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When Numbers Lie: the Under-reporting of Police Justifiable Homicides

Tiffany R Murphy

When Numbers Lie: the Underreporting of Police Justifiable Homicides

TIFFANY R. MURPHY*

The Department of Justice's Bureau of Justice Statistics (BJS) is tasked with tracking the number of police-involved homicides in a given year. Over a ten-year period, the BJS published the average number of police-involved homicides at 400 annually. However, the BJS's ability to provide accurate information in this area is woefully lacking because of systemic failures in its data collection from law enforcement agencies. These deficiencies result in hundreds of police-involved homicides being unreported. What results is an incomplete picture for local, state, and federal agencies to make assessments as to how the over 18,000 law enforcement agencies are performing concerning the use of force, training, and de-escalation techniques. Several non-profits and news agencies have filled in the gap created by the BJS to portray an accurate picture of how many lives are taken by police officers in a given year. Their efforts show that close to 1,000 people are killed by police under the use of force doctrine—a figure over twice as high as the BJS published.

A growing concern over law enforcement's use-of-deadly force prompted Congress to enact the Death-in-Custody Reporting Act (DCRA), signed into law in December 2014. The simplicity of the DCRA should allow the BJS to collect accurate data in the future. However, the DCRA still relies solely on self-reporting from law enforcement agencies as a base for its data analysis. This article examines the police-involved homicides of John Crawford, Michael Brown, and Tamir Rice to highlight the errors that can easily happen in data collection and suggests remedies to ensure accurate account of the number of police-involved homicides in

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* Assistant Professor of Law, University of Arkansas School of Law, Fayetteville; J.D., University of Michigan Law School; B.A., University of Michigan. The author would like to thank Professors Brian Gallini, Laurent Sacharoff, and Annie Smith; Craig Cooley, Kathy Hall, and D. Brian Burghart for their insight; and Jon Shirron who provided excellent research assistance.

a given year. The success of the DCRA depends on diversification of data collection similar to non-profits and media which have greater accuracy and detail concerning police involved homicides. The BJS must adopt broader data collection protocols to ensure data accuracy and allow governmental agencies to make appropriate policy assessments based on that data. Only then can effective changes in police officer training on use of force help to curb the high number of deaths each year.

I. Introduction.....	44
II. Bureau of Justice Statistics: What's Wrong with the Numbers?	49
A. Mandatory Reporting: Will it Fix the Problem?	53
B. How Do the Two Laws Compare?	54
C. What are The Government's Weaknesses in Gathering The Data under The VCA or DCRA?	57
III. Three Police-Involved Homicides That May Not Be Included in the BJS Report	64
A. Beavercreek, Ohio Shooting of John Crawford, III at Walmart	65
B. Ferguson, Missouri Shooting of Michael Brown on the Sidewalk	69
C. Cleveland, Ohio Shooting of Tamir E. Rice at a Playground	73
IV. Is There A Better Way to Gather Police-Involved Homicide Statistics? The Efforts of Non-Profits to Fill in the Gap and Why the Numbers Matter.	77
A. Why Do The Numbers Matter? What They Can Tell Us?	80
1. Police Departments with Flawed Internal Policy and Practices Usually have Deficiencies in their Use-of- Force Reporting.	80
2. The Failure to Properly Implement Training and Investigative Guidelines Creates Situations where Police are more likely to use Deadly Force.	84
B. Lessons the BJS can Learn from Non-Profits: How the Death In Custody Reporting Act Can Improve Law Enforcement Policy	89
V. Conclusion.....	91

I. INTRODUCTION

The use of force by police should be guided by a respect for human life and human dignity, the need to protect public safety, and the duty to protect individuals from unreasonable seizures under the Fourth Amendment.¹

When police use deadly force, a host of people believe it is only as a last resort to protect themselves or others from peril.² Despite this belief, a rising number of police-involved shootings are of unarmed people where the potential threat is disproportional to the force used.³ It is not just the shootings themselves that trouble communities across the country, but the justification provided by police leadership and prosecutors that lead to no action taken against these officers. These homicides result in a loss of life and give rise to the question of whether the police value the lives in the communities they serve. What is now becoming prevalent are officer shootings of people of color that are designated as justifiable homicide, regardless of the circumstances, due to the shooter wearing a badge.

On November 20, 2014, Akai Gurley became one such victim. After having his hair braided, Akai Gurley and his girlfriend exited an apartment on the seventh floor of the Louis Pink Housing complex.⁴ The

¹ U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 1 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf.

² U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 1 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf.
 e Emily Ekins, *Poll: 47% Say Cases of Excessive Force by the Police Are on the Rise, 45% Say Police Are Too Quick to Use Lethal Force, Significant Perception Differences Across Race and Ethnicity*, REASON.COM (Oct. 10, 2014, 4:48 PM), <http://reason.com/poll/2014/10/10/poll-47-say-cases-of-excessive-force-by>.

³ See generally, Sandhya Somashekar and Steven Rich, *Final Tally: Police Shot and Killed 986 People in 2015*, The Washington Post, Jan. 6, 2016, https://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a_story.html;
Report: 1 in 10 People Fatally Shot by Police in 2015 were Unarmed, PBS Newshour, Dec. 27, 2015, <http://www.pbs.org/newshour/bb/one-in-10-people-fatally-shot-by-police-in-2015-were-unarmed/>

⁴ See Rocco Parascandola & Oren Yaniv, *Exclusive: Rookie NYPD Officer Who Shot Akai Gurley in Brooklyn Stairwell Was Texting Union Rep as Victim Lay Dying*, N.Y. DAILY NEWS, (Dec. 5, 2014), <http://www.nydailynews.com/new-york/brooklyn/exclusive-texted-union-rep-akai-gurley-lay-dying-article-1.2034219>; see

couple chose to take the stairs down to the main floor because the elevators often malfunctioned.⁵ This seemingly inconsequential decision would end up costing Gurley his life. As they walked down the darkened stairwell, a single gunshot was fired from the stairwell above the couple. Gurley collapsed from a bullet wound in his chest, falling down a flight of stairs. The man responsible for shooting Gurley was New York City Police Officer Peter Liang. Officer Liang, a probationary officer, was patrolling the housing project's stairwells with his partner.⁶ Because the stairwell lights did not work, both officers carried their flashlights above their drawn guns.⁷

What is not clear is why Officer Liang fired down the stairwell, fatally shooting Gurley. What is clear is that Gurley was unarmed.⁸ He likely was unaware of the two officers on the floor above him; they did not identify themselves, did not ask the couple to stop, and made no other sound prior to the gunshot.⁹ Gurley died as a result of the gunshot. The New York Medical Examiner ruled his death a homicide.¹⁰ The question both Gurley's family and numerous others were asking was whether the

also Al Baker & J. David Goodman, *New York City Police Officer Is Said to Be Indicted in Shooting Death of Akai Gurley*, N.Y. TIMES, Feb. 10, 2015, at A1; Christina Carrega-Woodby, *NYPD Cops Didn't Realize Anyone was Shot for 4 Minutes After Peter Liang Fired Gun Killing Akai Gurley, Partner Says*, N.Y. DAILY NEWS, (Feb. 2, 2016), <http://www.nydailynews.com/new-york/akai-gurley-girlfriend-testifies-peter-liang-trial-article-1.2517520>.

⁵ See Stephanie Clifford, *Brooklyn Grand Jury to Examine Akai Gurley Shooting Death*, N.Y. TIMES, Dec. 5, 2014, at A19.

⁶ See *id.*; see also Ashley Southall, *Police Department Fires Partner of Ex-Officer Peter Liang*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/13/us/politics/police-department-fires-partner-of-ex-officer-peter-liang.html>

⁷ Clifford, *supra* note 5; see also Parascandola & Yaniv, *supra* note 4. ("Officials said Liang was holding a flashlight in his right hand and a Glock 9-mm. in the other when he opened the door to the eighth-floor landing")

⁸ See Joel Rose, *Grand Jury Awaits Evidence In NYPD Shooting of Unarmed Black Man*, NPR (Feb. 2, 2015), <http://www.npr.org/2015/02/02/382725084/grand-jury-awaits-evidence-in-nypd-shooting-of-unarmed-black-man>.

⁹ See generally *infra* note 6; Christina Carrega-Woodby, *NYPD Cops Didn't Realize Anyone was Shot for 4 Minutes After Peter Liang Fired Gun Killing Akai Gurley, Partner Says*, NY Daily News, Feb. 2, 2016; <http://www.nydailynews.com/new-york/akai-gurley-girlfriend-testifies-peter-liang-trial-article-1.2517520>

¹⁰ Carlo Allegri, *Grand Jury to Weigh NYPD Shooting of Unarmed Man in Stairwell*, CBS NEWS (Dec. 5, 2014), <http://www.cbsnews.com/news/akai-gurley-case-grand-jury-to-weigh-nypd-shooting-of-unarmed-man-in-stairwell>.

homicide would be ruled justified or whether Officer Liang would be prosecuted for an abuse of force and related criminal charges. Brooklyn District Attorney Ken Thompson submitted the case to a grand jury who indicted Officer Liang for second-degree manslaughter, along with other lesser charges.¹¹ A jury convicted Office Liang of manslaughter where he faces up to fifteen years in prison.¹²

How New York City classified Mr. Gurley's death is critical for reporting to the Bureau of Justice Statistics (BJS). Pursuant to the new Death in Custody Reporting Act (DCRA), all police-involved shootings must be reported to the BJS.¹³ New York handles the gathering of cases, like Mr. Gurley's through its own statistical analysis center that must locate and verify information from all of the police departments within the state. This state agency relies solely on media accounts for counting police-involved homicides.¹⁴ Because of the high-profile nature of Officer Liang's shooting of Mr. Gurley, his death would be counted. While this may indicate that data collection works, the BJS reports that it only captures fifty-nine to sixty-nine percent of police-involved homicides in 2011.¹⁵ During that same year, BJS reports that twenty-six people were killed by some law enforcement agency that year.¹⁶ Given that BJS admits serious flaws in its data collection and analysis, it is unclear whether that statistic is accurate. The facts surrounding Mr. Gurley's homicide are critical because they illustrate the serious flaws in police training. Similar to Tamir Rice's homicide in Cleveland, probationary police officers, in the Gurley homicide, shot when caution and de-escalation techniques were more appropriate.

An accurate assessment of police-involved shootings is vital not only for transparency between law enforcement and the public, but also

¹¹ John Marzulli et al., *Cop Involved in Fatal Shooting of Akai Gurley has been Indicted on Manslaughter Charges*, N.Y. DAILY NEWS (Feb. 10, 2015), <http://www.nydailynews.com/new-york/nyc-crime/involved-fatal-shooting-akai-gurley-indicted-article-1.2109892>.

¹² See Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, The New York Times, Feb. 11, 2016.

¹³ See DUREN BANKS ET AL., ARREST-RELATED DEATHS PROGRAM ASSESSMENT: TECHNICAL REPORT 3 (2015), <http://www.bjs.gov/content/pub/pdf/ardpatr.pdf>; see also Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014).

¹⁴ See BANKS ET AL., *supra* note 13, at 27.

¹⁵ See *id.* at 1.

¹⁶ See *id.* at 25.

for the policy decisions made on such an assessment.¹⁷ Without a true accounting of police-involved homicides as a guide, both internal and external policy decisions will be ineffective in properly addressing how best to train and educate law enforcement on the use of deadly force.

Originally, the federal government, specifically the BJS, an agency within the Department of Justice, was tasked with collecting and dispensing data on the use of force by law enforcement across this country. The BJS is responsible for compiling statistics from law enforcement agencies of shootings, crime rates, and arrests among other things. A key category consistently underreported is the number of police-involved homicides committed in a given year, which the BJS acknowledges are historically underreported. However, BJS is unsure how to remedy this deficiency to provide accurate reporting of such homicides. Consistent underreporting is exacerbated by the inability of states to ensure that law enforcement agencies systematically count the use of deadly force by their officers. While the New York City Police Department publishes its internal numbers on use of force,¹⁸ the rest of the New York, along with other states like Illinois and Florida, infrequently provide such data to the BJS.¹⁹

Until late in 2014, law enforcement agencies were not required to report the number of homicides caused by their officers.²⁰ Whether a law enforcement agency disclosed its police-involved homicides was at the sole discretion of the agency. This discretion included how each agency defined a homicide, which allowed flexibility in the number of deaths actually reported. For example, if internal affairs believed a death was attributable to a police officer was justifiable, that homicide may not be reported to the BJS. Therefore, how the NYPD views Officer Liang's actions plays a critical part in how the homicide is classified within the

¹⁷ See generally *id.*

¹⁸ N.Y.C. POLICE DEP'T, ANNUAL FIREARMS DISCHARGE REPORT 2013 (2014), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2013.pdf.

¹⁹ See Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Uncounted in Federal Stats*, WALL ST. J. (Dec. 3, 2014), <http://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504>.

²⁰ See Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014); see also Allie Gross & Bryan Schatz, *Congress is Finally Going to Make Local Law Enforcement Report How Many People They Kill*, MOTHER JONES (Dec. 17, 2014), <http://www.motherjones.com/politics/2014/12/death-custody-reporting-act-police-shootings-ferguson-garner>.

department. Underreporting as a result of law enforcement discretion is further compounded by inconsistencies in definitions on the part of law enforcement and BJS.²¹ These factors, along with state lapses in collection, result in a less than fifty percent accounting of police-involved homicides from the years 2003 to 2009, and 2011.

In the face of such inaccuracies, local, state, and federal governments struggle to effectively evaluate the policies and procedures of their police departments. Police chiefs and internal affairs personnel are unable to adequately revise training procedures and protocols so that officers learn how to identify situations wherein force is immediately appropriate and differentiate them from those where de-escalation is the proper action. Additionally, accurate data would provide a level of transparency, which would foster community trust and cooperation with local law enforcement. The growing concern surrounding underreporting of police-involved homicides has given rise to the distrust of communities and the demand for greater accountability. In response, a new law has gone into effect that could provide a clear picture of the problem. Though at one time voluntary, the Death in Custody Report Act (DCRA) now mandates that law enforcement agencies fully disclose police-involved homicides, removing any discretion of a law enforcement agency to forego disclosure.²²

The first DCRA report will be disseminated sometime in 2016;²³ as of now, a few non-profit organizations and newspapers have attempted to gather data on the use of force and police-involved shootings or homicides. These groups hope this data will be helpful in presenting an accurate picture of the number of police shootings and will highlight the need to revamp police policies to ensure the use of deadly force is truly the last resort. The rise in justifiable homicides by police necessitates that police departments themselves must ensure that they are actually

²¹ See generally *infra* note 26 (Tom McEwen, *National Data Collection on Police Use of Force*, BUREAU OF JUSTICE STATISTICS (1996), <http://www.bjs.gov/content/pub/pdf/ndcopuof.pdf>).

