

Loving Big Brother: Comments on Seidman, Police Interrogation, and the Fifth Amendment

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Are we, as Professor Seidman concludes, “bound to remain irresolute” in our understanding of the constitutional guarantee against self-incrimination because we are caught between two irreconcilable psychologies about self-determination? I don’t think so.

If these two psychologies—“autonomous” versus “situated and inter-subjective” accounts of preference formation, as Seidman puts it—are equally plausible, though mutually inconsistent, then we are inextricably caught. If one account is more accurate but not widely understood as such, then we are trapped in irresolution only if we fail to overcome ignorance. Seidman does not clearly indicate his choice between these two explanations for our current confusion. My choice is for the latter explanation—that the account of “autonomous” choice made by socially isolated actors is false. This account is, however, deeply rooted in conventional theorizing. Though erroneous, it persists for the same reasons that the “flat earth” theory seemed so attractive for so long: because it appears continuously confirmed by daily experience of apparently indisputable physical facts (my body and my mind are physically separated from others’, just as the earth seems flat when I walk on it) and because alternative explanations have apparently fearful consequences (if my choices are not “mine” then I must be the slave of others who are making my choices for me; if the world is round then I must surely fall off).

Seidman’s failure to consign the conventional account of autonomous choice to the discredited company of the “flat earth” theory has two unfortunate consequences: He misses opportunities to clarify the constitutional jurisprudence about self-incrimination; and he falls into errors in his own factual assertions about individual psychological functioning, errors that compound the confusions he means to dispel in his jurisprudence.

Seidman begins his analysis by distinguishing between “the truth of statements concerning internal hopes, desires, and beliefs and the truth of

statements concerning external facts about the world."¹ He correctly states that this distinction makes sense only in the context of a "radically individualistic" psychology, which is "controversial."² Seidman seems, however, to embrace this psychology, or at least to treat it as no less plausible than its competitor, when he discusses the truth status of coerced expressions of remorse. He invokes three examples: public confessions displayed in Stalin's "show trials," popular demand for an "apology" from President Reagan for the Iran-Contra imbroglio, and the common practice of demanding that a convicted criminal express contrition as a condition for sentencing leniency. In each instance, Seidman flatly states, there is no plausible claim of sincerity, and therefore of truth, in the coercively extracted expression of remorse.³

Seidman's conclusion does follow logically from the "radically individualistic" account of choicemaking. True remorse, from this perspective, can come only when a person acts as a socially isolated integer—not because others demand that he "feel" repentant and certainly not because he repents in order to avert others' punishment. Seidman does not acknowledge, however, that this consequence of the individualist account impeaches its psychological accuracy. The individualist account of the preconditions for "true remorse" is inconsistent with the ordinary social practice of apology.

Consider this commonplace example. I make some statement. You respond, "That statement hurts me. Unless you apologize, I will no longer have the same feelings of [esteem] [friendship] [love] for you that I had until this moment." In this scenario, any apology from me is clearly linked to a threatened adverse consequence. Does this "coercion" necessarily impeach the truth value of any apology that I might offer? I am, of course, "free" to withhold my repentance in the face of your threat; but Stalin's prisoner is equally free to resist and suffer his torture. Are Stalin's coercions clearly different in kind from the torments of the fabled

1. Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 Yale J.L. & Humanities 149, 151 (1990).

2. *Id.*

3.

Stalin's objective was . . . to force the defendants to acknowledge their own guilt and the justice of their own executions. Of course, this objective could never be achieved. Stalin could coerce the outward signs of agreement and submission, but no amount of force could achieve actual consent.

Id. at 167.

It is quite mysterious why [the American public] should want such an apology [from President Reagan], or, indeed, how a statement extracted under the threat of political reprisal can tell us anything about whether the President was actually "sorry." Yet the public desire for such a statement—meaningless as it inevitably would have been—was palpable.

Id. at 168.

[C]riminal defense attorneys know that expressions of remorse can lead to a more lenient sentence and therefore regularly urge their clients to make such statements. Of course, this kind of implicit bargaining cannot produce actual remorse. . . .

Id. at 168-69 (footnote omitted).

