1. **Police Reform**
   a. **HB62- POST Certification Amendments**
      Brady/Giglio obligation
      Disclosure requires possession
      POST may discipline when an agency or court finds an officer knowingly engaged in conduct involving dishonesty, deception, bias, or prejudice.

   b. **HB237 Lethal Force Amendments**
      "A peace officer is justified in using deadly force when…" to "the defense of justification applies to the use of deadly force by an officer when"
      "the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to [others] <u>an individual other than the suspect…"</u>

      Although the substantive word change on lines 46 and 50-51 may seem small—authorizing police officer use of deadly force when the suspect poses a danger "to the officer or to ~~[others]~~ **<u>an individual other than the suspect</u>**"—it reflects a significant change for the better in how officers will be trained to engage with suicidal individuals. Right now, officers are generally trained to engage the suspect and eliminate the threat, period, with little or no training in tactical repositioning or tactical withdrawal. This has long been seen as problematic when the individual is a danger only to themselves (e.g., a suicidal teen with a pocket knife), both by the public, which tends to not understand at all officer-caused deaths to suicidal individuals, and by law enforcement, whether <u>local</u> or <u>national</u>.

      One study cited by the Police Executive Research Forum in its recent publication "<u>Suicide by Cop: Protocol and Training Guide</u>"—which has since been embraced by the International Association of Chiefs of Police—indicates that approximately 10-29% of officer-involved shootings involve "suicide by cop." Training officers to engage those incidents differently, and indeed, allowing those officers the ability and approval to dis-engage or withdraw, could prove crucial to lowering those percentages.

   c. **HB264 Law Enforcement Weapons Use Amendments**
      This bill creates an intra-agency reporting requirement whenever an officer points a firearm or aims a taser at someone while the electric arc is showing. This legislation relies on two recent studies.
      i. First study of 313 officers
         Simulator: cell phone or gun
         Officers directed to have gun at "aim," "high ready," or "low ready"
         Results:
         Time difference in response between "aim" and "low ready" was 0.11 seconds. Compared response time to time gap between trigger pulls after being told to shoot a semiautomatic pistol as fast as possible (0.25 seconds)
         False positives difference between "aim and "low ready" was 34%
         "<u>Engineering Resilience" Into Split-Second Shoot/No Shoot Decisions: The Effect of Muzzle-Position</u>, Paul L. Taylor, Police Quarterly, Sept 30, 2020
      ii. Second study of 16 years of OICIs by Dallas Police Department before and after implementing a "point and report" policy.
         "officers shot a smaller proportion of citizens who were unarmed, physically assaulting, and using a motor vehicle as a weapon after the 'point and report' policy was implemented."
         "the study also showed a statistically significant difference in the proportion of cases resulting in 'threat perception failures' from pre-policy to post-policy change ($\chi 2=6.09$; $p=0.014$). Prior to the policy change, almost one-fifth (18%) of incidents involved officers discharging their firearms when they perceived a gun

but it turned out not to be one. After the implementation, just 4% of incidents involved a gun threat perception failure."

Can police shootings be reduced by requiring officers to document when they point firearms at citizens? John A Shjarback , Michael D White, and Stephen A Bishopp, *Injury Prevention* Published Online First: 04 January 2021

2. Substantive Changes

   a. **HB227 Self Defense Amendments**

   Imagine a survey of prosecutors about what changes the justice system needs. In that case, I doubt that "more evidentiary hearings before trial whenever a defendant wants" would be on the list. Nevertheless, a self-described homemaker and electrician co-sponsored HB227, Self-Defense Amendments. This bill will almost certainly complicate cases involving claims of defense of self, defense of others, or defense of property. Under this bill, if a charged defendant makes a prima facie claim of defense of self/others/property, the prosecutor must disprove that claim by clear and convincing evidence at an evidentiary hearing. Failure to do so will result in the case's dismissal with prejudice. After outcries from victim advocates, domestic violence cases and B and C misdemeanors are exempt. But in any other charged case involving a firearm or a physical confrontation, expect to see Defendants filing these motions and judges requiring a post-preliminary hearing/pretrial evidentiary bonanza.

   b. **HB260 Criminal Justice Modifications**

   HB260 fundamentally alters how to calculate, order, and pay restitution. "Restitution" is defined as "the payment of pecuniary damages to a victim." A "victim" is anyone who suffered pecuniary damages proximately caused by the defendant's criminal conduct. A "victim" would include the Utah Office for Victims of Crime ("UOVC") if they made a payment to a victim, the estate of a deceased victim, and the parents, spouses, or siblings of a victim.