²² *Id.*

²³ See Death in Custody Reporting Act of 2008, HR 3971 <https://www.govtrack.us/congress/bills/110/hr3971/text>; See also D. Brian Burghart, *Numbers Game: Congress Re-authorized an Ineffective Law to Track Officer-Involved Homicides*, Reno News & Review, Jan. 1, 2015 (comparing the 2008 DCRA with the newly enacted version and the potential limitations of the new law), <https://www.newsreview.com/reno/numbers-game/content?oid=15920679>

²³ § 2(f)(2), 128 Stat. at 2861. (The date of the first report in 2016 is unknown).

protecting and serving the communities they police. The perceived abuse of power erodes much of the faith people have in those who wear badges as evidenced by the influx of numerous and highly visible protests over the last several months.

This article seeks to highlight the current problems with use-of-deadly-force statistics and advocates mandatory reporting of all uses-of-force by law enforcement agencies on local, state, and federal levels. Part I discusses use-of-deadly-force data compilation and reporting by the Bureau of Justice Statistics. Further, this section explains why the approximately 400 justifiable homicides the BJS reports annually is substantially lower than the actual number of homicides committed by law enforcement. An examination of the current methodology used by the BJS to gather data in conjunction with whether the newly enacted DCRA will correct these problems will be discussed.

Part II presents three high profile police-involved shootings from 2014. A discussion of the homicides of John Crawford, Michael Brown, and Tamir Rice that will illustrate the various problems encountered in efforts to properly collect accurate information from police-involved shootings. These three cases illustrate the difficulties both the states and BJS face to independently assess the actual course of events so that responsive changes in police policy and procedure can be implemented.

Part III evaluates the current efforts by non-profits and news organizations to calculate the actual number of police-involved shootings and homicides. These agencies rely on community involvement to report police shootings that may otherwise not find their way into larger media broadcasts. The efforts of these non-profits are commendable, but the responsibility rests with the federal government to ensure accurate reporting by law enforcement. An accurate picture of the number of police-involved shootings is necessary to help law enforcement agencies create better policies and training that minimize the need for deadly force. Further, compulsory reporting puts law enforcement agencies on notice that their actions are visible and must conform to the expectation that deadly force should be the last option—used sparingly and only when absolutely necessary.

II. BUREAU OF JUSTICE STATISTICS: WHAT'S WRONG WITH THE NUMBERS?

The 1994 Violent Crime Control and Law Enforcement Act included a provision mandating the collection of statistics on excessive

use of force by law enforcement.²⁴ As such, the Bureau of Justice Statistics (BJS) was tasked to determine the best means to collect this data.²⁵ The initial report was released in 1996, and detailed the previous efforts to compile use-of-force data from various local, state, and federal law enforcement agencies.²⁶ The report outlined problems providing accurate statistical information on the various levels of use-of-force.²⁷ At the outset, the BJS decided to include statistics not just for the use-of-deadly-force, but on all uses-of-force by law enforcement.²⁸ Doing so would provide a better picture of the practices and procedures of all police agencies.²⁹ The BJS recognized that new data collection methods would need to adapt to the data source to create a true picture of the use-of-force by police officers in the more than 17,000 police agencies around the country.³⁰ Thereafter, the Use-of-Force Reports would provide the crux of the data used for statistical analysis, but other reports would complement the BJS efforts.³¹ The Use-of-Force Report was issued every other year or so ending in 2011.³²

One of the key sources of information to supplement the Use-of-Force Report came from the Police-Public Contact Survey (PPCS), which surveyed people about their interactions with the police and their opinions about the police.³³ The BJS's intentions were to measure community viewpoints on use of force by police along with gathering data from the

²⁴ Data on Use of Excessive Force, 42 U.S.C. § 14142 (2014) states:

(a) Attorney General to collect. The Attorney General shall, through appropriate means, acquire data about the use of excessive force by law enforcement officers.

(b) Limitation on use of data. Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of the victim or any law enforcement officer.

(c) Annual summary. The Attorney General shall publish an annual summary of the data acquired under this section.

²⁵ Rachel Harmon, *Why Do We (Still) Lack Data on Policing?* 96 MARQUETTE L.REV. 1119, 1136 (describing the role of the BJS "to collect and analyze data about crime and the operation of the criminal justice system, and to provide that information to federal, state, and local governments, as well as the general public.").

²⁶ Tom McEwen, *National Data Collection on Police Use of Force*, BUREAU OF JUSTICE STATISTICS (1996), <http://www.bjs.gov/content/pub/pdf/ndcopuof.pdf>.

²⁷ *Id.*

²⁸ *Id.* at 7

²⁹ *Id.*

³⁰ *Id.* at vi, 8.

³¹ *Id.* at 8.

³² See BANKS ET AL., *supra* note 13, at 16.

³³ See Harmon, *supra* note 25, at 1137.

departments.³⁴ The PPCS provided limited data for the use-of-force report given that it is only collected every three years.³⁵ Another limitation is the method by which the PPCS data are collected. A random sample of people is called to complete a questionnaire on their interactions with police.³⁶ Participation is completely voluntary. The usefulness of the survey is questionable given the small representative sample used to make statistical models. The BJS website explains the survey population as:

49,246 of the 62,280 individuals age 16 or older in the NCVS sample. To produce national estimates on police-public contacts, sample weights were applied to the survey data so that the respondents represented the entire population, including the nonrespondents. After adjustment for nonresponse, the sample cases in 2011 were weighted to produce a national population estimate of 241,404,142 persons age 16 or older.³⁷

The voluntary nature of both the Use-of-Force Report and the PPCS calls into question the reliability of the statistical analysis as a source for forming policy decisions.³⁸ Further, there is little effort from federal agencies to ensure the quality of the statistical information received.³⁹

Along with the BJS, the Federal Bureau of Investigation (FBI)

³⁴ See generally N.Y.C. POLICE DEP'T, ANNUAL FIREARMS DISCHARGE REPORT 2013, *supra* note 16, at 64-66, 75-77 (explaining how citizen complaints are important to understanding the use of force for individual departments and the plans for National Crime Victimization Survey to supplement data on the use of police use of force).

³⁵ See BUREAU OF JUSTICE STATISTICS, DATA COLLECTION: POLICE-PUBLIC CONTACT SURVEY (PPCS), <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=251> (last visited Feb. 12, 2015) (showing that the PPCS was collected every three years from 1996 and ending in 2011).

³⁶ See *id.* (describing the purpose of the survey as, "Provides detailed information on the characteristics of persons who had some type of contact with police during the year, including those who contacted the police to report a crime or were pulled over in a traffic stop. The PPCS interviews a nationally representative sample of residents age 16 or older as a supplement to the National Crime Victimization Survey. The survey enables BJS to examine the perceptions of police behavior and response during these encounters.").

³⁷ *Id.*

³⁸ See Harmon, *supra* note 25, at 1135.

³⁹ *Id.* (explaining that the FBI makes little effort to ensure accurate accounting); see also Shelia McLaughlin, 1 *Police-Involved Death*, 2 *Conflicting Accounts*, CINCINNATI ENQUIRER (Oct. 30, 2014), <http://www.cincinnati.com/story/news/politics/2014/10/24/one-police-involved-shooting-two-different-accounts/17830599>.

collects some data on the number of police-involved shootings for its Supplementary Homicide Report (SHR). This document is part of the yearly report that provides information on a variety of crimes and criminal conduct across the country.⁴⁰ The purpose of the SHR is different from that of the BJS's Use-of-Force reports. Whereas the number of homicides or other uses of force are the focal point for the BJS reports, the SHR treats this information as one component of its overall picture on crime statistics. Similar to the BJS, reporting information on the number of police-involved homicides to the FBI for use in the SHR is at the discretion of police departments unless the state specifically mandates disclosure.⁴¹

From 2007 to 2012, the BJS reported approximately 1,242 justifiable homicides by law enforcement.⁴² This averages out to about 420 homicides in a given year.⁴³ This number is wrong. A growing

⁴⁰ See NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, UNIFORM CRIME REPORTING PROGRAM DATA: SUPPLEMENTARY HOMICIDE REPORTS, 2012, <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/35023>; see also N.Y.C. POLICE DEP'T, ANNUAL FIREARMS DISCHARGE REPORT 2013, *supra* note 18, at 1 ("The FBI collects voluntary submitted data on deaths from police actions for its Supplementary Homicide Reports. It disseminates the data only on request, and summaries of those deaths are not part of the FBI's annual Uniform Crime Report. Several studies have noted problems with this limited data collection effort, most notably the inconsistencies between numbers reported to the FBI and numbers reported in other data collection efforts.")

⁴¹ See NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, *supra* note 40 ("The UNIFORM CRIME REPORTING PROGRAM DATA: SUPPLEMENTARY HOMICIDE REPORTS, 2012 (SHR) provide detailed information on criminal homicides reported to the police. These homicides consist of murders; non-negligent killings also called non-negligent manslaughter; and justifiable homicides. UCR Program contributors compile and submit their crime data by one of two means: either directly to the FBI or through their State UCR Programs. State UCR Programs frequently impose mandatory reporting requirements which have been effective in increasing both the number of reporting agencies as well as the number and accuracy of each participating agency's reports. Each agency may be identified by its numeric state code, alpha-numeric agency ("ORI") code, jurisdiction population, and population group. In addition, each homicide incident is identified by month of occurrence and situation type, allowing flexibility in creating aggregations and subsets.")

⁴² See Barry & Jones, *supra* note 17.

⁴³ See Jaeah Lee, *Here's the Data That Shows Cops Kill Black People at a Higher Rate Than White People*, MOTHER JONES (Sept. 10, 2014 5:00 AM), <http://www.motherjones.com/politics/2014/08/police-shootings-ferguson-race-data>; see also Wesley Lowery, *How Many Police Shootings A Year? No One Knows*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/news/post->

consensus recognizes that this number is erroneous—including the BJS.⁴⁴ Even when the SHR data are included with the BJS numbers, the count of police-involved homicides is still inaccurate.⁴⁵ Depending on what non-profit or newspaper is providing this information, the incidents of justifiable homicides are still underreported at a rate of a few hundred or more each year.⁴⁶ Most of these non-governmental groups estimate the number of homicides is closer to 1,000 per year.⁴⁷ According to *The Wall Street Journal*'s test of the BJS 2007–12 homicide totals, 1,800 police homicides were reported from 105 police departments⁴⁸—a number which is forty-five percent higher than the BJS yearly average.⁴⁹ Given that there are over 18,000 law enforcement agencies in this country and *The Wall Street Journal* only received answers from 105 of them, it is clear that the BJS is not providing complete information.

A. Mandatory Reporting: Will it Fix the Problem?

On December 18, 2014, President Obama signed the Death In Custody Reporting Act (DCRA) into law.⁵⁰ The new law makes mandatory what has long been completely voluntary: law enforcement reporting to the BJS the true number of law enforcement caused deaths during a given year.⁵¹ Any state receiving federal funding for its police departments from the Omnibus Crime Control and Safe Streets Act of

nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows.

⁴⁴ See BANKS ET AL., *supra* note 11, at 33–34.

⁴⁵ *Id.*; see also Lowery, *supra* note 43 (“The FBI’s justifiable homicides and estimates from (arrest-related deaths) both have significant limitations in terms of coverage and reliability that are primarily due to agency participation and measurement issues,” said Michael Planty, one of the Justice Department’s chief statisticians, in an email.”)

⁴⁶ See Barry & Jones, *supra* note 19; see also D. Brian Burghart, FATAL ENCOUNTERS, <http://www.fatalencounters.org> (last visited Mar. 7, 2016); Kyle Wagner, *Deadspin Police-Shooting Database Update: We’re Still Going*, DEADSPIN (Aug. 27, 2014, 2:09 PM), <http://regressing.deadspin.com/deadspin-police-shooting-database-update-were-still-go-1627414202>.

⁴⁷ See Reuben Fischer-Baum & Al Johri, *Another (Much Higher) Count of Homicides By Police*, FIVETHIRTYEIGHT.COM (Aug. 25, 2014, 3:12 PM), <http://fivethirtyeight.com/datalab/another-much-higher-count-of-police-homicides> (comparing the accuracy of police-involved shootings listed on the Killed By Police Facebook page).

⁴⁸ See Barry & Jones, *supra* note 19.

⁴⁹ *Id.*

⁵⁰ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014).

⁵¹ *Id.*

1968, would see up to a ten percent reduction in funds if they did not provide data on a yearly basis.⁵² States are required to disclose:

- (1) the name, gender, race, ethnicity, and age of the deceased;
- (2) the date, time, and location of death;
- (3) the law enforcement agency that detained, arrested, or was in the process of arresting the deceased; and
- (4) a brief description of the circumstances surrounding the death.⁵³

The BJS has two years to collect and analyze the data before the first required reporting date.⁵⁴ Initial findings will be published sometime in 2016 or early 2017.

B. How Do the Two Laws Compare?

While the Use-of-Force Report and the DCRA strive to provide an account of police-involved homicides that occurred in a given year, the methods for each are very different. The Violent Crime Control and Law Enforcement Act designated that the DOJ obtain data on the “use of excessive force” by law enforcement.⁵⁵ Nowhere in the statute is the term “excessive force” defined, leaving the scope and wording to the DOJ, specifically the BJS. Lack of specific guidance has left the BJS in a quandary to both define “excessive force” and identify additional terminology to get to the heart of police-involved homicides. In the initial BJS report on the Use-of-Force, separate definitions are listed for the following: “deadly force,” “police brutality,” “excessive force,” “excessive use of force,” “illegal use of force,” “improper, abusive, illegitimate, and unnecessary use of force.”⁵⁶ Inconsistency in terminology directly impacts whether an officer acted properly in using any level of force. A police department defines various levels of use-of-force in any way it sees fit. Without laying the groundwork for a common interpretation of widely used terms that at present mean very different things to different agencies, any system used to track accountability and

⁵² § 2(c)(2), 128 Stat. at 2861.

⁵³ § 2(b), 128 Stat. at 2860.

⁵⁴ § 2(f)(2), 128 Stat. at 2861 (this two year lapse is the same as the original Use-of-Force Report after the Violent Crime Control and Law Enforcement Act went into effect).

⁵⁵ Data on Use of Excessive Force, 42 USC § 14142 (2014).

⁵⁶ NATIONAL INSTITUTE OF JUSTICE & THE BUREAU OF JUSTICE STATISTICS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 4 (1999) (internal quotation marks omitted).

use of force will be flawed.