"prisoners of love"—from any of us, that is, who would be wounded to the core of our self-esteem if our lover, our friend, our respected colleague turned a cold face toward us?⁴

The individualist account Seidman appears to endorse would require that both Stalin and my lover assure me that, while each would prefer that I recant past offenses, the high regard which I previously enjoyed from each would not be diminished in any degree by my refusal. The individualist account would even insist that unless Stalin or my lover freely and sincerely offered this assurance, without any fear of retaliatory resentment from me, then no truthful exchange about our future feelings toward one another could occur. All this follows from the individualist account; and all this shows why that account is fantastically remote from the experienced psychology of everyday life. This brief discussion of the interactive and mutually "coercive" conventions governing apologies demonstrates the workings of the interdependent network of social practice through which each of us continuously defines and redefines our sense of individual identity. This is the common sense of the psychological theory regarding the social construction of self.⁵ Properly understood, this theory confounds the conventional disjunction between "freedom" and "slavery"; but though we are all mutually and equally enslaved by one another—and

4. Compare Hannah Arendt's depiction of the psychological force driving Stalin's victims toward their confessions:

The disturbing factor in the success of totalitarianism is . . . the true selflessness of its adherents: it may be understandable that a Nazi or Bolshevik will not be shaken in his conviction by crimes against people who do not belong to the movement or are even hostile to it; but the amazing fact is that neither is he likely to waver when the monster begins to devour its own children and not even if he becomes a victim of persecution himself, if he is framed and condemned, if he is purged from the party and sent to a forced-labor or a concentration camp. On the contrary, to the wonder of the whole civilized world, he may even be willing to help in his own prosecution and frame his own death sentence if only his status as a member of the movement is not touched. It would be naive to consider this stubbornness of conviction . . . a simple expression of fervent idealism. Idealism . . . always springs from some individual decision and conviction and is subject to experience and argument. . . . [T]he fanaticized members [of totalitarian movements] can be reached by neither experience nor argument; identification with the movement and total conformism seem to have destroyed the very capacity for experience, even if it be as extreme as torture or the fear of death.

H. Arendt, *The Origins of Totalitarianism* 307-08 (1973 ed.).

5. Intuitive grasp of the application of this theory to romantic love and its relevance to police interrogation practices is suggestively conveyed in the old standard, first popularized by Al Jolson:

You made me love you,
I didn't want to do it
I didn't want to do it,
You made me want you,
And all the time you knew it
I guess you always knew it,
. . . .

You made me sigh for
I didn't want to tell you,
I didn't want to tell you
I want some love that's true,
Yes I do, Deed I do, You know I do.

J. McCarthy & J. Monaco, *You Made Me Love You (I Didn't Want To Do It)* (1913).

thus also equally free—it is possible, and even likely, for some to disguise this equality through brutal oppressions of others.⁶

Though Seidman acknowledges the psychological acuity of the interactive theory, he is unwilling to endorse it because, he claims, it plunges us into a swamp of normative indeterminacy. This objection emerges most clearly in his treatment of *Miranda*.⁷ Seidman says,

If preferences are not autonomous and temporally prior to interaction, then there is no preexisting state of affairs that requires protection [against self-incrimination]. There is simply a choice between different sorts of interactions that will produce different preferences. An intersubjective approach thus fails to explain why we ought not mandate—or at least permit—the type of interaction [between criminal suspect and police] that will produce a preference for socially useful self-incrimination.⁸

This critique rests on a misunderstanding of the interactive account of the construction of self-identity. There is a “preexisting state of affairs” in this account that is “temporally prior to [the] interaction” between suspect and police—the previous, extensive, and rich sets of social interactions between the suspect and his family, friends, community, and all of their forebears. Seidman’s truncated version of the interactive account treats individuals as inherently separated from their past networks of interactions. He seems to view the interactive account through the socially isolating, myopic lens of the theory of radical individualism, and he thus misses the crucial factual premises of the interactive account.

To identify the “preexisting state of affairs” that the suspect carries with him may not necessarily demonstrate that these past affiliations “require” or deserve protection in the interrogation room. The underlying factual premises of the interactive account do, however, frame the normative question with greater clarity and precision than the competing premises of the individualist account. The interactive account clearly indicates that the basic normative question at stake in police interrogation practice is our social valuation of a citizen’s past affiliations against the government’s capacity to separate the citizen from his past and thereby redefine his civic identity in—and as—an exclusive, unmediated relationship between individual and state authority. The choice, thus portrayed, is between pluralist and authoritarian conceptions of social organization.

