qualify as an assault, it must be coupled with an apparent, present ability to cause the harm (such as a raised fist). However, the Supreme Court of Texas cited a case in which the Montana Supreme Court held that an "overt act" could be either physical or verbal (*In re Mental Health of E.M.,* 875 P.2d 355 (Mont. 1994)). The threshold for what is adjudged threatening conduct in those with severe, persistent mental illness has traditionally been lower than that required in criminal statutes. Although a few states have, at least for brief periods, required that "danger to others" in civil commitment cases be proved "beyond reasonable doubt," most states now adhere to the constitutional minimum established in *Addington.* Since both criminal convictions and civil commitments result in at least temporary deprivation of liberty, the lower threshold required in civil commitments suggests that a less stringent evidentiary process is satisfactory.

There is a potential problem here. If verbal statements, even ones as freighted with sexually threatening overtones as those of K.E.W., can satisfy the danger-to-others arm of a civil commitment statute, then states might turn civil commitment actions into civility codes. In setting the threshold in *Addington*, the Court sought to prevent ". . .commit(ing) an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior" (*Addington*, p 427).

In a concurrence in *K.E.W.*, one of the justices related his concern about allowing a verbal statement, which is not overtly threatening, to satisfy the danger-to-others arm. He noted that, considered in the abstract, K.E.W.'s statements "may not rise to the level of a threat" (*K.E.W.*, p 27). Indeed, there is no indication that K.E.W. ever verbalized intent to force females into sexual acts. The justice recommended that the threat arm in this case be grounded in K.E.W.'s nonverbal acts, such as, keeping a "list of women's names as well as detailed plans to impregnate them (among other things)" or his carrying of these documents on his person and his holding them out to those providing his medical treatment (*K.E.W.*, p 28).

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Can Municipalities Bear *Respondeat Superior* Liability for Failure to Adequately Train Police Officers in Crisis Intervention Techniques?

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The Fifth Circuit Court of Appeals Upheld the Appellate Court's Grant of Summary Judgment for the City of Houston in a Case Alleging the City's Failure to Adequately Train Their Police Officers in Crisis Intervention Techniques

The United States Court of Appeals for the Fifth Circuit affirmed the lower court's summary judgment dismissal of claims against the city of Houston by the family of the deceased, Omar Esparza, for violations of Mr. Esparza's Fourth and Fourteenth Amendment Rights (*Valle v. City of Houston*, 613 F.3d 536 (5th Cir. 2010)).

Facts of the Case

Omar Esparza locked himself in the family home and refused to let his parents, the Valles, enter. He had had depression and anxiety for months, and his parents had attempted to get him admitted to a hospital for psychiatric care. After Mr. Esparza refused to come out or let his parents into the house for about an hour, the parents called 911 to get medical assistance for their son. The police were dispatched instead. Mr. Esparza refused their requests that he come out or let them in. The officers contacted their supervisor, a sergeant, who arrived on the scene and assumed control. After failing to convince Mr. Esparza to unlock the door, he contacted the SWAT captain who directed the on-scene supervisor to get a crisis intervention team (CIT) special officer to negotiate with Mr. Esparza. After 30 to 40 minutes of negotiation without success, the sergeant, without consulting or notifying the CIT officer, contacted the SWAT captain who authorized forceful entry into the house.

Mr. Esparza had threatened neither himself nor others and was not charged with a crime. The city alleged that Mr. Esparza had a hammer and charged at the officers when they entered. The sergeant fired three blasts of nonlethal, soft-impact beanbags from the shotgun he was carrying but was unable to stop Mr. Esparza. Another officer fired his Taser and missed him. Finally, another officer fired his 40-caliber automatic pistol at Mr. Esparza, who was struck by three bullets and died of his wounds. Mrs. Valle then entered the home and saw her son lying on the floor; she stated that she did not see a hammer.

The Valles sued the city (they did not sue any of the individual officers) pursuant to 42 USC § 1983, alleging violations of Mr. Esparza's Fourth and Fourteenth Amendment rights. The Valles asserted that the officers engaged in a warrantless search and that they employed excessive force in their attempts to seize Mr. Esparza. They also alleged that the city was liable under § 1983 for failure to adequately train the officers who entered their home. The district court granted the city's motion for summary judgment, holding that the decision to enter the Valles' home was not made by a city policymaker, and thus no city policy was a "moving force" in causing the Valles' injuries (*Valle*, p 537). The district court also held that although the Valles raised an issue of material fact as to the city's failure to train the officers, they failed to show that a city policymaker acted with deliberate indifference and that the allegedly inadequate training was a "moving force" in bringing about the constitutional violation (*Valle*, p 537).

Ruling and Reasoning

The court of appeals affirmed the district court's summary judgment. In addressing the questions of warrantless search and excessive force, the court first cited *Monell v. Dept. of Social Services* (436 U.S. 658 (1978)) in which the Supreme Court held that municipalities can bear no § 1983 *respondeat superior* liability. The court of appeals then quoted its own ruling in *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001), in which it held that a municipality is liable only for acts directly attributable to it "through some official action or imprimatur." The court explained a three-prong process by which § 1983 municipal liability could be grounded. A successful claim must "identify (1) an official policy or custom, of which (2) a policymaker can be charged with actual or constructive knowledge, and a (3) constitutional violation whose 'moving force' is that policy or custom" (*Valle*, p 538).