Because there is no standard methodology for measuring use of force, estimates can vary considerably on strictly computational grounds. Different definitions of force and different definitions of police-public interactions will yield different rates. . . . In particular, broad definitions of use of force, such as those that include grabbing or handcuffing a suspect, will product higher rates than more conservative definitions.⁵⁷

Non-uniform interpretation of the term led to a significant difference in the number of police-involved homicides reported compared to justifiable homicides. For example, according to the BJS yearly report “Arrest-Related Deaths,” there were 4,813 deaths attributed to police officers between 2003 to 2009.⁵⁸ In contrast, the number of “justifiable homicides” in that period was 2,657.⁵⁹ Terminology and definitions impacts how data is collected and reported. Because of these variations, the initial data reports suggested that use of force by police was few and far between when the opposite was the case.⁶⁰ The BJS acknowledged that due to the lack of “standard methodology for measuring use of force, estimates can vary considerably on strictly computational grounds.”⁶¹ Such deviations concerned BJS as to how various groups would accept their data as credible.⁶²

Further complicating the BJS’s efforts to collect data under the Violent Crime Act is the wording used by the police. Each law enforcement agency defines the use of force differently.⁶³ Some police departments use “justifiable homicides” and “use of deadly force” to calculate the number of police shootings or homicides they are supposed

⁵⁷ *Id.* at 3.

⁵⁸ See D. Brian Burghart, *Data clash*, FATAL ENCOUNTERS (Feb. 7, 2015), <http://www.fatalencounters.org/posts> (explaining the difference in terminology the BJS uses on police-involved homicides; depending on what terms are used, a different number of total homicides is given).

⁵⁹ *Id.* (“Justifiable homicides” are those wherein a police officer kills a suspected felon in the line of duty.)

⁶⁰ NATIONAL INSTITUTE OF JUSTICE, *supra* note 57, at 2 (“[T]he data consistently indicate that only a small percentage of police-public interactions involve the use of force.”)

⁶¹ *Id.*

⁶² See *Id.* at 62-65; see generally BANKS ET AL., *supra* note 13, at 1-2, 32-34; see also Ryan Gabrielson et al., *Deadly Force*, in *Black and White*, PRO PUBLICA (Oct. 10, 2014, 10:07 AM), <https://www.propublica.org/article/deadly-force-in-black-and-white>; see Barry & Jones, *supra* note 17.

⁶³ See McEwen, *supra* note 26, at vi.

to track.⁶⁴ Each of these phrases is subjective. How a police department categorizes police-involved shootings may result in the exclusion of some deaths at the hands of officers, and this omission is passed on to the state reporting agency and then to the DOJ. The BJS recognizes the statistical hazards inherent in using incomplete data. The lack of uniformity in terminology creates an inability to properly compare various departments on whether their officers are properly trained.⁶⁵ Because numerous police departments within a state or region look to crime data to make changes to policy and training, using uniform force terms makes data comparisons more accurate and effective.⁶⁶

The DCRA seeks to remedy this problem by simplifying the terminology that both the state data collecting agencies and the BJS use. Instead of relying on ambiguous and subjective terms, the new act identifies specific categories of information that must be collected from both the states and the federal government.⁶⁷ The four subsections of the act give guidance on what information must be gathered from each case, thereby avoiding the difficulties that have led to substantial underreporting in previous BJS reports.⁶⁸ By eliminating the subjectivity in defining terms, data collection will be more accurate.⁶⁹ A cause for concern rests in subsection 4, because it asks for “a brief description of the circumstances surrounding the death.”⁷⁰ While the first three sections have little ambiguity concerning the factual information needed, the Descriptions section has the potential to have the same subjectivity issues that made the prior Use-of-Force Reports problematic. If the categorization of a shooting is left solely to the discretion of police, as described in detail later, then it is likely that essential facts will be

⁶⁴ See *Id.* at 5-7, 43-44.

⁶⁵ See *Id.* at 43.

⁶⁶ See *Id.* at 27-28 (discussing how any police department will use these reports to improve training, professionalism, and oversight within a department).

⁶⁷ See *Id.* at 43-48 (explaining the difficulties in data collection due to various definitions surrounding excessive force and types of force).

⁶⁸ See Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014); see also NATIONAL INSTITUTE OF JUSTICE, *supra* note 56, at 19-24 (summarizing study on use of force implementing simplified categories of data collection while avoiding the definitions problems that plagued earlier studies; their approach is very similar to the categorical collection that is being used in the DCRA).

⁶⁹ See generally McEwen, *supra* note 26, at 47 (analyzing the difficulties on the various terms surrounding “excessive force” while explaining the importance of collecting data on it).

⁷⁰ See *id.*; see also NATIONAL INSTITUTE OF JUSTICE, *supra* note 56, at 4.

sanitized from the incident report given to BJS. An unvarnished account of the surrounding events is critical if the appropriate policy and procedure determinations are to be made from these data.

Another fundamental change is a penalty for non-compliance. Because disclosure under the Violent Crime Act was discretionary, there was no impetus to penalize any local or state police department for nondisclosure. This led to less than ten percent of police departments across the country providing any information on the number of deaths their officers caused.⁷¹ Under the DCRA, the Attorney General may withdraw up to ten percent of federal funding from any police agency that does not comply with the reporting provisions.⁷² While this penalty may not be significant for many larger police departments, the impact could be substantial for smaller departments that require more budgetary assistance from federal grants and statutory appropriations. Questions remain as to whether an Attorney General will sanction non-reporting police departments, but the mandatory provision is a step in the right direction. Making non-compliance public would not only help alleviate community concerns, but motivate other departments to comply with the statutory requirements.

The policies governing collection and use of data for the VCA (Violent Crime Control and Law Enforcement Act of 1994) and DCRA are markedly different. The VCA specifies that the data on police-involved homicides can be used, “only for research or statistical purposes and may not contain any information that may reveal the identity of the victim or any law enforcement officer.”⁷³ In contrast, the DCRA requires disclosure of the name, gender, race, ethnicity, and age of the deceased. The only policy consistent between both is the preservation of the individual officer’s anonymity.⁷⁴ Overall, the focus on accountability and transparency is the hallmark of the DCRA. Through simplicity and mandatory compliance, it should obtain higher accuracy in its data collection than the VCA.

C. What are The Government’s Weaknesses in Gathering

⁷¹ See Lowery, *supra* note 43 (discussing that only 750 of the 17,000 law enforcement agencies report “justifiable homicides to the BJS).

⁷² See Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, § 2(c)(2), 128 Stat. 2860, 12861 (2014).

⁷³ See Data on Use of Excessive Force § 2(b), 42 U.S.C. § 14142 (2014).

⁷⁴ See 42 U.S.C. § 14142(b); 128 Stat. 2860.

The Data under The VCA or DCRA?

Despite the DCRA's efforts to streamline data collection, there are still concerns about the BJS's ability to give an accurate account of police-involved homicides. Some non-profits that gather statistics on police-involved homicides see the DCRA as merely reinstituting lapsed VCA without addressing the fundamental problems associated with prior efforts.⁷⁵ To improve the quality of information on police-involved shootings, the BJS will incur incidental costs from news services, records requests, and other expenses associated with gathering and evaluating information.⁷⁶ Freedom of Information requests, obtaining records from courts or police departments may charge fees for searches or copy costs. Because of the plethora of law enforcement agencies in the country, such searches add up to considerable fees to BJS. But the BJS is tasked by the federal government with compiling a large number of statistical reports on the criminal justice system.⁷⁷ Its budget is insufficient to prepare and disseminate such comprehensive reports.⁷⁸ The BJS is the first to acknowledge the limitations of its data collection and analysis.⁷⁹ With no appropriations attached to this bill, the BJS has little means to enhance its data collection process and remediate the vast underreporting of law enforcement agencies.⁸⁰

Beyond the matter of funding is the larger issue of self-reporting, which will not change under the DCRA. Every piece of data BJS receives from law enforcement is based on self-reporting.⁸¹ If the police agencies

⁷⁵ D. Brian Burghart, *Numbers Game: Congress Re-Authorized an Ineffective Law to Track Officer-Involved Homicides*, RENO NEWS & REVIEW (Jan. 1, 2015), <https://www.newsreview.com/reno/numbers-game/content?oid=15920679>.

⁷⁶ See BANKS ET AL., *supra* note 13, at 33-34; see also D. Brian Burghart, *Freedom of Information Act updates*, FATAL ENCOUNTERS (Sept. 5, 2013), <http://www.fatalencounters.org/freedom-of-information-act-updates>.

⁷⁷ See *About the Bureau of Justice Statistics*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=abu> (last visited Mar. 4, 2016) (The BJS Mission, "To collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government. These data are critical to federal, state, and local policymakers in combating crime and ensuring that justice is both efficient and evenhanded.")

⁷⁸ See Harmon, *supra* note 25, at 1139 (discussing that BJS has a smaller budget compared with other statistical bureaus within the executive).

⁷⁹ See McEwen, *supra* note 26.

⁸⁰ See BANKS ET AL., *supra* note 13, at 33-34; see also Burghart, *Freedom of Information Act updates*, *supra* note 73.

⁸¹ See *Data Collection on Arrest-Related Deaths*, BUREAU OF JUSTICE STATISTICS,

believe their actions are appropriate, no report will be filed, affecting information collected by the states to the BJS.⁸² “The incidence of wrongful use of force by police is unknown. Research is critically needed to determine reliably, validly, and precisely how often transgressions of use-of-force powers occur.”⁸³ While the DCRA does streamline data collection from states, it is often the internal police department data collection procedures that impair BJS’s ability to glean valid data for analysis.⁸⁴ Each state has a state reporting coordinator whose responsibility it is to gather data.⁸⁵ The method of obtaining information on police-involved homicides varies greatly from state to state. The majority of states identify homicides from the media only and never ask their police departments for data.⁸⁶ A handful of states use medical examiners or coroners as sources for their police-involved homicide numbers.⁸⁷ Only twelve states communicate with the police or specifically have staff to gather this information.⁸⁸ The result from such disparate collection methods is a jumble of inconsistent reporting of police-involve homicides.

The BJS’s assessment revealed troubling results concerning the credibility of state information. States reported different numbers of police-involved homicides to the BJS than to the FBI’s SHR.⁸⁹ That states can report two different numbers to two separate divisions of the DOJ illustrates the problem with BJS’s credibility in gathering and reporting

<http://www.bjs.gov/index.cfm?ty=dcdetail&iid=428> (last visited Mar. 4, 2016) (discussing the methods of collecting data going into this report).

⁸² NATIONAL INSTITUTE OF JUSTICE, *supra* note 56, at 21 (discussing the problems properly accounting for the excessive use of force within the current data collection framework).

⁸³ *Id.* at ix.

⁸⁴ See BANKS ET AL., *supra* note 13, at 24-31.

⁸⁵ *Id.* at 24.

⁸⁶ *Id.* at 27. These states include Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New York, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Virginia, West Virginia, Mississippi, and Montana.

⁸⁷ *Id.* These states are Colorado, Maine, Massachusetts, New Mexico, North Carolina, South Carolina, and Washington.

⁸⁸ *Id.* The states that have direct law enforcement agency reporting Alabama, Washington, D.C., Kansas, Missouri, New Hampshire, Nevada, Tennessee, and Vermont. Those states that designate arrest-related death program staff are Arkansas, Georgia, Wisconsin, and Wyoming.

⁸⁹ *Id.* at 25.

data. Currently, newspapers and non-profits are providing data with greater accuracy than the federal government.⁹⁰

A comparison between the BJS and the SHR highlights the disparity.⁹¹ A number of states still report no homicides, but it is unclear whether this is because there have been no homicides or they provided no data.⁹² The BJS's assessment of state reporting did find that states with mandatory reporting of police-involved homicides, namely California and Texas, disclosed the lowest percentage of incidents when compared with other states.⁹³ If mandatory reporting is to be effective, BJS must move beyond exclusive reliance on state-self reporting. The BJS needs a system in place to verify data provided by state reporting agencies.

Since its inception, the highest success rate for the BJS's collection of data on police-involved homicides was in 2011 and was only seventy-two percent.⁹⁴ Prior to 2011, the BJS obtained forty-nine percent of the total number of police-involved homicides from 2003 to 2009, and 2011.⁹⁵ In its estimation, the more accurate number of police-involved homicides for 2011 was closer to 928, rather than the 420 average per year the FBI originally reported.⁹⁶ These disparities illustrate the need for both

⁹⁰ See generally *Investigation: Police Shootings*, WASH. POST, <http://www.washingtonpost.com/graphics/national/police-shootings> (last visited Mar. 4, 2016); *The Counted: People Killed by the Police in the United States*, THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database#> (last visited Mar. 4, 2016); see also Wagner, *Deadspin Police-Shooting Database Update: We're Still Going*, *supra* note 46.

⁹¹ See generally *Investigation: Police Shootings*, *supra* note 90; see also *The Counted: People Killed by the Police in the United States*, *supra* note 90; see also Wagner, *Deadspin Police-Shooting Database Update: We're Still Going*, *supra* note 46.

⁹² See generally *Investigation: Police Shootings*, *supra* note 90; see also *The Counted: People Killed by the Police in the United States*, *supra* note 90; see also Wagner, *Deadspin Police-Shooting Database Update: We're Still Going*, *supra* note 46.

⁹³ See BANKS ET AL., *supra* note 13, at 32 ("BJS may also further examine the policies and practices in California and Texas. Both states have mandated reporting legislation, but our analysis suggests that approximately a fifth of the observed cases in California in 2011 were reported in the SHR only, while 14% of the observed cases in Texas 2011 were reported to the SHR only").

⁹⁴ *Id.* at 32-33 (reporting that 2011 was their best year of reporting when using both the ARD and SHR databases; in prior years they had less than fifty percent accuracy in their police involved homicide data).

⁹⁵ *Id.* at 13.

⁹⁶ *Id.*; see also Lee, *supra* note 43; Chuck Raasch, *Average of One Person A Day Killed by Police, but Many Ruled Justifiable Homicides, Says FBI, DOJ*, ST. LOUIS DISPATCH (Aug. 11, 2014), <http://www.stltoday.com/news/local/crime-and-courts/average-of-one->

mandatory reporting, and most importantly, the need for a better way to glean this information from the states. If self-reporting is going to be the basis of data collection, the federal government must ensure that states gather accurate numbers from their police departments. A better method may be to diversify its data collection to include the National Violent Death Reporting System, news reports, along with state reporting.⁹⁷

Regardless of whether the DOJ looks to other sources to supplement state self-reported data, police departments must be more forthcoming with information about police-involved homicides. The DOJ has already issued guidance to police departments requiring internal reports and investigations of police-involved homicides. In 2001, the Department of Justice drafted the “Principles for Promoting Police Integrity” to provide guidance on the best policies and procedures for the use-of-force, handling misconduct investigations, training, and data collection.⁹⁸ These guidelines were designed to help police departments build better relationships with the communities they serve given that such relationships are vital for effective crime prevention.⁹⁹ The document includes a description of use of deadly force and specifies that use-of-force incidents should be evaluated and documented to ensure proper training and sound policy decisions.¹⁰⁰ Police departments may be sued by the DOJ Civil Rights Division if their officers’ actions systematically violate the constitutional rights of people.¹⁰¹ It is in a department’s best interests to abide by best practices for internal supervision, reporting, and investigation. Doing so not only ensures that a department will have to respond to a formal complaint from the DOJ, but more significantly, avoid the negative press for non-compliance. The DOJ ought to enforce compliance with its recommended best practices, as compliance with best practices is easier under the DCRA.

