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USES AND MISUSES OF DEADLY FORCE

Edward Ronkowski, Jr.*

Article Seven of the Illinois Criminal Code grants police officers wide discretion in their decisions to use, or refrain from using, deadly force to protect themselves, to stop forcible felonies, to prevent escape, or to protect the public. Because the unintentional shooting of innocent persons sometimes results from legal uses of deadly force, the Illinois Legislature is presently considering bills which would eliminate some justifications for the use of deadly force. In this Article, Mr. Ronkowski calls for the establishment of internal safety and policy rules within police departments, violation of which would lead to dismissal from the force. The author also asserts that a police officer should operate under an affirmative duty to restrain a fellow officer from using deadly force irresponsibly.

A police officer becomes "prosecutor, judge, jury, and executioner" when he commits a justifiable homicide in one of the six instances permitted under Illinois law. Although the private citizen is also authorized to use deadly force in prescribed circumstances, the citizen's power is less potent than that of the police officer.

The decision to use deadly force requires critical judgment. The police officer's failure to act can result in injury or loss of life to an innocent party. Conversely, an officer's improper use of deadly force can result in dismissal from the police force, civil liability, and criminal prosecution. Where the legal justification for the use of deadly force is not apparent from the circumstances, either state or federal court is an available forum for the injured party.

Currently, the Illinois Criminal Code permits the use of deadly force in the following instances: 1) to prevent death or great bodily harm; 4) to prevent the defeat of an arrest by resistance or escape where the arosee is

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2. See People v. Cash, 326 Ill. 104, 157 N.E. 76 (1927) (police officer was convicted of manslaughter for shooting at a fleeing motorist and thus killing a passenger, despite the officer's defense that the motorist feloniously tried to run him over); Tutle v. Forsberg, 331 Ill. App. 503, 73 N.E.2d 861 (1947) (officer held liable for illegally discharging his gun while attempting to make a lawful arrest).
3. See Fults v. Pearsall, 408 F. Supp. 1164 (E.D. Tenn. 1975) (deputy sheriff who shot plaintiff fleeing from arrest for misdemeanor was liable for violation of plaintiff's civil rights).
4. ILL. REV. STAT. ch. 38, § 7-1 (1977):

Use of Force in Defense of Person. A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.
either (a) committing a forcible felony, (b) attempting to escape by the use of a deadly weapon, or (c) otherwise indicating he will inflict great bodily harm unless arrested without delay; \(^5\) 3) to prevent a forcible felony; \(^6\) 4) to prevent a felony in a dwelling; \(^7\) 5) to prevent an assault after a violent, riotous entry into a dwelling; \(^8\) or 6) to prevent an escape from a penal institution. \(^9\) These rights are extended to both police officers and citizens with the exception

5. ILL. REV. STAT. ch. 38, § 7-5 (1977):
   *Peace Officer's Use of Force in Making Arrest.* (a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:
   (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
   (2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

   (b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he know [sic] that the warrant is invalid.

6. ILL. REV. STAT. ch. 38 § 7-3 (1977):
   *Use of Force in Defense of Other Property.* A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than a dwelling) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

7. ILL. REV. STAT. ch. 38, § 7-2 (1977):
   *Use of Force in Defense of Dwelling.* A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if:
   (a) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling, or
   (b) He reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling.

8. Id.

   *Use of Force to Prevent Escape.* (a) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.
that citizens cannot use deadly force to prevent the defeat of an arrest or to prevent an escape from a penal institution. In the Eighty-first General Assembly, the Illinois Legislature considered several bills that would limit those situations in which police use of deadly force is presently justified.

This Article will discuss the justifications for the use of deadly force in Illinois and will focus upon judicial interpretation of the applicable statutes. The proposed legislation will be examined and a preferable alternative will be suggested.

The Police Officer's Right to Carry Firearms

Before the justifications for the use of deadly force can be examined, the extent of a policeman's right to carry firearms must be considered. By virtue of his office, the police officer acquires special privileges to carry firearms which the private citizen does not share. Only those public employees who are required by their employment to make arrests and preserve public order are considered police officers for these purposes.

One privilege vests police officers with authority to carry firearms within their jurisdictional boundaries while on duty. Another privilege allows

(b) A guard or other peace officer is justified in the use of force, including force likely to cause death or great bodily harm, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

10. See ILL. REV. STAT. ch. 38, § 7-5 (1977) (authority given only to police officer to use deadly force where necessary to make a lawful arrest); ILL. REV. STAT. ch. 38, § 7-9 (1977) (authority given only to police officer to use deadly force to prevent an escape from a jail or penitentiary). See notes 5 & 9 supra.

11. House Majority leader Michael J. Madigan introduced six bills offering different variations of the same statute. They are currently slated for interim study. See Bagley, The Use of Deadly Force in Arrests, Chicago Daily L. Bulletin, Dec. 8, 1978, at 1, col. 1. [hereinafter cited as Bagley]. The author reported that:

[T]he suggested changes...[include]...limit[ing] the use of deadly force by police officers to crimes involving the use or threat of deadly force, or that [sic] a delay in arrest will create a substantial risk that the suspect will cause death or serious bodily harm. Other suggestions...[include]exclud[ing] burglary from the definition of forcible felony—or at least non-residential burglary... The purpose, according to Madigan, is to allow for a full and open debate on the entire issue of deadly force both in the public and legislative forum.

Id. at 3.

12. ILL. REV. STAT. ch. 38, § 2-13 (1977), defines a "peace officer" as "any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses". See People v. Perry, 27 Ill. App. 3d 230, 327 N.E.2d 167, (1st Dist. 1975) (security guards employed by housing authority were not "special policemen" and had same status as private individuals, who have no authority to arrest citizens for ordinance violations). But see People v. Picka, 44 Ill. App. 3d 759, 358 N.E.2d 937 (5th Dist. 1976) (state university security officers are peace officers within their specific jurisdiction as defined by statute).

13. See ILL. REV. STAT. ch. 38, § 24-1 (1977) (listing prohibitions of the use and possession of firearms) and ILL. REV. STAT. ch. 38, § 24-2 (1977) (exempting policemen from pertinent parts of § 24-1 and conferring upon officers the right to carry firearms).
police officers to carry concealed firearms when not on their own land or in their fixed place of business.\textsuperscript{14} Additionally, police officers generally can carry weapons over a wider geographic territory than private citizens.\textsuperscript{15} Some state's attorneys have overbroadly interpreted these statutes and have concluded that any off-duty police officer can carry his firearm loaded and concealed anywhere within the state.\textsuperscript{16} Although there is some confusion as to whether or not guards are entitled to carry arms when off-duty, the Illinois Judiciary is clearly sympathetic to police officers and allows them wide latitude in their right to carry firearms while off-duty.\textsuperscript{17} Actually, the officer's privilege to carry weapons is limited to his jurisdictional boundaries while on duty.\textsuperscript{18}

\textsuperscript{14} ILL. REV. STAT. ch. 38, § 24-1(a) 4 & 24-1(a) 10 (1977) (footnotes omitted), states: 

\textit{Unlawful Use of Weapons.} (a) A person commits the offense of unlawful use of weapons when he knowingly:

(4) Carries concealed in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver, stun gun or laser or other firearm; or

(10) Carried or possesses in a vehicle or on or about his person within the corporate limits of a city, village or incorporated town, except when on land or in his own abode or fixed place of business, any loaded pistol, revolver, stun gun or laser or other firearm.

\textsuperscript{15} Survey, \textit{Officers Carry Firearms}, 29 ILL. POLICE ASS'N OFFICIAL J., Feb. 1976, at 62 (officers on duty can carry their firearms outside their jurisdiction in every state but North Carolina).


\textsuperscript{17} See Arrington v. City of Chicago, 45 Ill. 2d 316, 259 N.E.2d 22 (1970). In Arrington, prison guards attacked ILL. REV. STAT. ch. 38, § 24-2(a)(4), which prohibited them from carrying arms when not on duty. The court distinguished prison guards from police officers

A peace officer . . . has the duty to maintain public order wherever he may be; his duties are not confined to a specific time and place as are those of a prison guard. It is for this reason, and not because a peace officer may be subject to attack, that he is allowed to carry a weapon at all times.

\textit{Id.} at 24. See also People v. Barret, 54 Ill. App. 3d 994, 370 N.E.2d 247 (2d Dist. 1977), where an off duty police officer working as a security guard in a retail store was deemed a peace officer in execution of his duties when he arrested the defendants for assault and battery, and shoplifting. The court cited \textit{Arrington} and stated that an officer's duties are not constrained by specific time or place limitations; and People v. Perry, 27 Ill. App. 3d 230, 327 N.E.2d 167 (1st Dist. 1975), where the court cited \textit{Arrington} and stated that peace officers are required by their employment to give full time to the preservation of public order.

his territorial jurisdiction possesses only the limited rights of a private citizen to use deadly force. 19

WHAT IS DEADLY FORCE?

