

## INSTRUCTIONS

**Due Date: Changed to Sunday, September 13, 2009  
8:00 p.m.**

Carefully read this assignment which includes the evaluation criteria, the assigning memo, documents from the client's file, the applicable statutes, and excerpts from a related case. Your assignment is to draft the discussion section only of an interoffice memorandum. Your response shall follow the Format Requirements found in your supplement and on the Legal Writing Program website at <http://www1.law.umkc.edu/Academic/LWP/index.html>.

Follow the instructions carefully on removing metadata. Your assigned legal writing number must be picked up from Elizabeth Couzens in the Cardozo/Marshall Suite by Friday, September 11, 2009. Numbers will not be available after that and you must have your number to submit your paper to the assignment drop box. Do not include your name anywhere on your paper. Save your document in Word 2003 with a ".doc" suffix. Use only your legal writing number for the name of the file – 1234.doc

### Word Count

You must complete and attach the required cover sheet that is also available on the website. This assignment shall be no longer than 450 words (not including the cover page). Keep in mind that quality, not quantity, counts. Again, the required cover sheet is **not** included in your word count.

### Honor Code

Do your own work. You may, however, discuss the issues with other members of the first-year class or with the legal writing faculty. You may not speak to anyone else regarding this assignment. Should another professor ask you about the problem in his or her class, you may discuss it. You may not collaborate on the writing of this assignment. In other words, you may not show your writing to anyone, including members of your class. You may not look to any legal authorities or sources other than those provided to you in this handout. You may not have anyone else proofread or edit your work. Failure to follow any of these rules will be considered a violation of the Honor Code.

## Citation to Authority

Bluebook citation is required on this assignment. Because you have not yet been assigned ICW exercises in state statutes or in short form citation as of this week, you should refer to the attached authorities as follows:

Cal. Civ. Code § 43.92(x) (2009). Insert proper subsection letter in place of “x” and note that a space is inserted between the section symbol and the number, but is not inserted between the number and the opening parentheses of the subsection.

§ 43.92(x). After you have cited the statute in full the first time it is used, you may then use this short form with the subsection letter in place of “x.” Refer to BB Rule 6.2(c) for proper use of section symbols.

*Shortened form of first party’s name*, vol # reporter abbreviation at page where material is located. *Smith*, 123 F.3d at 567.  
Use this short form for the case opinions after you have cited that case in full the first time.

Do not cite to cases that are discussed within a case, cite to the case you are directly reading. On later assignments, we will add related authority to our citations.

## Evaluation Criteria

Your first draft will be critiqued and evaluated but not graded. I will be considering the following criteria in critiquing your work:

### A. Organization (25%)

1. Did the writer prioritize issues and subissues logically?
2. Did the writer discuss each issue and subissue separately and completely?
3. Did the writer utilize an IRAC-based organization?

### B. Content and Legal Analysis (40%)

1. Did the writer identify all of the relevant legal issues?
2. Did the writer analyze all necessary issues?
3. Does the discussion include all of the steps in the writer's reasoning process so that the reader can easily follow the logic of the discussion?
4. Does the discussion include applying facts of our case to the statute?

5. Does the discussion include appropriate analogies and distinctions of our facts to the facts of cases?
6. Does the writer reach a conclusion on each issue, as well as a final conclusion?
7. Is correct BB citation form used?
8. Is there appropriate attribution to sources?
9. Are quotations used properly, including alterations and omissions, and not overused?

C. Objectivity (25%)

1. Is appropriate counter-analysis included?
2. Does the writer explicitly state the logical arguments each side would offer to a court to advance their position?

D. Presentation (10%)

1. Is the document neatly typed and consistent with format rules?
2. Does the presentation detract from the message?

Your paper must be submitted to the assignment drop box available through your TWEN course on Westlaw no later than **8:00 p.m. Kansas City time (Central Standard or Daylight Savings, whichever is in effect) on Sunday, September 13, 2009.** This is a change in the due date and time of this assignment from what is on your syllabus.

