government does not know how many people die in the custody of the criminal-legal system each year. This is both a moral and administrative failure. Without clear, accurate, and publicly accessible information on deaths in custody, policymakers, researchers, and advocates are unable to make the changes necessary to reduce preventable in-custody deaths.

More than eight years ago, Congress passed the Death in Custody Reporting Act (DCRA), which empowers the U.S. Department of Justice (DOJ) to collect these data and requires it to publish a study using the data to identify ways to reduce deaths in custody.¹ But as of 2023, the department has yet to collect reliable data, let alone produce the required study.

On September 20, 2022, the Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations held a hearing that highlighted the DOJ's failure to effectively implement DCRA. At this hearing, the public learned about the tragic

deaths of two individuals, Matthew Loflin and Jonathan Fano. Loflin died of heart failure after officials failed to provide him with treatment in Chatham County Detention Center in Georgia in 2014. Fano committed suicide at the East Baton Rouge Parish Prison in Louisiana in 2017. Both individuals lost their lives as a consequence of poor care and poor conditions in custody, and both were pretrial detainees when they died.²

It is clear from the research on deaths in custody presented in the subcommittee hearing, and the experiences of people who die in custody, that preventable deaths in our nation's jails, state prisons, and federal prisons are a real, urgent concern. The limited data available today show that thousands of people die in government custody each year and that they are disproportionately people of color.³

“It is clear...that preventable deaths in our nation's jails, state prisons, and federal prisons are a real, urgent concern.”

This is why DCRA is so important. While DCRA may be a data collection, reporting, and research statute, it is grounded first and foremost in human rights. Policy changes that reduce preventable deaths will not occur until decisionmakers, advocates, and researchers understand the full breadth of this problem. Collecting complete, accurate in-custody death information is a critical step toward reducing deaths.

This report proposes a path forward on DCRA. It begins by analyzing the law and past efforts to implement the law, some of which were considerably more robust than the Justice Department's current plan. It then identifies a series of key challenges that remain unresolved.

The elements of federal, state, and local data collection are at the core of this issue and, as a consequence, it is easy to get lost in the granularity of data and process. Thus, it is more important than ever to emphasize the urgency of DCRA implementation. Every year that collection remains incomplete costs people in custody, some of the most vulnerable people in U.S. society, their lives. The government has an obligation to ensure the safety of people in its care — and some of those people are in custody.

What is the Death in Custody Reporting Act?

DCRA requires every state and territory, and each federal law enforcement agency, to collect data on deaths that occur while someone is being detained or arrested by law enforcement, or is in transit to or in the custody of a jail or correctional facility, and to submit that data to the U.S. attorney general. The data must include decedent information (their name, gender, race, ethnicity, and age); the date, time, and location of the death; the law enforcement agency involved; and “a brief description of the circumstances surrounding the death.” States that fail to comply face up to a 10 percent reduction to their awards under the Edward Byrne Memorial Justice Assistance Grant Program. The Justice Department is required to issue a report to Congress analyzing how DCRA data can be used to reduce in-custody deaths and how policies and practices contribute to or prevent those deaths.

History of DCRA Implementation

Between 2014 and 2021, the Justice Department published multiple plans detailing how it would manage the data collection required by DCRA. These plans vary considerably in their scope and level of detail, reflecting changing positions toward DCRA from the Obama, Trump, and Biden administrations. Reviewing each plan, along with other Justice Department documents regarding DCRA implementation, reveals multiple weaknesses in the department's current approach. The current DCRA program collects information on fewer questions,

contains fewer safeguards to ensure accurate data, and results in less transparency than earlier DCRA proposals or previous death in custody data programs.

In the summer of 2022, the DOJ suggested that new legislation was needed to fulfill DCRA's mandate. But the history of DCRA shows that the department has previously developed far more rigorous plans than what exists today — under the same version of the law that is in force today. The department has simply chosen not to implement them. These past plans contain provisions that the Justice Department clearly believed were compatible with the law and that, if actually implemented, would considerably strengthen DCRA. In addition, state and nongovernmental data collection programs provide examples of best practices that would improve federal implementation.

DCRA Today

More than eight years after DCRA was enacted, the Justice Department has yet to fully comply with the law. While federal agencies have reported data since 2016, the department has not successfully collected state and local data. In fact, its efforts to do so have yielded worse results than the data programs that were in place prior to the department's current DCRA program. The Government Accountability Office reported that in 2021 alone, the government potentially undercounted deaths in custody by nearly 1,000 compared to other public data sources. Meanwhile, DCRA data from 2019 contained only a portion of the data on prison deaths that were reported under the department's Mortality in Correctional Institutions data program, which has since been discontinued.

“...in 2021 alone, the government potentially undercounted deaths in custody by nearly 1,000 compared to other public data sources.”

In the final months of 2022, the Justice Department indicated it would step up its DCRA efforts, including by enhancing technical assistance to states and auditing data it receives. If implemented, these would be significant improvements. But the history of DCRA to date means real implementation, not promises, are necessary. And even technical assistance will be insufficient if the Justice Department continues to take an unnecessarily narrow view of what the law allows and requires. The department's position is a needless barrier to collecting meaningful data. With a more comprehensive DCRA program in place, deaths like those of Matthew Loflin and Jonathan Fano will be more likely to be prevented. Agencies will have the data they need to identify meaningful trends regarding in-custody deaths and will be able to proactively take measures to increase the safety of the people who are in the government's custody. For those agencies that fail to take proactive measures, the federal government will be in a better position to require the necessary improvements to decrease preventable deaths.

What the Justice Department Can Do Today to Implement the Death in Custody Reporting Act

- **Refine Administration:** Refine and update coordination and clarify reporting requirements and guidance for data collectors at the federal and state levels. Design an implementation plan that recognizes that DCRA gives the Justice Department a broad mandate to study deaths in custody in order to help prevent them.
- **Commit to Compliance:** Take concrete steps to ensure all agencies report DCRA data as required by the law. Issue clear standards for when and how the current 10 percent penalty will be imposed and impose the penalty on noncompliant states.
- **Improve and Standardize Collection Forms:** Ensure that the data collection forms contain clear, specific questions that will elicit clear data about the circumstances surrounding deaths. Once the forms are improved, keep them consistent for as long as possible, enabling longitudinal studies.
- **Engage in Studies that Address DCRA-Mandated Research Questions:** Clearly define the universe of data necessary to answer the research questions in the DCRA statute and issue the required analysis to Congress.
- **Increase Transparency:** Create, maintain, publicly publish, and annually update a list of agencies subject to DCRA. Release annual reports on key data trends and make anonymized data available that at a minimum breaks out information at the agency or facility level. Create a unique individual identifier system like those commonly used by other agencies to protect privacy while disaggregating data for research and evaluation.

Introduction

Deaths in custody have long been, and remain, a national crisis. Far too many of these deaths are caused by excessive violence from law enforcement, including dangerous and unnecessary use of force by police and the abuse and neglect of incarcerated people.

The Death in Custody Reporting Act of 2013 (DCRA) calls on local, state, and federal law enforcement agencies to report the details surrounding these deaths and requires the federal government to use the collected data to study ways to decrease the number of deaths.

Though it's been years since Congress passed DCRA, the Justice Department has still not produced the critical research mandated by the law.

The result? While existing data show that thousands of individuals die in custody or during arrests each year, there is no comprehensive information on how many people die in custody, who they are, how they die, or how best to prevent future deaths.

This report explores when, where, and why the agencies charged with DCRA reporting lost their way — and how the Department of Justice can fulfill its duty to fully implement the law.

Why Is the Death in Custody Reporting Act So Important?

A comprehensive census of deaths in and around the criminal-legal system is not just the law under DCRA. It is also a critical step to achieving a just, free, and equitable society. The authority that society grants to law enforcement officials gives them the power to limit our personal freedoms. This comes with a fundamental responsibility to, at the very least, keep those of us they detain safe, healthy, and alive.

When law enforcement agencies fail in this responsibility, the government must be able to identify and mandate changes to prevent future deaths. That requires accurate, reliable, and consistently reported data. DCRA requires the Justice Department to collect the data necessary to craft policy that will reduce in-custody deaths.

