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POLICY REFORM IDEAS FOR LAW ENFORCEMENT USE OF DEADLY FORCE

The laws justifying deadly force in Utah are more generous to law enforcement officers than to other members of our community. That was a policy decision made years ago, when Utah lawmakers determined that Utah's use-of-force statute would permit an absolute defense and bar to prosecution of law enforcement officers whenever an officer, having used deadly force, reasonably believed the subject posed a serious threat to the officer or to any other individual.

The same standard applies in most states across the country. It is the very standard that is questioned by millions as the country mourns the tragic deaths of George Floyd, Breonna Taylor, and so many other Black and Brown men and women at the hands of law enforcement. Yet to use the legal standard itself as a basis to condemn individual officers is unfair. It is legislators, not law enforcement officers, who decide what our public policies and laws should be; the vast majority of officers nationwide comply with those laws consistently and with the honor their profession requires.

That said, the time has come to re-examine and, we hope, re-set the balance of justice in this State and in this country. Put another way, if we want different outcomes, we need different laws.

Our goal with this list of possible reforms is not to present "the answer" to deaths caused by law enforcement—as if only one answer exists—but instead to provide many alternatives and points for discussion and debate in support of a crucial and long-delayed examination by policy makers, at all levels of government, of the appropriate balance between the sworn obligation of law enforcement to protect the public, on the one hand, and the constitutional and human rights of our residents and communities, on the other hand.

We freely acknowledge the reform ideas listed below are both over-inclusive, in that adoption of one may render another unnecessary, and under-inclusive, in that many excellent reform ideas geared more generally to law enforcement and not specifically to law enforcement use of deadly force are not included. We also freely acknowledge there will be any number of important reforms we have not yet considered; no one person or institution, including ours, has a monopoly on good ideas.

We eagerly invite your input, discussion, and engagement in this effort. Differences of opinion are inevitable but not insurmountable. The conversation itself is long overdue and vital both to our very system of government and to the lives of all Utahns. This is the promise of democracy.

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POSSIBLE AMENDMENTS TO UTAH STATE LAW[1]

1. Apply the same legal standards for self-defense to law enforcement officers as are applied to non-officers.

In Utah, individuals other than law enforcement officers are justified in using deadly force "only if the individual reasonably believes that force is necessary to prevent death or serious bodily injury to the individual or another individual as a result of imminent use of unlawful force, or to prevent the commission of a forcible felony." Utah Code §76-2-402(2)(b) (emphases added). Utah's law limiting non-officers from using deadly force in most situations thus contains the following limitations, none of which apply to law enforcement officers[2]:

- Limits the crimes for which a non-officer may use deadly force for prevention;
- Requires imminent danger; and
- Does not allow non-officers to claim self-defense when that person provoked the use of force or was the aggressor.

Applying these same limitations to law enforcement officers would simplify the analysis and permit equality of enforcement between officers and non-officers.

2. Require that law enforcement use the least lethal force that is reasonably available and effective, and make the defense of justification unavailable when an officer fails to do so.

The Utah Legislature could amend Utah Code §76-2-404[3] (attached as Appendix A) to allow screening prosecutors and courts to consider whether less lethal force was reasonably available and would have been effective when determining whether the justification defense is available (either as a total defense to liability or to support a lesser charge).

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[1] Because this Office is the only prosecution agency in Utah that routinely publishes its investigations and findings regarding officers' use of deadly force, we cannot speak to how other prosecution offices make their decisions or what concerns they may have. This list is instead based on the nearly 100 officer-involved critical incidents we have investigated and screened between 2010 and the present.

[2] Some of these restrictions are also discussed below as free-standing propositions for reformative amendments to the separate section governing officer use of force.

[3] This Office was the impetus, drafter, and stakeholder lead on the last major revision to this section of code, see HB406, Investigation Protocols for Peace Officer Use of Force (2019 Session).

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3. Require that law enforcement attempt de-escalation or non-escalation whenever reasonably possible and make the defense of justification unavailable when an officer fails to do so.