Based on evidence, law enforcement agencies have yet to adopt best practices as evidenced by the lack of consistent reporting of police-

person-a-day-killed-by-police-but/article_36b96a29-3267-5cc8-aa51-046d7744ea52.html (showing that the DOJ reports an average of 419 homicides were attributable to law enforcement for the years 2003 to 2009).

⁹⁷ BANKS ET AL., *supra* note 13, at 32 (emphasizing the need to delve into other areas to obtain better statistical data).

⁹⁸ U.S. DEP’T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE PRACTICES AND POLICIES (2001).

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* at 3-6.

¹⁰¹ *See* Cause of Action, 42 USC § 14141 (2014).

involved shootings. In 2008, forty-five states had internal agencies responsible for collecting data and reporting of crime-related data from its agencies to the federal government.¹⁰² Some state legislatures authorize or mandate their state agencies to gather data from various state agencies for federal reporting.¹⁰³ Even in mandatory-reporting states, obtaining compliance from police departments was haphazard at best.¹⁰⁴ For example, the Florida Department of Law Enforcement tracks police-involved homicides and use-of-force but has not provided this data to BJS since 1996, because, its “tracking software was outdated.”¹⁰⁵ Similarly, Michigan State Police failed to turn over the use-of-force data because they were not “in tally form.”¹⁰⁶ Other police departments refused to report any justifiable homicides as a matter of policy.¹⁰⁷ As long as the BJS relies on state self-reporting, these excuses for non-compliance will remain available to police departments and states.

The crux of the problem with self-reporting is that when law enforcement agencies lack internal reporting mechanisms and supervision accurate data collection is impossible. Many people voice concern that if an agency denies that a homicide is excessive, the death will not be counted.¹⁰⁸ There is a tendency by many police departments to minimize or justify the behavior as proper use of police power.¹⁰⁹ When a

¹⁰² James Lynch & John Jarvis, *Missing Data and Imputation in the Uniform Crime Reports and the Effects on National Estimates*, 24 J. CONTEMP. CRIM. JUST. 69, 72 (2008).

¹⁰³ See BANKS ET AL., *supra* note 13, at 27 (describing state reporting methods including two states that have legislative mandates to report arrest-related deaths).

¹⁰⁴ Lynch & Jarvis, *supra* note 102, at 74 (explaining the reporting rates of states who have internal reporting agencies at 74% while those without report, on average at about 57%. These disclosures are for the Uniform Crime Reporting (UCR) program, also published by the BJS).

¹⁰⁵ See Barry & Jones, *supra* note 19.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (“The Fairfax County Police Department in Virginia, for example, said it didn’t consider such cases to be an ‘actual offense,’ and thus doesn’t report them to the FBI.”)

¹⁰⁸ *Id.*

¹⁰⁹ Lilley Workneh, *‘I’m Lucky To Be Living’: Video Shows Cops Brutally Beating Unarmed Black Man In Michigan*, HUFFINGTON POST (Mar. 5, 2015), http://www.huffingtonpost.com/2015/03/25/violent-arrest-floyd-dent_n_6941714.html (“Police said they pulled Dent over for failing to make a complete halt at a stop sign. Dent, who was unarmed and has no criminal record, said he was not intentionally trying to get away, and video shows him driving at the same speed while cops followed behind him. Dent’s account of the altercation differs significantly from that of police, who said that Dent threatened to kill the officers and bit one of them during the incident. However,

department both evaluates if an officer acted appropriately, and then is responsible for reporting inappropriate use of force, it can define the conduct in any way that suits the department's own self-interest. If a suspect challenges an officer during an arrest, and the officer subsequently beats the suspect to the point that hospitalization is required, the police department may deny that the force was excessive because the suspect resisted.¹¹⁰ As long as the officer is credited with following proper police procedure, even though the community considers the force disproportionate to the offense, the conduct may not be considered offensive.¹¹¹ Because there is no independent arbiter of what is meant by justified, excessive, or misconduct, the picture of abuses of power by police officers provided by the BJS will be incomplete. DOJ'S reliance on self-reporting makes it unable to gather data about the excessive use of force by police.

To highlight the problems that arise from police department self-reporting of police involved homicides, consider that the police chiefs classified the John Crawford, Michael Brown, and Tamir Rice shootings as appropriate uses of deadly-force. Their inclusion in federal statistics will depend on how the BJS asks the Beavercreek, Ferguson, and Cleveland Police Departments about their data. If any department

police have not produced any recording of the threat or photographs of the alleged bite marks"); see also Kimberly Kindy & Kelly Kimbriell, *Fatal Shootings by On-Duty Police Officers: An Analysis*, WASH. POST (Apr. 11, 2015) (discussing the prosecution of Cleveland Police Officer Michael Brelo for shooting Timothy Russell and Malissa Williams in a car while both victims were unarmed. Russell and Williams led 62 Cleveland Police Cars on a chase through the city when they were finally stopped and police opened fire on the car shooting 139 times).

¹¹⁰ Matt Pearce, *After Video Surfaces, Grand Jury Charges 2 Philadelphia Policemen in Beating*, L.A. TIMES (Feb. 5, 2015) (discussing how Najee Rivera was arrested after two Philadelphia police officers claimed he fell off his scooter and attacked the officers. Rivera was charged with assault and resisting arrest in the altercation. However, after his girlfriend found local video surveillance of the traffic stop, it contradicted the two officers' story. "Instead, one of them actually reached out of the window and clubbed Rivera in the head; the car bumped the scooter and Rivera fell to the ground . . . Both officers then got out and immediately placed Rivera in their control. He never resisted, he never struck them, he never fought back, they just started hitting him . . . First, one held him against the wall, while the other beat him with a baton. Then they held him in on the ground and beat him some more, with both fist and baton.").

¹¹¹ This is the greatest issue with subsection 4 of the DCRA. Police officers have a strong inclination to downplay any questionable or criminal behavior given the stakes involved. Not only would they face internal sanction, but both criminal and civil liability depending on the severity of the conduct.

concludes that the force used was not excessive and that the homicide was justified, then there would be no need to report. Without more exacting language and compulsory reporting, no currently used metric can successfully delineate the magnitude of unreported deaths attributable to police officers.¹¹²

III. THREE POLICE-INVOLVED HOMICIDES THAT MAY NOT BE INCLUDED IN THE BJS REPORT

In 2014, several highly publicized police-involved homicides resulted in the deaths of people of color and caused many communities to question the use of deadly force doctrine.¹¹³ These shootings sparked protests because of the perception in directly affected cities and elsewhere that use of deadly force by a police officer is justified, regardless of the circumstances.¹¹⁴ In each of the three shootings discussed below, the medical examiner's office classified the individual's death as homicide. Conversely, the police departments classified each homicide as justified and a proper use of police discretion. Because the internal administration in each instance categorized the shootings as a permissible use of deadly force, any of these homicides might be omitted from the BJS data. For the reasons previously explained, the mandatory report may not correct this error because each state differs in how it reports police-involved homicides to the federal government. The homicides of John Crawford, Michael Brown, and Tamir Rice illustrate the complications associated with ensuring accurate data are first compiled by the police department, then transferred to the proper state agency for reporting to the federal government. Hopefully, the DCRA may provide a means to gather more accurate information about these three shootings.

¹¹² While more specific language will not solve all the problems with data collection, it is definitely a step in the right direction. Additionally, action is needed to make the categories of data collection more objective in their terminology, allow for broader access to sources of data for verification and higher inclusion rates, and more transparency on the limitations of data collection will improve the overall BJS police-involved shooting index.

¹¹³ See, e.g., Andrew Cohen, *The Garner Decision in Black and White: Reckoning with The Great Justice Divide*, MARSHALL PROJECT (Dec. 4, 2014, 5:50 PM), <https://www.themarshallproject.org/2014/12/04/the-garner-decision-in-black-and-white>; see also Ray Sanchez, *Protesting Police Shootings: Demands For Change Sound Out Nationwide*, CNN.COM (Dec. 16, 2014, 7:03 PM), <http://www.cnn.com/2014/12/14/us/nationwide-police-protests>.

¹¹⁴ See Cohen, *supra* note 113; Sanchez, *supra* note 113.

A. Beavercreek, Ohio Shooting of John Crawford, III at Walmart

On August 5, 2014, the Beavercreek Police Department received a 911 call about a suspicious black male walking around a Walmart with a rifle.¹¹⁵ According to the emergency call, the man allegedly pointed the gun at children in the store.¹¹⁶ Ronald Ritchie, who made the 911 call, told dispatch that Crawford looked like he was trying to load the gun.¹¹⁷ Police officers responded to the call and located Crawford in the toy section.¹¹⁸ Witnesses said Crawford waved the gun around at people before the police arrived, causing the store management to direct people away from him.¹¹⁹ Crawford picked up the air rifle while shopping. The air rifle was sold by Walmart and had been left on the shelf without a box when Crawford picked it up.¹²⁰ When the police approached him, Crawford was on his cell phone.¹²¹

There remains a clear discrepancy in events between the accounts from the police and the video footage provided by Walmart. According to Officer Sean Williams and Sergeant David Darkow, Crawford refused to put the gun down when instructed.¹²² Because of his non-compliance,

¹¹⁵ *Man, Holding Realistic-Looking Toy Gun, Shot, Killed at Ohio Walmart*, DAYTON DAILY NEWS (Aug. 7, 2014, 12:13 PM), <http://www.daytondailynews.com/news/news/man-holding-realistic-looking-toy-gun-shot-killed-ngxTX>.

¹¹⁶ See Jon Swaine, *'It Was a Crank Call': Family Seeks Action Against 911 Caller in Walmart Shooting*, THE GUARDIAN (Sept. 26, 2014, 4:02 pm EST), <http://www.theguardian.com/world/2014/sep/26/walmart-ohio-shooting-charges-911-caller-john-crawford>.

¹¹⁷ Thomas Gnau & Chris Stewart, *Fake Guns, Real Tragedy; Beavercreek Shooting Shows Police, Imitation Weapons A Toxic Mix*, DAYTON DAILY NEWS (Aug. 10, 2014), <https://www.highbeam.com/doc/1P2-37056839.html>.

¹¹⁸ See Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii>.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See Steve Bennish & Mark Gokavi, *Death Won't Alter Air Gun Sales; State seeks more Video from Wal-Mart to Review Shooting. -2 Die in Incident at Beavercreek Store*, DAYTON DAILY NEWS (Aug. 9, 2014), <https://www.highbeam.com/doc/1P2-37054668.html>.

along with what the officers interpreted as an aggressive action, one officer fired two shots.¹²³ Crawford died from two gunshot wounds, one to his left arm and the other to his left torso.¹²⁴ The Beavercreek Police Chief stood behind his officers' use of deadly force against Crawford: "The officers gave verbal commands to the subject to drop the weapon. The subject . . . was shot after failing to comply with the officers' commands. The quick response of officers was instrumental in containing this situation and minimizing the risk to customers."¹²⁵ The Montgomery County Coroner ruled Crawford's manner of death a homicide.¹²⁶ An internal review conducted by the police department classified the homicide as justified.¹²⁷

The Walmart video footage contradicts the officers and their chief. The attorney representing the Crawford family and Crawford's father were permitted to view four minutes of the video prior to the grand jury.¹²⁸ That four minutes showed that police gave Crawford no time to comply with their demand that he put the gun down. The family's attorney explained the troubling nature of the shooting: "The time that went by from when the officers asked him to put the BB gun down was 0.36 seconds. They simply shot him on sight."¹²⁹ The family along with

¹²³ See Thomas Gnau, *Officer: 'I Fired Two Shots Center-Mass at (John Crawford III)'*, DAYTON DAILY NEWS (Oct. 14, 2014), <http://www.daytondailynews.com/news/news/local/officers-describe-moments-before-john-crawford-sho/nhhft>.

¹²⁴ Thomas Gnau & Chris Stewart, *New Details in Deaths of 2 at Walmart*, DAYTON DAILY NEWS (Sept. 25, 2014), <http://www.daytondailynews.com/news/news/new-details-in-deaths-of-2-at-walmart/nhWF3>; see also Jill Drury, *Coroner: Crawford had THC in system when shot at Walmart*, WDTN (Sept. 26, 2014), <http://wdtn.com/2014/09/26/coroner-williams-death-at-walmart-ruled-homicide>.

¹²⁵ Thomas Gnau & Chris Stewart, *Dangerous play: Toy guns and police don't mix*, DAYTON DAILY NEWS (Aug. 9, 2014), <http://www.mydaytondailynews.com/news/news/dangerous-play-toy-guns-and-police-dont-mix/ngyLZ>.

¹²⁶ See Bennish & Gokavi, *supra* note 122.

¹²⁷ See *Investigative Board Finds Shooting of Man Holding BB Gun Totally Justified*, TRUTH VOICE (Mar. 20, 2015), <http://truthvoice.com/2015/03/investigative-board-finds-shooting-of-man-holding-bb-gun-totally-justified>.

¹²⁸ *DeWine Keeps Kill Video; Family Disputes What Police Say Happened Before They Shot Young Black Man Inside Suburban Dayton Walmart*, SANDUSKY REGISTER (Sept. 3, 2014) (Ohio Attorney General's Office refused Sandusky Register's open records request to see video even though it fell within guidelines of disclosure under Ohio Open Records Act).

¹²⁹ Mark Gokavi, *Family Sues Police, Walmart; Suit Says John Crawford Had Less Than*

several agencies asked the Ohio Attorney General to release the video to the public immediately, but he refused based on his belief the video would negatively affect a future trial.¹³⁰ After the grand jury proceedings, the State made the video public. Video footage confirmed that, indeed, the police opened fire on Crawford almost immediately upon seeing him.¹³¹ Both officers approached Crawford down an aisle while he stood at the end of the aisle.¹³² From the vantage point provided by the video, it is not clear whether Crawford understood there were police present. The video shows that Crawford may not have been aware of the officers' presence until the last moment, if at all.¹³³ The officers approached Crawford down an aisle and Crawford may have been facing a different direction. The autopsy report revealed that the fatal shot entered "slightly from the front to back . . . under the rib area."¹³⁴

The Ohio Attorney General appointed Mark Piepmeier, a special prosecutor, to handle the grand jury proceedings.¹³⁵ Four men and five women comprised the grand jury that considered whether Crawford's death was justified.¹³⁶ Specifically, the grand jury's task was to determine

I Second to React to Police Orders, DAYTON DAILY NEWS (Dec. 17, 2014).

