

**Unit Goal: Legal authorities pertaining to peace officers' use of force.**

**28.1. Define and analyze the following terms relating to use of force.**

Definitions:

- Deadly Force - PC 9.01(3)
  - “Deadly Force” - is defined as force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.
- Force - Black’s Law Dictionary
  - Definition of the NOUN “force”:
    - Strength or energy brought to bear, cause of motion or change, active power; moral or mental strength; capacity to persuade or convince.
    - Violence, compulsion, or constraint exerted upon person or thing.
    - The quality of conveying impressions intensely in writing or speech.
  - Definition of the VERB “force”:
    - To do violence to.
    - To compel by physical, moral, or intellectual means.
    - To make or cause through natural or logical necessity.
    - To achieve or win by strength in struggle or violence.
    - An aggressive act committed by any person which does not amount to assault and is necessary to accomplish an objective.
    - Synonyms - compel, coerce, constrain, oblige.
- Reasonable Force - Black’s Law Dictionary
  - “Reasonable or Necessary Force” - is the amount of lawful physical coercion sufficient to achieve a legitimate law enforcement objective and is objectively reasonable under the facts, circumstances and alternatives confronting an officer at the time action are taken.

**28.2. Explain the legal authorities for the use of force.**

Legal authorities for use of force:

- Justification as a Defense - PC 9.02
- Confinement as Justifiable Force - PC 9.03
- Threats as Justifiable Force - PC 9.04
- Reckless Injury of Innocent Third Person - PC 9.05
- Civil Remedies Unaffected - PC 9.06
- Arrest and Search – PC 9.51

Estate of Ceballos v Bridgwater, Porras & Mull-

According to the Fifth Circuit Court of Appeals, this case on deadly force is clear; “an officer cannot use deadly force without an immediate threat to himself or others.” (Penal Code 9.51)

Milstead v Kibler, 243 F.3d 157 (4<sup>th</sup> Cir. 2001)-

“...police officers performing a discretionary function enjoy an immunity that shields them from liability for civil damages unless (1) the officers’ conduct violates a federal statutory or constitutional right, and (2) the right was clearly established at the time of the conduct, such that (3) an objectively reasonable officer would have understood that the conduct violated that right. “

Okonkwo v Fernandez, 2003 WL 22227858 (N.D. Tex. 2003)-

“Government officials who perform discretionary functions are entitled to the defense of qualified immunity, which shields them from suit as well as liability for civil damages, if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known. A defendant official must affirmatively plead the defense of qualified immunity.”

Graham v. Connor, 490 U.S. 386 (1989)-

“Graham, a diabetic having an insulin reaction, was mistakenly believed to be intoxicated by Charlotte, North Carolina police officers.

Though Graham asked officers to check his wallet for a diabetic decal he carried, and a friend attempted to get permission to give Graham orange juice, Charlotte police refused and during a struggle, four officers threw him headfirst into a police car.

Graham sustained serious injuries resulting in his suit alleging violation of his constitutional rights. The lower courts directed a finding for the police officers under the 14<sup>th</sup> Amendment’s absence of malice analysis-that they did not intend to harm Graham. The U.S. Supreme Court reversed the lower court’s ruling directing that the inquiry must, under the 4<sup>th</sup> Amendment, be whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them at the time, without regard to their underlying intent or motivation. “

Related cases:

- Brower v Inyo County, 489 U.S. 593 (1989)
- Saucier v Katz, 121 S. Ct. 2151 (2001)
- Osabutey v. Welch, 857 F.2d. 220 (1988)
- Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987)
- Harlow v. Fitzgerald, 457 U.S. 800 (1982)

**Instructor Note:** Refer to departmental policy.

### **28.3. Evaluate and explain the justification(s) for use of force.**

Justification Generally:

- Public Duty – PC 9.21
- Necessity – PC 9.22

**Lecture Scenario:** Demonstrate to class the legal authorities for the use of force.

- Officer confronts a suspect. As the officer approaches from approximately 30 feet, the suspect pulls a small caliber pistol and begins firing at the officer. The officer unholsters his

weapon, drops to the ground and instantly notices a group of individual bystanders some distance behind the suspect.

- Divide class into groups. Designate spokesperson and arrive at majority answer and report findings to class.
- What force may the officer justifiably use?
- By what authority?
- What may be the consequences of his injuring a third party?
- By what authority?

**Instructor Note:** Refer to departmental policy.

### Lecture Scenarios

- An officer stops a subject for a felony theft. The subject was identified by the loss prevention officer at a local store. The officer stops the suspect, who was on foot. They appear nervous. Suspect has both hands in their pockets. The suspect refuses to show their hands and becomes argumentative. The suspect then pulls out a handgun. The officer notices that civilians are in the backdrop of the suspect.
  - Student must be able to identify what level of force they can use.
  - Student will identify who, what, where and why and how it applies to communications such as report writing and proper articulation of facts.
- What legal authority does the use of force fall under?
  - Student will identify the justification for the force used and by what authority.
  - Student will recognize that they are accountable if they injure innocent third person.
  - Student will identify the civil remedies and by what authority.

**Instructor Note:** Refer to departmental policy.

### Protection of Persons:

- Self-Defense – PC 9.31
- Deadly Force in Defense of Person – PC 9.32
- Defense of Third Person – PC 9.33
- Protection of Life or Health – PC 9.34

### Protection of Property:

- Protection of One's Own Property - PC 9.41
- Deadly Force to Protect Property - PC 9.42
- Protection of Third Person's Property - PC 9.43
- Use of Device to Protect Property - PC 9.44

### Special Relationships:

- Parent-child - PC 9.61
- Educator-student - PC 9.62
- Guardian-incompetent - PC 9.63

### Custody and Escape:

- Custody - PC 38.01(1)

- Escape - PC 38.01(2)
- Prevention of Escape from Custody - PC 9.52
- Maintaining Security in Correctional Facility - PC 9.53

Affirmative Defense – CPRC 83.001 CIVIL IMMUNITY.

A defendant who uses force or deadly force that is justified under Chapter 9, Penal Code, is immune from civil liability for personal injury or death that results from the defendant's use of force or deadly force, as applicable.

Tennessee v. Garner, 471 U.S. 1 (1985):

Absent circumstances, such as exhibition of weapons or the commission of a violent felony suggesting that the suspect is likely to pose a threat of death or injury if not immediately apprehended, the 4<sup>th</sup> Amendment prohibits seizure of the suspect by the use of deadly force.

