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TEACHING ABOUT JUSTICE THROUGH CREATIVE STRATEGIES

ANTHONY G. AMSTERDAM¹

Let me start with the case law on my subject. *In re Cardwell* is directly on point. It provides an inspirational example of the ways in which important new law can be made even by the humblest and most unlettered of litigators.

The case apparently began when two prison writ writers discovered an outdated copy of *Corbin on Contracts* on the back shelf of the prison law library. Having mastered it, they filed in the United States Court of Appeals for the Ninth Circuit a petition for a writ *Causa et Origo est Materia Negotii*.² The petitioners prayed that the court grant the writ in the light of their "indigent circumstances, to show that the laws are for all[,] the nobly born, the well connected and those of grosser clay, in the instant action[,] persons of a different race than the majority community."

Somewhat puzzled, the court consulted *Black's Law Dictionary* and concluded that the petitioners had correctly translated *causa et origo est materia negotii* as meaning "the cause and origin is the substance of the thing." The court ruled that "[t]here is no such thing known to our law as a writ 'Causa Et Origo Est Materia Negotii.'"³ It went on to consider the petition as one for a writ of habeas corpus and denied relief.⁴

So far so bad. But the passage in the court's opinion containing the holding just quoted occupied a separate paragraph. So when West Publishing Company printed the opinion, it had to have a separate headnote with a separate keynote number. Thus we find that the first headnote in the reported case reads: "Courts [keynote number] 404: There is no such thing known to the law as a writ 'Causa Et Origo Est Materia Negotii.'" Then, of course, this important point of law had to be included in the digests. And so today, if you look in the annotations to 28 U.S.C. § 1651--known to you civil rights litigators as the all-writs section of the federal judicial code--you will find that annotation number 281 is captioned "Causa Et Origo Est Materia Negotii." One case is collected under this title. The annotation reads: "There is no such thing known to the law as a writ 'Causa Et Origo Est Materia Negotii.' *In re Cardwell*, C.A. 9, 1957, 256 F.2d 576."

Given the nature of the legal institutions that produced *In re Cardwell*, the emergence of the *Cardwell* decision as the leading case on its subject is quite

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² *In re Cardwell*, 256 F.2d 576 (9th Cir. 1957).

³ *Id.* at 577.

⁴ *Id.*

understandable. One needs only start with conditions of grinding poverty and a barbarously harsh criminal code, then add the need of West Publishing Co. to turn a tidy profit on the sale of annual pocket parts to big law firm libraries. Sound economic theory dictates that the law firms will have to make shelf space for these supplements by donating their old contracts treatises to the unbudgeted libraries of the state penitentiaries, particularly if they are given tax incentives to do so. Thus, even someone as economically unsophisticated as I am could have predicted the emergence of the *Cardwell* rule.

But, with all respect to Judge Posner and the Economic Epiphany, I submit to you that the rule of *In re Cardwell* is substantively wrong. And what I want to do today is to ask you for your help in proving that the case was wrongly decided.

Many of you have been doing this kind of thing for years. Critical Legal Studies specifically and deconstruction strategies generally have accustomed us to the notion that causes and origins are the substance of most things—that *causa et origo* is indeed *materia negotii*—although the legal academic power structure still remains largely of the Ninth Circuit view that no such writ is known to the law. Those of you who represent or speak for the deprived and the despised have argued repeatedly, with varying degrees of success, that causes and origins rather than the doctrines which disguise them are the heart of everything important.

In any event, I find myself in a room filled with some of the most profoundly creative minds in the country, and it would be a crying shame for me to talk at you for my allotted time, as though I had something special to contribute that you do not. Instead I will ask you to join me in creating my talk, through a form of colloquy. I am going to tell you a story about causes and origins. Then I'll ask all of you to talk about it in groups and to work collectively to turn my story into an instrument that we can use to understand some part of the substance of the thing with which this conference on justice is concerned. I hope that each group will choose a *rapporteur* and that the *rapporteurs* will share with the Conference the meaning that your group has made of my story.

The story itself is one of humankind's creation myths, dating back in this particular form more than 4,000 years. As I tell it, you will recognize it as a variant of other creation myths which you know well: stories about the Gods and the Titans, about the One God and the Rebel Angels, about Prometheus Bound and Unbound. But I ask you to listen carefully, please, to the details of my version, which is the tale told of the God Marduk in Babylon. Building on its details, I will ask you to use this particular creation story to illuminate and explain any one of four topics—and the first job of each of your groups will be to decide which topic you want to use the story to illuminate.