¹³⁰ Mark Gokavi, *John Crawford's Father: 'You Could Hear He Was Gasping For Air,'* DAYTON DAILY NEWS (Sept. 13, 2014), <http://www.daytondailynews.com/news/news/crime-law/shooting-victims-father-you-could-hear-he-was-gasp/nhL55> (Several protests took place over the Ohio Attorney General's refusal to disclose the video after requests under the Ohio Open Records Act).

¹³¹ Sebastian Murdock, *"New Video Shows John Crawford Fatally Shot by Police In Walmart,"* HUFFINGTON POST (Sept. 24, 2014), http://www.huffingtonpost.com/2014/09/24/john-crawford-air-rifle-video_n_5878022.html.

¹³² *Id.*

¹³³ *But for Video: Black Man with Gun In Wal-Mart Edition*, SIMPLE JUSTICE (Sept. 25, 2014), <http://blog.simplejustice.us/2014/09/25/but-for-video-black-man-with-gun-in-wal-mart-edition> ("One thing is clear: John Crawford doesn't turn, doesn't appear to show any recognition that there are cops to his left with guns pointed at him. One would assume that if police officers were yelling at a person to 'drop the gun,' there would be some indication, body movement, head turn, something, to demonstrate recognition that this was happening. The video shows no recognition that this was happening.").

¹³⁴ *No Indictment in Ohio Wal-Mart Shooting*, ASSOCIATED PRESS (Sept. 24, 2014), <http://www.cbsnews.com/news/no-indictment-in-ohio-wal-mart-shooting>.

¹³⁵ Gokavi, *John Crawford's Father: 'You Could Hear He Was Gasping For Air,'* "supra note 130.

¹³⁶ Mark Gokavi, *Special Grand Jury Convenes; Protesters Demand Justice for Man Killed in Police-Involved Shooting*, DAYTON DAILY NEWS (Sept. 23, 2014), <https://www.highbeam.com/doc/1P2-37204238.html>.

whether probable cause existed to charge Officer Sean Williams with murder, reckless homicide, or negligent homicide.¹³⁷ Given that grand jury proceedings are secret,¹³⁸ it is unknown how Special Prosecutor Piepmeier chose to present the evidence, what witnesses were called, or how hard he pushed for an indictment. The grand jury chose not to indict Officer Williams on any charges, thereby substantiating that Crawford's death was lawful.¹³⁹

Crawford's death is beyond tragic, considering that he was gunned down without opportunity to comply with police demands or to explain the gun that he carried was a pellet gun. The almost immediate designation of Crawford's death by the police chief as justifiable homicide illustrates the complexity of tracking use of force by police and the speed at which an incident is rendered invisible with respect to data collection. Ohio relies solely on the media to collect data of police-involved homicides.¹⁴⁰ In the BJS's estimation, it is not clear how effective this data collection method is given that they are only able to capture seventy-five percent of the actual number of police-involved homicides from these states.¹⁴¹ Further, Ohio does not identify specifics of their own proactive efforts to find such information; i.e., whether they regularly search through numerous state and local newspapers or just wait for search alerts to arrive.¹⁴²

While Mr. Crawford's homicide gained significant media attention, the shooting of Randall Scott, Jr. by officers with the Cleveland Police Department has been largely ignored. Officers asked Scott to stop walking when they saw him with an open beer can.¹⁴³ He placed the beer down, approached the officers with his hands in the air, and explained that

¹³⁷ See *id.*

¹³⁸ See Mark Berman, *No Indictments after Police Shoot and Kill Man at an Ohio Wal-Mart; Justice Dept. Launches Investigation*, WASH. POST (Sept. 24, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/24/no-indictments-after-police-shoot-and-kill-man-at-an-ohio-wal-mart-justice-dept-launches-investigation>.

¹³⁹ *Id.* "'"

¹⁴⁰ See BANKS ET AL., *supra* note 13, at 27.

¹⁴¹ *Id.* at 25-26.

¹⁴² *Id.* at 27.

¹⁴³ Daniel Rivero, *Web Series about Cleveland Police Lawsuits is a Must-Read for #BlackLivesMatter Activism*, FUSION (Feb. 4, 2015), <http://fusion.net/story/42684/web-series-about-cleveland-police-lawsuits-is-a-must-read-for-blacklivesmatter-activism/>; see also U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 1, at 14-15.

he had a concealed carry weapons permit.¹⁴⁴ When police saw the gun, they asked Scott to place his hands behind his head. As he dropped his hands to comply, an officer shot him in the abdomen, claiming that Scott was reaching for his gun.¹⁴⁵ However, according to several witnesses, Scott cooperated with the officers throughout the stop. Further, the DOJ Civil Rights Division remarked that Scott “took the precise steps advised by the Ohio Attorney General’s Office when a person carrying a concealed handgun is stopped for law enforcement purposes. The weight of the evidence suggests that [Scott] was attempting to comply with officers’ orders and did not pose an imminent threat of serious bodily harm to the officers or others, and the officer should not have fired his weapon.”¹⁴⁶ While not a homicide, such a clear use of deadly force would be included in the BJS’s statistical analysis. However, absent a targeted internet search, Scott’s shooting could be easily overlooked by data collection left only to the media.

Under the DCRA, Mr. Crawford’s homicide fits the statutory requirements for disclosure. However, it is unclear how the actions of the Ohio Attorney General, by withholding certain evidence from the public, may impact the description of the shooting. Given that the Walmart video casts doubt on officers’ version of events, it is unclear how the discrepancy would ever be made known to the BJS.¹⁴⁷ If the BJS is seeking an account of hard numbers to support policy initiatives, then a more complete picture of the homicide is necessary. Conflicting accounts of the shooting should be incorporated into any description provided to BJS to ensure an honest evaluation of the entire encounter can be made. Without such, Mr. Crawford’s homicide is truly just another death rather than an opportunity to evaluate whether the use of force was appropriate.

B. Ferguson, Missouri Shooting of Michael Brown on the Sidewalk

While the events in Beavercreek led to local protests and drew limited media attention, the death of Michael Brown set off a storm of

¹⁴⁴ Rivero, *supra* note 143.

¹⁴⁵ *Id.*

¹⁴⁶ U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 1, at 15.

¹⁴⁷ Such discrepancies between police accounts of use of force when compared with video evidence of the same encounter are numerous: Eric Garner’s choking homicide at the hands of the New York Police Department, Walter Scott’s homicide by North Charleston Police Officer Michael Slager.

protests and questions over the use of deadly force against people of color. Four days after Crawford's homicide, Michael Brown jaywalked across the 2900 block of Canfield Drive in Ferguson, Missouri. His offense led to a confrontation with Ferguson Police Officer Darren Wilson that claimed Brown's life.¹⁴⁸ Brown died as a result of six gunshot wounds.¹⁴⁹ Unlike the Crawford and Tamir Rice shootings, the lack of any video footage caused eyewitness accounts and forensic evidence became the determining factor in the grand jury's decision. St. Louis County Prosecutor Robert McCulloch deviated from common practice in directly filing charges. Instead, he presented evidence to the grand jury for a determination of charges against Ferguson Police Officer Darren Wilson.

The St. Louis grand jury's decision not to indict Wilson made little sense to the public in light of the large body of information available, whereas the jurors were constrained by the evidence and legal definitions presented only by the prosecution. Largely, this physical evidence is the medical examiner's report of Brown's autopsy along with forensic analysis of Wilson's squad car. The autopsy showed Brown was shot once in the hand at close range and a few other times from several feet away.¹⁵⁰ The autopsy report stated that Brown was facing Wilson when Brown took a shot to the forehead, two shots to the chest and a shot to the upper right arm. The wound to the top of Brown's head would indicate he was falling forward or in a lunging position toward the shooter; the shot was instantly fatal.¹⁵¹

Another medical examiner disagreed with the distance at which the hand wound was likely inflicted and contended that Brown's hand could have been a couple feet away from the weapon when it was fired.¹⁵² The St. Louis Prosecutor's Office stated that conflicting eyewitness accounts and forensic evidence resulted in Officer Wilson not facing

¹⁴⁸ — Ray Sanchez, *Investigation into Michael Brown's Shooting Death Complete*, CNN, (Oct. 1, 2014, 8:14 PM), <http://www.cnn.com/2014/10/01/justice/missouri-ferguson-shooting-investigation>.

¹⁴⁹ "*Id.*"

¹⁵⁰ Christine Byers, *Official Autopsy Shows Michael Brown Had Close-Range Wound to His Hand, Marijuana in His System*, ST. LOUIS DISPATCH (Oct. 22, 2014), http://www.stltoday.com/news/local/crime-and-courts/official-autopsy-shows-michael-brown-had-close-range-wound-to/article_e98a4ce0-c284-57c9-9882-3fb7df75fef6.html.

¹⁵¹ *Id.* (Three autopsies were done on Brown: St. Louis County, federal officials, and an independent medical examiner).

¹⁵² *Id.*

charges.¹⁵³ Prosecutor McCulloch's explanation of conflicting testimony did not include the numerous inconsistencies presented in Officer's Wilson's account of shooting Brown.

Further, Officer Wilson testified before the grand jury that Brown was threatening from the beginning of the encounter. Officer Wilson made multiple references to the hostile and threatening behavior exhibited by Brown. When he first saw Brown, Wilson stated that he perceived Brown to be "really big"—an interesting assertion given that both men are about the same height.¹⁵⁴ As Wilson explained, "I grabbed him, the only way I can describe it is I felt like a five-year-old holding onto Hulk Hogan . . . Hulk Hogan, that's just how big he felt and how small I felt from grasping his arm."¹⁵⁵ Wilson said he felt he could have been knocked out quickly by the repeated blows he received from Brown as the two men wrestled over Wilson's sidearm.¹⁵⁶ Wilson's version of events became the explanation of what happened in the eyes of the Ferguson Police Department and the St. Louis County Prosecutor's Office. As such, it defined how Brown's homicide was recorded in its internal and external database.

Understanding how the Ferguson Police Department categorized Michael Brown's homicide is crucial for understanding why his homicide may be omitted from the Use-of-Force Reports. Missouri's primary method for identifying police-involved homicides is the direct reporting by a police department to the BJS.¹⁵⁷ This means that departments choose how to report homicides, use-of-deadly force, and misconduct to the

¹⁵³ Andrew Cohen, *Law and Disorder in Ferguson*, MARSHAL PROJECT (Nov. 25, 2014, 11:53 AM), <https://www.themarshallproject.org/2014/11/25/law-and-disorder-in-ferguson>.

¹⁵⁴ Transcript of: Grand Jury (Volume 5) at 198, 207, State of Mo. V. Darren Wilson (Mo. Cir. Ct. Sept. 10, 2014), available at <https://graphics8.nytimes.com/newsgraphics/2014/11/24/ferguson-assets/grand-jury-testimony.pdf>; see also Paul Rosenberg, "Everything the Darren Wilson Grand Jury Got Wrong: The Lies, Errors and Mistruths that Let Michael Brown's Killer off the Hook," SALON (Nov. 26, 2014 8:45 PM), http://www.salon.com/2014/11/26/everything_the_darren_wilson_grand_jury_got_wrong_the_lies_and_mistruths_that_let_michael_browns_killer_off_the_hook (Officer Wilson testified that he was almost 6'4" and approximately 205 pounds. Michael Brown was 6'4", but weighed more.).

¹⁵⁵ See Transcript of: Grand Jury (Volume 5), *supra* note 154, at 212.

¹⁵⁶ See *id.* at 216.

¹⁵⁷ See BANKS ET AL., *SUPRA* NOTE 13, at 27.

FBI's (SHR) and to the BJS.¹⁵⁸ Because the FPD assigned complete fault to Brown for his own death, the internal review categorized the incident as justifiable homicide. According to the department, Brown committed a crime when he jaywalked that resulted in a proper police stop, at which time he became confrontational.¹⁵⁹ Because Wilson is portrayed as the victim, all of his actions may be easily interpreted as proper use of police discretion. The protections afforded to police departments permit such a decision to be made with impunity because the conclusions are not subject to independent review. Therefore, officers are insulated from criminal charges and no objective assessment is ever made.

When the BJS assessed state compliance with reporting police-involved homicides, the number reported by Missouri to the FBI's SHR differed from that given to the BJS.¹⁶⁰ Specifically, Missouri reports more incidents of police-involved shootings to the FBI.¹⁶¹ The FBI's SHR questionnaire asks only a few more questions concerning police-involved homicides than the BJS.¹⁶² These discrepancies are troubling because they highlight the ease with which police departments can filter data based on the information requested or by the perceived need to withhold potentially damaging information by both the police department and the state. Discrepancies between these two data sets indicate that police departments acknowledge that not all of their police-involved homicides, or lesser uses of force, are justified.¹⁶³

Exacerbating this problem is Missouri's reliance on its police departments to report all police-involved homicides.¹⁶⁴ While direct communication with a police department may seem the best and most

¹⁵⁸ See *id.*; see also McEwen, *supra* note 26.

¹⁵⁹ Yamiche Alcindor, Marisol Bello and Aamer Madhani, "Chief: Officer noticed Brown carrying suspected stolen cigars," USA Today, <http://www.usatoday.com/story/news/usanow/2014/08/15/ferguson-missouri-police-michael-brown-shooting/14098369/>, 9:50 p.m. EDT August 15, 2014.

¹⁶⁰ See BANKS ET AL., *supra* note 13, at 25 (According to BJS, "In Missouri, half of the cases reported to either system in the ARD, but 87% of the cases reported to either system were found in the SHR.").

¹⁶¹ Reporting to the SHR the number of "justifiable homicides" is part of the overall crime statistics a police department provides. While the BJS' inquiry of the same encompasses many more categories than justifiable homicides.

¹⁶² BANKS ET AL., *supra* note 13, at 25

¹⁶³ See *id.* at 3 ("The SHR homicide also includes a small number of law enforcement-related homicides that are not classified as justifiable, but those cases cannot be identified.").

¹⁶⁴ See *id.* at 27.

direct way to glean accurate information, the process is susceptible to underreporting. Given that there is a discrepancy between Missouri's police-involved homicide numbers reported to the FBI compared to the BJS, it is questionable whether police departments, like the FPD, provide an honest accounting of what happens within their communities. Data from the BJS is used as a basis for policy decisions, and could illuminate departmental biases along racial or economic lines. Police departments may choose to disregard the very real impact on citizens within the community.¹⁶⁵ While the DCRA would demand truth in reporting from each and every department, the instinct to avoid self-incrimination will render individuals and entire departments susceptible to downplaying or justifying an incident. In short, as long as self-reporting remains an option, police departments will avoid admitting responsibility.

