CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

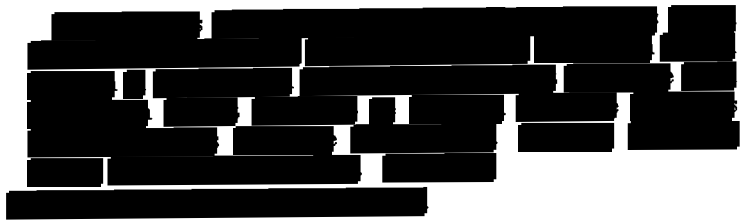
AT

OCTOBER TERM, 1963.

MALLOY *v.* HOGAN, SHERIFF.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 110. Argued March 5, 1964.—Decided June 15, 1964.



Harold Strauch argued the cause and filed a brief for petitioner.

John D. LaBelle, State's Attorney for Connecticut, argued the cause for respondent. With him on the brief were *George D. Stoughton* and *Harry W. Hultgren, Jr.,* Assistant State's Attorneys.

Melvin L. Wulf filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for the State of California; and by *Frank S. Hogan, Edward S. Silver, H. Richard Uviller, Michael R. Juviler, Aaron E. Koota* and *Irving P. Seidman* for the National District Attorneys' Association.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In this case we are asked to reconsider prior decisions holding that the privilege against self-incrimination is not safeguarded against state action by the Fourteenth Amendment. *Twining* v. *New Jersey,* 211 U. S. 78; *Adamson* v. *California,* 332 U. S. 46.[1]

[1] In both cases the question was whether comment upon the failure of an accused to take the stand in his own defense in a state prosecution violated the privilege. It was assumed, but not decided, in both cases that such comment in a federal prosecution for a federal offense would infringe the provision of the Fifth Amendment that "no per-

The petitioner was arrested during a gambling raid in 1959 by Hartford, Connecticut, police. He pleaded guilty to the crime of pool selling, a misdemeanor, and was sentenced to one year in jail and fined $500. The sentence was ordered to be suspended after 90 days, at which time he was to be placed on probation for two years. About 16 months after his guilty plea, petitioner was ordered to testify before a referee appointed by the Superior Court of Hartford County to conduct an inquiry into alleged gambling and other criminal activities in the county. The petitioner was asked a number of questions related to events surrounding his arrest and conviction. He refused to answer any question "on the grounds it may tend to incriminate me." The Superior Court adjudged him in contempt, and committed him to prison until he was willing to answer the questions. Petitioner's application for a writ of habeas corpus was denied by the Superior Court, and the Connecticut Supreme Court of Errors affirmed. 150 Conn. 220, 187 A. 2d 744. The latter court held that the Fifth Amendment's privilege against self-incrimination was not available to a witness in a state proceeding, that the Fourteenth Amendment extended no privilege to him, and that the petitioner had not properly invoked the privilege available under the Connecticut Constitution. We granted certiorari. 373 U. S. 948. We reverse. We hold that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination, and that under the applicable federal standard, the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked.

---

son . . . shall be compelled in any criminal case to be a witness against himself." For other statements by the Court that the Fourteenth Amendment does not apply the federal privilege in state proceedings, see *Cohen* v. *Hurley*, 366 U. S. 117, 127–129; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105.

736-666 O-65—3

The extent to which the Fourteenth Amendment prevents state invasion of rights enumerated in the first eight Amendments has been considered in numerous cases in this Court since the Amendment's adoption in 1868. Although many Justices have deemed the Amendment to incorporate all eight of the Amendments,[2] the view which has thus far prevailed dates from the decision in 1897 in *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use.[3] It was on the authority of that decision that the Court said in 1908 in *Twining* v. *New Jersey, supra,* that "it is possible that some of the personal rights safeguarded by the first eight Amendments