A discussion of deadly force usually focuses upon questions involving the permissible use of firearms. 20 It should be noted, however, that the employment of nightsticks, broken bottles, 21 tear gas, 22 bricks, 23 knives, boots, 24 large vicious dogs 25 and even bare fists, 26 depending on how they


20. See ILL. REV. STAT. ch. 38, § 7-8(a) (1977):

Force Likely to Cause Death or Great Bodily Harm. (a) Force which is likely to cause death or great bodily harm, within the meaning of Sections 7-5 and 7-6, includes: (1) The firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm; and (2) The firing of a firearm at a vehicle in which the person to be arrested is riding.

21. ILL. REV. STAT. ch. 38, § 24-1(a)(2); People v. Villabos, 53 Ill. App. 3d 234, 368 N.E.2d 556 (1st Dist. 1977) (broken bottle is deadly weapon); People v. Fort, 119 Ill. App. 2d 530; 256 N.E.2d 63 (1st Dist. 1970) (thrown bottle hitting the victim on the back of the head constituted a deadly weapon).


Illinois has not at present addressed the question of whether mace is a noxious liquid gas under the statute. A California court, in Cook v. Superior Court of San Diego County, 4 Cal. App. 3d 822, 84 Cal. Rptr. 664 (1970), found mace to be tear gas under a statute similar to that of Illinois. But see Jackson v. City of Baton Rouge, 286 So. 2d 743 (La. Ct. App. 1973), where it was held that mace was not a deadly weapon because the injury was minor and the arresting officer used the chemical in lieu of his nightstick to subdue a drunk and disorderly defendant.

23. People v. Williams, 56 Ill. App. 2d 159, 205 N.E.2d 749 (1st Dist. 1965) (brick thrown by a gang of youths at a passing cab constituted deadly force). See State v. Lee, 36 Del. 11, 171 A. 195 (1933) (a brick thrown with force and violence in close proximity to the person of another, or used as a weapon to strike by holding it in hand, is a deadly weapon); Peats v. State, 213 Ind. 560, 12 N.E.2d 270 (1938) (stone or brick thrown from a car travelling seventy miles per hour through an oncoming truck's windshield was deadly force).


25. See People v. Torrez, 86 Misc. 2d 369, 382 N.Y.S.2d 233 (1976). Although the Torrez court did not view a vicious dog as a deadly weapon, its characterization of a German shepherd as a dangerous instrument suggests that in the proper circumstances a court may find a vicious dog to be an instrument of deadly force.

are used, can constitute deadly force. The important variables are the force with which the instruments are used and the strength of the user. If the force and the strength of the aggressor are great enough, any object can be used in a manner constituting deadly force.\(^\text{27}\) The use of firearms alone, however, almost categorically will be construed as deadly force, irrespective of the force and strength variables. In fact, a police officer’s mere discharge of a firearm in the direction of a person to be arrested or at the arrestee’s vehicle is deadly force per se,\(^\text{28}\) regardless of the officer’s intent. Thus, a police officer was convicted of voluntary manslaughter when he killed a fleeing speeder with what was intended to be a warning shot.\(^\text{29}\)

**JUSTIFICATIONS FOR USE OF DEADLY FORCE IN ILLINOIS**

Each justification for the use of deadly force in Illinois requires the actor to proceed on the basis of “[a reasonable belief] that deadly force is necessary to prevent” some prescribed illegal act.\(^\text{30}\) This requirement defines the right to use deadly force and establish the boundaries of the privilege.

**Reasonable Belief Requirement**

In Illinois, the police officer or citizen is protected if he reasonably believed that the use of deadly force was necessary.\(^\text{31}\) The perceived danger need not be real,\(^\text{32}\) and a person under great stress and excitement is not required to use infallible judgment in the space of a few seconds.\(^\text{33}\)

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27. See People v. Carter, 410 Ill. 462, 465, 102 N.E.2d 312, 313 (1951), where the Illinois Supreme Court stated:

> A deadly weapon is not necessarily manufactured for the special purpose of taking animal life, nor need it be of any certain size or description. This court has defined a deadly weapon as "an instrument that is used or may be used for the purpose of offense or defense and capable of producing death. Some weapons are deadly per se; others, owing to the manner in which they are used, become deadly, while a small pocket knife, a cane, a riding whip, a club or baseball bat may be so used as to be a deadly weapon. . . . " Those instrumentalities not considered deadly per se may thus clearly become such by the manner in which they are used.

See also People v. Drumheller, 15 Ill. App. 3d 418, 421, 304 N.E.2d 455, 458 (2d Dist. 1976) (because size and strength disparity was so great, a blow from defendant’s bare fist to a fourteen-month-old child constituted deadly force).


33. People v. Lenzi, 41 Ill. App. 3d 825, 355 N.E.2d 153 (1st Dist. 1976) (person threatened by several bullies does not have time to reason out every response he should make or to judge precisely how much force he has to use to repel the attack and ensure his safety); People v. Harling, 29 Ill. App. 3d 1053, 331 N.E.2d 653 (1st Dist. 1975) (because defendant’s
Nevertheless, a fine line distinguishes the legally protected reasonable belief and the unprotected mere suspicion. Under current Illinois law, a reasonable belief justifying the use of deadly force in defense of oneself or another generally will not be found until a weapon is actually observed. However, where the person against whom the force is directed is known to carry a weapon, or indicates that he is carrying a weapon on his person and makes a move to use it, an exception to this general rule will lie.

Judicial interpretations often confuse the “reasonable belief” requirement. The Illinois statute indicates that a reasonable belief based on either an actual or apparent danger will justify the use of force necessary to prevent either imminent death or great bodily harm. However, decisions in other states with similar justifiable-use-of-force statutes have suggested that only the actual, as opposed to the apparent, facts are relevant in determining whether a belief was reasonable.

Illinois decisions, nevertheless, appear to follow the preferred construction of the statute. In People v. Morgan, the appellate court for the first district reversed the voluntary manslaughter conviction of a detective agency employee who had killed a disorderly waiter. The court noted that the waiter had attempted to remove something from his pocket after mentioning he had a gun, and it concluded that the detective may have labored under a belief that his conduct was necessary to save himself from death or greatly bodily harm was a reasonable one, he was not required to use infallible judgment in the space of a few seconds while he was under great stress and excitement).

34. Compare People v. Munguia, 33 Ill. App. 3d 880, 330 N.E.2d 574 (2d Dist. 1975), and People v. Smith, 58 Ill. App. 3d 784, 374 N.E.2d 1285 (1st Dist. 1978), with People v. Reeves, 47 Ill. App. 3d 406, 362 N.E.2d 9 (5th Dist. 1977), and Fortunto v. Police Board of Chicago, 38 Ill. App. 3d 950, 349 N.E.2d 521 (1st Dist. 1976). In Munguia, the defendant was found guilty of voluntary manslaughter when he extricated himself from a fight in a bar and later returned armed with a knife. The fight was resumed and defendant’s belief that deadly force was necessary to protect himself and a friend was held unreasonable, particularly because the victim’s resumed aggression may have been provoked by the defendant’s return with a knife. In Smith, the court held that mere disparity in size and verbal threats did not allow the defendant, who was standing in the street, to shoot a man seated in a car who had threatened him while holding a screwdriver. Contrarily, the Reeves court held that a wife who shot her husband as he dragged, beat, and threatened her was justified in the use of deadly force even though her husband was unarmed. The court relied on the fact that she had in the past been hospitalized as a result of beatings inflicted by her husband. In Fornuto, an escaping suspect turned on an officer in hot pursuit and lunged at him with a knife. The officer sidestepped the lunge and then shot the suspect in the back. At trial, there was a question as to whether the victim was running away when shot or whether he was still close enough to present an imminent threat to the officer. The court held, in part, that because only a few seconds had elapsed between the attack and the retaliation, infallible judgment was not required of the officer.


reasonable belief that deadly force was necessary to protect himself. The waiter was later determined to be unarmed. Illinois appellate courts have stated that in this type of situation the actual presence of a gun is theoretically immaterial; the words coupled with the directed action support the reasonable belief of danger. However, in 1890 the Illinois Supreme Court effectively prohibited the use of deadly force where there is no indication of the presence of a weapon. For example, if a suspect merely reaches toward his pocket, or draws his hand from below his waist, as if drawing a weapon, or places his hand in his pocket without mention of a weapon, the use of deadly force is not justified.