C. Cleveland, Ohio Shooting of Tamir E. Rice at a Playground

Similar to John Crawford, Tamir Rice, age twelve, was playing with a toy gun when a 911-call was made. The caller stated the gun was likely a toy. "He's sitting on the swing and keeps pulling it in and out of his pants, and pointing it at people. He's probably a juvenile, you know."¹⁶⁶ However, the caller's comments about the gun probably being fake were never communicated to the two police officers dispatched to the scene.¹⁶⁷ Police responded to the park next to Cudell Recreation Center in Cleveland, Ohio.¹⁶⁸ Officers Timothy Loehmann and Frank Gramback arrived at the Park and drove their patrol car very close to Rice. Video footage of the shooting showed Officer Loehmann, about ten feet

¹⁶⁵ See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

¹⁶⁶ "Boy, 12, Shot by Police Dies; Name Released," WKYC (Nov. 24, 2014), <http://www.wkyc.com/story/news/local/cleveland/2014/11/22/12-year-old-shot-at-cleveland-rec-center/19413165>.

¹⁶⁷ Wills Robinson & Lydia Warren, "Cops Who Shot 12-year-old Boy in the Stomach Watched Him Lie in Agony and Gave No First Aid before He Died Hours Later," DAILY MAIL (Nov. 30, 2014), <http://www.dailymail.co.uk/news/article-2854617/Cops-shot-12-year-old-Tamir-Rice-dead-holding-BB-gun-did-not-aid-watched-lie-agony-died-just-hours-later.html>; see also Laura Ly & Jason Hanna, *Cleveland Police's Fatal Shooting of Tamir Rice Ruled a Homicide*, CNN (Dec. 12, 2014), <http://www.cnn.com/2014/12/12/justice/cleveland-tamir-rice>.

¹⁶⁸ "See Boy, 12, Shot by Police Dies, *supra* note 166.

away from the boy, yelling at Rice through the car window.¹⁶⁹ Rice can be seen reaching into his waistband where he placed the toy gun.¹⁷⁰ Within two seconds of arrival, Officer Loehmann opened the car door and shot Rice in the abdomen.¹⁷¹ Neither officer provided any first aid to Rice as he lay dying in the park.¹⁷² Instead, they called in to report that shots were fired and waited for emergency medical service assistance.¹⁷³

Rice died at the hospital later that evening as a result of his gunshot wound.¹⁷⁴ His death, much like Brown's, shook the community and resulted in protests over what was considered police overreaction to the situation.¹⁷⁵ The community response to Rice's death resulted from the disclosure of Officer Loehmann's rookie status with the CPD. Prior to accepting a position with the CPD, Loehmann began his career in Independence, Ohio, in July 2012,¹⁷⁶ and started working with the Cleveland Police Department in March 2014.¹⁷⁷ When he initially called in the shooting, Loehmann believed Rice to be twenty-years-old.¹⁷⁸ The CPD Police Chief stated that Loehman, while "broken up" by the shooting, believed his life to be in danger when he shot Rice and was trying to protect himself.¹⁷⁹ Both officers were placed on administrative leave after giving their statements.¹⁸⁰ Prosecutors referred the case to a grand jury for determination of whether either officer would face charges

¹⁶⁹ "See Robinson & Warren, *supra* note 167.

¹⁷⁰ *Id.*

¹⁷¹ Nick Fagge & Lydia Warren, "EXCLUSIVE: 'My 12-year-old grandson was outright MURDERED by police.' Family of Black Boy with BB Gun Shot Dead for Not Putting his Hands up Breaks Silence to Slam Officers who Killed Him," DAILY MAIL (Nov. 28, 2014), <http://www.dailymail.co.uk/news/article-2853266/My-12-year-old-grandson-MURDERED-police-Family-black-boy-BB-gun-shot-dead-not-putting-hands-breaks-silence-slam-officers-killed-him.html>.

¹⁷² *Id.*

¹⁷³ *Id.* (noting that before EMS arrived, a Cleveland Police Detective and a FBI Agent performed first aid to Rice in an effort to save his life).

¹⁷⁴ "See Boy, 12, Shot by Police Dies, *supra* note 166.

¹⁷⁵ See Fagge & Warren, *supra* note 171.

¹⁷⁶ Lydia Warren, "The Moment Cleveland Cop Shot Dead a 12-Year-Old Boy in the Playground: Footage Captures Moment Officer Killed Tamir Rice after Mistaking his BB Gun for a Real Weapon," DAILY MAIL (Nov. 26, 2014), <http://www.dailymail.co.uk/news/article-2850234/Video-released-showing-police-shooting-Tamir-Rice-12-carrying-BB-gun.html>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See Robinson & Warren, *supra* note 167.

for the homicide.¹⁸¹ As in the cases of Crawford and Brown, the Cleveland Chief of Police decided the Rice shooting was an appropriate use of police powers, thereby casting doubt on whether Rice's murder will count within the number of police-involved homicides.¹⁸²

As mentioned above, Ohio's State Recording Commissioner (SRC) relies solely on the media to gather information on police-involved shootings.¹⁸³ Only those police-involved homicides that garner publicity will be included in the state statistical database. Reliance on such data collection is flawed considering that smaller towns may not have newspapers or reporters who report these stories. In these areas, it would be easy to miss a homicide because of smaller police departments and sparse media coverage.

The state's SRC is under the auspices of an independent agency that is tasked with gathering all types of data for the state.¹⁸⁴ Independent agencies typically provide more accurate reports regarding police-involved homicides compared to those housed within police departments.¹⁸⁵ However, there is still cause for concern as to the true autonomy of independent agencies and their resistance to local pressure regarding police shootings. Illinois, like Ohio, relies on media as its source for data and has an independent agency responsible for gathering data for various state and federal reports. Nonetheless, even under the auspices of that independent agency, several police-involved homicides for which the Chicago Police Department is responsible have disappeared from all statistical reports for the state.

Pedro Rios, Jr.'s death at the hands at the Chicago Police Department (CPD) is not included in any statistics reported to the Illinois

¹⁸¹ *Id.*

¹⁸² See Michael Baldwin, "Cleveland Police Chief Calvin Williams: Officer Timothy Loehman Not at Fault in Tamir Rice Shooting," NEWSNET5 CLEVELAND, (Dec. 18, 2014, 9:02 pm), <http://www.newsnet5.com/news/local-news/cleveland-metro/cpd-chief-officer-not-at-fault-in-tamir-rice-shooting> ("If you knew what that officer knew at the time and if you were placed in that situation," he said. "People say that Tamir was doing what a 12-year-old child does in the park playing and he was. But the officer was doing his job in responding to a call for service and there were things that the officer didn't know at the time.")

"Taking all that into consideration," Williams continued, "yes, I would say it's not the fault of the officer at this time and it's not the fault of Tamir."

¹⁸³ See BANKS ET AL., *supra* note 13, at 27.

¹⁸⁴ See *id.* at 29-30.

¹⁸⁵ See *id.*

SRC. According to the CPD, officers stopped Rios as he was leaving a fireworks display on July 4, 2014. Police reports state Rios had a “Dirty Harry,” a .44 Magnum gun in his waistband that he pulled on the officers.¹⁸⁶ They opened fire on Rios, shooting him twice. CPD spokesmen were quick to justify the shooting based on Rios’ actions.¹⁸⁷ However, as the police investigation commenced, several discrepancies came to light. First, Rios’ death certificate, which was public, listed the manner of death as a suicide.¹⁸⁸ The autopsy report, which was not public, lists the death as a homicide.¹⁸⁹ Second, the Independent Police Review Authority, the city’s statistical reporting agency labeled Rios’ homicide as “non-fatal.”¹⁹⁰ Even though the CPD acknowledged their officers shot and killed Rios, the Independent Police Review Authority classified the shooting as non-fatal. As such, the misclassification implied that Rios was alive, effectively erasing his death from the statistics. Rios is not the only police-involved homicide to mysteriously disappear from the CPD’s statistical accounting. Truthout, a police watchdog organization reviewed the CPD’s records for other such accounting incidents. In their evaluation, they found other anomalies. “Analyzing three years of deadly shootings by police under [CPD Police Chief] McCarthy’s leadership, Truthout [an independent news agency] found at least four fatal shootings, in addition to the fatality of Pedro Rios, Jr., missing from reports to the

¹⁸⁶ Liam Ford et al., *Two Boys, 14 and 16, Among Five People Shot by Chicago Police*, CHICAGO TRIBUNE (July 7, 2014), <http://www.chicagotribune.com/news/local/breaking/chi-two-boys-14-and-16-among-five-people-shot-by-chicago-police-20140707-story.html#page=1>.

¹⁸⁷ See *id.*; see also Benjamin Woodard, *Family of Teen Killed by Cops: Kids ‘Need Protection’ From Gangs, Violence*, DNAINFO (July 7, 2014, 5:47 PM), <http://www.dnainfo.com/chicago/20140707/rogers-park/family-of-boy-14-shot-dead-by-police-citys-children-need-protection>.

¹⁸⁸ Sarah Macaraeg, *EXCLUSIVE: As Chicago Police Kill Youth, Vast Misconduct Allegations Purged*, TRUTHOUT (Apr. 2, 2015), <http://www.truthout.org/news/item/29989-non-fatal-how-a-boy-s-deadly-shooting-by-chicago-police-uncovers-accountability-mechanisms-designed-to-fail#>.

¹⁸⁹ *Id.* (Vital statistics looks to the death certificate when pulling data for police-involved homicides. This mischaracterization is just one way to make a homicide disappear from data reported to the BJS).

¹⁹⁰ *Id.* (“Meanwhile, the Independent Police Review Authority (IPRA) – a City of Chicago agency tasked with investigating police misconduct complaints and weapon discharge notifications – categorized the fatal shooting of Rios as “non fatal” in its statistical report to the public”). The IPRA gathers statistical data to report to the State Reporting Center who then reports to the BJS.

public.”¹⁹¹ Such omissions add up and the BJS acknowledges that, in its best year of reporting, it was only able to gather seventy-two percent of the nation’s police-involved homicides.¹⁹²

A state’s statistical analysis is only as reliable and complete as the input data that are provided. The Chicago Independent Police Review Authority readily admits that the accuracy of data reported to Illinois’ SCR is directly contingent on receiving complete information from the CPD.¹⁹³ The Cleveland Police Department shares many shortcomings with the Chicago Police Department with respect to data manipulation. During the DOJ Civil Rights Division’s review of the Cleveland Police Department, the inadequate reporting of use-of-force and use-of-deadly-force was noted; this failure limited the department’s ability to properly evaluate the actions of officers involved in shootings.¹⁹⁴ Agencies that are truly autonomous could be relied on to provide neutral and objective analysis of a police officer’s actions when a person is shot. In contrast, when so called “independent” agencies deliberately misreport incidents of police-involved homicides, it erodes trust that law enforcement agencies can or should be able to evaluate their own conduct.

IV. IS THERE A BETTER WAY TO GATHER POLICE-INVOLVED HOMICIDE STATISTICS? THE EFFORTS OF NON-PROFITS TO FILL IN THE GAP AND WHY THE NUMBERS MATTER.

As police-involved homicides garner more media attention, several groups have sought a better method for collecting data. One such non-profit is Fatal Encounters, whose mission is “creating an impartial, comprehensive and searchable national database of people killed during interactions with law enforcement.”¹⁹⁵ Run by D. Brian Burghart, Fatal Encounters focuses solely on police-involved homicides.¹⁹⁶ Data compiled on Burghart’s website allows anyone to search by state, year, or specific name for the details of the incident. Through the blog posted on the website, Burghart discusses the weaknesses in the DOJ’s attempts to

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *See id.*; *see also* Macaraeg, *supra* note 188 (showing that “Chicago’s municipal government provides accuracy in reporting police violence only to the extent accuracy exists in police data”).

¹⁹⁴ *See* U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 1, at 31-37.

¹⁹⁵ Burghart, *Fatal Encounters*, *supra* note 46.

¹⁹⁶ *See id.*

collect the same information along with his own difficulties gathering accurate information from each state's police departments.¹⁹⁷ This information allows anyone to investigate trends involving race, gender, and location for these homicides. While Burghart is still gathering data from several police departments, the website already shows substantially higher numbers of police-involved homicides than BJS records. According to his website, there were 1040 homicides in 2013, 1153 in 2014, and 314 in 2015 to date.¹⁹⁸ Contrast that with BJS, which reported a yearly average of 420 police involved homicides.¹⁹⁹ Fatal Encounter's data is gathered from various groups including, news reports, individual accounts, police departments, court records, and various other sources.²⁰⁰ The website provides information for each homicide along with an overall assessment including trends for regions or types of homicide.²⁰¹

Other databases like *Deadspin*, curated by Kyle Wagner, compile data on every police-involved shooting in the country.²⁰² Gathering data on shootings is a much broader scope than Fatal Encounters because a person is not always killed. *Deadspin* includes in its data the names of officers involved in these shootings when it can be found.²⁰³ While on Facebook, "Killed By Police" records homicides in which a police officer was involved.²⁰⁴ Beginning in 2015 and 2016, respectively, *The Washington Post* and *The Guardian* each began their own public databases tracking police-involved homicides or shootings.²⁰⁵ Both websites keep a running total of the number of police-involved homicides for each year to date. Some of these databases use crowdsourcing to collect instances of police-involved homicides.²⁰⁶ Individuals can enter

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² Kyle Wagner, *We're Compiling Every Police-Involved Shooting in America. Help Us*, DEADSPIN (Aug. 20, 2014, 9:32 AM), <http://regressing.deadspin.com/were-compiling-every-police-involved-shooting-in-america-1624180387>.²⁰³

²⁰³ *Id.*

²⁰⁴ *Killed By Police*, FACEBOOK, <https://www.facebook.com/KilledByPolice> (last visited Mar. 4, 2016).

²⁰⁵ See *Investigation: Police Shootings*, *supra* note 90; *The Counted: People Killed by the Police in the United States*, *supra* note 90; Wagner, *Deadspin Police-Shooting Database Update: We're Still Going*, *supra* note 46.

²⁰⁶ *Lists, Links, and Databases*, FATAL ENCOUNTERS (Sept. 26, 2014), <http://www.fatalencounters.org/lists-links-and-databases>; see also Michael Wines &

data for an incident that can then be verified by these news blogs and non-profits; a more accurate and comprehensive picture emerges of the frequency with which police use-of-deadly-force in a given time frame. Further, agencies seeking additional information use state open records acts or the Federal Freedom of Information Act to capture unreported or low-profile homicides. Others rely on culling news reports to gather their data. Many of these databases work together to share or verify data to ensure the veracity of information. Such cross-referencing strategies provide a better picture of police activities than does the federal government.

Along with better accuracy, these blogs and websites provide anyone with a user-friendly means of evaluating data. If a person wants to know the number of police-involved shootings or homicides in a given state or city, these sites provide a means to find them. Depending on the database, a person can research an individual shooting, including such detail as the number of officers involved, when and where the shooting took place, and what state action was taken afterwards.²⁰⁷ The diversification of data collection allows for individual incidents of police-involved shootings to be immediately counted in a yearly total. News reports are examined allowing for reporters to follow-up with court records, medical examiners, or police reports to ensure accuracy. These websites share information amongst each other as a means for further data efficiency.