[2] Ten Justices have supported this view. See *Gideon* v. *Wainwright,* 372 U. S. 335, 346 (opinion of MR. JUSTICE DOUGLAS). The Court expressed itself as unpersuaded to this view in *In re Kemmler,* 136 U. S. 436, 448–449; *McElvaine* v. *Brush,* 142 U. S. 155, 158–159; *Maxwell* v. *Dow,* 176 U. S. 581, 597–598; *Twining* v. *New Jersey, supra,* p. 96. See *Spies* v. *Illinois,* 123 U. S. 131. Decisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment are: *United States* v. *Cruikshank,* 92 U. S. 542, 551; *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 543 (First Amendment); *Presser* v. *Illinois,* 116 U. S. 252, 265 (Second Amendment); *Weeks* v. *United States,* 232 U. S. 383, 398 (Fourth Amendment); *Hurtado* v. *California,* 110 U. S. 516, 538 (Fifth Amendment requirement of grand jury indictments); *Palko* v. *Connecticut,* 302 U. S. 319, 328 (Fifth Amendment double jeopardy); *Maxwell* v. *Dow, supra,* at 595 (Sixth Amendment jury trial); *Walker* v. *Sauvinet,* 92 U. S. 90, 92 (Seventh Amendment jury trial); *In re Kemmler, supra; McElvaine* v. *Brush, supra; O'Neil* v. *Vermont,* 144 U. S. 323, 332 (Eighth Amendment prohibition against cruel and unusual punishment).

[3] In *Barron* v. *Baltimore,* 7 Pet. 243, decided before the adoption of the Fourteenth Amendment, Chief Justice Marshall, speaking for the Court, held that this right was not secured against state action by the Fifth Amendment's provision: "Nor shall private property be taken for public use, without just compensation."

against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." 211 U. S., at 99.

The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme. Thus, although the Court as late as 1922 said that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . . ," *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 543, three years later *Gitlow* v. *New York,* 268 U. S. 652, initiated a series of decisions which today hold immune from state invasion every First Amendment protection for the cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.[4]

Similarly, *Palko* v. *Connecticut,* 302 U. S. 319, decided in 1937, suggested that the rights secured by the Fourth Amendment were not protected against state action, citing, 302 U. S., at 324, the statement of the Court in 1914 in *Weeks* v. *United States,* 232 U. S. 383, 398, that "the Fourth Amendment is not directed to individual misconduct of [state] officials." In 1961, however, the

[4] *E. g., Gitlow* v. *New York,* 268 U. S. 652, 666 (speech and press); *Lovell* v. *City of Griffin,* 303 U. S. 444, 450 (speech and press); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (speech and press); *Staub* v. *City of Baxley,* 355 U. S. 313, 321 (speech); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (press); *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (religion); *De Jonge* v. *Oregon,* 299 U. S. 353, 364 (assembly); *Shelton* v. *Tucker,* 364 U. S. 479, 486 (association); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 296 (association); *NAACP* v. *Button,* 371 U. S. 415 (association and speech); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U. S. 1 (association).

Court held that in the light of later decisions,[5] it was taken as settled that ". . . the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth . . . ." *Mapp* v. *Ohio,* 367 U. S. 643, 655. Again, although the Court held in 1942 that in a state prosecution for a noncapital offense, "appointment of counsel is not a fundamental right," *Betts* v. *Brady,* 316 U. S. 455, 471; cf. *Powell* v. *Alabama,* 287 U. S. 45, only last Term this decision was re-examined and it was held that provision of counsel in all criminal cases was "a fundamental right, essential to a fair trial," and thus was made obligatory on the States by the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U. S. 335, 343–344.[6]

We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Decisions of the Court since *Twining* and *Adamson* have departed from the contrary view expressed in those cases. We discuss first the decisions which forbid the use of coerced confessions in state criminal prosecutions.

Brown v. *Mississippi,* 297 U. S. 278, was the first case in which the Court held that the Due Process Clause prohibited the States from using the accused's coerced confessions against him. The Court in *Brown* felt impelled, in light of *Twining,* to say that its conclusion did not involve the privilege against self-incrimination. "Compulsion by torture to extort a confession is a different matter." 297 U. S., at 285. But this distinction was soon

---

[5] See *Wolf* v. *Colorado,* 338 U. S. 25, 27–28; *Elkins* v. *United States,* 364 U. S. 206, 213.

