Interrogation of Detainees: Extending a Hand or a Boot?

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I. INRODUCTION

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

In the post-9/11 world, 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 to 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 the case of *Hamdan*

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I owe many people an enormous debt of gratitude for this article, which is part of a larger project related to the limits of interrogation. Many thanks to Professor Gerald Korngold of Case School of Law for urging me to undertake this article, then actively encouraging its writing and reading an earlier draft; my Case colleagues: Professors Melvin Durchslag, Jonathan Entin, Paul Giannelli, Lewis Katz and Bob Strassfeld, all of whom so graciously helped me frame the issues relevant to their fields of expertise; Professor Phil Heymann of the Harvard Law School who not only read an earlier draft of the article but participated in formulating its parameters; Professor David Luban of the Georgetown Law School whose comments to an earlier draft were remarkable both in their speed and wisdom; Professor Craig Nard of the Case Law School whose comments on an earlier draft helped sharpen the arguments; faculty and students at the following law schools that so generously provided me a forum to present and test my thesis: Case Western Reserve, George Mason, George Washington, Harvard, Stanford, Utah, and Washington University, their critical and candid comments were of enormous importance in forcing me to defend my thesis; Institute for Global Security Research Fellow, Brian Field (Case Law '07) and Institute Senior Fellow and Presidential Management Fellow, Erin Page (Case Law '06) who spent untold hours researching, editing and arguing with me every step of the way. This article is truly a labor of their remarkable efforts.

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v. Rumsfeld,[1] a watershed executive power case. For this discussion, I argue that *Hamdan* can be viewed as the natural heir to the *Bram-Brown* progeny thus providing valuable lessons learned from the African-American experience in the Deep South to the current detainee interrogations. As will be discussed below, the *Bram-Brown* progeny is a set of cases, originating with *Bram v U.S.,* that outline the establishment of protections in the interrogation setting.

Five years after 9/11, there remains a persistent void of adequate standards for the interrogation[2] of those detained in this "armed conflict short of war."[3] To fill this void, a wide spectrum of possible interrogation standards exist, where permitting harsh interrogations or torture[4] are on one extreme and granting either full Geneva Convention or domestic criminal law protections are on the other.

Given the panoply of options between these two extremes, it is necessary to finally and precisely delineate a clear set of standards and procedures for detainee interrogations. The continual drum-beat of scholarship focused on torture, [5] while provocative and interesting, forms

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[1] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[2] 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 and Adrian Vermeule, *Should Coercive Interrogation Be Legal?* 104 MICH. L. REV. 671 (2006).

[3] The Israeli Government created this term to address the nebulous type of conflict which is not quite war and not quite a police action. *See* First Statement of the Government of Israel, Sharm El-Sheikh Fact-Finding Committee (Dec. 28, 2000), *available at* **http://www.mfa.gov.il/NR/exeres/FCFDA57E-15AB-4F50-AFBD-BDCE6A289FA8.htm** (last accessed February 5, 2007). I will be using it in this article to refer to the post 9/11 conflict.

[4] Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *in* MARK DANNER, TORTURE AND TRUTH (New York Review of Books, 2004).

[5] Alan Dershowitz has been the leading advocate of the so-called "torture-warrant," whereby a detainee may be tortured under court order in severe circumstances. *See* Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 274 (2003-2004). However, this article attempts to move beyond the often discussed issue of torture. Furthermore the efforts by the White House in the immediate aftermath of 9/11 to justify torture were reflective of an illegal policy that can best be described as "groping" and immoral. Similarly, the "ticking time bomb" has been cited as justifying an exception to the no-torture rule. The movie "The Siege" portrays the dilemma in how to obtain information believed to be required the required for purposes of national security. Whether the information was known to the detainee is unclear; what is clear is the absolute violation of his rights. *See* Amos N. Guiora and Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture,* 37 CASE W. RES. J. INT'L L. 427 (Spring 2006); Phillip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective: A Response to Bagaric and Clarke*, 40 U.S.F. L. Rev. 479; 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 (Summer 1994); David Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61 (Fall 2005); Kenneth J. Levit, *The CIA and the Torture Controversy:*

only a small facet of the interrogation inquiry. The broader question of what interrogation methods will be permissible beyond the cliché "ticking time-bomb" torture discussion is the more important issue.

In determining new detainee interrogation standards, I argue that allowing the unfettered executive to continue promulgating loosely regulated detainee interrogation standards offends civil society, 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, I seek to examine, and then meld, various aspects of the domestic criminal law paradigm with the prisoner of war paradigm in order to create a hybrid. The criminal law paradigm is defined as "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." [6] The hybrid paradigm is defined as being not a criminal law paradigm or a prisoner of war ("POW") paradigm, but rather a reflective equilibrium between the laws pertaining to domestic criminals and those pertaining to POWs. The hybrid paradigm is a melding of these other two models. [7]

In proposing a new analysis of coercive interrogation standards, the conclusions of this article are premised upon and necessitate the assumption, at least *arguendo*, of the hybrid paradigm as the most appropriate legal and policy framework for the detention and trial of detainees. In the event that one does not accept the hybrid paradigm, such a conclusion then requires that they must either accept that the detainee is entitled to full criminal procedure rights

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Interrogation Authorities and Practices in the War on Terror, 1 J. NAT'L SECURITY L. & POL'Y 341 (2005); Mirko Bagaric and Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justified,* 39 U.S.F.L. REV. 581, (Spring 2005).

[6] Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 1, 5(3d ed. 1982).

[7] 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 2007); and Amos N. Guiora *Where are Terrorists to be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, ___ CATH. U. L. REV. ___ (forthcoming 2007). However, the establishment of procedures does not imply that the full panoply of domestic criminal law rights, such as those articulated in Arizona v Miranda, 384 U.S. 436 (1966) be granted to the detainees in the trial process. The hybrid paradigm proposes a regime establishing the parameters of criminal law rights to be granted the detainees. The hybrid paradigm is comprised of seven policy recommendations that balance between the rights of the detainee and the equally legitimate rights of the state.

or, on the other hand, that the detainee is to be kept in a black hole in perpetuity. Although both of these interpretations are valid, for the purposes of this paper, the hybrid paradigm operates as the proper standard.

The arguments made for superimposing aspects of the criminal law paradigm onto the hybrid paradigm are not, however, to be confused with a broader claim that non-citizen detainees are inherently *entitled* to constitutional rights. Rather, I recommend the application of *some* constitutional protections to detainees as the best way to remedy the deficiencies persistent in the current system. This proposal aims to balance the need to enable interrogations as a means of pursuing legitimate national security considerations while also protecting an individual's interest in his own physical autonomy.[8]

Specifically, this hybrid model will be created by taking various criminal law protections that were extended by the Supreme Court to African-Americans in the Deep South throughout the last century (a timeframe hereinafter referenced as "Deep South")[9] and superimposing them upon the current detainee situation.

This article takes on particular importance in the aftermath of *Hamdan v Rumsfeld.*[10] In *Hamdan,* the Supreme Court signaled to the Bush Administration that the procedures currently governing the Guantanamo Bay military commissions[11] were inadequate and demanded a

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[8] *See* Amos N. Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counterterrorism*, 20 TEMP. INT'L & COMP. L.J.___ (forthcoming 2006) regarding comparative analysis of balancing approaches; Deborah Ramirez and 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); and Stephan Dycus, *The Role of Military Intelligence in Homeland Security*, 64 LA. L. REV. 779 (2004).

[9] The term "Deep South" references in particular the region from the late 1800's through the 1940's. In the Deep South, the mounting examples of violent interrogations brought the Supreme Court to finally step in and extend the protections of the Fifth and Fourteenth Amendments to African-Americans, who were once denied the extension of interrogation-based Constitutional protections.

[10] 126 S. Ct. 2749 (2006).

[11] Recent hearings in the United States Senate, Committee on the Judiciary showed the various interpretations of the impact of the *Hamdan* decision, and the response appropriate from the US Senate. *See* http://judiciary.senate.gov/hearing.cfm?id=1986 for witness testimony. *House Armed Services Committee Hearing on Standards of Military Commissions and Tribunals*, July 26, 2006, *available at* http://armedservices.house.gov/schedules/index.html (last accessed February 5, 2007). Further, the Institute for

reformulation of adequate procedures and processes for the military commissions.[12] Specifically, in discussing the current procedural deficiencies, the Court stated that:

> The commission's procedures…provide…that an accused and his civilian counsel may be excluded from…ever learning what evidence was presented during any part of the proceeding…the presiding officer decides to 'close.' Grounds for closure include the 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 officer's discretion, be forbidden to reveal to the client what took place therein…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."[13]

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.[14]"

In response to *Hamdan*, the United States Congress passed the Military Commissions Act of 2006.[15] While this Congressional action is a step in the direction of addressing the Court's concerns in *Hamdan*, it is ultimately insufficient in formulating proper interrogation standards. Rather than specifically articulating permissible interrogation methods, the Military Commissions Act grants to the Executive the authority to interpret the scope and application of Common Article III of the Geneva Convention. As the discussion to follow shows, the establishment of interrogation standards must be done in a clear and specific way so that the

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Global Security Law and Policy, of which the author is the Director, is the only law school in the country to provide legal memoranda to the United States Department of Defense Office of Military Commissions.

[12] The Court signaled this by 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 rather, the AUMF was more like the "lowest ebb" of power, akin to Youngstown Sheet & Tubing Co. v Sawyer, 343 U.S. 579 (1952), requiring further Congressional approval for such commissions. For a seminal article on the role of a Supreme Court in time of armed conflict, *see* Aharon Barak, *A Judge on Judging*, 116 HARV. L. REV. 16 (2002) President Barak's article is the clearest articulation of the responsibility, if not obligation, of a Supreme Court to be actively critical and judgmental of the executive *particularly* in war-time. *Hamdan* reflects that approach; decisions by the Rehnquist Court in the aftermath of 9/11 did not reflect that approach philosophical and jurisprudential approach. *See* also, Amos N. Guiora and Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005).

[13] Hamdan at 2786-2787.

[14] *Id.* at 2798.

[15] 120 Stat. 2600 (Oct. 17, 2006).

interrogators themselves know the precise contours of permissible interrogation methods. However, the evasiveness of the Military Commissions Act leaves itself open to far too many "on the battlefield" abuses.

The "*Bram-Brown* progeny" offers lessons for the extension of some constitutional protections common to domestic criminal law would cure the deficiencies identified by the Court. Again, this is not to say that full constitutional protections are to be granted to detainees. Rather, the Constitution is used here as a pallet from which to draw rights that have yielded success in domestic interrogations. In the same light as the *Bram-Brown* progeny symbolized the great watershed for implementing and extending existing constitutional protections to African-Americans in the interrogation setting,[16] *Hamdan* is a watershed for protecting detainees from coercive interrogation.[17]

This analysis does require occasional "leaps of faith." One such instance acknowledges that there are clear differences between the African Americans in the Deep South and the current detainees in the "war on terrorism;" in particular, citizenship status and the reasons for interrogation.[18] However, it is the similarities, not the differences, that are germane to this analysis. The African American experience in the interrogation setting provides a clear frame of reference for determining the limits of detainee interrogations despite differences in technicalities.

In proceeding with this analysis, this paper focuses on two interrogation methods common to domestic criminal law: threats[19] and cumulative mistreatment.[20] Methodologically,

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[16] Though Bram was white, the case is critical for the analysis of this paper as it was the Court's first decision regarding the limits of interrogation; Brown is critical as it is the first foray of the Court into the interrogations of African-Americans in the interrogation cells of the Deep South.

[17] Just as the cases prior to the *Bram-Brown* progeny stand for acquiesce by the courts and the government regarding the interrogation methods used in the Deep South, so to the decisions of Hamdi v Rumsfeld, 542 U.S. 507 (2004), and Khalid v Bush, 355 F. Supp. 2d 311 (D.D.C. 2005), stand for a modern deferential view of executive power.

[18] Specifically, the detainees are interrogated for information whereas the African-Americans in the Deep South were interrogated/abused out of spite and hatred.

[19] Defined as a communicated intent to inflict harm, either physical or mental, on another person's body or property, Black's Law Dictionary (8th ed. 2004), *see infra* at Sect. VII.

threats and cumulative mistreatment are useful tools as they are both common aspects of interrogations widely understood by both laymen and jurists. Beyond a historical analysis of these two interrogation methods, the subsequent jurisprudential analysis will be based on a careful examination of scholarship and Supreme Court decisions specifically pertaining to the 5th and 14th Amendments. Using the hybrid model, I propose a set of recommendations for both policy makers and decision makers as they seek to establish a legally permissible framework for future interrogations.

II: Detainee Rights and Status

To begin the process of determining which criminal law protections ought to be extended to the current detainee interrogations, a critical groundwork must be laid by first discussing who the detainees are and secondly, what rights they are currently afforded. Only then can we appropriately move into the discussion of the *Bram-Brown* progeny.

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.[21] The predominant discussions at that time suggested that the detainees[22] were to be identified either as prisoners of war,[23] entitled to full Geneva Convention protections, or as criminals granted rights in accordance with the traditional criminal

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[20] 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* at Sect. VIII.

[21] *See* Guiora, *Quirin to Hamdan*, *supra* note 7; Guiora, *Where are Terrorists to be Tried*, *supra* note 7; Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge,"* 8 U. PA. J. CONST. L. 165 (2006); and Robert M. Chesney, *Leaving Guantanamo: The International Law of Detainee Transfers,* 40 U. RICH. L. REV. 657 (2006).

[22] The traditional argument whether the actors are terrorists, freedom fighters, insurgents or guerillas was much discussed post 9/11. The discussion can often turn on whether an individual identified by one as a terrorist is, to another, a freedom fighter. Further, President Bush's politically driven statement declaring "war on terrorism" significantly muddled the waters.

[23] 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.

law paradigm. More than five years after 9/11,[24] this discussion remains incomplete and unsettled.[25]

The matter is complicated by the fact that the detained individuals do not fit either the accepted definition of soldiers in a regular army,[26] which provides the protections of the Geneva Convention, or of common domestic criminals,[27] who are entitled to the rights of the tradition criminal law paradigm.[28] But, it is important to understand the recent developments surrounding the Court's *Hamdan* decision correctly. The Court in *Hamdan* enunciated the need for extending certain Geneva Convention protections, yet this ruling should not be read to suggest that detainees are "prisoners of war." If classified as POWs, international law precludes bringing the detainees to trial.[29] Therefore, the *Hamdan* Court's mandate to extend certain Geneva Convention privileges, while still defining them as detainees, enables trials to go forward.[30]

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[24] *See* Memorandum from Deputy Secretary of Defense England to Department of Defense officials indicating that the detainees are in fact covered by the Geneva Convention, *available at* http://www.washingtonpost.com/wp-srv/nation/nationalsecurity/genevaconvdoc.pdf (Last accessed February 5, 2007).

[25] Vague definitions and standards make the determination of the appropriate legal forum for the detainees problematic. If they are neither prisoners of war nor criminals, then what are they and to what rights are they entitled? The answer to this inquiry currently finds itself in the "twilight zone" referred to by Justice Jackson in *Youngstown,* as Congress has not explicitly approved or disapproved any specific legal regime. Youngstown Sheet & Tubing Co. v Sawyer, 323 U.S. 579 (1952) (Jackson, J., concurring) Then, Hamdan*, supra*, it is suggested, will be viewed by constitutional law scholars as of the same importance as *Youngstown* in determining the limits of executive power. *See generally* 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, 196-198 (2005); 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); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155 (2002); and Senator Joseph R. Biden and John B. Ritch III, *The War Power at a Constitutional Impasse: A 'Joint Decision' Solution*, 77 GEO. L.J. 367 (1988).

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

[27] *See* Tun Yoin, *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); 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); MICHAEL RATNER AND ELLEN RAY, GUANTANAMO: WHAT THE WORLD SHOULD KNOW 184 (2004).

[28] The detained individuals are not able to be classified as soldiers of a regular army due to the lack of central command structure and visible insignia, and nor can they be classified as domestic criminals because such a classification does not do justice by equating acts of terrorism with common crimes tried in Article III courts.

[29] The appropriate legal forum for the conducting of trials for the detainees will no doubt be much addressed in the aftermath of *Hamdan, supra.* Further, 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.