**NOTE:** Bring two copies of your paper to your grading conference with your legal writing faculty. Be sure to keep your notes and these Exercise One instructions for use in Exercise Two.

## MEMORANDUM

To: Associate

From: Senior Partner

Date: September 9, 2009

Re: Duty to Warn: Serious Threat of Physical Violence Issue

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Our firm represents Kelly McGuire. She wants to bring suit against certified school psychologist, Letitia Tree, for injuries she sustained after being stunned with a stun gun by one of Tree's patients, Martin Cook. The burns caused substantial scarring and Ms. McGuire believes that they will seriously compromise her acting career.

Kelly McGuire wants to sue Letitia Tree for failing to warn her and Monica Lang, Martin Cook's former girlfriend, of Cook's deviant behavior and threats. She claims that "I would have been more cautious if I had known that this crazy man was still stalking Monica."

Please prepare the discussion section of a memo evaluating whether Tree had a duty to warn Monica Lang, and thus Ms. McGuire. At this time, focus only on whether Dr. Tree had any knowledge Cook posed a serious threat of physical violence under California law. I have another associate researching whether the conversation with Mr. Stephens was a patient communication and whether Ms. McGuire was a reasonably identifiable victim. For purposes of your memo, assume those elements are met. Do not deal with any other aspect of a claim against Tree or any other party, including the Center for the Arts.

## SWORN STATEMENT

Martin Cook

September 1, 2009

I, Martin Cook, make this statement as part of my plea agreement in the criminal prosecution regarding the incident with Kelly McGuire. I am truly sorry for what I have done.

At the time of the incident, I was a senior majoring in photography at the Center for the Arts (the "Center") in Los Angeles, California. I had been seeing Dr. Letitia Tree for counseling for several months.

As a sophomore, I voluntarily withdrew from the Center as I was severely depressed since the love of my life, Monica Lang, had broken up with me. At that time, Monica was a talented drama student in her final year at the Center. I told Dr. Tree that I had contemplated suicide and I could not stop calling Monica and driving past her apartment to see what she was doing. I would sit outside her apartment all night to check up on her and find out if she was seeing anyone else. I was unable to concentrate in class, was not eating, and was having difficulty going about normal life. I told Dr. Tree that my friend Scott Stephens finally convinced me that I needed help after I saw a man kissing Monica in the doorway to her apartment. I lost control and charged out of my car and threatened him with a pocket knife. Monica's neighbors called the police and prevented me from injuring anyone. Ultimately Monica convinced the man not to press charges.

After undergoing nine months of individual and group counseling with Dr. Paul McGraw, I terminated my treatment with him and sought readmission to the Center. In my application, I disclosed my prior psychological treatment. My request for readmission to the Center was granted on the condition that I meet with Tree once a week.

I always kept my appointments with Dr. Tree. I was candid with Dr. Tree about my undying love for Monica, but I did start to go out with other girls.

On July 29, 2009, I learned from a mutual acquaintance that Monica was engaged to be married. I could not stop myself from driving by her home for the next three nights. I learned that Monica was going to be in a production of *Les Miserables* at the Metropolitan Theater on August 1, 2009. In my session with Dr. Tree on that day, I told her that I was going to the theater to take photos of the cast for the

newspaper. I told Tree while I'm there, I'm going to get her alone and talk some sense into her. She can't marry that guy. I know if I can get her alone, I can convince her she belongs with me. I won't let anything stand in my way. She tried to convince me otherwise and I told her I would think about all she had said.

That night, I went to the *Les Miserables* opening. I had to see her. I planned to go to Monica's dressing room and stun her with my stun gun to temporarily knock her out. Then I was going to take her to a private place where I would be able to convince her that we belonged together. I was not going to let anyone stop me and was prepared to use the stun gun to ward off anyone else who would try to prevent me from persuading Monica that we belonged together.