The perceptions that form the basis of a reasonable belief need not be limited to the instant circumstances. For example, in People v. Honey, the first district appellate court reversed a civilian defendant's manslaughter conviction in consideration of his prior antagonistic encounters with the deceased. The defendant had engaged in a fist fight with the deceased five days before the fatal shooting. On the following day, the decedent threatened the defendant with a gun, but the defendant fled unharmed. Three days later they scuffled. The decedent, while rushing defendant with his hand in the same pocket from which he had produced the gun previously, again threatened to kill the defendant. The court found the defendant's perception to be reasonable at the time he used deadly force, even though a later search showed the deceased had been unarmed. Honey thus illustrates an exception, based on the existence of prior armed encounters, to the general rule that mere movement toward a pocket, absent mention of a weapon, cannot justify the use of deadly force.

Compare Honey with People v. Millet, where threats accompanied by the antagonist's fumbling inside a car trunk were held insufficient to justify three shots in the back. The first district appellate court reasoned that Millet should have waited until he actually saw a weapon or until his antagonist faced him with one.

40. Walker v. People, 133 Ill. 110, 24 N.E. 424 (1890).
42. People v. Carter, 3 Ill. App. 3d 121, 278 N.E.2d 209 (1st Dist. 1971). The antagonist jumped off his bar stool and struck the defendant bartender in the face hard enough to force him backwards against the rear area of the bar. The bartender grabbed a gun and fired two warning shots in the air. The antagonist then began to draw his hand from below the level of the bar as if he were drawing a weapon. The bartender fired into him thinking his hand contained a weapon. The court upheld the bartender's conviction because he had fired absent a reasonable belief that the antagonist's hand contained a weapon capable of causing great bodily harm to the bartender.
44. See notes 39-41 and accompanying text supra.
45. 60 Ill. App. 2d 22, 208 N.E.2d 670 (1st Dist. 1965).
Prior to 1961, Illinois statutes permitted deadly force to be used only when “absolutely necessary.” Thus, deadly force was justified only if used as a last resort. The inherent danger in the “last resort” policy was that it brought the innocent citizen or police officer perilously close to loss of his own life.

Two factors contributed to a more practical interpretation of the word “necessary.” First, the self-defense statute was amended to eliminate the word “absolutely” with respect to necessity. Second, the requirement that all other alternatives be exhausted was ameliorated in the case law, indicating a judicial recognition that one faced with threatened force may not have time to consider every possible response or judge precisely how much force should be used to repel an attack or ensure safety.

Currently, courts concentrate on whether the overall situation prompted a belief in the necessity of deadly force. The courts’ fundamental query

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46. People v. Stapleton, 300 Ill. 471, 133 N.E. 224 (1921) (accused may use deadly force only if he has a reasonable and well-grounded belief that he is actually in danger of losing his life or receiving great bodily harm). The old statute, ILL. REV. STAT. ch. 38, § 367 (1959), containing the “absolutely necessary” requirement, was replaced in 1961. See note 48 and accompanying text infra.

47. See People v. Stapleton, 300 Ill. 471, 133 N.E. 224 (1922). After being struck, knocked, and kicked by his victim, defendant Stapleton went home for his revolver and met the victim again. The defendant told the victim they were friends, but the victim put his hand into his pocket and pulled out his revolver. About shooting and killing the victim, defendant stated that he honestly believed he was in actual danger of being killed or receiving great bodily harm. The court reversed defendant’s conviction, stating that the use of deadly force is justified if the circumstances are such to induce in the defendant the belief that he is actually in present danger of receiving great bodily harm or of losing his life. Apparent necessity would not be sufficient to provoke the use of deadly force and the court stated that the fear should be that which a reasonable person would have under the circumstances.

As recently as 1966, the appellate court for the first district affirmed a conviction for murder and stated that killing in self defense was justified only when “absolutely necessary” to save the actor’s own life or prevent great bodily harm. Victim’s pushing the defendant and advancing toward him with a board did not justify defendant’s use of a revolver in self-defense. People v. King, 76 Ill. App. 2d 354; 222 N.E.2d 88 (1st Dist. 1966).

48. ILL. REV. STAT. ch. 38, § 7-1 (1977), replacing ILL. REV. STAT. ch. 38, § 367 (1959): Use of Force in Defense of Person. A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other’s imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.


when determining whether deadly force was necessary in a given situation is: did the defendant make some attempts to avoid the peril. An actor's failure to consider individual factors will not be decisive in a determination of the necessity issue. However, in determining whether the overall situation necessitated the use of deadly force, courts often consider whether an attempt at avoidance was made.

The necessity requirement also regulates the kind and amount of force that can be used to repel aggression. Thus, if an antagonist threatens a small amount of force, only a slightly greater amount of force can be used to repel the aggression. One who is legally justified in using force, however, is not required to afford a criminal violator the opportunity of a fair and equal struggle. Greater force may be employed as needed to prevent the aggression. For example, if an antagonist draws a knife, a firearm can be pointed as a deterrent. If a knife-wielding antagonist approaches within lunging distance and refuses to stop, deadly force can be used in self-defense. Consequently, as soon as the circumstances warrant a reasonable belief that great bodily harm is imminent, the use of deadly force is considered necessary.

When the requirement of necessity is applied in the setting of an immediate physical confrontation, even the most agile person cannot be expected to measure accurately the exact amount of force necessary to repel a danger. Thus, given emergency circumstances, only a gross disparity in the parties' use of force will warrant the imposition of civil or criminal sanctions. These life-threatening situations often offer the choice of either re-

51. People v. Jordan, 18 Ill. 2d 489, 165 N.E.2d 966 (1960) (to justify the use of deadly force for self-defense, defendant must show a good faith endeavor to decline further struggle before the mortal blow is given); People v. Adams, 113 Ill. App. 2d 205, 216, 252 N.E.2d 35, 41 (1st Dist. 1969) (while defendant had no duty to retreat, he showed no attempt to avoid peril in any way before dealing the fatal blows; manslaughter conviction affirmed).

52. People v. Johnson, 35 Ill. App. 3d 215, 340 N.E.2d 673 (1st Dist. 1975) (self-defense is not available to defendant where initial aggressor retreats from the conflict and defendant assumes the role of aggressor); People v. Johnson, 33 Ill. App. 3d 957, 338 N.E.2d 895 (5th Dist. 1975) (right to defend oneself does not permit pursuit and injury of aggressor after aggressor abandons the conflict).

53. People v. Williams, 56 Ill. App. 2d 159, 205 N.E.2d 749 (1st Dist. 1965) (brick thrown by a gang of youths who were beating their robbery victim, striking a passing cab, constituted deadly force and justified cab driver's retaliation with a firearm). See North Carolina v. Gosnell, 74 F. 734, 738 (1896) (where defendant used rock in attempt to resist arrest by police officer, police officer was justified in shooting defendant to prevent imminent danger of serious bodily harm to himself).

54. People v. Rorer, 44 Ill. App. 3d 553, 358 N.E.2d 681 (5th Dist. 1976) (defendant convicted of murder for killing an approaching individual who was brandishing a knife, but conviction reversed on grounds that evidence also showed an accidental homicide). See Scott v. Commonwealth, 301 Ky. 127, 131, 190 S.W.2d 345, 347 (1945) (not required to await the thrust of a knife).


56. People v. Harris, 124 Ill. App. 2d 234, 260 N.E.2d 325 (1st Dist. 1970) (where deceased advanced toward defendant during loud discussion, and it did not appear that deceased had any
taliation or retreat. Police officers generally do not have the second option because of their legal duty to effectuate an arrest, and because they are not required to retreat in the face of resistance to an arrest. Similarly, a private citizen need not retreat in the face of a deadly threat.

As the level of danger changes from moment to moment, the need for resorting to deadly force also changes. In People v. McBride, for example, an argument between a hotel night clerk and defendant ended in a fist fight. The night clerk drew a pistol and a struggle ensued. Defendant then disarmed the night clerk and the struggle continued until defendant gained control of the pistol and killed the clerk. In affirming defendant's conviction, the first district appellate court reasoned that one is not ordinarily justified in shooting an antagonist after he has been disarmed or disabled.

In addition to alternating levels of danger, the relative size and health of the parties can determine the need for resort to deadly force. In Schnepf v.

weapon, defendant's use of a firearm was unjustified); People v. Pursley, 302 Ill. 62, 134 N.E. 128 (1922) (attempted by deceased to strike accused with his fist did not justify the latter's meeting the assailant with a knife). Contra, People v. Dowdy, 21 Ill. App. 3d 821, 316 N.E.2d 33 (1st Dist. 1974) (an assailant's use of fists can justify defendant's use of a firearm in self defense).

57. ILL. REV. STAT. ch. 38, § 2-13 (1977):
"Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses. See Lynn v. People, 170 Ill. 527, 48 N.E. 964 (1898); State v. Dunning, 177 N.C. 559, 98 S.E. 530 (1919) (shooting misdemeanant who threatened officer with a knife allowed even though officer could have avoided injury by retreating).

58. ILL. REV. STAT. ch. 38, § 7-5(a) (1977):
Peace Officer's Use of Force in Making Arrest. (a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.