[30] 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

In moving from the discussion of who these individuals are to what rights they currently possess, some scholars have advocated categorizing the detainees simply as criminals,[31] applying clearly delineated interrogation standards relevant to the criminal law cases.[32] But, the prevailing view is that the detainees cannot be defined as such, but, again, must be defined under some form of prisoner of war or enemy combatant status.[33]

A very different legal regime would be in effect today if the Bush Administration had responded to the attacks of September 11th by drawing the *Hamdan* distinction of granting certain Geneva Convention protections without extending actual POW status. In all probability, such a regime would have passed judicial scrutiny. The Court may well have been satisfied with

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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). Accordingly, a soldier who is part of a regular army of a State easily meets this test (In Ex Parte Quirin, the Court held that the saboteurs were not soldiers as they had buried their uniforms upon reaching the US and therefore equated them to spies. 317 U.S. 1, 37 (1942)). Although it has been argued elsewhere (*See, e.g.,* Michael C. Dorf, *What is an "Unlawful Combatant," and Why It Matters?,* FindLaw, Jan. 23, 2002, *available at* http://writ.corporate.findlaw.com/dorf/20020123.html) that members of al-Qaeda do in fact belong to an organization with a command structure, they unquestionably do not meet the other three parts of the Geneva Convention definition.

[31] Jennifer Van Thiel, *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) and Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061 (2005).

[32] White v State of Texas, 310 U.S. 530 (1940) (where the Court held that Due Process precluded a death sentence grounded on a confession which resulted from the whipping and beating of a defendant), Brown v State of Mississippi, 297 U.S. 278 (1936) (where the Court held the confession invalid because, in extracting the confessions, the defendants were subject to whippings and hanging), Ashcraft v State of Tennessee, 322 U.S. 143 (1944) (where the Court held that it was coercive to interrogation the defendant for thirty-six hours without a break), Ward v State of Texas, 316 U.S. 547 (1942) (where the Court held that admitting the defendant's confession violated his due process rights because the police had moved him from town to town, telling the defendant that mob violence was waiting for him at each town), Chambers v Florida, 309 U.S. 227 (1940) (where the Court held confessions invalid where the defendants were held at length, being interrogated and moved around constantly because of false threats of mob violence), Lyons v Oklahoma, 322 U.S. 596 (1944) (where the Court held that eleven straight days of questioning was improper) and Bram v U.S., 168 U.S. 532 (1897) (where the Court struck down the confession because the interrogator had coerced the confession by telling the defendant that there was no question remaining as to his guilt, but rather that the only question was how many accomplices there were). *See, e.g.,* John F. Blevins, *Lyons v Oklahoma, the NAACP, and Coerced Confessions Under the Hughes, Stone, and Vinson Courts*, 90 VA. L. REV. (2004); Monrad Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN L. REV. 411 (1954); Steven Penney, *Theories of Confession*, 25 AM. J. CRIM. L. 309 (1998); Thomas P. Windom, *The Writing on the Wall: Miranda's "Prior Criminal Experience" Exception*, 92 VA. L. REV. 327 (2006); William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); and 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).

[33] *See infra* at note 23.

the Administration granting "some" rights,[34] rather than engaging in the "mental gymnastics" [35] that characterized the White House memos written in the aftermath of 9/11 in an attempt to determine the requisite protections for detainees.[36] Five years later and in the aftermath of the *Hamdan* decision, the Administration must finally incorporate these protections.[37]

b) Potential Sources of Rights

i) The Criminal Law Paradigm

Providing detainees full rights and procedures, as understood in the traditional criminal law paradigm, is both inappropriate and impossible. [38] There are numerous reasons why that is so. An example of the impracticability of adopting the full criminal law paradigm is the constitutionally granted right to confront an accuser. It is clear that in many counterterrorism trials there would be significant issues raised with bringing accusers into open court.[39] As a result, a detainee can never be fully apprised of the case against him.[40] But, just because the right to confront an accuser may not be logistically possible in terrorism trials, there must still be a determination of how to permit as much of this right as possible, without endangering national security. This specific dilemma can be remedied by requiring that a confidential source not be allowed as the sole basis for a conviction.

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[34] For articles addressing the issue of what rights are to be extended to the detainees in a trial setting, *See* Guiora, *Quirin to Hamdan*, *supra* note 7.

[35] *See* Guiora and Page, *supra* note 5.

[36] For discussion of the infighting within the Bush Administration regarding the appropriate procedures, *see* Tim Golden and Don Van Natta, Jr., *Threats and Responses: Tough Justice, Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, October 25, 2004; and Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, January 6, 2005.

[37] *See* testimony of Prof. Michael Scharf before the *House Armed Services Committee Hearing on Standards of Military Commissions and Tribunals*, July 26, 2006, *available at* http://armedservices.house.gov/schedules/index.html (last visited July 31, 2006). This, and other similar testimony, has lead to the Congressional development of legislation aimed at giving legislative approval to the judicial system of Guantanamo Bay, Cuba.

[38] *See, e.g.,* Guiora, *Quirin to Hamdan*, *supra* note 7; Guiora, *Where are Terrorists to be Tried*, *supra* note 7; Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); and Richard Raimond, *The Role of Indefinite Detention in Antiterrorism Legislation*, 54 U. KAN. L. REV. 515 (2006).

[39] Intelligence gathering largely emanates from two sources; HUMINET which is human intelligence and SIGNET which is signal intelligence. HUMINET depends on individuals willing to act as sources for a variety of reasons. For a fuller description of this, *see* Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004).

[40] According to the 6th Amendment, "the accused shall…be informed of the nature and cause of the accusation." U.S. Constitution Amendment VI.

As a further example, if the domestic criminal law paradigm were adopted in full, the prosecution would be required to make all intelligence sources open and available for cross-examination.[41] The overwhelming risk of obligating such sources to appear in open court is obvious and significant.[42] Modifications, then, would be required to the rules of evidence.

Beyond the sensitive issue of using of classified intelligence information in open court, another example of why the full criminal law paradigm cannot be applied is illustrated by the fact that under such application, a detainee would have to be "Mirandized" upon arrest on the battlefield. In considering the logistical implications of such a proposition, it is inconceivable that an American soldier would read Osama Bin Laden his Miranda rights, as required by the Supreme Court in the criminal law paradigm, prior to any interrogation.[43] In conjunction with these rights, the 4th Amendment exclusionary rule would apply to any evidence found at the scene, presenting significant logistical problems on the battlefield and in counterterrorism trials.

These few examples highlight why the criminal law paradigm should not, and can not, be fully applied, but rather it must be intelligently delineated which aspects of the criminal law paradigm may actually be applied to the trial of detainees. In defining detainee status, the first conclusion proposed is that the individual is not a criminal in the traditionally accepted and understood definition of the word.

ii) The POW Paradigm

A second relevant paradigm for discerning the detainees' rights and status is the POW paradigm. According to the Geneva Convention's four-part test, a POW is a soldier in a State's

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[41] Case Western Reserve School of Law and the Institute for Global Security Law and Policy were recently awarded $246,807.00 from the United States Department of Justice called "The Professional Education for Terrorism Trials Program" for the specific purpose of training federal prosecutors.

[42] *See* Thomas C. Homburger, Vice Chair of the Anti-Defamation League's National Commission, Statement of Anti-Defamation League and American Jewish Congress B'nai B'rith International, Hadassah, and The Jewish Council for Public Affairs to the House Committee on the Judiciary (May 23, 2000), *available at* http://www.fas.org/sgp/congress/2000/homburger.html (last accessed February 5, 2007).

[43] I have seen no documentation suggesting that Sadaam Hussein was "Mirandized" upon being taken into captivity.

army, part of a chain of command, who wears recognizable insignia and conducts himself in accordance with the laws of war.[44] This paradigm, like the criminal law paradigm, is inapplicable in full as the detainees captured on the battlefields of Afghanistan and Iraq do not meet this four-part test. While perhaps a chain of command exists, the three additional elements are not satisfied by the detainees as they wear no clear insignia, do not follow the laws of war,[45] and are not soldiers of any State's army.[46] As the detainees do not fully meet Geneva's four-part test, to designate them as POW's would be inappropriate under international law.

Another reason for the inapplicability, beyond the fact that a POW may not be brought to trial unless he has either committed a war crime or a crime during captivity,[47] is that a POW must be returned to his home country upon the cessation of hostilities.[48] Considering the difficulty in determining a true beginning of the hostilities associated with the "war on terrorism," the concept of "cessation of hostilities" is incongruous with a conflict of such an on-going and continuous nature.[49] Further, such a classification would impair any opportunity to bring these individuals to justice, because, if they were in fact able to be tried and sentenced, such a sentence could only last until the "end of hostilities."

iii) The Hybrid Paradigm of Rights for Detainees

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[44] 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.

[45] *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006).

[46] *See*, *e.g.,* 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, *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); and K. Elizabeth Dahlstrom, T*he Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L L. 662 (2003).

[47] *See* 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).

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

[49] Terrorism and counter-terrorism, according to most experts, is what can be best defined as a "continuous, low-intensity conflict" with peaks and valleys (as the summer 2006 "flare-up" of hostilities between Hizzbalah and Israel shows). For discussion on the cessation of hostilities in the war on terrorism, *see generally* 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); 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 or Suspected Terrorists*, 56 HASTINGS L.J. 801 (2005); and Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities,* 36 GEO. J. INT'L L. 669 (2005).

Having identified two paradigms that do not adequately address rights and procedures for detainees, the proper standards reside elsewhere. The hybrid paradigm,[50] previously defined as "a true mix of both the criminal law and prisoner of war paradigms without [either] full Constitutional or criminal procedure rights,"[51] reflects the proper balance between the need to guarantee the detainee rights in the criminal law setting, while simultaneously ensuring both the protection of sources and national security. The hybrid paradigm neither provides or guarantees the detainee the full rights of a typical criminal defendant nor throws him into the "dungeons of the world." This framework offers the proper balance by first recognizing the interests of both sides and attempting to preserve the interests of national security by not blindly granting full criminal law rights, while also preserving the rights of individuals by attempting to extend feasible protections.

In determining the status and rights that attach under the hybrid paradigm, Yale Kamisar's "comparative reprehensibility" test offers a deferential analysis of the amorphous middle-ground of this nebulously defined conflict. As outlined by Kamisar, comparative reprehensibility suggests that:

> where the defendant's conduct is more reprehensible than the police officer's (as of course, it usually will be), the 'judges shouldn't soil their hands' argument is a good reason for admitting illegally seized evidence. For 'judges soil their hands' a good deal more by 'turning a criminal loose upon society' than they do by simply ignoring an officer's violation of the fourth amendment.[52]

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[50] *See* Guiora, *Quirin to Hamdan*, *supra* note 7.
[51] *Id.*

[52] Yale Kamisar, *Comparative Reprehensibility and the Fourteenth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 2 (1987). Professor Kamisar further argues that the comparative reprehensibility test can take four possible forms: (a) since 'turning a criminal loose' is always more shocking, or at least as shocking, as admitting relevant and reliable, albeit illegally acquired, evidence, unless there are other good reasons for not doing so, a court should always admit such evidence; (b) in ruling on the admissibility of evidence obtained in violation of the fourth amendment, a court should balance the seriousness of the officer's error against the gravity of the defendant's crime and only exclude the evidence when, if ever, the reprehensibility of the officer's illegality is greater than the defendant's; (c) the courts should consider some crimes, e.g., murder, rape, and armed robbery, so serious that their gravity will always exceed the gravity of any unreasonable search or seizure and completely eliminate these crimes from the coverage of the rule, but apply the rule as it normally would be in all remaining cases; and (d) in applying the comparative reprehensibility test, a court might take a two-level approach, (i) never excluding illegally seized evidence in the 'most serious' cases (because the defendant's conduct in such cases will always by more

The criminal law paradigm and the prisoner of war paradigm are both insufficient for the current conflict. The questions that arise, and that are central to this discussion, are what standards and protections are applied to the hybrid paradigm without being overly deferential to either side.

III. *Bram*, *Brown*, and Their Progeny

Based on similarities between the current treatment of detainees and the historic treatment of African-Americans arrested in the South, the constitutional standards established by the Court[53] for the Deep South are applicable and germane to the discussions of the current "armed conflict short of war."[54] The starting point for examining the domestic jurisprudence of interrogation methods is the "*Bram-Brown* progeny." This progeny[55] begins with the Supreme Court's extension of constitutional protections in response to interrogations of African-American suspects imprisoned in the Deep South.

a) Similarities in Treatment of African American in the Deep South and Detainees

Before discussing the specific contours of the *Bram-Brown* progeny, it is important to more thoroughly discuss the similarities between the African Americans in the Deep South and the detainees. Only by first engaging in this historical examination will the later correlation be understood, thereby contributing to practical policy recommendations based on a reading of history and an analysis of the law.

In the Deep South,[56] those detained by law enforcement officials or whisked away by mobs were mainly poor, illiterate African Americans who were subjected to threats, cumulative mistreatment and additional interrogation methods that violated Constitutional safeguards. The Deep South interrogation methods in many instances were even reminiscent of the Star

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reprehensible than the police officer's), and (ii) freely balancing the gravity of the constitutional violation against the gravity of the defendant's crime in other cases.

[53] *See infra* at Sect. III(c) for discussion of *Bram, Brown*, *White, Ward*, *White,* and *Ashcraft*.

[54] *See infra* at note 3.

[55] *See Infra* at note 17.

[56] As referenced earlier to consist of the early to mid-1900's.

Chamber,[57] and such 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, do not speak the language of their surroundings, have little or no access to attorneys, and are subject to many threats and abuses from the detaining authorities.

As will be shown, in spite of the technical citizenship differences between the African Americans, who had historically been held as only 3/5 of a citizen,[58] and the detainees who are not citizens at all, the similarities between these two unprotected classes are ultimately more germane to this analysis than the differences. Specifically, the African American experience in the interrogation cells, in the woods, and in the back seats of the local sheriff's car, bear an eerie resemblance to the experience of the detainee captured in the aftermath of 9/11 and held in Guantanamo Bay, Abu Ghraib, Bagram, and other "black sites."[59]

There are further differences beyond just citizenship that require acknowledgment before moving forward. First, the detainees are currently being subjected to coercive interrogation not simply because of who they are, as was the case for African Americans in the Deep South, but they are also interrogated in the pursuit of information. Secondly, the torture of African Americans in the Deep South was due primarily to racism, whereas the current detainees are subjected to abuses as they are an "enemy" in a war setting. Again, though, the similarities in treatment and the lessons learned outweigh these differences, as will be shown through the following discussion and application. Further, in light of these acknowledged differences, this article does not suggest that the post-*Hamdan* world inherently requires adopting the *Bram-Brown* progeny rules, but rather that the *Bram-Brown* progeny offers lessons and insight into the extension of protections to an unprotected class.

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[57] The Star Chamber is a term used to describe the room in Westminster Palace where the King of England's council met, because of the star painted on the ceiling of that room. The court of equity had jurisdiction over criminal matters, and as it was intended to be a streamlined alternative to common-law courts, it became a byword for unfair judicial proceedings. *See* THE COLUMBIA ENCYCLOPEDIA 2704 (2000).

[58] *See* U.S. Const. art. I, § 2, cl. 3, amended by U.S. Const. Amend. XIV, §2.

[59] That expression has been used to describe detainees held in so-called "black sites" as exposed by Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, November 2, 2005.

Interrogation of Detainees: Extending a Hand or a Boot?

Just as allegations of rights violated in the early to mid 1900's lead to the establishment of the Wickersham Commission,[60] the post 9/11 experience of interrogating detainees has yielded numerous allegations of violations of human and civil rights,[61] ranging from minor[62] to major[63] which must lead to the development of new and clear standards.

Specifically, in the late 1800's to the early 1900's[64] African Americans were constant victims of lynchings, merciless whippings (with and without the complicity of local law enforcement officials), and further mistreatment in the local jails. [65] Further, in the Deep South, African Americans were often "rounded-up"[66] without evidentiary justification.[67] For instance,

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[60] President Hoover established the commission in response to American public's increasing worries about crime, and a concern about publicity coming from gang wars in Chicago.

[61] *See, e.g., U.S. Soldiers Tell of Detainee Abuse in Iraq*, Human Rights Watch, July 23, 2006; *No Blood, No Foul: Soldiers' Account of Detainee Abuse in Iraq*, Human Rights Watch, Volume 18, No. 3(G), July 2006; *More than 600 Implicated in Detainee Abuse,* Human Rights Watch, April 26, 2006; Michelle Voeller-Gleason, *Soldier Pleads Guilty to Detainee Abuse, Others Face Charges*, Army News Service, May 25, 2004; and Steven C. Welsh, *Detainee Abuse: Abu Ghraib Court Martial: Staff Sgt. Ivan Frederick*, International Security Law Project, October 26, 2004 *available at* http://www.cdi.org/news/law/abu-ghraib-courts-martial-frederick.cfm (last accessed February 5, 2007).

[62] Including photographs and stress positions.

[63] Including beatings and personal degradation.

[64] Bram was held in 1897 and while the defendant was not an African American it represents the first time the Supreme Court addressed the issue of the "limits of interrogation." The cases subsequently discussed in the paper were decided between 1920 and 1940.