**Comprehensive Scenario:**

- An officer observed a vehicle weaving on the roadway crossing from lane to lane and causing an obvious hazard. The officer attempts to conduct a traffic stop by initiating the patrol unit's lights and audible siren. The suspect does not immediately pull over and continues to drive for another mile. The suspect pulls into the parking lot of a local convenient store. The officer walks up to the suspect. The suspect was surprised by the officer as he was not aware of the officer's presence. The officer observed the suspect to have slurred speech and smell of unknown alcoholic beverage. The suspect appears to be not responding to officer's commands.
  - Student will identify what laws are violated and when is it appropriate to conduct a traffic stop.
  - Student will describe the standards of determining if a suspect is intoxicated.
  - Student will make an assessment based on any possible medical history the suspect may have and what the appropriate authority they have to detain the suspect under CCP.

**28.4. Discuss the concepts regarding use of force.**

Cases relevant to Texas:

- Fraire v. City of Arlington, 957 F.2d 1268 (1992) (Use of Force)
- Graham v. Connor, 490 U. S. 386 (1989) (Use of Force)
- Brother v. Klevenhagen, 28 F. 3d 452 (5<sup>th</sup> Cir. 1994) (Use of Force)
- Jackson v. City of Schertz, Texas, 2007 WL 4205709 (W.D.Tex. 2007) (Taser)
- City of Waco v. Williams, 209 S.W.3d 216 (Tex.App-Waco, 2006, pet. den.) (Taser)
- Hathaway v. Bazany, 2007 WL 3200413 (5<sup>th</sup> Cir. 2007) (shooting at a moving car)

Other relevant Circuit Court cases:

- Baskin v. Smith, 50 Fed Appx. 731 (6<sup>th</sup> Cir. 2002) (Handcuffing)
- Martinez v. New Mexico Dept. of Public Safety, 47 Fed. Appx. 513 (10<sup>th</sup> Cir. 2002) (Pepper Spray)

- Jennings v. Jones, 2007 WL 2339195 (1<sup>st</sup> Cir. 2007) (Pepper Spray)
- Robinson v. Solano County, 278 F.3d 1007 (9th Cir. 2002) (Seizure at Gunpoint)
- Kuha v. City of Minnetonka, 328 F. 3d 427 (8th Cir. 2003) (Use of Canine as Force)
- Robinette v. Barnes, 854 F. 2d 909 (6th Cir. 1988) (Use of Canine as Force)
- Cruz v. Laramie, 239 F.3d 1183 (10th Cir. 2001) (Hog-Tie/Hobble Tie)

**Instructor Note:** Discuss the different Circuit Courts and explain that Texas is in the 5<sup>th</sup> Circuit.

### **28.5. Describe psychological aspects of the use of force.**

Law enforcement role in arrest:

- In physical arrest, the police role is essentially defensive.
- The word defensive is defined as “serving to protect,” “devoted to resisting or preventing aggression or attack.”
- It is not aggression when an officer takes the initiative to confront a law violator - the officer’s act is not one of hostility. It is one designed to defend and protect the community from criminality.
- An officer’s problems may grow out of the use of force employed against a combative but unarmed law violator when reasonable alternatives to use of force are not employed.
- An officer needs a range of decision-making tools that permit use of exactly the degree of control that constitutes reasonable force.

Concept of Control:

- Control is that degree of influence the officer must exert over the violator to take them safely into custody.
- Control is a “two-way street.” An officer must be in complete self-control to be able to control a violator.
- Self-control alone will be one of the greatest assets in dealing with a law violator.
- Self-control results from the development of confidence in one’s skills.
- Self-control is achieved through training and practice both on the job and off.
- The objective of using control is to elicit cooperation from the violator.

Emotions, Attitudes, Prejudices:

- Arrest can be both an emotional and physical problem for officer and arrestee.
- Emotional response or reaction is directly involved in an encounter between an officer and a violator.
- Attitudes or prejudices can lead to conflict.
- An officer has the potential to reduce the problems and danger associated with physical arrest if they are firm but fair with the violator.
- Emotional responses are often the direct result of uncertainty.
- Uncertainty is likely to result in compensating behavior.
- Compensating behavior may take one of the following forms: hesitation, verbal abuse, bluff, or unnecessary force.

### **28.6. Identify the deciding factors for use of force when affecting an arrest.**

**Lecture Scenario:** Discuss the following scenario with students:

- An officer attempts to place a subject into custody for public intoxication. During placing the subject into custody, the subject becomes verbally abusive by insulting the officer's smaller stature. The officer tightens the cuffs to the point where the suspect lets the officer know that they feel pain. The officer refuses to listen and a struggle ensues.
  - Student will identify what the ramifications are of letting one's emotions affect the performance of their duties.
  - Student will identify what their job entails as a professional and how their actions and decisions will affect their department's reputation as a whole.
  - Student will identify the ethical role they play as a law enforcement professional.

**Use of Force Factors:**

- In every arrest situation the officer(s) must be firm and be prepared to protect themselves and others.
- Force must be controlled and used wisely with a purpose.
- Only the amount of force reasonably necessary to make the arrest should be used.
- An officer should consider the following factors when assessing the level of force that is reasonable under the circumstances:
  - Is the suspect submitting peacefully or resisting?
  - Is the suspect armed?
  - What is the nature of the crime?
  - Does the suspect have a previous arrest record or history showing a pattern of violence?
  - How many suspects are involved?
  - How much support from other officers is available?
  - What is the risk that the force chosen might cause injury to a bystander or other officers?

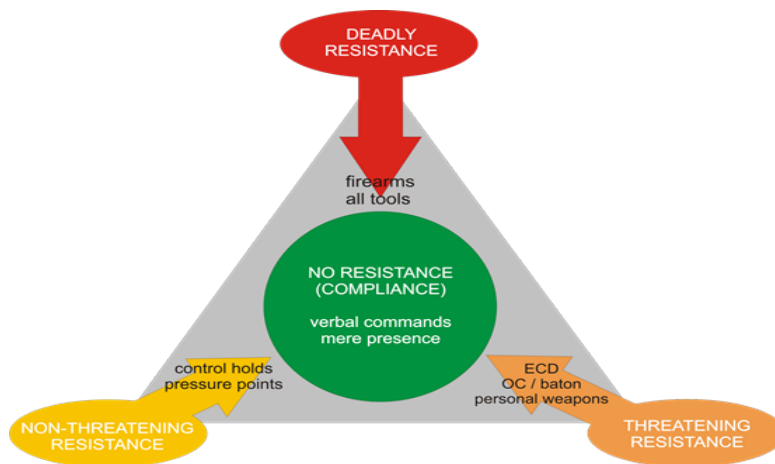
**28.7. Identify moral considerations and forces affecting an officer's decision to use deadly force.**

- Moral considerations include statutory and case law and whether deadly force is justifiable under the circumstances presented. Can deadly force be avoided without risk of injury or death to the officer or others?
- Administrative or departmental policy should be at least as restrictive as the law. In many cases it will be stricter than legal restrictions.
- Informal organizational norms, which reflect law enforcement's informal culture, may or may not be stricter than legal or agency restrictions.
- Individual choice or conscience reflects the inner controls of the officer.