60. 130 Ill. App. 2d 201, 264 N.E.2d 446 (1st Dist. 1970).

61. Id. at 208, 264 N.E.2d at 450.
Grubb, a nineteen-year-old, 175-pound, physically strong suspect, beat a 76-year-old sickly police officer with the officer's own night stick. During the later arrest, he kicked and struck the same officer in the face. A week later, the same boy, who had a reputation of resisting arrest and fighting with officers, unexpectedly emerged from a vehicle and approached the officer. He ignored three commands to halt. The police officer, apparently fearing he was going to receive another severe beating, shot and killed his previous assailant. While there was another younger officer some twenty feet away, the court reasoned that his presence could not have prevented the quick, severe blows or kicks that might have caused great bodily harm to the elderly officer. Consequently, deadly force was deemed reasonably necessary because of the physical disparities. However, if the officer had not tried to warn the suspect away, he would probably have been held liable for the improper use of deadly force.

The necessity requirement governs not only the actual decision to discharge a firearm and the amount of force that can be used, but also prohibits the unnecessary drawing and pointing of a firearm. However, in a potentially dangerous situation, the decision to have a weapon ready for use is usually left to the discretion of the police officer or citizen. Criminal or civil liability for assault can result from prematurely drawing or pointing a firearm if there is no reasonable potential for violence. However, courts recognize that a police officer must be equipped with the confidence to act quickly in an emergency, and accordingly do not severely regulate a policeman's right to draw his weapon. A weapon may be displayed and pointed before a person is justified in shooting. Thus, a firearm can be drawn and pointed at an approaching assailant who is bearing a dangerous knife before the assailant reaches lunging distance. Yet, only upon reaching the lunging point may the knife-bearing assailant be shot in self-defense.

64. People v. Attaway, 41 Ill. App. 3d 837, 354 N.E.2d 448, (1st Dist. 1976) (police officer who had reasonable grounds to suspect automobile occupants had been involved in an armed robbery was justified in exiting his squad car with weapon drawn).
66. People v. Williams, 57 Ill. 2d 239, 311 N.E.2d 681 (1974), cert. denied, 419 U.S. 1026 (1974). In reversing an aggravated assault conviction for drawing and holding a weapon on a hostile mob of twenty-five persons, the court noted the obvious: if the defendant had waited until the mob had advanced before drawing the weapon, the risk of violence may have increased.
67. People v. Gatheright, 43 Ill. App. 3d 922, 357 N.E.2d 597 (1st Dist. 1976) (police officer who reasonably inferred defendant had just committed armed robbery was justified in approaching defendant with drawn gun).
Even after a person properly decides deadly force is justifiable under one of the six permissible situations, he is faced with the dilemma of deciding when to cease firing his weapon. Just as a person may not lawfully use the alternative of deadly force until all the elements of a particular legal justification are present, he may continue firing only until the legal objective has been accomplished.\textsuperscript{68} It may be impossible, however, for a person to stop firing a weapon at the exact instant the justification ceases to exist. During a trial for murder, the evidence in \textit{People v. Bailey}\textsuperscript{69} revealed that the defendant had shot the two attackers in a small room four times in two seconds. The last two shots, according to the medical examiner, were fired after the assailants had fallen. The appellate court for the first district reversed defendant's conviction, holding that during the two seconds defendant fired he acted under a reasonable belief that deadly force was necessary.\textsuperscript{70}

Medical testimony can reveal the exact activity of a suspect at the time of a bullet's impact. When a firearm is discharged, the suspect's body position and movement are reflected by the path of the bullet. A pathologist or medical examiner can testify as to the position of the deceased at the exact instant of the shooting. Thus, the curve of a path of a bullet through a body can indicate whether the deceased was turning toward or away from the person using deadly force.\textsuperscript{71} This is one aid in determining when an initially justified shooting becomes an illegal act.\textsuperscript{72}

In sum, before deadly force is justified, the actor must have: (1) a reasonable belief, (2) that such force is necessary, (3) to prevent some prescribed illegal act. The preceding discussion has detailed the reasonable belief and necessity requirements. The following discussion explains the prescribed illegal acts against which deadly force may be applied.

\textsuperscript{68} \textit{People v. Limas}, 45 Ill. App. 643, 359 N.E.2d 1194 (2d Dist. 1977) (the self-defense justification ceased when the antagonist was disarmed and the defendant no longer feared death or great bodily harm).

\textsuperscript{69} 27 Ill. App. 128, 326 N.E.2d 550 (1st Dist. 1975).

\textsuperscript{70} \textit{See also} \textit{People v. Shipp}, 52 Ill. App. 3d 470, 367 N.E.2d 966 (2d Dist. 1977) (defendant fired five shots, the last one entering the deceased in the back).

\textsuperscript{71} See the decisive medical testimony in \textit{People v. Mitchell}, 12 Ill. App. 3d 960, 299 N.E.2d 472 (1st Dist. 1973) (challenged defendant's version and revealed that deceased was actually beginning to flee when shot), and that in \textit{Fornuto v. Police Board of Chicago}, 38 Ill. App. 3d 950, 349 N.E.2d 521 (1st Dist. 1976) (confirmed police officer's questionable and impeached version).

\textsuperscript{72} \textit{See People v. Shipp}, 52 Ill. App. 3d 470, 477, 367 N.E.2d 966, 971 (2d Dist. 1977). The trial court jury found defendant guilty of using unnecessary force in a self-defense situation. The appellate court stated that, although an initially justified shooting may end illegally once the victim is disarmed or disabled, the circumstance of self-defense does not require that perfect judgment be exercised. \textit{Id.} at 477, N.E.2d at 971. Here, defendant's particular circumstances warranted a reversal of the lower court's conviction. \textit{See also People v. Adams}, -- Ill. App. 3d --, --, 388 N.E.2d 1326, 1329 (2d Dist. 1979).
DEADLY FORCE JUSTIFICATIONS

Threat of Death or Great Bodily Injury

The first statutory authorization for the use of deadly force allows its use where there is an imminent threat of death or great bodily harm. Because of the subjective nature of this justification, both the assailant’s and user’s conduct must be examined. For instance, whether or not a warning was given may be a determinative issue. In an exigent self-defense situation, the need for immediate action to protect innocent parties may excuse any need for a warning. Given less perilous self-defense circumstances a jury sometimes examines whether the person shooting first fired a warning shot.

Unfortunately, however, the “courtesy” of a warning shot can position innocent bystanders perilously close to serious harm. Warning shots (or shots intended merely to wound) should be justified in the same manner as a shot intended to kill or cause great bodily harm. Indeed, a police officer is not required to fire a warning shot before using deadly force to prevent an arrestee’s escape. In fact, official police training wisely counsels against warning shots. The police training policy is founded on case law indicating that a large number of bystanders and other police officers have been

73. ILL. REV. STAT. ch. 38, § 7-1 (1977). See People v. Johnson, 2 Ill. 2d 165, 117 N.E.2d 91 (1954) (a blow to the back of defendant’s head held insufficient to support a reasonable belief of imminent bodily harm); People v. Shields, 18 Ill. App. 3d 1080, 331 N.E.2d 212 (1st Dist. 1974) (a person alone who is attacked by a much larger and unarmed assailant need not wait until he or she is badly beaten before using deadly force); People v. Williams, 15 Ill. App. 3d 303, 304 N.E.2d 178 (4th Dist. 1973) (use of deadly force unjustified since victim was not in immediate danger of being pistol whipped). See also W. Farrand and A. Johnson, in Model Test, note 16 supra, at 27, question 104 (neither the young age of assailant nor the manner of attack will matter in calculating the risk of imminent bodily harm); C. Cavanaugh, id. at 40 question 140 (a water pistol filled with acid offers a threat of great bodily harm).

74. See W. Farrand, A. Johnson & C. Travelstead, in Model Test, note 16 supra, at 38, question 135.

75. Griffin, Private Persons Authority in Making Arrest for Felony, to Shoot or Kill Alleged Felon, Annot., 32 A.L.R.3d 1078, 1085 (1970) [hereinafter cited as Griffin] (a warning shot is one of six factors influencing juries to find in favor of the user of deadly force).

76. See A. Harvie, The Police Officer’s Use of Force: Law and Liability 15 (1971); Cook County Sheriff’s Training Bulletin: Police Liability 1-766-5, at 11 (July 1, 1976) [hereinafter cited as Training Bulletin], Comment, The Use of Deadly Force in Arizona by Police Officers, L. & Soc. Ord. 481, 494 (1973) (warning shots may injure bystanders, prompt suspect to return fire, unintentionally injure the suspect, or cause other pursuing officers to use deadly force when not warranted).