Many law enforcement uses of deadly force involve mentally ill suspects who are threatening harm to themselves, are alone in a location without reasonable possibility of escape, or are threatening harm to third parties with unlikely or unavailable means (e.g., threats of cutting with a butter knife, threats from a significant distance, threats of serious harm with no means to effect it). In those cases, both common sense and human empathy dictate that de-escalation and self-restraint should be used whenever possible.

The Utah Legislature could amend Utah Code §76-2-404 to allow prosecutors and courts to consider an officer's failure to attempt de-escalation, or the officer's own escalation of the situation, when determining whether the statutory defense of justification is available (either as a total defense to liability or to support a lesser charge).

4. Amend the use-of-force statute to define when deadly force is "necessary."

Currently, the defense of justification is available when "necessary" to prevent death or serious bodily injury or to prevent escape in certain circumstances. Yet what is "necessary" is not separately defined. The Utah Legislature could amend Utah Code §76-2-404 to add a definition for "necessary," such as[4]:

> "Necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person. The totality of the circumstances means all facts known to the peace officer at the time and includes the conduct of the subject and the tactical conduct and decisions of the officer leading up to the use of deadly force.

5. Make the defense of justification unavailable when an officer's own criminal negligence created the necessity for use of deadly force.

Currently, the defense of justification is available even if an officer's own criminal negligence leads to the situation, whether by identifying the wrong person as a suspect, by unnecessarily

[4] Similar language was contained in a recent bill passed in California. It was amended prior to passage but retained the basic concept.

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escalating an encounter, or otherwise. The Utah Legislature could amend Utah Code §76-2-404 to preclude the justification defense when an officer was criminally negligent,[5] such as:

> It is not a defense if a person was killed due to the criminally negligent conduct of the officer, including situations in which the victim is a person other than the person that the officer was seeking to arrest, retain in custody, or defend against, or if the necessity for the use of deadly force was created by the officer's criminal negligence.

Adding this language to Utah's code would hold officers who use deadly force accountable when they, through their own criminally negligent conduct, create the situation necessitating deadly force.

6. Make the defense of justification unavailable when the suspect does not pose "imminent" danger to an officer or a third-party.

Currently, an officer's use of deadly force is legally justified when "the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person." Utah Code §76-2-404(1)(c). By contrast, federal law, 10 CFR section 1047.7, and some state laws require that a threat be "imminent" before deadly force may be used.

The Utah Legislature could amend Utah Code §76-2-404 to preclude the justification defense when the threat was not "imminent," defining "imminent" as follows:

> A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

Colorado recently used the word "imminent" to amend not just its general use of force, but also its "fleeing felon" law. In Utah, by contrast, when and how officers may use deadly force to stop an individual who is running away requires only that an officer "has probable cause to

[5] Utah defines criminal negligence as: "when a person should be aware of a substantial and unjustifiable risk that certain circumstances exist relating to the conduct. The nature and extent of the risk must be of such a magnitude that failing to perceive it is a gross deviation from what an ordinary person would perceive in that situation." Utah Code §76-2-103(4).

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believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed." Utah Code §76-2-404(1)(b)(ii).

7. Prohibit the use of deadly force when individuals pose a danger only to themselves.

Some state statutes, such as Pennsylvania, 18 Pa. Stat. and Cons. Stat. Ann. § 508, explicitly prohibit officers from using deadly force to prevent a person from self-inflicting death or serious bodily injury unless the person also poses a substantial risk of causing death or serious bodily injury to others in the process. Federal case law also supports the idea that qualified immunity should not apply where deadly force is used to prevent suicide.

The Utah Legislature could amend Utah Code §76-2-404 to preclude application of the defense of justification where the individual subjected to deadly force was a danger only to him- or herself at the time deadly force was used.