**Unit Goal: Various force options or alternatives available to peace officers.**

**28.8. List and discuss force options available to peace officers.**

**Instructor Note:** Instructors are encouraged to begin using a use of force model similar to the Dynamic Resistance-Response Model (DRM).



#### Force Options:

- Professional presence - entering into a scene
- Verbal communications - words, language
- Weaponless strategies - takedowns, come-alongs, etc.
- Weapon strategies
  - Chemical/electrical means
  - Stun gun
  - Baton or impact weapon
- Deadly force

#### 28.9. Identify the principal considerations in applying a use of force.

##### Principal considerations:

- Ineffective control results when the level of force is less than the subject's level of resistance.
- Excessive control results when the level of force is unreasonably greater than the subject's level of resistance potentially causing preventable injury.
- The force used should be no more than a reasonable officer would use under the total circumstances of the situation.
- Follow departmental policy and the law.

##### Practical Scenario: Demonstrate to class the legal authorities for the use of force.

- Role play
- Select one student suspect and one student officer.
- Instruct suspect:
  - The suspect in a felony theft case.
  - The suspect will have their hands in their pockets during the interview.
  - The suspect should be evasive with responses to officer's questions, particularly those regarding whereabouts during the time the offense was committed.

- If the officer asks the suspect to remove their hands from their pockets, the suspect should become argumentative.
  - Suspect should ask officer “why?” “Do you think I have a gun?”
- Instruct officer:
  - Receive a call to investigate felony theft suspect. Only information available is that the suspect has their hands in their pockets.
  - Investigate.
- Divide class into groups of equal number. Group designates a spokesperson and arrives at a majority answer and reports findings to class.
  - Can an officer demand a suspect to “take their hands out of their pockets?”
  - What can you do if they don’t?
  - What amount of force can be used to remove their hands from their pockets, if any?
  - Why can force be used, if any?
  - By what authority?
  - Does an order to “take your hands out of your pockets” create a risk that the officer might be injured if the suspect has a weapon in their pocket?
  - What alternatives are available to ordering a person to take their hands out of their pockets and what risks do such alternatives pose?
  - Place group responses on board and discuss differences. Elaborate on when and what force may be used.

**Instructor Note:** Refer to departmental policy.

**28.10. Discuss the impact of an officer’s professional presence.**

- Each scene has its own dynamic long before an officer arrives. Events change because of certain kinds of presences.
- This same thing occurs when officers enter the scene -- things change. This is due to the officers’ presence.
- Officers must be able to think of the scene as it was before they entered it and what it becomes while they are present. People act differently under different circumstances, and officers’ entrances into a scene create new sets of circumstances. This means that officers must remain alert to the dynamics of the people present and whether elements within a group may be in the posture of assisting the officer or hostile to the performance of duty.

**Example:** You are watching children at play and want to capture the moment on film. When entering the scene with a camera everything changes. The children become self-conscious and pose instead of being themselves. Whatever pictures are taken is different than they would have been had a hidden camera been used.

**28.11. Identify the various aspects of communication strategies used when dealing with the public.**



- Communication is an important professional skill.
- 97% of an officer's duties involve verbal skills.
- Only about 3% of contacts require physical force.

Elements of communication:

- Words, touch, body movement, message
- Content - actual message.
- Voice - verbal personality (how it is said).
- Non-verbal - raised eyebrows, posture, etc.

Perception of a message:

- 7% of the time a message is received due to content.
- 33% of the time a message is received due to voice.
- 60% of the time a message is received due to non-verbal (body language).

This means that approximately 93% of the time a message is received and interpreted based on how something is said rather than what is said. Improper listening is not paying attention to what is said, such as merely waiting for the opportunity to speak as soon as someone finishes talking. Communication is a professional skill, not just luck. Peace officers must communicate under uniquely stressful conditions:

- To people who do not want to talk or listen
- To emotionally charged individuals.
- In dangerous circumstances
- While being watched by others
- To people who dislike and/or mistrust peace officers
- Most people respond positively to reasonable requests from a peace officer.
- Frustrated people often resist.
- Upset people are often incapable of acting reasonably and will not respond to appeals of reason.
- Commands or orders are usually met with resistance.
- An officer must trust tactics which redirect behavior.
- Maintain disinterest (objectivity, free from bias, impartial, it does not mean uninterested, unconcerned, or mechanical)
- Learn to allow people to express frustration.
- Listen
- Do not take things personally.

**28.12. Identify elements that an officer must recognize and control in every encounter.**

Problem:

- Analyze and identify the problem.
- Enables an officer to plan an approach.
- Problems often change as confrontation progresses.

Audience:

- Everyone encountered is part of the audience.
- How is the audience reacting? Examples: receptive, hostile, critical, etc.

- Read audience and adapt tactics appropriately.
- If person has a friend in the audience, you may try to enlist their help - ask the friend to help reason with and persuade the person to follow the officer's orders.

Constraints:

- Determine if there are any obstacles to effective communication and try to eliminate them if possible.
- Examples: time of day, weather, location, external noise, officer's own mood, person's values and beliefs, or the person is deaf, mentally ill, mentally disabled, intoxicated, etc.

Ethical Presence:

- An expression of self-control.
- Use words to state purpose, not to express personal feelings.
- Maintain professional attitude.
- Anything perceived as hasty, irrational, or unfair, makes an officer seem unethical.

**Source:** Thompson, George J., & Stroud, Michael J. (1984). Verbal judo: redirecting behavior with words. Albuquerque, New Mexico: The Verbal Judo Institute.

**28.13. Identify some helpful "tools" used in redirecting someone's behavior using verbal persuasion.**

Listen:

- Differentiate the real problem from the symptoms of the problem.
- Determine priorities you must respond to
- Determine context of the event

Empathize:

- Understand the other person's state of mind.
- See through the eyes of the other person.

Ask:

- Use questions to gain control by causing others to report to you.
- Questions to direct attention away from the problem
- Buys time.
- Demonstrates concern.