Prior BJS reports provided only numbers without a breakdown on individual activity.²⁰⁸ However, the DCRA may change how data is compiled and disseminated in future BJS reports. The FBI's Supplementary Homicide Report (SHR) contains even less detail about police-involved homicides than the BJS reports. Grassroots organizations currently provide better, more accurate information than that the federal government; their efforts have delivered a bona fide account of police-involved homicides and shootings in this country. There have been an average of over 1000 police-involved homicides each year for at least the past few years, according to their estimation.²⁰⁹

Sarah Cohen, *Police Killings Rise Slightly, though Increased Focus May Suggest Otherwise*, New York Times, May 1, 2015.

²⁰⁷ Wagner, *supra* note 202.

²⁰⁸ *Use of Force*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=84> (last visited Mar. 4, 2016).

²⁰⁹ See Wagner, *supra* note 202; See generally Fischer-Baum & Johri, *supra* note 47.

A. Why Do The Numbers Matter? What They Can Tell Us?

The need for an accurate picture of police-involved homicides addresses two important objectives. First, individual police departments can develop responsive internal policies and procedures to evaluate the effectiveness of their use-of-force policies. Second, local, county, and state officials can make comparisons between departments to assess what policies and training are more effective to curtail police misconduct or implement better tactics for a given community. Finally, greater transparency on how effective police training and policies are in practice can be discussing with community officials and the public. Both the FBI's SHR and the BJS's use-of-force reports were developed in part to provide guidance to departments as they evaluate their training and policies.²¹⁰ These objectives must be met if a police department is truly going to provide protection to its community and if citizens are to trust that the actions of their officers are proper.

1. *Police Departments with Flawed Internal Policy and Practices Usually have Deficiencies in their Use-of-Force Reporting.*

After the homicides of John Crawford, Michael Brown, and Tamir Rice, the DOJ Civil Rights Division evaluated the circumstances of those shootings, and each police department to determine whether a violation of civil rights occurred.²¹¹ After several months of investigation that included interviewing witnesses, people within the community, and officers in each respective department, and reviewing the policy, procedures, and official reports, the Civil Rights Division issued lengthy reports.²¹² The reports detail a cycle of failures in proper procedures and

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²¹⁰ See McEwen, *supra* note 26, at 27-29 (discussing the various law enforcement agencies and state officials who would benefit from data on police use of force).

²¹¹ *Justice Department to Review the Shooting of John Crawford, III*, FEDERAL BUREAU OF INVESTIGATION (Sept. 26, 2014), <https://www.fbi.gov/cincinnati/press-releases/2014/justice-department-to-review-the-shooting-of-john-crawford-iii>; *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri*, DEP'T OF JUSTICE (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>; *Statement Regarding Tamir Rice*, DEP'T OF JUSTICE (Dec. 28, 2015), <https://www.justice.gov/usao-ndoh/pr/statement-regarding-tamir-rice>.

²¹² See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 1, at 9-12; see also U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 161, at 2-6.

policies.²¹³ The lack of appropriate oversight by superiors within a department created an environment where abuses of police power occurred.²¹⁴ Because of these abuses of the use-of-force doctrine by officers, the documentation of such incidents was almost non-existent, preventing review of the conduct by supervisors or any independent oversight. Without supervision, officers acted further outside department guidelines without repercussions. As this cycle continued, the communities these departments served suffered constitutional violations including Fourth Amendment excessive force and unreasonable seizure violations and loss of confidence in the police.

The DOJ Civil Rights Division investigated the Cleveland Police Department (CPD) twenty years prior to the report it issued on December 4, 2014.²¹⁵ Many of the problems discussed in that prior report had not been rectified, nor had recommended changes in policy been implemented. Throughout the report, the DOJ highlighted the inability of CPD officers to understand whether force was necessary for a given

²¹³ See *supra* notes 1, 166 and 212.

²¹⁴ U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 166, at 25 (describing numerous instances of improper supervision resulting in an almost complete abdication of supervision of police officer interaction with the public).

Good supervision would correct improper arrests by an officer before they became routine. But in Ferguson, the same dynamics that lead officers to make unlawful stops and arrests cause supervisors to conduct only perfunctory review of officers' actions—when they conduct any review at all. FPD supervisors are more concerned with the number of citations and arrests officers produce than whether those citations and arrests are lawful or promote public safety. Internal communications among command staff reveal that FPD for years has failed to ensure even that officers write their reports and first-line supervisors approve them. In 2010, a senior police official complained to supervisors that every week reports go unwritten, and hundreds of reports remain unapproved. “It is time for you to hold your officers accountable,” he urged them. In 2014, the official had the same complaint, remarking on 600 reports that had not been approved over a six-month period. Another supervisor remarked that coding errors in the new records management system is set up “to hide, do away with, or just forget reports,” creating a heavy administrative burden for supervisors who discover incomplete reports months after they are created. In practice, not all arrests are given incident numbers, meaning supervisors may never know to review them. These systemic deficiencies in oversight are consistent with an approach to law enforcement in which productivity and revenue generation, rather than lawful policing, are the priority. Thus, even as commanders exhort line supervisors to more closely supervise officer activity, they perpetuate the dynamics that discourage meaningful supervision).

²¹⁵ U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 1, at 1-2.

situation.²¹⁶ This led, understandably, to abuses and numerous instances of police misconduct that caused injury or death to Cleveland's citizens. Tamir Rice's homicide by CPD Officer Loehmann was not an isolated event. Rather, it was the result of the insufficient training and inadequate understanding of proper procedures that permeated the department.²¹⁷

The DOJ Civil Rights Division report details several examples showing how the CPD failed to use even a modicum of care when using deadly force. An unarmed black man being held hostage by others was able to escape his captors and ran toward the CPD for help. Instead of assisting the man, who approached in only his underwear, the sergeant on the scene opened fire on him.²¹⁸ Luckily, none of the bullets hit the man. When asked by superiors why the sergeant shot at the victim, he "believed Anthony had a weapon because he elevated his arm and pointed his hand toward the sergeant. No other officers at the scene reported seeing Anthony point anything at the sergeant."²¹⁹ Their behavior in situations similar to this indicated a lack of training and the ability to properly assess a situation. Because of this poor insight, the DOJ noted that the officers themselves are a danger to themselves along with the community they are charged with protecting.²²⁰

²¹⁶ *Id.* at 3 (finding "Our investigation concluded that there is a reasonable cause to believe that CPD engages in a pattern or practice of using unreasonable force in violation of the Fourth Amendment. That pattern manifested in a range of ways, including:

The unnecessary and excessive use of deadly force, including shootings and head strikes with impact weapons;

The unnecessary, excessive or retaliatory use of less lethal force including tasers, chemical spray and fists;

Excessive force against persons who are mentally ill or in crisis, including in cases where the officers were called exclusively for a welfare check; and

The employment of poor and dangerous tactics that place officers in situations where avoidable force becomes inevitable and places officers and civilians at unnecessary risk).

²¹⁷ *Id.* at 13. "We determine that, as a part of the pattern or practice of excessive force, officers fire their guns in circumstances where the use of deadly force is not justified, including against unarmed or fleeing suspects who do not pose a threat of serious harm to officers or others. We also discovered incidents in which CPD officers draw their firearms and even point at suspects too readily and in circumstances in which it is inappropriate."

²¹⁸ *Id.* at 14.

²¹⁹ *Id.* The sergeant's response is dubious given the victim wore only his underwear making it nearly impossible for him to have a weapon that would not have immediately been apparent.

²²⁰ *Id.* at 25-28.

The DOJ report detailed an example of the improper use of force by CPD officers. Off-duty officers in civilian dress approached a group of men who the officer believed were engaged in a drug transaction.²²¹

The officer approached them without calling for backup and told them to leave. When “Eric” got out of one of the cars, the officer drew his handgun, pointed it at Eric, and ordered Eric to the ground, identifying himself as a CPD officer but not showing a badge . . . One of the occupants of the car later told police that he thought they were being robbed. The officer then began wrestling with Eric with his gun still drawn. During the struggle, the officer struck Eric in the head with the weapon, at which time the weapon discharged. Eric then broke free from the officer and ran away. The officer reported that he did not know whether the bullet struck Eric, but that Eric was bleeding from the face as he ran away. The extent of Eric’s injuries is unclear based on the documents CPD provided.²²²

This incident, like many others, illustrates the pervasive failures of the CPD to follow proper procedures. One, the officer should have called for assistance if he truly thought the group was selling drugs. He was clearly outnumbered from the start. Because he was out of uniform, he lacked the authority both the uniform and badge provide. Second, he drew his weapon when Eric posed no imminent threat.²²³ The officer’s actions escalated hostility rather than defusing a tense situation. He made a bad situation worse by hitting Eric with his gun—an action that is never permissible. Finally, the officer failed to write a use-of-force report properly, which violated CPD policy.²²⁴ The officer could not give an explanation of the incident after the fact, suggesting that he neither assessed nor properly controlled the situation. A supervisor would be unable to conduct the necessarily follow-up investigation to determine whether the officer acted appropriately, without complete reports including witness accounts, of what transpired. Because the officer neglected his duty, the supervisor was ineffective in his.

After delineating examples of misconduct, the DOJ explored the root causes of the CPD’s problems. The lack of supervision, failure to

²²¹ See *id.* at 18.

²²² *Id.* (report changed the name of the victim to “Eric”).

²²³ See *id.* at 18 (explaining the limitations on when an officer is permitted to use deadly force. The officer’s actions were not justified because, “where a suspect physically resists arrest but poses no imminent danger of serious physical harm to the officer or another.”).

²²⁴ See *id.* at 29-31.

investigate use-of-force by its officers, and failure to impose consequences for improper conduct led to the increased level of dysfunction. Each of these components is necessary to create a department that is transparent and trusted within a community.

Departments must implement systems to ensure that force is consistently reported and investigated thoroughly and fairly, using consistent standards and without regard to improper external factors or biases. The force investigation serves as the basis for reviewing the force incident to determine whether the officer acted both lawfully and consistently with departmental policy, as well as to determine whether the incident raises policy, training, tactical, or equipment concerns, that need to be addressed for officer and civilian safety.²²⁵

Investigations into the use of force are important for independent evaluations into police conduct. These reports support global assessments of whether policies and practices are having the intended effect.²²⁶ As initially stated in the Use-of-Force Reports,

The lack of systemic, centralized data collection in many departments inhibits the rational development of new policies, training programs, and enforcement procedures A reliable, national-level source of information about police-civilian shooting incidents is necessary so that states, cities, and police departments can review and objectively evaluate their laws, policies, and procedures affecting police use of deadly force.²²⁷

Tracking data on levels of force by a department's officers provides quantitatively justified support enforcing best practice policies, implementing police training that develops responsive rather than reactive officers, and improves community policing. The level of detail provided by the non-profit databases should be duplicated by the BJS as mandatory reporting becomes commonplace for law enforcement agencies. By doing so, better statistical models will be developed to further enhance the level of policing for law enforcement agencies.

2. *The Failure to Properly Implement Training and Investigative Guidelines Creates Situations where*

²²⁵ *Id.* at 28.

²²⁶ *Id.*; see also McEwen, *supra* note 26, at 26 (explaining the intended goal of the Use-of-Force Reports "to improve training, policies, and procedures on appropriate uses of force" within law enforcement agencies and within local and state systems).

²²⁷ See *id.* at 18.

Police are more likely to use Deadly Force.

The DOJ Civil Rights Division reports on the Cleveland Police Department and the Ferguson Police Department (FPD) explicitly identified the lack of supervision and failure to provide guidance created an environment leading to the homicides of Michael Brown and Tamir Rice. Both the CPD and FPD engaged in excessive force when dealing with suspects and civilians regardless of whether suspects were unarmed, resisted arrest, or had no involvement in any criminal activity. Officers were unable to objectively evaluate whether a threat existed resulting in a use of force beyond what the situation needed. Such conduct should alert the police hierarchy that better training on cultural sensitivity, de-escalation, and community policing would alleviate these issues.²²⁸

The problem is in no way limited to the FPD. CPD officers also used excessive force when the situation did not warrant such behavior.²²⁹ Instances of misconduct are not isolated to these two departments, but are pervasive throughout the country.²³⁰ Almost daily, newspapers report the questionable conduct of police officers exceeding their police powers, the powers granted by the Tenth Amendment for an officer to protect the public.²³¹ Each encounter has the effect of eroding public trust in the

²²⁸ U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 166, at 33 ("In November 2013, an [FPD] officer deployed a canine to bite and detain a fleeing subject even though the officer knew the suspect was unarmed. The officer deemed the subject, an African American male who was walking down the street, suspicious because he appeared to walk away when he saw the officer. The officer stopped him and frisked him, finding no weapons. The officer then ran his name for warrants. When the man heard the dispatcher say over the police radio that he had outstanding warrants – the report does not specify whether the warrants were for failing to appear in municipal court or pay owed fines, or something more serious—he ran. The officer followed him and released his dog, which bit the man on both arms. The officer's supervisor found the force justified because the officer released the dog "fearing the subject was armed," even though the officer had already determined the man was unarmed.").

²²⁹ See *supra* note 1 at 20 (discussing officers beating a suspect who had already been placed under arrest).

²³⁰ See generally *National Police Misconduct Reporting Project*, CATO INSTITUTE, <http://www.policemisconduct.net> (last visited Apr. 15, 2015)' (reporting daily occurrences of police misconduct including the excessive use of force by police officers across the country).

²³¹ See generally, Oren Yaniv, *Exclusive: Assault Indictment for NYPD Officer Seen on Video Apparently Stomping on Suspect's Head, Sources Say*, N.Y. DAILY NEWS (Feb. 2, 2015, 8:20 PM), <http://www.nydailynews.com/new-york/nyc-crime/exclusive-assault-indictment-alleged-stomping-article-1.2101121> (showing how an officer struck a suspect who was in handcuffs and surrounded by other police officers); *Settlement of \$1 Million*

authority of officers to properly protect and serve their communities.²³² Reports for both the FPD and CPD document deficiencies in training and supervision of officers. The result is officers on the street who have little practice, and possibly little motivation, in de-escalating a situation or mitigating the need for force by attempting other ways to manage an encounter. What the DOJ Civil Rights Division found regarding the lack of accountability within the police department is a systemic fault.

