

JUSTICE, RIGHTEOUSNESS AND TERRY PRATCHETT(*)

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SOMMARIO: 1. Introduction. – 2. Subjectivity of the concept “Justice” and the case of the speluncean explorers. – 3. Social compact and justice. – 4. Law, literature and developing a social conscience. – 5. Terry Pratchett and the South African legal education context.-6. Conclusion.

1. Introduction

“...If a poor man will spend a year in prison for stealing out of hunger, how high would the gallows need to be to hang the rich man who breaks the law out of greed”¹

You might be forgiven for thinking that this quotation comes from some deep philosophical work on criminal justice but, in fact, it comes from Terry Pratchett, *Snuff*. Hence the title of this article.

This article was first developed for presentation as a conference paper at a theology conference². What you might wonder, was a lawyer doing at a theology conference? The interdisciplinary approach to topics such as justice is not, however, as strange a phenomenon as the modern practice of law may first suggest. The purpose of the law to facilitate justice for all who live in society is readily discernable from the almost universal use of Justitia (Lady Justice) as the symbol of law in Western societies. Justitia is a mythological Roman Goddess of mortal justice who is ordinarily depicted wearing flowing robes, reflecting a judicial flavour, carrying scales reflecting the ability and commitment to weigh both sides of each dispute and to achieve a fair balance of the interests of the parties. The scales as a symbol, in fact date back to the Egyptians who believed Anubis used the scales to weigh the soul of the departed against the feather of the truth. Justitia is blind to the status, position or other attributes of disputing parties, as demonstrated by the fact that she is blindfolded. She often carries symbols of truth, (the torch) and an axe or a sword that conveys the authority of

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¹ Terry Pratchett, *Snuff*, UK, Doubleday, 2011, 22.

² See (*) above.

the law, that justice is swift and has both might and power. The sword is double-edged, showing that it tilts both towards reason and justice³.

Thus, justice is the cornerstone of the law. This resonates with Psalm 89 verse 14 which portrays justice and righteousness as the foundations of God's throne and posits loving kindness and truth as His attendants. That the two concepts are inextricably linked in scripture is trite. The law is generally linked with doing justice or achieving justice whether in contract, criminal matters or distributively. That said, modern English attributes different connotations to justice and righteousness, a phenomenon largely attributable to the manner in which the original biblical text was translated⁴. Certainly, the law views righteousness as the status conferred on a party in whose favour a court has decided a matter. Likewise, an impartial judge whose is perceived as having decided a matter fairly and in accordance with the law, to avoid evil, (that is, justly) is regarded as righteous.

Justice and righteousness are understood differently by different people and this is especially true within the legal context. The subjective nature of an individual's understanding of justice is clearly demonstrated by Lon Fuller, a renowned legal philosopher in his fictional "Case of the Speluncean Explorers".⁵

2. Subjectivity of the concept "justice" and the case of the speluncean explorers

In the Case of the Speluncean Explorers, a fictional court of appeal was faced with a dilemma regarding the law's fairness and the role of judges in achieving a just and equitable judgement was highlighted. The limitations of a legal positivist approach to the application of the law was laid bare and the demands on judges to be fair was examined through the mechanism of a series of fictional judgments handed down by the judges on the court's bench in response to the complex and horrifying set of facts. Furthermore, the case exposed the extent to which the fabric of the law is threatened when judges attempt to achieve justice by manipulating the legal system to suit the exception.

In this case, five explorers were trapped within a cave as a consequence of a landslide. Their rescue took considerable time and cost the lives of ten brave men who died in the attempt. The explorers were trapped with minimal rations and, radio contact between the

³ See *Justitia: The Symbol of Law, Her History and Her Meaning*, available at www.brightubeducation.com/history-homework-help/128872-justitia-the-symbol-of-law/.

⁴ Nicholas Wolterstorff, "On justice vs 'righteousness'" in *Justice: Rights and Wrongs*, Princeton, New Jersey, Princeton University Press 2010 110-113.