[6] See also *Robinson* v. *California,* 370 U. S. 660, 666, which, despite *In re Kemmler, supra; McElvaine* v. *Brush, supra; O'Neil* v. *Vermont, supra,* made applicable to the States the Eighth Amendment's ban on cruel and unusual punishments.

abandoned, and today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram* v. *United States,* 168 U. S. 532, the Court held that "[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " *Id.,* at 542. Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." *Id.,* at 542–543; see also *Hardy* v. *United States,* 186 U. S. 224, 229; *Wan* v. *United States,* 266 U. S. 1, 14; *Smith* v. *United States,* 348 U. S. 147, 150. In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. *Haynes* v. *Washington,* 373 U. S. 503.

The marked shift to the federal standard in state cases began with *Lisenba* v. *California,* 314 U. S. 219, where the Court spoke of the accused's "free choice to admit, to deny, or to refuse to answer." *Id.,* at 241. See *Ashcraft* v. *Tennessee,* 322 U. S. 143; *Malinski* v. *New York,* 324 U. S. 401; *Spano* v. *New York,* 360 U. S. 315; *Lynumn* v. *Illinois,* 372 U. S. 528; *Haynes* v. *Washington,* 373 U. S. 503. The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. *Rogers* v. *Richmond,* 365 U. S. 534,

541. Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment prohibits the States from inducing a person to confess through "sympathy falsely aroused," *Spano* v. *New York, supra,* at 323, or other like inducement far short of "compulsion by torture," *Haynes* v. *Washington, supra,* it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining,* for such silence.

This conclusion is fortified by our recent decision in *Mapp* v. *Ohio,* 367 U. S. 643, overruling *Wolf* v. *Colorado,* 338 U. S. 25, which had held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure," 338 U. S., at 33. *Mapp* held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States. We relied upon the great case of *Boyd* v. *United States,* 116 U. S. 616, decided in 1886, which, considering the Fourth and Fifth Amendments as running "almost into each other," *id.,* at 630, held that "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within

the condemnation of [those Amendments] . . . ." At 630. We said in *Mapp:*

> "We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle,' *Bram* v. *United States,* 168 U. S. 532, 543–544 . . . . The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." 367 U. S., at 656–657.

In thus returning to the *Boyd* view that the privilege is one of the "principles of a free government," 116 U. S., at 632,[7] *Mapp* necessarily repudiated the *Twining* concept of the privilege as a mere rule of evidence "best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient." 211 U. S., at 113.

The respondent Sheriff concedes in his brief that under our decisions, particularly those involving coerced

---

[7] *Boyd* had said of the privilege, ". . . any compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." 116 U. S., at 631–632.

Dean Griswold has said: "I believe the Fifth Amendment is, and has been through this period of crisis, an expression of the moral striving of the community. It has been a reflection of our common conscience, a symbol of the America which stirs our hearts." The Fifth Amendment Today 73 (1955).

confessions, "the accusatorial system has become a fundamental part of the fabric of our society and, hence, is enforceable against the States." [8] The State urges, however, that the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. We have held that the guarantees of the First Amendment, *Gitlow* v. *New York, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, the prohibition of unreasonable searches and seizures of the Fourth Amendment, *Ker* v. *California,* 374 U. S. 23, and the right to counsel guaranteed by the Sixth Amendment, *Gideon* v. *Wainwright, supra,* are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a "watered-down, subjective version of the indi-

[8] The brief states further:

"Underlying the decisions excluding coerced confessions is the implicit assumption that an accused is privileged against incriminating himself, either in the jail house, the grand jury room, or on the witness stand in a public trial. . . .

". . . It is fundamentally inconsistent to suggest, as the Court's opinions now suggest, that the State is entirely free to compel an accused to incriminate himself before a grand jury, or at the trial, but cannot do so in the police station. Frank recognition of the fact that the Due Process Clause prohibits the States from enforcing their laws by compelling the accused to confess, regardless of where such compulsion occurs, would not only clarify the principles involved in confession cases, but would assist the States significantly in their efforts to comply with the limitations placed upon them by the Fourteenth Amendment."

vidual guarantees of the Bill of Rights," *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 275 (dissenting opinion). If *Cohen* v. *Hurley,* 366 U. S. 117, and *Adamson* v. *California, supra,* suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the *Twining* view of the privilege has been eroded. What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities. *Murphy* v. *Waterfront Comm'n, post,* p. 52. It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.