Paraphrase:

- Repeat what you have learned in your own words.
- Forces other person to stop talking and listen
- Helps to ensure that the officer understands situation.

Summarize:

- Allows the officer to conclude the situation.
- Officer provides the bottom line.
- State the resolution clearly.

**Types of verbal appeals**

Ethical appeal:

- Based upon position as a professional officer.
- Assures other person.
- Persuade others of your desire for a positive outcome
- This appeal is useful when dealing with people who are upset and highly emotional.

Rational appeal:

- Based on use of reasoning
- Appeal to common sense, good judgment, or community standards
- Show that solution is reasonable and most likely to produce results.
- This appeal is valuable when dealing with people having a strong sense of right and wrong.

Practical appeal:

- Based on an urgent need to change a particular circumstance
- Ignores long-term consequences.
- It is a short-term solution.
- Adapt yourself and persuade the other person that you are like them.
- Based on the beliefs and value system of the person

Personal appeal:

- Based on addressing person's needs and desires
- Set aside own personal values.
- This type of appeal works well with headstrong people who insist on getting their own way.

Words are no longer working:

- When a person seriously threatens bodily harm to an officer or the general public, an officer's control is compromised.
  - Sometimes a person combines aggressive words and actions.
  - Words and gestures alone are not an attack.
  - Sometimes a person displays conflicting signs - words suggest one thing and actions suggest another.
  - A good principle to remember is when words and actions disagree, trust actions.
  - Actions can also be misleading, but whenever words and actions disagree, be alert and ready to use force.
- When a suspect begins walking or running away, or when a person escapes from custody.
- When an officer is forced to repeat the same words or ideas over and over, the officer should conclude that the person is not being persuaded.
- When repeated refusal by a person to comply with a reasonable request constitutes a need for more than words.
- When a person is unreceptive to alternatives after repeated appeals

**Comprehensive Scenario:** Identify the authority an officer has to stop someone for a traffic violation (Related chapters include Traffic; Arrest, Search and Seizure; Communications; Patrol Procedures)

An officer stops a vehicle for an improper lane change traffic violation. The officer approaches the vehicle and meets with the driver. The officer observes that a second individual is in the vehicle. As the officer meets with the driver, he observes them to be nervous and sweating. The temperature outside is in the low 40's. The suspect does not answer but just stares straight ahead. The second subject is upset and feels that they are being harassed by law enforcement. The subject never gives the officer their information and refuses to sign the citation. (Refer to your department's policy regarding refusal to sign a summons to appear). The student will:

- Identify probable cause and identify the traffic code regarding lane changes.
- Articulate how they will approach this situation and establish communication with the suspect.
- Articulate the decision they chose to resolve this incident and under what authority gives them the ability to do so.

**Source:** Thompson, George J., & Stroud, Michael J. (1984). Verbal judo: redirecting behavior with words. Albuquerque, New Mexico: The Verbal Judo Institute.

#### **28.14. Identify communication strategies used when dealing with violence and assault calls.**

**Instructor Note:** Officers will identify and discuss scenarios focusing on circumstances unique to stressful crime scene(s) in domestic settings, where use of force decisions require skills of good judgement and discretion.

- Recent Violence Against Women (VAWA) legislation has helped to provide peace officers with more detailed information when assessing and responding to domestic violence and assault calls.
- While a clear majority of officer skills in judgement and discretion involve verbal skill to de-escalate a situation, research has shown that domestic violence calls are the most dangerous for responding officers.
- Most calls could be categorized as "he said/she said." One person's saying this person hit them: the other person's saying the opposite. You can't assume that just because there's a female, she's the victim, although an overwhelming majority of victims are women. You're trying to see: Do the dots connect? Do the stories line up? The goal is to protect the victim and hold the right person accountable. It's a tough thing to weave your way through, while maintaining not only your safety but that of the victim.

**Breakdown of 91 Line of Duty Deaths by Dispatched Call Types**

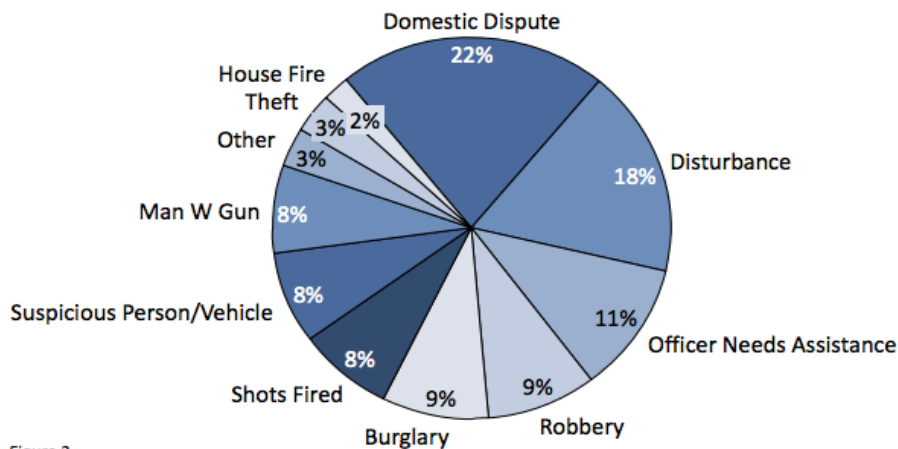


Figure 2

\*Courtesy of National Law Enforcement Officers Memorial Fund Study, 2016. - Mass

**Practical/Lecture Scenario:** Use the following scenarios with students to role-play and discuss per course objective strategies and techniques.

**Scenario #1:** Instructions for students in roleplay:

- The civilians in scenario are very wary of the police.
- They are not to reveal the information they know unless the officers are persistent and patient.

Jane Smith and David Jones are at the mall with their friends. Jane's friend Sally calls the police from the restroom and states that when they leave the mall, David is going to physically assault Jane in the parking lot. David has threatened her in front of several of their friends in the food court. Both Jane and David are 16. When police arrive at the scene, they find:

- Jane Smith is in the food court crying.
- David Jones is said to be somewhere in the mall with his friends.
- Sally, who called the police, is found by police sitting on the bathroom floor crying.
- Steve and Jack, David's friends, know that David has abused and threatened Jane but will not voluntarily reveal what they know.

**Scenario #2:** Instructions for students in roleplay:

- Mr. Johnson, who is associated with the police department through a charity he runs, knows that he needs to deflect and resolve this with minimal police intrusion.
- Mr. and Mrs. Johnson have two children who are 5 and 8 years old.
- Mr. Johnson tells the officers that no one called the police and that the call must have been a mistake. He states that everything is under control and the officers don't need to stay, as he knows that it's a busy time of night for them.
- The officers do not hear or see either of the children.