Force is frequently not reported. When it is, there is rarely any meaningful review. Supervisors do little to no investigation; either do not understand or choose not to follow FPD's use-of-force policy in analyzing officer conduct, rarely correct officer misconduct when they find it, and do not see patterns of abuse that are evident when viewing these incidents in the aggregate.²³³

The lack of supervision often goes hand-in-hand with inadequate training, a lethal combination identified in the instances that the use of deadly force violated departmental protocol. When supervisors fail to correct mistakes their officers make, the repercussions can include lost lives. The homicides of Akai Gurley and Tamir Rice, resulted directly from violation of training protocol by rookie officers. NYPD Officer Liang was explicitly told by his supervisor not to patrol inside the Pink Housing Project, but to maintain surveillance from outside.²³⁴ His actions violated a direct order, placing him and his partner in danger, and caused

Reached in North Augusta Police Shooting 68-Year-Old, ASSOCIATED PRESS, (Apr. 2, 2015 11:48 AM), <http://chronicle.augusta.com/news/crime-courts/2015-04-01/settlement-1-million-reached-north-augusta-police-shooting-68-year-old> (Satterwhite refused to stop for police during a traffic stop. He drove to his house where an officer, against supervisor orders, jumped out of his squad car, and shot into Satterwhite's car five times striking him four times. Satterwhite's body was then drug out of his car where he was later pronounced dead.).

²³² Frank Serpico, *The Police Are Still Out of Control: I Should Know*, POLITICO MAGAZINE (Oct. 23, 2014), http://www.politico.com/magazine/story/2014/10/the-police-are-still-out-of-control-112160_Page2.html#.VS6o2ZP57j8 (discussing his own experiences as a New York Police Department Officer who reported on police misconduct and the pervasiveness of it in today's police departments).

²³³ U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 161, at 25; *see also* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 1, at 28-36.

²³⁴ *See* Parascandola & Yaniv, *supra* note 3 (explaining Officer Liang's supervisor, Deputy Inspector Miguel Iglesias, told them not to do vertical patrols: "I want a presence on the street, in the courtyards – and if they go into the buildings they were just supposed to check out the lobby.").

the tragic and avoidable death of Akai Gurley.²³⁵ Their misconduct was further exacerbated when both officers failed to communicate with command immediately after the shooting.²³⁶ Questions abound as to how a rookie could so carelessly disregard a clear order from his commanding officer with little concern for repercussions. It seems that officers disregard orders when they know that the chance for punishment is low.

Whether the NYPD considers the actions of these officers negligent or intentional, it is clear better training and understanding of procedure is needed prior to placing an officer in the field.²³⁷ There must be a discussion within the department hierarchy that addresses the reasons officers choose to disregard direct commands with no attention to consequences. Because police are granted broad powers to protect the public and themselves, clear breeches of protocol should result in a higher level of accountability both inside and outside of the department.

Similarly, Cleveland Police Officer Loehmann drove into the park where Rice sat playing with his toy gun. The information dispatch provided was incomplete creating a domino effect of improper actions.²³⁸ The dispatcher failed to apprise Loehmann that the caller thought the gun could be a toy and the individual a juvenile.²³⁹ “When the officers raced into action, they took a shortcut that pointed their squad car straight into the park, pulling so close to Tamir that it made it difficult to take cover, or to use verbal persuasion or other tactics suggested by the department’s use-of-force policy.”²⁴⁰ Driving directly into the park took the option of

²³⁵ See *id.*

²³⁶ See J. David Goodman & Vivian Yee, *Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say*, N.Y. TIMES (Feb. 11, 2015), http://www.nytimes.com/2015/02/12/nyregion/akai-gurley-shooting-death-arraignment.html?_r=0 (explaining the indictment against Officer Liang and his hesitation to call in the shooting for fear of being fired).

²³⁷ See *supra* note 206.

²³⁸ Shaila Dewan & Richard Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> (“Because of multiple layers in Cleveland’s 911 system, crucial information from the initial call about “a guy in here with a pistol” was never relayed to the responding police officers, including the caller’s caveats that the gun was “probably fake” and that the wielder was “probably a juvenile. What the officers, Frank Garmback and his rookie partner, Tim Loehmann, did hear from a dispatcher was, “We have a Code 1,” the department’s highest level of urgency.”).

²³⁹ See *id.*

²⁴⁰ *Id.* (explaining the violations of internal policy and procedures that led to Rice’s

de-escalating the situation out of the equation. Because Officer Loehmann shot almost immediately upon arriving on the scene, he could make no judgments on the scene to see if peaceful means of resolving the problem existed.

The DOJ's report discussed numerous instances of officers failing to assess the appropriate threat level of a situation and then implement the correct course of action.²⁴¹ Putting an unprepared officer in the field invites tragedy to occur. The CPD failed to properly investigate Loehmann's background before hiring him. "Police records show that Officer Loehmann was hired without a review of his file at a previous department, where he resigned after suffering a 'dangerous loss of composure' during firearms training."²⁴² He resigned after six months from Independence Police Department, in part because of emotional instability a supervisor saw in his behavior.²⁴³ Based on the assessment of Loehmann's mental state, he should not be a police officer. The CPD hired him without knowledge of his instability. Such poor vetting by CPD resulted in Loehmann being placed inappropriately on patrol duty. The department placed him in an impoverished neighborhood likely to have high stress calls.²⁴⁴ Rice's homicide was preventable. Supervisors failed their obligation to review Officer Loehmann's background and also to provide him the necessary training to safely perform the job. Instead, he failed completely to execute the basic tenet of department protocol, to use force commensurate with the threat, and the result was Rice's death.

Officers know that if they step over the line, there are likely to be little to no consequence from anyone above them in the chain of command. Superiors are unlikely to question their reports of whether the suspect, in fact, resisted arrest or became confrontational, and therefore, no questions arise as to whether the level of force was proportionate to the threat.²⁴⁵ Little concern for consequences of using more force than

death).

²⁴¹ See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 1, at 42-44.

²⁴² Dewan & Oppel, *supra* note 238.

²⁴³ See *id.* ("One of his supervisors concluded that Officer Loehmann 'would not be able to substantially cope, or make good decisions,' during stressful situations.")

²⁴⁴ See *id.*

²⁴⁵ See *supra* note 111; see Michael Miller et al., *How a Cellphone Video Led to Murder Charges against a Cop in North Charleston, S.C.*, WASH. POST (Apr. 8, 2015) ("I think one of the concerns that immediately comes to mind is the discrepancy between the initial story, the kind of rush to judgment, the rush to say that procedures were followed and this was justified, and then when the video surfaced that quickly unraveled. That could raise

required breeds indifference to police policy and procedure. Police departments that are lax to the point of apathy about enforcing punishments for excessive force promote an atmosphere of tacit consent that culminates in homicides, including John Crawford, Michael Brown, Tamir Rice and countless others. In each of these situations, the internal police review absolved the officers of any wrongdoing, while external review found significant failures in internal supervision and evaluation of use of force and deadly force.²⁴⁶ Changes must occur within police departments to develop officers who resort to force only when truly necessary. These cases illustrate the complexities in gathering accurate statistical information. In BJS' audit of its own effectiveness, it found that states with direct law enforcement reporting had the lowest levels of data given to BJS.²⁴⁷

B. Lessons the BJS can Learn from Non-Profits: How the Death In Custody Reporting Act Can Improve Law Enforcement Policy

One goal of the BJS' Use-of-Force Reports was to provide both raw data and national statistical analysis to help shape law enforcement policy and procedure.²⁴⁸ Data on police-involved homicides and lesser uses of force could be compared by police departments and local and state officials to evaluate effective policies for broader implementation. The DCRA has the ability to generate a more efficient and comprehensive database on the number of police-involved homicides that occur yearly. For the Act to have its intended effect, the attorney general must enforce the penalty against law enforcement divisions that fail to comply with reporting. Given that, on average, 750 of the more than 17,000 police departments actually report to the BJS, strong, proactive measures are needed to ensure that each state receives data from its police

concerns about other incidents in which we've been assured that nothing was out of order and the officer acted completely properly but there were no witnesses or video documentation to dispute that.")'""

²⁴⁶ See generally *supra* note 1 at 1-9; see also Henry Gomez, *6 Cleveland Police Officers Accused of Brutality have Used Force on 39 Suspects Since 2009*, Cleveland.com, May 22, 2011, at 5:15 am, http://blog.cleveland.com/metro/2011/05/cleveland_police_officers_accu.html (discussing the number of officers who used force against unarmed civilians who were never charged).

²⁴⁷ See BANKS ET AL., *supra* note 13, at 27-28.

²⁴⁸ See McEwen, *supra* note 26.

departments.²⁴⁹ Statistics suggest that not every police department will have a police-involved homicide within a given year. The data clearly shows that large police departments have refused to disclose their data in prior use-of-force reports.²⁵⁰ The Attorney General should make these departments feel the full weight of the penalty provision of the DCRA, by reducing part of the department's federal funding. Given what has already been disclosed about the lack of training, supervision, and investigation when dubious conduct is shown, the public would support a greater degree of accountability from police departments.

Making the Attorney General the sole arbiter of who is penalized does create a conflict of interest. Akin to the problems local prosecutors have in prosecuting police officers within their jurisdiction, the DOJ often needs the assistance of state and local law enforcement agencies not only to obtain data in other arenas, but assistance in a variety of law enforcement activities, including policing, investigation, and prosecution. Constantly threatening funding in order to promote compliance may have a detrimental effect on the collaborative nature of the DOJ with state and local law enforcement. Further, if the Attorney General or presidential administration does not share the goals of the DCRA, the penalty provision may not be enforced. Further, there are issues of the ability of the Attorney General to revoke only small levels of funding so that it is not likely to sway the vast majority of these departments into compliance.

The determination of penalties for non-compliance should fall to the Civil Rights Division. Because the Civil Rights Division is tasked with investigating the conduct of various law enforcement agencies, it would be better positioned to evaluate whether a department has failed to disclose data, and the underlying reason for the failure to do so. In the cases of the Cleveland and Ferguson Police Departments, where their internal report writing, or lack thereof, made it nearly impossible to ascertain the true level of force used by officers, the Civil Rights Division would be in a better position to explain exactly why a penalty would be levied against a department. As part of their normal duties, the Civil Rights Division can file for injunctive relief against a department where a pattern or practice of misconduct occurs.²⁵¹ The additional power to levy

²⁴⁹ For those departments where no police-involved homicides occur in a calendar year, it must be explicitly stated.

²⁵⁰ See Barry & Jones, *supra* note 19.

²⁵¹ Cause of Action, 42 U.S.C. § 14141 (2014).

penalties for non-compliance with DCRA may incentivize departments to adopt and implement sound police practices and policies.

Additionally, the DCRA should be used to revise the best practices of police departments to reflect those that the DOJ initially issued in 2001.²⁵² The data collected on police-involved homicides can help shape proper conduct for departments as they overhaul their internal policies and procedures in the wake of public concern over the abuse of police powers. Data can be used to pinpoint police departments with the most problems prior to the DOJ Civil Rights Division being calling for review. The prior Use-of-Force Reports provided no policy perspectives on the data. “As a result, ‘BJS report[s] are] silent on the most basic notion of effectiveness of police policies or personnel decisions’.”²⁵³ The surveys currently sent to law enforcement for data collection do not delve deep enough into the practices of the police to fully uncover whether their actions are appropriate.²⁵⁴ Because of the methods used to gather data, the BJS does not ask questions which would obtain an accurate assessment of police policy and procedure. The BJS’s statistical analysis will indicate which departments have effective guidelines that decrease the need for higher levels of force. This could be measured by the size of the police force, the number of use-of-force incidents, and whether a specific training led to decreased numbers over time. Comparing such evaluations could assist police chiefs and municipalities, allowing them to compare themselves against equally situated departments to achieve better policing overall. The level of detail required under the DCRA is a step in the right direction if it is indeed comprehensive and provides for greater transparency on how policing is done in this county.

V. CONCLUSION

On April 12, 2015, Freddie Gray ran from the Baltimore Police and was consequently arrested.²⁵⁵ A week later, Gray died due to severe

²⁵² See *supra* note 99.

²⁵³ See Harmon, *supra* note 25, at 1140 (citing NAT’L RESEARCH COUNSEL, ENSURING THE QUALITY, CREDIBILITY, AND RELEVANCE OF U.S. JUSTICE STATISTICS 205 (Robert N. Groves & Daniel L. Cork eds., 2009)).

²⁵⁴ See McEwen, *supra* note 26, at 32-35.

²⁵⁵ “Kevin Rector, *The 45-Minute Mystery of Freddie Gray’s Death*, BALTIMORE SUN, (Apr. 25, 2015, 6:15 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-gray-ticker-20150425-story.html>.

spinal cord trauma from injuries he sustained during his arrest.²⁵⁶ The investigation by the Baltimore Police Department evaluated the conduct of the six officers involved in Gray's arrest. Baltimore State's Attorney, Marilyn Mosby, charged the six officers with various crimes including second-degree murder, manslaughter, and assault.²⁵⁷ The Department of Justice's investigation is ongoing to determine not only what happened, but whether the Baltimore Police Department systematically abuses its police powers.²⁵⁸ Gray's homicide is just the most recent to set off a wave of protests over the abuses of police power.

Gray's death will be counted amongst the hundreds that occurred last year at the hands of police officers. While his is very high profile, there are numerous deadly encounters with the police that did not result in protests or widespread media attention. The federal government must account for all deadly police encounters. These deaths at the hands of law enforcement tell a story of a community's relationship with its police department. These interactions must be evaluated. Tracking the lives taken by police is a vital part of our criminal justice system because it helps the public overall, the police themselves, and our communities determine what actions are appropriate. Without an honest and accurate measure of lives taken by police, faith in those given so much authority will dissipate further.

It is becoming clear through the investigations of the DOJ Civil Rights Division that many police departments struggle with the proper use of deadly force and with appropriate responses in tense situations. Officers are not given proper training on the methods of de-escalation and therefore reach with a level of force sometimes leading to an unnecessary loss of life. Without a better understanding of the current state of law enforcement, it is impossible to make policy, training, or personnel decisions that will have a lasting effect on improving how police departments are run. The BJS's role is to hold up a mirror in which police departments around the country can see themselves and the effects of their

²⁵⁶ See *id.*

²⁵⁷ See Lori Aratani et al., *Six Officers Charged in Death of Freddie Gray*, WASH. POST, (May 1, 2015), https://www.washingtonpost.com/local/overnight-calm-in-baltimore-as-tensions-remain-and-protests-expected/2015/05/01/00e07e7a-e4e6-11e4-8666-a1d756d0218e_story.html.

²⁵⁸ See Mike Levine, *Baltimore Police: DOJ Announces Federal Probe of Entire Department*, ABC NEWS (May 8, 2015, 12:44 PM), <http://abcnews.go.com/US/freddy-gray-doj-announces-federal-probe-entire-baltimore/story?id=30899279>.

actions. Police chiefs, local officials, and community leaders must take a honest look at what accurate data shows about the use of force, what training methods need to be altered, and how better to bridge relationships between law enforcement and the people they serve. Improvements in data collection and dissemination must be continuous and responsive to circumstances so that departments can self-evaluate and implement meaningful and lasting changes that improve their performance and relationships within the communities they serve. Policing is necessary to ensure public safety and the welfare. It starts with policy decisions that guarantee a life may only be taken in the line of duty when absolutely necessary and for no other reason.