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INTERROGATION OF DETAINEES: EXTENDING A HAND OR A BOOT?

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The current "war on terror" provides the Bush administration with a unique opportunity to both establish clear guidelines for the interrogation of detainees and to make a forceful statement about American values. How the government chooses to act can promote either an ethical commitment to the norms of civil society, or an attitude analogous to Toby Keith's "American Way," where Keith sings that "you'll be sorry that you messed with the USofA, 'Cuz we'll put a boot in your ass, It's the American Way."

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No aspect of the "war on terror" more clearly addresses this balance than coercive interrogation. In a recent decision, Hamdan v. Rumsfeld, *the United States Supreme Court found the procedures governing the Guantanamo Bay Military Commissions to be inadequate. Though the Court called on the Administration to create appropriate procedures and processes, the recently enacted Military Commissions Act and the subsequently issued Department of Defense Manual for the Trial of Detainees suggest that the Administration has not fully internalized* Hamdan*'s significance regarding the coercive interrogation of detainees.*

In seeking a clear articulation of interrogation standards, this Article turns to the pages of American history for guidance. Drawing a comparison between the current detainees and African Americans in the Deep South, this historical analysis argues that the same constitutionally based protections against coercive interrogation of African Americans can and should be extended to the detainees, a currently unprotected class.

This historical analogy is accomplished by analyzing a set of cases termed the Bram-Brown *progeny. This watershed line of cases shows the Supreme Court's willingness to enter the interrogation context in the Deep South, where the Court eventually mandated the extension of constitutional protections to an unprotected class of people.*

This Article concludes by formulating recommendations based on constitutional, criminal, and international law that the author posits will both cure the deficiencies identified by the Court in Hamdan *and provide a means for the United States to return to its moral stance in the international community.*

You'll be sorry that you messed with the USofA,
'Cuz we'll put a boot in your ass,
It's the American Way.

—"Courtesy of the Red, White, & Blue"
by Toby Keith

INTRODUCTION

Post 9/11, the United States has the opportunity to send a message to the rest of the world. The message can be either that of Keith's "American Way," or of a commitment to an ethical and moral approach of extending the norms of civil society. In the current "war on terror," an unfettered executive has refused to articulate standards and limits for coercive interrogation, communicating to the international community a message analogous to Keith's "American Way." The United States Supreme Court entered this debate in *Hamdan v. Rumsfeld*,[1] a watershed executive power

1. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

case. This Article argues that *Hamdan* can be viewed as the natural heir to the *Bram-Brown* progeny,[2] and that valuable lessons learned from the African American experience in the Deep South can and should be applied to the current detainee interrogation context. As discussed below, the *Bram-Brown* progeny is a set of cases, originating with *Bram v. United States*, which outlined the establishment of protections in the interrogation setting.[3]

Five years after 9/11, there remains a lack of adequate standards for the interrogation[4] of those detained in this "armed conflict short of war."[5] To fill this void, a wide spectrum of possible interrogation standards exist, permitting harsh interrogations or torture[6] at one extreme and granting either full Geneva Convention or domestic criminal law protections at the other.

Given the panoply of options between these two extremes, it is necessary to precisely and conclusively delineate a clear set of standards and procedures for detainee interrogations. The extensive scholarship focused on torture,[7] while provocative and interesting, forms only a small facet of the interrogation inquiry. The broader

2. *See* Bram v. United States, 168 U.S. 532 (1897); Brown v. United States, 297 U.S. 278 (1936).

3. *See infra* Part II.

4. Defined as the application of force, either physical or mental, in order to extract information. Coercive interrogation can range from mild to extreme, but somewhere along that spectrum coercive interrogation morphs into actions more commonly considered to be torture. Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 672–73 (2006).

5. The Israeli Government created this term to address the nebulous type of conflict which is not quite war and not quite a police action; in this Article it will be used to refer to the post 9/11 conflict generally. *See* Isr. Ministry of Foreign Affairs, Sharm El-Sheikh Fact-Finding Committee: First Statement of the Government of Israel (Dec. 28, 2000), http://www.mfa.gov.il/NR/exeres/FCFDA57E-15AB-4F50-AFBD-BDCE6A289FA8.htm.

6. Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *in* MARK DANNER, TORTURE AND TRUTH (2004).

7. *See, e.g.*, Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2003–2004) (advocating the so-called torture warrant). *See generally* Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justified*, 39 U.S.F. L. REV. 581 (2005) (arguing that torture is morally defensible in circumstances where more grave harm can be avoided); David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61 (2005) (discussing the principal legal issues associated with the treatment and interrogation of Prisoners of War and detainees); Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation, and Torture*, 37 CASE W. RES. J. INT'L L. REV. 427 (2006); Kenneth J. Levit, *The CIA and the Torture Controversy: Interrogation Authorities and Practices in the War on Terror*, 1 J. NAT'L SECURITY L. & POL'Y 341 (2005); Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275 (1994) (tracing the development and drafting of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Phillip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479 (2006) (considering if coercive interrogation works in producing timely, reliable and life-saving information).

question of what interrogation methods are permissible beyond the cliché "ticking time-bomb" hypothetical is the more important issue.

This Article argues that allowing an unfettered executive to continue to promulgate loose standards offends civil society and international law and decreases the likelihood of an international coalition assisting the United States in the "war on terror." In ascertaining the necessary new limits, the Article will examine, and then meld, various aspects of the domestic criminal law paradigm with the prisoner of war paradigm in order to create a hybrid model. The criminal law paradigm is "all that is involved in the administration of criminal justice, in the broadest sense, [embracing] ... substantive criminal law, criminal procedure, and special problems in the administration and enforcement of criminal justice."[8] The hybrid paradigm is not exclusively a criminal law paradigm or a prisoner of war ("POW") paradigm, but is in equilibrium between the laws pertaining to domestic criminals and those pertaining to POWs; it is a melding of these other two models.[9] The conclusions of this Article are premised upon the assumption that the hybrid paradigm is the most appropriate legal and policy framework to apply to the current detainee situation.

The arguments this Article makes for superimposing aspects of the criminal law paradigm onto the hybrid paradigm should not be confused with a broader claim that non-citizen detainees are inherently *entitled* to constitutional rights. Rather, the Article recommends the extension of *some* constitutional protections to detainees as the best way to remedy deficiencies in the current system. This proposal aims to balance the need for interrogations as a means of pursuing legitimate national security considerations against an individual's interest in his or her own physical autonomy.[10]

This Article's hybrid model will be created by taking criminal law protections that were extended by the Supreme Court to African

8. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1, 6 (3d ed. 1982).

9. Specifically, the hybrid paradigm is "a true mix of both the criminal law and prisoner of war paradigms without [either] full constitutional or criminal procedure rights." *See* Amos N. Guiora, Quirin *to* Hamdan*: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT'L L. 2 (forthcoming 2008) [hereinafter *Quirin to Hamdin*]; Amos N. Guiora, *Where are Terrorists to be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805 (2007) [hereinafter *Where are Terrorists to be Tried*].

10. *See* Stephan Dycus, *The Role of Military Intelligence in Homeland Security*, 64 LA. L. REV. 779 (2004); Amos N. Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism*, 20 TEMP. INT'L & COMP. L.J. 363 (2006) (regarding comparative analysis of balancing approaches); Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495 (2005).

Americans in the Deep South[11] throughout the last century and superimposing them on the current detainee situation.

This hybrid model takes on particular importance in the aftermath of *Hamdan v. Rumsfeld*.[12] In *Hamdan*, the Supreme Court signaled to the Bush Administration that the procedures governing the Guantanamo Bay military commissions were inadequate and demanded a reformulation of procedures and processes for the military commissions.[13] Among other things, the commission's procedures provide "that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding" that the commission chooses to close.[14] Grounds for such closure include:

> [T]he protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods or activities, and "other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officers discretion, be forbidden to reveal to the client what took place. . . . Moreover, the accused and his civilian counsel may be denied access to classified and other "protected information," so long as the presiding officer concludes that the evidence is 'probative.'[15]

In further analyzing these deficiencies, the Court held that even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment.[16]

In response to *Hamdan*, the United States Congress passed the Military Commissions Act of 2006.[17] While this Congressional action was a step in the direction of addressing the Court's concerns in *Hamdan*, it is ultimately insufficient to ensure proper interrogation standards. Rather than specifically articulating permissible

11. Defined in this Article as the region from the late 1800's through the 1940's.

12. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

13. *Id.* (stating that the Authorization for the Use of Military Force was not a blank check for the Administration to set up military commissions however they saw fit, but was more like the "lowest ebb" of power, akin to *Youngstown Sheet & Tubing Co. v. Sawyer*, 343 U.S. 579, 585–88 (1952), and requiring further Congressional approval for such commissions).

14. *Id.* at 2755.

15. *Id.*

16. *Id.* at 2798.

17. *See* Military Commissions Act of 2006, 10 U.S.C. § 948 (2006).

interrogation methods, the Military Commissions Act grants the executive the authority to interpret the scope and application of Common Article III of the Geneva Convention.[18] As the following discussion shows, interrogation standards must be established in a clear and specific way so that the interrogators themselves know the precise contours of permissible interrogation methods. The vagueness of the Military Commissions Act leaves the standards open to far too many "on the battlefield" abuses.

The *Bram-Brown* progeny offers examples of how extending some constitutional protections found in domestic criminal law might cure the deficiencies identified by the *Hamdan* Court. Again, this is not to say that full constitutional protections should be granted to detainees. Instead, the Constitution can be used as a palette from which to draw certain rights that have historically been successfully applied to domestic interrogations. The *Bram-Brown* progeny symbolized a great watershed for extending existing constitutional protections to African Americans in the interrogation setting;[19] *Hamdan* is similarly a watershed for protecting detainees from coercive interrogation.[20]

This analysis requires occasional "leaps of faith." There are clear differences between African Americans in the Deep South and the current detainees in the "war on terrorism." In particular, citizenship status and reasons for interrogation differ substantially. However, the similarities between these situations make the comparison worthwhile. The African American experience in the interrogation setting provides a clear frame of reference for exploring the limits of detainee interrogations.

This Article focuses on two interrogation methods common to domestic criminal law, threats[21] and cumulative mistreatment.[22] Methodologically, threats and cumulative mistreatment are useful subjects for examination as they are common aspects of interrogations widely understood by both laymen and jurists. This Article includes a historical analysis of these two interrogation methods,

18. *See id.*

19. *See* Bram v. United States, 168 U.S. 532, 540–45 (1897) (speaking for the first time regarding limits of interrogation); Brown v. United States, 297 U.S. 278, 279–87 (1936) (addressing for the first time interrogations of African Americans in the Deep South).

20. Just as the cases prior to the *Bram-Brown* progeny stand for acquiescence by the courts and the government to interrogation methods used in the Deep South, so too the decisions of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2003), and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), stand for a modern deferential view of executive power.

21. Defined as a communicated intent to inflict harm, either physical or mental, on another person's body or property. BLACK'S LAW DICTIONARY 1519 (8th ed. 2004). *See infra* Part V.

22. Defined as continual abuses or prolonged punishments of a detainee aimed at wearing down that detainee's will in an effort to extract information. *See infra* Part V.C.

and then undertakes a jurisprudential analysis based on careful examination of scholarship and Supreme Court decisions specifically pertaining to the Fifth and Fourteenth Amendments. Using the hybrid model, this Article ultimately proposes a set of recommendations for both policy-makers and decision-makers as they seek to establish a legally permissible framework for future interrogations.

