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## The Justice of the Heart in *Little Brother*

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### ABSTRACT

*This contribution examines how the short sci-fi movie Little Brother challenges traditional jurisprudential debates and the nature and meaning/s of law and justice. The focus rests on a critique of the application of legal rules in a mechanistic fashion and explores the possibilities of developing a jurisprudence 'of the heart', which recognises human beings as embodied selves in search of understanding and a more compassionate conception and practice of justice. Little Brother provides ample material for social and legal critique as the story focuses on the dire consequences of a mechanistic application of law without reflexivity, and the damage and pain that can be caused when the law is enforced without imagination, as may be illustrated in the South African Constitutional Court case of Masiya v Director of Public Prosecutions, (2007) CCT 54/06. In analysing this particular movie, the (literally) mechanistic qualities of the judgment against the accused, Frendon Ibrahim Blythe, is juxtaposed against an approach that recognises the value of narrativity, particularity and singularity. This focus facilitates a (re)consideration of the fundamental elements of the judicial system and offers a suggestive scrutiny of the system itself.*

### KEYWORDS

Legal Positivism - Science Fiction - Justice - Imagination - Judicial Activism

### INTRODUCTION: THE TIME IS THE FUTURE

Who can afford this life?  
Why are our bodies  
Untrusted by our laws?  
Are we afraid forever?  
(Cronin in Thornton, 2002. p. 270)

The premise explored in this contribution is that law/film literatures are able to offer possibilities for critical reflection and engagement with the law and can facilitate the mapping of (im)possible alternatives to traditional thought (Moran et al, 2004). Science fiction in particular can take one *beyond* the orthodox and into hyper-reality – a distorted or exaggerated reflection of life, but nonetheless a reflection that magnifies social norms and aberrations in the context of utopias and dystopias. 1

Stableford has written that science fiction is not about prediction, but is a celebration of the fact that the future is 'yet to be made' (Stableford, 1999, pp. 6-8). The business of science fiction is thus to serve as a reminder that there are *many* possibilities awaiting us in life and in the ways we live (before) the law. As Stableford comments, '[t]he elastic limits of possibility are there to be teased as well as explored, to be contorted in every way we may find practical or interesting' (Stableford, 1999, p. 8). 2

Science fiction also provides a space within which the role of the law in the construction of the social world can be reconsidered. This process of reconsideration also involves the wider issue of ethics, as a 'typical' science fiction theme often contains warnings against the rise of (law as) science and the depersonalisation and dehumanisation of the individual. 3

The short sci-fi film chosen for discussion and analysis below is *Little Brother* (Masters of Science Fiction: IDT Entertainment, 2007), a dystopian story set in the not-so-distant future. In this movie the protagonist, Frendon Ibrahim Blythe, an unemployed 'Backgrounder', is brought before an automated 4

court that operates as an extreme version of 'justice', speedily dispensing with the law in a neutral, abstract and objective manner. This machine, that dispenses with justice so blithely, operates within a society that is based upon strict class divisions and that deals with societal problems through an inflexible system of conformity and adherence to norms. Emotions are frowned upon; both individuality and close relationships are discouraged; and dissent is silenced in an attempt to create a well-ordered and smooth functioning system. Frendon challenges this disembodied system and its norms by insisting that his particular story be heard. It is through this very simple and effective challenge to the system and its mechanisms that Frendon is able to subvert to a certain extent the juggernaut of machine logic that eventually leads to his death. This short film thus critiques from a humanistic perspective a technical and bureaucratic system of law and justice.

The question may be posed here as to why such a critical analysis is necessary when it can be argued that the law has over the years *transformed itself* and that notions such as human rights have 'softened' the impact that the law has on the lives of individuals and groups. Legal positivism has, allegedly, lost the battle and we can now relax and place our trust in a system that allows for more creativity and flexibility in interpretation and adjudication. The answer, simply put, is that there is always more that can and should be done to inform, appraise and critique the legal system. In adopting and maintaining a critical stance against the *status quo*, it is possible to continue imagining a world that is better than our own and to remain vigilant against the power - and the large and small violences - that the legal system continues to exert upon fragile bodies and vulnerable lives. As Douzinas illustrates, even human rights are being co-opted in the name of regulation and the religion of capital, and their co-option by governments 'means that they have lost much of their critical force and their initial aim and role has been reversed' (Douzinas, 2007, p. 24). 5

