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**Reply**

**\*1011 SELF-INCRIMINATION AND THE CONSTITUTION: A BRIEF REJOINDER TO  
PROFESSOR KAMISAR**

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Lettow

Professor Yale Kamisar has been writing in the field of criminal procedure for many years, and we are grateful that he has chosen to respond to our ideas. At the outset of his long and lively response to Fifth Amendment First Principles, [\[FN1\]](#) Professor Kamisar promises to analyze our constitutional argument, with "special attention" to "current doctrines or trends." [\[FN2\]](#) But in what follows, he offers almost no analysis of, well, the Constitution -- its text, its history, its structure. We believe that constitutional law should, ideally, bear some relation to, well, the Constitution. Professor Kamisar, it seems, does not. He also sidesteps most of our main points.

Begin with the constitutional text. When John Doe is obliged --under pain of contempt -- to testify before Congress, or in a civil case, the Fifth Amendment has not (yet) been violated: it applies only to a criminal case. If Doe's congressional, or civil, testimony is never introduced as evidence in a criminal case, the Amendment, on our plain meaning reading, once again has never been violated: Doe has never been made an involuntary witness against himself in a criminal case. When Congress or a civil court compels testimony, this is generally not cruel, or barbarous, or uncivilized -- or unconstitutional. There is no poisonous tree here and thus no constitutional basis for excluding its "fruit." Kastigar [\[FN3\]](#) is thus wrong. This plain textual argument has considerable support in American and

**\*1012** English history, in the language and spirit of kindred constitutional clauses, and in more general principles of constitutional structure. It also solves many practical problems in current doctrine, and

resonates with a deeply rooted moral and constitutional norm that innocent defendants be protected against erroneous convictions based on unreliable evidence.

Professor Kamisar never squarely engages these constitutional arguments. He begins his analysis not in civil courtrooms or congressional hearings, but in police stations. [\[FN4\]](#) But, as we were at pains to say in our article, these proceedings are very different. Rogue police can be cruel, barbarous, and uncivilized. Abusive actions in police stations, squad cars, and crime scenes are themselves unconstitutional -- they are paradigmatic unreasonable searches and seizures under the Fourth Amendment. But, if a defendant's coerced "confession" -- witnessing -- is never introduced in a criminal case, the Fifth Amendment, on our reading, is not violated. [\[FN5\]](#) What's more -- and this is a separate point -- the Fourth Amendment does not require exclusion of anything in a criminal case.

Our Fourth Amendment logic is based on the article Fourth Amendment First Principles [\[FN6\]](#) -- and here, too, Professor Kamisar fails to present and squarely address the many constitutional arguments. To ruthlessly compress: the text of the Fourth Amendment nowhere calls for exclusion. Its reference to the people's right to be secure "in their persons, houses, papers, and effects" conjures up tort and property law, which protect these interests. No one at the Founding thought the Amendment required or invited exclusion. No English court, then or now, ever embraced exclusion. Both

**\*1013** American and English courts understood that tort suits and punitive damages were necessary to protect citizens from wrongful intrusions. No court in America, state or federal, ever excluded before 1886. When exclusion did come to America, it came via Boyd's [\[FN7\]](#) 1886 fusion of the Fourth and Fifth Amendments -- a fusion whose early progeny included both Counselman [\[FN8\]](#) and Weeks. [\[FN9\]](#) But this fusion, we have argued, is based on a plain misreading of the words and spirit of both Amendments. The modern Court has now decisively rejected this fusion. [\[FN10\]](#)

Without fusion, exclusion has no leg to stand on as a constitutional mandate. Judicial integrity does not require exclusion -- just look at England, or American civil courts where exclusion has never been the rule. The idea that government should never profit from its own wrong sounds nice -- but exclusion often lets criminals profit from their wrong. The Fourth Amendment does not require that government return drugs to drug dealers, or stolen goods to thieves. Government, courts have always held, may constitutionally keep the contraband; and, we submit, by the same logic, government may constitutionally use the contraband as evidence. Finally, government must be deterred from violating Fourth Amendment rights, but that is what punitive damages and strict administrative disciplinary schemes -- which we propose, following the Framers -- are for. Exclusion will not deter if the police want to abuse someone they know to be innocent, or if they just want to get drugs off the street, or return stolen goods to their rightful owner, or use evidence civilly, or use it against another criminal target, or . . .

