

The Constitutional Grey in Black Mirror's *White Christmas*

Science fiction has always fascinated me. As a genre, it allows authors to dream up future technologies and explore how they may impact our lives by asking “What if?”. While science fiction may provide optimistic answers—Star Trek being the prime example¹—the field is dominated by cynical dystopias.² This is, of course, purely a coincidence. We all know technology can only be used for good.³

Black Mirror, a Channel 4 and Netflix production, tells science fiction stories with a focus on near-future technology. Despite episodes spanning the emotional spectrum, the majority still answer the what-if question cynically. What if social media was used for societal standing?⁴ What if we could track our children at all times?⁵ What if... robotic bees?⁶ Interestingly, there is one technology that *Black Mirror* returns to on several occasions: The idea of the digital simulacrum (a.k.a. A digital clone).⁷

What if we could take a 1:1 scan of your brain and turn you into an AI? It would have all of your memories and feelings as well as your exact personality. In fact, unless you told it, it wouldn't know it wasn't you. *Black Mirror* explores such technology through creations like: the perfect dating app⁸, digital immortality⁹, or eliciting psychologically tortured confessions.¹⁰ The last one of these is the focus of *White Christmas*, my favorite *Black Mirror* episode, which has always left me with one question: How was any of this constitutional?

White Christmas decides to give advanced technology to the police (something we all know only goes well¹¹) and asks how they might use such technology, and Jon Hamm, to solve a homicide. As they are unable to get a confession from their prime suspect, the police take a digital scan of the suspect's brain to create an AI representation of their memories. The police

¹ I'd also recommend *Project Hail Mary* by Andy Weir, a story about life's ability to persevere despite the odds.

² Chief among these would be the always relevant *A Brave New World* by Aldous Huxley, 1984 by George Orwell, or the prescient *Neuromancer* by William Gibson. I was introduced to the genre by *Epic* by Conor Kostick, which I will always recommend.

³ For some of the exciting possibilities of technology See: Amnesty International, *Myanmar: Facebooks Systems Promoted Violence Against Rohingya Meta Owes Reparations*, Amnesty International (September 29, 2022) <https://www.amnesty.org/en/latest/news/2022/09/myanmar-facebook-systems-promoted-violence-against-rohingya-meta-owes-reparations-new-report/>; Tom Simonite, *Algorithms Were Supposed to Fix the Bail System. They Haven't*, *Wired* (February 19, 2020) <https://www.wired.com/story/algorithms-supposed-fix-bail-system-they-havent/>; or Kross E, Verduyn P, Demiralp E, Park J, Lee DS, Lin N, et al., *Facebook Use Predicts Declines in Subjective Well-Being in Young Adults*. PLoS ONE <https://doi.org/10.1371/journal.pone.0069841>

⁴ Charlie Brooker, *Nosedive*, *Black Mirror* (October 21, 2016).

⁵ Charlie Brooker, *Arkangel*, *Black Mirror* (December 29, 2017).

⁶ Charlie Brooker, *Hated in the Nation*, *Black Mirror* (October 21, 2016).

⁷ See Charlie Brooker, *Be Right Back*, *Black Mirror* (February 11, 2013); Charlie Brooker, *White Christmas*, *Black Mirror* (December 16, 2014); Charlie Brooker, *San Junipero*, *Black Mirror* (October 21, 2016); William Bridges and Charlie Brooker, *USS Calister*, *Black Mirror* (December 29, 2017); Charlie Brooker, *Hang the DJ*, *Black Mirror* (December 29, 2017); Charlie Brooker, *Black Museum*, *Black Mirror* (December 29, 2017).

⁸ Charlie Brooker, *Hang the DJ*, *Black Mirror* (December 29, 2017).

⁹ Charlie Brooker, *San Junipero*, *Black Mirror* (October 21, 2016).

¹⁰ Charlie Brooker, *White Christmas*, *Black Mirror* (December 16, 2014).

¹¹ See Lindsey Norward, *The Day Philadelphia Bombed Its Own People*, *Vox* (August 15, 2019) <https://www.vox.com/the-highlight/2019/8/8/20747198/philadelphia-bombing-1985-move>

then simulate said AI spending four years alone in an isolated cabin. The AI is in a simulated world, so these four years it experiences can occur in mere seconds for the real-world police. After these four years pass, the police send Jon Hamm into the AI's world using a digital avatar. Hamm seeks to bond with the AI and gain its trust, telling it the terrible things Hamm has done in his life. Hamm uses these stories to heavily imply to the AI that they are being punished and the cabin is Hell. Hamm's story convinces the AI to tell his own (or rather that of his real-world counterpart) and the AI eventually emotionally breaks, confessing to the murder. Hamm thanks the AI and returns to the real world where the police inform the human version: "You can keep that silent act up all you like, you've already talked."¹² The police then ghoulishly set the AI to simulate 1000 years every minute, leaving it trapped in Hell for simulated millennia.