Thus, although it can be argued that legal positivism has lost its dominant edge, there is - and should always be - a space for resisting complacency and thinking through better alternatives to the way that things are and have always been. 6

In the paragraphs below an attempt is made to expose some of the flaws of a technocratic system of law and alternatives to such a rigid system are briefly explored in order to uncover 'the justice of the heart'. 7

## A CASE IN POINT

Considered to be one of the most progressive constitutions in the world, the South African Constitution, 1996 provides in s.39(2) that: 8

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Constitutional supremacy (SA Constitution, 1996, s.2) has therefore ushered in a new era of judicial transformation in South Africa, where courts are obligated to develop the law should it not reflect the content and spirit of the Bill of Rights. However, *despite* the scope made available for judicial review and judicial activism, courts in South Africa - including the Constitutional Court - have tended to adhere to a rather outdated and constrained attitude of deference to the executive and legislature, (Bohler-Muller, 2007, p. 90) rather than actively and creatively responding to suffering. 9

A recent example of such judicial deference to the 'powers that be' can be found in the case of *Masiya v Director of Public Prosecutions (Pretoria) & Others* (CCT case 54/06). The accused, Masiya, had been charged with anally penetrating a nine-year-old girl (the complainant). (case a quo *S v Masiya* (2007) SHG 94/04). As a result, defense counsel argued that Masiya could only be convicted of indecent assault, and not rape, as the common law definition of rape in South Africa at the time was limited to non-consensual vaginal sexual intercourse, and did not include anal penetration of either women or men. Faced with this situation, the Magistrates Court decided, in accordance with its constitutional mandate to transform the law, that the common law definition of rape should be developed to include 'acts of non-consensual penetration of the male sexual organ into the vagina or anus of another person' (*S v Masiya*, para 45, emphasis added). Masiya was accordingly convicted for the crime of rape based on this extended definition of rape. The High Court subsequently also declared the common law definition of rape unconstitutional, and once again confirmed Masiya's conviction of rape within its extended ambit, namely the penetration of the anus of another person. The case then went to the Constitutional Court on appeal and for confirmation of the declaration of invalidity by the High Court. The Constitutional Court 10

only went as far as to recognise the anal penetration of the women and girls as rape and did not deem it necessary to extend the definition of rape to include the anal penetration of boys and men. In addition, despite the partial extension of the definition of rape to include the anal penetration of girls, the court went on to adopt a strong view of legality that suggests that it would be unfair to convict Masiya of the offence of rape when the conduct in question did not constitute an offence at the time of its commission, as this would be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act (para. 56). Masiya was subsequently found guilty of sexual assault which carries a lesser sentence.

It is submitted that the majority judgment of the Constitutional Court is legally and ethically problematic (Dersso, 2007, p. 373), especially with regard to the refusal of the court to include the anal penetration of boys and men into the extended definition of rape. 11

Justice Nkabinde (for the majority of the Court) in *Masiya* (para 29), rejected the efforts of the two lower courts to develop the common law definition of rape to include the anal penetration of *any person* and held that '[t]he facts do not require us to consider whether or not the definition should be extended to include non-consensual penetration of the male anus by a penis'. Nkabinde furthermore concluded that the common law definition should only be *partially* developed to include the anal penetration of women and young girls, but not men (*Masiya*, para 30). Her reasoning appears to be guided by two presumptions: Firstly, that it is not necessarily unconstitutional to have a definition of rape that is gender-specific, and, secondly, that courts should exercise judicial restraint when developing the common law as this is traditionally the domain of the legislature (*Masiya*, para 31). 12

It is submitted that both abovementioned arguments are flawed and led to the failure of the court to give full effect to the protection of human rights under the South African Constitution. In adopting an attitude of judicial deference/restraint, Nkabinde failed to give full effect to the constitutional obligation to develop the common law in such a way as to reflect the 'spirit, purport and objects' of the Bill of Rights as per s39(2). By refusing to extend constitutional protection to men, the judgment causes more harm than good, albeit under the guise of judicial respect for age-old 'democratic' principles. The impact of this judgment leads to an uncomfortable realisation that considerations of justice come second to what could be seen to be political expediency, as it appears that the court set aside the obligation and need to respond to men in crisis in order to ensure that the system – and the 'relationship' between the executive, legislature and judiciary – continues to operate smoothly and efficiently. 13

