

## REPLY

### TORTURE WITHOUT VISIBILITY AND ACCOUNTABILITY IS WORSE THAN WITH IT

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Oliver Wendell Holmes Jr. once defined the law as “[t]he prophecies of what the courts will do in fact.”<sup>1</sup> It is this empirical view of law that suggests to me that the courts will probably allow some degree of non-lethal torture when deemed necessary to elicit information capable of preventing an act of terrorism likely to result in mass casualties. My own normative preference would be for the courts to declare all forms of torture unconstitutional, even if its fruits are not used against the defendant and even if it is not administered as “punishment.” My own normative preference would also be for law enforcement officials to refrain from using torture, but my empirical conclusion is that they will, in fact, employ it in “ticking bomb” cases.<sup>2</sup> My prediction of what the current courts “will do in fact” is different from Professor Kreimer’s.<sup>3</sup> I hope he is right, but I think I am right.

If he is right, he should support my proposal for some kind of legal structure that promotes visibility and accountability through a “torture warrant.” In the absence of some such structure, it will be difficult to get a test case before the courts, since torture will continue to be administered beneath the radar screen and with the kind of “deniability” that currently shrouds the practice. The open authorization of limited torture warrants could, on the other hand, be challenged on its face, and we would soon learn whose prediction is more accurate. If he is right, all forms of torture would be declared unconstitutional. If I am right, there would, at least, be some accountability, visibility, and limitations on a dangerous practice that is currently shrouded in secrecy and deniability. Accountability and visibility are important elements in a democratic society, as I argue in detail in *Why Terrorism Works*.<sup>4</sup>

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<sup>1</sup> O. W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 461 (1897).

<sup>2</sup> ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002).

<sup>3</sup> Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

<sup>4</sup> DERSHOWITZ, *supra* note 2.