Seidman appears to claim that the individualist account not only frames the question but dictates a normative preference for protecting the individual (with his preformed “private” preferences) against the incursions of

6. For elaboration of these observations, see R. Burt, *Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations* 92-123 (1979).

7. *Miranda v. Arizona*, 384 U.S. 436 (1965).

8. Seidman, *supra* note 1, at 174-75.

state or "extrinsic social" authority. The individualist account provides this apparent resolving power, however, only by its insistent social myopia—by seeing nothing more in the police interrogation room than an individual and the state. It is at least plausible (and even preferable for understanding the real issues at stake in interrogation practice) to add another individual, another "private" actor, to this confrontation—that is, the crime victim. With the victim constructively present in the interrogation room, the true conflict now appears: not between the state and the criminal suspect, but between the suspect and the victim, each of whom (according to the individualist account) has his or her own separate, socially pre-formed but diametrically inconsistent preference regarding the prospect of the suspect's confession and conviction. Insofar as a normative consequence is supposed to follow from the individualist account, the state is obliged to protect each of these private, autonomous preferences; but since the preferences are directly contradictory, the individualist account provides no basis for choosing between them. Some state action is of course required to advance the victim's interest in the interrogation room whereas inaction will protect the suspect, but the individualist account in itself provides no reason to prefer state passivity. This account thus poses but does not answer the question about the proper reach of state power, about the relationship between state and pluralist sources of civic authority.

The interactive account better frames this normative question because of its superior psychological accuracy. The acknowledged experts in police interrogation have implicitly testified to the superior accuracy of this account. The manuals used by police for their training in interrogation techniques specify that the interrogator must establish a strong relationship with the suspect. According to a widely used 1962 manual, the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation."⁹ Another popular textbook amplifies this proposition, specifying that interrogation should "take place in the investigator's office or at least in a room of his own choice" and not "within the walls of [the suspect's] home . . . [where] his family and friends are nearby, their presence lending moral support."¹⁰ These instructions make clear that it is not enough simply to remove the suspect from his familiar surroundings. One might imagine the police isolating the suspect in a room with nothing but pencil and paper, and a sign on the wall, "confess or else." This emphatically is not the kind of "privacy" enjoined by the manuals: the central tenet is that the

9. F. Inbau & J. Reid, *Criminal Interrogation and Confessions* 1 (1962), *quoted in* *Miranda v. Arizona*, 384 U.S. 436, 449 (1965) (emphasis in original).

10. C. O'Hara, *Fundamentals of Criminal Investigation* 99 (1956), *quoted in* *Miranda v. Arizona*, 384 U.S. 436, 449-50 (1965).

interrogator is "alone *with* the person under interrogation."¹¹ This social isolation is designed to produce a relationship between police and suspect where "by the sheer weight of his personality . . . [the investigator can] dominate his subject and overwhelm him with [an] inexorable will to obtain the truth."¹²

What is the source of this domination? Viewed through the lens of the individualist psychological account, the manual reference to the "weight of [the interrogator's] personality" would appear to be a deceptive euphemism for the weight of the interrogator's club, which he uses to provoke fear of physical assault. If we use the lens of the interactive approach, the prospect of physical assault assumes much less importance. By this account, we can take the threat of the "weight of . . . personality" at face value.

The Supreme Court's endorsement in *Miranda* of uncounseled waiver of the right to counsel necessarily depended on a view of the psychology of the police-suspect interaction. I agree with Seidman that the uncounseled waiver makes psychological sense only within the context of the individualist account—specifically through the rationalist imagery (if not caricature) conventionally drawn from that account, that an individual provided with information (such as a criminal suspect who is warned of potential adverse consequences by police) can readily choose a rationally self-interested course of action as long as he is given an opportunity to make an initially "free and uncoerced" decision.¹³ If this individualist account were not available to the Court, if the only formulation for understanding the psychology of the police-suspect encounter were the interactive account, then the Court would have been forced to acknowledge that there is no initial moment of disengaged "free and uncoerced" decision-making in the encounter, that a complex relationship involving some degree of domination arises from the first instant of the police-suspect encounter.

This would follow from the interactive account not because of some unique quality in the police-suspect encounter but because human beings, by this account, are continuously and inextricably engaged in relationships

11. F. Inbau & J. Reid, *supra* note 9, at 1 (emphasis added).

12. C. O'Hara, *supra* note 10, at 112.

13.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

Miranda v. Arizona, 384 U.S. 436, 467-69 (1966).