The four topics are: (1) the role of law in American society; (2) our society's conception of justice; (3) the predominant style of law teaching in the United States today; and (4) the predominant characteristics of contemporary mainline legal scholarship. Assuming that the world in which these institutions flourish was created by the process that the story of Marduk relates, how does one account for the observed characteristics of the institutions? What light does the Marduk story shed on these four institutions?

Now, you may think that any connection between Marduk and these legal topics is far-fetched to start with. But let me remind you that Khammurabi,

King of Babylon, perhaps the earliest known maker of human laws, did not think so. In the epilogue of the Code of Hammurabi, he enjoins the kings of all future time to observe the words of righteousness that he has caused to be engraved in stone. They are not to efface his judgments or the decisions he has rendered. If they heed his words, justice will be theirs, and long life; they will root out evildoers and promote the welfare of their people. But if they overrule his words, they will be cursed by the gods, and their reign will be destroyed.

Hammurabi seems even more sure of all this than Justice Scalia. The reason for his confidence appears in his prologue. For he tells us there that when Anu, the Lord of the Heavens, and Enlil, the Lord of the Earth, gave the rule of all mankind to Marduk, when they first pronounced the name of Babylon, then too they called Hammurabi to be king, to cause justice to prevail in the land, prevent oppression of the weak, and lead humankind in service to the gods. Hammurabi thus links his authority and his destiny to Marduk's. But who was Marduk?

In the beginning, so the story goes, there were Apsu and Tiamat, male and female respectively. This was before there was heaven or earth, so when Apsu begat children and Tiamat gave birth to them, there was no place for them to be except within the bodies of Apsu and Tiamat themselves. Thus, god-children grew in Apsu and Tiamat, the first of whom was Mummu, the vizier of Apsu. Then came Lahmu and Lahamu and Anshar and Kishar and some other siblings with whom I will not bore you except to say that they multiplied; and Anshar begat Anu, and Anu begat Ea, and Ea begat Marduk.

At this point it was beginning to get pretty crowded inside Apsu and Tiamat. Apsu complained to Tiamat that he could no longer rest by day or sleep by night, and he proposed that they destroy all these little gods and get some peace. Apsu was apparently not much concerned with the distinction between being and non-being, inasmuch as he and Tiamat encompassed all such opposites. So he suggested, cold-bloodedly perhaps by our lights, that the kids be drowned. Tiamat opposed that idea, saying that parents should be long-suffering with their children. Tiamat embodied Chaos and could tolerate a whole heap of cognitive dissonance.

Apsu, however, was encouraged by Mummu to kill the lesser gods. Learning this, Ea led the gods in a new strategy. We are told that they took to silence, and sat quietly. Ea drew a magic circle of protection around the gods, shielding them from the power out there in the bodies of Apsu and Tiamat. Then Ea recited a magical incantation that put Apsu to sleep; Ea loosened Apsu's chinstrap and put Apsu's tiara on his own head; Ea slew Apsu and built his dwelling place on Apsu. Ea subjugated Mummu, putting a nose-rope on him.

Now Anu, by begetting the four winds and bringing dirt to the surface of the waters, disturbed and divided the primal waters which had previously been everything that was. Tiamat was troubled, and her spawn repeated Apsu's complaint that it was no longer possible to get any rest and sleep with all these gods bustling about. Feeling guilty that she had not marched at Apsu's side when he went against the gods and was slain by Ea, Tiamat roused herself into battle fury. She gave birth to eleven forms of monsters--from storm demons to serpents filled with venom instead of blood. Her first born was Kingu and he became her consort. Incited by Kingu, Tiamat and her spawn prepared to wage war against the gods.

Ea called Marduk, his son, to be the champion of the gods. Marduk agreed, but on condition. Before he would take the field, he insisted that Anshar, now the senior living divinity, convene the gods and declare Marduk supreme. Henceforth, Marduk--not Anshar--was to fix the destinies of the gods by utterances, and whatever Marduk created would remain unchanged. Anshar did this; the gods convened and set Marduk up on a throne, declaring that his word would henceforth be Truth. When Kingu and the furious Tiamat came against the gods, Marduk accused them of stirring up strife and chided them for the disorder of their ranks. Tiamat literally went bughouse, shuddering and screaming wildly. Marduk caught her in a net and killed her.

Then Marduk split Tiamat in half like a clamshell. From one half, he made the dome of the heavens. I do not recall that we are told what he did with the other half. (This was before the days of recycling and similar conservationist ordinances.) Marduk proceeded to define the year and the zodiac, and the number of days in the year, and the orders of the planets and the stars, and the orderly progress of the moon through the station of the sun.