⁵ Lon Fuller, *The Case of the Speluncean Explorers* 62 (4) Harvard Law Review, Feb. 1949, available at www.nullapoena.de/stud/explorers.html.

explorers and the rescuers having been established, a conversation took place regarding their chances of survival until help could reach them. Having established that they had no chance of survival on the rations they had available, the parties established that the killing and consuming of one of their number would offer the rest of them some prospect of survival. The explorers sought advice on how to select which of them should be sacrificed but neither physicians, politicians nor theologians were willing to instruct them on this. Thereafter, no further radio contact was made. After 30 days, the explorers were rescued and it was discovered that they had reached an agreement amongst themselves that one of them should die and be consumed by the others. Whetmore, who was party to the agreement, was chosen and, despite his wishing to withdraw from the agreement and wait a further week before acting, was killed and consumed. The four survivors were treated in hospital for malnutrition and shock and then put on trial and convicted of the murder of the unfortunate Whetmore. The penalty was death.

The four survivors appealed the finding of the court a quo and, on appeal, it seemed that the Chief Justice, Truepenny, whose judgement appeared first, was only too happy to comply with the letter of the law in convicting the four survivors of murder and sentencing them to death in accordance with the letter of the law that states that the wilful taking of another's life is murder and should be punished by death. He then advocated that the survivors should throw themselves on the mercy of the executive to commute the sentence to six months imprisonment, thus complying with the letter of the law and at the same time, ensuring that justice had been done⁶. Foster, J. argued that society and its positive laws are founded upon a social contract which, in these circumstances, is suspended and that the "law of nature" applied. He argued further, that Whetmore agreed to his own demise in terms of the charter of government entered into by the explorers as suited to their exigent circumstances. Foster conveniently ignored Whetmore's attempt to withdraw from the agreement. This judge argued in the alternative, that, should the positive law be applied, its evident purpose should inform its interpretation and thus, as this situation was akin to a situation of self-defence, the men's actions, informed as they were by their exigent circumstances, should be treated as an exception to the law and their defence should succeed.

Tatting, J., who confessed to having some difficulty in dissociating his emotional response from his intellectual response to the case, found Foster's argument that the law of the Commonwealth was inapplicable to be absurd. Furthermore, he reasoned that if near

⁶ Lon Fuller *The case of the Speluncean Explorers* cit.

starvation is not a defence to the theft of a loaf, how could the possibility that one might starve, justify wilfully taking another man's life? This judge, overwhelmed by the complexities of this case and bemoaning the decision of the prosecutor to indict the explorers, thus facing the judges with the dilemma before them, elected, not to pass judgement.

Keen J, the fourth judge on the bench, boldly declared that the court had no truck with executive clemency and that it was not concerned about what is right or wrong, good or bad but only with the application of the law of the land. He took a purely positivistic approach to determining the case. He dismissed the emotional and intellectual arguments of the others and proceeded from the perspective that the judge must apply the law of the land and not his own conception of morality. He viewed the difficulties encountered by the other judges in wrestling with the case as a consequence of their failure to distinguish the legal from the moral. In upholding the convictions, he emphasised that once the prosecutor had elected to prosecute, the judges had to apply the law and that their personal conception of justice is irrelevant.

Finally, the last judge, Handy J., highlighted the importance of public opinion in the application of the law and indicated that in his opinion, judges should use their common sense and, in this case, should not convict.

Lon Fuller's article, which explores both the philosophy of law and of government, clearly demonstrated how the judges in the fictional case grappled with achieving a just outcome in the case. Their judgements clearly demonstrated that a simple application of legal principles cannot be the whole law. Humanity has a role to play to temper the law with justice.

3. Social compact and justice

The idea of a social compact that underlies social interaction, as referred to in the fictitious judgements described by Lon Fuller, is not new. Indeed, a number of legal philosophers such as John Rawls refer to a social compact which confers legitimacy on the state. Rawl's social contract features what he referred to as the "original position", the position from which he developed the idea of "justice as fairness"⁷. In addressing concerns around the achievement of distributive justice in society, the original position calls for a fair and impartial point of view to be adopted when reasoning about fundamental principles of

⁷ John Rawls *A Theory of Justice*, Cambridge, Massachusettes, The Belknap Press of Harvard University Press 1971.

justice. This means that the individual must imagine him or herself in the position of free and equal persons who jointly agree upon and commit themselves to principles of social and political justice. To ensure the individual's impartiality, he or she is veiled in ignorance about his or her personal characteristics and social and historical circumstances. Individuals are oblivious to their own fundamental interests as well as general facts about psychology, economics, biology, and other social and natural sciences. They are then presented with a list of the main conceptions of justice drawn from the tradition of social and political philosophy, and are asked to choose a conception of justice from amongst those offered, that will most effectively assist in establishing conditions most conducive to pursuing their ends and fundamental interests.