- Mrs. Johnson appears visibly upset and nervous. She also has visible signs of bruising on her arms and neck. When approached directly, Mrs. Johnson avoids eye contact with the officers and is reluctant to answer any of the officers' questions.

It's approximately 8:30pm. A 911 call is received to respond to a possible domestic violence incident. A man has called anonymously saying that he is hearing loud crashing and screaming coming from a house on his block. The man provides the house number, and your unit responds. You and your partner approach the door you hear a male voice yelling "be quiet, the police are here." You've determined the residence to belong to a Mr. and Mrs. Johnson. This is the first time anyone has been dispatched to this house.

If the officers enter the residence, they will find that the TV in the living room has been smashed, that chairs have been overturned in the kitchen and that a hole in the wall in the hallway appears to have been made by a fist. The officers would observe that the children's toys are scattered about. Officers would also observe that a small handgun safe is visible and on the living room couch. It's unclear if there is a weapon in it or if it has been removed.

#### **28.15. Recognize criteria relating to a professional peace officer's use of force.**

A professional peace officer employs theoretical knowledge under constantly changing and unpredictable circumstances. Criteria for assessing whether a person is acting professionally are:

- Ability to communicate effectively with those persons outside of the profession.
- Ability to accurately assess the situation and define the problem.
- Ability to know when to move from words to force.
  - There is no clear-cut simple answer
  - As a professional, an officer's use of force is:
    - Selective (the officer knows what kind of force and how much to use)
    - Appropriate (used in a controlled and purposeful manner)
- Ability to return to words and verbal strategies once the threat to an officer's safety (or other's safety) is over.
- Possess the knowledge to recognize a person's actions that indicates they are under the influence of some substance or having a mental or physical disorder.
- Ability to evaluate personal performance.
- Capability of describing and characterizing performance to superiors
  - An officer must be consciously competent to know the reasons for their actions in any given situation.

**Source:** Thompson, George J., & Stroud, Michael J. (1984). Verbal judo: redirecting behavior with words. Albuquerque, New Mexico: The Verbal Judo Institute.

#### **28.16. Identify typical procedures that are followed after an officer-involved shooting.**

Departmental Policy

- Each department has its own procedures for investigating officer-involved shootings. Most agencies have extensive investigative procedures in such circumstances.

**Instructor Note:** Emphasize that each department has its own procedures and that the officer should follow those procedures. Instructors should discuss evidentiary procedures common to use of force incidents and the involved officer's role.

Applicable cases and codes:

- Garrity v New Jersey, 385 U.S. 493 (1967) ruled that evidence gathered from an employee under threat of dismissal was not admissible in a criminal trial
- Texas Government Code, Chapter 614, Sections 614.021, 614.022, and 614.023
- Guthery v Taylor, 112 SW3d 715 (Tex. App.-Houston [14<sup>th</sup> District] 2003, no pet.)
- City of Seagoville v. Lytle, 227 S.W.3d 401 (Tex. App.-Dallas 2007, no pet.)
- For civil service cities see Chapter 143 Local Government Code.
- Sheriff's Civil Service see Chapter 158 Local Government Code

Internal Affairs Investigations:

Each department has its own policy and procedures concerning internal affairs investigations. Officers should be aware of these practices. Where there is the possibility of criminal charges being filed many departments will conduct separate investigations because of Garrity v. New Jersey. During an administrative investigation, officers may be compelled to answer questions, participate in a line-up, or take a polygraph examination. If the officer is warned of the possible consequences of non-cooperation, they may be disciplined. This information is not admissible in a criminal trial under Garrity v New Jersey. If any answer sought by the investigator (or any information derived from such answer) is intended for use in a criminal trial, the officer must be given the Miranda warning contained in Article 15.11 and 38.22 of the CCP. Texas statutes provide guidelines for investigations.

**Unit Goal: Factors basic to unreasonable force and possible consequences when excessive force is used.**

**28.17. Identify the possible consequences that may arise from improper or excessive use of force.**

- Federal Laws
- Conspiracy against rights of citizens
  - Conspiracy against rights of citizens-Title 18 Section 241 United States Code Annotated
- Deprivation of rights under color of law
  - Violations of the Civil Rights of Person in Custody - Section 39.04 Vernon's Annotated Texas Penal Code
- Deprivation of rights under color of law
  - Title 18 Section 242 United States Code Annotated
- Federal civil rights complaints are investigated by the FBI:
  - How many complaints a year and how many are investigated and presented to a grand jury (**Instructor Note:** Find current statistics.)
  - They look for clearly offensive, deliberate, and willful misconduct.
  - If an agency is taking swift decisive action to punish misconduct, it may defer to that administrative process.
  - No good faith defense for criminal violations

**28.18. Define Crew Resource Management (CRM).**

Definition: A management model which provides every crew member with an active voice during situations where human error can have a devastating effect.

**Instructor Note:** There are case studies used to help define and explain CRM. An instructor may reference the 1977 Tenerife Crash Case Study and/or the United Flight 173 Portland Oregon Case Study to help explain the CRM concept.

**Source:**

Federal Aviation Authority. (2012, July 1). *Tenefire Accident (1977)*. Retrieved from YouTube:

<https://www.youtube.com/watch?v=vqrfNVwp5n8>

Smithsonian Channel. (n.d.). Disaster at Tenerife. *Air Disasters*, 10(3). Retrieved from

[https://www.youtube.com/watch?v=36XzwJqo\\_tg](https://www.youtube.com/watch?v=36XzwJqo_tg)

American Abilities Television Network. (2015, Feb. 6). *Air Crash Investigation United Flight 232 'Impossible Landing'*. Retrieved from YouTube:

<https://www.youtube.com/watch?v=S4tFVfG0t8w&t=11s>

**28.19. Describe the benefits of using CRM.**

The Crew Resource Management concept provides a concrete practical tool for real world situations.

- Supports Duty to Intervene (**Instructor Note:** refer to SB 69, CCP Article 2.1387)
  - Addressing the concerns of all team members will likely slow a scene down and allow rational thought to overcome emotions.
  - Police Officers are human and are subject to the same emotions as other humans.
    - An officer may have personal problems that lower their tolerance for the chaos they encounter as part of their job.
    - Frustration when a subject is being un-cooperative.
      - Frustration from one scene may follow the officer to the next scene.
      - An officer may have a preconceived notion regarding how a subject at a scene will act based on previous experiences with that person, whether it be recent or more longstanding.
    - Anger when witnessing horrific acts, or the outcome of such acts, committed by a suspect.
      - Child abuse
      - Spousal abuse
      - Robbery
      - Etc.
  - Oftentimes it is the team that helps keep those emotions in check.
    - A crewmember may recognize a partner's emotions.