In a nutshell, these are some of our main constitutional arguments about the Fourth and Fifth Amendments. Professor Kamisar does not squarely engage these and many of our other constitutional claims. [\[FN11\]](#) What he does discuss at length is what courts have **\*1014** said. We of course agree that precedent is an important part of constitutional law. The problem is, precedent in this area is often convoluted and contradictory. Professor Kamisar can quote Justice Frankfurter for the Court in the 1961

Rogers case [\[FN12\]](#) as poo- pooing reliability; and we can quote Justice Souter for the Court in the 1993 Withrow case [\[FN13\]](#) and Justice O'Connor for the Court in the 1985 Elstad case [\[FN14\]](#) as tightly linking the Fifth Amendment to reliability. (Technically, of course, the Rogers language does not address the Self- Incrimination Clause -- nor does the Rochin language Professor Kamisar leans on [\[FN15\]](#) -- whereas both Withrow and Elstad do discuss the Self- Incrimination Clause, proper.) Professor Kamisar can point to Justice Brennan's narrow reading of the logic of Schmerber; [\[FN16\]](#) and we can point to Justice O'Connor and Judge Friendly's broader account of its deep structure. [\[FN17\]](#)

The precedents, in short, look in different directions at once. In order to pick which direction to follow -- which of the tangled strands to isolate and embroider upon -- the legal community and the Court need a clear account of what the clause is and should be about. Ideally, that account should not require total repudiation of everything the modern Court has said and done. We believe our account meshes well with the Burger and Rehnquist Courts' general themes of innocence, reliability, and truth-seeking. Professor Kamisar may disagree and say that we have, for example, overread Justice O'Connor. [\[FN18\]](#) On the other hand, he admits he disagrees \*1015 with her votes in these cases, whereas we applaud them; and his reading of her underlying vision may simply be too grudging.

Ideally, however, an attractive theory must do more than resonate with important themes in modern precedents. It should also mesh with the text, history, and structure of the Constitution, and with attractive normative principles. It should be rooted in a big idea or ideas worthy of inclusion in an enduring document proclaimed in the name of the People. In our article, we try to provide just such an account. Without such an account, thoughtful judges cannot decide which strands in precedent to follow and which to discard.

The challenge of our article to Professor Kamisar and other leaders in the field who might reject our account is to come up with their own more attractive constitutional account of the Self-Incrimination Clause -- to figure out what it says, and why, and to root that reading in text, history, and structure, as well as precedent. With respect, he has failed to provide such an account until now; and his response today likewise fails to provide a clear coherent constitutional account.

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[\[FNaa\]](#). Student, Yale Law School. A.B. 1990, Princeton; M.Litt. 1993, Oxford. -- Ed. What follows is a brief rejoinder to Yale Kamisar, On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony, [93 Mich. L. Rev. 929 \(1995\)](#).

[\[FN1\]](#). See [Akhil Reed Amar & Renee B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857 \(1995\)](#).

[\[FN2\]](#). Kamisar, *supra* note \*\*, at 936.

[FN3]. [Kastigar v. United States, 406 U.S. 441 \(1972\)](#).

[FN4]. This is the vast bulk of Parts I and II of Professor Kamisar's article. See supra note \*\*, at 936-80. We explore the consequences of this "backwards" analysis infra note 5.