Rawls contended that the most rational choice for the parties in the original position are two principles of justice: The first guarantees the equal basic rights and liberties needed to secure the fundamental interests of free and equal citizens and to pursue a wide range of conceptions of the good. The second principle provides fair equality of educational and employment opportunities enabling all to fairly compete for powers and positions of office; and it secures for all a guaranteed minimum of all-purpose means (including income and wealth) needed to pursue their interests and to maintain their self-respect as free and equal persons.

As demonstrated by Fuller and Rawls above, what is “just” is a question that has challenged philosophers through the ages, and society's understanding of the concept is essential to the determination and protection of human rights. In South Africa, justice is not only the cornerstone of law but is central to the provisions of the South African Constitution⁸, the supreme law of the land⁹. The South African law is bound to the values and principles enshrined in the Constitution and, for this reason, clarifying the concept of justice in a South African context is both a daunting and essential task if the judicial system is to serve society effectively, healing societal divisions and redressing past injustice and recognising that the law serves the full diversity of those who live in the country¹⁰. This is where Sir Terry Pratchett comes into the discussion.

4. Law, literature and developing a social conscience

⁸ The Constitution of the Republic of South Africa, 1996.

⁹ The Constitution of the Republic of South Africa, cit. section 2.

¹⁰ See the objectives of the Constitution of the Republic of South Africa, cit. Preamble.

There has long been recognition of the fact that fact can be taught using fiction¹¹. This is certainly true within the legal discipline where the law and literature movement has been steadily gaining momentum over some decades¹². Although it is not without its critics, this movement recognises that there is a connection between law and literature and this interconnectedness may offer the educator endless opportunities to allow students to explore their own conscience in a non-threatening space created for that purpose.

Works abound in which writers explore legal themes, with plots filled with social ills, court room dramas, legal twists and turns and machinations of lawyers desperate to save their clients. Lawyer protagonists or antagonists proliferate. The brave young lawyer whose passion for justice will not be extinguished, no matter the personal cost, is represented almost as often as the cruel, jaded, disillusioned and even corrupt lawyer. Literature often depicts social issues which tug at the reader's social conscience and sense of good and right. However, writings in which there are happy endings for the good and sticky endings for the bad such as is depicted in *The Importance of being Earnest*, have gradually been replaced by works that reveal an absence of "so-called" "poetic justice" revealing society's growing loss of confidence in the fulfilment of justice¹³.

Thus, Shakespeare's call for all the lawyers to be killed in *Henry IV* met with more than a little approval and Atticus Finch, creation of Harper Lee in *To Kill a Mockingbird* became a hero and inspiration to many. Literary works have thus lent themselves to the academia as suitable material to teach legal issues. Law and literature courses do not just rely on the great literary works of Shakespeare, Dickens, Orwell, Kafka and the like, but, there is an increasing reliance on popular literature and other media at a number of institutions in which reliance is placed upon literature, film, art and music to teach courses like Philosophy¹⁴. It may realistically be anticipated that given the popular appeal of media coverage of courtroom proceedings such as the O.J Simpson trial and the recent trial of Oscar Pistorius, that academics in law faculties will increasingly rely on such examples of courtroom proceedings to make the law and its role as a transparent mechanism, increasingly real for law students.

¹¹ For an example of this see, D. Camp *It takes two: Teaching with twin texts of fact and fiction* 53(5) *The Reading Teacher* 400-408;

¹² For a detailed discussion of the intersection between the law and literature see, *inter alia*, Richard A. Posner *Law and Literature* (3rd ed.) U.S.A., Harvard University Press 2009; Ian Ward, *Law and Literature: Possibilities and Perspectives*, Cambridge, New York, Cambridge University Press, 1995.

¹³ Keiran Dolin *Fiction and the law* UK, Cambridge University Press, 1999, 5.

¹⁴ Rutgers University in New Jersey "Politicising Beyonce" uses, amongst others, musical lyrics to address feminist issues. The University of California, Berkley teaches philosophy with reference to the Simpsons and Durham University offer a Harry Potter course in which social issues are examined. The Hunger Games has been used in many courses to teach empathy.