Initially passed in 2000, the first iteration of the Death in Custody Reporting Act expired in 2006. A 2008 attempt to reauthorize the law failed to pass the Senate. But in December of 2014, a new version of the bill passed the House and the Senate, and DCRA of 2013 was enacted.⁴

A series of high-profile police killings in the summer of 2014 had spurred Congress to revisit the law. In July, police in New York City killed Eric Garner after placing him in a choke hold. A month later, in Ferguson, Missouri, police killed Michael Brown. That fall, Chicago police shot and killed Laquan McDonald. In Cleveland, 12-year-old Tamir Rice was killed by a police officer while playing with a toy gun. The “news wave” of reporting sparked by these deaths was fueled by, and in turn fueled, community activism against police violence and calls for accountability that continued throughout the year.⁵

The activism also highlighted the fact that this violence disproportionately impacts Black and Brown people and communities. In 2014, *ProPublica* analyzed 1,217 deadly police shootings of male teenagers (aged 15-19) between 2010 and 2012. They found that police killed Black youth at a rate 21 times higher than their White peers.⁶

Despite an increased media focus on and public activism against police violence, many more Black and Brown people have been killed by law enforcement since the reauthorization of DCRA in 2014. After the murder of George Floyd spurred more nationwide protests in 2020, a study found that 60 percent of reported deaths by law enforcement involve people of color. Moreover, the study said, such deaths are significantly undercounted.⁷

Calls for accountability and justice reached a crescendo in the summer of 2020 and continue to come from across the nation and the world. But more than two years later, these calls have still not been answered by meaningful policy

changes. And until DCRA is fully implemented, the country will not have the complete, authoritative, nationwide data on deaths in custody and during arrests that could serve as the basis for such policy action.

The timing of this report is critical. Based on the limited data available, in-custody mortality rates were hitting all-time highs even before accounting for the devastating impact of COVID-19 on incarcerated populations. In 2019 — the most recent year in which the Justice Department collected reasonably accurate data — there were more deaths in local jails than ever recorded, an increase of 5 percent from the previous year. The number of unique jurisdictions reporting one or more deaths was the highest in history. The reported mortality rate for people incarcerated but not convicted hit an all-time high, as did reports of in-custody deaths from drugs and alcohol. State prisons reported the most homicides in reporting history.⁸ But even as conditions deteriorated, the Justice Department’s implementation of DCRA, which began in earnest in 2020, has resulted in lower quality data than what existed before.⁹

There is much to learn about why the Department of Justice’s data collection is getting worse and about what can be done to reverse these trends. Without reliable data, researchers, advocates, decisionmakers, and law enforcement will continue to struggle to evaluate basic policies. Jurisdictions will continue to operate unchecked, and violations of fundamental rights will continue apace. The Department of Justice must act now.

I. The Death in Custody Reporting Act

What is the Death in Custody Reporting Act?

DCRA of 2013 has three main components: a data collection requirement, an enforcement mechanism, and a reporting requirement.¹⁰

DCRA requires every state and territory, and each federal law enforcement agency, to collect data on arrest-related and in-custody deaths and to submit that data to the U.S. attorney general. The data must include decedent information (their name, gender, race, ethnicity, and age); the date, time, and location of the death; the agency involved; and “a brief description of the circumstances surrounding the death.”¹¹

The law’s collection and reporting requirement covers a broad range of circumstances.

States must collect and provide information each quarter:

“regarding the death of any person who is detained, under arrest, or is in the process of being arrested, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, State-run boot camp prison, boot camp prison that is contracted out by the State, any State or local contract facility, or other local or State correctional facility (including any juvenile facilities).”¹²

Federal law enforcement agencies must collect and report data annually about the death of anyone who is:

“detained, under arrest, or is in the process of being arrested by any officer of such Federal law enforcement agency (or by any State or local law enforcement officer while participating in and for purposes of a Federal law enforcement operation, task force, or any other Federal law enforcement capacity carried out by such Federal law enforcement agency); or (2) en route to be incarcerated or detained, or is incarcerated or detained at— (A) any facility (including any immigration or juvenile facility) pursuant to a contract with such Federal law enforcement agency; (B) any State or local government facility used by such Federal law enforcement agency; or any Federal correctional facility or Federal pre-trial detention facility located within the United States.”¹³

The second component of DCRA involves compliance and enforcement.¹⁴ States receive federal grant money through the Justice Department’s Edward Byrne Memorial Justice Assistance Grant Program (commonly known as Byrne JAG).¹⁵ To compel compliance with its data collection and sharing requirements, DCRA gives the attorney general discretionary authority to reduce those grant allocations for non-compliant states by 10 percent, with any withheld funds to be reallocated to compliant states.¹⁶ To date, no penalties have been issued for non-compliance because the department has chosen not to apply the provision.¹⁷ And because the penalty is assessed at the state level, there is no penalty for federal agencies that fail to comply.

The third component of the law — the study requirement — calls on the Justice Department to study the collected data and issue a report to Congress on its findings. According to DCRA, this report should serve two functions: It should “(A) determine means by which such information can be used to reduce the number of such deaths; and (B) examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities relating to such deaths.”¹⁸ When DCRA was enacted in December of 2014, the law mandated that the Justice Department should provide its report no more than two years after the enactment date.¹⁹

DCRA of 2013 appears straightforward. But orchestrating the collection and public release of data — and using that data in research to guide policy reform — is not an automatic process. The next section analyzes the department’s attempts to develop strategies for implementing the law.

History of DCRA Implementation: 2014 to 2020

Understanding the political, social, and legislative history of DCRA is critical to understanding the reforms proposed in this report, as they are the forces responsible for the fits and starts in DCRA program implementation.

The first report to Congress mandated by DCRA was due in 2016. This was an ambitious goal, but the Justice Department wasn’t starting from scratch: After the original DCRA statute expired in 2006, the department’s Bureau of Justice Statistics (BJS) had continued to collect state-level data on arrest-related deaths and deaths in prisons

and jails.²⁰ Unfortunately, a 2015 audit revealed that the program was radically undercounting arrest-related deaths.²¹ Before the DOJ could publish the report to Congress that DCRA required, it would need a new strategy for collecting reliable data.

Between 2014 and 2021, the Justice Department published multiple different plans detailing how it would manage the data collection required by DCRA. These plans vary considerably in their scope and level of detail, reflecting changing positions on implementation of DCRA from the Obama, Trump, and Biden administrations.

In the summer of 2022, DOJ suggested DCRA as written hinders its ability to collect death data. But the history of DCRA shows that the department has previously developed far more rigorous plans than what exists today. The department has simply chosen not to implement them.

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Reviewing each plan, along with other Justice Department documents regarding DCRA implementation, reveals multiple weaknesses in the department's current approach. These past plans contain provisions that the Justice Department clearly believed were compatible with the law and that, if actually implemented, would considerably strengthen DCRA.

August 2016 Collection Plan

In 2015, after suspending its Arrest-Related Deaths program (which began under the 2000 version of DCRA), BJS began testing a redesigned program for collecting data. It published a new collection plan based on this redesign — the first proposed implementation plan since DCRA was reauthorized nearly two years earlier — in the Federal Register on August 4, 2016.²²

The primary innovation of this plan was its “hybrid” approach. The Arrest-Related Deaths program had relied on data reported by agencies. But this new methodology would have BJS survey news sources to identify deaths potentially covered by DCRA, then survey the involved agencies to gain additional information. While the new approach sought to address the problem of agencies failing to report data, civil society groups pointed out that the quality of that data would depend almost entirely on the quality of media reporting on in-custody deaths.²³

December 2016 Collection Plan

The August 2016 collection plan was never implemented: Within months of its announcement, the Office of Justice Programs (OJP) moved responsibility for state data collection to a different bureau within the Department of Justice. While the Bureau of Justice Statistics would retain responsibility for

collecting data from federal agencies, the responsibility for state data collection was shifted to the Bureau of Justice Assistance (BJA).²⁴ BJA administers the Byrne JAG Program — the federal grants to states that the Department of Justice has the power to reduce to enforce DCRA compliance.

The BJA announced its first state data collection plan in the Federal Register on December 19, 2016.²⁵ This December 2016 collection plan remains the most developed of all the plans proposed to date, and it is the foundation for many of our recommendations.

The plan had four core components: definitions, a description of data collection methodology, state-level compliance requirements, and guidelines for data transparency. The plan specified that states were required to report data to BJA quarterly, and that a single state agency would be responsible for gathering data from local agencies in the state and reporting the data to BJA.

- The December 2016 collection plan also provided the most detailed criteria to date for determining which deaths required reporting under DCRA. It required states to report “any deaths that occurred:
- Due to any use of force by law enforcement personnel (e.g., officer-involved shootings and deaths caused by law enforcement weapons or tactics).

- While the decedent's freedom to leave was restricted by law enforcement prior to, during, or following an arrest — including during detention for questioning or investigation (e.g., a *Terry* stop); during the process of apprehension (e.g., the pursuit of a criminal suspect, or a standoff with law enforcement); while in the custody of, or shortly after restraint by, law enforcement personnel (even if the decedent was not formally under arrest); or while in transit by law enforcement personnel.
- During an interaction with law enforcement personnel responding to medical or mental health assistance (e.g., in response to suicidal persons).
- While the decedent was confined in a correctional or detention facility, including a prison, jail, boot camp, lockup, or booking center.
- While the decedent was under the jurisdiction or supervision of a law enforcement agency or correctional or detention facility but located elsewhere, such as special jail facilities (e.g., medical/treatment/release centers, halfway houses, or work farms), or in transit.”²⁶

As a check on the state-reported data, the plan also modified the hybrid data collection methodology BJS had proposed several months earlier. States would report quarterly, and the BJA would also review sources already in the public record. BJA planned to compare the data reported by the states to the data identified in the open-source review and request additional information from reporting agencies to fill any identified gaps.²⁷

At the time, the Justice Department anticipated state data collection would start in the third quarter of fiscal year 2017 and be fully operational by FY 2018.²⁸

To facilitate the logistics of collecting data, the department developed four new data collection forms: a quarterly summary of all covered deaths, a form for states to confirm the accuracy of BJA's open-source review, and two new incident report forms (one for corrections and another for law enforcement) to provide detailed information about each death.²⁹ These data collection forms are critical because they dictate the kind of data available for analysis.