77. 73-3 AELE Law Enforcement Legal Defense Manual, Police Use of Firearms—II, at 10 & 19 (1973) [hereinafter cited as Firearms—II], (published by Americans for Effective Law Enforcement, Inc., South San Francisco, Calif.).

injured by warning shots. Further, any warning shots fired in the direction of a person are illegal per se unless the police officer would otherwise be entitled to shoot that person. Practical considerations suggest that a verbal warning, when feasible, is a safer alternative and just as effective. To prevent juries from giving too much weight to the lack of a warning shot, courts should instruct juries that a warning shot does not have to be fired prior to the use of deadly force.

Escaping Forcible Felons

Only in the case of the first statutory justification, where death or great bodily harm is threatened, need there be an actual fear of peril to life. The remaining five legal justifications permit use of deadly force regardless of jeopardy to life.

The second legal justification for use of deadly force in Illinois is based on the presence of a reasonable belief that deadly force is necessary to prevent an arrest from being defeated by escape. However, deadly force cannot be used to effect all arrests. Only where the arrestee is either suspected of committing a forcible felony, or attempting to escape from a crime by the use of a deadly weapon, will the use of deadly force be justified under this rule. Thus, the type of crime involved (forcible felony versus other felonies and misdemeanors) in an arrest situation will be controlling. This rule results in some incongruities.

Consider the attempted arrest of an automobile thief. The officer would not be justified in shooting because no forcible felony has been commit-

80. ILL. REV. STAT. ch. 38, § 7-8 (1977). See People v. Klein, 305 Ill. 141, 137 N.E. 145 (1922). The victim had been escaping from arrest for a misdemeanor when the defendant deputy sheriff shot at his moving automobile. Although the defendant yelled "halt" before firing, the Illinois Supreme Court sustained his conviction and reiterated that a police officer can never use deadly force to effect a misdemeanor arrest. This rule commands regardless of the police officer's intent or the otherwise impossibility of arrest. See also Locke v. Bralley, 50 S.W.2d 240 (Tex. Civ. App. 1932) (warning shot that wounded suspect was justified since the situation warranted use of deadly force); Geiger v. Madden, 58 Pa. Super. 616 (1915) (situation did not warrant use of deadly force, therefore, warning shot which killed suspect exposed officer to liability).
81. See note 4 supra.
83. Id.
84. For example, in Fults v. Pearsall, 408 F. Supp. 1164 (E.D. Tenn. 1975), a deputy sheriff shot an escaping misdemeanant and was held liable for violation of plaintiff's civil rights.
85. See ILL. REV. STAT. ch. 38, § 7-5 (1977). The applicable statute defines "forcible felony" to mean treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery, and any other felony that involves the use or threat of physical force or violence against any individual. ILL. REV. STAT. ch. 38, § 2-8 (1978). See Moreland, The Use of
However, if the arrestee had broken into the automobile, stolen some cigarettes and then fled, he would have committed the forcible felony of burglary. The officer could then justifiably shoot him. Similarly, a high school student expectorating on a police officer commits the forcible felony of an aggravated battery. The insolent youth also could be subjected to the risk of death if he tried to escape from his crime. Although it would be unusual to find a police officer applying deadly force in these situations, a volatile policeman equipped with the authority of this statute is capable of working serious harm within the ambit of his authority.

Although the application of Illinois law alone leads to incongruous result, if the use of deadly force is altogether disproportionate to the magnitude of the offense, it may be argued that an officer can be subject to liability under federal civil rights laws. For example, it is suggested that if an Illinois police officer tried to use deadly force against an arsonist who was burning his own automobile with the intent to defraud an insurer, he may have

_force in effecting or resisting arrest_, 33 Neb. L. Rev. 408 (1954), where the author points out that in dealing with a forcible felon's escape, police officers cannot shoot the felon on sight. The police officer must reasonably believe that the shooting is necessary to prevent the escape. _Id._ at 409.

86. The escapee in this situation would be guilty of the crime of theft, Ill. Rev. Stat. ch. 38, § 16-1 (1977), a crime that is not included in the forcible felony definition. _Id._ § 2-8.

87. See, e.g., People v. Lanpher, 59 Ill. App. 3d 825, 376 N.E.2d 433 (3rd Dist. 1978), where the court held that the theft of a C.B. radio from a vehicle is a burglary.


89. See Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), rev'd on other grounds, sub nom Ashcroft v. Mattis, 431 U.S. 171 (1977); Comment, Policeman's Use of Deadly Force in Illinois, 48 Chi-Kent L. Rev. 252, 259 (1971) [hereinafter cited as Comment]. See also United States v. Clark, 31 F. 710 (6 Cir. 1887). In _Clark_, the defendant military officer shot the deceased as he was attempting to escape custody. Although this case occurred before the enactment of 42 U.S.C. § 1983, the court stated that "the fifty-ninth Article of War provides that any officer accused of a capital crime [is to be brought before] the civil magistrate." _Id._ at 711. The court therefore felt authorized to consider civil sanctions for the officer's excessive use of authorized force.

90. Ill. Rev. Stat. ch. 38, § 2-8 (1977), includes arson in the list of those crimes classified as forcible felonies. It is clear from the statutory definition of arson that there would be many instances in which an attempt to commit arson would not warrant the use of deadly force to prevent its commission:

_Arson._ A person commits arson when by means of fire or explosive, he knowingly:

(a) Damages any real property, or any personal property having a value of $150 or more, of another without his consent; or

(b) With intent to defraud an insurer, damages any property or any personal property having a value of $150 or more.

Property "of another" means a building or other property, whether real or personal, in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender may also have an interest in the building or property.

difficulty justifying his action in a federal court. Arson is a forcible felony under Illinois law. The police officer is thus statutorily justified in his use of deadly force to prevent an arsonist's escape. However, in the circumstances described, a due process issue emerges. An eighth circuit case, decided on due process grounds, held that a police officer cannot shoot at a fleeing forcible felon unless the “felon could not be otherwise apprehended and... the felon had used deadly force in the commission of the felony...” This holding was reversed, however, by the United States Supreme Court for lack of standing. No seventh circuit cases have decided this issue, and other jurisdictions have not followed this decision. Seven states, however, have adopted the Model Penal Code provision that requires that the felon be using deadly force in the commission of his act before the officer can shoot.

93. Ashcroft v. Mattis, 431 U.S. 171 (1977). The United States Supreme Court refused to decide the issue and reversed on grounds that the case was moot since plaintiff had failed to allege damages and the police officer's belief in the state law was a valid defense of good faith.
94. Qualis v. Parrish, 534 F.2d 690 (6th Cir. 1976) (unsuccessful civil rights action brought against officers who used deadly force to prevent escape from arrest for felonious assault); Wolfe v. Thayer, 525 F.2d 977 (5th Cir. 1976) (parents of a boy shot while fleeing a burglary denied damages for unconstitutional deprivations of his life); Jones v. Marshall, 383 F.Supp. 358 (D. Conn. 1974) (statute that allowed officers to shoot a fleeing felon who was a suspected automobile thief upheld).
95. Seven states have adopted the Model Penal Code's provision, according to Sullivan, Violation Cases End for Six Officers, 32 ILL. POLICE ASS'N OFFICIAL J., February, 1979, at 24. The provision reads in pertinent part:
§ 3.07 Use of Force in Law Enforcement
(1) USE OF FORCE JUSTIFIABLE TO EFFECT AN ARREST. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.
(2) LIMITATIONS OF THE USE OF FORCE
(a) The use of force is not justifiable under this section unless:
(i) the actor makes known the purpose of the arrest or believes it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.
(b) The use of deadly force is not justifiable under this section unless:
(i) the arrest is for a felony;* and
(ii) the person effecting the arrest is authorized to act as peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
Moreover, official police training policy describes at least eight factors that govern the determination of when it is necessary to use deadly force to stop the escape of a forcible felon. Many of these standards have been used to interpret the statute by the Illinois courts. Police officers are not expected to exhaust a checklist before shooting, but public policy demands a cognizance of these factors. First, the age of the suspect has importance. Second, the relative size of the individuals bears a direct relationship to the level of force that may be practically and legally required. A more physically imposing police officer probably would be expected to subdue a resisting criminal without resorting to deadly force. Third, the availability of assistance is another controlling factor in deciding whether to use deadly force. Deadly force cannot be justified when the felon may be as easily apprehended by seeking available assistance. Fourth, the known criminal history of an offender is important, especially that part revealing prior assaults on police officers. Fifth, whether the suspect was known to be

(iv) the actor believes that:

(1) The crime for which the arrest is made involved conduct including the use of threatened use of deadly force; or

(3) there is substantial risk that the person to be arrested will cause death or serious bodily harm or his apprehension will be delayed.

* In Illinois, this would be changed to “forcible felony.”