   Calculating Restitution. Law enforcement agencies are required to include all information about restitution in the investigative report. Prosecutors filing charges must contact any known victim or person asserting a claim on behalf of a victim, including UOVC, and gather the actual or estimated restitution amount. At the time of a conviction, diversion agreement, or PIA, the prosecutor shall provide the court with the victims' names and the actual or estimated amount of restitution. Suppose the prosecutor does not have all the information. In that case, the prosecutor must provide the defendant with all information reasonably available to the prosecutor and any additional information as it becomes available. Adult Probation & Parole prepares Presentence Investigation Reports. Still, prosecutors are required to provide AP&P with all invoices, bills, receipts, and any other evidence of pecuniary damages, as well as victim contact information.

   Ordering Restitution. A court shall order any convicted defendant to pay restitution per either the terms of any plea agreement or for the entire amount of pecuniary damages proximately caused to each victim by the defendant's criminal conduct. That is the restitution amount (previously known as complete restitution). The court shall also impose a payment schedule (previously court-ordered restitution). The payment schedule should consider the victim's needs, the defendant's financial resources, the schedule's burden, the ability to pay in installments, the rehabilitative effect restitution, and any other relevant circumstances. Any periods of incarceration or involuntary commitment suspend payments except when expressly ordered otherwise.

   Beginning July 1, 2021, if the court does not order restitution at sentencing, the judge must schedule a restitution hearing. The only two exceptions are when the parties waive a hearing based on a stipulated amount, or the prosecution certifies the defendant owes no restitution. The court may not order restitution without a prosecutor's statement that the prosecutor has consulted with all victims, including UOVC. The outer time limit for a court to order restitution is the termination of the defendant's sentence, or, for first-degree felonies, seven years after a prison commitment.

   All post-filing diversion and PIA agreements must include an agreed-upon restitution amount (including terms of repayment) or a prosecutor's certification that the defendant does not owe restitution.

Collecting Restitution. The courts will have responsibility for receiving, processing, and distributing payments for criminal accounts receivable. The only exception is when the court sentences a defendant to prison. The Utah Office of State Debt Collection (OSDC) handles the accounts receivable then. A court may not terminate a defendant's probation before the probation period's expiration until the court enters a finding regarding whether the defendant owes restitution. Any unpaid criminal accounts receivable at the time of termination of sentence or probation shall be converted by the court into a civil account receivable and forwarded to OSDC. Courts may no longer deliver unpaid obligations to OSDC after 90 days of nonpayment if the criminal accounts receivable includes restitution.

c. **SB98 Asset Forfeiture Amendments**

The Salt Lake County District Attorney Office has handled asset forfeitures primarily through the civil process because the statutory timeline is so much shorter than the statute of limitations for criminal charges. A change to forfeiture law in SB98 may lead to more criminal forfeitures in the future. A prosecutor may convert a civil forfeiture action to a criminal forfeiture any time after the prosecutor files an information or indictment. To do so, the prosecutor must include the grounds for forfeiture in the information or indictment. So when screening a criminal case in which the law enforcement agency seized assets, check to see whether the civil forfeiture has been resolved or is still pending. If the civil forfeiture is still pending, the prosecutor can convert it to attach to the criminal case. If the case results in a conviction, the forfeited proceeds will be available for the court to order distribution to address any fines, fees, recoupment, or restitution. All remaining proceeds will be subject to distribution in compliance with the asset forfeiture statutes.

3. Bail

a. **HB47 DUI Revisions**

Bail may be denied in a DUI/DMCS resulting in death or serious bodily injury if there's clear and convincing evidence the person would constitute a substantial danger to the community if released.

"(3)(d) Victim testimony is not required at a hearing on a motion to detain if an appearance by the victim would present an undue burden upon the victim.

(e) Notwithstanding any other provisions of this section, there is a rebuttable presumption that an individual is a substantial danger to the community:

(i) as long as the individual has a blood or breath alcohol concentration of .05 grams or greater if the individual is arrested for or charged with the offense of driving under the influence and the offense resulted in death or serious bodily injury to an individual; or

(ii) if the individual has a measurable amount of controlled substance in the individual's body, the individual is arrested for or charged with the offense of driving with a measurable controlled substance in the body, and the offense resulted in death or serious bodily injury to an individual.