The December 2016 collection plan also articulated a blueprint for state compliance. States had two responsibilities. First, they needed to submit complete and timely reports. If the open-source review found deaths not logged by a state, the state would be required to provide the data in a supplemental report. Failure to report data quarterly or to provide supplemental reports would constitute noncompliance.³⁰ Second, starting by FY 2018, the DOJ planned to require states to submit annual compliance plans. The department intended to publish those state collection plans, assess them on an annual basis, and work with states on improving collection and reporting.³¹

Because the quality of the data the Justice Department receives depends in large part on the quality of each state's collection, publishing state data collection plans would provide invaluable transparency. These plans would offer the public insight into a crucial component of DCRA: the processes by which states gather data from the local law enforcement agencies that account for the overwhelming majority of police in this country.

The DOJ planned a grace period for compliance. While it encouraged states to begin data collection, the department postponed compliance checks until its guidelines and state plans were complete. To further entice compliance, the DOJ proposed a new pre-penalty option allowing non-compliant states to funnel their 10 percent funding penalty into activities designed to pull them into compliance.³²

Finally, the December 2016 plan outlined how DOJ would make DCRA data public. The department announced its intent to release data down to the agency and facility level, including information on the circumstances around reported deaths. The plan specified that published data would contain no personal identifying information and that other details from the data would be subject to the Freedom of Information Act.³³

December 2016 Report to Congress

Three days before the publication of the collection plan, then-Attorney General Loretta Lynch submitted a report to Congress outlining the Justice Department's data collection efforts and the department's plan to fulfill DCRA's research requirement.³⁴ In the report, Lynch committed the Department of Justice to exceeding the statute's mandate for a single study of collected data. "Because the Department believes there is significant merit in studying the trends of in-custody deaths over time," the report states, "the Department intends to conduct this study periodically and to submit subsequent reports to Congress."³⁵

The December 2016 report to Congress delved into data collection methods, previewing the forthcoming plan from BJA to collect DCRA data from the states. It also outlined the federal data collection effort that would be led by BJS.

According to the report, the department notified "approximately 155" federal departments and agencies with detention or incarceration responsibilities about data collection and reporting requirements.³⁶ BJS expected to collect FY 2016 data from federal agencies between December 2016 and March 2017 and issue a report using those data later in 2017.³⁷

The most significant development in Lynch's December 2016 report to Congress was its discussion of the department's research plan.³⁸ Appropriately, it acknowledged that fulfilling DCRA's statutory research mandate required answering questions that were not made explicit in the law.

DCRA had specified that one purpose of the mandated Justice Department report was to analyze data on deaths in custody and "determine means by which such information can be used to reduce the number of such deaths."³⁹ The December 2016 report to Congress specified how the planned report would meet this requirement. The Justice Department would:

- determine the number and causes of death by each reporting agency;
- compare the number and causes of deaths across agencies with similar characteristics (e.g., funding, size, location);
- identify agencies that deviate from the norm on the number and causes of deaths (with much to learn from the law enforcement agencies that have far fewer deaths as well as agencies that have excessive deaths); and,

- “determine the most common manners and causes of death and develop specific recommendations for how to reduce such deaths, ... addressing necessary policies, procedures, staffing levels, officer training, supervision, accountability measures, and the provision of timely medical and mental health care, among other recommendations.”⁴⁰

The study would also meet DCRA’s requirement that the Justice Department “examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons and other specific facilities related to such deaths.”⁴¹ Because DCRA does not include provisions for data collection on management practices, the December 2016 report explained that the department planned for external consultants to collect the necessary data about management practices and policies.⁴²

Unfortunately, neither the December 2016 collection plan nor the research study plan outlined in the December 2016 report to Congress was ever implemented.

June 2018 Collection Plan

DCRA languished under the Trump administration. On June 11, 2018, more than a year after President Donald Trump took office, the BJA proposed a third state collection plan, one that would replace both of the December 2016 proposals.⁴³ The June 2018 collection plan significantly softened the Justice Department’s earlier interpretation of the responsibilities the law imposed on local, state, and federal governments.

In a step backward, the BJA narrowed the definition of “reportable deaths” to “deaths custody and deaths in jail, prison, or detention settings. (i.e., deaths reportable on Form DCR-1).”⁴⁴ While this likely covers many of the same incidents as the more detailed definitions in the December 2016 collection plan, the 2018 definition provided significantly more room for inconsistent interpretation, leaving open the possibility that some incidents that would be covered by the 2016 definition could go unreported.

The June 2018 collection plan also detailed how the DOJ would revamp the forms it used for data collection. It eliminated the open-source data form found in the 2016 plan, and it replaced what had been separate forms for collecting information on deaths from law enforcement and corrections agencies with a single form for all agency types. That form was shortened, eliminating a number of questions.⁴⁵

Most damagingly, the June 2018 plan dropped the open-source review DOJ had proposed two years earlier as a check on state reporting, instead limiting collection to data reported by the state collection agencies. In other words, the methodology reverted to one similar to the ill-fated Arrest-Related Deaths program that BJA abandoned in 2014 because it significantly undercounted deaths.

The 2018 plan also reversed the earlier progress toward transparency around DCRA data, entirely eliminating two key provisions of the 2016 plan. First, it scrapped the requirement for states to create and review their own collection plans and the provisions requiring states to publish those plans. The department also not only abandoned its plans to publicly release the data collected through

DCRA, but in separate guidance suggested that the extent to which DCRA data were subject to release through the Freedom of Information Act would “be determined on a case by case basis.”⁴⁶

Finally, the BJA again postponed the first data collection from states, this time to the first quarter of FY 2020.

2018 Inspector General Review

Nearly four years after DCRA’s reauthorization, and with no public progress on meeting the law’s requirements, the Justice Department Office of the Inspector General reviewed the department’s efforts in late 2018.⁴⁷

The OJP’s responses to that inquiry demonstrated a concerning lack of commitment to the law.

On the question of why the department had not produced the required report analyzing DCRA data, the office took the position that Lynch’s 2016 report to Congress outlining a proposed research methodology satisfied the law’s mandate. Therefore, it reasoned, the Justice Department had fulfilled the requirement to produce a report within two years of the law’s enactment. It informed the inspector general that the department had “no plan” to produce another report or to publish associated data tables.⁴⁸

The inspector general review disputed the conclusion that the Lynch report satisfied the reporting requirement.⁴⁹

While OJP’s responses to the inquiry did not rule out another report, they did raise questions about the usefulness of a future DCRA report from the Department of Justice. In the same set

of responses, OJP explained that “[o]nce data collection has begun, the Department will assess what kinds of reporting would be appropriate based on the available data.”⁵⁰ This approach reverses the relationship between collection and reporting: Collection must be designed to capture data that will answer the research questions in need of investigation. At a minimum, this includes those research questions detailed in and mandated by DCRA.

The inspector general review expressed concern that BJA’s collection plan would yield incomplete data, specifically noting that the decision to drop the open source review portion of the program undermined its effectiveness.⁵¹

It also flagged issues with the federal data collection process, which had begun in a more timely fashion than the state collection. The investigation revealed that “not all federal law enforcement agencies have submitted [DCRA] reports.”⁵²

More alarmingly, the review found that BJS did not have a definitive list of the federal agencies required to report. As a result, “until BJS collects complete reports from all federal agencies, the Department will be unable to determine the total number of individuals who died in federal custody and which agency had custodial responsibility at the time of death.”⁵³

DCRA Today: 2020 to Present

In January of 2020, the BJA started collecting state DCRA data. As discussed later in this report, the quality of these data is extremely poor.

In September of 2021, the BJA published yet another collection plan for state data. Unfortunately, the plan was largely based on its June 2018 precursor, and it suffered from the same problems: vague definitions, a lack of data auditing, no state collection plan requirement, and an absence of transparency measures.⁵⁴ The accompanying reporting forms also remained inadequate, relying on an open-ended text field to elicit key data.

Despite these fundamental shortcomings, there were signs in this period that BJA was devoting somewhat more attention to DCRA implementation than in past years. The bureau developed and updated several resources for state officials and provided them with assistance by streamlining and simplifying reporting. For example, it added a DCRA reporting tool to the online portal state officials already use for grant reporting.⁵⁵ The BJA also produced a detailed user's guide for entering DCRA information online, and it provided training to help state officials with data submissions.⁵⁶

So far, BJA's state data collection has been outpaced by the federal data collection efforts led by BJS, which began yielding some public data during this period.⁵⁷ However, the BJS reports also leave considerable room for improvement.