[65] For example, there were 3,385 documented mob lynchings of African Americans in the U.S. between 1882 and 1935. MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT, THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 354-355 (2001). Further, historian W. Fitzhugh Brundage's study of lynchings in Georgia found that 441 of 460 victims of lynchings between 1880 and 1930 were African Americans. *See* W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 262 (1993).

[66] While the term "round up the usual suspects" was popularized by the movie Casablanca, it is highly relevant both to the African American experience as discussed in this article and as evidenced by the number of detainees released from Guantanamo it would seem to be equally relevant to those detained in Afghanistan. For instance, of the 760 detainees brought to Guantanamo Bay in 2002, the military has released 180 without ever charging any of them. A report authored by Seaton Hall Law Professor Joshua Denbeaux found that (1) 55% of the detainees are not charged with having committed any hostile acts against the United States, (2) Only 8% of the detainees were characterized as al Qaeda fighters, and of the remaining detainees, 40% have no definite connect with al Qaeda at all, and 18% have no definitive ties with either al Qaeda or the Taliban, (3) the Government has detained numerous individuals based merely on affiliations with large groups that are not on the Dept. of Homeland Security watchlist, as only 8 % are detained because they were deemed to be "fighters," and (4) only 5% of the detainees were even captured by U.S. forces. "The government has detained these individuals for more than four years, without a trial or judicial hearing, and has had unfettered access to each detainee for that time," said the report, written by lawyers who represent two of the detainees. The lawyers — Mark Denbeaux, a law professor at Seton Hall University in New Jersey, and Joshua Denbeaux — were assisted by Seton Hall law students." *See* http://law.shu.edu/ for full report (last accessed February 5, 2007).

[67] This is illuminated in countless stories from the early and mid 1800s. For instance, the 1831 case of Nat Turner (*see* HERBERT APTHEKER, A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 119 (1951)), involved thousands of slaves acting in rebellion. In this case there was a uprising in which 60 white men lost their

as will be further illuminated and discussed, the accusation by a white woman that an African American male had sexually assaulted her, sealed his fate, regardless of proof. An accusation that he was merely "looking" may well have doomed him to "mob rule."[68]

In the same vein, many of the detainees in the ill-defined "war on terror" [69] have been detained on a "round up the usual suspects" basis.[70] Unfortunately, many of the means used in current detainee interrogations are all too similar to the African American experience in the Deep South.[71]

The 1931 Wickersham Commission Report on Lawlessness in Law Enforcement[72] was established by President Herbert Hoover for the specific purpose of examining the veracity of

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lives, as did 100 black men. The white response, indicative of the time, was not to search out the guilty parties for trial in the courts, but rather to hang all black men who either participated, or were thought to have participated. Further, night riders were organized with police authority to put down any groupings they determined to be secret meetings. JOHN A. DAVIS, BLACK, CRIME, AND AMERICAN CULTURE, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, VOL. 423, CRIME AND JUSTICE IN AMERICA: 1776-1976 89-98 (1976).

[68] The Scottsboro Case, which has become the paradigm for "black on white" rapes, is a case where the accuser's "whiteness" overrode any consideration of her gender or sexual history. In 1931, two white women were hitchhiking on a train across the state border to find work. When two police officers entered the car, the women, out of fear of being arrested for violating the then in place law prohibiting transporting women across state lines for illicit purposes, immediately told the police officers that they had been raped by nine black men, who were all sitting in the same train car. These accusations lead to the quick formation of a mob that was only restrained by the promise of a speedy trial. This ensuing trial ended with quick death sentences, despite the lack of evidence regarding any rape. Even as the case went through appeal, and the women recanted their stories, the local population did not believe in the innocence of the nine men. Further, despite evidence of the women'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." *See* LISA LINDQUIST DORR, WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA 1900-1960 (2004).

[69] President Bush's use of the term "war" reaped unintended consequences. Although it was no doubt aimed at galvanizing the nation, the fact that in international law war can only be between states, he inadvertently promoted Al-Qaeda to the level of a state.

[70] *See infra* at note 66.

[71] The 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., Impunity for the Architects of Illegal Policy*, Human Rights Watch, April 2005, *available at* http://www.hrw.org/reports/2005/us0405/6.htm (last accessed August 2, 2006). Further, on December 25, 2002 the Washington Post reported that persons held at Bagram were kept kneeling for hours in black hoods as well as being deprived of sleep with 24-hour bombardments of lights. Further, this article quoted one official as saying that "we don't kick the [expletive] out of them, we send them to other countries so they can kick the [expletive] out of them."

[72] The "Report on Lawlessness in Law Enforcement" was one of fourteen reports published by the National Commission on Law Observance and Enforcement, or "The Wickersham Commission." For a discussion of the Commission's report, *see* http://www.lexisnexis.com/academic/guides/jurisprudence/wickersham.asp (Last accessed July 25, 2006). President Hoover established the commission in response to American public's increasing worries about crime, and a concern about publicity coming from gang wars in Chicago.

numerous reports regarding the conduct of police departments in interrogations throughout the United States generally and the Deep South particularly. In the end, the Commission's members concluded that suspects had been regularly subjected to "the third degree."[73] Specifically, the Commission determined that willful infliction of pain on criminal suspects was widespread and pervasive. The Commission further determined that the abusers included not just interrogators, but the entire system: police officers, judges, magistrates, and other officials of the criminal justice system. The commission found such violations by examining illegal arrests, bribery, coercion of witnesses, fabrication of evidence, and the aforementioned "third degree."[74]

The specific history of African-Americans in southern jails has been well documented and the subject of much commentary.[75] Furthermore, the "conspiracy of silence"[76] among the relevant communities contributed to abuses, if not death. Even more troubling, many lynchings were conducted with either the active or passive participation of local law enforcement.[77]

In further discussing this necessary history, there are significant similarities between the tragic events of the Deep South and abuses in modern day detainee interrogations. Beyond the similarities in interrogation methods used against the African-Americans in the Deep South and the current detainees, there is a further poignancy to the similarities. Specifically, just as African Americans in the Deep South often died as a result of the physical mistreatment, such tragedy occurs in current detainee interrogations: according to charges filed by the U.S. military against Chief Warrant Officer Lewis Welshofer, Jr., Maj. Gen. Abed Hamed Mowhoush of the Iraqi army was killed by Welshofer during the course of an interrogation.[78]

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[73] The Wickersham Commission defines this term as "the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions." National Commission on Law Observances and Enforcement, *Report on Lawlessness in Law Enforcement* (Washington, D.C.: Government Printing Office, 1931).

[74] *Id*.

[75] *See generally* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539 (2006); Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119 (Summer 2003); Rutledge, *supra* note 32; and Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187 (2005).

[76] *See* Guiora and Page, *supra* note 12.

[77] *See* Brundage at 18; Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. J. 263, 281 (2003); and Muneer I. Ahmad, A RAGE SHARED BY LAW: POST-SEPTEMBER 11 RACIAL VIOLENCE AS CRIMES OF PASSION, 91 Cal. L. Rev. 1259 (2004).

[78] Chief Warrant Officer Welshofer was ultimately reprimanded in court, but not given jail time for this charge. *See, e.g., No Prison Time for Soldier Held in Iraqi's Death*, New York Times 1/24/2006, Sect: A. Also, for

Further, a Department of Defense report documents additional instances of abuses inflicted by U.S. personnel beyond just the well known experiences of Abu Ghraib.[79] Major General Antonio Taguba's investigation states the following:

> 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 and frighten detainees, and in at least one case biting and severely injuring a detainee.[80]

These examples of many detainees being poorly treated in modern day interrogations further indicate the similarities between the detainee treatment and that of African-Americans in the Deep South.

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instances of more detainee deaths, *see* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1 (detailing the deaths of two Afghan detainees tortured by their Army captors); and Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1.

[79] For discussion of the events of Abu Ghraib and elsewhere, *see generally* Frank Rich, *Supporting Our Troops Over a Cliff*, N.Y. TIMES June 4, 2006; Carlotta Gall and David Rhode, *The Reach of War: The Prisons; Afghan Abuse Charges Raise Questions on Authority*, N.Y. TIMES, September 17, 2004; Eric Schmitt, *The Conflict in Iraq: Abuse,* N.Y. TIMES September 9, 2004; Eric Schmitt, *The Reach of War: Capitol Hill*, N.Y. TIMES July 16, 2004; Josh White, *Memo Shows Officer's Shift on Use of Dogs*, WASH. POST, April 14, 2006; 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); John T. Parry, *Just for Fun: Understanding Torture and Understanding Abu Gharaib,* 1 J. NAT'L. SECURITY L. & POL'Y 253 (2005). For a discussion of the historical use of lynchings, *see* generally: Robert Peltz, *Contempt of Court, The Turn-of-the-Century Lynching That Launched 100 Years of Federalism,* 57 U. MIAMI L. REV. 221 (2002); William S. McFeely, *A Legacy of Slavery and Lynching: The Death Penalty as a Tool of Social Control*, 21-NOV CHAMPION 30 (1997); and Anne S. Emmanuel, *Lynching and the Law in Georgia Circa 1930: A Chapter in the Legal Career of Judge Elbert Tuttle,* 5 WM. & MARY BILL RTS. J. 215 (1996).

[80] *See* "An open letter to President George W. Bush on the question of torture and cruel, inhuman or degrading treatment," Amnesty International, May 7, 2004, *available at* http://web.amnesty.org/library/Index/ENGAMR510782004 (last accessed February 5, 2007).

As will be documented below, with respect to the ill-treatment in the Deep South, the Supreme Court finally entered the mix. In a series of monumental decisions, here termed the *Bram-Brown* progeny, predicated on the 5th and 14th Amendments, the Court held that the "Star Chamber" was a clear violation of the Constitutional rights of African Americans. The Court held that the government must immediately extend constitutional protections and due process to the interrogations of African Americans.[81]

Just as the Court in the *Bram-Brown* progeny demanded the extension of procedural protections to African American interrogations, the Court in *Hamdan* similarly articulated to the government that the legal regime established in the aftermath of 9/11 must be changed. Specifically, the Court in *Hamdan*, held that the detainees are entitled to Geneva Convention, Article III protections, stating that:

> Even if al Qaeda was not signatory of Geneva Conventions, aliens captured in connection with United States' war with al Qaeda [are] entitled to protection of article of Geneva Conventions prohibiting 'the 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'; conflict with al Qaeda was a 'conflict not of an international character' within meaning of article, which afforded some minimal protection to individuals associated with neither a signatory nor even a nonsignatory 'Power' who were involved in a conflict 'in the territory of' a signatory.[82]

In order to comply with the ruling from *Hamdan,* requiring the establishment of adequate procedures, the government would benefit by looking at the historical extension of the Fifth and Fourteenth Amendments to African-Americans in the Deep South in response to the rulings of the *Bram-Brown* progeny.

b) Origins of the *Bram-Brown* Progeny

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[81] *See* discussion *infra* at Sect. III.
[82] Hamdan at 2794.

Interrogation of Detainees: Extending a Hand or a Boot?

In *Bram v US*,[83] 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. Here, Bram was accused of committing murder on board an American vessel sailing from Boston to South America.[84] The ship's crew overpowered Bram, who was the ship's first officer, and put him in irons until the vessel reached Halifax.[85] Upon reaching Halifax, Bram was brought to jail and interrogated by a detective from the Halifax Police Department.[86]

Bram's subsequent confession led to his conviction for the murder aboard the ship.[87] Bram appealed the conviction, claiming that the confession was coerced.[88] In the ensuing appeal, the interrogator testified that Bram had confessed fully to the murder without undue influence or coercion.[89] Bram's counsel objected, arguing that Bram had been brought to the detective's private office where he was stripped and interrogated. Under these circumstances, the defense counsel argued 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."[90]

Although *Bram* does not illustrate an egregious threat, per se, the Court's decision to reverse Bram's conviction established a bright line test 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.[91]

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[83] Bram v U.S., 168 U.S. 532.
[84] *Id*. at 534.
[85] *Id*. at 536.
[86] *Id*. at 537. Although Bram was brought first to Hallifax, and, at the request of the American consul, interrogated by the Hallifax authorities, the American consul eventually requested that Bram be brought to Boston. It was in the United States, then, that Bram was formally charged with murder.
[87] *Id.* at 534.
[88] *Id.* at 539.
[89] *Id.* at 538-539.
[90] *Id.* at 539.
[91] *Id.* at 543.

As the progeny is further developed, it is important to note that the strict *Bram* test has not been overturned.[92] Rather, it has been reiterated through its adaptation into a broader test, such as the "totality of the circumstances"[93] test articulated by the Court in *Ashcraft,*[94] which then morphed into the "shocks the conscience" test[95] for determining whether an interrogation violated a suspect's 5th and 14th Amendments rights.[96]

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[92] *See* 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 NO. 3 CRIM. LAW BULLETIN 4 (2003); and 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).

[93] *See* generally U.S. v Etchison, 2005 WL 3088343 (Police interrogation of a suspect in custody threatens the Fifth Amendment where officers compel confessions through coercive interrogation or exposure to "inherently coercive" environments created by custodial interrogation.); State v Swanigan, 279 Kan. 18 (Kansas 2005) (Police officers' threats during interrogation to tell county attorney of defendant's lack of cooperation was inconsistent with defendant's Fifth Amendment right against self-incrimination but did not render his confession involuntary per se.); Riley v Dorton, 115 F.3d 1159 (4th Cir. 1997) (while a pretrial detainee was painfully tightly handcuffed, an officer inserted a pen into a pretrial detainee's nose and threatened to rip it open. The officer also slapped the detainee, causing his head to snap to one side and raising welts on his face. The detainee subsequently suffered depression and nightmares. The court found these injuries to be no more than *de minimus,* necessitating judicial action); Taylor v. McDuffie, 155 F.3d 479 (4th Cir. 1998) (while attempting to remove a driver's license from a pretrial detainee's mouth, an officer "placed his knee in the lower part of [plaintiff's] back and at the same time grabbed [plaintiff] by the head and started pulling his head backwards until his back popped." The detainee also claimed that the officer "shoved a small wooden object into [the detainee's] nose with such force that it caused his nose to hemorrhage and then shoved it into [the detainee's] mouth." The court found the injuries to be *de minimus* at most. The Court held that there are only two exceptions to the rule that plaintiff's injuries must be more than *de minimus* to sustain a claim of excessive force. The first is under extraordinary circumstances where the officer's conduct is "repugnant to the conscience of mankind. The second exception from the rule requiring more than *de minimus* injury is under a claim of excessive force employed during interrogation); Gray v Spillman, 925 F.3d 90 (4th Cir. 1991) (the pretrial detainee was tightly handcuffed, which caused swelling and injury to his right hand; kicked in the foot, which caused severe pain and swelling; and shoved up against a wall, which injured his lip and loosened three of his front teeth. The court held that even if these injuries were *de minimus,* in the context of interrogation, a plaintiff has only to prove the use of *any* physical force to coerce an incriminating statement.); Bartram v Wolfe, 152 F.Supp.2d 898 (S.D.W.Va. 2001)) (Beating and threatening a person in the course of custodial interrogation violates the Fifth and Fourteenth Amendments of the Constitution.).

[94] Ashcraft v State of Tennessee, 322 U.S. 143 (1944). Later, in Arizona v Fulminante, 499 U.S. 279 (1991), where the Court held a jailhouse confession to have been coerced because defendant confessed to a government, agent who was posing as a fellow prisoner, who offered to protect defendant from jailhouse violence in exchange for the truth for instance, the Court wrote: "[w]e deal first with the State's contention that the court below erred in holding Fulminante's confession to have been coerced. The State argues [under *Schneckloth*] that it is the totality of the circumstances that determines whether Fulminante's confession was coerced, but contends that rather than apply this standard, the Arizona court applied a 'but for' test, under which the court found that but for the promise given by Sarivola, Fulminante would not have confessed. In support of this argument, the State points to the Arizona court's reference to Bram v. United States. Although the Court noted in Bram that a confession cannot be obtained by 'any direct or implied promises, however slight, nor by the exertion of any improper influence,' it is clear that this passage from Bram, which under current precedent does not state the standard for determining the voluntariness of a confession, was not relied on by the Arizona court in reaching its conclusion." *Id.* at 285.

[95] Edward L. Fiandach, *Miranda Revisited*, 29-NOV CHAMPION 22 (2005) ("With Brown establishing the outer parameter of what would commonly be known as the Due Process voluntariness test, the next two decades would

Bram's bright-line rule specifically acknowledged not only the applicability of the Fifth Amendment, but also that "there 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."[97] The next major development of the progeny was the extension of the *Bram* rule to the police departments of the Deep South.