8. Limit the suspected criminal offenses for which the use of deadly force is justified.

Under current Utah law, an officer is legally justified in using deadly force when someone is trying to escape or prevent an arrest and the officer "has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury." Utah Code §76-2-404(1)(b)(i) (emphases added). This language covers a broad range of suspected offenses, ranging from aggravated murder to threats with intent to prevent occupation of a building or public place.

Limiting the defense of justification to a much narrower category of offenses could result in the use of deadly force only when the underlying felony is one involving extreme violence. The Utah Legislature could accomplish this through a list of specific offenses for which deadly force may be authorized,[6] or through either of the following simple changes to existing law that would permit the use of deadly force only where:

- there is "probable cause to believe that the suspect has committed a felony offense involving the infliction ~~or threatened infliction~~ of death or serious bodily injury"; or
- there is "probable cause to believe that the suspect has committed a felony offense involving the infliction ~~or threatened infliction~~ of death ~~or serious bodily injury~~."

[6] An example of limited offenses is already available in Utah Code section 76-2-402(1), where "forcible felonies" are defined for purposes of self-defense for non-officers. Though this definition may be too narrow for police officers, it illustrates that meaningful distinctions for "justification" can be, and have been, made based on the offense at issue.

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9. Codify "imperfect self-defense" for an officer's use of deadly force.

Nationwide, some of the most tragic, inexcusable deaths at the hands of law enforcement involve situations where a person was misidentified as a suspect or someone unarmed was shot under a mistaken belief the person was holding a gun. Utah's existing murder statute, which applies when non-officers' actions result in death of another, codifies a concept of "imperfect self-defense," which imposes liability but decreases the penalty when "the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances." Utah Code 76-5-203(4)(a). So, for example, application of this defense would reduce an offense from murder to manslaughter.

The Utah Legislature could codify a similar imperfect self-defense clause for when an officer uses deadly force when the officer had a subjective reasonable belief of danger or that the legal requirements for justification have been met, but the existing circumstances objectively contradict that belief.

10. Create sentinel event review procedures in state law, including evidentiary protections for investigative work product.

Outside, independent investigations of "sentinel events" have long been the norm in the trucking and airline industries, in hospitals, and elsewhere.[7] Utah has recognized the need for them, as well, for deaths occurring in correctional facilities through its requirement for, and evidentiary protection of,[8] morbidity and mortality ("M&M") reviews.

Extending that concept to law enforcement agencies would allow them to request and receive candid and independent outside assessments—without threat that their admission of mistake

[7] A "sentinel event" is defined by American healthcare accreditation organization The Joint Commission, for example, as any unanticipated event in a healthcare setting resulting in death or serious physical or psychological injury to a patient or patients, not related to the natural course of the patient's illness. The concept was drawn from trucking, aviation, nuclear power, and other hazardous industries—all of which have reduced their error rates to very low levels based, in part, on sentinel event reviews.

[8] Importantly, for this to be effective, the reviews themselves, as well as any written or oral work product generated by investigators, will need to be tightly protected from disclosure whether through GRAMA or discovery in civil cases. These protections would not extend to the underlying facts or documents relevant to the event that pre-exist the sentinel event review or are not generated in the course of the review, nor could the protection be used to delay otherwise legally required production of underlying facts or documents.

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or imperfection will be used against them later—when serious injury or death occurs based on what appears to be systemic failures or individual/collective mistake. The resulting findings and recommendations would encourage agencies to identify and correct problematic systems, behaviors, or trainings going forward.[9]

11. Eliminate agency obligations for attorney fee reimbursement for excessive force claims if the officer was criminally charged, and the officer was fired based on the use of force, even if the officer is later acquitted or the charges dropped.

Under current Utah law, agencies are required to defend and indemnify ("D&I") employees for actions taken in the course of their duties, within the scope of their duties, or under "color of law." Even if officers are criminally charged—which is not covered by existing D&I obligations—the agency must reimburse the officer for her or his attorney fees if the charges are dropped or not sustained for almost any reason, including failures of evidence. Not only does this cost the taxpayers substantial amounts, even when most would agree the conduct at issue is outrageous, but it can also inadvertently (and almost certainly unconsciously) incentivize a "circling of the wagons" in order to avoid monetary liability.