I watched the performance and anxiously waited for most of the spectators to leave. Then I used my press credentials to go backstage. I found her dressing room and knocked on the door expecting to stun Monica with my stun gun as she opened the door. Unfortunately, Kelly McGuire was using Monica's dressing room at the time because Monica had already left through the back door to attend the cast party. When McGuire opened the door, I stunned her with my stun gun on the front of her neck causing two X-shaped burns. She screamed and a security guard knocked me to the ground. I was then arrested and charged.

## WITNESS STATEMENT

Scott Stephens

September 3, 2009

Q: Please state your name and address

A: Scott Stephens, 593 Sunshine Way, Ocean, California.

Q: Mr. Stephens, you understand that I am an attorney representing Kelly McGuire in a possible action against Dr. Letitia Tree?

A: Yes.

Q: How do you know Martin Cook?

A: Marty and I have been friends since middle school. We played on the same soccer team together. Our families always traveled together for our soccer tournaments.

Q: Do you also attend the Center for the Arts School?

A: Yes. Marty and I decided to go there together. I'm finishing my degree in Graphic Arts. We are roommates.

Q: What was Marty's major?

A: Photography. His future as a photographer was very promising. He had received numerous accolades in the local trade publication for his work and was a part-time photographer at a city newspaper.

Q: Do you know Monica Lang?

A: Yes, Monica was Martin's girlfriend.

Q: Was? When did they break up?

A: During Marty's freshmen year. Marty was very jealous and possessive. Monica wasn't ready to settle down and she got tired of Marty's jealousy over everything.

Q: How did Marty react to the breakup?

A: Not well. He really went off the deep end. He called her constantly and stayed up all night parked outside her apartment to be sure she wasn't seeing anyone else.

Q: What did you do?

A: I encouraged him to withdraw from the Center and to undergo counseling for emotional instability.

Q: Did he?

A: Yes. He started seeing a psychologist, Dr. Paul McGraw. He saw him for counseling for about nine months all together.

Q: Did he come back to school?

A: Yes. He applied to readmitted. I understand the admissions committee discussed his file with his former treating psychologist and asked Dr. Letitia Tree, the Center's certified school psychologist, to review Marty's entire treatment file. In large part because Monica had already graduated from the Center and no criminal charges had ever been filed against Marty for charging the boyfriend, all parties ultimately agreed to grant Marty's request for readmission to the Center on the condition that he meet with Tree once a week.

Q: How was he doing then?

A: Better. He didn't call or stalk Monica. We went out on some group dates a few times.

Q: What happened to change all that?

A: We were at a happy hour when Tom Kruse, another Center student, started teasing Marty about Monica. He chided Marty about Monica seeing the light and deciding to marry Mike Gibson next summer.

Q: How did Marty react?

A: He went off the deep end again. He spent the next three nights in the car outside her apartment. He bought a stun gun.

Q: What did you do?

A: I decided to call Dr. Tree. I knew Marty had an appointment with her on Friday and I decided to call right after the appointment. She told me she could not talk with me about any of her patients. I informed her that I knew she had been treating Marty. I told her I was concerned for Marty's welfare and had growing concerns that Marty was once again unable to control his obsession with Monica Lang. I told her that Marty had spent the last three nights in the car outside her apartment. I told Tree that Marty had also learned the address and phone number of Monica's fiancé and that Marty had told me the night before that he would do whatever he had to do to prevent Monica from marrying that schmuck. I also told Tree that Marty had purchased a stun gun and was carrying it everywhere he went and that Marty had confided in me that he was planning to go backstage at the *Les Miserables* opening to get her alone and talk some sense into Monica.

Q: What did Tree say or do?

A: Tree told me that the law tied her hands and she could not discuss any of her patients with me.

## WITNESS STATEMENT

Dr. Letitia Tree

September 4, 2009

Q: Please state your name and occupation.

A: Dr. Letitia Tree. I am a certified school psychologist for the Center for the Arts School.

Q: How long have you been in that position?

A: Fifteen years.

Q: Did you treat Martin Cook?