Put simply, judgments such as *Masiya* illustrate the need for the law and its systems to be continuously scrutinised, interrogated and critiqued. And this is where popular culture and, especially sci-fi, may be useful tools in exposing the flaws and finding alternative ways in which to address injustices. 14

As mentioned above, the sci-fi short film *Little Brother* provides ample material for social and legal critique as the story focuses on the dire consequences of a mechanistic application of law without reflexivity, and the damage and pain that can be caused when the law is enforced without imagination and without compassion, as is illustrated in *Masiya* above. In analysing this particular movie, the (literally) mechanistic qualities of the judg(e)ment against the accused, Frendon Ibrahim Blythe, is juxtaposed against an approach that recognises the value of narrativity, particularity and singularity. This focus facilitates a (re)consideration of the fundamental elements of the judicial system and offers a suggestive scrutiny of the system (Bohler-Muller, 2006, p. 299). 15

## FRENDON IBRAHIM BLYTHE FACES THE MACHINE

Law sets itself outside the social order, as if through the application of legal method and rigour, it becomes *a thing apart* which can in turn reflect upon the world from which it is divorced. (Smart, 1989, p. 11, emphasis added). 16

*Little Brother* is a science fiction film based on a short story by Walter Mosley that first appeared in his book of dystopian short stories entitled *Futureland: Nine Stories of an Imminent World* (Mosley, 2001), although the screenplay by Mosley – which is the focus of this exploration – differs quite substantially from the original short story. The time is the immediately possible future, the protagonist is Frendon Ibrahim Blythe, a prisoner and accused of the newly instituted and almost fully automated Sac'm Justice System. He is on trial for the murder of a police officer and the assault of his partner, a crime that carries a mandatory penalty of death. Frendon's brain is connected in a futuristic courtroom to a computer 17

'judge' – a screen depicting a large all-seeing Eye - through a plastic execution tube attached to the base of his skull. The tube is part of Restraint Mobile Device 27, or RMD 27, an automated 'guard'. The only two humans in the room with Frendon are two other security guards.

In eliminating flesh-and-blood judges and juries, the Sac'm system has essentially created a mechanical and purely 'objective' criminal justice system. The crux of the story is that Frendon must find a way to outwit his virtual judge in order to avoid the death penalty, the automatic outcome for murdering a police officer in the Sac'm System, as the system does not recognise the crime of culpable homicide in such circumstances. 18

Frendon is brought before this automated court constructed to deal speedily, effectively and efficiently (as only a machine is able to do) with legal infringements perpetrated by the poor. He is unemployed and has been living in 'Common Ground' - government sponsored underground accommodation where inhabitants eat and sleep in shifts to conserve space, while having almost no hope of employment or a normal life 'above ground'. As the story progresses, Frendon escapes this monotonous life underground in order to find his mother, and this is where he meets St Augustine the Second who teaches him about the nature of freedom. 19

When asked to identify himself as U-CA-M-329-776-ab-4422 by Judge Prime Nine, Frendon refuses to respond to this simple question and this is where he begins to 'confuse' the system. Rather, he asks the system whether it will answer *his* questions. After eventually providing the system with a confirmation of who he is, he then causes further confusion when he requests to be released from the chair he is strapped to. The machine, after considering the fact that the neural-cam attached to Frendon's brain constitutes sufficient security, releases him from the device. Once released from the constraints of the chair, he is introduced to another monitor, depicting the image of his court-appointed counsel, AttPrime Five. Again, Frendon refuses to follow procedure and protocol and rejects the assistance of counsel, which is in effect part of the same database that is prosecuting him, and insists on defending himself against the charges. He then admits his guilt to the court but claims that he wishes to present to a jury extenuating circumstances that would prove him innocent of criminal intent. 20

Frendon then finally calls for a jury that will 'listen to his story' and 'see his face'. A long period of time lapses as the machine considers this request until it informs Frendon that he is not qualified to defend himself against the charges, and that the matter is a simple one: he has admitted to killing a police officer and must be sentenced to death according to the rules. But Frendon again insists on telling his story – and revealing his character and experiences - to a jury of his peers. He explains to Prime Nine that he can only receive a fair trial if he is permitted to speak for himself. 21