We turn to the petitioner's claim that the State of Connecticut denied him the protection of his federal privilege. It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries. *Counselman* v. *Hitchcock,* 142 U. S. 547; *McCarthy* v. *Arndstein,* 266 U. S. 34; *Hoffman* v. *United States,* 341 U. S. 479. We recently elaborated the content of the federal standard in *Hoffman:*

> "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is

> asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U. S., at 486–487.

We also said that, in applying that test, the judge must be

> " '*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." 341 U. S., at 488.

The State of Connecticut argues that the Connecticut courts properly applied the federal standards to the facts of this case. We disagree.

The investigation in the course of which petitioner was questioned began when the Superior Court in Hartford County appointed the Honorable Ernest A. Inglis, formerly Chief Justice of Connecticut, to conduct an inquiry into whether there was reasonable cause to believe that crimes, including gambling, were being committed in Hartford County. Petitioner appeared on January 16 and 25, 1961, and in both instances he was asked substantially the same questions about the circumstances surrounding his arrest and conviction for pool selling in late 1959. The questions which petitioner refused to answer may be summarized as follows: (1) for whom did he work on September 11, 1959; (2) who selected and paid his counsel in connection with his arrest on that date and subsequent conviction; (3) who selected and paid his bondsman; (4) who paid his fine; (5) what was the name of the tenant of the apartment in which he was arrested; and (6) did he know John Bergoti. The Connecticut Supreme Court of Errors ruled that the answers to these questions could not tend to incriminate him because the defenses of double jeopardy and the running of the one-year statute of limitations on misdemeanors would defeat any prosecution growing out of his answers to the first

five questions. As for the sixth question, the court held that petitioner's failure to explain how a revelation of his relationship with Bergoti would incriminate him vitiated his claim to the protection of the privilege afforded by state law.

The conclusions of the Court of Errors, tested by the federal standard, fail to take sufficient account of the setting in which the questions were asked. The interrogation was part of a wide-ranging inquiry into crime, including gambling, in Hartford. It was admitted on behalf of the State at oral argument—and indeed it is obvious from the questions themselves—that the State desired to elicit from the petitioner the identity of the person who ran the pool-selling operation in connection with which he had been arrested in 1959. It was apparent that petitioner might apprehend that if this person were still engaged in unlawful activity, disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted.[9]

Analysis of the sixth question, concerning whether petitioner knew John Bergoti, yields a similar conclusion. In the context of the inquiry, it should have been apparent to the referee that Bergoti was suspected by the State to be involved in some way in the subject matter of the investigation. An affirmative answer to the question

[9] See *Greenberg* v. *United States,* 343 U. S. 918, reversing *per curiam,* 192 F. 2d 201; *Singleton* v. *United States,* 343 U. S. 944, reversing *per curiam,* 193 F. 2d 464. In *United States* v. *Coffey,* 198 F. 2d 438 (C. A. 3d Cir.), cited with approval in *Emspak* v. *United States,* 349 U. S. 190, the Court of Appeals for the Third Circuit stated:

"in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry." 198 F. 2d, at 440–441.

might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to his relationship with a possible criminal. See *Rogers* v. *United States,* 340 U. S. 367. We conclude, therefore, that as to each of the questions, it was "evident from the implications of the question, in the setting in which it [was] asked, that a responsive answer to the question or an explanation of why it [could not] be answered might be dangerous because injurious disclosure could result," *Hoffman* v. *United States,* 341 U. S., at 486–487; see *Singleton* v. *United States,* 343 U. S. 944.

Reversed.

While MR. JUSTICE DOUGLAS joins the opinion of the Court, he also adheres to his concurrence in *Gideon* v. *Wainwright,* 372 U. S. 335, 345.

[redacted]