A: Just to be clear, I want it on the record that Marty has signed a waiver allowing me to talk with you.

Q: Yes, that's understood.

A: OK. I began seeing Marty last year after he was readmitted to the Center.

Q: What were you treating him for?

A: His obsessive thoughts regarding his former girlfriend, Monica Lang.

Q: How was he doing in treatment?

A: Well. Although he has a continuing infatuation with his former girlfriend, he appeared to be making efforts to date other women. He reported that he had no contact with Lang and did not appear to be reverting to any of his previous stalking behaviors.

Q: What happened on August 1, 2009?

A: He arrived for his late afternoon session in a very agitated state. He told me that he had been thinking about Lang constantly ever since he learned from a mutual acquaintance that she had become engaged to be married. He admitted that he had spent the last three nights outside of her apartment and that he was going to go to the theater that night to talk with her.

Q: What did you do?

A: I talked with Marty about all the progress he had made. I expressed concern about him driving past Lang's home and advised him that, in light of his past relationship with Lang, he should not go to the theater and should ask the newspaper to find someone else to cover the *Les Miserables* photo shoot. I advised Marty to stay away from Lang and reminded him that it appeared that Lang had already made her choice. I told Marty that it was unlikely that anything he told Lang now would change her mind.

Q: Did you write anything in your session notes?

A: Yes, I wrote that Marty seemed to visibly calm down. Before he left, he promised me that he would think about all that I had said.

Q: Anything else happen?

A: Yes. As Marty was leaving the session, he hurriedly grabbed his book-bag from the floor. As he picked up his bag, a large, black, metallic object fell out onto the floor. I asked what the item was. Marty immediately became flustered and jammed it back into his bag. He told me that the item was a light meter he used while taking photos and quickly left my office.

Q: Then, what happened?

A: I got a telephone call from Scott Stephens.

Q: What was said?

A: He expressed his concerns about Marty. He was concerned for Marty's welfare and had growing concerns that Marty was once again unable to control his obsession with Monica Lang. He told me that Marty had also learned the address and phone number of Monica's fiancé and that Marty

had told Scott the night before that he would do whatever he had to do to prevent Monica from marrying that schmuck. He then told me that Marty had purchased a stun gun and was carrying it everywhere he went and that Marty had confided in Scott that he was planning to go backstage at the *Les Miserables* opening to get her alone and talk some sense into Monica.

Q: What did you say or do?

A: I expressed my concerns about not talking about any of my patients with him. I told him that the law tied my hands. I was planning to talk to the Center the next day.

**§ 43.92. Psychotherapists;  
duty to warn of threatened  
violent behavior of patient;  
immunity from monetary  
liability**

(a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in [Section 1010 of the Evidence Code](#) in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.

(b) There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

267 Cal. Rptr. 553

California Court of Appeal, First  
District.  
Margaret C. BARRY, Plaintiff and  
Appellant,  
v.  
Peter TUREK, M.D., Defendant and  
Respondent.  
**No. A043977.**

March 20, 1990.

**\*553** Appellant Margaret Barry appeals the grant of summary judgment against her. She asserts the trial court erroneously found that respondent psychiatrist, Dr. Peter Turek, was immune from liability under [Civil Code section 43.92](#), subdivision (a).

#### I. STATEMENT OF THE FACTS

Respondent provided psychological care to Bismillah Jan at St. Mary's Hospital (St. Mary's) in San Francisco starting on May 14, 1986. Jan, a male Afghani, suffered severe injuries to the head and neck in the Afghanistan war, and was brought to St. Mary's for reconstructive surgery by the California Committee for a Free Afghanistan. At that time, Jan was 17 or 18 years old, five feet four inches tall, and weighed approximately 105 pounds. He wore a mask which covered most of his face. He spoke no English and communicated through interpreters.