After much buzzing and flashing of lights, Prime Nine reboots and assents to Frendon being heard by a jury. The jury is a 'collective intelligence' residing in a chamber below the court, consisting of the wetware neural components of ten thousand potential jurors, which have been created by a biological linkage and compression system. Frendon then submits before Prime Nine and the jurors that his circumstances and motivations should be considered and proceeds with a narration of his life. He describes himself as 'White Noise', a 'Backgrounder', who has spent twenty seven years of his life living underground, hardly ever seeing the sun. He never knew his parents, was never properly educated and has never been employed. Living below the streets, he learned all he knew from stealthy conversations, brief video-feeds and Saturday night movies. He lived his life in perpetual boredom and never saw the sun until he was allowed above ground for fifteen minutes at a time after the age of sixteen. To him, freedom is either the sun or death, as the latter would allow the release of his body from the darkness of 'Common Ground'. He then asks the court if it has ever experienced being White Noise. Unable to understand the relevance of the question, Prime Nine responds after a time that 'among the core wetware membership that comprises our main logic matrix none was ever subjected to Common Ground'. And this, according to Frendon, is the problem: the court cannot understand the *experience* of living underground and is thus unable to judge him fairly without listening to his story. 22

When questioned as to whether he is confessing to his crime, Frendon explains that he is 'painting a picture', telling a story. He then goes on to explain the circumstances and context of his crime. He was with St Augustine the Second when they came across a young black girl-child. They were then approached by two policemen who threatened the life and bodily integrity of the child. This was when he responded with violence, his intention being to protect the girl from rape and abuse. After relating his story, Frendon faces the ten thousand jurors as they appear on a screen one-by-one and begin to mutter to themselves as they express doubt as to his guilt, despite the clear rules that exist in such cases. A crisis of the law ensues as the system is unable to deal with this doubt and breaks down under the strain 23

of the automated jurors' inappropriately emotional responses. All the while, Prime Nine repeats that the 'law is the law' and that the court has an obligation to execute Frendon. The 'feelings' - evoked by Frendon's story - eventually result in the malfunctioning of the system. The law as (literally) a *thing apart* cannot cope with this invasion of its seemingly autonomous domain and the system fails as a result.

In a final twist, Frendon Ibrahim Blythe is pronounced guilty by default before the technicians are able to fix the logic problem. He is executed by Prime Nine, and his brain is extracted by a metallic tentacle-like probe. 24

The story ends with Frendon himself appearing on a screen in the courtroom. His image explains to the female guard present that he has been assimilated into the system by the jurors in order to 'save the system from itself'. The override had taken his life, but he is now able, *as part of the system*, to ensure the change that he could not achieve as someone who stood before the automated court as White Noise. 25

## THE LAW AS/OF THE MACHINE

Law has a *life of its own* and ... it arrives at a judgement by means of an almost mechanical process. (Diamantides, 1995, p. 209).

As alluded to above, the story of *Little Brother* serves as a warning against the rise of science and the loss of the human soul. Frendon Bythe's encounter with the court depicts the law as *something apart, with a life of its own*. His encounter with the law is reduced to a matter of survival against the system. In this way this short film magnifies the problems with a positivistic system that has reached its logical conclusion. The figure of Frendon, described as 'the runt of the litter', depicts the ability to resist, albeit that the consequence may very well paradoxically involve one's assimilation into the very system that one mistrusts, despises and fears. 26

The Kafkaesque nature of the courtroom scenario in *Little Brother*, where the law and its systems are depicted as unquestionably rational and passionless is reminiscent of the Franz Kafka's execution machine in *In the Penal Colony* (Kafka, 1919 at <http://www.mala.bc.ca/~johnstoi/kafka/inthepenacolony.htm>). The penal colony guard, who operates the machine that carries out body-mutilating executions, fawns over the machine and marvels at its technological advancement. He is a technocrat, a man that believes in excruciating detail, and proudly shows the explorer the mechanical drawing from which the machine was constructed. He neither questions the law, nor the manner of its enforcement, but rather praises the scientific advancement that has led to this gruesome form of punishment. 27