The following cases represent the core of the Supreme Court's specific intervention in the interrogations of African-American suspects mandating the application of the 5th and 14th Amendments.[98] The decisions here reflect an understanding that the interrogation methods of the Deep South were a fundamental violation of the Constitution.

c) Jurisprudence of the *Bram-Brown* Progeny

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see the Court move closer to the rationale of Bram. In so doing, the Court's focus would inexorably shift from an examination of the statement's truthfulness to the motivation to make the statement and whether the decision to testify against one's self was "free and voluntary."); David Aram Kaiser, *United States v. Coon: The of Detrimental Reliance for Plea Agreements?*, 52 HASTINGS L.J. 579 (2001) ("While Bram was decided before Brown and its progeny, for the middle third of the 20th century [the Court] based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. [The Court] applied the due process voluntariness test in some 30 different cases decided during the era that intervened between Brown and Escobedo v. Illinois."); and MaryAnn Fenicato, *Miranda Upheld by U.S. Supreme Court*, 2 NO. 19 LAWYERS J. 2 (2000) ("Although Bram preceded Brown , the latter prevailed because the Fifth Amendment was not considered incorporated by the Fourteenth Amendment and applicable to the states until 1964. Thus, the due process test was utilized in approximately thirty different cases thereafter, 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.'").

[96] In applying the 14th Amendment to the criminal law interrogation setting, the Supreme Court has addressed the core issues of voluntary confessions and the totality of the circumstances. What the Court referred to in Rochin v California, 342 U.S. 165 (1952), as "shocks the conscience" is the test for determining whether an interrogation violated the 5th and 14th Amendments. This test stands for the proposition that the police cannot procure evidence from for a criminal prosecution in a particularly offensive manner (in Rochin, the methods objected to included a forced stomach pump looking for drugs in the defendant's stomach).

[97] Bram at 545.

[98] Whether the Court could have intervened earlier is for scholars to debate; that being said I have argued elsewhere that judicial review in armed conflict must be active and immediate. *See, e.g.,* Guiora and Page, *supra* note 12. The judicial review philosophy advocated in the article is based on the Israeli model as espoused by the former President of the Israeli Supreme Court, Aharon Barak. *See* Barak, *supra* note 12.

Interrogation of Detainees: Extending a Hand or a Boot?

The Supreme Court's initial Deep South interrogation case was *Brown v U.S.*[99] *Brown* specifically presents the question of whether convictions, based solely on confessions that are shown to have been extorted by State officers through brutality and violence, are consistent with the Fourteenth Amendment's due process requirement.[100] The holding in *Brown* is of particular importance because the "due process doctrine for police interrogations began its life with the Court's dramatic creation of a Fourteenth Amendment exclusionary rule in *Brown*."[101]

The petitioners in *Brown*, all African-Americans, were convicted for the murder of a white man. The petitioners were arrested, indicted, tried, convicted, and sentenced to death within exactly one week.[102] Specifically, upon the discovery of a dead body, the local sheriffs went to the home of one of the petitioners. The sheriff asked the petitioner to accompany him to the house of the deceased where, unbeknown to the petitioner, a mob of white men had gathered to accuse him of the crime. Upon the petitioner's denial, the mob seized him, with the sheriff's assistance, and hung him by a rope.[103] The mob then let the petitioner down before re-hanging him a second time.[104]

This process continued while Brown repeatedly protested his innocence.[105] The mob then tied the petitioner to a tree and whipped him as he consistently denied the accusations.[106] At this point, the mob finally released Brown, and he managed to stagger home, despite the severe abuse he had just endured.[107] Other suspects were then brought to the jailhouse where they were made to strip and lay over chairs while their backs were cut to pieces with a leather strap containing buckles.[108] It was made clear to the victims that the whippings would continue unless and until they confessed.[109]

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[99] Brown v U.S., 297 U.S. 278 (1936).
[100] *Id*. at 279.
[101] Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2203 (1996).
[102] Brown at 279.
[103] *Id.* at 281.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id.* at 282.
[108] *Id.*
[109] *Id*.

After a few days, the sheriff returned to Brown's home to arrest him yet again. In the process of taking Brown to jail in the adjoining county, the sheriff stopped and severely whipped him, threatening that he would continue the whipping until the defendant confessed.[110] At this point, Brown finally acceded to the demands, and confessed.[111] Nevertheless, the whippings continued until the confession's specific language was in accordance with that desired by the officers.[112]

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.[113]

In these two watershed cases, *Bram* and *Brown*, the extension of protections was achieved through the use of two different and important constitutional principles: the Fifth Amendment right against self-incrimination was articulated in *Bram*, and the Fourteenth Amendment's due process clause was articulated in *Brown*.[114]

Explaining and applying the *Bram-Brown* progeny, the following cases further depict circumstances in the Deep South for African Americans enabling us to draw conclusions pertinent to detainee interrogation. In discussing the following specific cases, they were not only chosen for their showing of the progressive application of the 5th and 14th Amendments to

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[110] *Id*.
[111] *Id.* 280-282.
[112] *Id*. at 282.
[113] *Id*. at 463.
[114] *See generally* Fenicato, *supra* note 95. Referring to Brown, Laura Magid, commented that "[i]n 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.'" Laura Magid, *Deceptive Interrogation Practices: How Far is Too Far?,* 99 MICH. L. REV. 1168, 1172 (2001).

African-Americans, but also for the similarities they show to current detainee treatment. Specifically, these cases were chosen because each one of them shows the violent nature of interrogations in the Deep South, which is the primary tenant of the comparison effectuated herein to the interrogations of detainees.

In *White v Texas,* [115] the defendant, a black farmhand working on a plantation outside of Livingston, Texas, was convicted of rape and subsequently sentenced to death.[116] The defendant was called in from the field while picking cotton to go to the brother of the prosecutrix "where fifteen or sixteen negroes of the vicinity were at the time in custody without warrants or the filing of charges."[117] White was then 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.[118]

The defendant, who was illiterate, eventually signed a written confession.[119] While the officer who was identified by petitioner as the individual who whipped him nightly in the woods denied doing so, he did not specifically deny taking the petitioner into the woods to be interrogated.[120] 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."[121]

Furthering this legacy in the Deep South, the defendant in *Ward v Texas*, [122] a black man accused of killing a white man, appealed his murder conviction, arguing that it was based on a coerced confession. Upon arrest, the police told the defendant that mobs of white men were waiting for him in various towns.[123] Based on the supposed presence of these mobs, the police

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[115] White v Texas, 310 U.S. 530 (1940).
[116] *Id*. at 530.
[117] *Id*. at 532.
[118] *Id*.
[119] *Id*.
[120] *Id*. at 533.
[121] *Id*., citing Chambers v Florida, 309 U.S. 227 (1940).
[122] Ward v Texas, 316 U.S. 547 (1942).
[123] *Id*. at 548.

took the defendant from town to town under the cover of night, not allowing him to sleep.[124] Further, the defendant 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."[125]

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 to which he was subjected.[126] Specifically, the Court spoke of "cumulative mistreatment"[127] when it indicated that:

> The effect of moving an ignorant negro by night and day to strange towns, telling him of threats of mob violence, and questioning him continuously is evident from petitioner's statement to County Attorney Rolston that he would be glad to make any statement that Rolston desired. Disregarding petitioner's claims that he was whipped and burned, we 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 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.[128]

Moving forward, in 1944, the petitioners in *Ashcraft v Tennessee*[129] claimed that their convictions had been improperly extorted by law enforcement officials.[130] The defendants were

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[124] *Id*. at 549.
[125] *Id.*
[126] *See infra* at Sect. VIII for definition.
[127] Finding cumulative mistreatment requires a case by case analysis where the court must focus on particular circumstances, such as the amount of movement, specific length of time, number of people, gender, to make a determination of when the "continuousness" breaks the individual's will.
[128] Ward at 555.
[129] Ashcraft v Tennessee 322 US 143 (1944).
[130] *Id*. at 145.

questioned continuously for more than 36 hours by a relay of police officers.[131] In reversing the convictions, the *Ashcraft* Court held that, under the "totality of the circumstances" test, the confessions were compelled through cumulative mistreatment.[132]

As previously indicated, the question in *Bram* was whether the defendant had been compelled or coerced to make a self-incriminatory statement contrary to the 5th Amendment. The question in *Ashcraft*, furthering the approach from *Brown*, was whether the defendant's 14th Amendment privileges were violated when he was coerced to confess.[133]

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 the grounds of cumulative mistreatment, as "it appears that Ashcraft from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty never left this homicide room of the fifth floor."[134]

The *Ashcraft* dissent, though, raises concerns that the majority's position may be construed to mean that *any* lengthy interrogation is "inherently coercive."[135] The dissent argues that while confessions resulting from a lengthy interrogation should be held as *prima facie* involuntary, there still needs to be a focus on the actual coerciveness of the interrogation.[136]

The *Bram-Brown* progeny's litany of violent and coercive interrogations serves to typify the treatment of African Americans in the Deep South. African Americans were arrested based on a vague inkling of guilt, subjected to threats of violence, and physically tortured to induce confessions. The above discussion provides a poignant lesson for the discussion of rights to be extended to detainees. In each of these cases, the Court took great measures to demand that

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[131] *Id*. at 153.
[132] *Id*.
[133] *Id*. at 148.
[134] *Id*. at 149.
[135] *Id*. at 157.
[136] *Id*.

these constitutionally unprotected citizens receive many constitutional protections afforded to white society.

d) Applying the Deep South to the Detainees

The above selected cases of the *Bram-Brown* progeny highlight conduct that is similar to that of the current detainees. The detainees currently held by the United States, similar to the African Americans in the above progeny, 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, often times leading to untrustworthy confessions and intelligence.

The importance of the above discussion is not the specific criminal law aspects, as the detainees are under the hybrid paradigm, but rather the lessons of interrogation methods that were held by the United States Supreme Court to be beyond those which are permissible to be carried out at the hands of American law enforcement. With the above facts and discussion in hand, this article will next turn to the Constitutional debate of extending Constitutional protections to non-citizens.

In addition, to this discussion of "how" to extend such protections, the preceding question of "why" must always be kept in mind. In short, as stated earlier, a regime of protection needs to be extended because of the abuses which have occurred over the years since 9/11, most notably in Abu Ghraib and Guantanamo Bay. These abuses are direct results of a system that was hesitant to draw lines in the sand, instead favoring illusive and undefined standards. Further, it must be kept in mind that applying these Deep South principles to detainees is not done in a veiled attempt to coerce the other side to act in the same way towards American prisoners, as such is highly unlikely, but rather such an extension of protections comports with the moral duty that is enshrined in the United States. Then, accepting this need for extending protections, the next issue to address is extending Constitutional protections to aliens.

IV. Extending Constitutional Protections to Aliens

Interrogation of Detainees: Extending a Hand or a Boot?

As alluded to earlier, the proposed analysis grounds itself on accepting the argument for extending constitutional protections to both American citizens as well as non-citizens held by the United States.[137] The acceptance of the argument that constitutional protections may be extended to non-citizens is critical to the analysis contained in this article, as the detainees currently held in Guantanamo Bay and elsewhere are clearly not American citizens.[138]

In light of the discussion of who the detainees are, from what paradigms of rights to draw on for protections, and the Court's dealings with the historic example of the interrogations in the Deep South, it is appropriate now to analyze the more general question of extending constitutional protections to the detainees as non-citizens, a currently unprotected class. As was shown earlier, the *Hamdan* Court mandates the extension of protections to detainees, but for the comparison being made in this article, it remains to be delineated how to cross the gap between the fact that African Americans were considered partially citizens, and the detainees' are wholly aliens.

An initial issue is why constitutional rights should be extended to non-citizens in the first place. David Cole argues that any alien, legal or illegal, residing in the US is entitled to full constitutional guarantees and protections.[139] According to Cole:

> As politically tempting as the trade-off of immigrants' liberties for our security may appear, we should not make it. As a matter of principle, the rights that we have selectively denied to immigrants are not reserved for citizens. The rights of political freedom, due process, and equal protection belong to every person subject to United States legal obligations, irrespective of citizenship.[140]

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[137] *See infra* at Sect. I.

[138] The exceptions are 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. Hamdi was then released to the care of his father in Saudi Arabia. John Lindh Walker, then, was captured in Afghanistan was, tried and convicted in U.S. District Court. Further, Jose Padilla (the so-called "dirty bomber") was declared by then Attorney General Ashcroft to be "one of the most dangerous terrorists alive" and was the subject of numerous lawsuits regarding his habeas corpus will be tried in federal court in Miami on a series of lesser charges. Mr. Ashcroft's comments bear repeating only in that they represent a disturbing trend in the Bush Administration's initial legal responses to 9/11. *See* Ediberto Roman, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 559-560 (2006). Hamdan is thus the culmination of grave concern regarding the executive branches' "over-reaching."

[139] DAVID COLE AND JAMES DEMPSEY, IMMIGRANTS' RIGHTS AND AMERICAN FREEDOMS IN THE WAR ON TERRORISM (2003).

[140] David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

To discuss extending Constitutional protections to non-citizens, it should be first noted that the origins of this question began in the Supreme Court's *Dred Scott* decision, holding that the Fifth Amendment was not limited to the geographic boundaries of the states, but rather such protections were extended to all incorporated territories of the United States.[141] In the 150 years since *Dred Scott*, the Court has discussed similar cases with two distinct "lines of demarcation" important for determining detainee rights: first, distinguishing between individuals within and outside of the United States, and secondly distinguishing between citizens and non-citizens.

In discussing these two issues, case law slowly extended Constitutional protections to include non-citizens, provided cognizable ties to the United States could be demonstrated. The clearest tie was physical location within the border of the United States.[142] Thus, as will be seen in the discussion of *Eisentrager*,[143] this specific inquiry directly impacts this article's question as the decision of Guantanamo Bay's status as a territory of the United States is of the utmost importance. If Guantanamo Bay is held as a territory of the United States, then the precedent dictates that fundamental rights, like the Fifth and Fourteenth Amendments, should apply. But, if not held to be a territory, then the Constitutional protections would not necessarily be afforded.[144]

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[141] *See* Dred Scott v. Sandford, 60 U.S. 393 (1857).

[142] U.S. v Tiede, 86 F.R.D. 227 (D. Berlin 1979).

[143] Johnson v. Eisentrager, 339 U.S. 763 (1950). In Eisentrager, petitioner sought habeas corpus review as a German national in the custody of the United States Army. The Supreme Court held that the German nationals who were being held based on a military commission conviction for having engaged in military activity against the United States, possessed no right to a habeas corpus petition.

[144] The historical litany of this distinction began in 1891 with the case of In re Ross, 140 U.S. 453 (1891). In Ross, an American seaman was suspected of murder on an American ship in Japan. The defendant then was tried and convicted by a consular court in Japan, appealed based on a Fifth Amendment claim, and the Supreme Court denied the appeal because the trial took place outside of the United States, and thus the Fifth Amendment did not apply. In that case the Court acknowledged that it was a valid question to inquire whether the person asserting constitutional protection was inside or outside of the United States. This line of cases continued, then, with the "Insular Cases" running from 1901-1922. Specifically, cases considered to be within the progeny of the "Insular Cases" dealt with the land acquired by the United States during the Spanish-American War. This was, for the first time, where the Court noted that some constitutional rights could be extended out to U.S. territories, but only some rights would be here extended, as the territory was not fully incorporated. *See* Downes v Bidwell, 182 U.S. 244 (1901).

For the second distinction the Court looked to the applicability of Constitutional protections to citizens, no matter where they were physically located. As noted above,[145] the Constitution did not initially have any reach beyond the territorial boundary of the United States. However, although the "Insular Cases"[146] began the process of expanding such a holding generally, they did not specifically touch on the question for non-citizens. Specifically, the "Insular Cases" achieved four effects relevant to this distinction: (1) they offered explicit legal justification of American endeavors in Puerto Rico; (2) the cases created a system by which America, as a State, could exert power over a foreign entity; (3) they defined the "legitimate" framework for later political struggles relating to the issue of the political status of Puerto Rico and the grating of legal and political rights to Puerto Ricans; and (4) they created a framework that facilitated the establishment of practices which recognized, and validated, the colonial project in Puerto Rico.[147]

As the Court further developed this second distinction, the question of citizenship, it increasingly held that citizens "carry" their constitutional rights outside of the territory of the United States. In 1990, the Court held in *Verdugo-Urquidez*[148] that the Fifth Amendment, in particular, applied to any "person" or "accused" as opposed to the more restrictive Fourth Amendment protection of "the people."[149]

In the aftermath of the aforementioned *Dred Scott* decision, which expanded constitutional protections, the *Eisentrager* Court noted a slow and steady progression of an increase in rights to be granted to aliens.[150] In noting this progressive trend, the *Eisentrager*

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[145] *See infra* at note 144.