"Andersen was booked into the Cache County Jail after the crash. He was released hours later on bail after posting $17,245 bond, angering the victim's families, who wanted him to remain incarcerated. He could be sentenced to up to 10 years in prison."

b. **HB58 Riot Amendments**

This bill removes tumultuous conduct from behavior qualifying as a riot. It also replaces the felony enhancement for any riot that results in a bodily injury by requiring that the individual cause substantial or serious bodily injury. Under this bill, jails must detain all arrested felony rioters until they appear in front of a judge. Even then, defendants may be held without bail for the duration of the case if there's clear and convincing evidence they pose a flight risk. Any felony defendant could be held without bail under current law when there is clear and convincing evidence that the defendant is likely to flee the jurisdiction if released. The justifications for specifying felony riot for mandatory detention and no bail eligibility are anecdotes. Some claimed that most rioters are from out of state, and a revolving door at the jail leads many arrestees to return to the riot before police can get the situation under control. Both claims were unverified or discredited before the legislative session. Still, suppose you find yourself arresting and prosecuting a well-organized mob of rioters filled with out-of-state instigators. In that case, the code is ready for you.

c. HB220 Pretrial Detention Amendments

This bill will impose a third bail system on Utah's criminal justice process in less than a year with a promise of a fourth system in the future. While marketed to legislators as a "pause" or a "reset" of bail reform in anticipation of unidentified better bail reform, the bill repeals some significant provisions and imposes others. This bill repeals the statutory presumption that people be released on their recognizance if the court finds that additional conditions are unnecessary to ensure public safety and the defendant's appearance. It repeals the provision requiring courts consider a defendant's ability to pay when imposing a financial condition of release. It repeals the statutorily created motion process for prosecutors to request pretrial detention when they believe a court should deny someone release. It repeals the definition of a pretrial status order. Still, it leaves the now undefined term in several portions of the code. It repeals the requirement that a judge impose the least restrictive reasonably available means to ensure that a defendant appears in court and the public is kept safe. It repeals the statutory presumption that defendants charged with first-degree felonies pose a public safety risk. And it abolishes the list of 20 terms and conditions which a judge could consider imposing on a defendant while the case is pending and replaces it with bail, recognizance, or any other term or condition.

But this bill doesn't just repeal provisions. It creates a statutory right for defendants and prosecutors to subpoena witnesses to testify at pretrial detention hearings (although it repeals the codified process to obtain a hearing). It creates a limited but clear right for defendants to compel victims to testify at the hearings. It codifies a new provision suggesting that the court may change the terms or conditions of a defendant's release at any time, introducing further instability and unpredictability into the pretrial process. It increases the percentage of forfeited bail which goes to the prosecutor who brings the forfeiture action. And it reinstates a previously repealed prohibition on justice court judges denying bail in any case.

Practice Tip: Governor Cox committed to calling a special session to address the netherworld of ambiguity into which this bill thrusts Utah's bail system. As prosecutors consider how to handle detention questions in the coming months, there are two essential principles to keep in mind. First, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739 (1987). Second, remember the monetary bail is very rarely the answer to ensuring appearance or public safety. "The traditional money bail system has little to do with actual risk, and expecting money to effectively mitigate risk, especially risk to public safety, is historically unfounded." Report to the Utah Judicial Council on Pretrial Release and Supervision Practices (2015), quoting Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial (2014). A Utah legislative performance audit in 2017 concluded that Utah's monetary bail system is also ineffective at promoting court appearances. Even considering the limitations of monetary bail, it can be tempting to avoid arguing for detention by just imposing an exorbitant monetary bail amount. Still, appellate courts see unaffordable bail as denying bail subject to the same constitutional limitations. "Because the practical effect of excessive bail is the denial of bail, logic compels the conclusion that the harm the Eighth Amendment aims to prevent is the unnecessary deprivation of pretrial liberty." Meechaicum v. Fountain, 696 F.2d 790, 791 (10th Cir. 1983). So instead of asking for unaffordable bail, prosecutors should cut to the chase and ask for pretrial detention if they believe it's necessary. Suppose a prosecutor cannot articulate in writing why they think the court should detain a defendant. In that case, that may be an indicator the prosecutor should not request detention while the case is pending.