I. DETAINEE RIGHTS AND STATUS

To begin the process of determining which criminal law protections ought to extend to detainee interrogations, it is critical to discuss who the detainees are and what rights they are currently afforded.

A. Who are the Detainees?

In the immediate aftermath of 9/11, numerous commentators, scholars, and policy-makers sought to define the status and rights of those captured and subsequently detained in Guantanamo Bay, Abu Ghraib, Bagram, and elsewhere.[23] The predominant discussions at that time suggested that the detainees should be identified either as prisoners of war[24] entitled to full Geneva Convention protections, or as criminals granted rights in accordance with the traditional criminal law paradigm. More than five years after 9/11, this discussion remains incomplete and unsettled. Among other difficulties, vague definitions of detainee status make the determination of the appropriate legal forum for the detainees problematic. If they are neither prisoners of war nor criminals,

23. *See generally* Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006) (discussing the domestic and international legal frameworks that apply to the transfer of a detainee from U.S. custody to the custody of another state, particularly where torture is a concern); *Quirin to Hamdan*, *supra* note 9; *Where are Terrorists to be Tried*, *supra* note 9; Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006) (discussing the legal status of detainees).

24. The Geneva Convention defines a POW as a soldier who: 1) is part of a command structure; 2) openly wears his insignia; 3) openly carries his arms; and 4) conducts himself according to accepted laws of war. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135. A soldier who is part of a regular army of a state easily meets this test. *See, e.g.*, Michael C. Dorf, What is an "Unlawful Combatant," and Why It Matters (Jan. 23, 2002), http://writ.corporate.findlaw.com/dorf/20020123.html.

then it is unclear how they should be classified and what rights they are entitled to. This debate currently finds itself in the "twilight zone" referred to by Justice Jackson in *Youngstown Sheet & Tubing Co. v. Sawyer*,[25] as Congress has not explicitly approved or disapproved any specific legal regime.

The matter is complicated because detained individuals do not fit the accepted definition of soldiers in a regular army, as is required to obtain POW status. While it is arguable that al-Qaeda has a command structure, detainees do not meet the other three parts of the Geneva Convention definition, as they wear no clear insignia, do not follow laws of war, and are not soldiers of any state's army.[26] Nor can the detainees be classified as common domestic criminals, because of national security concerns, and, arguably, their lack of citizenship. Therefore, detainees are neither given the protections of the Geneva Convention,[27] nor are they granted the rights of the traditional criminal law paradigm.[28]

In this context, it is important to understand the Court's *Hamdan* decision correctly. The Court in *Hamdan* clarified the need to extend certain Geneva Convention protections, yet the ruling did

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25. Youngstown Sheet & Tubing Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). Some commentators have suggested that *Hamdan v. Rumsfeld* will become equally important in determining the limits of executive power. *See generally* David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155 (2002) (discussing the conflict involved in expansive executive authority); Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A 'Joint Decision' Solution*, 77 GEO. L.J. 367 (1988) (discussing the war power in the Constitution); Themes Karalis, *Foreign Policy and Separation of Powers Jurisprudence: Executive Orders Regarding Export Administration Act Extension in Times of Lapse of Political Questions*, 12 CARDOZO J. INT'L & COMP. L. 109 (2004) (proposing that the Export Administration Act is crucial to the government's ability to obtain information from exporters for national security and foreign policy reasons); Lorell Landis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 196–98 (2005).

26. *See, e.g.*, K. Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L L. 662 (2003); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006); Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT'L L. REV. 1 (2005); Rui Wang, Note, *Assessing the Bush Administration's Detention Policy for Taliban and Al-Qaeda Combatants at Guantanamo Bay in Light of Developing United States Case Law and International Humanitarian Law, Including the Geneva Conventions*, 22 ARIZ. J. INT'L & COMP. L. 413 (2005).

27. *See* David Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004); Srividhya Ragavan & Michael S. Mireles, Jr., *The Status of Detainees from Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619 (2005); Omar Akbar, Note, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195 (2003).

28. *See* MICHAEL RATNER & ELLEN RAY, GUANTANAMO: WHAT THE WORLD SHOULD KNOW 184 (2004); Luisa Vierucci, *Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to Which Guantanamo Bay Detainees Are Entitled*, 1 J. INT'L CRIM. JUST. 284 (2003); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149 (2005).

not suggest that detainees are prisoners of war.[29] This is crucial because international law precludes bringing the detainees to trial if they are classified as POWs.[30] The *Hamdan* Court's mandate to extend certain Geneva Convention privileges does not affect the classification of individuals as detainees and enables trials to go forward. Taking another approach, some scholars have advocated for categorizing the detainees as criminals[31] and applying clearly delineated interrogation standards that have been established by criminal law jurisprudence.[32] The prevailing view, however, is that the detainees cannot be defined as domestic criminals, but must be defined under some form of prisoner of war or enemy combatant status.[33]

A different legal regime would be in effect today if the Bush Administration had responded to 9/11 by drawing the *Hamdan* distinction and granting certain Geneva Convention protections to detainees without extending actual POW status. Such a regime may

29. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795–97 (2006).

30. If defined as a prisoner of war, the individual may only be brought to trial on charges of either war crimes or violations occurring during detention.

31. Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061 (2005); Jennifer Van Thiel, Note, *Good for the Nation, Good for the Administration: Why the Courts Should Hear the Guantanamo Bay Detainee Cases and How it Will Have Positive Effects*, 27 WHITTIER L. REV. 867 (2006).

32. *See, e.g.*, Lyons v. Oklahoma, 322 U.S. 596 (1944) (holding eleven straight days of questioning improper); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (finding interrogation of defendant for thirty-six hours without a break coercive); Ward v. Texas, 316 U.S. 547 (1942) (refusing to admit defendant's confession where police threatened mob violence); White v. Texas, 310 U.S. 530 (1940) (precluding a death sentence based on a confession which resulted from whipping and beating defendant); Chambers v. Florida, 309 U.S. 227 (1940) (invalidating a confession where defendants were held at length, interrogated, and moved around because of false threats of mob violence); Brown v. Mississippi, 297 U.S. 278 (1936) (invalidating a confession where defendants were subject to whippings and hanging); Bram v. United States, 168 U.S. 532 (1897) (striking down a confession where interrogator told defendant that there was no question remaining as to his guilt, but that the only question was how many accomplices there were). *See generally* Monrad Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954) (examining Fourth Amendment confession cases); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309 (1998) (articulating a genealogy of confessions law); William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006) (discussing constitutional reform in four areas: policing, adjudication and crime definition, punishment, and federalism); Peter B. Rutledge, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court*, 63 U. CHI. L. REV. 1311 (1996); Thomas P. Windom, *The Writing on the Wall:* Miranda's *"Prior Criminal Experience" Exception*, 92 VA. L. REV. 387 (2006); John F. Blevins, Note, Lyons v. Oklahoma, *the NAACP, and Coerced Confessions Under the Hughes, Stone, and Vinson Courts, 1936–1949*, 90 VA. L. REV. (2004).

33. Memorandum from Jerald Phifer, to Commander, Department of Defense Joint Task Force 170, *in* MARK DANNER, TORTURE AND TRUTH 168 (2004); Memorandum from Donald Rumsfeld, Secretary of Defense, to Commander USSOUTHCOM (Jan. 15, 2003), *in* MARK DANNER, TORTURE AND TRUTH 183 (2004); Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *in* MARK DANNER, TORTURE AND TRUTH 115 (2004).

have passed judicial scrutiny, as the Court may have been satisfied with the Administration granting "some" rights, rather than engaging in the "mental gymnastics"[34] that characterized the attempt to determine the requisite protections for detainees.[35] Now, five years later, in the aftermath of the *Hamdan* decision, the Administration is finally being forced to incorporate these protections.

B. Potential Sources of Rights

1. The Criminal Law Paradigm

An initial context from which to draw potential rights for detainees is the domestic criminal law paradigm. Providing detainees full rights and procedures of the traditional criminal law paradigm, however, is both inappropriate and impossible.[36] An example of this impracticability is the constitutionally granted right to confront an accuser.[37] In many counterterrorism trials there would be significant problems associated with bringing accusers into open court, since intelligence gathering largely relies on individuals being willing to act as sources.[38] As a result, a detainee could never be fully apprised of the case against him or her as constitutionally required. Although the right to confront an accuser may not be logistically possible in terrorism trials, there should still be an effort to extend as much of this right as is possible without endangering national security. For instance, this specific dilemma could be remedied by deeming a confidential source insufficient as the sole basis for a conviction.

Another example of why the full criminal law paradigm cannot be applied is that a detainee would then have to be "Mirandized" upon arrest, even if captured on the battlefield. As an extreme illustration, it is inconceivable that an American soldier would read Osama Bin Laden his Miranda rights prior to interrogation, as

34. *See* Guiora & Page, *supra* note 7, at 440.

35. For a discussion of the Bush Administration infighting regarding appropriate procedures, see Tim Golden & Don Van Natta, Jr., *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1, and Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, Jan. 6, 2005, at A1.

36. *See, e.g.*, *Quirin to Hamdan*, *supra* note 9; *Where are Terrorists to be Tried*, *supra* note 9; Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); Richard Raimond, Comment, *The Role of Indefinite Detention in Antiterrorism Legislation*, 54 U. KAN. L. REV. 515 (2006).

37. "[T]he accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him." U.S. CONST. amend. VI.

38. *See* Amos N. Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004).

would be required by the Supreme Court in the criminal law context. Going further, the Fourth Amendment exclusionary rule might then apply to evidence found at the scene, presenting significant logistical problems in counterterrorism trials.

These examples highlight why the criminal law paradigm cannot be fully applied to the detainees. Additionally, the status of a detainee is not that of a criminal in the traditionally accepted and understood definition of the word. Thus, the criminal law paradigm is not appropriate in the current detainee context. Rather, aspects of the criminal law paradigm which could actually be applied to detainees must be clearly delineated.

2. The POW Paradigm

A second potential paradigm for discerning detainees' status and rights is the POW paradigm. This paradigm, however, is also inapplicable. First, detainees do not meet the Geneva Convention's four-part test, so to classify them as POWs would be inappropriate under international law.[39] Further, a POW may not be brought to trial unless he has either committed a war crime or a crime during captivity.[40] In addition, under international law a POW must be returned to his home country upon the cessation of hostilities.[41] Clearly, the concept of "cessation of hostilities" is incongruous with the "war on terror," which is a conflict of a continuous nature.[42] Finally, the classification of detainees as POWs would impair any opportunity to bring these individuals to justice, because if they were actually tried and sentenced, such sentence could only last until the "cessation of hostilities."

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39. *See supra* note 28.

40. *See supra* note 28; *see also* Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights obligations Under the Geneva Conventions*, 9 No. 3 HUM. RTS. BRIEF 6 (2002).

41. *See* Major Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186 (1995).

42. *See generally* Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 GEO. J. INT'L L. 669 (2005) (discussing the current challenges to international law); George C. Harris, *Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. L.A. INT'L & COMP. L. REV. 31 (2003) (exploring the Bush Administration's application of the unlawful enemy combatant doctrine to terrorism suspects and the resulting implications for our criminal justice system); Vincent-Joel Proulx, *If the Hat Fits, Wear it, if the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801 (2005) (discussing the inconsistencies of the Bush Administration's actions in the war on terror and human rights law).