[146] The "Insular Cases" are nine cases addressing the constitutional questions of the status of Puerto Rico and the Philippines in 1901. The Insular Cases also include a series of cases from DeLima v. Bidwell, 182 U.S.1 (1901) to Balzac v. Puerto Rico, 258 U.S. 298 (1922).

[147] *See* generally, Sanford Levinson, *The Canon(s) of Constitutional Law: Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

[148] U.S. v. Verdugo-Urquidez, 494 U.S. 259, 265-66 (1990).

[149] Moving forward momentarily, the current Congressional immigration debates enable further analysis. In the immigration context, illegal immigrants working in the United States are subjected to the aspects of the Constitution which benefit the government, such as taxation. Thus, the argument can be made that if the government is going to apply Constitutional guarantees when beneficial to its interests, then Constitutional protections, as discussed later in this article, must be extended.

[150] Eisentrager at 766.

Court held that physical presence *alone* in the country creates an implied guarantee of certain rights, which become even more extensive when an active statement of intent to become a citizen is made.[151] Specifically, the Court noted 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."[152]

Applying these principles to the discussion of Guantanamo detainees, the court in *Khalid v Bush*[153] held that Guantanamo Bay detainees do not possess any cognizable rights because, the district court noted, non-citizens detained by the United States beyond the domestic borders (as the court argued to be the case with Guantanamo Bay) cannot avail themselves of constitutional protections. *Rasul v Bush,*[154] then, offers a more appropriate frame of reference on the question of the interplay between the decisions of Guantanamo's territorial status and the proper extension of constitutional protections. *Rasul* stands for the proposition that the federal courts have jurisdiction to hear a detainee's habeas petition *whenever* they are held in a place where the "United States exercises complete jurisdiction and control."[155]

In further arguing for constitutional protections for detainees, the *In re Guantanamo Detainees*[156] court cited *Rasul* as recognizing the precedent from *Eisentrager* barring claims of an alien seeking to enforce the U.S. Constitution in a *habeas* proceeding outside of a sovereign territory of the United States.[157] However, the *In re Guantanamo Detainees* court held that the *Eisentrager* decision which denied German detainees constitutional rights, was inapplicable to the Guantanamo detainees because the detainees, unlike the Germans, "have been imprisoned in territory over which the U.S. exercises exclusive jurisdiction and control."[158]

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[151] *Id.* at 771.
[152] *Id.*
[153] Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (foreign nationals captured on the battlefield and brought to Guantanamo Bay filed petitions for writ of habeas corpus).
[154] Rasul v. Bush, 542 U.S. 466, 467 (2004).
[155] *Id.*
[156] In re Guantanamo Detainees, 355 F. Supp. 2d 443, 453-454 (D.D.C. 2005).
[157] *Id.* at 449.
[158] *Id.* at 476. The German detainees were held and tried by the United States Army in the "China Theatre." However, upon their convictions they were sent to Germany to serve their sentences. Eisentrager at 766.

Thus, pertaining to the question at hand, in light of the jurisprudence of the *Eisentrager* decision, the appropriate holding turns on the territorial status of Guantanamo Bay. Guantanamo detainees must be granted constitutional protections if Guantanamo Bay is accepted as a territory of the United States.

The discussion regarding the applicability of constitutional rights to the detainees must first be grounded upon the understanding that, although we are not talking about "legal aliens," we are also not talking about "illegal aliens," as the term is commonly understood.[159] Rather, this discussion involves a third class of aliens: the detainees. This class of individuals was brought within the jurisdiction of the United States, specifically to Guantanamo Bay, which the above discussion showed was held to be tantamount to U.S. soil, against their will by U.S. soldiers acting upon the orders of the Commander-in-Chief.[160]

Thus, this brief discussion highlights the permissibility of extending constitutional protections to non-citizens. Specifically, given the sufficient connection between the detainees and the United States, particularly being on American soil and being on such soil because of U.S. authorities, the detainees may not be inherently entitled to full constitutional protections, but they certainly deserve certain constitutional protections in order to preserve the interests of civil society.

V. Analysis of the 5th and 14th Amendments in the Context of Interrogations

a) The 5th Amendment Right Against Self-Incrimination

The protections of the 5th and 14th Amendment are inextricably tied to the interrogation setting of the domestic criminal law paradigm. The 5th Amendment of the U.S. Constitution

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[159] This term usually refers to individuals who have illegally crossed our borders in an effort to get around the lengthy immigration process.

[160] *See generally*, Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatans, Aliens and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004); 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); and Wendy R. St. Charles, *Recognizing Constitutional Rights of Excludable Aliens: The Ninth Circuit Goes Out on a Limb to Free the "Flying Dutchman*," 4 J. TRANSNAT'L L. & POL'Y 145 (1995).

specifically protects an individual from being forced to incriminate himself.[161] For this article, the ultimate question regarding the Fifth Amendment is whether the right against self-incrimination should be extended to detainees. The further question under the 5th Amendment, whether an individual arrested in the "zone of combat"[162] should be read his Miranda rights, is likely answered in the negative for its impracticality, yet it remains open whether such rights and protections should be granted to the detainee *once* he is in the interrogation setting.[163]

In analyzing the *Bram-Brown* progeny, it is clear that the Supreme Court extended the Fifth Amendment in general to the indigent, illiterate African Americans in the jailhouses of the Deep South. As noted above, in the aftermath of *Hamdan* this right needs to, at least partially, be extended to the detainees as well.[164] Although never directly addressing the detainees' privilege regarding self-incrimination, the *Hamdan* Court's opinion offers a scathing criticism of the military commissions as a whole, thus incorporating the lack of 5th Amendment protections into its criticism. The Bush Administration would clearly disagree with any such proposition given its previous indication that "it is not practicable to apply in military commissions under this order

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[161] Specifically, "nor shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Scholars and Supreme Court cases alike have analyzed the significance of this right in various contexts: For scholarship discussing the Fifth Amendment in relation to police interrogation methods, *see generally* Alexander J. Wilson, *Defining Interrogation Under the Confrontation Clause After Crawford v Washington,* 39 COLUM. J.L. & SOC. PROBS. 257 (2005); Paul G. Alvarez, *Taking Back Miranda: How Seibert and Patane Can Keep "Question-First" and "Outside Miranda" Interrogation Methods in Check*, 54 CATH. U. L. REV. 1195 (2005); and Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867 (2005). For scholarship discussing the Fifth Amendment in relation to court testimony, *see* H. Mitchell Caldwell and Carlo Spiga, *Crippling the Defense of an Accused: The Constitutionality of the Criminal Defendant's Right to Testify*, 6 WYO. L. REV. 87 (2006). For scholarship discussing the Fifth Amendment in relation to confessions, *see generally* Eric English, *You Have the Right to Remain Silent, Now Please Repeat Your Confession: Missouri v Seibert and the Court's Attempt to Put and End to the Question-First Technique*, 33 PEPP. L. REV. 423 (2006) and Ronald J. Allen, *Miranda's Hollow Core*, 100 NW. U. L. REV. 71 (2006).

[162] This is a much used, perhaps misused and misunderstood, term of art. In traditional warfare, the zone of combat was where armies faced each other: infantry and armored corps units on the battleground; air forces in the air and navies on the high sea. In "armed conflict short of war," the zone of combat has been significantly expanded to include the civilian population and urban residential areas. The training of the soldier for the zone of combat is significantly different than for traditional warfare.

[163] *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); Sean D. Murphy, *Executive Branch Memoranda on Status and Permissible Treatment of Detainees,* 98 AM. J. INT'L L. 820 (2004); and 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).

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

the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[165]

While it can be argued that a detainee *may* possess intelligence information of operational importance, making a discussion of self-incrimination moot for the lack of information ever going to open court, as noted through the above discussion of *Bram,* the Supreme Court has linked the 5th Amendment's protections against self-incrimination to general limitations of acceptable interrogation methods. In addressing the question of the extension of 5th Amendment rights to non-citizens, courts and scholars have often wrestled on exactly this question.

For instance, in the recent immigration decision *Zadvydas v. Davis*,[166] the Supreme Court reaffirmed the tradition of applying due process to aliens present within the United States, regardless of their legal status.[167] Specifically, the Court held that the 5th Amendment is incongruent with a law that would permit the indefinite detention of a non-citizen on domestic soil. Thus, "once present in the country, aliens can claim due process protections."[168]

In further addressing this question, the court in *Verdugo-Urquidez*[169] denied a motion to suppress evidence seized by agents of the Drug Enforcement Agency while searching the home

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[165] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 222 § 1(f) (Nov. 16, 2001). Further, Timothy Lynch, *Power and Liberty in Wartime*, 2004 CATO SUP. CT. Rev. 23 (2004) has argued that: "President Bush shocked the American legal community by asserting what was essentially a 'new day of executive detentions.' But absent an invasion or rebellion on American soil, it is farfetched to suggest that any person in America can be imprisoned on the mere say-so of the president. However, it is not unreasonable or implausible to suggest that wartime circumstances can mean a change in the rules, methods, and procedures by which the government can deal with the problem of illegal aliens. American law generally denies the benefit of a transaction to one who procures the transaction with fraud. Thus, why should an individual who has entered the United States surreptitiously or through false pretenses benefit from that wrong by acquiring the full panoply of constitutional rights that are accorded to citizens and long-term permanent residents? Before a nonresident alien can acquire standing to assert constitutional protections against detention and imprisonment, the first order of business ought to be an examination of the prisoner's immigration status. 'If that status was obtained by fraud, misrepresentation or other unlawful means, then it should be deemed void *ab initio*. Such an alien should be treated under the law as if he never was lawfully admitted to the United States-- because in a very real sense he was not.'"

[166] Zadvydas v. Davis, 533 U.S. 678 (2001).

[167] Shirin Sinnar, *Patriotic or Unconstitutional: The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003).

[168] *Id.*

[169] Verdugo-Urquidez, 494 U.S. 259 (1990).

of a Mexican citizen without a warrant.[170] While the Court held that 4th Amendment rights are not to be extended to non-citizens,[171] Justice Kennedy, in his concurring opinion, stated that the defendant should be entitled to Due Process Clause protection under the 5th Amendment when his case finally went to trial.[172]

Specifically, the Court ruled that 4th Amendment protections did not extend to the home of a Mexican citizen in Mexico.[173] The Court, however, made a point to distinguish its holding from one that would have occurred had the appeal been regarding the 5th Amendment. In looking at the language of the 4th Amendment, the Court noted that the Amendment's application was only to "the people."[174] The 5th and 6th Amendments, however, apply to "persons" or "the accused," respectively.[175] The Court although not explicitly extending 5th Amendment protections to non-citizens, used dicta to indicate that such a holding is not beyond the pale.

While Cole convincingly argued that legal and illegal aliens should be entitled to the same rights and protections, it is important to note that his position is not uniformly accepted. Those with views in opposition to Cole's argue that the extension of Constitutional protections to non-citizens is only permissible when such an individual has "some substantial connection to the United States."[176] The view believes that the law of the United States holds that only aliens within the U.S. territory are "persons" and that such status is wholly unavailable to any alien outside of the American border.[177]

In examining the extension of 5th Amendment rights and protections to detainees in the interrogation setting, the applicable question here is whether this specific extension of rights to African-Americans in the Deep South is applicable to the hybrid paradigm detainees. Specifically, we must determine whether a detainee subjected to coercion is entitled to 5th

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[170] *Id.* at 274-275.
[171] *Id.* at 265.
[172] 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 (2005).
[173] Verdugo-Urquidez at 271.
[174] *Id.*
[175] *Id*. at 265-66.
[176] *See* Parrish, *supra* note 38.
[177] *Id.*

Amendment privileges against self-incrimination. In the wake of the *Bram-Brown* progeny holdings, which granted this right to African-Americans, I submit that extending the right to detainees is both constitutionally appropriate and necessary. Though the detainees are not American citizens, their interrogation takes place in American custody on soil that is as American as possible without actually being within the American borders.[178] Furthermore, the "ticking time bomb" justification is inapplicable here as, in the interrogation setting far from their base of operations, it is doubtful that the detainees presently represent a threat to those interrogating them.

As the preceding discussion illuminates, consensus the extension of constitutional protections to non-citizens has not yet been reached. However, as shown above, the Supreme Court is inclined to extend 5th Amendment safe-guards to all "persons" subject to control of the United States government. Further, unlike immigrants, the detainees did not willingly come to be under U.S. control, but rather were brought under control by the U.S. authorities.

Granted, it is arguable that by taking up arms against the U.S., the detainees were willful combatants placing themselves in this situation and therefore are not entitled to constitutional protections. However, as the detainees are "innocent until proven guilty," they are solely defined as *suspects* at the interrogation stage. Suspects, regardless of what crime they may *potentially* be found guilty of, are entitled to the 5th Amendment protections. This principle holds true for African Americans in the Deep South, for all non-citizens living in the U.S., and for detainees held by the U.S.

b) The 14th Amendment Right to Due Process

In addition to extending 5th Amendment protections to African-Americans, the *Bram-Brown* progeny stands for the proposition that the African Americans of the Deep South were to be extended the 14th Amendment guarantee of due process.[179] As noted earlier, the discussion

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[178] According to the administration which tried to claim that Guantanamo Bay was not actually American soil.

[179] Specifically, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. For discussion on the applicability of the Fourteenth Amendment Due Process rights to

of extending constitutional protections to non-citizens has involved the 14th Amendment at almost every turn.[180] Specifically, the drafters of the Constitution intended the 14th Amendment

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detainees, *see* Tamara Huckert, *The Undetermined Fate of Guantanamo Bay Detainees' Habeas Corpus Petitions*, 9 GONZ. J. INT'L L. 236 (2005-2006); Michael I. Greenberger, *Three Strikes and Your Outside the Constitution: Will the Guantanamo Bay Alien Detainees be Granted Fundamental Due Process?*, 37 APR MD. B.J. 14 (2004); and Jeffery F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L. J. 849 (2003).

[180] In Kwon v Colding, 344 U.S. 590 (1953) and Jean v Nelson, 472 U.S. 846 (1985), the court noted that "as a general rule, aliens who are physically present in the United States are accorded the full panoply of traditional due process rights, while aliens merely seeking to enter the country do not enjoy such protection and find much less process due an adjudication of their right to admission."

In Medina v O'Neill, 838 F.2d 800 (5th Cir. 1988) and Lynch v Cannatella, 810 F.2d 1363 (5th Cir 1987), the court held that even though inadmissible aliens may not challenge admission decisions, and the like, "they 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."

In Johnson v Eisentrager 339 U.S. 763 (1950), the Court, in discussing the constitutional rights of aliens, has stated in domestic matters that ""m]ere lawful presence in the country creates an implied assurance of safe conduct." The Supreme Court ultimately held that the petitioners in Eisentrager had no standing to file a claim for habeas relief in a United States court.

In In re Guantanamo Detainees Cases, 355 F.Supp.2d 443 (D.D.C. 2005), the Court upheld a decision which was based on an interpretation that Eisentrager barred claims of any alien seeking to enforce the United States Constitution in a habeas proceeding unless the alien is in custody in sovereign United States territory. Recognizing that Guantanamo Bay is not part of the sovereign territory of the United States, the District Court dismissed the cases for lack of "jurisdiction to consider the constitutional claims that are presented to the Court for resolution." After issuing a show cause order as to why an additional pending habeas case filed by a Guantanamo detainee should not be dismissed in light of the decision in Rasul, the District Court also dismissed that case, and all three cases were appealed to the United States Court of Appeals for the District of Columbia Circuit.

In Rasul v. Bush, 215 F.Supp.2d 55 (D.D.C. 2002), the Supreme Court reversed the D.C. Circuit's decision, which had upheld the District Court, and held that the District Court did have jurisdiction to hear the detainees' habeas claims. The majority noted several facts that distinguished the Guantanamo detainees from the petitioners in Eisentrager more than fifty years earlier: "[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." Emphasizing that "[b]y the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base," and highlighting that the government conceded at oral argument that "the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base," the Court concluded, "Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the *habeas* statute]."

The Supreme Court expressly acknowledged that the allegations contained in the petitions for writs of *habeas corpus* "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" as required by the *habeas* statute, and concluded by instructing that "whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims." Rasul at 68-73.

The court in *Hamdi v Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) held that the President constitutionally detained the petitioner, a United States citizen, as an enemy combatant pursuant to the war powers entrusted to him by the United States Constitution, the court 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. This annotation

to apply to non-citizens as opposed to the unclear history of the 5th Amendment. The Congressional debates surrounding the adoption of the 14th 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 of the 14th Amendment did not use the term "citizens," but rather made frequent reference to "persons," which can be interpreted to include non-citizens.[181] This is highly relevant to the focus of this article in analyzing whether the Supreme Court's holdings regarding due process, as discussed earlier, may be applied to the category of persons to be protected by the hybrid paradigm: detainees.

c) Constitutional Rights and Due Process Applied To the Hybrid Paradigm

In discussing how to apply the 5th and 14th Amendments to the hybrid paradigm, case law illuminates an analysis of both the "totality of the circumstances" test and the "voluntariness" tests.[182] The "totality of the circumstances" approach is a test where the Court examines all of the factors surrounding a confession to independently determine its validity. The "voluntariness test," then, specifically focuses on whether the defendant independently chose to confess.