In keeping with the theme of the Kafkaesque, and in praise of efficiency and objectivity, Haruki Murakami's character, Kafka Tamura, in the novel *Kafka on the Shore* (2005), ponders the dangers of cold practicality when he reads a book on the trial of the Nazi war criminal Adolf Eichmann, (Murakami, 2005, pp. 171-172). The unnamed book that Murakami's character, Kafka, reads in a forest cottage is reminiscent of Hannah Arendt's *Eichmann in Jerusalem*, (Arendt, 1963). Arendt uses the phrase 'the banality of evil' to characterise Eichmann's actions as a member of the Nazi regime and, in particular, his role as chief architect and executioner of Hitler's genocidal *Endlösung* ('solution'). Eichmann followed his instructions with meticulous diligence. Tasked with investigating how best to exterminate the eleven million Jews in Europe, he went about the business of 'how best, in the shortest period of time and for the lowest possible cost, to dispose of the Jews' (Murakami, 2005, p171). Illustrating Arendt's observation of the 'banality of evil' (Arendt, 1963), Murakami describes how Eichmann, seated at his desk, crunched numbers and calculated the minute details of extermination: 28

Eichmann studied how many Jews could be packed into each railway carriage, what percentage would die of "natural" causes while being transported, the minimum number of people needed to keep the operation going, the cheapest method of disposing of dead bodies - burning, or burying or dissolving them. (Murakami, 2005, p. 171). 29

And everything went according to his efficient and effective plan: by the end of the war six million Jews had been 'disposed of'. So, in the light of the successful implementation of his plans, Eichmann fails to understand the legal and ethical implications of his actions: 30

He was just a technician, he insisted, who found the most efficient solution to the problem assigned him. Wasn't he doing what any good bureaucrat would do? So why was he being singled out and accused? (Murakami, 2005, p. 172)

Just as the executioner in Kafka's *Penal Colony*, Eichmann is a technocrat who admires efficiency and works towards ensuring the smooth running of the well-oiled Nazi Machine. He is a 'practical guy'. In a note written in the book read by Kafka Tamura, his friend, Oshima, reflects (as Arendt does) on the relationship between imagination and responsibility and surmises that Eichmann was capable of doing what he did due to his obvious *lack of imagination* and, therefore, his inability to take responsibility for so many deaths: 31

It's all a question of imagination. Our responsibility begins with the power to imagine. It's just as Yeats said: In dreams begin responsibility. Turn this on its head and you can say that where there's no power to imagine, no responsibility can arise. Just as we see with Eichmann. (Marukami, 2005, pp. 171-172).

These examples, both literary and real, found in *Little Brother's* courtroom, Kafka's colony and Eichmann's trial, illustrate that it is the *failure of imagination* that leads to the worship of the efficiency of the machine. Where there is no power to imagine or to dream, no responsibility can arise. Frenon's pending death is depicted as part of a losing game against a machine, the penal colony executioner is so enamoured with the technical abilities of his machine that he is unable to imagine the pain it causes, and Eichmann sees himself as a cog in a machine and not as a man responsible for causing the suffering and death of millions of fellow human beings. 32

Similarly, the doctrine of legal positivism formulates law as an autonomous, determinable and empirical science. This apparently harmless rule-based approach, however, entails an outright rejection of the law having a metaphysical or 'natural' existence. In this sense, positivism merely reinforces the legal *status quo* by placing unquestionable faith in the legal canon (the machine). Law, like science, is seen to be objective, neutral and certain. What is *not* acknowledged is that this is merely one perspective amongst many others. 33

The doctrine of legal positivism – which provides little if any room for imagination – tends to leave legal theory and the 'practice' of law severely impoverished. As such, the unwillingness on the part of technocratic lawyers to address the social, moral and political components of law is highly problematic as it leads to an uncritical acceptance of the 'smooth' functioning of the legal machine within any given society, thereby perpetuating the *status quo* (which may be anything but ideal). The formal requirements of valid law are seen as all-important and, for the largest part, its *content* is ignored. That which is dispensed in courts is thus merely a political and cultural *caricature of justice*. 34

Ultimately, positivism tends to be backward looking and *posits* – lays down the law – that legal texts be dealt with separately from the unruly mess of ordinary lives. If law is constructed in this way as a closed, autonomous system that represents a knowledge of its own – much like a machine – then social and experiential knowledges that do not fall within the traditional legal canon are ignored and/or silenced or left standing before the door of the law without any hope of being admitted (Kafka, 1984). 35