In the situation where an officer is criminally charged for the use of force, and the agency determines the officer should be fired for the use of force, sound public policy dictates that the agency should not be liable for attorney fees incurred by the officer in the criminal case.[10] The Utah Legislature may also wish to re-examine the extent to which agencies' D&I obligations might be limited when an officer's use of force is found to be "unjustified" under the statutory definition or in violation of agency policy.[11]

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[9] A comprehensive discussion of the value of sentinel event reviews in law enforcement can be found in John Holloway & Ben Grunwald, *Applying Sentinel Event Reviews to Policing* (2019), available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3102&context=faculty_scholarship (last visited July 11, 2020).

[10] While an officer should, of course, be entitled to all due process protections at every stage of the employment matter, it is a different question entirely whether an officer may demand reimbursement of attorney fees, even when lawfully fired, in a separate criminal case to which the officer's employing agency is not a party. (This is also true for any public employee terminated for misconduct.) Representative Brammer's HB450, Attorney Fee Revisions (2020 Session), which was initially drafted by this Office, would have accomplished that policy change. Its language could easily be revived for the 2021 Session.

[11] The State of Colorado recently enacted legislation (discussed, as well, in item 16 below) requiring that an agency's D&I obligations be limited by 5% or $25,000 (whichever is less) of the settlement or judgement in a state law civil rights lawsuit, and that the officer should be personally liable for that

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12. Authorize prosecutors to convene grand juries as an investigative tool when an officer uses deadly force.

The power of a grand jury to subpoena witnesses to testify under oath can serve as an important investigative tool to find out what happened in cases where witnesses are hesitant to publicly share what they observed. Sometimes, and with no intentional fault on the part of any officer or agency, an officer's use of deadly force may devolve into a loyalty test for officers who might be hesitant to openly share relevant information that makes a fellow officer look bad. The privacy afforded to grand jury proceedings can protect testifying officers' privacy while also giving the grand jury a more complete picture of what happened when a person was subjected to deadly force by police officers.

Under current Utah law, prosecutors must ask the judicial branch for permission to convene a grand jury, with essentially no parameters for the judicial branch's to decision to decline or grant the request. Allowing prosecutors (at their own agency's expense) to convene a grand jury when an officer uses deadly force would provide an important investigatory tool for these cases.[12] This Office is working with Representative Nelson on grand jury legislation for the 2021 General Session.

13. Mandate that law enforcement agencies complete all internal investigations of alleged officer misconduct and require that sustained allegations are presumptively "public" under the Utah Governmental Records Access and Management Act.

In 2020, Representative Perry sponsored HB43, Peace Officer Standards and Training, which requires law enforcement agencies to report to POST any allegations and any investigation results regarding officers who may have violated POST standards but who retired or resigned before the investigation concluded. That can only be truly effective, however, if impartial, fair investigations are both undertaken and concluded,[13] and subject to disclosure so that

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amount, whenever the employing agency determines "the officer did not act upon a good faith and reasonable belief that the action was lawful."

[12] Every few years the Utah Legislature considers legislation surrounding the issue of the judicial branch refusing to convene grand juries in Utah (e.g., HB233 (2019), HB451 (2015), and SB143 (2010)). This Office was involved in each of those prior legislative efforts.

[13] To the extent the Utah Legislature is concerned that an agency may be unable to fairly and impartially investigate one of its own officers, Representative Hall's 2020 bill, HB353, Internal Investigation Amendments, as revised (in a non-public version) in discussions with this Office and the Attorney General's Office, could provide a useful template for reform.

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potential future employers and the public are aware of possible "bad apples" when they apply to new agencies.

The Utah Legislature could require agencies to complete all investigations of misconduct, regardless of whether the officer leaves employment before the investigation is complete, and it could amend GRAMA to mandate transparency of those findings for the benefit of both the public and future employers.