The "voluntariness test," which is the most applicable test specifically targeting confessions, finds its roots in English common law and early American jurisprudence.[183] In evolving from earlier tests, the American courts began to recognize two constitutional bases for the requirement that a confession be voluntary: the 5th Amendment right against self-

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collects and discusses the cases that have considered the executive branch's designation of a person as an unlawful or enemy combatant."

See also, Cole and Dempsey, *supra* note 139.

[181] Cong. Globe, 37th Cong., 2nd Sess. 1638 (1862).

[182] *See* Magid, *supra* at note 114.

[183] *See* King v Rudd, 168 Eng. Rep. 160, 161 (1783) (stating that the English courts excluded confessions obtained by threats and promises) and King v Warickshall, 168 Eng. Rep. 234 (1783) ("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.").

incrimination and the 14th Amendment Due Process Clause.[184] The operative question in any application of the "voluntariness test" is how deferential[185] of a "voluntariness test" ought to be used for detainees interrogated in the context of "armed conflict short of war."[186]

As an example: should interrogators be allowed to apply physical force to get the detainee to talk? Does the Constitution and case law enable interrogators to threaten the detainee in the name of national security so that all sense of balance between the rights of the state and the equally legitimate rights of the individual will be skewed?[187] Is cumulative mistreatment to be applied until the detainee "breaks down" and "spills the beans"—regardless of the truth of the information?

Under an analysis of history, it is evident that common law had no constraints on permissible methods used to gain a confession. However, the United States courts grew concerned about the reliability of these confessions when physical abuse was involved. Thus, as shown in the facts of *Brown*, the Court found that facts surrounding the interrogation had led to a false confession because, despite the growing concerns over such practices, law enforcement continued to employ the "third degree."[188]

In discussing the dilemma faced by applying 5th and 14th Amendment tests, Laura Magid pointed to the use of the "totality of the circumstances" test when she noted that:

> 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,

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[184] *See* Bram, stating that the 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, and Brown, reversing a conviction under the Due Process Clause because it was based on coerced confession.

[185] Deferential as understood to provide the interrogators great latitude in their efforts to seek a confession from the suspect and consequently understood to be a minimizing of his 5th amendment right not to self-incriminate. For instance, *see* Justice O'Connor's words in Hamdi: "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."

[186] *See infra* at note 3.

[187] *See* Guiora, *supra* note 8, for a discussion regarding balancing in counter-terrorism.

[188] *See* Magid, *supra* note 114. "Due process required interrogation procedures that would yield voluntary, and therefore reliable, statements. Courts used a 'totality of the circumstances' analysis to determine whether 'the interrogation was . . . unreasonable or shocking, or if the accused clearly did not have an opportunity to make a rational or intelligent choice.'"

> 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.[189]

In the alternative, then, Magid proposes the use of a third test, the "shocks the conscience" test:

> The Court has suggested that a 'shock the conscience' standard may be useful for determining when police deception during interrogation goes too far. The Court applied the shock the conscience standard when it considered police deception not towards a suspect, but towards the attorney for the suspect who was interrogated. In 1986, in *Moran v. Burbine*, 475 U.S. 412 (1986), the Court heard a claim that the police violated due process: 1) by failing to inform the defendant that an attorney, retained by his sister, was trying to contact him; and, 2) by falsely telling the attorney that the suspect would not be questioned that day. The Court rejected the claim, finding that 'egregious . . . police deception might rise to a level of a due process violation," but that the conduct in Moran 'falls short of the kind of misbehavior that so shocks sensibilities of civilized society as to' violate due process.
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> Under a shock the conscience standard, techniques cannot be considered shocking simply because they are successful in convincing suspects to give truthful confessions. The shock the conscience standard bars only those few techniques that, even though they do not involve physical coercion clearly forbidden under the voluntariness test, and even though they do not implicate the concerns of the reliability rationale, nevertheless violate canons fundamental to the traditions and conscience of our people. Although the hypothetical involving the imposter chaplain is not the only technique that shocks the conscience by violating a fundamental value, it is one of only a small group."[190]

For this discussion, I propose that applying both the "voluntariness test" and the "shocks the conscience" test from the criminal law paradigm are the most appropriate tests to be superimposed onto the hybrid paradigm. These tests are the most appropriate because, in

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[189] *Id.* at 1173.
[190] *Id*. at 1209.

comparing them to other alternatives, they are the most articulate tests focused specifically on the tactics used in gaining information and whether those tactics broke the detainees' will. Further, the "shocks the conscience" test, in particular, is useful as it is not concerned with the eventual *use* of the information received; rather, it focuses solely on the acceptability of techniques used. This test is useful here because detainee interrogations often take divergent forms, where interrogations seek either intelligence information or information for an upcoming trial. The use of the "shocks the conscience" test permits the development of standards specifically addressing the conduct, with no concern for how the received information will be used. Thus, the use of this test eliminates the counter argument that detainee standards must be different than criminal law because the interrogations have different aims. On the other hand, standards like the "exclusionary rule" from criminal procedure would prove ineffective as it only applies to the *use* of information, thus causing it to fail in the detainee interrogations aimed solely at intelligence gathering.

However, in order to understand how this superimposition can occur, it is critical to step back into American history. Again, the proper frame of reference is not the twenty-first century,[191] but rather the treatment of African-Americans in the 1930's and 1940's, as described *infra* at Section III. Choosing the Deep South as the frame of reference, rather than staying with modern day examples from the "war on terrorism" is beneficial because one learns better from applying history to today's world rather than applying circumstances from today's world to today's world.

In light of southern sheriffs and deputies interrogating African Americans while exposing them to the brutality of mob rule, the *Bram-Brown* progeny held that such actions were violative of both the 5th and 14th Amendments. A particularly important aspect of the *Bram-Brown* progeny is the fact that the Courts did not articulate or create a new set of rules, but rather dealt with the issues through a progressive and active implementation of the 5th and 14th

[191] Despite the modern day abuses like the Abner Louima case where New York City officers shoved a broom handle into a Haitian immigrant's rectum. *See* http://archives.cnn.com/2002/LAW/02/28/police.torture.overturn/index.html (last accessed February 5, 2007).

Amendments.[192] This transformative moment in American constitutional law, initiated by the Supreme Court, led to a fundamental restructuring of the basic rights of African Americans. This is evidenced by the fact that, rather than allow officials to continue the mistreatment, the beatings, whippings, degradations and humiliations, the Supreme Court mandated the extension of the 5th and 14th Amendments.[193] Ultimately, the criminal law paradigm was held to be applicable not only to whites, but also to the "not-fully-citizen" blacks.

Today, the U.S. is at yet another transformative moment in American society which must lead to a restructuring of basic constitutional guarantees similar to the holdings of the *Bram-Brown* progeny. Again recognizing that the detainees are not American citizens, they still must be granted certain protections.[194] When the Court indicated that the continued abuse of African Americans was impermissible, the remedy was the extension of the 5th and 14th Amendments. Thus, if the 5th and 14th Amendments were deemed to be tools to protect a discriminated and oppressed group from coercive interrogations, then the same jurisprudential standard should be extrapolated for detainees.

VI: Defining Coercive Interrogation, Torture, and Analyzing Relevant Cases

The entirety of the discussion thus far has revolved around the coercive interrogation of detainees through the use of threats and cumulative mistreatment. Before going any further, it is important to determine what coercive interrogation is and the reality of its modern day use.

a) Defining Coercive Interrogation

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

[193] *Id*.

[194] I have discussed the limits of those constitutional rights in *Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists, See* Guiora, *Quirin to Hamdan*, *supra* note 7. The discussion of the *limits* of those rights has been made inevitable by the Supreme Court's decision in *Hamdan;* rather than the Bush Administration's initial theory of granting minimal rights to the detainees, the Court has forced the White House and Congress alike to engage in active debate regarding what rights must be granted the detainees. While this article does not address the limits of all rights to be granted, it does seek to delineate detainee rights in the interrogation setting.

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.[195]

Given the documented instances in which those "in the field" have applied a "liberal application test" to regulations, rules, and guidelines, proposed definitions and standards must be neither circular nor over-burdened with legalese and technicalities. Continuing to promulgate memos with vague standards serves only to create an environment whereby detainees could be subjected to treatment similar to that forever seared in the collective conscience of millions of Arabs. It is likely that Lyndi England, the Abu Ghraib guard photographed abusing detainees, did not read either Jay Bybee's or John Yoo's memos[196] elusively discussing permissible interrogation standards, and, in all probability, her immediate commanders also did not receive copies. Although Lyndi England did not specifically read the memos and then make a decision based on the arguments contained therein, these memos tainted the mood and atmosphere throughout the military whereby such abuses were able to fester.

Although responsibility, discretion, and judgment are the essence of command, the fine-lined approach proposed above by Posner and Vermeule is problematic from the perspective of interrogation room realities. It may be satisfactory to create vague and evasive standards when writing from the protected vantage point of American academia, but the practical reality is the impact such proposals will have when put into action on the ground. The political fall-out that resulted from the soldiers' misinterpretation and abuse of vague standards, is far too damaging

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[195] *See* Posner and Vermeule, *supra* note 2.

[196] *See* Joseph Margulies, *The Right to a Fair Trial in the War on Terror*, 10 GONZ. J. INT'L L. 57, 61 (2006) for a discussion of both memos.

and dangerous to continue to leave the interpretation of these loosely defined principles to those on the front lines.

The potential for improper application of guidelines is particularly poignant when one considers the fact that the aforementioned abuses were able to take place under the following two standards articulated by the U.S. Army:

Army Regulation 190-8, paragraph 2-1(d), contains a reference to allowable procedures:

> Prisoners 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.... Prisoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions.

Finally, and most definitively, 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].[197]

As these above cited standards appear clear and concise, they suffered from "slippery slope" interpretation showing that even these were not clear enough. In short, when drafting rules and procedures, not only *should* they be clear, they *must* be clear. If the standards adopted are not clear and precise, they are destined for abuse and "adaptive" interpretation. Similar to the "void for vagueness" doctrine,[198] a set of standards and procedures which are overly vague must be held void for their lack of specificity. Vague rules only serve to allow for a slippery slope.

As discussed earlier, the United States government has taken steps towards addressing the questions of coercive interrogation by the recent adoption of the Military Commissions Act

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[197] Army Field Manual 34-52, (2006).

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

of 2006.[199] However, despite this step in the direction of addressing the Court's concerns in *Hamdan*, it is wholly insufficient in remedying the lack of interrogation standards.[200] Again, the establishment of interrogation standards must be done in a clear and specific way so that the interrogators themselves know exactly what is permissible and what is off limits. Thus, the evasiveness of the Military Commissions Act leaves itself open to far too many "on the battlefield" abuses.

In creating these standards, there is a delicate balance between the government's national security interests and the equally valid interests of the individual in his personal autonomy. I propose that these two interests are effectively balanced through the clear articulation of permissible interrogation standards that permit the following five interrogation methods: a) the use of uncomfortable chairs, b) room temperature modification, c) sleep deprivation, d) loud music, and e) the use of hoods.

Further, in applying these acceptable interrogation methods, there is also a need for an active judiciary.[201] Specifically, an active judiciary is necessary to challenge an unfettered executive to guarantee that the competing interests of national security and of the individual detainee are being considered and balanced against each other.

b) Reality of Modern Day Coercive Interrogation

Much like the members of the Wickersham Commission were shocked to discover the realities of the "third degree,"[202] American policymakers were equally shocked by the reality of Abu Ghraib.[203] Thus, the fine-lined argument developed by Posner and Vermeule does not match the real-life happenings in detainee interrogations. The practical reality is that in any

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[199] 120 Stat. 2600 (Oct. 17, 2006).

[200] The Military Commission Act allows for executive interpretation of coercive interrogation standards, rather than a clearly articulation of the standards up front in the legislation.

[201] Independent judicial review guarantees both procedural and substantive oversight. Specifically, Israel has the most fully developed two track judicial approach to terrorism in that defendants may be brought either to court for a full criminal trial or detained administratively subject to independent judicial review. *See* Guiora, *Where are Terrorists to be Tried*, *supra* note 7.

[202] *See infra* at note 60.

[203] Frank Rich, *Saving Private England*, N.Y. TIMES, May 16, 2004.

setting, interrogation clearly puts the power of the State against the power of the individual. Both the Supreme Court and scholars alike have commented that the setting is a fundamental "mismatch."[204] This "mismatch" was particularly acute in the context of the fundamental violations of constitutional rights in the Deep South. The fundamental inequality present in interrogations is also clearly present in Guantanamo today as the typical detainee is powerless, thousands of miles from his home, unclear of his whereabouts, and, most likely, not an English-language speaker.

It is for that reason that Professors Posner and Vermeule's attempt to find a "middle ground" must be rejected. The quote below, reflective of their jurisprudential approach, is problematic in the real world of both Montgomery, Alabama and Guantanamo:

> All we suggest is that law should treat coercive interrogation the way it treats other grave evils. Law has a typical or baseline regulatory strategy for coping with grave evils that sometimes produce greater goods. That strategy involves a complex regulatory regime of rules-with-exceptions, involving a prohibition on official infliction of serious harms, permission to inflict such harms in tightly cabined circumstances, an immunity regime that requires officials to follow the rules in good faith but protects them if they do so, and review procedures to reduce error and enhance transparency. In this baseline regime, the circumstances in which serious harms may be inflicted are specified ex ante, rather than being remitted solely to the discretionary mercy of juries, judges, and the executive after the fact. Contrary to the academic consensus, we see no plausible reason for treating coercive interrogation differently.[205]

Such a "middle ground" approach cannot persist as coercive interrogation must be treated differently, rather than in the same way as "other grave evils," as Posner and Vermeule prefer. In an environment of such inherent unfairness, this argument of "fine-lining" is inappropriate in and of itself because of the numerous abuses shown so far in the "war on terrorism."

c) Torture

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[204] *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) and William T. Pizzi and Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813, 819 (2005).

[205] *See* Posner and Vermeule, *supra* note 2.

The topic of torture has been critiqued, discussed, and analyzed.[206] As noted earlier, this article is not intended to add to the torture, or "ticking time bomb," debate. Nevertheless, any discussion of developing interrogation standards for detainees must consider torture. At the outset, torture is unequivocally illegal, immoral, and does not lead to actionable intelligence.[207] Nevertheless, others have taken the opposite position, and, in an effort to establish the parameters of detainee interrogation, it is important to discuss such views.

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

> Any 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.[208]

> 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

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[206] *See generally* Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture,* 81 IND. L.J. 1255 (2006); 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); Jeffery C. Goldman, *Treaties and Torture: How the Supreme Court Can Restrain the Executive*, 55 DUKE L.J. 609 (2005); Jeremy Waldron, *Torture and Positive law: Jurisprudence for the White House,* 105 COLUM. L. REV. 1681 (2005); David Luban, *Liberalism, Torture, and the Ticking Time Bomb,* 91 VA. L. REV. 1425 (2005); *Next CIA Chief Must Forswear Torture Tactics,* BALTIMORE SUN, May 15, 2006; Steve Chapman, *Unconscionable Torture Tactics: Will the Next CIA Director Have the Courage to Swear Off Waterboarding?* CHICAGO TRIBUNE, May 11, 2006; Frances Williams, *Washington to Defend Record on Torture Before UN*, FINANCIAL TIMES, May 4, 2006; Oren Gross, *Art Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004), Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003); and Carol Rosenberg, *U.S.: Block Any Evidence Obtained Via Torture*, PHILADELPHIA INQUIRER, March 24, 2006.

[207] *See* Guiora and Page, *supra* note 5.

[208] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984).

> humiliates him before others or drives him to act against his own will or conscience.[209]

Further, in the widely quoted and cited Cleveland Principles, torture was succinctly defined as "any cruel, inhuman, or degrading treatment."[210]

In defense of torture, consider the arguments of Bagaric and Clarke[211] 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.[212]

Writing in response to Bagaric and Clarke, Rumney asserts that the fundamental problem is the "end product."[213] Whether it is termed "actionable intelligence,"[214] or "bad information and false confessions,"[215] the bottom line is the same: experience has shown that information received from a tortured detainee is overwhelmingly inaccurate, unreliable and of minimal value in preventing acts of terrorism.[216]

Further, torture ought to be pragmatically avoided as intelligence gained through torture may damage the investigatory process itself. In hearings concerning the confirmation of Alberto Gonzales as United States Attorney General, Douglas A. Johnson, executive director of The

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[209] *See* Nan Miller, *International Protections of the Rights of Prisoners: Is Solitary Confinement in the U.S. a Violation of International Standards,* 26 CAL. W. INT'L L.J. 139 (1995).