## THE JUSTICE OF THE HEART

... by recognising the impossibility of easy, logical answers we can free ourselves to think about the questions in a more constructive and imaginative manner. Law cannot be successfully separated from politics, morals, and the rest of human activities, which is an integral part of the web of social life. (Olsen in Olsen (ed.), 1995, p. 473)

Lawyers and legal scholars have – from various perspectives (Lacey, 1998, p. 44) – called for law to be more inclusive; for the restoration of the voices of minorities and outsiders; for more attention to be paid to context; for more empathic, compassionate and ethically responsible judgments; and for the inclusion of narrative (storytelling) in legal proceedings. The fear is that the exaltation of logical consistency and predictability displaces concerns of imagination, compassion and substantive justice. Therefore, the premise is that lawyers, judges, and scholars should not suppress emotions and experiential understanding. According to these alternative perspectives, empathy, human stories, and different voices should be woven into the tapestry of legal scholarship, legal training, law formulation, legal counselling 36

and advocacy, and the application and enforcement of law. However, there also rests a danger in expecting the law to accommodate difference(s). As a system founded in and on violence (Derrida, 1990; Davies, 2001, p. 213), the law has its limits and it could be argued that it is indeed impossible to expect the law *as it is* to be receptive of the stories of outsiders. Herein lies the danger of assimilation as depicted in *Little Brother*, where Frendon has to become part of the machine in order to make a difference.

The unquestioning belief that the law is a closed logical system protects the domain of law and its autonomy and objectivity and serves to prevent the law from being 'contaminated' by other perspectives and worldviews. This faithfulness to a theory of law that operates at a high level of abstraction subsequently results in a denial of the messiness and the unruliness of life. As Margaret Thornton argues, many feminists have criticised the exclusion of the particular, the subjective, the emotive and the embodied from the domain of the legal (Thornton, 2002, p. xiii). And this is where law/film critique and feminism could and do at times overlap. Critique of the law from the viewpoint of popular culture may and can serve the same ends as feminist critiques where, from both perspectives, one can expose the limits and violence of the law and in such a way attempt to introduce alternative ways of thinking about the law and its impact on real lives. 37

Thornton points out that popular culture – like the feminine – has largely been expelled from the legal domain as a 'non-rational Other' (Thornton, 2002, p. 3). As an autonomous and self-generating system, the law thus fails to pay attention to what is going on in the world. As such, an over-emphasis on neutrality, autonomy and objectivity – the dominant discourse of western masculinity – and the de-racialisation and de-sexualisation of the law allows the claims of what Thornton calls 'Benchmark Men' (Thornton, 2002, p. 4-5) to be universalised and different voices to be excluded and silenced. Popular culture has the potential to address, as feminism has, dissatisfaction with the institution of law as it is. 38

To re-iterate, in *Little Brother* the role of the law as (positivistic) machine is interrogated in an encounter between a technocratic legal system and the particular and singular story of Frendon Blythe. This sci-fi encounter with the law and its system exposes 'the normative voice of reason and authority' (Thornton, 2002, p.11) that, through its technical and procedural rules, seeks to restrain and discipline the human body, and which finally breaks down when faced with uncertainty. 39

In depicting the law as machine, *Little Brother* emphasises positivism's obsession with expelling the political, the social, or any 'otherness', and its reliance on pure logic and rationality in order to ensure effective and efficient judgments uncontaminated by 'unruly and disruptive knowledges' (Thornton, 2002, p. 11). The latter non-rational 'knowledges' – encompassing emotion, corporeality, tactility, aestheticism and the specular – are considered to be corrosive of the Authority of Law (Thornton, 2002, p. 15) and are banished, only to return to haunt the system – a sort of 'ghost-in-the-machine': 40

The integrity and authority of the privileged form of knowledge demands that which is dangerous and threatening to be kept out. It is the role of technocentrism to police traditional boundaries and to occlude law's predilection in favour of benchmark masculinity ... Despite these rearward attempts to protect the integrity of law, the firm line of separation between law and popular culture appears to be vanishing. (Thornton, 2002, p. 51).