First, the BJS reports on federal DCRA data have been plagued by delay. The first report, issued in 2020, covered data from 2016 and

“In January of 2020, the BJA started collecting state DCRA data... the quality of these data is extremely poor.”

2017. A reporting lag of three years renders data considerably less useful as a policymaking tool. Fortunately, subsequent reports have come out more promptly, with a report on 2018 and 2019 data released in September of 2021 and a report on 2020 data published in July of 2022. BJS was scheduled to release the next report, *Federal Deaths in Custody and During Arrest, 2021 – Statistical Tables*, in November 2022, but has now listed the report with a new release date of quarter 2 in 2023 on the bureau's “Forthcoming Publications” page.⁵⁸

In addition, the format of the reports issued so far have limited their usefulness. They include aggregated data tables. These tables do reveal general trends, such as which agencies have reported the most in-custody deaths, basic demographic information about decedents, and some information about causes and manners of the deaths. However, they are organized by single variables, and without access to the underlying data it is impossible to analyze the interaction of multiple variables.

More concerningly, the reports issued in 2020 and 2021 obscured one of the most significant data points: the number of people killed by law enforcement officials. The reports included homicide as a cause of death, but they did not distinguish between killings by law enforcement or others, such as other incarcerated people. However, BJS's data collection forms for the relevant periods did contain this extra level of detail.⁵⁹ The 2022 report was the first to specify the number of homicides specifically by law enforcement.

2022 Executive Order and Justice Department Response

On May 25, 2022, President Biden signed an executive order focused on effectiveness and accountability in policing and the criminal-legal system. The order included a call to strengthen DCRA implementation. It ordered the FBI and federal prosecutors to ensure that use-of-force investigations happen in a timely fashion, and to collect and preserve the data required for DCRA reporting. President Biden also ordered the attorney general to publish a report within 120 days, detailing “the steps the DOJ has taken and plans to take to fully implement” DCRA.⁶⁰

Released in September 2022, the department's report revealed deep, ongoing problems with DCRA implementation.⁶¹ Most troublingly, it found that the first two years of state data collection, 2020 and 2021, had resulted in considerable undercounts when compared to earlier BJS collections and nongovernmental organizations' tallies of deaths in custody.⁶²

The department also appeared to reject the possibility of applying the Byrne JAG penalty, claiming in the report that the penalty would not incentivize compliance but would have “negative

consequences.” Nor did the report contain a plan for increasing the amount of DCRA data available to the public.

Most troublingly, the report included a request for new legislation that DOJ claimed would enable it to improve its implementation of DCRA. But nearly everything it claims new legislation would allow it to do was already included in the December 2016 implementation plan, which was developed under the current statute. The department's view that the existing law is insufficient is misguided, as discussed in a subsequent section.

It should be noted that the report also articulated several planned reforms that, if implemented, would represent progress. It indicated that the department has been using open-source data to audit states' reporting and plans to continue the practice. The Justice Department also committed to developing clearer compliance standards and announced that it would require states to submit data collection plans for department review. Finally, it announced that the National Institute of Justice would prepare the mandated research report by 2024, including gathering information about agency policies and management practices.

These reforms represent a positive step toward improved implementation — as well as a partial return to the policies laid out in the December 2016 plan. But past experience is a reminder that there is too often a disconnect between the Department of Justice's plans and the actions it takes to actually implement DCRA. And DOJ's apparent claim that it needs new statutory language to allow it to do what it set out to do in 2016 suggests the department remains committed to an overly narrow view of the law.

Other Efforts to Track Deaths in Custody

Before closing the review of past and current strategies for data collecting and reporting, it is instructive to highlight a few programs managing such tracking on the state level. A handful of states have passed their own laws to track deaths in custody, both independent of federal efforts and as a way to facilitate their compliance with DCRA. Groups of researchers in academia, the media, and the nonprofit sector have also managed to collect impressive data sets, despite lacking the legal status of government-mandated programs. These efforts are important for several reasons.

Under the federal DCRA framework, state governments are responsible for collecting data from local governments and reporting that data to the Justice Department. As a result, DCRA's success depends on state, as well as federal, implementation. In addition, the variety of data collection efforts across the country, all of which have seemingly exceeded what the federal government has managed to date, provide lessons for best practices for DCRA.

Texas

Texas law requires law enforcement agencies in the state to report deaths in custody, which includes deaths occurring during physical detainment, arrest, and incarceration.⁶³ These reports are submitted to the office of the state attorney general, and they are due within 30 days of a death. The Texas Office of the Attorney General currently posts information from *each individual death* in custody to its website, amounting to more than 15,000 entries dating back to the early 1980s.⁶⁴

This data transparency has enabled nongovernmental organizations to analyze Texas data at a level of detail currently impossible for federal data.⁶⁵ The nonprofit Texas Justice Initiative (TJI) gathered information reported to the Texas attorney general's office. It also used open records requests to collect reports submitted by the Texas Department of Criminal Justice to the BJS to create a searchable database of more than 12,000 deaths in custody since 2005, along with filtering tools that allow users to sort data by multiple variables.⁶⁶ This work illustrates how making more raw data available enables the public and policymakers to study details that could facilitate policy reform.

The relative transparency of the data has also enabled journalists and advocates to point out weaknesses in the implementation of the Texas law. Between 2015 and 2020, hundreds of reports were filed after the 30-day limit.⁶⁷ Some reports are incomplete. More than 100 reports lacked required medical examiner information; some were updated after journalists raised questions. Law enforcement agents have also left records incomplete for years. Failing to comply with the state's reporting mandate is a class B misdemeanor and could potentially result in up to 180 days in jail. However, as with the federal DCRA, no consequences have ever been levied against those who failed to report.⁶⁸

Even given these issues, the Texas law provides a model, illustrating why transparency is so crucial and how the Department of Justice can make DCRA data relatively available to the public.

California

In 1961, California began collecting data on deaths in custody with the passage of Government Code section 12525.⁶⁹ California also makes the underlying data publicly available, and the state's Justice Department has created visualizations to help the public better understand trends in the data.⁷⁰ That said, there have also been concerns about the accuracy of data reported to the state, with some media trackers finding significantly more deaths in custody than those reflected by the state's numbers.⁷¹

Indiana

Even in cases where a state has not passed a reporting law, there are instances in which DCRA has encouraged states to be more transparent about deaths in custody. In Indiana, for example, the Indiana Criminal Justice Institute (ICJI) is the state statistical agency responsible for collecting DCRA data.

ICJI has created a dashboard of basic descriptive statistics on death in custody.⁷²

It also issued a report covering its first reporting period (January 1, 2020 to December 31, 2020).⁷³ Notably, Indiana released its report just three months after the reporting period ended, an impressively fast turnaround compared to federal reports.

Nongovernmental Organizations

In the absence of formal state reporting programs, researchers across the country have been able to gather an impressive amount of data about deaths in custody. For instance, in Louisiana, the Incarceration Transparency project, run out of the Loyola University New

Orleans College of Law, has compiled data and documents on prison and jail deaths in the state dating back to 2009.⁷⁴ Data are gathered by law students using the state's public records law, which allows the release of individual death reports.

These kinds of granular data are far more useful for policy reform than more generalized information. For example, the project was able to show that over half of juvenile suicides in custody occurred while the individual was in segregation. Similarly, 43 percent of suicides in Louisiana parish jails occurred while the individual was in a segregated cell. Such findings demonstrate how dangerous segregation is, and could be used to argue for changes in Louisiana law or policy regarding the use of segregation in jails and juvenile detention facilities.

The UCLA Law COVID Behind Bars project also leverages public information to create relatively granular data, and it has created a nationwide dashboard of corrections deaths due to COVID-19.⁷⁵ The data, which are scraped from public releases, are available at the facility level—with the caveat that their accuracy is contingent on the accuracy of official tallies.

A number of nongovernmental groups track police violence as well. To name just two, the Mapping Police Violence project and *The Washington Post's* Fatal Force database compile data on police killings from a variety of sources, including news and social media reporting, official releases, and government databases.⁷⁶ As this report later discusses, the Justice Department found these databases considerably more complete than BJA's DCRA data through 2021.

II. The Data

To date, the Justice Department has released only limited information about the data it has collected under DCRA. This section summarizes what is known about the department's DCRA data and explores the significant gaps in this information. The Justice Department has not put nearly enough data into the public domain to allow policymakers or the public to draw informed conclusions about deaths in custody, and it is unlikely the department possesses enough information to do so itself.

Current Data: Federal Deaths in Custody

As discussed in Part I of this report, the Bureau of Justice Statistics (BJS) is the Justice Department bureau responsible for collecting data on deaths in custody from federal law enforcement agencies. Since the reauthorization of DCRA in 2014, the BJS has released highly generalized reports on the data it has collected.