[210] The "Cleveland Principles" emanated from the "Torture and the War on Terror" conference held at Case Western School of Law in Cleveland, Ohio on October 7, 2005. The text of the resolution may be found at: http://www.law.case.edu/centers/cox/content.asp?content_id=85 (last accessed July 26, 2006).

[211] *See* Bagaric and Clarke, *supra* note 5.

[212] *Id*.

[213] *See* Rumney, *supra* note 5.

[214] *See* Guiora and Page, *supra* note 5.

[215] *See* Rumney, *supra* note 5, at 493.

[216] As noted from my personal experience.

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."[217] According to Johnson:

> 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.[218]

Further, commenting on the coercive interrogation techniques authorized by the Bush Administration and scandals such as Abu Ghraib, David Gottlieb[219] states that: "[o]nce these powers were placed in the hands of poorly-trained reservists, they morphed into something more sinister."[220]

Lending credence to the words of both Johnson and Gottlieb, the current allegations of improper treatment of detainees in Guantanamo Bay, Iraq, and Afghanistan strongly suggests that allowing coercive techniques[221] has led to even more serious abuses.[222] This is evidenced by the testimony of a former military interrogator in Afghanistan, Chris Mackey. Mackey recounts how the mental pressures can further contribute to a slippery slope:

> 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.

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[217] Nomination of the Honorable Alberto R. Gonzales, Counsel to President George W. Bush, to be the Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 9-10 (2005) (testimony of Douglas A. Johnson).
[218] *Id.*
[219] Professor at Kansas School of Law
[220] David J. Gottlieb, *How We Came to Torture*, 14 KAN. J.L. & PUB. POL'Y 449, 455 (2005).
[221] *See infra* at note 71 for the types of coercive techniques permitted by the Bush Administration.
[222] This inference can easily be made given the abuses at Abu Ghraib.

> Following the rules to the letter was the safe route. Even entertaining the idea of doing otherwise was inviting 'slippage.'[223]

Mackey's words speak loudly of the inherent and implicit danger of the inevitable "slippery slope." Even if moderate safeguards are instituted, as recommended by Prof. Dershowitz,[224] it is all but inevitable that an interrogator somewhere, sometime, will "misunderstand," "misinterpret," or, even worse, be classified by an American President as a "bad apple who does not represent the American military."[225] In short, unclear or evasive guidelines lend themselves too easily to misinterpretation "in the field." This becomes particularly important when noting that the most recent legislative response to this question, the Military Commissions Act of 2001,[226] stops short of clearly and specifically delineating permissible and impermissible actions. Thus, the United States is still in great need of clear and concise standards espoused by political leaders.

While many, such as Posner and Vermeule,[227] argue persuasively that an explicit ban on torture should not be extended to include coercive interrogation, the relevant question is whether their definition of "coercive interrogation" is tantamount to the above referenced definitions of "torture." In this respect, the definitions ultimately used in the new standards cannot be a matter of mere semantics as they forecast the application of both law and policy. As I have argued elsewhere, the distinction between harsh, yet permissible, methods of interrogation and torture is far too tenuous and would require extensive training and outstanding command and control mechanisms.[228] Thus, it is simply implausible to adhere to the amorphous views of those desiring to permit some forms of coercive interrogations, but not others. Such a holding is simply impractical.

It is important to briefly note the existence of a difference between the concepts of torture and coercive interrogation. In making this distinction, "the most important inquiry for

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[223] *See* Rumney, *supra* note 5, at 504-505.
[224] *See* Dershowitz, *supra* note 5.
[225] *See Mr. Rumsfeld's Defense*, N.Y. TIMES, May 8, 2004.
[226] 120 Stat. 2600 (Oct. 17, 2006).
[227] *See* Posner and Vermeule, *supra* note 2.
[228] *See* Guiora and Page, *supra* note 5.

interrogations is the applicable definition of coercion. Webster's Dictionary defines coercion as 'the threat of force used to enforce an act a person would not wish to carry out voluntarily or by persuasion. Often, it involves the use of actual force in order to make the threat credible, but it is the threat of (further) force which brings about the cooperation of the person being coerced.'"[229] This differs from torture as torture remains the actual use of force or abuse.

Thus far, the discussion has suggested that the hybrid paradigm provides a satisfactory answer, in the spirit of *Hamdan*, to establishing an appropriate rule of law for detainees. Further, it has been argued that the 5th and 14th Amendments are applicable to the interrogation setting, though not to initial detention in the "zone of combat" or fully to the trial phase of the "armed conflict short of war." Moreover, as I have argued repeatedly, torture, however it is phrased, spun or articulated, is illegal and its advocates are pushing interrogators down a very dangerous slippery slope. In the next section, we shall define and address "threats" as applied to the hybrid paradigm.

VII. Defining Threats

In order to further the determination of appropriate standards from the criminal law paradigm for the hybrid paradigm interrogations, using the Deep South experiences as a guide, threats and cumulative mistreatment now serve as the "analytical road map." While other aspects of traditional interrogation are equally applicable, threats and cumulative mistreatment enable an analysis of the proposed hybrid model, as both have long been a mainstay of criminal law interrogations and have been subject to critique and analysis for many years.[230]

In determining permissible or impermissible threats in interrogation, the Rehnquist Court provided some guidance. As Welsh White notes:

> Indeed, the limitations of the pre- Miranda voluntariness test prompted the Court to seek 'some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.' Simultaneously,

[229] Amos N. Guiora, *We're at War: We Need Information*, CLEVELAND PLAIN DEALER, September 28, 2006.
[230] *See infra* at Sect. III.

> those concerned with restraining pernicious interrogation practices sought a constitutional rule that would impose effective, general restraints on the police. Miranda represented the solution to these problems. To the extent that the Court intended Miranda to replace the due process voluntariness test, however, the Miranda Court did not contemplate the important role that the due process voluntariness test would continue to play in regulating post-waiver interrogation practices.[231]

The primary danger in permitting interrogators to threaten a detainee is the risk of eliciting an involuntary and false confession from a detainee who desires the cessation of such threats, leading him to espouse any information believed to meet the interrogator's wishes.

a**) What is a Threat?**

Threats can take many forms: threatening a suspect to cause harm to his relatives (particularly females); threatening to move him from jurisdiction to jurisdiction;[232] turning the suspect over to an angry mob (particularly when the African American suspect is accused of having killed or desired to kill a white person);[233] or threatening or intimating to the suspect that he will be physically harmed unless he confesses.[234]

The determination of whether specific language amounts to a threat will depend on the circumstances of its use. In making this determination, a court would, as discussed earlier, employ a "totality of circumstances" test. The determination of whether certain conduct constitutes a threat looks at whether, in light of the circumstances, the accused's will was overborne at the time he confessed. [235] If it is determined that an interrogator did in fact threaten the subject individual, it is of no consequence whether that threat specifically produced fear in the interrogated individual as any threat that yields apprehension of harm will suffice for the invalidation of the confession. More specifically, if the threat is of a violent nature, there is no

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[231] Welsh S. White, *Miranda After Dickerson: The Future Concession of Law*, 99 MICH. L. REV. 1211 (2001).
[232] *See infra* at Sect. III(c). for a discussion of *Brown*.
[233] *See infra* at Sect. III(c). for a discussion of *Ward.*
[234] *See infra* at Sect. III(c). for a discussion of *White.*
[235] *Threats in Interrogation; Voluntariness of Confessions,* CORPUS JURIS SECUNDUM—CRIMINAL LAW, § 908.

need to even measure the specific impact on the will of the victim, as a violent threat is *per se* invalid.[236]

An examination of relevant threat jurisprudence[237] leads to the conclusion that "threats" are neither definitively nor consistently defined. Whether the test is akin to Justice Stewart's definition regarding pornography[238] is perhaps an open question, but, for the purposes of this article, "threat," in the context of the hybrid paradigm, will be 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.* [239]

Ronald Allen,[240] writing in support of Prof. Kamisar, offers a slightly more "middle ground" approach when he suggests that interrogation and threats be analyzed as follows: "an interrogation was proper that was not obtained through physical violence or its threat, and did not overbear the will of the suspect; 'overbearing the will' in turn was best defined by tactics that might lead an innocent person to confess."[241] In attempting his own definition, Allen emphasizes the "will" of the suspect and whether threats used in the interrogation setting overcame that "will."

b) Testing the Impact of a Threat on a Confession – the "Voluntariness Test"

As noted earlier, the interrogation room represents a complete inequality where the state posses both the resources and the inherently threatening position, and, as such, the "battle"

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[236] *Id*.

[237] *See* Frazier v State, 107 So.2d 16 (1958); State v Bernard, 106 So. 656 (1925); Schneckloth v. Bustamonte, 93 S. Ct. 2041 (1973); U.S. v Robinson, 698 F.2d 448 (1983); Stephen v State, 11 Ga. 225 (1852); and Stein v People of State of New York, 73 S.Ct. 1077 (1953).

[238] Justice Stewart in Jacobellis v State of Ohio, 378 U.S. 184, 197 (1964), in which the majority commented regarding pornography that "I know it when I see it."

[239] In proposing this definition, I seek to balance between legitimate and lawful interrogation methods and unlawful measures which violate the detainee's constitutional rights. Furthermore, the definition intends to articulate clear criteria and parameters of the "limits of the permissible." The definition both draws on the enormous contributions of others and on my own professional interrogation experiences.

[240] Ronald Allen, *In Praise of Yale Kasmir,* 2 OHIO ST. J. CRIM. L. 9 (Fall, 2004).

[241] *Id.* at 17.

cannot be a fair fight. The question, though, is whether an interrogator's actions increased this inherently threatening situation to impose undue force on the individual to confess.

As Fred Inbau and John Reid make clear, the distinctions between permissible and impermissible interrogation methods are a matter of degree. "Under any test of confession admissibility….a confession was legally invalid if it had been obtained after a suspect had been led to believe that *unless* he confessed he was in danger of loss of life or bodily harm."[242] A particularly manipulative example of a threat that would nullify a confession is telling a suspect that unless he confesses the police will apprehend and accuse his wife, his mother, or some other person close to him.[243]

c) Application Regarding Threats

In applying criminal law principles to the hybrid paradigm, the focus returns to the "voluntariness" test, which, in the absence of the clear use of force or threats of force, applies to determine whether the confession was voluntary. In making this determination, the court must assess both the interrogators' practices and the suspect's individual characteristics for the purpose of determining whether the suspect's will was overcome.[244]

If the confession is determined to be involuntary, then the court must rule the statement inadmissible. Thus, the proper remedy would be similar to, if not analogous to, the exclusionary rule. Conversely, if legitimate threats led to the confession, then the statement may be useable. According to the criminal law paradigm jurisprudence, voluntariness is the critical variable in determining admissibility. Again, I propose that the adoption of the hybrid paradigm would obviate much of this confusion.[245] Adopting the hybrid paradigm would create a clear system, whereby there is less need for discretional analysis in determining voluntariness.

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[242] FRED E. INBAU AND JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 187 (1967) (emphasis added).
[243] *Id.* at 188.
[244] Welsh S. White, *Miranda After Dickerson: The Future Concession of Law,* 99 MICH. L. REV. 1211 (2001).
[245] *See* Guiora, *Quirin to Hamdan, supra* note 7.

In determining whether, after a threat has been made, the confession was voluntary, I suggest the following spectrum: at one extreme is the implied or direct threat to a family member;[246] immediately adjacent are threats discussed by the Supreme Court as reviewed in section II,[247] and at the other extreme are legitimate threats such as the mention of possible prison sentence for obstructing justice.

Inbau and Reid offer insight on delineating lawful threats:

> Advising or imploring a subject to tell the truth is never considered objectionable. Some difficulty arises 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. Some courts have gone so far as to hold that the same rejection rule applies even when the suspect is merely told 'it would be better to tell the truth.[248]

One might interject a concern that this application of these restrictive criminal law principles to detainee interrogations will "handicap" the interrogator in his protection of national security. However, this would be no truer than for the police detective. If society has determined that police can effectively investigate murders and rapes under a set of standards that do not allow for harsh interrogation methods, then interrogators of detainees should be able to conduct their interrogations in a similar fashion.

As Kreimer recently argued:

> In reconciling order and liberty, American traditions have denounced the use of torture and its cognates not because such measures are irrational,

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[246] In 1988, when serving as a Prosecutor in the West Bank Military Court, I received the following phone call on a Friday night from an attorney representing a Palestinian suspected of having committing an act of terrorism: "Have you guys (the reference was to the IDF/General Security Services) gone crazy…my client tells me you threatened to arrest his sister and mother with the implied threat that their modesty will be violated." I promised to intervene in the matter, spoke with relevant security officials, was assured no such threat had been made and accordingly updated the attorney who seemed reassured by my response. As I heard nor received any additional complaint regarding the matter, I viewed the matter as closed. I bring this to the reader's attention in order to highlight the extraordinary sensitivity in Islam to such threats, the requirement to assure that interrogators do not "cross the line" and the need to establish clear guidelines.

[247] *See infra* at Sect. III for discussions of the threats made against African-Americans in the Deep South.

[248] *See* Inbau and Reid, *supra* note 242 at 190.

> but because they corrode the core of our liberty and of our national identity. Even the Bush administration is unwilling to claim publicly that 'cruel, inhuman or degrading treatment' is consistent with American values. It maintains that its policy is to treat prisoners 'humanely,' while, with the fine hypocrisy that marks the homage of vice to virtue, it defines 'torture lite' as humane.[249]

While Kreimer's comments are addressing torture, the comments are applicable to the proposals of this article. In short, no theories which allow for "wiggle room" should be accepted. The acceptance of such a standard, like Kreimer's "torture lite,"[250] creates a system which permits the government to abuse a detainee.

The limits of interrogation, however defined and in whatever paradigm, are the core issue in seeking information. The Supreme Court's articulation of the limits of interrogation was valid in the context of the abuses suffered by African Americans in harsh, cruel and violent settings. Those same principles are also relevant to the interrogation setting of this current armed conflict, as the threats that interrogators have made to detainees since 9/11 are disturbingly similar in nature to those made 70 years ago in a different context.[251] The fear, disconnect, and vulnerability felt by suspects in the Deep South is existentially and psychologically similar to that felt by the detainees.[252]

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[249] *See* Kreimer, *supra* note 75.

[250] *Id*.

[251] *See* Table of Interrogation Techniques Recommended/Approved by U.S. Officials, Human Rights Watch, for a discussion of specific threatening actions permitted in the interrogation of detainees, *available at* http://hrw.org/backgrounder/usa/0819interrogation.htm (last accessed February 5, 2007).

[252] I have, over the course of my 19 year career, met with Palestinian detainees in various stages of the process: from those just arrested, to remand hearings that I conducted, to trials that I both appeared in as a prosecutor to those I conducted as a judge. In addition, I have met with detainees in the context of visits conducted by various human rights organizations to prisons. I feel qualified to state the following: the system which is ultimately comprised of individuals serving in a wide range of security related positions attempts to balance the legitimate needs of the detainees with pressing, sometimes urgent matters of state security. Most of the detainees understand the "rules of the game" and are well aware of the process, particularly those who have been arrested, if not tried, in the past. Nevertheless, a certain percentage of the detainees are clearly under pressure and in "stress mode." When threatened, they are more susceptible to providing sometimes critically needed information to their interrogators. Are the interrogations conducted in such as a way as to accommodate the prisoner's "comfort zone?" The answer is obviously no. That being said, I am of the belief that most of the individuals involved in the process understand what I refer to as "the limits of the interrogation" and are conscious of the illegality of unlawful threats. It should be added that in various capacities during my IDF service I was involved in the training of various units involved in the process. There was a clear understanding that "limits" had to be taught and re-taught. Nevertheless, there is no doubt that excess occurred and continues to occur. That is perhaps a tragic inevitably of the conflict. The theory espoused

The application of these criminal law principles regarding threats to the hybrid paradigm explicitly rejects the views espoused in the Bybee memos.[253] This rejection is the essence of the theory proposed here. Mild threats, such as those implicit in any interrogation setting itself or those that merely notify the defendant of the possible consequences awaiting him, are easily considered within the constitutionally permissible aspects of the criminal law paradigm. But, that only satisfies stage one of the threat analysis. After determining that a threat was on its face permissible, the next test is whether the resulting confession was voluntary.[254] If held to be involuntary in response to a threat, then the confession is inadmissible. Supreme Court precedent has unequivocally instructed law enforcement officials regarding the "limits of power" with respect to threats. In extrapolating from the criminal law paradigm, I suggest that the same test applies to the hybrid paradigm.