Jan roamed freely on the seventh floor of St. Mary's. On a number of occasions, he followed nurses in "inappropriately close ways" and "grab[ed] nurses and [tried] to **\*554** kiss and fondle them." These incidents

appear to have occurred between May 15 and May 25 of 1986. Respondent and his assistants instructed Jan not to touch the nursing staff and, on at least one occasion, Jan nodded affirmatively after such instructions were given.

Jan never made verbal threats of violence within the hearing of respondent or his assistants, and appellant does not point to any evidence that respondent knew Jan had any violent tendencies.

Appellant worked on the seventh floor of St. Mary's as office manager in the social services department. Jan entered her office on a number of occasions, leaned over her and touched her with his shoulder. On each occasion, Jennifer Root, a clerical worker in the same office, had been present.

On the afternoon of June 6, 1986, Jan again came into appellant's office when she and Root were there. Appellant was on the telephone and Jan stood at her shoulder. Root left the office to run an errand. When appellant hung up the phone and stood up, Jan pushed his body against her and pinned her against the wall. He attempted to simultaneously fondle her breast and force her legs open while he masturbated. Appellant was wearing a pants outfit at the time; none of her clothes were removed during the assault. Root returned to the office while the assault was still occurring and Jan ran out of the room.

The assault aggravated appellant's bursitis of the shoulder and caused her to suffer psychological trauma.

#### II. STATEMENT OF THE CASE

On June 1, 1987, appellant filed suit

against respondent, the California Committee for a Free Afghanistan, and others, alleging negligence and negligent infliction of emotional distress. [\[FN3\]](#) On August 17, 1988, respondent moved for summary judgment on the grounds that Jan did not communicate to him a serious threat of violence. However, the court specifically held that appellant had not met her burden of showing the case was within the exception to the immunity provided under [Civil Code section 43.92](#).

[FN3](#). Neither the hospital, or the Committee or its members were ever served.

This timely appeal followed.

### III. DISCUSSION

[Civil Code section 43.92](#), subdivision (a) provides that: "There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in [Section 1010 of the Evidence Code](#) in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."

[Section 43.92, subdivision \(a\)](#) was enacted to limit the liability of psychotherapists under [Tarasoff v. Regents of University of California \(1976\) 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334](#). [\[FN4\]](#) The legislative history to [Civil Code section 43.92](#), subdivision (a) states: "[C]ase law has held that a psychiatrist may be liable for

negligently failing to protect a person when a patient presents a serious danger to that person. \*555 [¶ ] This bill would provide for immunity from liability for a psychotherapist who fails to warn of and protect from, or predict and warn of and protect from a patient's threatened violent behavior, except where the patient has communicated to the psychotherapist a serious threat of violence against a reasonably identifiable victim." (1985 Summary Digest at pp. 227- 228.)

[FN4](#). In [Tarasoff](#) the parents of a murdered woman sued the murderer's therapist for failing to warn them of the danger his patient presented. The court held that "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." ([Id.](#), at p. 431, 131 Cal.Rptr. 14, 551 P.2d 334.) The court determined that a psychotherapist's duty may include warning the intended victim. ([Ibid.](#))

Psychotherapists thus have immunity from [Tarasoff](#) claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims. We are satisfied that appellant has established she was part of a group of "reasonably identifiable victims."

The much more difficult question is

whether appellant has sufficiently shown that respondent ought to have been aware that Jan presented a serious threat of physical violence. Before Jan's assault on appellant his inappropriate conduct with women was limited to incidents in which he attempted to grab and kiss the nurses: His medical chart states that he followed the nurses in "inappropriately close ways." Although the nurses quite properly found this behavior annoying, no physical violence was involved in these incidents and the nurses' notes suggest they were not frightened by Jan's conduct. The nursing staff attempted to correct the problem by setting limits Jan could comprehend and abide by. On May 25 Jan tried to kiss and fondle the nurses and was ordered back to his room. Later that day, however, the nurse noted that Jan displayed no inappropriate sexual behavior during her time with \*556 him. The record shows that the assault on appellant was by far the most serious incident involving Jan.