- Speaking louder
  - Heavy breathing
  - Red Faced
  - Clinching fist
  - Threatening word choices
  - Etc.
- Using Crew Resource Management (CRM) tools, a crewmember (partner, co-worker) can intercede before their partner's emotions become regrettable actions.
- Fosters communication between:
  - Crew Members
  - Outside Resources
- Maintains accountability for all personnel involved.
- Alleviates emotional responses by involving all parties.
  - People support that which they help to create.
  - When people have a voice in the matter, they become part of the team, and as such, their emotional desire for the team's success begins to outweigh their emotional desire for individual success.

**28.20. Discuss how the CRM model applies to law enforcement.**

**Instructor Note:** refer to SB 69, CCP Article 2.1387 and Article 2.33

George Floyd, Derek Chauvin, Thomas Lane, and LTC Roger Stinson

- On June 15, 2020, Houston Police Chief Art Acevedo, forwarded an e-mail to the entire department that was originally drafted by Roger Stinson LTC USA Retired
  - LTC Stinson was a US Army Rotor Wing pilot for many years and was extensively trained in CRM.
  - He noted a CRM issue between Officers Derek Chauvin and Thomas Lane during the George Floyd incident.
    - Lane was in his first week as a full-time patrol officer after completing the Field Training Program the previous week.
    - Chauvin was Lane's Field Training Officer, and as such, had a direct role in Lane's career until the week prior to this incident (Alfonseca, 2021)
  - Body camera footage shows the following conversation between Lane and Chauvin while Chauvin had his knee on the back of Floyd's neck: (CNN, 2020)

**Source:** CNN. (2020, August 4). Leaked Bodycam Video Shows New Details of George Floyd's Arrest. Retrieved 11 04, 2022, from <https://www.youtube.com/watch?v=ESGXmWh0z7c>

- Lane: Should we roll him on his side?
- Chauvin: No, he's staying put where we got him.
- Lane: I just worry about the excited delirium or whatever.
- Chauvin: That is why we have the ambulance coming.

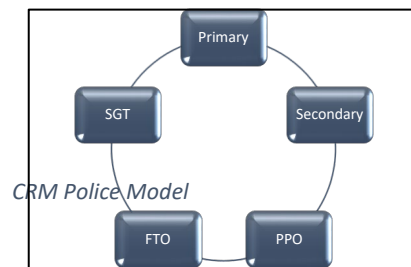
- Lane: OK
- LTC Stinson recognized what he called “Excessive Professional Courtesy” being displayed in the conversation between Chauvin and Lane.
  - Lane was uncomfortable with the actions taking place and attempted to address his concerns with Chauvin, the senior officer and, in all practical senses, the trainer on the scene.
  - Chauvin did not recognize Lane’s concerns due to his apparent authority as the senior officer and trainer.
  - Lane then provided Chauvin with the “Excessive Professional Courtesy” by simply saying “OK,” even though Chauvin’s answer did not completely resolve his concern.
- In his e-mail, LTC Stinson discussed the dangers of Excessive Professional Courtesy by saying: “It is when a junior pilot or crew member demonstrates excessive professional courtesy or excessive deference to a more senior pilot and trust in that senior crew-member’s experience and judgment. It’s this “Excessive Professional Courtesy” that can lead to a lack of preventative action, leading to accidents causing serious injuries or deaths. That is why aircrews address eliminating “Excessive Professional Courtesy” during every crew-brief prior to flight.” – LTC Retired Stinson

#### Applying CRM on a Police Scene

- Traditionally the primary officer on a scene has ultimate authority.
  - It was oftentimes heard “My Scene, My Decisions.”
  - Many supervisors would even extend that Excessive Professional Courtesy to the primary officer.
  - In other cases, if a supervisor arrived on the scene, they may take ultimate authority and all other officers would then extend the Excessive Professional Courtesy to the supervisor.
  - The issue, even historically speaking, is that every officer on a scene is responsible for what happened on that scene, i.e.:
    - Three officers and a Sergeant on scene at the Rodney King incident were charged (Mydans, 1992)
    - Not only were NYPD Officers Pantaleo and D’Amico held accountable for Eric Garner’s 2014 death (Marzulli, Parascandola, & Tracy, 2014), but two of the four EMT’s who arrived were also suspended because of the incident (Annese, 2014)
    - Even after all the controversy, and eventual acquittals or dropped charges, all six officers involved in the Freddy Gray incident were held administratively accountable (Fenton, 2017)
- House Bill 3712 (87R): TCOLE Published Model Policies
  - Duty to Intervene and Duty to Report Excessive Force:
    - The agency has a written directive that requires every employee, regardless of rank, to have a duty and responsibility to intervene with any other employee’s use of force that clearly exceeds agency directives and

training regarding what is objectively reasonable under the circumstances. The agency's written directive must also clearly state that all employees, regardless of rank, have a duty and responsibility to prevent the use of excessive force, and to report, in writing, any use of excessive force to a supervisor or the agency's governing body, as applicable. This directive will be included in the annual Use of Force training. This directive applies to both sworn and non-sworn employees.

- Employees shall promptly report those observations to a supervisor. If not done initially, the report to a supervisor shall be done in writing as well. The obligation to report remains in place even if the employee is successful in intervening in the use of force. Any failure to intervene and/or failure to report improper use of force shall be grounds for discipline, up to and including termination.
- Prohibition Against Chokeholds:
  - The agency has a written directive that prohibits the use of a choke hold, carotid artery hold, or similar neck restraint, unless the officer reasonably believes the restraint is necessary to prevent serious bodily injury to or the death of the peace officer or another person. Any officer using such force will cease immediately upon control of the subject (normally when the person has been handcuffed or no longer actively resisting) and begin the application of an appropriate medical response if needed. Officers are required to report these incidents through the process outlined in the agency's use of force reporting policy.
- Duty to Render Aid:
  - The agency has a written directive that requires an officer who encounters an injured person while discharging the officer's official duties to immediately and as necessary request emergency medical services personnel and, while waiting for emergency medical services personnel to arrive, provide first aid or treatment to the person to the extent of the officer's skill and training. The officer is not required to request emergency medical services or provide first aid or treatment if making the request or providing the treatment would expose the officer or another person to a risk of bodily injury, or if the officer is injured and physically unable to make the request or provide the treatment.
- The CRM Model for Police Scenes
  - Utilizing CRM between Officers on a scene
    - Every responder on a police scene must acknowledge the concerns of all other responders on a scene
      - Primary and Secondary (Beat Mates)
      - Partners (Two Man Units)
      - Veterans and Beginners
      - Field Trainer and Probationary Police Officer (Trainee)