VIII. 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." Therefore, to begin it must be established what such a term means in the criminal law paradigm.[255]

"Cumulative mistreatment" should be defined as occurring when law enforcement officials either hold a detainee for an extended period of time, subject him to seemingly endless interrogations, or where a suspect is deprived of basic needs for a significant period of time.[256]

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in this article is that ultimately our sense of morality must be the true guide in assisting us determine the "limits of power" and unlawful threats are just that, unlawful.

[253] *See infra* at note 4.

[254] *See infra* at Sect. V(c) for a discussion of voluntariness.

[255] Much like with the definition of threats above, the following definition represents my effort to synthesize the efforts of others, scholars, courts, policy makers and interrogators alike. In addition, it reflects my professional experience.

[256] One pointed example of cumulative mistreatment, solitary confinement, raises issues of the Eighth Amendment. How, then, do these standards apply to the discussion of the Eighth Amendment's prohibition of cruel and inhuman punishment? Although such discussion is typically confined only to the post-conviction world, a setting basically inapplicable to this paper's discussion of interrogation, there is connection to be made to the times where acts/punishments made *prior* to conviction raise the Eighth Amendment.

The primary example of the application of the Eighth Amendment to the pre-conviction setting is through solitary confinement. The typical focus on such analysis is the psychological effect that solitary confinement has on the

Thus, a more refined definition of "cumulative mistreatment" for this discussion will be any "prolonged interrogation incorporating illegal methods resulting in an involuntary confession." In short, cumulative mistreatment should be found through a case by case analysis where the court looks to determine whether the continuousness and cumulativeness was the specific factor which broke down a detainee's will.

a) Voluntariness is Again the Standard

In determining the limits of interrogations, the need to ensure a voluntary confession is once again the standard where cumulative mistreatment will result in the inadmissibility of the confession for concern of involuntariness.[257]

In order to offer one example beyond the Deep South that satisfies the above definition, the facts in *McNabb v US* [258] are illustrative. In *McNabb,* the defendants were questioned while in custody before appearing in front of a magistrate, in violation of the law at the time. Rather,

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detainee. It can be used, just as cumulative mistreatment, as a way to break a detainee's will, leading to a confession which may in fact be coerced and false. The Court in In Re Medley, 134 U.S. 161 (1890), through dicta, discussed the particularly horrific conditions historically attributed to solitary confinement: "The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. . . . But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident some changes must be made in the system . . . ."

The Court's decision, then, in Estelle v. Gamble, 429 U.S. 97 (1976), was the first Supreme Court case to apply the Eighth Amendment cruel and unusual punishment clause to deprivations not specifically part of a prisoner's sentence. In Estelle, the plaintiff claimed that he received inadequate medical treatment from prison personnel after sustaining an injury." "Failure to do so may actually produce physical 'torture or a lingering death,' which the Eighth Amendment originally prohibited." The Court stated that "[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation."

Lastly, in Rhodes v Chapman, 452 U.S. 337 (1981), the Court added a "totality of the circumstances" test regarding conditions in solitary confinement. The Court announced that "[c]onditions . . . alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities." The Rhodes Court, however, noted that the Constitution does not mandate comfortable prisons, and therefore, provided great deference to the legislature and prison officials in allowing them to determine and implement effective measures of prison reform."

Although many discussion of solitary confinement and the Eighth Amendment center on a post-conviction analysis, the standards there set are directly applicable to the discussion of this article. If solitary confinement is held to be psychologically damaging to the inmate, then it can be extrapolated that an interrogator who moves a detainee into solitary confinement is inflicting the same psychological impact on the *pre-conviction* individual.

[257] Such as the actions in Ashcraft which lead to the reversal of a conviction.

[258] McNabb v. U.S., 318 U.S. 332 (1943).

the arresting officers were required to take the defendants before the nearest judicial officer for an initial hearing. The officers, however, subjected the defendants to pressure under a system incompatible with the law for an extended period of time. Despite the fact that such actions may have been acceptable, or at least excusable, if only carried out over a short time, the lengthy amount of time casts a shadow of doubt in this case. Specifically:

> Throughout the questioning, most of which was done by Taylor, 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 would be used against them, and that they need not answer any questions asked unless they desired to do so.[259]

b) *McNabb* as Applied to Detainees

Much like the Court finding the treatment of the defendants in *McNabb* unconstitutional, similar treatment in the detainee interrogation context is also unconstitutional. Thus, I once again propose the use of the "voluntariness test," as articulated by the Court[260] and as analyzed and commented on by scholars,[261] as appropriate to the hybrid paradigm regarding cumulative mistreatment. The Supreme Court's ruling in *McNabb* is on-point for the detainees as it serves as an example of what to do with tainted evidence:

> Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in 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

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[259] *Id.* at 336.

[260] "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." *Id.* at 348.

[261] *See* Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions,* 40 VAL. U. L. REV. 601 (2006); Kimberly Burke, *Circumstances of a Voluntary Confession,* 25 J. JUV. L. 84 (2005); and Rutledge, *supra* note 32.

> tends to undermine the integrity of the criminal proceeding. Congress has explicitly commanded that 'It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial.[262]

Justice Reed's dissent is reflective of an approach that history has shown to be highly problematic:

> I find myself unable to agree with the opinion of the Court in this case. An officer of the United States was killed while in the performance of his duties. From the circumstances detailed in the Court's opinion, there was obvious reason to suspect that the petitioners here were implicated in firing the fatal shot from the dark. The arrests followed. As the guilty parties were known only to the McNabbs who took part in the assault at the burying ground, it was natural and proper that the officers would question them as to their actions.[263]

The adoption of Justice Reed's dissent would allow for "exceptions," "special circumstances" and "exigency." As made clear by both the Court in *Hamdan* and the Administration's later decision to recognize that the detainees are entitled to Geneva Convention protections,[264] "exceptions" developed in the immediate aftermath of an event are ultimately nullified. Justice Reed's dissent would have contributed to law enforcement allowing itself judicially sanctioned excess *in response* to a particular event. Clearly delineated rules allow no opportunity for such excess, whether in the criminal law paradigm or the hybrid paradigm.

A further example similar to *McNabb* is *Upshaw v US*.[265] In *Upshaw*, the Court ruled a suspect's confession inadmissible after law enforcement officials again failed to comply with criminal procedure rules by not bringing the suspect before a magistrate within the requisite time:

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[262] McNabb at 342.
[263] *Id.* at 347.
[264] As noted in the recent memorandum written to Department of Defense officials by Deputy Secretary of Defense England: "you will ensure that all DoD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3."
[265] Upshaw v. U.S., 335 U.S. 410 (1948).

> Where 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.[266]

The petitioner in *Upshaw* was convicted of larceny based on a confession which he argued was coerced.[267] His confession was made at the end of a 30-hour period where the petitioner was held in prison without any charges or a warrant.[268]

The Court has further discussed this in *Anderson v US*:[269]

> While the petitioners, with at least thirteen others, were thus held in custody at the Y.M.C.A. by the state officers, they were questioned by the federal agents intermittently over a period of six days during which they saw neither friends, relatives, nor counsel. Incriminating statements from six of the petitioners were the fruit of this interrogation.
>
> The question for decision is whether these confessions-repudiated when those who made them took the witness stand at the trial-were properly admitted in evidence against all the petitioners, including Anderson and Ellis who did not confess. In the McNabb case we have held, that incriminating statements obtained under the circumstances set forth in that opinion cannot be made the basis of convictions in the federal courts. The considerations which led to that decision also govern this case. The detention of the petitioners by state officers was, as the Government concedes, in violation of the Tennessee statute which provides that 'No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate.'[270]

As both *Upshaw* and *McNabb* indicate, an examination of whether a detainee's interrogation is tantamount to cumulative mistreatment is viewed under a broad totality standard for whether such treatment overcame their will.[271] Now that we have a definition and Court

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[266] *Id.* at 411.
[267] *Id.* at 410.
[268] *Id.*
[269] Anderson v. U.S., 318 U.S. 350 (1943).
[270] *Id*. at 355.
[271] While human rights groups and others responded to the quoted and cited statements and documents as indicative of the Administration's sanctioning of torture, the cumulative effect of the methods authorized is, in

explanation for cumulative mistreatment, the question becomes whether the actions inside interrogation rooms in the "war on terror" violate this standard.

As discussions earlier in this article indicated, there are many aspects of current detainee interrogation that violate the established rules of both threats and cumulative mistreatment. As Amnesty International has indicated, the "[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." The report goes on to assert that interrogation teams employ such tactics by having access to the medical files of the detainees, which give away many weaknesses of individual detainees. Then the interrogator's power is asserted through lengthy, and cumulative, use of sleep deprivation, stress positions, isolation, hooding, sensory deprivation, and the use of dogs to induce fear.[272]

c) Cumulative Mistreatment: Just as Violative of Rights as are Threats

Before reaching the concluding recommendations of this discussion, it is worth noting that, on its surface, cumulative mistreatment may not come across to be as damaging as the more easily defined and understood physical threats. The Supreme Court, though, has held that cumulative mistreatment is as violative of a defendant's constitutional rights as threats.[273] The holding of a defendant for a number of days prior to bringing him before a judge,[274] the repeated transfer of an African-American suspect from county to county without sleep,[275] the holding of a suspect in a hotel for a number of days for the purposes of intermittent interrogation,[276] the

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essence, cumulative mistreatment. The specific acts, in and of themselves as analyzed in Sect. VI(b), fall under the definition of torture as defined by international law which the Administration now concedes is applicable. What is of interest in this section is the sum total of a particular interrogation; not only a specific waterboarding imposed on a detainee but whether that detainee's entire interrogation (as compared to a single act) was reflective of coercive interrogation based on cumulative mistreatment resulting in an admissible confession. The analysis in this section, accordingly, is of the interrogation in the "overall" rather of a particular act during the course of an interrogation.

[272] *Guantanamo: An Icon of Lawlessness*, Amnesty International, January 6, 2005. *Available at* http://web.amnesty.org/library/Index/ENGAMR510022005 (last accessed February 7, 2007).

[273] *See infra* at Sect. VII.

[274] McNabb at 334.

[275] Ward at 548-549.

[276] Zing Sung Wan v US, 266 U.S. 1 (1924).

continued whipping of the African American suspect in the woods,[277] and the beatings imposed on a suspect over the course of a number of days[278] are all illustrative of cumulative mistreatment as defined in this article.

These cases are the criminal law version of what Amnesty International and other human rights groups have argued is the reality of Guantanamo Bay, Abu Ghraib and Bagram. The hybrid paradigm cannot tolerate cumulative mistreatment, just as it cannot tolerate threats.

The 5th and 14th amendments, as analyzed by the Supreme Court in the series of cases examined earlier, "speak" loudly. The right to not incriminate oneself and the right to due process in the criminal law paradigm have been affirmed and re-affirmed by the Supreme Court. Threats, as the Court has made clear, violate both of those seminal amendments in the context of the interrogation room. As I have argued, that principle must be extended beyond Montgomery, Alabama to the detainee interrogation room.

IX. Recommendations

In understanding the discussion thus far, it must be noted that this analysis is not intended to be a defense for the detainee.[279] Rather, the fundamental concerns are two-fold: 1) protecting the interrogator from his own government and 2) ensuring that constitutional guarantees are honored. Specifically, unrestrained coercive interrogation and torture comport with neither civil

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[277] White at 532.
[278] Brown at 280.
[279] Over the course of a 19 year career in the Israel Defense Forces, Judge Advocate General Corps I prosecuted , sat in judgment of, recommended the imposition of a wide range of administrative sanction against and was consulted on extraordinarily difficult and complex issues pertaining to Palestinians accused of having committed acts of terrorism against Israelis and Palestinians alike. I add this only to ensure the reader that the basis for a concern regarding the detainee is not a result of "softness" nor misplaced innocence. Not in the least nor could I be accused of that. Rather, the philosophical underpinnings of this concern are based precisely on my highly relevant professional experiences in the West Bank, the Gaza Strip and elsewhere and my well developed understanding of how the best intentioned, most highly trained "best of the best" can, under stress, commit egregious errors. I write these words out of the deepest respect for those who have committed their professional career, personal risk, to protect society. I have developed enormous respect for these individuals; many whom society would never recognize for their identities must remain confidential. Therefore, I am so profoundly concerned, both personally and professionally, when policy recommendations are jurisprudentially based and not reflective of "life on the ground" as I (and others) have seen it.

society nor the international community. Thus, the requisite next step for the United States government is the establishment of clearly delineated rules for coercive interrogation. It must be acknowledged that the establishment of strict standards may in fact lead to a more difficult eradication of terrorism. If such standards do cause the executive to be unable to act with unfettered discretion, it follows that the recommendations contained herein may lead to the death of more innocent people. However, the interests of operating within civil society require that the United States engage in the requisite balance between the interests of national security and the equally valid interests of an individual in personal autonomy rather than erring wholly on the side of governmental interests with no consideration of the costs.

The government has many different places to look for lessons on how to respond to the need to establish standards and guidelines for interrogations. Although the present discussion has focused on the domestic rules and lessons, there are international standards that also provide important considerations.[280] From the domestic standpoint, though, the government can learn from the criminal law paradigm because of the extensive procedures already established for interrogations, as well as the historical treatment of African-Americans in the Deep South.

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[280] The best starting point for understanding the international law framework, under which all acts in the interrogation setting must fall is the 1984 Torture Convention. As its name indicates, this Convention prohibits the signatory parties from using any torturous acts against a detainee. This standard, though, should come as no surprise, and does not directly impact the discussion of this article, which has already articulated the assumption that torture is improper. Prior to the 1984 Convention, though, broader language already existed in international law. Pursuant to the Universal Declaration of Human Rights, "no one shall be subjected to torture *or cruel, inhuman, or degrading treatment or punishment*."

The lack of understanding of what would meet the standard of torture, or inhuman, treatment was cured through the definition provided in the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment: "The term 'torture' means any 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." G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984), reprinted in S. Treaty Doc. No. 100-20 (1988).

Further, the European community has dealt with questions of line-drawing in coercive interrogation through Article 3 of the European Convention for the Protection of Human Rights, which indicates that "no person shall be subjected to torture or to inhuman or degrading treatment of punishment." The European Human Rights Court was created to enforce this standard, and first did so in the case of Ireland v UK, 25 Eur. Ct. H.R. 96 (1976). In this case, the Irish government complained about British interrogation techniques which included hooding, noise, standing against a wall, and sleep deprivation. The Court held that the techniques used constituted inhuman and degrading treatment, but did not give rise to "torture." The Court expounded on this holding, by explaining that torture is merely inhuman and degrading conduct carried out to the extreme. Thus, the Court appears to indicate that the line, or standard, is short of "torture," as the lesser versions, inhuman and degrading, are themselves impermissible.

This hybrid model comprised of melding aspects from both the criminal law and POW paradigms and applying it to the current detainees, based on a historical analogy, provides a unique opportunity to formulate concrete policy recommendations—rooted in the law—to decision makers.

The recommendations outlined below are premised on a number of assumptions 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 and not to be adopted;

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

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

Recommendation 5: the *Bram-Brown* progeny, as developed in this article, articulates clear guidelines with respect to the limits of interrogation where neither coercive interrogation nor cumulative mistreatment can be permitted to exist;

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

Recommendation 7: coercive interrogation parameters must be *clearly* established to specifically articulate what methods are acceptable, and the 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; and

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

As has been suggested throughout this article, clear and unequivocal guidelines and standards must be provided to interrogators. To do otherwise is a disservice to the interrogators and may result in unconstitutional interrogations. Recommending that amorphous instructions be adopted is as unviable as authorizing torture. The Deep South story with respect to constitutional protections for minorities is an unhappy one and the treatment of African-Americans in the interrogation setting is a prime example.

From the *Bram-Brown* progeny we must apply the following with respect to the detainees: the 5th and 14th amendments are to be fully extended to the detainees; coercive interrogation in the hybrid paradigm will not exceed the limits of interrogations in the criminal law paradigm *though* detainees need not be Mirandized in the "zone of combat" and need not be guaranteed the same rights at trial; clearly written instructions must be provided to the interrogators for American interrogation history is replete with excess; and threats and cumulative mistreatment most effectively illustrate the limits of interrogation.

In order to avoid the mistakes of the past, we need to learn from the relevant lessons that history provides. The interrogation cells of the Deep South are applicable to the interrogation cells of Guantanamo Bay. An analysis of the *Bram-Brown* progeny provides the most effective lesson that history can provide for the armed conflict in which America presently finds herself.