Frendon Blythe challenges the system by simply questioning the *status quo* and insisting on telling his story. By refusing to accept things as they are, he confuses and disrupts the process of judgment by insisting on speaking in his own voice. Frendon's use of personal narrative thus unsettles the system itself, as his humanity places the objectivity of legal truth in jeopardy and opens up a space for the affective. He insists on explaining his 'lawlessness' to the court in his own terms and does not succumb to the language of the law. He is more concerned with what is just than with what is 'lawful', and so the language he uses subverts the system as he tries to capture the inexpressible ethical dilemmas that constitute his and every other human life. His is not a legal treatise but a struggle for justice in an uncaring world, where the citizens of civil society have been become mere consumers in capitalist settings, and where efficiency has displaced reflexivity. 41

Frendon's challenge to the *status quo* of the automated system can be read as an attempt to offer an alternative notion of justice which is more closely linked to a call for contextuality, care and compassion (Gilligan, 1982; Gilligan, 2002; Schor and Weed (ed.), 1994). He describes his life as a 'Backgrounder' and thereby contextualises his conduct. By insisting on introducing his singular corporeality, he is able to challenge the legal 'imagination' (or, rather, lack thereof) and the values of consistency, integrity, and 42

impartiality that it claims to represent.

Ultimately, the language that Frendon relies upon confuses the system. The machine goes offline, re - 43  
boots, flashes and buzzes at it is faced with a logic that emanates from outside its domain of control.  
Eventually, the system breaks down, but not before completing its mission of executing Frendon. But he  
does not disappear altogether, he ironically becomes part of the very machine that destroys his body,  
thus both succeeding and failing in his mission to survive.

## CONCLUSION: THE FUTURE IS NOW

In law it often seems that where our voices ought to be there is only silence or denial. (Berns,  
1999, 4)

A flexible, narrative approach could, unlike legal positivism and its technocratic processes of exclusion 44  
and disempowerment, assist in creating spaces in which to accommodate the particularities and nuanced  
variations in human stories such as Frendon's. However, it can also be argued that hearing all sides of  
the story is precisely what positivism does. This may be so, but the 'hearing' of those who stand before  
the law is generally a process of rendering their stories legally coherent according to established rules  
and universal standards. The self, on the other hand, is the protagonist of a life's tale that cannot easily  
(if at all) be captured in the language of law as illustrated in *Little Brother*. Something more than a legal  
'hearing' is needed when responding to the call to hear the 'other' and to recognise her or his humanity  
(Cavarero, 2000; Cavarero 2005). This failure of the law to respond – even under the best of  
circumstances – is illustrated in the *Masiya* case where the pain of male rape is acknowledged in a  
 cursory manner and then set aside in an attempt to ensure that 'the system' continues to operate  
smoothly. In adopting an understanding of gender equality that ignores the fragility of men, and in  
accepting without much question principles of democratic majoritarianism (Botha, 2003, p. 13), the  
South African Constitutional Court failed to give full effect to the rights enshrined in the Constitution and,  
furthermore, failed to deliver a just and ethically responsible - and responsive - judgment.

The judgment in *Masiya* is but one of many examples of the reductiveness of the law and its inevitable 45  
tendency to cling to the traditional and the known, or, to put it another way, to replace old universalising  
meta-narratives with new ones. According to the logic and language of institutionalism, the law seeks to  
*normalise* and restore order, which leads to the inevitability of structural inertia and an inability to  
engage in radical and revolutionary politics.

However, if, in terms of the ancient legal maxim, to do justice is to follow the heart – *carde creditur ad* 46  
*iustitiam* – then how can justice be achieved through legal means if the law rejects the affective domain  
and anything associated with connection and particularity? The law, it is written in seminal texts, resides  
in the rational mind and 'Backgrounders' or outsiders such as Frendon Ibrahim Blythe are perceived as  
non-rational beings, subjected to passions of the heart. They are seen as passive victims who 'can only  
ever look at history in terms of little stories, through the wrong end of their opera glasses' (Salecl, 1994,  
p. 115).

And yet, there is another world hidden from the consciousness of law: the world of singular and partial 47  
narratives – the 'little' stories of 'Backgrounders', outsiders, and male rape victims. Law and popular  
culture scholarship has a role to play in bringing these stories to the fore and to constantly challenge  
received and entrenched knowledge systems and legal doctrine. Like Frendon, the secret lies in learning  
to speak differently and to continuously interrogate the system in order not to disappear altogether.

For critical legal thought, this is a question of a starting point; are you crushed by the past, or, are you  
strong enough? Can you summon the strength to start anew, anew, anew? (Douzinas and Gearey, 2005,  
p. 258).

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