While four constitutional violations jump out to me in the episode— a Fourth Amendment seizure of the suspect's AI, either a Fifth Amendment self-incrimination or a Sixth Amendment Confrontation Clause issue, and an Eighth Amendment cruel punishment— this blog post will focus on the latter three. The episode doesn't spend a lot of time discussing how the police got the AI in the first place.¹³ Despite their behavior providing little hope they followed proper procedure, we don't have enough facts to make a ruling. Instead, our focus will be on the Fifth, Sixth, and Eighth Amendments.

The Constitution's Fifth Amendment says an individual "shall [not] be compelled in any criminal case to be a witness against himself."¹⁴ Many know this as the right a criminal defendant has to not take the stand—otherwise known as "taking the Fifth." The doctrine has extended to police interrogations, most famously in *Miranda v. Arizona*.¹⁵ The Court has also found that the Fifth Amendment protects a defendant's "private papers" that are testimonial in nature.¹⁶

These Fifth Amendment doctrines give our *White Christmas* defendant two possible claims. First, the AI represents the defendant's mind and memories; therefore, it should be considered an extension of "himself." As such, the confession was in violation of *Miranda*. Second, if the Court decides the AI is not the defendant then it should be considered the defendant's testimonial private papers.¹⁷

While I find both of these arguments compelling, I doubt the current Court would. It's no secret that the Court has a consistent trend of shrinking defendants' rights.¹⁸ In fact, just last year the Court took a shot at *Miranda* itself.¹⁹ The Court may compare the defendant's first argument, and the AI itself, to current police programs and algorithms that are deemed

¹² Charlie Brooker, *White Christmas*, Black Mirror (December 16, 2014).

¹³ *Id.* ("That cookie we took from you told us all we need to know.").

¹⁴ U.S. Const. Amend. V.

¹⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁶ *Fisher v. United States*, 425 U.S. 391 (1976).

¹⁷ The Court deciding the AI is not the defendant's self also opens up the *Crawford* question discussed later.

¹⁸ Zeke Webster, *The Disappearing Rights of Criminal Defendants in America*, Balls and Strikes (December 6, 2021) <https://ballsandstrikes.org/legal-culture/disappearing-criminal-defendants-rights/>.

¹⁹ *Vega v. Tekoh*, 142 S. Ct. 2095 (2022)(Redefining *Miranda* as a prophylactic and a violation of *Miranda* is not *per se* a violation of the Fifth Amendment).

“predictive policing.”²⁰ Therefore, the Court would be required to draw the line between acceptable programs and programs that are constitutionally protected.²¹ This would require a level of nuance the Court appears allergic to.²²

So what about the AI being the defendant’s testimonial private papers? *Fisher v. United States* prevents the production of a person’s private papers if they are testimonial in nature.²³ If the documents are not testimonial, then the defendant cannot be said to have been forced to be a witness against himself.²⁴ In this case, while the documents were used to generate a testimonial output, they themselves were not necessarily testimonial. Is it testimonial because the AI contained the memory of the crime even if, without interrogation, it never would have provided such testimony? As *Fisher* notes blood samples, voice exemplars, and handwriting samples have all been considered allowed and non-testimonial.²⁵ The “testimony” from these comes from their analysis, not themselves. Applying such reasoning to this case, it seems easy for the Court to hold the AI itself was not a testimonial document and does not violate the Fifth Amendment.

If the Court declines to apply the Fifth Amendment to this AI, our defendant may still be protected by the Sixth Amendment’s Confrontation Clause.²⁶ If the Court decides that the AI is not an extension of the defendant, it would be a third-party declarant which the defendant has a right to confront. This raises several interesting questions. First, if the technology allows it, can an AI be considered a competent witness at trial? If not, could the Court define Jon Hamm as the declarant instead of the AI? The second of these options seems much more likely, a trial court may be reticent to grant an AI pseudo-personhood and the right to testify at trial. It seems much more reasonable for Jon Hamm to be declared an expert witness and the AI a method of examining data/information. This falls in line with current practices of examining experts on their conclusions and the methods they used to get them.²⁷

Jon Hamm being named the declarant should also be a relief for the defendant. *Crawford* prevents the admission of testimonial hearsay against a criminal defendant who cannot confront the declarant at trial. Cases following *Crawford*, specifically *Williams v. Illinois*, have narrowed the definition of what statement can be considered a “testimonial.”²⁸ These definitions of testimonial generally require it to have “the primary purpose of accusing a targeted individual of

²⁰ Tim Lau, *Predictive Policing Explained*, Brennan Center (April 1, 2020) <https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained>.