- Supervisor and Subordinates
- While a senior, more experienced, officer or supervisor may need to proceed with their plan of action regardless of the junior officer's objections, they must ensure:
  - Time constraints limit their ability to explain the junior or subordinate officer's error in judgement, i.e., the situation requires an immediate action to save lives or property.
  - They can articulate (even if at a later time) the specific errors in the junior officer's objections – Utilize the training opportunity.
    - When the scene allows, explain to the junior officer why their thought or concern is errored.
    - If there is no time for explanation on scene, ensure to explain the error after the fact.
    - Thus, a senior person must first truly listen to the junior person's concerns, mentally contemplate the idea, and clearly articulate why the junior person's concern or suggestion is invalid in that situation.
    - If the senior person is unable to do this, then the junior person likely has a valid point that must be further investigated.
  - To overrule the idea and not the person, a senior officer must not disregard a junior officer's objection just because they are less experienced or subordinate.
- Consider the knowledge junior officers may have.
  - Just out of training academy where they obtained the latest training in:
    - Penal Code and other Legal Codes
    - De-Escalation Techniques
    - Crisis Intervention Training
    - Firearms
    - Driving
    - Defensive Tactics
  - May have come from other fields prior to law enforcement.
    - Law degree
    - Corporate negotiations
    - Sales
    - Military
      - Combat experience
      - Medical training
    - Other Advanced Degrees
      - Psychology
      - Sociology
      - Chemistry

- Prison or jail guards
- Utilizing CRM between police and non-police resources
  - Other responders
    - Fire
    - Medical Personnel
      - EMT's
      - Hospital Staff
    - Legal Professionals
      - DA's Office
      - Municipal Legal Departments
    - Public Works
      - Water
      - Electric
    - Property Owners
    - Wrecker Drivers
  - Civilian subjects of the event
    - Complainants
    - Witnesses
    - Suspects
  - Bystanders or anyone who may offer some assistance.
    - Medical assistance
    - De-Escalation assistance
      - A bystander may know the excited person and how to calm them down.
      - They may share a common culture with the excited person and thus able to help calm them down.
- Background information or other scene intelligence

**Source:**

Marzulli, J., Parascandola, R., & Tracy, T. (2014, August 7). *web.archive.org - NYPD No. 3's order to crack down on selling loose cigarettes led to chokehold death of Eric Garner*. Retrieved from Daily News:

<https://web.archive.org/web/20201210065946/https://www.nydailynews.com/new-york/nyc-crime/wife-man-filmed-chokehold-arrested-article-1.1893790#cAOs5mib4wBv4MOC.97>

Mydans, S. (1992, March 6). *Police Beating Trial Opens With Replay of Videotape*. Retrieved from The New York Times: <https://www.nytimes.com/1992/03/06/us/police-beating-trial-opens-with-replay-of-videotape.html>

Annese, J. M. (2014, 06 21). *web.archive - emts and paramedics who respond*. Retrieved from silive.com (Staten Island Live):  
[https://web.archive.org/web/20210210082902/https://www.silive.com/news/2014/07/emts\\_and\\_paramedics\\_who\\_respon.html](https://web.archive.org/web/20210210082902/https://www.silive.com/news/2014/07/emts_and_paramedics_who_respon.html)

Fenton, J. (2017, October 5). *Freddie Gray case trial boards to be prosecuted by outside lawyer, a former school board chair*. Retrieved from The Baltimore Sun:  
<https://www.baltimoresun.com/news/crime/bs-md-ci-freddie-gray-trial-board-outside-help-20171003-story.html>

**Instructor Note:** Emphasize that officer and scene safety are most important.

- While some outside resources may be valuable, every officer must use their best judgement on when and how to use such resources and be mindful of people who may have ill intentions.
- Training and experience will help officers determine who, when, where, and to what extent an outside resource may be trustworthy and safe to rely on.

**28.21. Demonstrate how to utilize CRM in the field.**

- Get Attention
  - Use a loud and clear voice get the crew member's attention.
  - Address the individual by name or title.
    - "Danny"
    - "Corporal"
    - "Sergeant"
- State the concern.
  - State what you see in a direct manner.
  - Own your emotions about it.
  - "I am concerned for the health and safety of the suspect."
- State the problem as you see it.
  - Be specific and concise.
  - "It seems he is suffering from positional asphyxia."
- Suggest a solution.
  - When necessary, acknowledge possible objections to the solution.
  - Provide a solution that best resolves your concerns while considering the possible consequences of that solution.
  - "The suspect is securely detained and does not seem to be threat anymore. I think we should roll them over to ease their breathing."
- Obtain agreement (buy-in)
  - Get the member to either agree or provide an alternative solution that will resolve the concern.
  - "Does that sound good to you?", or
  - "Do you agree?", or
  - "What are your thoughts?"
- In time sensitive situations
  - Avoid personal pronouns.
    - "You're looking the wrong way", or
    - "You missed your turn."
  - Instead use titles or names then describe the issue:

- Danny, the suspect is approaching your right side.
- Danny should respond likewise, "Covering right side."
- Your response should follow suit, "I'm going non-lethal."

**28.22. Analyze factors that the courts use to determine if unreasonable force was used in a case.**

Court factors:

- Officers can be held to be personally liable for using excessive force - there are factors that may be considered in determining liability.
- Reasonable force may be used to effect an arrest when an officer has probable cause for that arrest.
- The 4th Amendment limits the level of force that may be used to reasonable force.
- Reasonableness is based on individual facts and circumstances of the situation.
- The need for force will be evaluated - the feasibility or availability of alternatives are considerations.
- The extent of injury inflicted will be evaluated - minor injuries may be relegated to state court as a tort suit rather than as a Section 1983 cause.

**Instructor Note:** See Civil Practice and Remedies Code, Section 101.055 Vernon's Texas Code Annotated.

**Lecture Scenario:** Demonstrate to class the civil liabilities and legal remedies for unnecessary use of force. Set the scene:

- Officer is interviewing an individual and determines the individual has committed a violation and he is going to immediately place this person under arrest. The officer tells the suspect he is under arrest for this particular offense. The suspect is argumentative and uncooperative. The suspect is not being physically aggressive.
  - Divide class into groups. Designate spokesperson and arrive at majority answer and report findings to class.
  - Is suspect legally able to respond to any physical force the officer uses to arrest him? If so, by what authority?