That there is a link between law, literature and humanities was the subject of an interview conducted by Lloyd Langman at the 2009 Learning in Law Annual Conference in January 2009. The subjects of the interview were three law authors Dr Adam Gearey and Professors Gary Slapper and Melanie Williams, who were asked their views on whether or not literature makes for better lawyers as suggested by Professor Ian Ward in his keynote address¹⁵ at the same conference¹⁶. All three indicated their love of literature and the importance of reading. Both Geary and Williams obtained qualifications in English literature. Gearey indicated that cases were short stories and statutes were the texts through which the administration talks to the public.

Slapper too, confirmed that lecturers and tutors generally share a passion for literature and identified allusions to literary texts in judgements and textbooks. He thus valued his knowledge of, inter alia, Blake, Tennyson, Kafka and Orwell.

When asked their views on the role of inter-disciplinary enquiry in law, all three indicated the fundamental value of inter-disciplinarity and lamented the tardiness with which the law has taken up opportunities for inter-and multidisciplinary enquiry. Such enquiry is, according to Gearey, essential if law is to be placed within the correct ethical and political context.

Slapper welcomed recent increases in interdisciplinary studies in law but indicated that these can still be improved upon. In his view, literature can “afford a marvellous and useful new dimension to study as, much of law is at its core about story-telling”. He thus expressed surprise that it has not been incorporated into legal syllabuses. Williams noted the resistance of law to interdisciplinary studies and their potential, but stressed that elective courses may offer opportunities to increase inter-disciplinarity and, through this, flexible minds geared to face the workplace. In her opinion, an interdisciplinary approach not only broadens the exposure of students to intellectual material but also allows them to develop more than just “legalistic” thinking. It nuances their understanding and critiques, allowing them to further develop their thinking and problem-solving skills.

Proponents of the Law and Literature movement¹⁷ have explored not only the depiction of law in literature (And here the reference is to what they have determined to be “great literary

¹⁵ Lloyd Langman *Legal Education and the democratic imagination* available at <http://webjcli.ncl.ac.uk/2009/issue3/ward3.html>.

¹⁶ Lloyd Langman *Author interview: Law and literature* available at http://www.taylorandfrancis.com/articles/author_interview_law_and_literature1

¹⁷ Law in literature and Law and literature. The movement is gaining momentum and has spawned books as well as journals dedicated to the discipline. See, for example, *Studies in Law and Literature*.

texts” and the application of literary critique to law.) Such proponents have revealed the importance of the complimentary nature of law and literature¹⁸ as well as the interdisciplinary nature of law¹⁹. Others, such as Balkin, a Constitutional law professor at Yale Law School, focus on music and drama as suitable analogies to law rather than literature. His focus is on the relationship between law and politics. Dr Adam Gearey, Robin West, Allan Hutchinson, and others all uphold the view that law can benefit from the study of literature.

Yet another proponent of this movement, Robin West, uses law and literature in an attempt to re-unite the human element and the regulatory mechanisms of society. She advocates the use of narrative texts to develop an understanding of the human condition and how the law impacts upon it²⁰.

5. Terry Pratchett and the South African legal education context

Terry Pratchett, a brilliant writer of fiction, who sadly died on 13 March 2015, adeptly made use of his Discworld series in order to pass social commentary in a palatable and humorous way. Pratchett can truly be regarded as a philosopher with a gift for forcing society to confront their own shortcomings in a non-confrontational manner. His books, which might at first glance seem like fantasies for children, both young and old, which indeed they are, are, on a deeper level, compelling windows into human behaviour. Pratchett shares his unique insights into human nature and the injustices of society so cleverly that his cutting observations are buried in humour that manages to dull the sting.

Indeed, Pratchett is not simply an author into whose works deeper thought and meaning has been read, Pratchett was knighted in 2009 and the contribution he made to highlighting social ills has been repeatedly recognised²¹.

Pratchett’s “Discworld” creates a neutral environment in which the reader readily identifies social injustice and responds to it instinctively, in the manner Rawls may have envisaged the individual reduced to the original position would. The reader is not directly compelled to confront his or her own inadequacies or failures but, this takes place

¹⁸ Ian Ward

¹⁹ Melanie Williams.

²⁰ See, Robin West *Narrative, Authority and the Law* Ann Arbor, U.S.A., Michigan University Press, 2004.