[FN5]. Professor Kamisar's backwards organization -- starting in brutal police stations and only later considering civilized questioning in civil cases, before Congress, in grand juries, and so on, is not harmless error. When he finally gets around to talking about Kastigar proper, he defends it as an application of the poisonous tree doctrine. See, e.g., Kamisar, supra note \*\*, at 986-88, 1005-06. But this is utterly question-begging. On our textual account, no Fifth Amendment violation has occurred merely because Kastigar was obliged to testify outside his own case. If his words are not introduced inside his case, before the jury, no Fifth Amendment violation will ever occur. We reject Kastigar for the same reason Kamisar embraces Schmerber (a case he wrongly sees as irrelevant): The government did not "violate a constitutional guarantee at any point along the way .... No fruits of [[[government] misconduct were involved in [Kastigar] because there was no misconduct." Id. at 957, 1006.

If Professor Kamisar believes that asking civilized questions in civilized settings is itself misconduct or poisonous, he must explain why -- he must, that is, offer an account of self-incrimination proper and not of police barbarism. But he has failed to do this.

[FN6]. See [Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 \(1994\)](#).

[FN7]. [Boyd v. United States, 116 U.S. 616 \(1886\)](#).

[FN8]. [Counselman v. Hitchcock, 142 U.S. 547 \(1892\)](#).

[FN9]. [Weeks v. United States, 232 U.S. 383 \(1914\)](#).

[FN10]. See [United States v. Leon, 468 U.S. 897, 905 - 06 \(1984\)](#); [Fisher v. United States, 425 U.S. 391, 408 \(1976\)](#).

[FN11]. Professor Kamisar chides us for not discussing the "fruit of the poisonous tree" doctrine. See, e.g., Kamisar, supra note \*\*, at 1006. But cf. Amar & Lettow, supra note 1, 908 n.227, 917 n.265. There are two reasons why we do not discuss this doctrine at length. First, unlike Professor Kamisar, we do not begin and end in the police station. Rather, we seek to offer a much more global account of all Fifth Amendment doctrine -- government-employer cases, required records, subpoenas, immunity, and

so on. Second, the fruit doctrine, we believe, ultimately derives from Fourth Amendment rules about exclusion; and one of us has elsewhere set out at length a critique of all Fourth Amendment exclusion claimed to be mandated by the Constitution. See Amar, *supra* note 6. As we have proclaimed here repeatedly -- from our title and opening footnote to our final paragraph -- our argument today builds upon that earlier work. Our main argument today is also analytically severable. Some readers may accept our Fifth Amendment idea of testimonial immunity for civilized testimony, but reject our Fourth Amendment views. For these readers, fruits of police brutality should be suppressed, but not fruits of civilized depositions.

[FN12]. See Kamisar, *supra* note \*\*, at 939-40 (quoting [Rogers v. Richmond, 365 U.S. 534, 540 - 41 \(1961\)](#)).

[FN13]. See Amar & Lettow, *supra* note 1, at 895 n.172 (quoting [Withrow v. Williams, 113 S. Ct. 1745, 1753 \(1993\)](#)).

[FN14]. See *id.* at 882 (quoting [Oregon v. Elstad, 470 U.S. 298, 308 \(1985\)](#)).

[FN15]. See Kamisar, *supra* note \*\*, at 954 (quoting [Rochin v. California, 342 U.S. 165, 172-73 \(1952\)](#)). Elsewhere, Professor Kamisar acknowledges that his quotes from Rochin and Rogers are, technically, off point. See *id.* at 943.

[FN16]. See *id.* at 957-58 & n.123 (quoting, *inter alia*, [Schmerber v. California, 384 U.S. 757, 765 \(1966\)](#)).

[FN17]. See Amar & Lettow, *supra* note 1, at 882 & nn.102-03; *id.* at 887. Schmerber's holding -- that a criminal suspect can indeed be forced to furnish evidence against himself -- negates the root premise of Counselman and Kastigar. Professor Kamisar misses this in Part III of his article.

[FN18]. See Kamisar, *supra* note \*\*, at 968-75. But see Amar & Lettow, *supra* note 1, at 883 n.109.

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