These reports cover federal DCRA data for FY 2016-2017 (published in December 2020), FY 2018-2019 (published in September 2021), and FY 2020 (published in July 2022).⁷⁷ The three reports consist primarily of data tables, with some accompanying commentary. In each, the data are split into two overarching categories: arrest-related deaths and in-custody deaths.

Arrest-Related Deaths

Federal agencies reported 51 arrest-related deaths in FY 2016, 41 in FY 2017, 68 in FY 2019, and 65 in FY 2020.⁷⁸ Information provided about arrest-related deaths includes:

- the manner of death;
- the weapon that caused the death;

- the sex, race, ethnicity, and age range of the decedent;
- the reason for law enforcement contact;
- the alleged offense of the decedent;
- information about the decedent's actions, weapons, and threats to others;
- information about law enforcement's actions during the arrest; and
- the weapons used by law enforcement during contact.

The FY 2018-2019 and FY 2020 reports also included information about the decedent's condition, such as intoxication, suspected mental health issues, or physical disabilities.

Deaths in Custody

Federal agencies reported 468 in-custody deaths in FY 2016, 429 in FY 2017, 448 in FY 2018, 449 in FY 2019, and 614 in FY 2020.⁷⁹ Information provided about deaths in custody includes:

- manner of death;
- general location;
- sex, race, ethnicity, and age range of the decedent;
- alleged offense;
- legal status; and
- decedent's time served.

The reports also detailed the total number of deaths reported by each responding federal agency and the number of agencies that provided data.

Data Limitations

These data provide a basic overview of the number of people who died during contact with the federal criminal-legal system. But the BJS reports are flawed in multiple important respects and in ways that undermine their usefulness.

First, the reports have been plagued by delay. The first report, issued in 2020, covered data from 2016 and 2017. A reporting lag of three years renders data considerably less useful as a policymaking tool. Fortunately, subsequent reports have come out more promptly, although the scheduled November 2022 publication of 2021 federal data has been delayed without explanation.

While the decreasing delay between data collection and publication is encouraging, the presentation of the data issued so far has limited its usefulness. The format of the reports prevents readers from gaining anything more than a cursory understanding of the data. The reports largely comprise aggregated data tables. These tables do reveal general trends, such as which agencies have reported the most in-custody deaths; however, they are organized by single variables. Without access to the underlying data, it is impossible to analyze the interaction of multiple variables.

To take one fundamental example, the reports have information about the race and ethnicity of those who died in custody, but there is no way to cross-reference these categories. Thus, the data show that in 2020, 69.1 percent of people who died during arrest were White and 25.5 percent

were Black. The data also show that 28.8 percent of the people who died during arrest (for whom ethnicity data were available) were Hispanic, and 71.2 percent were non-Hispanic. But the data tables cannot tell us what percentage of decedents were, for example, non-Hispanic White people or Black Hispanic people.

These shortcomings extend to other data as well. The reports issued in 2020 and 2021 obscured one of the most significant data points: the number of people killed by law enforcement officials. The reports included homicide as a cause of death but did not distinguish between killings by law enforcement or others in custody. However, BJS's reporting forms for data collection for FYs 2016-2019 specifically asked about homicides by federal officers.⁸⁰ The July 2022 report, detailing data collected in 2020, was the first to publicly provide the number of homicides by officers.⁸¹

That report also reflected a substantial increase in the number of people who died in prisons and jails in 2020 when compared to previous years. It stands to reason that the COVID-19 pandemic played a role in this increase, but the 2020 report did not include a tally of in-custody deaths specifically due to COVID-19.

Current Data: State and Local Deaths in Custody

The Justice Department has not yet released any data collected at the state and local level under DCRA (other than in the context of audits finding serious problems with that data). This leads to a critical point, one reiterated in the recommendations: It is essential that the Department of Justice collect and release the data that DCRA requires states to provide.

While the department has not released any state-level DCRA data, there have been three audits of the data it collected in 2020 and 2021. These audits revealed that the quality of the data BJA collected is worse than that of any comparable source, including the information BJS collected before 2019 and data collected by multiple nongovernmental organizations.

At a September hearing before the Senate's Permanent Subcommittee on Investigations, the Government Accountability Office reported that in 2021 alone, BJA potentially undercounted deaths in custody by nearly 1,000 compared to other public data sources. The Government Accountability Office also found that 70 percent of state DCRA records submitted during FY 2021 were incomplete.⁸²

“These audits revealed that the quality of the data BJA collected is worse than that of any comparable source...”

The Justice Department's own analysis in September 2022 had similarly dismal findings: State-reported data rarely aligned with open source counterparts.⁸³ It matched information identified by the Mapping Police Violence project and *The Washington Post* between 29 percent and 38 percent of the time. Another internal department audit found that during the three-month period in 2019 when both BJA and BJS collected data on deaths in state and local prisons and jails, the BJA collection captured only a small share of the data in the BJS data set.⁸⁴

III. The Challenges

The Justice Department is failing to adequately implement DCRA. The data it has collected to date is incomplete, inaccurate, and opaque, and it has yet to complete a study on how to reduce deaths in custody. This section outlines the major barriers to implementation, ranging from technical considerations about data collection methodology to the department's own meritless arguments that the current version of DCRA ties its hands. The recommendations at the end of this report are designed to overcome the challenges discussed here.

Compliance

Noncompliance with the data reporting mandated by DCRA is an issue that hampers both federal agency and state data collection.

Federal Agency Compliance

Since DCRA reauthorization in 2014, there have been problems with federal data collection as basic as identifying how many federal agencies are required to report, in addition to the challenges of collecting data from each agency that is so required. For its FY 2017 collection, the Justice Department surveyed 117 federal agencies, with 108 responding.⁸⁵ In 2018, the department's inspector general report noted that neither BJS — nor the DOJ itself — knew the actual number of federal agencies with law enforcement authority.⁸⁶

For the FY 2020 data collection, the Justice Department surveyed 133 agencies. During that collection cycle, all but one of those agencies responded, bringing the response rate up to 99 percent. This is a good sign, but the shifting number of agencies surveyed underscores the inadequacies of earlier surveys, and it raises questions about whether BJS has finally identified the full universe of agencies that are subject to DCRA.⁸⁷

State Compliance

Under the Justice Department's current approach to DCRA data collection, a single state agency is responsible for collecting data from local agencies within the state and reporting that data to the BJA. The Justice Department has expressed concern about the effectiveness of this arrangement. While these concerns are not without merit, it also appears that the department has yet to use all the tools it has to address them.

The first concern is that this current process adds an extra layer — a state agency — between local data sources and the federal government. The Justice Department has argued that state agencies “will not be the best source of data for deaths encountered by local law enforcement agencies or jails.”⁸⁸ In addition to being less familiar with the incidents that need to be reported than the directly involved agencies, state agencies also may lack the power to require their local governments to report to them, complicating efforts to enforce compliance.

It is true that the earlier BJS Arrest-Related Deaths program had considerable trouble collecting accurate local data from central state agencies.⁸⁹ However, the department's December 2016 collection plan contained measures designed to improve data quality. The proposed method —comparing reported data to open source information and then following up with states to fill gaps in their reporting — has the potential to address shortcomings. But that methodology was never implemented. It is essential for the department to return to it.

The department also has an unused tool available to it to help enforce compliance. DCRA contains a compliance mechanism in the form of the grant penalty, but the Justice Department has argued that the penalty is a blunt tool that would not work.

DCRA allows DOJ to reduce a noncompliant state's Byrne JAG funding by up to one-tenth. But the 10 percent penalty applies to an entire state's Byrne JAG allocation, not to specific noncompliant agencies. Complicating measures further, some state and local agencies don't even receive Byrne JAG funds. For example, as of 2018, only about a quarter of local law enforcement agencies in Alaska and Missouri received Byrne JAG funding.⁹⁰ These dynamics mean local agencies receiving Byrne JAG funding distributed through their state can face the loss of funds even when they are compliant. Meanwhile, agencies without Byrne JAG funding may lack motivation to comply with data collection, since they may not be penalized directly.⁹¹

That said, it is far too early to conclude that the penalty is ineffective because, to date, the Justice Department has never imposed it. The penalty may in fact be an effective incentive for states to compel local jurisdictions to produce the data required by DCRA, but that is impossible to prove — or disprove — in the abstract. A penalty that is taken off the table is guaranteed to fail.

Data Collection

Naturally, compliance issues impact the quality of DCRA data. But even if all agencies were 100 percent compliant in submitting reports, the methodological problems with *how* the Justice Department collects data would lead to data of a quality so poor as to jeopardize its usefulness.