**ALI MODEL PENAL CODE** § 3.07 (1962).

96. See Model Test, supra note 16, at 29, question 110.
97. See People v. Muldrow, 30 Ill. App. 3d 209, 332 N.E.2d 664 (1st Dist. 1975) (self-defense argument more difficult when defendant and deceased are same age); People v. Givens, 26 Ill. 2d 371, 186 N.E.2d 225 (1962) (elderly man justified in using gun in self-defense due to fear of physical harm from young, robust assailant).
98. People v. Givens, 26 Ill. 2d 371, 186 N.E.2d 225 (1962) (held age and size of parties important in calculating whether a self-defense shooting was justified); People v. Kelly, 40 Ill. App. 3d 315, 352 N.E.2d 240 (1st Dist. 1976) (physical stature of victim is element to be considered in determining whether deadly force is justified); People v. Muldrow, 30 Ill. App. 3d 209, 332 N.E.2d 664 (1st Dist. 1975) (where defendant outweighed decedent by 80 pounds, it was more difficult to show self defense).
99. See Kyle v. City of New Orleans, 353 So.2d 969 (La. 1977) (factors to be considered in determining whether a shooting in self-defense was justified include: known character of arrestee, nature of the offense, physical size, strength and weaponry of the officers compared to the arrestee, and chances of escape and alternative methods of arrest). See **RESTATEMENT (SECOND) OF TORTS** § 132, Comment c (1965) (relative strength and size of officer and suspect is factor when determining reasonableness of force used).
100. Schnepf v. Grubb, 125 Ill. App. 2d 432, 261 N.E.2d 47 (4th Dist. 1970) (availability of assistance considered when determining reasonableness of force used). See Dyson v. Schmidt, 109 N.W.2d 262 (Minn. 1961) (policeman held liable for accidentally shooting bystander during gun battle in crowded movie theater because suspect could have been more safely apprehended if the officer called in available assistance).
101. Schnepf v. Grubb, 125 Ill. App. 2d 432, 261 N.E.2d 47 (4th Dist. 1970) (a policeman, aware of a deceased's prior bad conduct and personal vendetta against that policeman, was justified in reasonable belief that deadly force was necessary). People v. Brumbeloe, 97 Ill. App. 2d 370, 240 N.E.2d 150 (1st Dist. 1968), and People v. Honey, 69 Ill. App. 2d 429, 217 N.E.2d
A suspect motioning toward a pocket in which he is known to carry a weapon increases his chances of being shot by the officer. Sixth, the place of arrest can be a factor. Is the suspect fleeing into a dead-end alley or into an unfamiliar neighborhood? Seventh, the presence of the suspect’s companions can have a legal as well as practical significance. Lastly, differences in the available lighting present entirely different tactical situations. At night, a fleeing felon can kill or escape more readily than during the day.

As in self-defense situations, the police officer is protected if his belief in the necessity of preventing an escape is reasonable, even if there exists an erroneous perception of fact. In Pearson v. Taylor, decided under a similar statute in another jurisdiction, a nocturnal police search for two murder suspects, known to be heavily armed, resulted in the discovery of two men walking along a road. The officers pulled the squad car thirty feet behind the suspects and flashed the headlights upon the men. Twice the officers told them to approach with their hands uplifted. The suspects ignored the command and approached in a crouched position. The officers then fired upon them. Unknown to the officers at the time, the suspects were unarmed, had just telephoned the police, and were in fact surrendering. The court held that, under the circumstances, the officers’ beliefs were reasonable and justifiable. Similarly, as long as the police officer has a reasonable belief that deadly force is necessary to prevent the escape of the forcible felon, he is protected even though no felony has been committed in fact.

371 (1st Dist. 1966), are two cases which state that prior assaults with deadly weapons by deceased on defendant may cause defendant to reasonably believe deadly force is necessary to defend himself.

102. People v. Stapleton, 300 Ill. 471, 133 N.E. 224 (1921) (when deceased pulled gun first, the defendant was justified in using deadly force and shooting deceased); People v. Honey, 69 Ill. App. 2d 429, 217 N.E.2d 371 (1st Dist. 1966) (deceased had previously pulled gun from pocket when attacking defendant and when he repeated the same motion for his pocket several days after the first incident, the defendant was justified in using deadly force).

103. Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964) (defendant officer had reasonable belief to think deadly force was necessary to effect the arrest when he had no knowledge of the neighborhood into which the arrestee was fleeing).

104. People v. Fort, 91 Ill. App. 2d 212, 234 N.E.2d 384 (1968). Police officers undertook to arrest defendant in the presence of other hostile individuals. An officer testified that the individuals were attempting to remove defendant from custody. The court held that the officers were therefore justified in using any force necessary to effect the arrest.


106. 116 So. 2d 833 (La. 1959).

Although the police officer is protected on the basis of his reasonable belief, the public expects him to be more careful than the private citizen in using deadly force. For example, long-standing police policy requires officers to be patient if the success of the arrest will not be imperiled. It is preferable that an arresting officer delay the actual moment of custody rather than cause unnecessary harm through an impulsive use of force.108 Also, a police officer must use reasonable efforts to apprehend the suspect before he employs deadly force.109

Typically, a verbal command or warning by the pursuing police officer satisfies the "reasonable efforts" requirement. In Fornuto v. Police Board of Chicago,110 Officer Fornuto avoided dismissal from the police force because he shouted, "Halt, police," before shooting a fleeing felon. In foot-pursuit of a robbery suspect, the officer yelled his warning twice. The suspect whirled around with a knife, lunged, and turned as if to run. The officer shot the suspect in the back. In ordering the reinstatement of the officer, the appellate court for the first district noted that the officer had expended all reasonable alternatives to prevent the suspect's escape, and further held that a warning shot was unnecessary.

When the officer knows the identity of an escaping forcible felon, an additional question concerning the propriety of his use of deadly force arises. Due to the lack of case law in this area, the police officer lacks clear guidelines for his behavior. For example, suppose a police officer responds to a burglary-in-progress call. As he arrives at the scene of the crime, a well-known burglar observes him and flees from a basement window. The police officer recognizes the burglar and yells a command to halt. This particular burglar may never have been known to carry a weapon.111 Does the knowledge of the burglar's identity preclude the use of deadly force because an officer could make an arrest at a later date in a more controlled environment? Some authorities argue that positive knowledge of the identity of a fleeing forcible felon precludes the otherwise permissible use of deadly force because further attempts to arrest may be possible.112

108. See Kyle v. City of New Orleans, 353 So. 2d 969 (La. 1977). The court stated that the amount of force used to effect the arrest must be tested under the "reasonable force" standard. Id. at 972. The force used in the case before the court exceeded reasonableness because "[t]he officers could have delayed the arrest without great risk." Id. at 974.

109. Fornuto v. Police Board of Chicago, 38 Ill. App. 3d 950, 349 N.E.2d 521 (1st Dist. 1976) (police officer avoided dismissal from police force by yelling "halt" before shooting); Krantz v. O'Neil, 99 Ill. App. 2d 179, 189, 240 N.E.2d 180, 185 (1st Dist. 1968) (court instructed the jury that reasonable efforts to apprehend the suspect must be made prior to the execution of justified deadly force). See also RESTATEMENT (SECOND) OF TORTS § 131 (1965) (deadly force may be used once the person reasonably believes that the arrest cannot otherwise be reasonably effected) (emphasis added).


111. Example taken from Model Test, supra note 16, at 21, question 82.

112. C. Travelstead & A. Johnson, id. at 21, question 82.
This interpretation wrongly engrafts upon the statute the additional element of a duty to desist and delay even if all other elements justifying the use of deadly force are present. Eliminating the arresting officer's discretion and requiring him to delay the arrest upon recognition of the arrestee could endanger innocent citizens. This danger would be present because the arrestee would be encouraged to avoid subsequent apprehension, and because prosecution would be prejudiced through the loss of some evidence obtainable only through immediate apprehension of the suspect. The plain and ordinary interpretation of the statute permits the use of deadly force irrespective of the knowledge of a suspect's identity, provided the suspect is defeating the arrest by escape and all other elements of the justification are present. In all cases, it is clear that if the officer does not know the arrestee's identity or whether the arrestee is armed, the officer can justifiably use deadly force.\footnote{113}

**Arrestee's Escape with Deadly Weapons**

When the arrestee is attempting to escape by the use of a deadly weapon, the police officer's alternatives are more defined.\footnote{114} A police officer is not required to chase and disarm one who is resisting arrest, but has the option of using deadly force if the arrest cannot be made with diligence and caution.\footnote{115} If the arrestee is armed with a deadly weapon, a clear indication of danger is present. Such an exigency allows the officer to act whether or not the offender actually has used the weapon. The normal inference, that the arrestee intends to use the weapon to defeat the arrest, is thus given conclusive effect.\footnote{116}