3. The Hybrid Paradigm of Rights for Detainees

Because the two paradigms above do not adequately balance rights and procedures for detainees with national security interests, the proper standards must reside elsewhere. The hybrid paradigm, previously defined as "a true mix of both the criminal law and prisoner of war paradigms without [either] full Constitutional or criminal procedure rights,"[43] reflects the proper balance between guaranteeing a detainee rights in the interrogation setting and protecting national security. The hybrid paradigm neither ensures a detainee full rights of a typical criminal defendant, nor throws him into the "dungeons of the world." This framework instead recognizes the interests of both sides by not blindly granting full criminal law rights, yet extending feasible protections. The question then becomes what standards and protections should be applied.

II. *BRAM, BROWN,* AND THEIR PROGENY

Because of similarities between the current treatment of detainees and the historic treatment of African Americans in the Deep South, the constitutional standards established by the Court for the latter are applicable to the current situation. The proper starting point for examining domestic jurisprudence relating to interrogation methods is the *Bram-Brown* progeny. This line of cases represents the Supreme Court's extension of constitutional protections in response to coercive and abusive interrogations of African Americans in the Deep South.

A. Similarities in Treatment of African Americans in the Deep South and Current Detainees

Before discussing the specific contours of the *Bram-Brown* progeny, it is important to more thoroughly outline the similarities between African Americans in the Deep South and detainees. Only by first engaging in this historical examination will the later correlation be understood so that a reading of history and an analysis of the jurisprudence may contribute to modern practical policy recommendations.

43. *See Quirin to Hamdan, supra* note 9.

In the Deep South, people detained by law enforcement officials were mainly poor, illiterate African Americans without legal representation who were subjected to threats, cumulative mistreatment, and other interrogation methods that violated constitutional safeguards. This treatment continued until the Supreme Court finally mandated the extension of Fifth and Fourteenth Amendment protections. Similarly, the detainees in Guantanamo Bay are typically poor, illiterate at least in English, have little or no access to attorneys, and are subjected to many threats and abuses from authorities. Most importantly for this Article, the African American experience, in interrogation cells, in the woods, and in local sheriffs' cars, bears an eerie resemblance to the experience of a detainee captured in the aftermath of 9/11 and held in Guantanamo Bay, Abu Ghraib, Bagram, and other "black sites."[44]

There are, however, differences between the two groups that must be acknowledged before moving forward. First, in terms of citizenship, African Americans were historically considered partial citizens of the United States, at least for some purposes[45] and following the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments were recognized as full citizens,[46] while the detainees are non-citizens. Secondly, detainees are subjected to coercive interrogation not simply because of who they are, as was the case for African Americans in the Deep South, but in the pursuit of information. Along this line, the mistreatment of African Americans in the Deep South was motivated largely by racism, whereas detainees are seen as an "enemy" in a war-like setting. Again though, similarities in treatment and the parallel lessons to be learned exceed the issues raised by these differences. Further, in light of these acknowledged differences, this Article does not suggest that all *Bram-Brown* rules should be adopted in the detainee context, but rather that the *Bram-Brown* progeny offers lessons and insight into the extension of protections to a previously unprotected class. Just as allegations of abuse in the early to mid 1900s led to the establishment of the "Wickersham Commission"[47] and eventually the Court mandated extension of constitutional protections, detainee interrogations have been accused of violating human and civil rights,[48] and new, clear standards must be developed in response.

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44. As coined by Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

45. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

46. *See* U.S. CONST. amends. XIII, XIV, IV.

47. *See infra* note 53 and accompanying text.

48. *See, e.g.*, HUMAN RIGHTS WATCH, "NO BLOOD, NO FOUL": SOLDIERS' ACCOUNT OF DETAINEE ABUSE IN IRAQ (2006), http://hrw.org/reports/2006/us0706/us0706web.pdf;

From the late 1800s to the early 1900s, African Americans were constant victims of popular violence aided by the complicity of local law enforcement officials, and further subjected to mistreatment in local jails.[49] In the Deep South, African Americans were often rounded up and accused without evidentiary justification.[50] For instance, the accusation by a white woman that an African American man had sexually assaulted her sealed his arrest regardless of proof; an accusation that he was merely "looking" may have doomed him to "mob rule."[51] In the same vein, many of the detainees in the ill-defined "war on terror" have been detained on a "round up" basis.[52]

Partly as a response to allegations of abuse in the Deep South, the 1931 Wickersham Commission *Report on Lawlessness in Law En-*

Michelle Voeller-Gleason, *Soldier Pleads Guilty to Detainee Abuse, Others Face Charges*, ARMY NEWS SERVICE, May 25, 2004, http://www4.army.mil/ocpa/read.php?story_id_key=5992; Steven C. Welsh, Int'l Sec. L. Project, Detainee Abuse—Abu Ghraib Court Martial: Staff Sgt. Ivan Frederick (Oct. 26, 2004), http://www.cdi.org/news/law/abu-ghraib-courts-martial-frederick.cfm; Press Release, Human Rights Watch, U.S.: More than 600 Implicated in Detainee Abuse (Apr. 26, 2006), http://hrw.org/english/docs/2006/04/26/usint13268.htm; Press Release, Human Rights Watch, U.S. Soldiers Tell of Detainee Abuse in Iraq (July 23, 2006), http://hrw.org/english/docs/2006/07/19/usint13767.htm.

49. *See* MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT, THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 354–55 (2001) (stating that there were 3385 documented mob lynchings of African Americans in the U.S. between 1882 and 1935); *see also* W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930, at 262 (1993) (noting that of the 460 lynching victims in Georgia between 1880 and 1930, 441 were African Americans).

50. As one example, the 1831 case of Nat Turner involved thousands of slaves acting in rebellion. The response was not to search out the guilty parties for trial, but rather to hang all African American men who either participated or were thought to have done so. Further, night riders were organized with police authority to put down any groupings they determined to be secret meetings. *See* HERBERT APTHEKER, A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 119 (1951); John A. Davis, *Black, Crime, and American Culture*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 89–98 (1976).

51. The *Scottsboro* Case, which has become the exemplar for "black on white" rapes, was a case where the accuser's "whiteness" overrode any other evidentiary consideration. The accused were convicted and sentenced to death, despite evidence of the accuser's involvement in prostitution and adultery. One spectator told a reporter that the "victim might be a fallen woman, but by God she is a white woman." LISA LINDQUIST DORR, WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA 1900–1960 2 (2004).

52. Of the 760 detainees brought to Guantanamo Bay in 2002, the military has released 180 without ever charging any of them. Further, fifty-five percent of detainees are not charged with having committed any hostile acts against the United States, only eight percent of the detainees were characterized as al Qaeda fighters, numerous individuals have been detained based merely on affiliations with large groups not on the Department of Homeland Security watchlist, and only five percent of detainees were even captured by U.S. forces. *See* MARK DENBEAUX ET AL., THE GUANTÁNAMO DETAINEES DURING DETENTION: DATA FROM DEPARTMENT OF DEFENSE RECORDS (2006), http://law.shu.edu/news/guantanamo_third_report_7_11_06.pdf.

forcement[53] was established by President Herbert Hoover to determine the veracity of numerous reports regarding inappropriate conduct of police departments in interrogation settings. In the end, the Commission's members concluded that suspects had been regularly subjected to "the third degree," defined as "the employment of methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime."[54] The Commission determined that willful infliction of pain on criminal suspects was widespread and pervasive. The investigation also revealed that the abusers were not just interrogators, but police officers, judges, magistrates, and other officials of the criminal justice system. The Commission found violations in the form of illegal arrests, bribery, coercion of witnesses, fabrication of evidence, and the aforementioned "third degree."[55] Aside from the Commission's report, the history of African Americans in southern jails has been well documented and the subject of much commentary.[56] The complacency of local communities contributed to mistreatment and, even more troubling, many abuses involved the active or passive participation of local law enforcement.[57]

There are significant similarities between the mistreatment in the Deep South and abuses in modern detainee interrogations. Beyond similarities in interrogation methods,[58] there is an unfortunate parallel in the tragedies that result from employing these methods. Just as African Americans in the Deep South often died as a result of physical mistreatment, such tragedies have also

53. One of fourteen reports published by the National Commission on Law Observance and Enforcement, or "The Wickersham Commission." *See* Samuel Walker, Records of the Wickersham Commission on Law Observance and Enforcement (Dec. 1977), http://www.lexisnexis.com/academic/guides/jurisprudence/wickersham.asp.

54. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

55. *Id.* at 3.

56. *See generally* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006) (discussing the different approaches taken by the U.S. and the rest of the international community in dealing with hate speech); Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187 (2005) (discussing the changing legal landscape on torture in the War on Terror); Rutledge, *supra* note 32; Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119 (2003) (discussing the problems with forced confessions).

57. *See* Brundage, *supra* note 49, at 18; Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 281 (2003).

58. Techniques authorized by U.S. Secretary of Defense Rumsfeld include the use of stress positions, isolation, hoods over head, removal of comfort items, forced grooming, removal of clothing, and using detainees' phobias to induce stress. *See, e.g.*, HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 29–48 (2005), http://www.hrw.org/reports/2005/us0405/us0405.pdf.

occurred in detainee interrogations;[59] according to charges filed by the U.S. military, Maj. Gen. Abed Hamed Mowhoush of the Iraqi army was killed during the course of an interrogation.[60] Further, additional instances of abuses inflicted by U.S. personnel are well documented.[61] Discussing the findings of an investigation, Major General Antonio Taguba lists the following as examples of detainee mistreatment:

> Punching, slapping, and kicking detainees; jumping on their naked feet; Videotaping and photographing naked male and female detainees; Forcibly arranging detainees in various sexually explicit positions for photographing; Forcing detainees to remove their clothing and keeping them naked for several days at a time; Forcing naked male detainees to wear women's underwear; Forcing groups of male detainees to masturbate themselves while being photographed and videotaped; Arranging naked male detainees in a pile and then jumping on them; Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; Writing 'I am a Rapest' (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked; Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture; A male MP guard having sex with a female detainee; Using military working dogs (without muzzles) to intimidate

59. *See* Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 20, 2005, at A1; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1.

60. Chief Warrant Officer Lewis E. Welshofer was charged with the offense, and ultimately reprimanded in court, but not given jail time. *See, e.g., No Prison Time for Soldier Held in Iraqi's Death*, N.Y. TIMES, Jan. 24, 2006, A19.

61. *See generally* John T. Parry, *Just for Fun: Understanding Torture and Understanding Abu Gharaib*, 1 J. NAT'L SECURITY L. & POL'Y 253 (2005) (discussing the problems inherent in defining the word torture and exploring the more general problem of state violence); James W. Smith, III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671 (2006) (discussing the disparate treatment of enlisted soldiers in the military justice system); Carlotta Gall & David Rhode, *The Reach of War: The Prisons; Afghan Abuse Charges Raise Questions on Authority*, N.Y. TIMES, Sept. 17, 2004, at A10; Eric Schmitt, *Pentagon Officials Are Hurrying to Correct Conditions in Iraqi Prisons*, N.Y. TIMES, September 9, 2004, at A14; Josh White, *Memo Shows Officer's Shift on Use of Dogs*, WASH. POST, Apr. 15, 2006, at A11.

> and frighten detainees, and in at least one case biting and severely injuring a detainee.[62]

These examples further illuminate the similarities between detainee treatment and that of African Americans in the Deep South.