14. Create a searchable statewide Brady/Giglio database for officers with sustained charges of excessive force, dishonesty, discrimination, or misconduct toward others based on any protected class, and make the underlying disciplinary records presumptively "public" under the Utah Governmental Records Access and Management Act.

Although prosecutors have a duty to disclose impeachment evidence against material witnesses when the evidence has a reasonable probability of affecting the verdict or sentence of a defendant, there is no single database of police misconduct that prosecutors can review to discover and share impeachment information with defense attorneys. Instead, prosecution agencies are left to gather what information they can independently. This becomes even more problematic when an officer leaves one agency to avoid a misconduct investigation and ends up committing similar misconduct in a different jurisdiction.

The Utah Legislature could create a searchable statewide database to help ensure that problematic officers do not simply move from one agency to another (similar to, but going further than, item 13 above), while simultaneously protecting the due process rights of defendants across the state. Such a database and associated revisions to GRAMA to make underlying disciplinary records presumptively public would also further the dual goals of promoting transparency and increasing trust in law enforcement.

15. Codify the duty to intervene when a law enforcement officer fails to intervene or report when faced with another officer's use of excessive force.

The United States Supreme Court has held that qualified immunity does not extend to officers who fail to intervene when a fellow officer uses excessive force or commits any other constitutional violation. The Utah Legislature could codify this requirement for intervention as follows, for example (from Colorado):

> A peace officer shall intervene to prevent or stop another peace officer from using physical force that exceeds the degree of force permitted, if any, in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control, without regard for chain of command.

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The Utah Legislature could also, if it wishes, criminalize a failure of one officer to intervene or to report the misconduct of another officer[14]; the same Colorado statute quoted above makes failure to intervene the Colorado equivalent of a Class A misdemeanor.

16. Limit or eliminate qualified immunity for excessive force cases based on state law.

The idea of limiting qualified immunity for law enforcement officers has recently swept the nation; Colorado, for one, recently did just that in a sweeping bill including numerous reforms to law enforcement practices in that state. The Utah Legislature could similarly decide to eliminate or limit qualified immunity in state courts.[15]

17. Always require an oral warning prior to the use of deadly force and consider mandating the warning be unambiguous or further defined.

Current Utah law requires an oral warning prior to the use of deadly force only "if feasible." Utah Code §76-2-404(2). The Utah Legislature could amend current law to always require an oral warning before using deadly force, regardless of "feasibility" (which is itself undefined and amorphous in practice). The statute could also require the oral warning be unambiguous (e.g., not involve multiple officers giving contradictory instructions—such as, "don't move," at the same time as, "on your knees" or "drop it"), or could further define what a warning must include to be sufficient. Colorado, for example, recently passed legislation requiring:

> A peace officer shall identify himself or herself as a peace officer and give a clear verbal warning of his or her intent to use firearms or other deadly physical force, with sufficient time for the warning to be observed, unless to do so would unduly place peace officers at risk of injury, [or] would create a risk of death or injury to other persons.

[14] Polling released recently by Libertas Institute indicates 79% of Utahns polled "strongly agree" that "officers who witness another officer's misconduct should be required to file a report about that officer"; another 15% "somewhat agree," while only 3% "somewhat" or "strongly disagree."

[15] Because most excessive force claims are currently brought in federal court, under federal law, it is unclear what eliminating qualified immunity on a state level would mean as a practical matter.

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18. Empower municipalities to implement civilian review boards as they see fit.

In 2019, the Utah State Legislature passed HB 415, which limited the power of municipalities to delegate authority over police departments and chiefs. This was in direct response to concerns about civilian review boards.

While not every city has the interest or capacity to implement civilian review boards, some cities in Utah have constituents demanding more civilian oversight over police departments in hopes of decreasing law enforcement officers' use of deadly force.[16]

The Utah Legislature could repeal HB 415, or otherwise amend Utah Code Title 10 Chapter 3, to empower local elected officials to make policy choices that work for their communities.