When the option to use deadly force is available, the decision confronting the officer is one of timing. At what instant in the sequence of events does shooting an armed, fleeing arrestee become legally justified? Under common law, the police officer need not withhold fire until the arrestee shoots first. Rather, the officer can shoot when the arrestee commits any overt act which indicates an attempt to use the weapon.\footnote{117} Consider the dilemma that might face police officers arresting a non-forcible felon in a house. The suspect, facing a large prison term, flees the rear of the house with a pistol in hand. After ignoring repeated commands to halt, the armed felon turns toward a large tree. The officers can reasonably assume that the suspect in-

\footnote{113. Id.}
\footnote{114. ILL. REV. STAT. ch. 38, § 7-5(a)(1) & (2) (1978).}
\footnote{115. Perkins, The Law of Arrest, 25 IOWA L. REV. 201, 268 (1940) [hereinafter cited as Perkins]. The author quotes from an old decision which stated a view that still prevails today: "[If the victim retains] his purpose of resisting to the death, and to make a running fight, the officer and his men [are] not bound to risk their lives by rushing on a desperate man, who still [keeps] his gun in his hands." State v. Garret, 60 N.C. 85, 86 (1863).}
\footnote{116. ILL. ANN. STAT. ch. 38, § 7-5 committee comment (Smith-Hurd 1972).}
\footnote{117. See Perkins, supra note 115, at 285, where the author discusses this conclusion found in Hammond v. State, 147 Ala. 79, 41 So. 761 (1906).}
tends to fire at them from behind the shelter of the tree. Depending on the physical location and personnel variables, the officers could justifiably shoot the arrestee at any time after the arrestee turned toward the tree.

Frequently, police officers are faced with near-borderline situations in which deadly force is not yet justified. Consider the officer who shoots a person he is attempting to arrest for the misdemeanor of carrying a concealed weapon. Because the crime is not a forcible felony, and the arrestee is not escaping by the use of the deadly weapon, the shooting would not be justified. Thus, mere possession of a weapon is insufficient to trigger the use of deadly force. However, as stated earlier, if the arrestee makes an overt act to use the weapon, such as drawing or pointing the weapon at the officer, the use of deadly force will be justified. Therefore, the misdemeanant who flees from arrest wielding a gun could be the target of an officer's shot.

Escape Endangering Human Life

A police officer is also statutorily authorized to use deadly force in order to prevent an arrestee's escape if the arrestee in any way "indicates he will endanger human life or inflict bodily harm unless arrested without delay." For example, an arrestee fleeing from an officer in a high speed chase endangers pedestrians. If the pursuing officer could minimize the risk to pedestrians by shooting the driver, he may use deadly force.

Preventing Forcible Felonies or Dwelling Felonies

Two other Illinois statutes permit the use of deadly force: 1) where it is necessary to prevent the commission of a forcible felony, and 2) where it is necessary to prevent the commission of a felony in a dwelling. Since an unauthorized entry into a dwelling with the intent to commit a felony constitutes the forcible felony of burglary, these justifications are similar. They authorize the policeman to pursue both the arsonist of a home and

118. See Bailey v. Commonwealth, 310 Ky. 731, 221 S.W.2d 693 (1949) (defendant justified in shooting subsequent to discharge of decedent's gun and, as a police officer, justified in using whatever force necessary to effect an arrest); West Virginia v. Laing, 133 F. 887 (4th Cir. 1904) (affirmed holding that police officer's firing on an armed fleeing suspect was done as a lawful discharge of duty).


120. C. Travelstead & A. Johnson, in Model Test, supra note 16, at 24, question 93.


122. A. HARVIE, supra note 76, at 11.

123. ILL. REV. STAT. ch. 38, §§ 7-1, -3 (1977).

124. ILL. REV. STAT. ch. 38, § 7-2(b) (1977).

125. See A. HARVIE, supra note 76, at 9.
the residential burglar. Consider the felon who is guilty of criminal property damage in excess of $150.00. If he flees and refuses to stop on command, the necessity requirement for these statutes is satisfied. If such activity occurs in a dwelling, all elements required for a justifiable homicide are present. It should be noted, however, that a mere trespass will never justify the taking of a human life. The statute requires a trespass to a dwelling and the commission of a felony after a refusal to stop before deadly force is justified.

Illinois courts have required these additional elements—trespass to a dwelling and a commission of a felony—to be clearly present to support the use of deadly force. For instance, where an owner’s premises contain both a store and an upstairs dwelling area, the owner may not threaten an irate customer with the use of deadly force in order to remove the customer from the store. The significance of the requirement that the offense be committed in a dwelling is graphically illustrated in the case of People v. Dillard. In that case, the proprietor of a gas station in a high crime area discovered, as he was leaving with the day’s receipts, three trespassers behind the station. When he fired at the trespassers, they drew illegally possessed firearms and returned the fire. The appellate court for the fifth district stated that the proprietor’s authority to use reasonable force to remove the trespassers did not include the right to use deadly force against mere trespassers. Thus, the court held that, despite the trespassers’ illegal possession of firearms, they were justified in returning the proprietor’s fire.

Prevention of Assault After Riotous Entry

Pursuant to the fifth Illinois justification, deadly force may be used to prevent an assault that occurs after a violent riotous entry into a dwelling. For example, in People v. Eatman, tenants closed the door on the landlady and her bodyguard, who had come to collect the rent. The management forcibly kicked the door in, refused to leave, and struck the residents. The tenants responded with deadly force. The Illinois Supreme Court ruled that the occupant of a dwelling need not have a belief of peril to

126. See People v. Post, 39 Ill. 2d 101, 233 N.E.2d 565 (1968) (involuntary manslaughter conviction for shooting a fleeing prowler reversed for failure to establish that defendant’s act was reckless). But see People v. Smith, 404 Ill. 125, 88 N.E.2d 444 (1949) (shooting unjustified since building was open to the public).
130. 5 Ill. App. 3d 896, 284 N.E.2d 490 (5th Dist. 1972).
131. Id. at 901, 284 N.E.2d at 494.
133. 405 Ill. 491, 91 N.E.2d 387 (1951).
justify the use of deadly force. In holding that the bodyguard’s death was justified, the court stated that a strong forcible entry, a show of violence, and a refusal to desist were sufficient to justify the use of deadly force.  

\[\text{\textit{Escape From Penal Institution}}\]

The sixth and last Illinois justification applies only to law enforcement officers. They may use deadly force to prevent an escape from a penal institution. The statute requires only a reasonable belief that the escaping prisoner was lawfully detained. The police officer need not inquire into the nature of pending charges before deciding to use deadly force. Even if the officer later discovers that the prisoner was held on a mere disorderly conduct charge, the shooting was still justifiable. However, if the firing police officer knew that the prisoner was awaiting trial for less than a forcible felony, he could face a federal civil rights action. Further, once the prisoner completes his escape, deadly force cannot be applied pursuant to this last statutory justification.

\[\text{\textit{Possible Legislation}}\]

As this Article has detailed, the criminal law in Illinois permits a broad use of deadly force. This year, the Illinois Legislature is considering narrowing the scope of a police officer’s right to use deadly force. In particular, it is

135. ILL. REV. STAT. ch. 38, § 7-9(b) (1977). See also id., § 1003-6-4(b).
136. If one or more committed persons injures or attempts to injure in a violent manner any employee, officer, guard or any other committed person or damages or attempts to damage any building or workshop, or any appurtenances thereof, or attempts to escape, or disobeys or resists any lawful command, the employees, officers and guards shall use all suitable means to defend themselves, to enforce the observance of discipline, to secure the persons of the offenders, and prevent such attempted violence or escape; and said employees, officers or guards, or any of them, shall, in the attempt to prevent the escape of any such person, or in attempting to retake any such person who has escaped, or in attempting to prevent or suppress violence by a committed person against another person, a riot, revolt, mutiny or insurrection, be justified in the use of force, including force likely to cause death or great bodily harm under Section 7-8 of the Criminal Code of 1961 which he reasonably believed necessary.
137. See note 89 and accompanying text supra.
138. ILL. ANN. STAT. ch. 38, § 7-5 committee comment (Smith-Hurd 1972). See FISHER, LAWS OF ARRESTS §§ 25-31 (1967). The author points out that a person is not an escapee until he has been arrested and reduced to confinement. Thus, at common law, a person fleeing to avoid initial custody is not an escapee.
examining the officer's right to shoot fleeing forcible felons who have committed non-residential burglaries.¹³⁹

Six bills were introduced. The most restrictive bill limits the use of deadly force to crimes involving the use or threat of deadly force and to situations in which a delay in the arrest would create a substantial risk that the suspect would cause death or serious bodily injury. Compromise positions taken by other bills exclude burglaries and non-residential burglaries from the forcible felony justification. Proponents of the compromise bills cite six cases in Chicago in which suspects had been shot and it later was determined that the deceased suspect had been unarmed.¹⁴⁰ However, the proponents overlook the rationale that has long supported the existing law. The proposed legislative restrictions are contrary to the majority rule in many states having similar statutes.¹⁴¹ Other states go further than Illinois and extend the right to shoot fleeing felons to citizens.¹⁴²