**Instructors Note:** Instructors should research current FBI statistics relating to law enforcement officers killed and assaulted.

Applicable cases:

- Tennessee v Garner, 471 U.S. 1 (1985)
- Graham v Connor, 109 S.Ct. 1865 (1989)
- Gordon v State, 707 S.W.2d 626 (Tex. Cr. App. 1986)

Other considerations which might be used:

- The nature of the offense in which control was lost.
- Actions of third parties who were present.
- An emergency situation which existed.
- Behavior of the person against whom force was used.

- The physical size, strength, and weaponry of the arrestee.
- Known character of the arrestee.

In general, an action is unreasonable if a reasonable man in similar circumstances would recognize the act as involving a risk of harm and a risk of such magnitude as to outweigh the utility of the act or the manner in which it was done. If an officer's conduct in discharging his weapon creates a danger recognizable as such by a reasonable and similarly situated officer, they will be held accountable to others as the proximate result of his conduct. The officer's liability is affected by the agency's written directives. Written directives of an agency may be used against the officer and/or the agency. Written directives of an agency may be used to support the officer and/or the agency. An officer using more force than the agency's written directives allow is increasing his vulnerability to legal liability.

The potential for a conflict of interest arises in the legal defense of a suit in which an officer argues that he was only following agency policy and procedures in the use of force and is entitled to a good faith defense.

This argument, especially if the officer is called as a witness, could increase the local agency's exposure to monetary liability. Some legal experts have maintained that officers and local governments should have separate attorneys for this reason. Officers should seek legal advice as to the correct course of action in this matter.

The officer's liability is affected by not following prudent police procedures prior to the decision to use force. Failure to follow proper procedures can make a situation more dangerous. Failing to follow prudent procedures in stopping and confronting suspects may increase the risk that force be used. An officer can be found liable in his justified use of deadly force if his negligent conduct created a danger for himself or others.

An officer may face possible personal liability for failure to stop other officers from using excessive force in his presence. A police supervisor has an affirmative duty to intervene and stop officers who are engaging in excessive force in their presence. A non-supervisory officer has an affirmative duty to intervene to stop officers and/or supervisors who are engaging in excessive force in their presence.

(CCP Art 2.13) (a) It is the duty of every peace officer to preserve the peace within the officer's jurisdiction. To affect this purpose, the officer shall use all lawful means. (b) The officer shall: (1) in every case authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime. A peace officer or peace officer supervisor has the duty to intervene if officers are engaging in the excessive use of force.

Applicable cases:

- *Davis v Rennie*, 264 F3d 86 (1st Cir. 2001), holds that "An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under 42 USC Sec. 1983 for their nonfeasance.



- Shaw v Stroud, 13 F.3d 791 (4th Cir. 1994), Supervisor may be liable for acts of subordinate, even where supervisor has no direct involvement if the supervisor has failed to document and take corrective action for prior similar acts of misconduct.

**Instructor Note:** Once students are through this and the Strategies of Defense topical areas, all techniques in these topical areas should be practiced and assessed in all scenarios, role-plays, and practical applications.

**Comprehensive Scenario:** Have students identify the justification for use of force to prevent the consequences of theft.

An officer arrives at the scene of a reported shooting. They observe an individual lying face down across the threshold. The individual appears to be unconscious. They are bleeding from what appears to be a gunshot wound in his right side. You investigate and find a shotgun tied to a chair and a rope tied from the trigger device of the shotgun to the opened door. Your investigation further reveals that this was a device to deter burglaries.

- Question(s). Group or individuals' response(s).
  - Is the owner or manager justified in using force to prevent the consequences of theft?
  - If so, by what authority? If not, why not?
  - Is the owner or manager justified in using force or the threat of force in this manner?
  - If so, by what authority? If not, why not?

**Practical Scenarios:** Have students role-play the following scenarios:

- An officer is responding to a subject disturbance. Upon arrival, the officer meets with the subject who appears to be irate. The subject becomes defensive immediately upon officer's arrival. The officer attempts to give verbal commands but the subject refuses to listen. Subject takes a fighting stance with closed fist.
  - Student will confront the subject and attempt to control the situation based on their force options.
  - Student will need to articulate what option they chose and why. Options can vary from soft empty hand to hard empty hand, less lethal etc.
  - Student will then secure the subject as to protect and prevent escape.
  - Instructors can debrief with the student to show other options that are available.
  - Open the floor up to discussion with the class.
- An officer is responding to a domestic violence call for service. Upon arrival, the officer arrives at a residence and immediately hears yelling and screaming. The officer announces themselves and observes the female party to have a contusion and blood on her lip. The male suspect turns to the officer and tells them to get out of his house. The male suspect then approaches the officer and confronts them with verbal threats.
  - Student will run through the scenario with an instructor who will play the subject.
  - The instructor will get the student to converse in dialogue asking what authority the student has to be in his residence.

- Student will then attempt to identify the subject's intention by identifying non-verbal clues.
- Student will make the determination to use a force option based on the subject's intentions.
- Grading will be based on the student's ability to control the situation based on the agencies use of force policy and penal code.
- A debriefing with the student is encouraged.
- The officer is interviewing an individual and determines the individual has committed a violation and they are going to immediately place this person under arrest. The officer tells the suspect they are under arrest for this particular offense. The suspect becomes argumentative and uncooperative. The suspect is not being physically aggressive.
  - Divide class into groups. Designate spokesperson and arrive at majority answer and report findings to class.
  - Is the suspect legally able to respond to any physical force the officer uses to arrest him? If so, by what authority?
  - Demonstrate to class the civil liabilities and legal remedies for unnecessary use of force.
- The officer is dispatched to motor vehicle accident. Upon arrival, the officer observes two vehicles on the roadway that have apparently collided with each other. The officer meets with the two occupants of the vehicles. The officer requests for the identification from the driver to unit 1 not realizing that the driver to unit 1 had just stolen the vehicle that he had crashed. The officer requests for his identification and observes that he is nervous. The officer observes that the driver of unit 1 appears to be wearing gang attire. The driver of unit 1 refuses to be patted down. The driver pulls away and pulls out a gun.
  - Role play the above scenario.
  - Have two participants from class as drivers to the crashed vehicle.
  - Have one or a two officer respond to this incident.
  - Have the officers make contact with the drivers to the vehicles.
  - Does the driver of Unit 1 have the right to not let the officers conduct a pat down?
  - What authority does the officer have to conduct a pat down?
  - What Force can be used on the driver to unit 1 and why?