With respect to ill-treatment in the Deep South, the Supreme Court finally entered the mix. In a series of monumental decisions predicated on the Fifth and Fourteenth Amendments, the Court held that interrogation methods in the Deep South were unconstitutional, and that the government must immediately extend constitutional protections and due process to remedy the situation.[63]

The Court in *Hamdan* similarly indicated to the government that the legal regime established in the aftermath of 9/11 must be changed. Specifically, the Court held that detainees are entitled to Geneva Convention Article III protections, even though al Qaeda is not a signatory to the Geneva Conventions.[64] Specifically, detainees are protected from "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" and since conflict with al Qaeda was a "conflict not of an international character" within the meaning of Article III, they are provided some minimal protection afforded to all individuals associated with a conflict "in the territory of" a signatory.[65]

To comply with the ruling from *Hamdan*, the government would benefit from looking to the historical extension of the Fifth and Fourteenth Amendments to African Americans in the Deep South carried out in response to the rulings of the *Bram-Brown* progeny.

B. Origins of the Bram-Brown *Progeny*

In *Bram v. United States*,[66] the Supreme Court first entered the interrogation setting. While the case did not involve an African American, the Court's bright-line rule became central in later race-based cases. Bram, a first officer, was accused of committing murder

62. Letter from Irene Kahn, Secretary General, Amnesty International, to George W. Bush, President of the United States (May 7, 2004), http://web.amnesty.org/library/Index/ENGAMR510782004.

63. *See infra* Part II.B.

64. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006).

65. *Id.* at 2795–97.

66. Bram v. United States, 168 U.S. 532 (1897).

on board an American vessel sailing from Boston to South America.[67] The crew overpowered Bram and put him in irons until the vessel reached Halifax, where Bram was brought to jail and interrogated by a detective from the Halifax Police Department.[68] Bram's subsequent confession led to his conviction for murder.[69] Bram appealed, claiming that the confession was coerced, but the interrogator testified that Bram had confessed without undue influence or coercion.[70] Bram's counsel argued that Bram had been brought to the detective's private office where he was stripped and interrogated, and that "no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent."[71] The Court's decision to reverse Bram's conviction established a bright-line rule with respect to threats made during interrogation:

> A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.[72]

Crucially, this strict *Bram* rule has never been overturned.[73] Rather, it has been affirmed through its incorporation into broader tests, such as the "totality of the circumstances" test articulated by the Court in *Ashcraft v. State of Tennessee*,[74] which then morphed[75]

67. *Id.* at 534.

68. *Id.* at 536–37 (noting that the American consul eventually requested that Bram be brought to Boston where he was formally charged with murder).

69. *Id.* at 540.

70. *Id.* at 538–39.

71. *Id.* at 539.

72. *Id.* at 543.

73. *See* Mark A. Goodsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators From Non-Americans Abroad*, 91 GEO. L.J. 851 (2003); Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 How. L.J. 31 (2005); Marvin Zalman, *The Coming Paradigm Shift on Miranda: The Impact of* Chavez v. Martinez, 39 CRIM. L. BULL. 4 (2003).

74. Ashcraft v. Tennessee, 322 U.S. 143, 148 (1944); see also Arizona v. Fulminante, 499 U.S. 279, 285–86 (1991) (holding a jailhouse confession coerced where defendant confessed to a government agent posing as a fellow prisoner, and noting the continued appropriateness of the *Bram* standard).

75. *See* David Aram Kaiser, Note, United States v. Coon*: The End of Detrimental Reliance for Plea Agreements?*, 52 HASTINGS L.J. 579 (2001) (noting that for the middle third of the twentieth century, the Court based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process); MaryAnn Fenicato, *Miranda Upheld by U.S. Supreme Court*, LAW. J., Sept. 2000, at 2, *available at* Westlaw 2 No. 19 LAWYERSJ 2 (explaining

into the "shocks the conscience" test developed in *Rochin v. California* for determining whether an interrogation violated a suspect's Fifth and Fourteenth Amendments rights.[76] *Bram*'s bright-line rule specifically acknowledged that:

> [T]here can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law . . . as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.[77]

Thus established, the *Bram* rule was extended in a series of cases that represent the core of the Supreme Court's intervention in the interrogations of African American suspects, and ended with mandated application of the Fifth and Fourteenth Amendments.

C. Jurisprudence of the Bram-Brown *Progeny*

The Supreme Court's initial Deep South interrogation case was *Brown v. Mississippi*.[78] *Brown* presented the question of whether convictions based solely on confessions extorted by State officers through brutality and violence were consistent with the Fourteenth Amendment's due process requirement.[79] The holding was, and still is, of particular importance because "due process doctrine for police interrogations began its life with the Court's dramatic creation of a Fourteenth Amendment exclusionary rule in *Brown*."[80]

The petitioners in *Brown*, all African Americans, were convicted of the murder of a white man, and were arrested, indicted, tried, convicted, and sentenced to death in just one week.[81] Upon the

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that "the due process test was utilized in approximately thirty different cases . . . and continually refined into an inquiry examining whether a defendant's will was overborne by 'weighing the circumstances of pressure against the power of resistance of the person confessing.'"); Edward L. Fiandach, *Miranda Revisited*, CHAMPION, Nov. 2005, at 22 (describing the Court's return to the rationale of *Bram*, with a focus on the motivation to make the statement and whether the decision to testify against one's self was "free and voluntary").

76. *See* Rochin v. California, 342 U.S. 165 (1952) (finding that the "shocks the conscience" test stands for the proposition that the police cannot procure evidence for a criminal prosecution in a particularly offensive manner, here a forced stomach pump to look for drugs in defendant's stomach).

77. Bram v. United States, 168 U.S. 532, 545 (1897).

78. Brown v. Mississippi, 297 U.S. 278 (1936).

79. *Id.* at 279.

80. Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2203 (1996).

81. *Brown*, 297 U.S. at 279.

discovery of a dead body, local sheriffs retrieved one of the petitioners and took him to the house of the deceased, where a mob had gathered to accuse him of the crime.[82] When the petitioner denied his guilt, the mob seized him and, with the sheriff's assistance, hung him, then let him down before hanging him a second time as Brown repeatedly proclaimed his innocence.[83] The mob then tied the petitioner to a tree and whipped him, then finally released him to stagger home.[84] The sheriff later returned to Brown's home to arrest him, and while transporting Brown to jail, stopped and severely whipped him, threatening that he would continue until the defendant confessed.[85] Brown finally acceded to the demands and confessed, yet the whippings continued until the confession's specific language was in accordance with that desired by the officers.[86]

The Court in *Brown* held that the trial court should have disallowed the confessions because of the brutality used to procure them. Specifically, the Court used the "totality of the circumstances" approach:

> There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.[87]

These two watershed cases, *Bram* and *Brown*, extended protections through the use of two constitutional principles: the Fifth Amendment right against self-incrimination in *Bram*, and the Fourteenth Amendment due process clause in *Brown*.[88]

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82. *Id.* at 280–82.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 463.
88. *See generally* Fenicato, *supra* note 75; Laura Magid, *Deceptive Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1172–73 (2001) ("In 1936 . . . with *Brown v. Mississippi*, the Court turned to the Due Process Clause of the Fourteenth Amendment as the basis for examining the voluntariness of confessions in dozens of state cases. The Court held that police use of violence was 'revolting to the sense of justice,' stating that '[t]he rack and torture chamber may not be substituted for the witness stand.' ").

These principles were further elaborated in the following cases, chosen both for their depiction of the progressive application of the Fifth and Fourteenth Amendments to African Americans, and also because they illustrate the violent nature of interrogations in the Deep South, which is comparable to modern detainee interrogations.

In *White v. Texas*, an African American farmhand was convicted of rape and subsequently sentenced to death.[89] White was taken to a local jail, where each night armed officers took him into the woods, asked him to confess, whipped him, and warned him not to tell anyone what transpired.[90] White, who was illiterate, eventually signed a written confession.[91] In reversing the defendant's conviction, the Court held that "due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."[92]

Two years later in *Ward v. Texas*, an African American man accused of killing a white man appealed his murder conviction, arguing that it was based on a coerced confession.[93] Upon arrest, the police told the defendant that mobs were waiting for him in various towns, and took him from town to town under the cover of night, not allowing him to sleep.[94] Ward contended that he only offered a confession after "he had been arrested without a warrant, taken from his home town, driven for three days from county to county, placed in a jail more than 100 miles from his home, questioned continuously, and beaten, whipped, and burned by the officer to whom the confession was finally made."[95] The *Ward* Court held that accepting the defendant's confession into evidence was a denial of his due process rights because of the cumulative mistreatment[96] to which he was subjected:

> [W]e must conclude that this confession was not free and voluntary but was the product of coercion and duress, that petitioner was no longer able freely to admit or to deny or to

89. White v. Texas, 310 U.S. 530 (1940).
90. *Id.* at 532.
91. *Id.*
92. *Id.* at 533 (citing Chambers v. Florida, 309 U.S. 227, 241 (1940)).
93. Ward v. Texas, 316 U.S. 547 (1942).
94. *See id.* at 549, 553–55.
95. *Id.* at 549.
96. *See infra* Part V.C (defining the term and explaining that finding cumulative mistreatment depends on particular circumstances such as amount of movement, specific length of time, number of people, etc., to make a determination of when the "continuousness" breaks the individual's will).

> refuse to answer, and that he was willing to make any statement that the officers wanted him to make.
>
> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.[97]

Moving forward, in 1944 petitioners in *Ashcraft v. Tennessee* also claimed that their convictions had been improperly extorted by law enforcement officials.[98] Ashcraft was questioned continuously for more than thirty-six hours by a relay of police officers.[99] In reversing the convictions, the *Ashcraft* Court held that, under the "totality of the circumstances" test, the confessions were compelled through cumulative mistreatment, which was a violation of the Fourteenth Amendment.[100] The particular importance of *Ashcraft* is its factual distinction from the previous cases in that the conviction was overturned not because of physical abuse, but rather on grounds of cumulative mistreatment, where " . . . Ashcraft from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty never left this homicide room of the fifth floor."[101] The *Ashcraft* dissent, however, was concerned that the majority's position could be construed to mean that *any* lengthy interrogation was "inherently coercive," and they argued that there still needed to be a focus on the actual coerciveness of the interrogation.[102]

The *Bram-Brown* progeny's litany of violent and coercive interrogations typifies the treatment of African Americans in the Deep South. African Americans were arrested with little evidentiary cause, subjected to threats of violence and cumulative mistreatment, and physically tortured to induce confessions. In each of these cases, the Court took great measures to demand that the previously constitutionally unprotected citizens receive the constitutional guarantees afforded to the rest of society.

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97. *Ward*, 316 U.S. at 555.
98. Ashcraft v. Tennessee, 322 U.S. 143, 145 (1944).
99. *Id.* at 153.
100. *Id.* 153–55.
101. *See id.* at 149.
102. *See id.* at 157.