The Data Collection Forms

The Department of Justice has designed forms for agencies and other respondents to use to capture and report DCRA data. The BJA uses one form for states to report arrest-related and in-custody deaths; the BJS uses two forms for federal agencies to report, one for arrest-related deaths arrests and one for deaths in custody.⁹² Inconsistencies between these forms, changes to the forms over the years, and insufficient prompts present data integrity issues. When questions change from year to year, it becomes difficult to compare data over time. Additionally, if the forms ask substantively similar questions in different ways, it becomes more difficult to compare data collected from different forms. And forms that fail to ask all the questions necessary to collect the data needed for policy evaluation and change doom the entire effort at the outset.

As an example, BJS form CJ-13A, the "Arrest-Related Death Incident Report" for federal law enforcement agencies, is instructive. The 2016 and 2017 forms required agencies to report the following information for each arrest-related death: the number of officers who responded to the original service call, the number of officers who discharged weapons, and the number of shots fired.⁹³ Each of these questions could provide valuable data on current practices and allow for comparison across agencies — not only of the number of arrest-related deaths but also of the conduct of law enforcement agents in the time leading up to those deaths. Certainly such data would be of interest to those looking for ways to decrease the number of people killed during arrests each year. By 2018, however, these questions had been deleted. They have yet to be added back to the most recent version of the form on the BJS website.⁹⁴

Another example is BJS form CJ-13B, the bureau's "Detention or Incarceration Death Incident Report." After the 2018-2019 iteration of the form, multiple key questions were dropped.⁹⁵ These included questions about the existence and source of a death certificate; questions about additional injuries to personnel, other confined people, or the victim; questions about law enforcement behavior (e.g., whether there was use of a weapon, prone position, restraint, or struggle); additional questions pertaining to any reported deaths by suicide; and, if the death was due to a preexisting medical condition, questions soliciting information on any medical treatment the decedent received. These questions are critical for research, transparency, and accountability.

The BJA collection form is even more problematic. The form requires very little data and reporting, especially when compared to the federal collection forms, even in their pared-down versions. Most notably, the BJA form includes no questions on the following: weapons used by the decedent and the officers or agency personnel; the reason for law enforcement use of force; injuries to law enforcement personnel and civilians; decedent behavior, including types of resistance; or the decedent's perceived state of mind.

Instead, the BJA form attempts to capture all of this information in a qualitative text field with the following instructions: "Please provide a brief description of the circumstances leading to the death (e.g., details surrounding an event that may have led to the death, the number and affiliation of any parties involved in the incident, the location and characteristics of an incident, other context related to the death, etc.)."

This question does meet the statutory requirement to collect "a brief description of the circumstances" surrounding deaths.

However, an open-ended text-based approach runs the risk that not all relevant information will be captured and using text rather than standardized fields complicates subsequent analysis by making it harder to compare entries.

Data Collection Methods

Collection methods likely vary by state, presenting another challenge to collecting quality data. Across the United States, no standard method of data collection exists among law enforcement agencies. Given the range of different methods of data collection, it may be methodologically unsound to compare data from different states.

Moreover, as the significant undercounts produced by the now defunct Arrest-Related Deaths program showed, there is a real problem with the methodology of relying on law enforcement agencies to self-report on the number of people who died during their arrests or in their custody.⁹⁶ Current data collection methods provide a great deal of discretion to those reporting, and law enforcement agencies tend to justify the actions of their personnel.⁹⁷ For example, some agencies have listed "excited delirium syndrome" or "sickle cell trait" as causes of death, even when officer use-of-force was in question.⁹⁸

Some inaccurate reporting can be mitigated by good data collection methods and forms that include strong definitions and clear examples for respondents. Such updates have the added benefit of also allowing for retrospective reviews, should future advances in research undermine or refute questionable diagnoses. They can help researchers to better ascertain trends in how certain cause- or manner-of-death determinations are

applied. And they can support researchers in evaluating whether the use of these diagnoses differed by racial/ethnic groups.

However, changes to the forms alone will not address this problem. While it is true that the plain language of DCRA only requires the Justice Department to collect data from state reporting agencies and federal agencies, it's clear that there needs to be some check on self-reporting.

Instituting an audit of state-reported data using open source data is a critical methodological shift that will need to happen if the Department of Justice is to satisfy the research requirements in the statute.

Research Scope

One important gap in implementation that rarely garners attention is the fact that DCRA requires the Department of Justice not only to collect data on deaths in custody but also to analyze the data in order to develop strategies to reduce harm. DCRA mandates that the department's report address two research questions: The first is how to reduce the number of deaths in custody. The second is what relationships, if any, exist between deaths in custody and administrative policies.

To determine how the information collected through DCRA may help reduce deaths in custody, researchers will need more comprehensive data than what has so far been released by the BJS in its three reports.

Linking policies to fatal outcomes is also impossible without more data. The publicly available data are not broken out by agency and facility, making it impossible to use that data, for

example, to determine if deaths in custody are more likely to occur in certain facilities, or if they are a result of agency-wide policies and directives.

And even though the Justice Department cannot satisfy the second research question mandated by DCRA without more data about state, local, and agency policies, there is little information about the department's current plan to have consultants gather the data. There are approximately 19,450 law enforcement agencies, 685 medical examiners/coroners, 2,800 local adult jail jurisdictions, and 56 U.S. states and territories; collecting this information will clearly require significant preparation.⁹⁹

Further complicating data collection is the fact that many of these self-contained agencies modify their policies at will. Given that policy data vary over time and across agencies, any research into those policies will require ongoing data collection to stay accurate, relevant, and useful.

“Linking policies to fatal outcomes is also impossible without more data.”

Transparency

DCRA does not explicitly require the public release of data beyond the mandated report to Congress. However, the spirit of the law is plainly to increase public understanding of deaths in custody. This congressional intent is reflected most recently in the Senate Appropriations Committee's draft explanatory report accompanying the 2023 Commerce, Justice, Science, and Related Agencies appropriations bill, which calls on the Justice Department to provide an explanation of how it plans to "improve the quality and transparency of future data collected" under DCRA.¹⁰⁰

It is true that other federal laws, like the Privacy Act, limit how the government handles personal identifying information, and releasing DCRA data to the public does implicate privacy concerns.¹⁰¹ But privacy considerations simply limit the release of personal identifying information, like names or Social Security numbers. They are not a major barrier to the release of other data.

Ideally, the department should release incident-level data. As the department acknowledged in its 2016 plan, removing individual identifying information should resolve personal privacy concerns, making it possible to release, at the very least, agency- and facility-level data. The identities of agencies that report deaths in custody are not protected by privacy considerations in this context.¹⁰² And BJA, as a non-statistical agency, does not face the same restrictions on the use and aggregation of data as BJS does.

The federal data tables BJS currently releases are insufficient for the purpose of enabling true public engagement with the information collected under DCRA. To determine how that information may help reduce deaths in

custody, stakeholders and outside researchers will need far more granular data than what has been released to date. The basic data tables prevent a fuller understanding of the context of each incident, and they impede the discovery of overall patterns in the data. As previously discussed, because the data are aggregated and presented at a national level, it is impossible to analyze the relationships of variables within the data. As a last example, the BJS data tables cannot shed light on the racial breakdown of people placed in prone positions by law enforcement before their death, because the tables only sort by one variable at a time.

Flawed Legal Interpretations

Underlying several of the challenges described above is a more fundamental barrier: The Justice Department claims that elements of the DCRA statute and other federal laws affirmatively prohibit it from taking actions that would improve DCRA implementation.¹⁰³ These claims have shifted multiple times since 2016, which is reason enough to view them skeptically. Closer examination confirms that they do not stand up to scrutiny and no additional legislation is required for the Justice Department to act.

The first questionable interpretation was the 2016 decision to shift state collection duties from BJS to BJA, which is discussed in the Appendix. It is not at all clear that this change was required by the law. BJS is limited by law to using data "only for statistical or research purposes," and executive branch lawyers determined that because noncompliance with DCRA carried a potential funding penalty, BJS could not gather the data lest it exceed its mandate. However, BJS can collect data under other programs that condition grant eligibility on data reporting.¹⁰⁴

There is also ample evidence that Congress intended for BJS to continue collecting the data when it reauthorized DCRA in 2014. The chair of the House Judiciary Committee at the time specifically noted that BJS was still collecting data and concluded that the reauthorization would “not impose any new cost on the agency” — presumably because Congress intended for DCRA collection to continue unchanged.¹⁰⁵

While unnecessary, the Justice Department’s determination that BJS could not manage state collection would not have prevented the department from adequately implementing DCRA, as the December 2016 implementation plan contained the framework for a robust collection program. Subsequent interpretations have proved far more damaging.

The most concerning of these interpretations involves the department’s approach to data transparency. As discussed above, the December 2016 plan called for releasing DCRA data with personal identifying information redacted. Since then, the department has changed its stance on transparency multiple times, most recently claiming that part of the OJP’s authorizing statute limits the way it can use DCRA data. Specifically, the department claims that it cannot release data that contains personal identifying information or that “could ‘by virtue of sample size or other factors, be reasonably interpreted as referring to a particular private person.’” In addition, the department claims that data can only be released if it would facilitate the DCRA-mandated report to Congress.¹⁰⁶

These claims are without merit. As an initial matter, the provision that the Justice Department claims imposes these limits only applies to one chapter of the United States Code, and DCRA is contained in an entirely different chapter.¹⁰⁷

Even if the cited provision did somehow apply, it would not prevent the publication of DCRA data. While federal privacy law likely requires that personal identifiers like names, dates of birth, or Social Security numbers be redacted, court cases have made it clear that it is permissible to release government records that are not identifying on their own but could be combined with other information in the public domain to identify a person.