(even when they are ruminating alone) and because the police (like others who occupy authoritative social positions such as parents, teachers, doctors, or lawyers) always convey some echo of dominance intertwined in some degree with alluring promises of nurturance. By this account, the intricate blend of dominance and nurturance in all of these relationships stacks the deck toward "willing" (though often "resentful") submission by suspects, children, students, patients, or clients.

This is the basis for the vulnerability to suggestion, the apparent eagerness to please, that provides the most plausible explanation for the documentation that Seidman cites regarding the undiminished willingness of criminal suspects, acting contrary to any rationally detached conception of self-interest, to waive counsel and to make inculpatory statements to police in the post-*Miranda* era.¹⁴ The socially isolated premises of the individualist account obscure this vulnerability and its ubiquitous role in human interactions.

Indeed, it is only a slight misstatement to say that the psychological coercion available to the police in their encounters with suspects is the force that underlies the ordinary practice of apologies: the threat that, if you don't apologize, I won't love you any more. The police interrogation manuals demand privacy between interrogator and suspect in order to precipitate the feelings of dependency and the consequent "atmosphere of domination"¹⁵ that gives powerful salience to this threat of withdrawn affection. The team approach commended by the manuals—the "Mutt and Jeff" act," alternating interrogation by ostensibly friendly and unfriendly officers¹⁶—directly relies on this psychology by promising affection and threatening its withdrawal. This is not police reliance on beatings; it is more insidious and more effective than that. George Orwell had it right in *1984*: it is possible to love, truly to love, Big Brother.

The interactive account of human psychology tells us this, and it also offers a distinctive way of thinking about the role of attorneys in this social relationship. By the individualist account, the attorney's essential function is to bolster the client's capacity to resist state authority through providing information by which the client can decide what rights to claim and what to cede, what to give Caesar and what to withhold. By the interactive account, the attorney is not so much an intermediary or barrier

14. Seidman, *supra* note 1, at 165-66 nn. 69-71.

15. C. O'Hara, *supra* note 10, at 112.

16.

"In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. . . ."

Miranda v. Arizona, 384 U.S. 436, 452 (quoting C. O'Hara, *supra* note 10, at 104; F. Inbau & J. Reid, *supra* note 9, at 58-59).

between Individual and State but more a source of authority, allegiance, and love available to the individual as an alternative to the exclusive relationship demanded by the state. From this perspective, the right against self-incrimination expresses a pluralist conception of social relations by prohibiting state imposition of an exclusive relationship with individuals. In the context of police interrogation, the attorney stands as the guarantor of pluralism, as the proxy for others in the society—spouse, friends, parents—who are prepared to stand by the suspect notwithstanding the demands of state authority that he confess “or else. . . .”

If we view police interrogation through the individualist account, it is at least plausible to conclude that the information necessary to apprise the suspect of his rights can be conveyed adequately (even if not as effectively) by state officials without the presence of an attorney for the suspect. Viewed through the interactive perspective, there is no way that a state official and an attorney can be considered interchangeable; each serves contradictory psychological and normative functions.

The majority Justices in *Miranda* may not themselves have believed in the psychological accuracy of the individualist account; they may have endorsed the uncounseled waiver of counsel as a political move to mollify the anti-crime lobby. Even so, the widespread currency and apparent acceptability of the individualist account in our society, like the “flat earth” convictions of the unsophisticated in 1492, made it possible for Chief Justice Warren to write this portion of the majority opinion without obvious embarrassment. I am, however, more inclined to believe that the Justices embraced the individualist account with at least the same enthusiasm that Professor Seidman displayed in his essay: that “although profoundly problematic,” it is “attractive enough to [be considered] both plausible and interesting.”¹⁷ I further suspect that the Justices were misled by the apparent attractions of this account in the same way that Seidman missed the pervasive role of threatened loss of love in the social practice of apologies. If the Justices, that is, had understood the importance and effectiveness of this threat in all social interactions, and its consequent relevance to police interrogation, they could not have pretended to themselves or others that an uncounseled waiver was at all responsive to the problem of psychological coercion that they properly identified at the heart of the issue.

I thus disagree with Seidman: the individualist psychological account is not “attractive”; it is malign. It is neither “plausible” nor “interesting”; it is false. In this matter, as in others, we must see the truth to set ourselves free.

17. Seidman, *supra* note 1, at 158 n.41.