III. APPLYING CONSTITUTIONAL PROTECTIONS FROM THE *BRAM-BROWN* PROGENY TO THE DETAINEE CONTEXT

Selected cases of the *Bram-Brown* progeny highlight conduct that is similar to that in the current detainee situation. Like the African American suspects in the cases described above, detainees have in many instances been rounded up and detained based on vague and unarticulated suspicion of guilt, subjected to violent and degrading interrogations, and held until their will is broken, so that they often give untrustworthy confessions. Beyond the specific criminal law aspects of the *Bram-Brown* progeny, the lesson for modern policy- and decision-makers is to see the constitutional limits on interrogation methods the Supreme Court has placed on American law enforcement. To extend such constitutional protections to detainees, however, requires a discussion of the application of constitutional provisions to non-citizens and an examination of the Fifth and Fourteenth Amendments in the interrogation context.

A. Extending Constitutional Protections to Aliens

First, the gap between African American partial citizens and detainee non-citizens must be bridged to make the central comparison of this Article. This Article's analysis is based on the acceptance of the argument that certain constitutional protections should be extended to both American citizens and non-citizens held by the United States. This premise is critical because the detainees currently held in Guantanamo Bay and elsewhere are generally not American citizens.[103] This Article assumes that at least some constitutional protections must be extended to non-citizen detainees to remedy abuses that have occurred since 9/11, most notably in Abu Ghraib and Guantanamo Bay. For the purposes of this Article's argument, non-citizen aliens do not include "illegal aliens" as the term is commonly understood. This discussion involves only alien detainees, individuals brought within the

103. Exceptions include: Hamdi, who was initially held in Guantanamo Bay and transferred to a naval brig in South Carolina when his claim of American citizenship was verified; John Lindh Walker, captured in Afghanistan but tried and convicted in U.S. District Court; and Jose Padilla, the subject of numerous habeas lawsuits who will be tried in federal court in Miami on a series of lesser charges.

jurisdiction of the United States against their will by U.S. soldiers acting upon the orders of the Commander-in-Chief.[104]

The question of non-citizen rights was first addressed by the Supreme Court's decision in *Dred Scott v. Sandford*, where the Court held that the Fifth Amendment's reach was not limited to the geographic boundaries of the states but extended to all incorporated territories of the United States.[105] Since *Dred Scott*, the Court has developed two distinct lines of cases relevant to determining detainee rights; first distinguishing between individuals within and outside of the United States, and secondly distinguishing between citizens and non-citizens.

Case law first extended constitutional protections to include persons who could demonstrate cognizable ties to the United States, where the clearest tie was physical location within the border.[106] This extension of rights to all those within the territory directly impacts this Article, and makes the territorial classification of Guantanamo Bay of the utmost importance. If Guantanamo Bay is found to be a territory of the United States, then precedent dictates that fundamental rights, like the Fifth and Fourteenth Amendments, should apply. Conversely, if Guantanamo Bay is not a territory, then detainees would not necessarily be afforded constitutional protections there.[107]

While the Constitution did not initially reach beyond the territorial boundaries of the United States, the "Insular Cases"[108] began to expand protections to some persons outside of the territory, though they did not specifically address non-citizens. The "Insular Cases" offered explicit legal justification of American endeavors in

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104. *See generally* Valerie L. Barth, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY'S L.J. 105 (1997) (proposing interpreting the word "person" in the Fifth Amendment to include any and every human being within the jurisdiction of the republic); Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004) (discussing the redefinition of citizenship in regard to individuals suspected of disloyalty); Wendy R. St. Charles, Note, *Recognizing Constitutional Rights of Excludable Aliens: The Ninth Circuit Goes Out on a Limb to Free the "Flying Dutchman"—Dispensing with a Legal Fiction Creates and Opportunity for Reform* 4 J. TRANSNAT'L L. & POL'Y 145 (1995) (discussing the Ninth Circuit's decision to apply constitutional protections to illegal immigrants).

105. Dred Scott v. Sandford, 60 U.S. 393 (1857).

106. *See* United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

107. *See generally In re* Ross, 140 U.S. 453 (1891) (denying defendant's appeal where the trial took place outside of the United States because the Fifth Amendment did not apply and validating the inquiry into whether defendant seeking constitutional protection was inside or outside of the United States).

108. Nine cases addressing constitutional questions regarding the status of Puerto Rico and the Philippines in 1901. *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922); DeLima v. Bidwell, 182 U.S. 1 (1901).

Puerto Rico, created a system by which America could exert power over a foreign entity, defined the framework for granting legal and political rights to Puerto Ricans, and facilitated the establishment of practices which recognized and validated the colonial project in Puerto Rico.[109] Further, in determining the extraterritorial reach of constitutional protections, the Court increasingly decided that citizens "carry" their constitutional rights outside of the territory of the United States. In 1990, for example, the Court held in *United States v. Verdugo-Urquidez* that the Fifth Amendment applies to any "person" or "accused" as opposed to the more restrictive Fourth Amendment protection of "the people."[110]

As for non-citizens, after the *Dred Scott* decision expanded constitutional protections, in 1950 the Court in *Johnson v. Eisentrager* noted the steady progression of rights courts were granting to aliens.[111] The *Eisentrager* Court followed the trend, holding that physical presence in the country *alone* creates an implied guarantee of certain rights, which become even more extensive when an active statement of intent to become a citizen is made.[112] The Court reasoned that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[113]

Applying these principles to the Guantanamo detainees, the court in *Khalid v. Bush* held that Guantanamo Bay detainees do not possess any cognizable rights because non-citizens detained by the United States outside of domestic borders cannot avail themselves of constitutional protections.[114] *Rasul v. Bush,* however, gave a slightly different interpretation of the proper extension of constitutional protections in a place with an undetermined territorial definition, such as Guantanamo Bay.[115] *Rasul* stands for the proposition that federal courts have jurisdiction to hear a detainee's habeas petition *whenever* the detainee is held in a place where the "United States exercises complete jurisdiction and control."[116]

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109. *See generally* Sanford Levinson, *Why the Canon Should be Expanded to Include "The Insular Cases" and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000) (discussing which set of texts should be included in the core material of constitutional law).

110. United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990).

111. Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950).

112. *Id.* at 770.

113. *Id.*

114. Khalid v. Bush, 355 F. Supp. 2d 311, 321 (D.D.C. 2005) (dealing with foreign nationals captured on the battlefield and brought to Guantanamo Bay who filed petitions for writ of habeas corpus).

115. Rasul v. Bush, 542 U.S. 466, 473–84 (2004).

116. *Id.* at 480.

Further arguing for constitutional protections for detainees, the court in *In re Guantanamo Detainees Cases* initially cited *Rasul* as agreeing with the *Eisentrager* precedent barring claims of an alien seeking to enforce the Constitution in a habeas proceeding outside of a sovereign territory of the United States.[117] However, the *In re Guantanamo Detainees Cases* court further explained that the *Eisentrager* decision was inapplicable to the Guantanamo detainees because the detainees, unlike the German petitioners in *Eisentrager*, "have been imprisoned in territory over which the U.S. exercises exclusive jurisdiction and control."[118]

Thus, in light of the jurisprudence of *Eisentrager* and subsequent Supreme Court decisions, the appropriate extension of constitutional protections to detainees turns on the territorial status of Guantanamo Bay and the extent of U.S. jurisdiction and control over Guantanamo Bay and other detention facilities. Clearly, Guantanamo detainees must be granted protections if Guantanamo Bay is accepted as a territory of the United States. Further, in other detention locations (and in Guantanamo if it is not a U.S. territory), given the sufficient connection to the United States, the detainees may not be inherently entitled to full constitutional rights, but they arguably deserve certain constitutional protections.

B. Analysis of the Fifth and Fourteenth Amendments in the Context of Interrogations

The protections of the Fifth and Fourteenth Amendments are inextricably tied to the interrogation setting in the domestic criminal law paradigm. The Fifth Amendment specifically protects an individual from self-incrimination and was applied to the interrogation setting in *Bram*.[119] In addition to extending Fifth Amendment protections, the *Bram-Brown* progeny also granted Fourteenth Amendment due process rights to African Americans in the context of interrogations.[120]

117. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 449 (D.D.C 2005).

118. *Rasul*, 542 U.S. at 476 (noting that the German detainees in *Eisentrager* were held and tried by the United States Army in the "China Theatre," but upon their convictions were sent to Germany to serve their sentences).

119. Bram v. United States, 168 U.S. 532, 542–57 (1897).

120. " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

1. The Fifth Amendment Right Against Self-Incrimination

For this Article, the ultimate question regarding the Fifth Amendment is whether the right against self-incrimination should be extended to detainees. Other Fifth Amendment-related protections, such as *Miranda* rights, are likely impracticable where an individual is arrested in the "zone of combat,"[121] but it remains an open question whether such protections may be granted to a detainee *once* he is in the interrogation setting.[122]

In the *Bram-Brown* progeny, the Supreme Court extended the Fifth Amendment to protect African Americans in the Deep South. In the aftermath of *Hamdan* this right, or at least parts of it, needs to be extended to the detainees as well.[123] Although not directly addressing self-incrimination, the *Hamdan* Court's opinion includes a scathing criticism of the military commissions as a whole, and implicitly incorporates the lack of Fifth Amendment protections. In opposition, the Bush Administration had previously argued that "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[124]

While it can be argued that detainee self-incrimination is a moot point where information is never heard in open court, the Supreme Court in *Bram* linked the Fifth Amendment's protections against self-incrimination to general limitations of acceptable interrogation methods.[125] In addressing the question of the extension of Fifth Amendment rights to non-citizens, courts and scholars have often wrestled with exactly this issue. For instance, in the recent immigration decision in *Zadvydas v. Davis*, the Supreme Court reaffirmed the precedent of applying Fifth Amendment due process to

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121. Defined in traditional warfare as where armies face each other, but significantly expanded in the "armed conflict short of war" to include the civilian populations and urban residential areas.

122. *See, e.g.*, Rinat Kitai, *A Custodial Suspect's Right to the Assistance of Counsel: The Ambivalence of the Israeli Law Against the Backdrop of American Law*, 19 BYU J. PUB. L. 205 (2004); Jonathan F. Lenzner, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297 (2004); Sean D. Murphy, *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT'L L. 820 (2004).

123. *See, e.g.*, Rosa Brooks, *Orwell Has Nothing on This White House*, L.A. TIMES, July 14, 2006, at B13; Bob Herbert, *The Definition of Tyranny*, N.Y. TIMES, July 17, 2006, at A17; Adam Liptak, *Scholars Agree That Congress Could Reject Commissions, but Not That It Should*, N.Y. TIMES, July 15, 2006, at A10; Kate Zernike & Sheryl Gay Stolberg, *Detainee Rights Create a Divide on Capitol Hill*, N.Y. TIMES, July 10, 2006, at A1.

124. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

125. Bram v. United States, 168 U.S. 532, 543 (1897).

aliens present within the United States, regardless of their legal status.[126] Specifically, the Court held that the Fifth Amendment is incongruent with a law that would permit the indefinite detention of a non-citizen on domestic soil, explaining that once present in the country, aliens can claim due process protections.[127]

Further, the Court in *Verdugo-Urquidez*, denying a motion to suppress evidence seized from the Mexico home of a Mexican citizen without a warrant, ruled that Fourth Amendment rights do not extend to non-citizens outside the borders of the U.S.[128] The Court, however, made a point to distinguish its holding from what might have occurred had the appeal been regarding the Fifth Amendment, reasoning that the Fourth Amendment's application was only to "the people," whereas the Fifth Amendment applies to "persons."[129] Although not explicitly extending Fifth Amendment protections to non-citizens, the Court used dicta to indicate that such a holding is not beyond the pale.[130] In addition, Justice Kennedy, in his concurring opinion, stated that the defendant should be entitled to due process clause protection under the Fifth Amendment when his case finally went to trial.[131]

Consensus on the appropriate extension of constitutional protections to non-citizens has not yet been reached. However, as shown in *Zadvydas* and *Verdugo-Urduidez*, the Supreme Court seems inclined to extend Fifth Amendment safeguards to all "persons" subject to control of the United States government. Along this line, the detainees did not willingly come to be under U.S. control, but rather were brought under control by U.S. authorities. In addition, in the case of the Guantanamo Bay detainees, interrogation takes place in American custody on soil that is as American as possible without actually being within U.S. borders. Lastly, the detainees, who are "innocent until proven guilty," are solely defined as *suspects* at the interrogation stage. Suspects, regardless of what crime they may *potentially* be found guilty of, are entitled to Fifth Amendment protections.[132] This principle was held to be true for African Americans in the Deep South and for all non-citizens living in the

126. Zadvydas v. Davis, 533 U.S. 678 (2001); *see also* Shirin Sinnar, *Patriotic or Unconstitutional: The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003).

127. *Zadvydas*, 533 U.S at 693 (internal citations omitted).

128. United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990).

129. *Id.* at 265–66.

130. *Id.*

131. *See also* Brenner A. Allen, *A Cause of Action Against Private Contractors and the U.S. Government for Freedom of Speech Violations in Iraq*, 31 N.C. J. INT'L L & COM. REG. 535, 585 (2005).

132. U.S. CONST. amend. V.

United States, and should now be applied to detainees held by the United States.

2. The Fourteenth Amendment Right to Due Process

Historically, extending constitutional protections to non-citizens has involved the Fourteenth Amendment at almost every turn.[133] Additionally, it is relatively certain that the drafters of the Fourteenth Amendment intended it to apply to non-citizens. Congressional debates surrounding the adoption of the Fourteenth Amendment show that the drafters had a close familiarity with the provisions of the Articles of Confederation, a document that noted a strict line of demarcation between "citizens" and "persons." The framers did not use the term "citizens" in conjunction with the Fourteenth Amendment, but rather made frequent reference to "persons," which can be interpreted to include non-citizens.[134] This is highly relevant to the focus of this Article in analyzing whether the Supreme Court's holdings regarding Fourteenth Amendment due process may be applied to the detainees in the hybrid paradigm.

133. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 467, 481 (2004) (reversing *In re Guantanamo Detainee Cases* and holding that the District Court did have jurisdiction to hear the detainees' habeas claims because "[the Guantanamo petitioners] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control," and emphasizing that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the habeas statute]"); Kwon v. Colding, 344 U.S. 590 (1953); Johnson v. Eisentrager 339 U.S. 763 (1950) (stating that "[m]ere lawful presence in the country creates an implied assurance of safe conduct"); Medina v. O'Neill, 838 F.2d 800 (5th Cir. 1988); Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987) (holding that aliens "are entitled under the due process clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials"); Jean v. Nelson, 711 F.2d 1455, 1467 (11th Cir. 1983) ("As a general rule aliens who have effected an entry, whether lawfully or not, are accorded the full panoply of traditional due process rights."), *aff'd*, 472 U.S. 846 (1985). *But see* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (holding that the President constitutionally detained petitioner, a United States citizen, as an enemy combatant pursuant to executive war powers and noting that one who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such).

134. CONG. GLOBE, 37th Cong., 2nd Sess. 1638 (1862).

3. The Fifth and Fourteenth Amendments Applied to the Hybrid Paradigm

The standards used when applying the Fifth and Fourteenth Amendments to the hybrid paradigm may be one of two options created by precedent: the "totality of the circumstances" test and the "voluntariness" test.[135] Briefly, the totality of the circumstances approach requires the Court to examine all of the factors surrounding a confession to determine its validity, while the voluntariness test specifically focuses on whether the defendant freely decided to confess.

The voluntariness test, which is most applicable for targeting confessions, has its roots in English common law and early American jurisprudence.[136] From this historical precedent, American courts began to recognize two constitutional bases for requiring that a confession be voluntary: the Fifth Amendment right against self-incrimination and the Fourteenth Amendment due process clause.[137] The question in applying the voluntariness test to detainees is how deferential of a standard ought to be used for interrogations in the context of "armed conflict short of war." For example, should interrogators be allowed to apply physical force, to threaten the detainee in the name of national security, or to use cumulative mistreatment until the detainee confesses?

Historically, common law had few constraints on permissible methods used to gain a confession. Over time, however, American courts grew concerned about the reliability of confessions involving physical abuse. Eventually, in *Brown*, the Court found that circumstances surrounding the interrogation had led to a false confession where law enforcement employed the "third degree."[138] The *Brown* Court used a "totality of the circumstances analysis to determine whether 'the interrogation was . . . unreasonable or shocking, or if

135. *See* Magid, *supra* note 88, at 1172–73.

136. *See* R v. Rudd, (1783) 168 Eng. Rep. 160, 161 (K.B.) (stating that the English courts excluded confessions obtained by threats and promises); R v. Warickshall, (1783) 168 Eng. Rep. 234, 235 (K.B.) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected.").

137. *See* Brown v. Mississippi, 297 U.S. 278 (1936) (reversing a conviction based on coerced confession under the due process clause); Bram v. United States, 168 U.S. 532, 543–44 (1897) (stating that the voluntariness test "is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself' ").

138. *Brown*, 297 U.S. at 281.

the accused clearly did not have an opportunity to make a rational or intelligent choice.' "[139]

However, as explained by Professor Laura Magid, the totality of the circumstances test was occasionally overly complex:

> The totality of the circumstances test required courts to consider: the conduct and actions of the officers; the physical surroundings of the interrogation; and the characteristics and status of the defendant, including both physical and mental condition. Some types of police conduct were deemed so coercive that no examination of the particular susceptibilities of the suspect was even necessary. Most notably, physical violence and threats, whether implicit or explicit, could not be directed against any suspect. Physical mistreatment, such as extended periods of interrogation without intervals for sleep, also provided grounds for finding involuntariness.[140]

As an alternative to the totality of the circumstances test, Magid proposes the "shocks the conscience" test, "useful for determining when police deception during interrogation goes too far, and 'so shocks sensibilities of civilized society as to violate due process.' "[141] In practice, however, the shocks the conscience standard bars only those few techniques that, while not involving physical coercion clearly forbidden under the voluntariness test or implicating the concerns of the reliability rationale, nevertheless violate fundamental values of the people.[142] There are only a limited number of hypothetical situations that fit into this category.[143]

In the context of detainee interrogation, both the voluntariness test and the shocks the conscience test are appropriate to superimpose onto the hybrid paradigm. These tests are the most applicable because they focus specifically on the tactics used in gathering information. The shocks the conscience test, in particular, is useful because it is not concerned with the eventual *use* of the information received, but focuses on the acceptability of techniques. Detainee interrogations are often conducted for divergent purposes, whether to gather intelligence or to get information for an upcoming trial, and the shocks the conscience test permits the development of standards specifically addressing

139. *See* Magid, *supra* note 88, at 1173.

140. *Id.*

141. *Id.* at 1208 (quoting Moran v. Burbine, 475 U.S. 412 (1986)).

142. *Id.*

143. *Id.* at 1208–09 (pointing to the example of the imposter chaplain as falling under this standard).

conduct. Ultimately, the use of this test counters the argument that detainee standards must be different than those in criminal law because the interrogations have different aims.

To understand how these standards can be incorporated into a novel arena, it is critical to examine American history. Again, the treatment of African Americans in the 1930s and 1940s is illustrative, with the *Bram-Brown* progeny holding that certain interrogation methods violated both the Fifth and Fourteenth Amendments.[144] A particularly important aspect of the *Bram-Brown* progeny is that the Court did not create a new set of rules, but devised a remedy through a progressive and active implementation of the Fifth and Fourteenth Amendments.[145] This transformative moment in American constitutional law led to a fundamental restructuring of basic rights and the extension of criminal law paradigm protections to African Americans.

Today, the United States is at yet another transformative moment in constitutional law, which must lead to a restructuring of basic constitutional guarantees similar to the changes that followed the holdings of the *Bram-Brown* progeny. Recognizing that the detainees are not American citizens, they must still be granted certain limited protections.[146] Years ago, the Court deemed the Fifth and Fourteenth Amendments to be appropriate tools to protect a discriminated and oppressed group from coercive interrogations; the same jurisprudential standard should be applied to detainees in the modern context.

IV: COERCIVE INTERROGATION AND TORTURE

This Article has thus far revolved around the coercive interrogation of detainees through the use of threats and cumulative mistreatment. Before proceeding any further, it is important to determine what coercive interrogation is and examine the reality of its modern use. In addition, this Part will touch upon the subject of torture, arguing that it is, in any form, illegal and immoral and

144. *See supra* Part II.

145. *See* JACOBUS TENBROEK, EQUAL UNDER THE LAW (1965); Akil Reed Amar, *The Supreme Court, 1999 Term, Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289 (2006); Jack M. Balkin, *Wrong the Day It Was Decided:* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005); David E. Berstein, *Fifty Years After* Bolling v. Sharpe*:* Bolling, *Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253 (2005); Magid, *supra* note 88; Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006).

146. *See Quirin to Hamdan*, *supra* note 9.

must be clearly defined and regulated so that interrogators avoid abuses in the detainee interrogation context.

A. Coercive Interrogation Must be Specifically Defined

One proposed definition of "coercive interrogation" was put forth by Professors Posner and Vermeule:

> (1) the application of force, physical or mental (2) in order to extract information (3) necessary to save others. Coercive interrogation can range from the mild to the severe. At some point of severity, coercive interrogation becomes a species of 'torture,' which is flatly prohibited by domestic and international law. Coercive interrogation and torture are thus partially overlapping concepts; neither is a proper subset of the other. Mild coercive interrogation does not amount to legal 'torture,' which requires that a threshold of severity be met. And there are forms of torture that are not coercive interrogation—for example, when torture is used as a means of political intimidation or oppression, indeed for any purpose other than extracting information necessary to save third-party lives.[147]

The above definition, however, is unsatisfactory. Given the documented instances where regulations, rules, and guidelines have been "liberally" interpreted, proposed definitions and standards must not be circular, nor over-burdened with legalese and technicalities. Promulgating memos with vague standards serves only to create an environment where detainees can be subjected to mistreatment similar to that recently publicized out of Abu Ghraib. For example, although Lyndi England, the Abu Ghraib guard photographed abusing detainees, likely did not read the Bybee or Yoo memos[148] and base her conduct on their arguments, the memos tainted the mood and atmosphere throughout the military such that abuses were able to occur.

Additionally, the "middle ground" approach proposed by Posner and Vermeule is problematic in light of interrogation room realities. It may be sufficient to create vague and compromising standards when writing from the vantage point of academia, but such proposals are troublesome when put into action. As evidenced by the

147. Posner & Vermeule, *supra* note 4.

148. *See* Joseph Margulies, *The Right to a Fair Trial in the War on Terror*, 10 GONZ. J. INT'L L. 57, 61 (2006) (discussing both memos).

political fallout resulting from soldiers' misinterpretation and abuse of vague standards, it is inappropriate to leave the interpretation of loosely defined principles to those in the interrogation rooms or on the front lines.