Finally, Marduk created humankind. His purpose was to make a race of slaves, required to serve the gods, so that the gods would be free to repose at ease. You may remember that the right to repose at ease was all that poor Apsu had ever wanted in the first place; and the gods, after disabling him and rendering him helpless, had killed him for it. But this cynical observation is mine, not the scribe's. Like most myths of its kind that have survived, this one is told from the viewpoint of the victors. Marduk is presented as resplendent and entirely virtuous.

But he did need a little blood to create people. So the gods brought the vanquished Kingu before Ea in bonds. Kingu was killed and his arteries were slashed. From the blood, humankind was made. Then Ea ordered humankind to obey the gods under Marduk, and the gods were indeed released from all labor, as Marduk had desired.

Now, please take the Marduk narrative, and decide within your group first of all which of our four topics you will use the narrative to illuminate. Discuss what the myth tells us about that topic. If the Marduk story does indeed explain the creation of our world--and it certainly might, inasmuch as so many civilizations have some similar creation myth--then it should account for the state in which we find the world on such matters as the role of law in American society, our society's conception of justice, and the dominant styles in law school teaching and legal scholarship.

Choose a *rapporteur* who will summarize your conclusions on your chosen topic. Your discussions need not, of course, accept the notion that the Marduk myth satisfactorily explains the topic. If you can find any aspects of your topic that are *not* adequately accounted for by the myth, you should discuss those too. And do not forget that the version of the myth that I have given you, which came from the library of King Ashurbanipal of Assyria, may be a bit one-sided. Certainly, the opinions of Tiamat and Apsu concerning the relevant events have not been well preserved in this version. You are free to imagine them.

Rapporteur # 1

We saw the myth as helping to explain the role of law in American society. Those who have power, or the arrogance to proclaim themselves the supreme

leaders, adopt rules to try to assure their security and power and ease of life. But they discover that they also need underlings--subject people in addition to rules--to truly establish their security and maintain their power. Those underlings, however, do not necessarily choose to follow the rule of the gods. This sets in motion a sort of constant cyclical process of throwing off gods and then raising to godhead whoever has the arrogance or the power to proclaim themselves the new supreme beings and to set up their own set of rules. Thus, the whole process starts all over again. This is the origin of the cyclical theory of law, the cyclical empowerment theory of law and history.

Rapporteur # 2

We said all of the above. And whether you can see or hear or even understand these names when they are presented orally makes a point about perfection and control and predictability. When we discussed it, the way the story was told--the unfamiliar categories, the sort of neat little flow charts, all of that process you used to set it out--illustrated to me in my own law school experience as a student: the predicament of being clueless as to what was going on. It brought back the feeling of a lack of context in which to place anything, and the feeling of lack of control that students have. Then the drawing of the circles in order to protect, and the silencing, came to mind, particularly in terms of legal scholarship. That applies to all of the topics. So much for the Babylonian gods!

Amsterdam

The theme of the circle of protection against chaos does apply to all the topics, doesn't it? One of the most striking things about even our conception of justice is that the very act which gives rise to a conception of justice for ourselves limits the extension of justice to others. There is always a banished race of rebel angels, another race that has been excluded from our protectively defined world. The concept of justice and the need for justice arise out of the act that excludes that group.

We do much the same thing in law school, and we do much the same thing in our scholarship. The difficulty is that the establishment of order--which seems to be our precondition for being able to handle the chaos of reality--gives rise to a technocracy of those who can manipulate the ordering concepts. Whatever they cannot manage is excluded from the circle. Thus we say: "Forget about the welter of things, forget about everything except the facts that can be described by numbers and by findings and by theories or prescribed by rules and doctrines. We will draw a circle *here*, and all else is *out there*."

One of the great strengths of American legal scholarship is its traditional claim that scholarship means attending to everything relevant. Of course, in order to do that in a world in which facts and realities are embarrassingly multifarious and interconnected, you have to define the scope of relevancy so as to exclude virtually all of them. So the focus of our attention, whether one is talking about law or about how we teach or about scholarship, is bounded by a very small and artificial circle.