On appeal from a summary judgment we must determine whether a triable issue of material fact exists. Where, as here, summary judgment has been granted in favor of the defendant, we must consider whether there is any possibility that the plaintiff may be able to establish her case. In making this decision we must construe strictly the defendant's declarations and construe liberally those of the plaintiff. (*Slaughter v. Legal Process and Courier Service, supra*, 162 Cal.App.3d at p. 1244, 209 Cal.Rptr. 189.) With these principles in mind we nonetheless have concluded that there is insufficient evidence to suggest that, based on Jan's prior conduct, respondent should have been aware Jan was likely to commit such a serious sexual assault.

In sum, because Jan's conduct in the hospital prior to the assaults on appellant did not constitute a "serious threat of physical violence" for the purposes of establishing an exception to the immunity provided by [Civil Code section 43.92](#), subdivision (a), the court correctly granted respondent's motion for summary judgment.

Accordingly, the judgment is affirmed.

END OF DOCUMENT

California Court of Appeal, First  
District,  
Milton MAVROUDIS et al., Petitioners,  
v.

SUPERIOR COURT of the State of  
California FOR the COUNTY OF SAN  
MATEO,

Respondent;  
KAISER FOUNDATION HOSPITALS  
et al., Real Parties in Interest.

**Civ. 46368.**

Feb. 26, 1980.

**\*728** Petitioners Milton and Betty Mavroudis seek a writ of mandate to compel respondent superior court to order the production of certain psychiatric records. In the alternative, they request the records be delivered to their psychiatric expert, under a protective order, for examination to determine whether they contain evidence which would indicate real parties in interest knew, or reasonably should have known, that the psychiatric patient presented a serious danger to petitioners.

**\*729** Respondent superior court's interpretation of Tarasoff is erroneous on two points. It limits the court's holding to cases where the therapist has Actual knowledge of the danger, and to cases where the danger is present toward Particular individuals. However, the Tarasoff court stated the duty to use reasonable care to protect the intended victim arises whenever a therapist Determines, Or pursuant to the standards of the profession Should determine, that his patient presents a serious danger of violence to another. The court stated its holding in these terms:

"When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances."

[\(17 Cal.3d at p. 431, 131 Cal.Rptr. at p. 20, 551 P.2d at p. 340.\)](#)

In applying the holding in Tarasoff, courts should be cautious not to construe it too broadly. The Supreme Court recognized the difficulty a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. The therapist need not render a perfect performance but merely exercise " 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) under similar circumstances.' **\*730** " ([17 Cal.3d at p. 438, 131 Cal.Rptr. at p. 25, 551 P.2d at p. 345.](#)) The therapist is not liable for the injuries caused by his patient if his judgment proves wrong, so long as it was reasonable under the circumstances.

"Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged

wrongly is insufficient to establish negligence."

([Id.](#), at p. 438, [131 Cal.Rptr. at p. 25, 551 P.2d at p. 345.](#)) The therapist's duty is further limited by his patient's interest in privacy. The psychiatrist's duty to preserve the privacy of his patient requires that he not disclose a confidence of his patient "unless such disclosure is Necessary to avert danger to others." ([Id.](#), at p. 441, [131 Cal.Rptr. at p. 27, 551 P.2d at p. 347.](#), emphasis added.) An assessment of the necessity of the disclosure which gives rise to the therapist's duty must take into account the imminence of the danger posed by the patient. If the patient does not pose an imminent threat of serious danger to a readily identifiable victim, a disclosure of the patient's confidence would not be

necessary to avert the threatened danger and the therapist would be under no duty to make such a disclosure. (See Fleming & Maximov, *The Patient or his Victim: The Therapist's Dilemma* (1974) 62 *Cal.L.Rev.* 1025.)

We conclude that the court's holding in *Tarasoff* means that the therapist's duty of care to protect the intended victim against threatened danger presented by the therapist's patient arises when the therapist determines, or reasonably should have determined, that his patient presents a serious and imminent danger of violence to a readily identifiable victim.

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