The potential for improper application of guidelines is particularly obvious considering that most abuses thus far have taken place under multiple standards articulated by the U.S. Army. First, Army Regulation 190-8, paragraph 2-1(d), referencing allowable procedures, states, "[p]risoners may be interrogated in the combat zone. The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited ... [p]risoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions." Secondly, Army Field Manual 34-52, the controlling doctrine on this subject, states:

> U.S. policy expressly prohibit[s] acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogations.
>
> Such illegal acts are not authorized and will not be condoned by the US Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice].[149]

Though these standards appear relatively clear and concise, they have suffered from "slippery slope" interpretation. In short, if standards are not abundantly clear and precise, they are destined for abuse and loose interpretation. Drawing on the "void for vagueness" doctrine,[150] a set of standards and procedures that are overly vague should be held by the courts to be void for their lack of specificity.

The United States government has taken steps to address coercive interrogation by the recent adoption of the Military Commissions Act of 2006.[151] While this move begins to respond to the Court's concerns in *Hamdan*, it is still insufficient in remedying the lack of interrogation standards, as it allows executive interpretation instead of articulating standards from the outset. Under the

149. DEP'T OF THE ARMY, FIELD MANUAL 34–52: INTELLIGENCE INTERROGATION 1–8 (1992), *available at* http://www.fas.org/irp/doddir/army/fm34-52.pdf.

150. *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003).

151. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

Act, interrogators do not know exactly what is permissible, thus the Act leaves itself open to abuse.

In creating a definition of coercive interrogation and developing interrogation standards, a delicate balance must be struck between the government's national security interests and the equally valid interests of an individual in his or her personal autonomy. This Article proposes that these two interests are effectively balanced by a clear articulation of permissible interrogation standards that allow the following methods: the use of uncomfortable chairs, room temperature modification, sleep deprivation, loud music, and the use of hoods. In applying these acceptable interrogation methods, an active judiciary is critical.[152] Independent review is necessary to ensure both procedural and substantive oversight, and to challenge an unfettered executive so that competing interests of national security and personal autonomy are fairly considered.

Lastly, the reality of modern coercive interrogation is that the detainees are perpetually at a disadvantage that cannot be remedied with a vague, "middle ground" approach. Much like the members of the Wickersham Commission were shocked to discover the realities of the "third degree," American policy-makers were equally astounded by the realities of interrogations at Abu Ghraib.[153] Practically, interrogation necessarily puts the power of the state against the power of the individual in an inevitable "mismatch."[154] This mismatch was particularly acute in the context of the Deep South, and is also clearly present in Guantanamo today, where a typical detainee is powerless, thousands of miles from his home, unclear of his whereabouts, and, most likely, not an English-language speaker. For that and other reasons, Professors Posner and Vermeule's attempt to articulate a standard that finds a "middle ground" must be rejected. Coercive interrogation must be treated differently.

B. Torture

The topic of torture has been extensively critiqued, discussed, and analyzed.[155] This article is not intended to focus on the torture

152. *See Where are Terrorists to be Tried, supra* note 9.

153. Frank Rich, *Saving Private England*, N.Y. TIMES, May 16, 2004, at AR1.

154. *See* Laura Hoffman Roppe, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 758 (1994); William T. Pizzi & Morris B. Hoffman, *Taking* Miranda*'s Pulse*, 58 VAND. L. REV. 813, 819 (2005).

155. *See generally* Joshua A. Decker, *Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror*, 6 CHI. J. INT'L L. 803 (2006) (discussing whether the Bush Administration can legally deny the unlawful combatants of al

debate. Nevertheless, any discussion of developing interrogation standards for detainees must consider torture. It is this Article's position that torture is unequivocally illegal, immoral, and does not lead to actionable intelligence.[156] Nevertheless, others have taken the opposite position, and in an effort to establish the parameters of detainee interrogation the Article will briefly discuss such views.

Torture is defined by the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[157]

Qaeda and the Taliban international humanitarian law protections); Jeffery C. Goldman, *Treaties and Torture: How the Supreme Court Can Restrain the Executive*, 55 DUKE L.J. 609 (2005) (arguing that the Supreme Court should take a far more activist approach in reviewing executive interpretation of international law and that it may do so while remaining consistent with judicial precedent); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004) (arguing that supporting an absolute ban on torture, rather than a qualified prohibition, is the appropriate legal position from both a moral and pragmatic viewpoint, but that there should be exceptions during truly catastrophic times); Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003); David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, 91 VA. L. REV. 1425 (2005) (examining the place of torture within liberalism); Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255 (2006) (arguing that the most effective power-checking tools have emerged from the military and intelligence community, the media, non-governmental organizations, and the courts); Jeremy Waldron, *Torture and Positive law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005) (discussing that the absolute prohibition on torture should remain in force and that any attempt to loosen it would deal a traumatic blow to our legal system); Steve Chapman, *Unconscionable Torture Tactics: Will the Next CIA Director Have the Courage to Swear Off Waterboarding?* CHI. TRIB., May 11, 2006, at 25; *Next CIA Chief Must Forswear Torture Tactics*, BALT. SUN, May 15, 2006, at 11A; Carol Rosenberg, *U.S.: Block Any Evidence Obtained Via Torture*, PHILA. INQUIRER, March 24, 2006, at A12; Frances Williams, *Washington to Defend Record on Torture Before UN*, FT.COM, May 4, 2006, http://search.ft.com/ftArticle?id=060504008510.

156. *See* Guiora & Page, *supra* note 7.

157. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

Additionally, the European Commission of Human Rights has stated that:

> [T]he notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical. Further, treatment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his own will or conscience.[158]

Lastly, in the widely cited Cleveland Principles, torture is succinctly defined as "any cruel, inhuman, or degrading treatment."[159]

In defense of torture, consider the arguments of Bagaric and Clarke, who speculate that torture may be acceptable in certain conditions:

> The only situation where torture is justifiable is where it is used as an information gathering technique to avert a grave risk. In such circumstances, there are five variables relevant in determining whether torture is permissible and the degree of torture that is appropriate. The variables are (1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information. Where (1), (2), (4) and (5) rate highly and (3) is low, all forms of harm may be inflicted on the agent—even if this results in death.[160]

Other scholars, however, have found a fundamental problem with the "end product" of torture.[161] Whether it is termed "actionable intelligence,"[162] or "bad information and false confessions,"[163] experience has shown that information received from a tortured detainee is overwhelmingly inaccurate, unreliable, and of minimal

158. Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards*, 26 CAL. W. INT'L L.J. 139, 150 (1995).

159. *See* Frederick K. Cox Int'l Law Ctr., Case W. Reserve Univ. Sch. of Law, The Cleveland Principles of International Law on the Detention & Treatment of Persons in Connection with "the Global War on Terror," http://www.law.case.edu/centers/cox/content.asp?content_id=85 (last visited Oct. 27, 2007) (emanating from the "Torture and the War on Terror" conference held at Case Western School of Law in Cleveland, Ohio on October 7, 2005).

160. Bagaric & Clarke, *supra* note 7, at 611.

161. *See* Rumney, *supra* note 7.

162. Guiora & Page, *supra* note 7, at 428.

163. Rumney, *supra* note 7, at 495.

value in preventing acts of terrorism. Further, torture ought to be pragmatically avoided, as intelligence gained through torture may damage the overall investigatory process. Douglas A. Johnson, executive director of the Center for Victims of Torture, claimed that arguing for the necessity of torture rests on "unproven assumptions based on anecdotes from agencies with little transparency":

> Well-trained interrogators, within the military, the FBI, and the police have testified that torture does not work, is unreliable and distracting from the hard work of interrogation. Nearly every client at the Center for Victims of Torture, when subjected to torture, confessed to a crime they did not commit, gave up extraneous information, or supplied names of innocent friends or colleagues to their torturers. It is a great source of shame for our clients, who tell us they would have said anything their tormentors wanted them to say in order to get the pain to stop. Such extraneous information distracts, rather than supports, valid investigations.[164]

The current allegations of improper treatment of detainees strongly suggests that allowing coercive techniques[165] has led to serious abuses bordering on torture, as described in the testimony of a former military interrogator in Afghanistan, Chris Mackey:

> When we arrived in Afghanistan, I had an unshakable conviction that we should follow the rules to the letter: no physical touching, no stress positions, no "dagger on the table" threats, and no deprivation of sleep . . . but I knew that it was possible to make bad decisions in the heat of the moment, that it was easy for emotions to overwhelm good judgment. Following the rules to the letter was the safe route. Even entertaining the idea of doing otherwise was inviting "slippage."[166]

Even if moderate safeguards against torture are instituted[167] it is all but inevitable that some interrogator will "misunderstand," "misinterpret," or be classified as a "bad apple who does not represent the American military."[168] Especially in the realm of torture,

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164. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 522 (2005) (testimony of Douglas A. Johnson, Executive Director, Center for Victims of Torture).

165. *See* NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 54 (detailing types of coercive techniques permitted by the Bush Administration).

166. Rumney, *supra* note 7, at 504–05.

167. *See* Dershowitz, *supra* note 7.

168. *See* Editorial, *Mr. Rumsfeld's Defense*, N.Y. TIMES, May 8, 2004, at A16.

unclear or evasive guidelines lend themselves too easily to misinterpretation with devastating consequences. This truth is particularly important when noting that the most recent legislative response, the Military Commissions Act of 2001,[169] stops short of clearly and specifically delineating permissible and impermissible actions. Because torture, however it is phrased, spun, or articulated, is illegal, the United States is in great need of clear and concise standards in the context of torture so that interrogators are not pushed down a dangerous slippery slope and do not commit abuses.

V. THREATS AND CUMULATIVE MISTREATMENT

To determine which criminal law standards should apply to interrogations in the hybrid paradigm by examining the historical example of the Deep South, threats and cumulative mistreatment are particularly relevant as both have long been mainstays of interrogations and have been the subject of to critique and analysis for many years.

In the interrogation context, the primary danger in permitting interrogators to threaten a detainee or subject him or her to cumulative mistreatment is the risk of eliciting an involuntary and false confession. Thus, threats and cumulative mistreatment must first be defined specifically so interrogators are aware of actions that risk eliciting false statements. Then, the permissibility of threats or cumulative mistreatment should be determined based on the voluntariness of the confession they illicit.

A. Defining a Threat

Historically, case examples demonstrate that threats can take many forms, including threatening a suspect with harm to his relatives, moving him from jurisdiction to jurisdiction, turning the suspect over to an angry mob, or intimating to the suspect that he will be physically harmed unless he confesses.[170]

Whether specific language amounts to a threat or not will depend on the circumstances. In making this determination, a court employs a "totality of circumstances" test to decide whether, as a result of the conduct alleged to be a threat, the accused's will was

169. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

170. *See supra* Part II.C. (discussing *Brown*, *Ward*, and *White*).

overborne at the time he confessed.[171] To find a threat, a court must assess both the interrogator's practices and the suspect's individual characteristics.[172] If the threat is of a violent nature, a subsequent confession is *per se* invalid.[173] These generalities aside, examining relevant jurisprudence leads to the conclusion that threats are neither definitively nor consistently defined.[174] For the purposes of this Article, however, threats are defined as interrogation methods inducing a suspect to provide his interrogator(s) with information when under the impression that to do otherwise will result in penalty either to himself or to others. As noted earlier, the interrogation room is a place of inherent inequality where the state possesses both the resources and a powerful position, so the interrogation "battle" can never be a fair fight. The question, then, is whether an interrogator's actions increased this inherently threatening situation to impose undue force on the individual to confess. Applying this criminal law principle to the hybrid paradigm, the focus returns to the "voluntariness" test to determine whether the confession was freely given.