The Valles did not argue that the city had a formal written policy or custom, the exercise of which resulted in the wrongful seizure of their son. Rather, they asserted city liability for the captain's "single unconstitutional decision" authorizing the forcible entry (*Valle*, p 538). The court held that for such a claim to survive, it must demonstrate that the decision-maker "had final policymaking authority and that his decision was the 'moving force' behind the constitutional injury" (*Valle*, p 538). The court stated that "discretion to exercise a particular function does not necessarily entail final policymaking authority over that function" (*Valle*, p 538), and thus the Valles' argument for "single incident exception" was simply an attempt to impose municipal *respondeat superior* liability. The court stated that if such an argument were permitted, a municipality could be liable for almost any decision of its employees that resulted in a constitutional violation, since the unconstitutional decision could be regarded as "official municipal policy" for that particular decision (*Valle*, p 539). The court allowed that the captain's forced entry order was arguably "the 'moving force' behind the constitutional violations that resulted in Esparza's death," but because the captain's decision "was not a decision by a final policymaker of the City," the city could not be held liable (*Valle*, p 539).

As to the Valles' assertion regarding city liability in failing to "adequately train its patrol supervisors in the use of CIT tactics," the court of appeals used the same three-pronged test mentioned earlier. It relied on the Supreme Court's ruling in *City of Canton v. Harris*, 489 U.S. 378, 390 (1989), stating that in resolving disputes as to the adequacy of municipal training programs the "focus must be on [the] adequacy of the training program in relation to the tasks the particular officers must perform" (*Valle*, p 539). The primary target of the Valles' "inadequacy" argument was the city's prior decision not to implement additional CIT training for their police force (due to budgetary and time constraints). In 2004, the city had been advised that incidents involving mentally ill individuals were not being managed appropriately (even by CIT-trained officers). The appeals court affirmed the district court's contention that the Valles presented sufficient summary judgment evidence to raise a jury question as to the adequacy of the city's CIT training program. However, the court

rejected the Valles' claim that said training inadequacies were a "moving force" in the constitutional violation and that the city had been deliberately indifferent—that is, conscious of the fact that its policies were jeopardizing constitutional rights. The court pointed out that the SWAT captain who authorized the forcible entry had been trained in CIT tactics and that the on-site CIT officer later testified that if she had been asked at the time of the decision to forcibly enter the home, she would not have disagreed with the decision. Summing up, the court held that "it is difficult to show deliberate indifference in a case such as this one where the City has implemented at least some training" (*Valle*, p 542).

Discussion

Throughout the opinion, the court of appeals emphasized its consensus against endorsing municipal liability. Near the end of its opinion, the court asserted its wariness in relation to municipal liability findings, relating that the "court has been wary of finding municipal liability on the basis of a single incident to avoid running afoul of the Supreme Court's consistent rejection of respondeat superior liability" (*Valle*, p 543). This seems to be a question of administrability. Indeed, an appellate endorsement of municipal *respondeat superior* liability would be likely to lead to a civic liability free for all and many bankrupt municipalities.

However, the very existence of CIT tactics indicates that progress is being made at the ground level on the problems at the heart of this case. The court of appeals endorsed the basic aims of CIT training and even suggested that if more of the officers had been trained in CIT tactics, the tragedy might have been avoided (*Valle*, p 540). Research is under way to determine whether CIT improves outcomes in incidents in which the police encounter severely mentally ill clients (see Compton MT, Bahora M, Watson AC, *et al*: A comprehensive review of extant research on crisis intervention team (CIT) programs. *J Am Acad Psychiatry Law* 36:47–55, 2008). At the very least, CIT training appears to improve rates of diversion to mental health services in those arrestees with severe mental illness (Compton *et al*, p 52). Forensic psychiatrists can, and we think should, advocate at the community level for improved acceptance and more comprehensive implementation of CIT training in their own municipal police forces.

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Testamentary Capacity

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The Presence of Mental Illness Does Not Preclude Testamentary Capacity

At issue in *In the Matter of the Estate of Berg*, 783 N.W.2d 831 (S.D. 2010), is whether a trial court erred in its finding that Mr. Berg, who had a history of schizophrenia, had the capacity to write a will and was not subject to undue influence in executing such.

Facts of the Case

After being discharged from the U. S. Army in 1943, Fred Berg had visual and auditory hallucinations, which were controlled by electroconvulsive therapy (ECT) for several years. He began refusing ECT and, in 1950, underwent a bilateral prefrontal lobotomy. After his lobotomy, Mr. Berg was able to engage in social and recreational activities for the remainder of his life.

In 1967, the Veterans Administration found that Mr. Berg lacked the capacity to contract or to manage his own affairs, including the disbursement of funds, and was incompetent "for the limited purposes of insurance and disbursement of benefits" (*Berg*, p 834). A court order appointed American National Bank and Trust Company as a guardian to dispense benefits.

In 1991, Mr. Berg was visited by his nephew Roger Berg (Roger), and a friendship began that lasted until Mr. Berg's death. Roger called his uncle regularly, and they saw each other one to two times per year for the next 16 years. The director of social services at Mr. Berg's nursing home noted that Mr. Berg would "light up" when Roger was expected for a visit and that he spoke about these visits with great enthusiasm. She also noted that very few other family members visited. Mr. Berg and Roger took several trips together. In 1995, Roger was given Mr. Berg's power of attorney.

In 1996, Roger became aware that Mr. Berg had $500,000 in the bank but did not tell the rest of Mr. Berg's family. In 1997, upon Roger's recommendation, Mr. Berg met with an attorney to draft a will.