POSSIBLE CHANGES TO AGENCY POLICIES AND TRAINING REQUIREMENTS

19. Improve and mandate extensive officer training on the value and effective uses of less than lethal force.

Where split-second decisions are concerned, as there often are when law enforcement is protecting the public, there is significant evidence that muscle memory plays a crucial part—perhaps the crucial part—in how officers respond.[17] This means an officer's practical, physical training, both for certification and for years thereafter, likely plays a far greater role than, for example, classroom instruction.[18]

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[16] Recent polling indicates 75% of Utahns either "strongly" (49%) or "somewhat" (26%) agree "more agencies should utilize independent civilian review boards to investigate complaints against officers."

[17] E.g., Rhea Mahbubani, *Officers already get training to deal with biases they may not know they have, but there's no evidence it actually works*, Insider (June 16, 2020), available at: https://www.insider.com/police-defensive-deescalation-techniques-implicit-bias-training-2020-6 (last visited July 12, 2020); Betsy Mason, *Curbing implicit bias: what works and what doesn't*, Knowable Magazine (June 4, 2020), available at: https://www.knowablemagazine.org/article/mind/2020/how-to-curb-implicit-bias (last visited June 4, 2020); Tom James, *Can Cops Unlearn Their Unconscious Biases?*, The Atlantic (December 23, 2017), available at: https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996/ (last visited July 12, 2020); Kirsten Weir, Policing in black & white, American Psychological Association (December 2016), available at https://www.apa.org/monitor/2016/12/cover-policing.html (last visited July 12, 2020).

[18] E.g., Mahbubani, supra n.17 (quoting Lorenzo Boyd, the director of the Center for Advanced Policing at the University of New Haven, "'When police are in a stressful situation and the adrenaline is going, they rely on muscle memory, they rely on what they train on the most,' he added. 'If you're

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Focusing officers' practical, physical training specifically and extensively on the value and effective uses of less lethal uses of force will, hopefully, lead to long-term changes in officers' split-second reactions to potentially lethal interactions on the job. This should be required both for initial certification and for renewed certification, as well as regular on-the-job training. The requirement of least-lethal-use-of-force should be added to agency policies, if not already, and those policies should be consistently taught and enforced through officer discipline when needed.

20. Improve and mandate extensive officer training on the value and effective uses of de-escalation techniques.

Much like officer training on use of force, officer training on de-escalation techniques should involve extensive use of physical, role-play scenarios rather than just classroom instruction that, again, has proven less effective for long-term change.[19] This should be required both for initial certification and for renewed certification, as well as regular on-the-job training. The requirement for officers to attempt de-escalation should be added to agency policies, if not already, and those policies should be consistently taught and enforced through officer discipline when needed.

21. Develop policies addressing use of force when the suspect is fleeing and once the threat posed by a suspect is sufficiently abated.

Several years ago, this Office determined it was likely unreasonable for officers to shoot at a vehicle driving away from officers given the high risk of serious injury if the vehicle were to spin out of control into on-coming traffic, pedestrians, or other people or property. Although our determination was initially not well received by local law enforcement agencies, eventually at least some adopted our Office's analysis into their own internal policies for use of force.[20]

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spending 300 hours on police tactics and eight hours on de-escalation, if there's a conflict, you're going to go back to what you learned, and many of those are aggressive tactics.'").

[19] *Id.* ("The lack of attention to de-escalation, non-escalation, and verbal persuasion tactics leaves officers inadequately equipped to effectively diffuse a tense situation," [] said [Jacinta Gau, associate professor of criminal justice at the University of Central Florida.] "They might not know or not know very well how to handle a suspect who is getting agitated and how to calm that person down and prevent a use-of-force situation from ever happening.").