As to the purpose of the statute, it is instructive to note that under DCRA, data reporting is required to continue in perpetuity, while the report to Congress is only required to happen once, undermining the notion that the whole purpose of the law is to facilitate a single report.¹⁰⁸

A question highlighted in the September 2022 Senate hearing on DCRA is key: How is it that nongovernmental researchers are able to perform an annual deaths in custody census at the state level, utilizing Freedom of Information Act requests, open records requests, and open-source data, while the Department of Justice claims that such a census is too difficult to achieve?

First, the Justice Department’s current DCRA reporting structures are inadequate. Individual states and nongovernmental groups are gathering far more data than the department has managed to collect. Secondly, any claims that more robust DCRA data are impossible to gather are simply untrue. Nongovernmental projects are making data available at a far more granular level than the Justice Department has.

This isn’t a matter of what’s possible. It’s a matter of the federal government, with its vast resources, committing to catch up to these private efforts.

IV. Recommendations

The following recommendations are straightforward, consistent with the existing legislative framework, and in many cases drawn from the Justice Department's own past plans for DCRA. Implementing them will dramatically improve the accessibility and usefulness of DCRA reporting.

DCRA Administration

There are several changes that the Department of Justice can make unilaterally that would radically improve the quality of DCRA data and analysis.

- Refine and update coordination, definitions, and guidance for data collectors at the federal and state levels. Providing consistent attention to updated, clear, standardized guidance and collaborative technical assistance will positively impact compliance, data collection, research, and transparency.
 - Advocate for states to adopt DCRA laws.
 - Include guidance for medical examiners and other decision-makers in the forensic pathology field to ensure consistent and accurate reports on cause of death.
- Go beyond the plain text of the statute in designing a DCRA implementation plan. The department's own 2016 collection plan illustrates how steps beyond those explicitly described in the law are necessary to fully realize the stated requirements and underlying intent of DCRA.
- If it does not exist already, the Justice Department should develop a mechanism for state and local personnel to provide feedback on training and guidance so that the BJA may iteratively improve these resources.

- Reduce the lag between data collection and reporting. Assuming it keeps to its planned schedule, BJS has already shortened its turnaround time impressively, from three years to one year. This is good progress, but the department must continue to reduce this gap, and it must publish state data as quickly as possible as well.

Compliance

Every local, state, and federal agency with arrest or custodial authority must participate fully in data collection and reporting. The power to arrest and detain people demands a companion responsibility to do so with integrity. Collecting and reporting quality data is the mechanism for ensuring integrity. Compliance cannot be optional.

The Department of Justice should make use of the compliance mechanism built into the DCRA statute. However, to avoid the risk that imposing a financial penalty will make it harder for states to fund compliance, the department should readopt the provision from the 2016 plan allowing states to use the funds that would be reappropriated to instead fund DCRA implementation.

- Begin annual compliance checks immediately and make the findings public.
- Use all available data, including from open sources, to assess compliance. Full compliance requires reporting complete and accurate information, which cannot be known without some sort of audit.
- Issue clear standards for when and how the 10 percent penalty will be imposed. Impose the penalty on noncompliant states.

- Give states the option to use the 10 percent that would otherwise be withheld to improve and standardize data collection and reporting processes.

Data Collection Methods

The government cannot collect inferior data and expect quality research as a result. Collection forms must be designed to collect sufficient data to thoroughly study deaths in custody. This requires reengineering the forms with purpose, intent, and technical expertise.

Accordingly, we recommend a more robust data collection plan modeled largely after the December 2016 collection plan. Critical components of the 2016 plan include clear and specific definitions and annual state-level data collection plans. Additionally, the BJA and the BJS should collaborate to create forms that will be used across programs and departments and that will not require revision for several years.

- The department should consider the following while redesigning collection forms:
 - Demographic variables for race, ethnicity, and age brackets should, at a minimum, meet the OMB Directive 15 reporting standards,¹⁰⁹ which will allow for easy comparability and use. Going forward, DCRA forms should always be updated to include any future adjustments to Directive 15. Getting DCRA collection to include at least the minimum OMB standard for race could also have positive implications for other law enforcement collections at the federal, state, and local levels.
 - Questions relevant to arrest-related and in-custody deaths should appear on both collection forms.
- Questions shared by both forms should have identical wording and answer sets.
- To the extent possible, questions should be specific, with checkbox or multiple choice answers that allow for clear data comparison.
- Forms must capture killings by law enforcement officers as a separate category, rather than capturing these deaths in an “other” category.
- A text box, with a clear prompt, should remain on the incident report forms. We recommend the prompt from the 2018 form.
- All forms should include one question at the end of the survey with an open text box answer where additional details about the death in custody can be reported. However, the forms should not rely on text boxes as the primary or only means of eliciting key information.
- Forms must also capture deaths of bystanders that are a consequence of police action.
- Questions about cause of death should be structured in a way that clearly distinguishes between accidents and intentional deaths.
- Once the forms are redesigned, they should be kept consistent over several years. Additions can be made, but standardized questions and answers between forms should remain the same for research and evaluation.

- When changes to forms are needed, the department should first study how changes would affect the quality of data. This is a typical practice for federal agencies like the U.S. Census Bureau,¹¹⁰ and we recommend that deliberate approach here as well.
- The department should restore the 2016 requirement for states to submit data collection plans and review and revise those plans annually.

Research Scope

The Justice Department must commit to producing studies that address the DCRA-mandated research questions. In order to facilitate this, it must clearly define the universe of data necessary to answer those questions. We recommend the December 2016 definitions as a model to help define reportable deaths since they provide specific and granular categories of covered situations. DCRA data collection must also address the fundamental issue of policy data collection to satisfy the second part of the mandated research.

- Identify the most appropriate definition of deaths to include in DCRA reporting. Use this definition consistently across agencies, forms, and years. We recommend the definition used in the December 2016 data collection plan.
- Develop a plan to gather data on relevant agency and facility policies.
- If an investigation is open/pending at the time the data are reported, create a process for respondents to follow up after the investigation is closed and report required data.

Transparency

The DOJ and other federal agencies must commit to timely data reporting. As a good faith effort, we recommend the responsible agencies release more data now. Specifically, the department should publish homicides broken out by use-of-force/police-involved and other homicides — a step taken for the first time in the data tables published by BJS in July 2022.¹¹¹

- Release the existing data at a more granular level, by agency, facility, and perhaps even at the level of individual incident, in machine-readable formats.
- Create, maintain, publish, and annually update a list of federal agencies subject to DCRA.
- Ensure that public reports include highly salient data, including the number of killings by law enforcement officials.
- Where applicable, clarify whether deaths occurred in agency-owned facilities or contract facilities.
- Publish annual compliance plans for states that are available to the public.
- Improve data reporting with more visual reports and public data dashboards.
- Create a unique individual identifier (a number) system, like those commonly used by other agencies, to protect privacy while disaggregating data for research and evaluation.

V. Conclusion

Accurate, publicly accessible data on deaths in custody is essential to law enforcement accountability in the United States. We need quality data to research in-custody deaths and learn how to prevent them. Without sound DCRA implementation, decisionmakers do not have the information they need to make policy, advocates do not have a clear picture of the full impact of the criminal-legal system, and the Justice Department cannot provide the oversight needed to reduce in-custody deaths. The recommendations in this report will strengthen DCRA administration and compliance by improving data collection, expanding the department's ability to conduct the research required by DCRA, and increasing transparency.

Under enhanced scrutiny from Congress and taxpayers, federal agencies must make a commitment to enhance collection methods and to publish results. In doing so, we also must acknowledge mistakes of the past and mitigate future mistakes through careful planning, training, and guidance. Our government has a responsibility to protect the lives and rights of all people and to take decisive action to reduce fatalities in the criminal-legal system.

The stakes are high, and we have more on the line with DCRA than simply good data and research. Despite known structural failure, proof of systemic inequality, public engagement, and bipartisan legislation from Congress, the United States government has not been able to protect the rights and health of its people. And the situation is getting worse.

Racial disparities in the U.S. criminal-legal system, and specifically in arrest-related and in-custody fatalities, are not new. Nor is the failure of the system to resolve them. Full implementation of DCRA is critical.

If we believe in freedom, justice, and equality, we must act to enforce the DCRA mandate. It is time for federal, state, and local agencies to deliver.