²¹ I certainly find many issues with predictive policing programs and do not believe police should be using them. Unfortunately, I don’t have the space here to also analyze such a *Minority Report* future. For more about predictive policing and it’s terrifying pitfalls See Brennan Center, *supra* note 20.

²² Compare *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022)(Breyer, J. dissenting)(Stating the Court should consider the compelling reasons the government may need to regulate guns to prevent gun violence and balance those reasons with the Constitutional Right to Bear Arms..) to *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022)(Alito, J. concurring)(Taking Breyer’s dissent to task for considering gun violence statistics.)

²³ *Fisher v. United States*, 425 U.S. 391 (1976).

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.S. Const. Amend. VI.

²⁷ See generally *Williams v. Illinois*, 567 U.S. 50 (2012) (Discussing procedures for DNA analysis of blood.

²⁸ *Williams v. Illinois*, 567 U.S. 50 (2012).

engaging in criminal conduct.²⁹” In *Williams*, a statement was deemed not testimonial, and therefore admissible, when it was not prepared with the intention of being used in a criminal trial.³⁰

In *White Christmas*, the AI did not know that the confession it was making would be used in a criminal prosecution. In fact, due to the defendant’s real world silence, it seems unlikely the AI would have provided the statement for such a purpose. Counter-intuitively, this means if the AI is the declarant, the statement is not-testimonial and can be more readily admitted. If Jon Hamm is the declarant, however, it would be considered testimonial. Hamm’s character fully intended for the confession to be used in a criminal prosecution and was working under the direct supervision of the police and prosecutor. Therefore, if Hamm is the declarant, he must be available to testify at trial. If he is not, the statement cannot be admitted.³¹

The final constitutional question of *White Christmas* concerns the Eighth Amendment’s application to AI. The Eighth Amendment has generally been interpreted one of two ways, both rooted in the original Founders’ intent. One way, perhaps explained best by Thurgood Marshall in *Furman v. Georgia*, states the words “cruel and unusual” are inherently broad.³² Therefore, by their inclusion the amendment was intended to evolve with society’s understandings of punishment.³³ Alternatively, one can interpret the Eighth Amendment to only bar punishments that were considered cruel or unusual by the founders. This is most famously outlined by Antonin Scalia.³⁴

If one were to use this first method of interpretation, it’s possible to find that it applies to AI as well. The AI in *White Christmas* is personified, it believes itself to be the real human essence of the defendant. Certainly, one would find it cruel to trap another person in a cabin alone, in what they believe to be Hell, for millennia while only minutes pass in the real world.³⁵ That said, this interpretation method relies on the perceptions and belief of society writ large. The rights to avoid punishment for those distanced from the mainstream are most tenuous. Would society understand the punishment exacted on a computer program, whose personification can only be seen with special technology?

The second interpretation method almost certainly precludes the AI being protected from such punishment. The Founders could certainly never imagine the possibilities of AI and it seems unlikely if described to them, they would grant them constitutional rights. At best, the founders may have considered AI to be a form of property.

White Christmas provides a chilling possible future for criminal defendants in a world where police have access to technology like digital clones. Current constitutional protections

²⁹ *Id.* at 82 (2012).

³⁰ *Id.*

³¹ *White Christmas*’s ending provides some compelling reasons to believe Hamm might miss that court date. Perhaps our defendant has been saved after all.

³² *Furman v. Georgia*, 408 U.S. 238 (1972) (Marshall, J. concurring).

³³ *Id.*

³⁴ Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 856, 857 (1989).

³⁵ *Solitary Confinement is Cruel and Ineffective*, Scientific American (August 1, 2013) <https://www.scientificamerican.com/article/solitary-confinement-cruel-ineffective-unusual/>.

don't map cleanly onto this technology and its uncertain our rights will be protected if such technology makes it before the current Court. As technology continues to push us into the future, we should remember to consider if we need to change our perceptions on historical rights. Until then, I'll be escaping into a different speculative world.³⁶

³⁶ Right now that's *Axiom's Edge* by Lindsay Ellis.