B. Threats and Inadmissible Confessions—the "Voluntariness Test"

Under traditional criminal law, a confession resulting from a legal threat may be used, but that confession becomes inadmissible if it is deemed involuntary.[175] Voluntariness is the critical variable in determining admissibility. In the detainee context, adoption of the hybrid paradigm could obviate much of this confusion because strict criminal law precedent would not have to be followed, so policy-makers could create a new, clear system with less discretion allowed in determining voluntariness.[176]

To identify whether a confession is voluntary when given after a threat, this Article suggests the use of the following spectrum. At one extreme is the implied or direct threat to a family member,[177] immediately adjacent are threats comparable to those directed to-

171. 23 C.J.S. *Criminal Law* § 1252 (2007).

172. *See* Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

173. *See id.*

174. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Stein v. New York, 346 U.S. 156 (1953); United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983); Frazier v. State, 107 So. 2d 16 (Fla. 1958); Stephen v. State, 11 Ga. 225 (1852); State v. Bernard, 106 So. 656 (La. 1925).

175. McNabb v. United States, 318 U.S. 332, 341–42 (1943).

176. *See Quirin to Hamdan, supra* note 9.

177. Those of the Islamic tradition are extraordinarily sensitive to such threats.

wards African Americans in the Deep South and denounced by the Supreme Court,[178] and at the other extreme are legitimate threats such as the mention of possible prison sentence for obstructing justice. Professor Fred Inbau offers further insight on delineating lawful threats:

> Advising or imploring a subject to "tell the truth" is never considered objectionable. Some difficulties occasionally arise, however, when the interrogator uses such language as "it would be better for you to confess," "you had better confess," "it would be better for you to tell the truth," or "you had better tell the truth."
>
> A number of courts have held that such statements as "you had better confess" or "it would be better for you to confess" constitute threats or promises which will nullify a confession; and some courts have gone so far as to hold that the same rule applies even when the suspect is told "it would be better to tell (or you had better tell) *the truth.*"[179]

As a brief note, one might interject a concern that application of restrictive criminal law principles to detainee interrogations will handicap interrogators and jeopardize national security. However, this Article argues that if society has determined that police can effectively investigate murders and rapes under a set of standards that do not allow for certain harsh interrogation methods, then interrogators of detainees should be able to conduct their interrogations in a similar fashion. In addition, some threats made to detainees are disturbingly similar to threats used against African Americans in the Deep South,[180] and as the Supreme Court's limiting of interrogation methods was a valid response to abuses suffered by African Americans, so limiting the conduct of interrogators in the detainee context is similarly appropriate.

The application of criminal law principles regarding threats and voluntary confessions explicitly rejects the views espoused in the Bybee memos.[181] This rejection is the essence of this Article's theory. Mild threats, such as those implicit in any interrogation setting or those that merely notify the defendant of the possible consequences

178. *See supra* Part II.

179. *See* FRED E. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 170 (1948).

180. *See* Human Rights Watch, Table of Interrogation Techniques Recommended/Approved by U.S. Officials (Aug. 2004), http://hrw.org/backgrounder/usa/0819interrogation.htm.

181. *See supra* note 6.

awaiting him, easily fall within constitutionally permissible methods under criminal law jurisprudence. Supreme Court precedent, however, has unequivocally instructed law enforcement officials regarding the "limits of power" with respect to threats that result in involuntary confessions. In extrapolating from the criminal law paradigm, the same voluntariness test should apply to the detainee interrogation context.

C. Defining Cumulative Mistreatment

While courts and scholars have discussed and defined threats in the context of the interrogation setting, the same cannot be said for "cumulative mistreatment." Bringing together definitions from other scholars, courts, and policy-makers, this Article defines "cumulative mistreatment" as any "prolonged interrogation incorporating illegal methods resulting in an involuntary confession." Generally, cumulative mistreatment is found by a court's determination that the continuousness and cumulativeness of the interrogation was the specific factor which broke down a suspect's will.

D. Voluntariness is Again the Standard

To determine appropriate limits for cumulative mistreatment, the need to ensure a voluntary confession is once again paramount, and an involuntary confession is inadmissible.[182] The facts in *McNabb v. United States*[183] are illustrative. In *McNabb*, the defendants were questioned while in custody, but before appearing in front of a magistrate, in violation of the law at the time. Despite the fact that such actions may have been excusable if carried out over a short time, the lengthy questioning concerned the Court:

> Throughout the questioning . . . at least six officers were present. At no time during its course was a lawyer or any relative or friend of the defendants present. Taylor began by telling "each of them before they were questioned that we were Government officers, what we were investigating, and advised them that they did not have to make a statement, that they need not fear force, and that any statement made by them

182. *See* Ashcraft v. Tennessee, 322 U.S. 143 (1944) (reversing a conviction under similar circumstances).

183. McNabb v. United States, 318 U.S. 332, 336 (1943).

> would be used against them, and that they need not answer any questions asked unless they desired to do so."[184]

Similar cumulative mistreatment in the detainee interrogation context is also unconstitutional. Thus, once again, the voluntariness test as articulated by the Court in *McNabb*[185] is the appropriate standard to use to determine cumulative mistreatment in the hybrid paradigm:

> [I]n their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding.[186]

After *McNabb*, the Supreme Court revisited the issue of cumulative mistreatment in *Upshaw v. United States*.[187] The Court ruled Upshaw's confession coerced and inadmissible, reasoning that "[w]here confessions were made during a thirty hour period while accused was held a prisoner after police had arrested him on suspicion and without a warrant and the delay was for the purpose of furnishing an opportunity for further interrogation, the confessions were inadmissible."[188] As both *Upshaw* and *McNabb* indicate, whether a detainee's interrogation is tantamount to cumulative mistreatment should be determined under a broad standard where the deciding factor is whether such treatment overcame the detainee's will.

E. Threats and Cumulative Mistreatment in the Detainee Context

There is little doubt that aspects of current detainee interrogations violate the established rules governing both threats and cumulative mistreatment. As indicated by Amnesty International,

184. *Id.* at 336.

185. *Id.* at 341–42. ("While the connotation of voluntary is indefinite, it affords an understandable label under which can be readily classified the various acts of terrorism, promises, trickery, and threats which have led this and other courts to refuse admission as evidence to confessions.").

186. *Id.* at 342.

187. Upshaw v. United States, 335 U.S. 410 (1948); *see also* Anderson v. United States, 318 U.S. 350 (1943).

188. *Upshaw*, 335 U.S. at 414.

"[t]he very conditions in which the detainees are held—harsh, isolating and indefinite—can in themselves amount to torture or cruel, inhuman or degrading treatment."[189] The Amnesty report goes on to assert that interrogation teams employ such tactics as lengthy and cumulative questioning, sleep deprivation, stress positions, isolation, hooding, sensory deprivation, and the use of dogs to induce fear.[190] Lastly, while cumulative mistreatment may not initially seem as damaging as more tangible physical threats, the Supreme Court has held that cumulative mistreatment is as violative of a defendant's constitutional rights as threats.[191]

The Fifth and Fourteenth Amendments, as analyzed and extended by the Supreme Court in the precedent cases discussed in this Article, speak loudly and clearly. The right against self-incrimination and the right to due process in the criminal law paradigm have been affirmed and reiterated by the Supreme Court. The Court has made clear that coercive interrogations, torture, threats, and cumulative mistreatment violate both of these seminal amendments in the context of interrogations. These principles, outlined in criminal law jurisprudence, must now be extended to remedy the abuses found in modern detainee interrogations.

CONCLUSION AND RECOMMENDATIONS

In sum, this Article aspires to address two fundamental concerns: first to protect interrogators from prosecution by their own government, and second to ensure that constitutional guarantees are honored. Unquestionably, unrestrained coercive interrogation and torture comport with neither the values of civil society nor the norms of the international community. Thus, the requisite next step for the United States government is to establish clearly delineated rules and standards to prevent coercive interrogation. These standards must reflect a balance between the interest of the United

189. Amnesty Int'l, Guantanamo: An Icon of Lawlessness (Jan. 6, 2005), http://web.amnesty.org/library/Index/ENGAMR510022005.

190. *Id.*

191. *See supra* Part V. For examples of cumulative mistreatment in this Article, see *McNabb v. United States*, 318 U.S. 332, 334 (1943) (holding a defendant for a number of days prior to bringing him before a judge), *Ward v. Texas*, 316 U.S. 547, 548–549 (1942) (repeated transfer from county to county without sleep), *White v. Texas*, 310 U.S. 530, 532 (1940) (continued whipping of suspect in the woods), *Brown v. United States*, 297 U.S. 278, 280 (1935) (beatings imposed on a suspect over the course of a number of days), and *Zing Sung Wan v. United States*, 226 U.S. 1 (1924) (holding a suspect in a hotel for a number of days for the purposes of intermittent interrogation).

States in national security and the equally valid interest of an individual in his or her personal autonomy.

The government has many different places to look for examples of how to establish effective standards and guidelines for interrogations. From the domestic standpoint, the government can draw upon the traditional criminal law paradigm and the extensive procedures already established for interrogations, as well as the Supreme Court's historical response to mistreatment of African Americans in the Deep South. Using the hybrid model comprised of aspects from both criminal law and prisoner of war paradigms, and reflecting on historical analogy, the government has a unique opportunity to formulate concrete policy recommendations rooted in the law. The suggestions outlined below are examples of conclusions that might be drawn from the ideas articulated throughout this Article.

Recommendation 1: Detainees, even if not American citizens, are to be granted basic constitutional protections.

Recommendation 2: Torture as an interrogation method is illegal and the so-called "ticking time bomb" exception is not to be condoned or adopted.

Recommendation 3: The "void for vagueness" doctrine is applicable in determining the limits of coercive interrogation, and instituted policy must be clear and particular in its standards.

Recommendation 4: Both the law and the spirit of *Hamdan* are to be applied when determining the limits of interrogation.

Recommendation 5: The *Bram-Brown* progeny, as discussed in this Article, articulates clear guidelines with respect to the limits of interrogation where neither coercive interrogation, threats, nor cumulative mistreatment can be permitted.

Recommendation 6: The process of extending constitutional guarantees to the detainees can and should draw from the Supreme Court's extension of constitutional rights in response to the African American experience in the Deep South.

Recommendation 7: Coercive interrogation parameters must be *clearly* established to specifically articulate what methods are acceptable, and acceptable measures should be limited to a)

the use of uncomfortable chairs, b) room temperature modification, c) sleep deprivation, d) loud music, and e) the use of hoods.

Recommendation 8: Interrogation of detainees without protecting the detainees' rights with respect to self-incrimination and due process violates the Constitution.

Recommendation 9: The United States Supreme Court must engage in active judicial review of an otherwise unfettered executive regarding the interrogation methods used.

Most importantly, clear and unequivocal guidelines and standards must be promulgated by the government and provided to interrogators. In order to avoid the mistakes of the past, the United States must learn from the relevant lessons that history provides. The interrogation cells of the Deep South are applicable to the interrogation cells of Guantanamo Bay. The *Bram-Brown* progeny provides the most effective lesson that history can offer for the armed conflict in which America presently finds herself, and the nation would do well to learn.