Rapporteur # 3

Rebelling as a matter of power gets translated into a normative claim of right, which is one way of thinking about American values. Might makes right. We were struck by the lack of morality that pervaded the whole story. The goals were personal pleasure and essentially lack of work--finding or making other tools to do your own labor so that you did not have to do anything. The methods chosen by both groups in the Marduk story were killing, drowning, murder. There did not seem to be much morality to it at all. The only "should" that Tony Amsterdam used in the whole story was Tiamat telling her husband, "No, we should indulge the children, we should let them have some room." For that she got killed and made into the universe. The moral of the story with regard to justice so far as we were concerned was that justice does not deal much with morality. Or perhaps we have to put our morality into the world to make it just, to speak of justice.

Rapporteur # 4

We took it as an example of the predominant style of teaching in law schools today. We did that because of our sense that you were making a point to us as progressive teachers about how, notwithstanding many of the things we say and do, nonetheless we often are indistinguishable from many of our colleagues whom we often criticize because they lack a political or progressive perspective.

Having been in the back of the room and finding it hard to hear, our group essentially did not hear. We totally tuned out and during our discussion our feeling was a little bit of annoyance and anger because here was somebody whom we really wanted to hear in terms of what he thought about the issues of the conference, and instead we were being brought into a myth that would give us no idea that anything that Tony Amsterdam was saying had anything to do with the way he has been his entire life--which is, after all, what was so compelling to us about having the chance to listen to him. So the point is that if we behave like other people and do not bring in our experience and instead start doing charts with lots of facts and things, it often does not get heard at all, and then we lose the power of who we are.

Amsterdam

I do have the feeling that all of us in our teaching come to replicate the very models that ideologically offend us. It is remarkable how infrequently we bring students into a shared process of thinking problems through. To some extent, of course, that is inescapable in law school teaching, because we have to bring the students up to speed technically. Law school education is in many ways undergraduate education, not graduate. When they first come in, law students have no technical competence at all.

But what this excuses our doing, and what we end up doing, is spending all of our time cramming technology into students and thereby teaching them something that we think we understand and can get them to accept. There is very little effort to grow together with them to solve problems that the faculty have not already solved. I do not mean that there is none. I am sure that there are some courses that do this. But when we look generally at legal education, what we see is a communication to students of and through a highly

authoritarian style of teaching. The very nature of law comes to be viewed as didactic. There is no way for real conversations to develop in the law.

Alternative approaches may be possible. This was brought home to me recently when we tried an interesting new game in one of our courses at NYU. We play the game in the first hour of a quasi-clinical course that examines the implications of evidentiary rules for litigation planning. We started to play this game originally because the first class is taught so soon after the beginning of the semester that the students don't have time to prepare for it. We needed something for the first hour that the students didn't have to prepare for. So we invented the following party game, which is called *I Spy*.

The course is taught by two faculty members. This year, Ron Noble is one and I am the other. We tell our 32 student class that we would like to begin the course by playing a party game for an hour. Ron says: "It's now five after 1:00 p.m. I'm in my office and I have student visiting hours. I encourage students to come in and talk with me about any subject that is appropriate for a student to discuss with a faculty member during office hours. That includes any questions about the law or about law school courses, anything of that sort. Remember, though, when you come in to talk with me, that I have limited time. I will not take well to people who just come in about nothing and waste my time. Also, I have a very definite sense of proprieties, and I would not welcome people coming in and asking me about things that are not proper for a student to ask a law faculty member about."

Ron steps out of the room for a moment and I say: "Now I am going to hire you to be a spy for me. This semester I am co-teaching a course called *Evidence: Litigation Planning* with Ron Noble. I have my doubts whether he is looking forward to co-teaching with me, and I'd like to find out how he feels about it. What I want you to do is to go in and talk with Professor Noble during his office hours, and find out. I want you to get me information on two subjects. First, does Professor Noble expect to enjoy co-teaching with me or not? Second, why? What is it exactly that makes him either like or dislike the prospect of co-teaching with me? Any question you ask Professor Noble which is calculated to produce information on either of these two subjects gets three points. I recognize, of course, that you may have to ask certain other questions as lead-ins to the three-point questions or as cover-ups for the three-point questions. Any question which is an apt lead-in or cover-up gets one point. But any question that you ask which is neither a three-point question nor a one-point question gets you zero."

Ron comes back in, sits down, and says: "My office hours have begun. I'll take volunteer visitors. Whoever is not visiting should listen and keep score of how my visitors are doing. Whenever a visitor says or asks something that will really irritate me, really drive me up the wall, he or she loses three points. Things that will mildly irritate me cost the visitor one point. All other questions are scored as zero."