[20] So, for example, Salt Lake City Police Department's policy manual now states:

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Current Utah law does not explicitly address what officers must consider before using deadly force to stop a fleeing suspect who may be armed but who appears intent on escape rather than imminent violence toward officers or third parties. Similarly, Utah law does not address when the use of deadly force, even if initially justified, must cease—e.g., once the threat is abated. We concede that at least the latter scenario may seem too nuanced for codification at the state level; because each encounter falling within these categories will be highly fact-specific, they may not lend themselves easily to state-level regulation or possible criminal liability. We do believe, however, that, even if the Utah Legislature determines not to address these issues now, agencies could and should work to develop policies to address them.

22. Mandate meaningful, evidence-based implicit bias training, and implement tools for discretion-elimination where possible, for supervisory and human resources personnel in all law enforcement agencies.

There is currently no evidence that implicit bias training has an impact on officers' day-to-day interactions with residents.[21] Meaningful implicit bias training may make a difference at the system or agency level, however, as supervisory and human resources personnel come to better

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300.5.1 SHOOTING AT A MOVING VEHICLE
Discharging a firearm at a moving vehicle is generally prohibited. An officer should only discharge a firearm at a moving vehicle or its occupants when:
(a) The officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle, and the vehicle is being used in a manner to immediately threaten the officer or another person with death or serious bodily injury; or
(b) A person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle.

[21] Weir, supra n.17 ("In two studies [of implicit bias training] with more than 6,300 participants, all of the interventions reduced implicit prejudice in the short term. But none of those changes lasted more than a couple of days following the intervention—and in some cases, the effects vanished within a few hours."); Mason, supra n.17 (quoting psychologist Anthony Greenwald, co-author of an implicit bias study published in 2020 by the Annual Review of Psychology, "I'm at the moment very skeptical about most of what's offered under the label of implicit bias training, because the methods being used have not been tested scientifically to indicate that they are effective. And they're using it without trying to assess whether the training they do is achieving the desired results. [. . .] I see most implicit bias training as window dressing that looks good both internally to an organization and externally . . . But it can be deployed without actually achieving anything, which makes it in fact counterproductive. After 10 years of doing this stuff and nobody reporting data, I think the logical conclusion is that if it was working, we would have heard about it." (hyperlink in original).)

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understand systemic biases and limitations, as well as the best and worst qualities for effective law enforcement officers. The same has proven true for discretion-elimination policies and training.[22]

Adopting tools for discretion-elimination and mandating meaningful, evidence-based implicit bias training for supervisory and human resources employees furthers the short-term goal of educating agency leaders on systemic racism and other biases in policing and a long-term goal of more effective and proactively anti-racist recruiting, training, and, where necessary, disciplining officers.

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The use of deadly force by law enforcement has been under scrutiny for years. As the last two months of protests both here and across the country demonstrate, application of the current legal standards for officers' use of force has produced outcomes that are questioned, reasonably, by many in our communities. When expectations of the community collide so strongly with what the law requires, a re-examination of what the law is, and a fulsome discussion of where it might go, is not just timely but crucial.

Just as we in the criminal justice system owe it to our communities and stakeholders to seek justice under the law, policymakers owe it to their constituents to think carefully about what those laws should be.

The time is now.

Respectfully,

Sim Gill, Salt Lake County District Attorney

[22] Mason, supra n.11 (discussing results of one discretion-elimination study, i.e., blind audition experiments at several United States symphony orchestras; blind auditions resulted in a 30% increase in the number of women hired between the 1970s and 1990s).

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APPENDIX A

CURRENT UTAH LAW REGARDING LAW ENFORCEMENT USE OF DEADLY FORCE

(76-2-404 Peace Officer's Use of Deadly Force)

(1) A peace officer, or any person acting by the officer's command in providing aid and assistance, is justified in using deadly force when:

(a) the officer is acting in obedience to and in accordance with the judgment of a competent court in executing a penalty of death under Subsection 77-18-5.5(2), (3), or (4);

(b) effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and

(i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or

(ii) the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed; or

(c) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

(2) If feasible, a verbal warning should be given by the officer prior to any use of deadly force under Subsection (1)(b) or (1)(c).

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