evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth." Nevertheless, Justice Frankfurter said in another case, "[n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved."[325] Three years later, in *Malloy v. Hogan*,[326] in the process of applying the Self-Incrimination Clause to the states, Justice Brennan for the Court reinterpreted the line of cases since *Brown v. Mississippi*[327] to conclude that the Court had initially based its rulings on the common-law confession rationale, but that, beginning with *Lisenba v. California*,[328] a "federal standard" had been developed. The Court had engaged in a "shift [that] reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." Today, continued Justice Brennan, "the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897," when *Bram v. United States* had announced that the Self-Incrimination Clause furnished the basis for admitting or excluding evidence in federal courts.[329]

One week after the decision in *Malloy v. Hogan*, the Court defined the rules of admissibility of confessions in different terms: although it continued to emphasize voluntariness, it did so in self-incrimination terms rather than in due process terms. In *Escobedo v. Illinois*,[330] it held inadmissible a confession obtained from a suspect in custody who repeatedly had requested and been refused an opportunity to consult with his retained counsel, who was at the

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[325] Culombe v. Connecticut, 367 U.S. 568, 601 (1961). The same thought informs the options of the Court in Haynes v. Washington, 373 U.S. 503 (1963).

[326] 378 U.S. 1 (1964).

[327] 297 U.S. 278 (1936).

[328] 314 U.S. 219 (1941).

[329] Malloy v. Hogan, 378 U.S. 1, 6–7 (1964). Protesting that this was "*post facto* reasoning at best," Justice Harlan contended that the "majority is simply wrong" in asserting that any of the state confession cases represented anything like a self-incrimination basis for the conclusions advanced. Id. at 17–19. Bram v. United States, 168 U.S. 532 (1897), is discussed under "Confessions: Police Interrogation, Due Process, and Self-Incrimination," *supra*.

[330] 378 U.S. 478 (1964). Joining Justice Goldberg in the majority were Chief Justice Warren and Justices Black, Douglas, and Brennan. Justices Clark, Harlan, Stewart, and White dissented. Id. at 492, 493, 495.