The students need not know a single rule of evidence to play *I Spy*. What they do need to do is the same kind of thinking that is necessary to frame courtroom questions which are unobjectionable under the evidentiary rules of relevance and probative-prejudice balance--for example, Federal Evidence Rules 401 and 403--and which will get where counsel wants to go without unduly riling the judge or jury. The students have to think simultaneously

about the reasons for a question, the justifications for it, and the difference between these two things. Because the students do not need to know the rules of evidence and cannot view the exercise as testing them out on the rules, they promptly gear into this kind of thinking and begin to do it with resourcefulness, imagination and creativity. They listen to one another and they learn from one another.

For example, one student says: "Hi, Professor Noble. I see that you and Professor Amsterdam are co-teaching *Evidence: Litigation Planning*. Another section of the course is being taught by Professors X and Y." [This is accurate.] "I'm trying to figure out which section to take, and I wonder if you could tell me something about the differences between them?" There follow a lot of one-point questions and some threes. The idea takes hold, and other students work to improve upon it. One says: "Hi, Professor Noble. I'm a second-year student and I'm thinking about whether I should take the *E:LP* course this year or next year. I've heard rumors that Professor Amsterdam may not teach it next year, and I was wondering how much difference that will make in the course?" Quite a number of one- and three-point questions follow. Then another student takes over: "Hi, Professor Noble. I've found in both college and law school that sometimes co-taught courses can be very exciting and dynamic, and sometimes they can be awful. A lot depends on whether the faculty who co-teach them have complementary or warring perspectives. Now, I know that you were formerly a prosecutor and Professor Amsterdam was a defense lawyer, and I was wondering . . ." Not only do a lot of three-point questions follow, but the students generally seem to be more adroit and creative in working with the technical rules of admissibility of evidence and their caseplanning consequences later in the course than they were before we began to play *I Spy* in the first hour.

I Spy shows that we can sometimes best gain insight into a subject by talking about another. Certainly, one of my reasons for asking you to discuss the Marduk myth today was to raise questions about our teaching. We are law teachers, therefore we talk about law in our teaching. We are expected to do so and we will cross strongly held expectations if we do not. There are costs and benefits, frustrations and surprises down that path. But it is worth considering whether we might not pick up added understanding on the way. Talking about myths, for example, may require us and our students to confront ideas that are all the more useful for an understanding of law because they seem quite alien to it.

Consider the anger and rage with which many of us watched the Clarence Thomas hearings, offended by what was happening to Anita Hill. Then remember that the Anita Hill story is not a new story. It is almost twice as old as our Marduk story--about 8,000 years old. The form in which you probably know it best, if you will forgive me for dropping the arcane names of a few more gods, is the story of Persephone. Persephone was raped and abducted by Hades, the King of Hell and the brother of Zeus. Persephone was Zeus's daughter. When her mother Demeter went to complain about the crime to Zeus, Zeus had three reactions. You will recognize them and the Senators who best expressed them. Reaction number one: "Aw, hell, it wasn't a crime of wickedness, it was a crime of love." Reaction number two: "Yes, but remember who Hades is. He's my *brother*." Reaction number three: "And if Hades hadn't

lost out when we cast lots to be top god, he'd be sitting on my throne right now." This third reaction comes as close as you will ever catch Zeus coming to saying, "there but by the grace of God go I."

Then what does Zeus do? Zeus does not want to talk about the crime against Persephone. He wants to focus on *her*. What he says is: "Yes, she can come back and live in heaven again, but not if she ate anything while she was in hell. Not if she gained anything from her association with Hades. Because if she was an opportunist, if she did not leave immediately and give up her career, then we can't take her back into heaven. *She* is impure." At this, some snitch who looked rather like a few of the witnesses at the Thomas hearings proceeded to reveal that Persephone had in fact eaten seven pomegranate seeds while in hell. Seven lousy pomegranate seeds. Whereupon, she was condemned to spend half of every month in heaven and half of every month in hell for the rest of her life.

Perhaps one does not need the myth of Persephone to understand the Anita Hill story. But it helps. It helps us to look at our legal institutions from outside the narrow, closed circle in which most of us operate most of the time or believe we operate. Part of the problem is that all of our legal institutions and much of our rationality are the products of an evolution that is only several thousand years old. But we have a set of instincts and a neurological system that have evolved over more than a million and a half years. Human beings became human and they still live in the shadow of the cave. Our instinct remains to draw the line against chaos. That line is the line to which the light of our small, comforting fire reaches--the line beyond which there be Tigers, there be Cavebears, there be all those other demon races. Yet stories about what lurks beyond the line turn out to be stories about ourselves. Maybe we should pay more attention to them. Maybe that would help to broaden our conceptions of justice.