The proposed restrictions, moreover, would encourage a felon to attempt escape. Severe restrictions on a policeman's authority to use deadly force would jeopardize his effectiveness in responding to a felony-in-progress call. He might as well go "wearing track shoes and armed only with water pistols."¹⁴³ In the final analysis, the loss of police officers' lives must be balanced against the loss of fleeing felons' lives. Statistically, the largest category of activity engaged in by police officers at the time of being killed on

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¹³⁹ See Bagley, supra note 11. See also Sullivan, Violation Cases End for Six Officers, 32 ILL. POLICE ASS'N OFFICIAL J., Feb. 1979, at 24-25.
¹⁴⁰ Id.
¹⁴² Commonwealth v. Klein, 372 Mass. 823, 363 N.E.2d 1313 (1977) (citizen may shoot fleeing felons who have engaged in crimes which threaten death or great bodily harm—rule applied retroactively to a citizen who shot the fleeing burglar of a business); Commonwealth v. Chermansky, 430 Pa. 170, 242 A.2d 237 (1968) (citizen may shoot fleeing felon who has committed treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with intent to murder, rape or robbery, or a felony that normally causes or threatens death or great bodily harm).
duty is that of responding to burglary- and robbery-in-progress calls. Prohibition of the right to use deadly force against forcible felons would inhibit police officers' readiness to use their firearms and would increase the risk of their being injured. Undoubtedly, the number of police officers killed in pursuit of felons would increase if the law is further restricted.

Traditionally, the strongest curb on the illegal use of deadly force has been the potential civil liabilities of the police officer. The police officer's civil liability for the improper use of deadly force arose not as a challenge to the existing law justifying the use of deadly force, but rather as a response to the harm incurred by the unintentional shooting of innocent persons. Because the measure of civil liability parallels the criminal law of unjustifiable use of deadly force, the potential for civil liability is a tremendous impetus for self-restraint.

Despite popular conception, in many typical pursuit situations, the rank-and-file police officer is often a poor marksman. Contrary to Hollywood representations, a police officer has a greater chance of being shot by the criminal than of killing the criminal at whom he is shooting. Currently, the typical required firearms training consists of exercises in shooting approximately fifty shots at a brightly lit target under perfect shooting conditions. This is inadequate because none of the required training gives the police officer comprehensive instructions on how to avoid being shot or on how to conduct himself in a tactical shooting situation. Generally, these critical decisions are left to the untrained police officer to learn experientially. If the training were expanded to include firearms tactics and to simulate combat firing under poor lighting and shooting conditions, the officers could then acquire abilities that would aid them in self-defense. Also, unnecessary shooting potentially would be avoided as a result of the officers' increased confidence.

144. R. Brooks, supra note 105, at 243-44.
145. La Monte v. City of Belleville, 41 Ill. App. 3d 697, 703, 355 N.E.2d 70, 76 (5th Dist. 1976).
146. See A. Harvie, supra note 76, at 15, where it is stated that "[i]t is difficult, if not impossible to shoot accurately at a moving vehicle, especially from a moving vehicle."
147. R. Daley, Target Blue (1978). In 1970 in New York, the police had a total of 634 shooting incidents. Six hundred fifty-nine police officers fired 1643 shots, including 183 warning shots, of which only 436 shots hit their targets. Of these 643 incidents, seven officers died, 242 were injured and 19 had their firearms taken away from them. Fifty criminals were killed and 212 criminals were wounded. Most of these shootings occurred at night. Almost all of these incidents occurred within seven yards and lasted under two seconds. Only 75 incidents were a Hollywood type gun fight with the officer and criminals exchanging multiple shots.
Some jurisdictions have imposed civil sanctions against police departments for failure to provide appropriate firearms training for their police officer. In the New York Police Department, a veteran police officer of nine years consistently met departmental qualifications with his weapon. Upon surprising two armed robbers from behind, he fired at them from a distance of less than eight feet. The officer missed both felons, hitting and killing the victim of the intended robbery with four of the six shots fired.\(^\text{150}\) The court imposed liability upon not only the police officer, but also upon his supervisors for failure to train the responsible officer adequately. The New York courts have further imposed liability for the failure to provide firearms training to state troopers on moving silhouette targets.\(^\text{151}\) The Illinois Courts have begun to follow this trend and have allowed recovery against a city for the failure to train a police officer adequately.\(^\text{152}\)

Some police chiefs and sheriffs, in order to avoid costly litigation and expensive judgments, have enacted safety and policy rules for their departments concerning firearms. These regulations can be tailored to fit the requirements of the department, the level of training and proficiency of the officers, and the experiences of the department. Most of these regulations restrict the police action more than does the criminal law.\(^\text{153}\) Although these regulations may be more stringent than the state law, police officers may be discharged pursuant to the requirements of the particular department.\(^\text{154}\) Because they emanate from a source of authority that has a more direct relevancy for a police officer than a potential liability action in which the governmental authority may eventually have to pay, these regulations often have a more powerful deterrent effect.

Unfortunately, trial courts have admitted these restrictive departmental rules into evidence in civil cases\(^\text{155}\) as probative evidence of a violation of a duty to the public\(^\text{156}\) and a violation of an individual department’s firearm regulation. Such rules have contributed toward sizeable judgments even


\(^{152}\) Peters v. Bellinger, 22 Ill. App. 2d 105, 159 N.E.2d 528 (4th Dist. 1959), rev’d. on other grounds, 19 Ill. 2d 367, 166 N.E.2d 581 (1960) (liability had been based not only on a lack of training but police officer had a felony conviction and had been involved in many street brawls.)


when the shooting is justified under state law. Unless the legislature acts to prohibit the admissibility of police regulations in civil liability lawsuits, police departments effectively will be deterred from promulgating safety and policy guidelines.

In response to judicial intervention into issues concerning the negligent use of justifiable deadly force, the Illinois Legislature has acted twice. First, the Illinois Police training Act was amended to require all full-time police officers appointed after January 1, 1976, successfully to complete a prescribed basic training course within the first six months of their initial employment or to forfeit their positions. Second, part-time police officers are prohibited from carrying firearms unless they successfully complete a twenty-four hour course requiring the proficient use of firearms with stationary targets under the control situation of a police range, and the study of the legal and moral ramifications of the use of deadly force. These laws indicate an attempt to establish minimum guidelines for the training of police officers and a desire to insulate police chiefs and supervisors from vicarious civil liability. It is hoped that through concise standard guidelines every officer can be trained to the same level of minimum proficiency. Non-compliance with these training laws could result in the imposition of strict liability against a municipality or, at the least, be persuasive proof of liability for the negligent use of deadly force by a police officer.

The next step in the law of civil liability concerning police officers would be to allow recovery for the wrongful act of a police officer when the officer fails to stop the illegal use of force of another officer (of the same rank or lower) with whom he is working. For example, suppose two Illinois officers pursued a suspect in a vehicle for a misdemeanor violation. The fleeing driver hits a tree, and when he attempts to run, one officer wrongfully shoots and kills him. In a similar situation, both officers were sued, but the first district appellate court failed to resolve a crucial issue: is an officer who is in a position to prevent the illegal use of deadly force liable for his

157. See Grundt v. City of Los Angeles, 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970). A police training manual outlined restrictive justifications for the use of deadly force. The court held that the manual had been improperly excluded from evidence at the trial and that plaintiff was deprived of a crucial theory in her case because of its exclusion. Contra, City of St. Petersburg v. Reed, 330 So. 2d 256 (Fla. App. 1976) (police department cannot impose additional civil liability on their police officers by adopting voluntary restrictive guidelines on the use of deadly force).


failure to do so? Indeed, is an officer who explicitly encourages an unjustified or excessive use of force liable for the results of his encouragement? A policy of co-liability would discourage improper use of firearms because police officers would have a duty to restrain each other before the instant of shooting.

**Conclusion**

Illinois statutes describe six instances in which police officers are justified in using deadly force. Despite repeated judicial refinement and interpretation of these six provisions, several areas of legal uncertainty remain. An off-duty police officer still cannot be sure whether it is illegal to carry a gun outside of his jurisdiction, or whether he can shoot at a fleeing forcible felon whom he recognizes, or to what extent he may be held liable for shooting at fleeing forcible felons. With regard to the plaintiff’s lawyer, he has available expanded legal theories with which to sue not only the officer, but also the officer’s supervisors and municipality for the failure to provide sophisticated firearms training. Despite repeated public outcry, the courts have entrenched the police officer’s rights to use deadly force. However, even with statutory modification and legal refinement, the police officer will always have the capability to be “judge, jury, and executioner” in these instances. Therefore, the answer to cries of abuse lies in improving officer training.