Appendix: The History of DCRA

DCRA of 2000 (2000 to 2014)

President Bill Clinton signed the Death in Custody Reporting Act of 2000 (DCRA of 2000) into law on October 13, 2000. DCRA of 2000 required states that received Truth in Sentencing grants to certify that they would report “on a quarterly basis,” with guidance from the attorney general, “information regarding the death of any person who is in the process of arrest, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, or other local or State correctional facility (including any juvenile facility) that at a minimum includes — (A) the name, gender, race, ethnicity, and age of the deceased; (B) the date, time, and location of death; and (C) a brief description of the circumstances surrounding the death.”¹¹² Unlike the 2014 version of DCRA, the 2000 legislation did not include reporting mandates for federal agencies.

The Bureau of Justice Statistics (BJS) was the first agency to manage DCRA data collection, in the form of the Death in Custody Reporting Program.¹¹³

Under this program, BJS managed two separate data collections. For deaths in state prisons and local jails, it developed the Mortality in Correctional Institutions (MCI) data collection. The MCI successfully collected death data from about 98 percent of the roughly 2,800 local adult jail jurisdictions nationwide and all 50 state departments of corrections.¹¹⁴ The BJS used the data to track national trends and produce reports on mortality in jails and state prisons.¹¹⁵

The second component of the BJS program was the Arrest-Related Deaths (ARD) data collection, which began in 2003. The ARD program

counted use-of-force deaths and deaths by suicide, accident, and natural causes.

DCRA of 2000 lapsed in 2006, but BJS kept collecting data despite the law’s expiration.¹¹⁶

Congress tried to pass a reauthorization of DCRA in 2008; the House of Representatives passed the legislation, but the Senate never did.¹¹⁷ Unfortunately, it took six more years and a nation catalyzed by ongoing police brutality to prompt the U.S. Congress to reauthorize DCRA.

Meanwhile, the Arrest-Related Deaths program was plagued by data collection issues. The program was suspended in 2014 because BJS lacked confidence in the data, and the bureau commissioned a review.¹¹⁸ Outside experts estimated that the program captured only around 50 percent of estimated “law enforcement homicides.”¹¹⁹ With these issues in mind, the BJS determined the data did not meet agency standards and suspended ARD data collection in 2014, pending a redesign.¹²⁰

DCRA of 2013 (2014 to 2016)

While administrative hurdles and changes unfolded in the background, police brutality in Black communities and against Black people attracted national attention. In this political environment, Congress passed the Death in Custody Reporting Act of 2013 (DCRA of 2013), building on the foundations of DCRA of 2000. DCRA of 2013 passed the House of Representatives on a voice vote and in the Senate under unanimous consent. President Barack Obama signed it into law on December 18, 2014.

Beginning in the summer of 2015, BJS took steps to redesign the Arrest-Related Deaths data collection program. It developed and tested what it termed a “hybrid” methodology, consisting of two phases.¹²¹ First, BJS researchers used open data sources, like media reports and public agency documents, to identify potentially relevant deaths. After compiling this data set, the bureau surveyed law enforcement agencies and medical examiner offices identified in the reports for additional information about the deaths. It also surveyed a sample of other agencies for which no deaths had been identified. An initial pilot of this methodology identified 427 arrest-related deaths from June to August 2015; 72 percent of surveyed agencies responded to BJS in full.¹²² BJS later determined that the data it gathered in the pilot study was fairly robust, capturing more deaths than the contemporaneous databases managed by The Guardian and The Washington Post¹²³ — a notable difference from the current DCRA collection, which, as discussed in the main report, has failed to match the quality of outside databases.¹²³

As described in Part I of this report, the hybrid methodology from the Arrest-Related Deaths redesign was the basis for the Justice Department’s August 2016 DCRA implementation plan; it was modified in the December 2016 plan after the department decided to shift data collection from BJS to BJA and to route data through a single agency within each state, replacing the direct local outreach of the pilot methodology.

Endnotes

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⁸ E. Ann Carson, Bureau of Justice Statistics, *Mortality in Local Jails, 2000-2019 – Statistical Tables*, NCJ 301368 (December 2021), 1, <https://bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf>; E. Ann Carson, Bureau of Justice Statistics, *Mortality in State and Federal Prisons, 2001-2019 – Statistical Tables*, NCH 300953 (December 2021), 1, <https://bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf>.

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¹⁰ Pub. L. 113-242 (2014), <https://www.govinfo.gov/content/pkg/PLAW-113publ242/pdf/PLAW-113publ242.pdf>.

¹¹ 34 U.S.C. § 60105(b).

¹² 34 U.S.C. § 60105(a).

¹³ 18 U.S.C. § 4001 note

¹⁴ 34 U.S.C. § 60105(c)(2)

¹⁵ The Byrne JAG program has been known under a variety of names through the years, including the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs and the Local Government Law Enforcement Block Grants program. See 34 U.S.C. § 10151(b)(1).

¹⁶ 34 U.S.C. §§ 60105(c)(2), 60105(d).

¹⁷ *Report of the Attorney General Pursuant to Section 6(e) of Executive Order 14074: Department of Justice Implementation of the Death in Custody Reporting Act of 2013* (September 16, 2022), 11, <https://bja.ojp.gov/doc/DOJ-Implementation-of-DCRA-of-2013.pdf>.

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¹⁹ 34 U.S.C. § 60105(f)(2).

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²⁴ Legal counsel for the OJP held that according to guidance from the U.S. Office of Management and Budget (OMB), the BJS could not collect DCRA data. The opinion stemmed from OMB guidance which “requires statistical agencies to operate separately from policy-making activities.” The OMB considered the administration of the DCRA program to be policymaking because the DCRA gave authority to withhold the 10 percent of funding for non-compliant states. Department of Justice Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, 19-01 (December 2018), 11, <https://oig.justice.gov/reports/2018/e1901.pdf>.

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²⁷ 81 Fed. Reg. 91951 [see note 25].

²⁸ 81 Fed. Reg. 91950 [see note 25].

²⁹ 81 Fed. Reg. 91950-91951 [see note 25].

³⁰ 81 Fed. Reg. 91950-91951 [see note 25].

³¹ 81 Fed. Reg. 91951 [see note 25].

³² 81 Fed. Reg. 91951 [see note 25].

³³ 81 Fed. Reg. 91952 [see note 25].

³⁴ Loretta Lynch, *Report of the Attorney General to Congress Pursuant to The Death in Custody Reporting Act* (December 16, 2016), <https://www.justice.gov/archives/page/file/918846/download>.

³⁵ *Report of the Attorney General to Congress Pursuant to The Death in Custody Reporting Act*, 11 [see note 34].

³⁶ *Report of the Attorney General to Congress Pursuant to The Death in Custody Reporting Act*, 2 [see note 34].

³⁷ *Report of the Attorney General to Congress Pursuant to The Death in Custody Reporting Act*, 2 [see note 34].

³⁸ *Report of the Attorney General to Congress Pursuant to The Death in Custody Reporting Act*, 10-11 [see note 34].

³⁹ Pub. L. 113-242 (2014), <https://www.govinfo.gov/content/pkg/PLAW-113publ242/pdf/PLAW-113publ242.pdf>.

⁴⁰ [“Report of the Attorney General to Congress Pursuant to The Death in Custody Reporting Act,”](#) 10 [see note 34].

⁴¹ Pub. L. 113-242 (2014), <https://www.govinfo.gov/content/pkg/PLAW-113publ242/pdf/PLAW-113publ242.pdf>.

⁴² The lack of policy data is typically not a part of the conversation around DCRA challenges and implementation, but it is a fundamental issue for program success. We explore it further in the *Policy Data* section below.

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⁴⁴ 83 Fed. Reg. 27024 [see note 43].

⁴⁵ For more, See the Administration & Data Collection section under Part III: CHALLENGES.

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⁴⁸ *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, 20 [see note 47].

⁴⁹ *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, 20 [see note 47].

⁵⁰ *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, 2 [see note 47].

⁵¹ *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013*, 13-14 [see note 47].

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⁵⁹ Bureau of Justice Statistics, “Arrest-Related Death Incident Report,” Form CJ-13A (2016), <https://bjs.ojp.gov/content/pub/pdf/CJ-13A2016.pdf>; Bureau of Justice Statistics, “Arrest-Related Death Incident Report,” Form CJ-13A (2017), <https://bjs.ojp.gov/content/pub/pdf/CJ-13A2017.pdf>.

⁶⁰ Executive Office of the President. “[Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety](#),” Federal Register. May 31, 2022. Pgs. 32945-32963. Pg. 32952.

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¹⁰¹ 5 USC §552a; 34 U.S.C. §10231

¹⁰² 34 USC § 10134 stipulates that data collected by BJS “be gathered in a manner that precludes their use for law enforcement or any purpose relating to a private person or public agency other than statistical or research purposes.” However, BJA, which collects the state data, has no equivalent restriction on data about agencies (see 34 USC §10231, which protects only personal identifying information). Even if BJS collected the state data, analyzing and publishing the data is a quintessential “statistical or research purpose.”

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