²¹ Tom Bernard *Montrous Regiment by Terry Pratchett*, Harper Collins, Nov 2003, available at, www.bookslut.com/fiction/2003_11_000953.php stated that, although Pratchett started the Discworld series as a sendup on the Fritz Lieber’s stories, he took advantage of his literary intellect to “turn a critical and revelatory eye, not only on his disc world but also on the real world. His use of humour and imagination allow him to make direct remarks on issues of vital import in a manner that lightens the message being conveyed”.

incidentally. This process is no more clearly illustrated than in *Snuff*, a book about discrimination, a book which could readily be a prescribed work for all first-year law students in South Africa.

There are a number of issues that face legal academics at South African Universities, not least of which is that educational under-preparedness amongst undergraduates abounds and there is thus a need to entrench reading and writing skills alongside the content of courses.²²

Furthermore, in an unequal society it is imperative that graduates understand the relationship between law and the society in which it is located, its role in bringing about transformation or entrenching equality, and a sense that as a privileged group they have a responsibility to invest in the society in which they live. To engender a social conscience in an environment that often appears to worship money and the betterment of self at any cost is not an easy task. As an academic in this environment, I have thus sought ways and means to address both these issues. One suggestion is to incorporate Pratchett into the curriculum.

Terry Pratchett, through the medium of his works, especially those set within the realm of the Discworld, an imaginary world that floats through space on the back of a giant turtle, offers his reader a sharp and unmasked insight into the human condition, compelling the reader to invest in the values of a just and moral society founded upon the principles of equality, freedom and human rights. This is achieved through the use of empathy.

Pratchett brings a unique approach to law and its impact upon society. He reveals the interrelationship between law, politics, economics and culture with the accuracy of a skilled surgeon who slices away all the detritus with which human motives are masked in an effort to get to the heart of what a just and moral society should value and the need for a few brave “men” to lead the movement to achieve the objectives, one step at a time. He expertly exposes the human condition as selfish. Thus it is suggested that Pratchett, which is at heart light reading, has the potential to serve as a useful source of material to educate law students, not on the law per se but on the ills that plague our society and which the law must address, instilling not only an understanding of the human condition but also a social conscience motivated by sound moral values and a keen sense of justice. In doing this, the awareness which law students will bring to their interpretation of the law and its critical analysis will encourage their deeper understanding of the fact that a simple change in law will not

²² Caroline Nicholson *Back to the Future: Teaching legal History and Roman Law to a Demographically Diverse and Educationally Under-Prepared Student Body* 11-2 *Fundamina*, 2005, 50-62.

necessarily change attitudes and beliefs and that changing the law may only be a first step in transforming society. This means, these scholars will better appreciate that post-apartheid South Africa is not a non-racist, non-discriminatory environment but that it has set its course to achieve these objectives. A paradigm shift in the minds and actions of all South Africans will be needed to fully achieve these goals.

Pratchett's characters are often broadly based upon characters from classical literature, ancient history and even from popular culture. His works are both humorous and satirical, exposing the reader to his humanitarian thinking and his wide understanding of society, politics and culture. His writings, although seemingly light-hearted and comic have been widely recognised for their literary value and Pratchett himself holds nine honorary doctorates in recognition of his contribution to the literary world.

Pratchett clearly conveys the need for rules to regulate our society and that rules are created by, and serve the needs of those in power. He emphasises that individual obedience to rules, whilst necessary for the smooth running of society cannot be unthinking and that it takes a few brave individuals to challenge the law where it is unjust if change is to be facilitated.

The witty and humorous depictions of this strange Discworld often contain within them serious themes that force the reader to think more deeply about her own social context. The books thus encourage readers to experience and understand what others feel in a neutral environment. This is potentially a valuable tool in teaching law students in a legal system where legal history is characterised by grave injustice and discrimination.

Pratchett is able, through his Discworld, to create a space within which the dangers of, amongst others, discrimination, inequality and poverty can be safely explored without any political or emotional baggage on the part of the reader.

The concept of a social contract, the compact between the government and organised society or the state and ordinary citizens or the governed, as espoused by Hobbes, Locke, Rousseau and others for purposes of exchanging certain rights and freedoms for protection, is clearly reflected in Pratchett's view of the relationship between the residents of Ankh-Morpork and its leadership in the person of Lord Vetinari. He explores moral and political theory and reveals that even the social contract itself is instrumental in the subjugation of certain classes. Pratchett demonstrates this point as skilfully as Lon Fuller does in the Case of the Speluncan Explorers. Pratchett is aware of class, race, gender and other forms of

subjugation and raises real concerns about the state of society whilst inviting readers to take a long, hard look at their own behaviours, mirrored in those of his book's characters. The books seem to portray a more Hobbesian view of the social contract than Lockeian. The sense is that without society's submission to Vetinari's rule, society would be governed by fear, violence, crime, conflict and, untimely, death. Certainly, Vetinari seems almost Stalinesque in his view that what is good or evil and what is true is dependent on the will of the ruler. Hence, peace is the consequence of subjection to the absolute power of the common master. That said, however, citizens are entitled to Locke's rights to liberty and life and impartial protection backed by overwhelming force²³.

Certainly, Pratchett endorses the view that the individual knows what is right and good and that given time and courage will come to the realisation that injustice requires action and that such action will need the strength of a few brave souls to manifest.

For purposes of this article I have chosen to demonstrate how this might be done with reference to the book *Snuff*. This popular book sold 55000 copies within the first three days of its release. It is entertaining and captures the reader's imagination. Thus, if students were to be encouraged to read this particular Pratchett book they would be exposed to some fundamentally important legal issues whilst engaging in the pleasure of reading a well-written book.

Legal issues that the book engages with include but are not limited to, the rule of law, jurisdiction, dignity and equality, non-discrimination, the concept that punishment must fit the crime²⁴, the principle of non-retrospective application of law and legal dynamism.

The book is rich with social issues which the law must address. Each reading reveals new issues. The author uses his light-hearted story to bring discrimination, apathy, morality and social values into stark focus. Pratchett cleverly uses empathy to align his readers with his views on the equality of all, the importance of the supremacy of the law, the need to question the morality of our actions, and the responsibility of every person to act wherever injustice exists.

Even more importantly in my opinion, he highlights the fact that discrimination wears down the down-trodden until they internalise the sense of inferiority accorded them by

²³ For a very brief and simplified overview of the distinctions between the social contract theories of Hobbes and Locke, see *Locke versus Hobbes* available at <http://jim.com/hobbes.htm>.

²⁴ See the introductory quotation to this article.

society and that there is a responsibility on all members of society to ensure the self-worth of all.

Pratchett is critical of the attitude of the privileged in society that hide behind the law to further entrench inequality. He is equally critical of those who, although not in privileged positions, benefit from entrenched structures and claim to be powerless to do anything to change those structures.

Through his protagonist, the author stresses the fundamental importance of rule of law, the need for all to address injustice, and the folly of basing ones judgments on appearances. Pratchett elicits the reader's empathy for the underdog and fires up her sense of indignation and injustice towards an unequal society in which certain individuals regard themselves as above the law. The author also clearly illustrates how any changes in the law, brought about to deal with newly perceived and deeply felt inadequacies of the law that regulates society, must be proscriptive and not retrospective in their effect.

6. Conclusion

There appears to be no cogent reason why the pairing of fiction and non-fiction reading cannot be used as an effective method in teaching young adults. It is not proposed that learning the law can take place solely through reading fiction, simply that learning can be spiced up by using fiction as a prelude to teaching legal concepts, skills and processes. Pratchett's astute observations about society, the role of law and the need to bravely address injustice wherever we find it could be meaningfully used by legal academics to enhance their teaching and to make the lessons they teach more palatable for the student whose day could be brightened by confronting the most serious social concerns with a pinch of humour.

Pratchett's works address some of the most fundamental constitutional issues that confront South Africa today. For this reason it is suggested that *Snuff* and other such works, could be meaningfully used in the South African legal education context to help form a social conscience in first-year law students, preparing them for a more serious education in how the law can address the human condition with which it is confronted.

Abstract

Justice, as a concept, is the foundation of the law. In this article the importance of the concept of justice and how the approach to justice is necessary to temper the law is discussed with reference to Lon Fuller's Case of the Speluncean Explorers and John Rawls' "original position". The article then proceeds to discuss the increasing need to establish a social conscience and sense of justice amongst South African law students whose under-preparedness for tertiary education acts as a barrier to accessing complex academic materials. The article suggest how, relying on the principles of the Law and Literature Movement, Terry Pratchett's insightful social commentaries embedded in his fiction writings might meaningfully be drawn upon to instil both a love of reading and an insight into the human condition in law students.