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Imagining "Law-Stuff" at the Newark Earthworks

For those who primarily study the earthbound works of people living today or in the relatively recent past through their written words, the Newark Earthworks initially presents an undeniably awesome but frustratingly silent landscape. Who were these workers of the earth who looked to the skies? How might we conjure their lives? How might we, like our nineteenth-century spiritualist ancestors, make the dead speak and tell us their secrets? What does it mean for our work when all of the words are supplied by us, not by them? Who can speak for them?

As one reads the work of archaeologists and astronomers, views efforts to reconstruct an understanding of the earthworks in their own time, and listens to current would-be representatives of those builders, a possible interlocutor emerges out of the mists of time—and the miracle of contemporary video technology—to populate our imagination. We are invited by the astronomers to stand on Observatory Mound in the avatar of a native inhabitant and imagine ourselves in another world—some two millennia ago—a world that is visible to us today principally in the traces of massive earthen constructions with their seductively precise astronomical alignments.[1] We are led to see this iconic figure, the shaman, as the natural denizen of the space and the natural leader of his people.[2]

A local Ohio reporter describes a recent visit to the Great Circle: "On this mound, a Native American shaman might have stood above drums drumming and rattles rattling and hundreds of people standing in the earthen circle below, all waiting for the moon to rise beyond the circle, beyond the adjoining octagonal mound, ascending above the horizon."[3] We were introduced to the shaman first at the Octagon, but now he has moved to the Great Circle—as though he is the only individuated human who can be imagined being in this place.[4] Newark. Hopewell. How little any of these names tell us.

The seemingly neutral geometric and local contemporary designations are at once simply descriptive and confoundingly opaque.

The opacity seems to lead irresistibly to the sacred—another word that stands in for the limits of our knowledge and our experience. We are invited to think of these spaces as mysterious and sacred, places that were once, and perhaps still are or should be, dedicated to burial or worship or pilgrimage or heavenly contemplation or communication with the divine. The plea is that they now deserve protection because of their enduring sacred value, the natural wonder of these spaces, their connection to historic tribes or local and national history, or, perhaps, their link to a worldwide cultural heritage—now threatened. But often it seems it is simply because we moderns are so desperately in need of the sacred.

There is by now a rich literature analyzing the seemingly endless appropriation of Indian things for majority purposes.[5] One strand of this history of exploitation is the figuring of the Indian as religious. While sometimes that figuration has been for the purposes of rejecting Indian religious ways as idolatrous, it has also been for the purpose of parasitically supplying a missing piece. The notion is that a sense of the sacred is something precious that we lack, something that Indians have and that we can get from them. Next to what Mesoamerican scholar Kay Read calls the noble and the nasty Indian in the imagination of non-Indians is the shaman—the holy Indian.

Peering through the mist of time and mystification, who else might we see? Are these places best thought of as religious places, as "ceremonial centers," as places of pilgrimage? If we stand with the members of the imagined assembled crowd, how can we imagine the work that they did? How did they live and govern their lives? What role did law play in this place?

Law Then

Native American legal studies have flourished in the last few decades. The rich resources of oral history, ethnography, and archival research, along with an increasing number of legally trained Native scholars, are yielding an ever more complex understanding of the legal lives of preconquest peoples and the legal borrowings, impositions, and transformations that have occurred in the subsequent half millennium. The Newark Earthworks are a part of this story.

It is not a simple task. How do we move past the figure of the shaman to the kinds of events and transactions that would be of interest to a legal scholar? Lacking archives and with a highly attenuated oral history, the political and

legal ways of those who lived in much earlier times seem still out of reach —just beyond our view.

I begin from the assumption that where there are people, there is law and legal jurisdiction, not just because I am a lawyer and lawyers are naturally hegemonic in their inclinations, although that is certainly the case, or because we live in a peculiarly law-obsessed time and place, although that is also the case, but because noticing law tells us something important about human societies. Human life is always everywhere subject to rules and governed by those who know how to make and break them. All human societies we know about have had rules about marriage, burial, trade, governance, food, and crime, among many other matters—including religion—and they have all had ways of settling disputes that inevitably arise. As Robert Cover says, "We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."[6] And by "we," he means all humans. Cover also believed that "no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[7] Law is universal, and law is universally socially and culturally embedded. Everywhere there is what Karl Llewellyn and Adamson Hoebel in *Cheyenne Way* called "law-stuff."[8]

So how do we conjure "law-stuff" in this particular place? Who might there be there to do the law jobs? And what roles might we imagine for the assembly?

These earthworks are believed to have been constructed during the Middle Woodland period by a culture we call the Hopewell, a cultural efflorescence that centered in the Ohio River valley but whose catchment extended north into present-day Canada, west into what we call the Dakotas, east to the Delaware, and south to the Gulf of Mexico. The material record suggests that those who lived here were agriculturalists and that they had trade relationships that extended all over North America and into Central America. We don't know why they built these earthworks. We know that they are not burial grounds and that they are not defensive works. We are not sure where the people who built them lived. There is evidence of settlement nearby, but not enough dwellings have been discovered for the number of people imagined to have gathered in the Great Circle. Were these places only used at certain times of the year? Are the dwellings that have been found dwellings for caretakers or religious guardians? What do the roads that connected the Newark Earthworks to others in the vicinity imply about their activities? How do we put together the picture being developed by those archaeologists

who study agriculture and daily life with the picture being developed by those who study the earthworks and the archaeoastronomers?

Assembling the fragments of what one thinks one knows about any society into a picture of a whole society is always itself fragmentary and provisional. Furthermore, those who have tried to imagine the lives of Hopewell peoples, like other scholars, bring their own theories of what makes societies tick. Is life driven by economic considerations, or by power, or by reproduction? There are so many questions. But using the rich resources of legal history and legal anthropology, we can begin to make some educated guesses about how law might have worked in a society that apparently did not have an aristocratic class (we surmise that from the fact that burial mounds did not develop in Ohio until much later) but that may have had trade and other relations with peoples all over North America.

Let us go back to the Octagon and the figure of the shaman. Do we imagine him or her to have any relationship to law? If we move around the globe to Iceland at roughly the same time or just a little later, we find another such solitary figure standing before an annual assembly in a magnificent outdoor space. He is the lawspeaker of ninth-century Iceland.

Medieval Iceland was a society without "kings, counts, or monks" as William Ian Miller puts it.[9] It was a society without a state, but it was not a society without law or one without inequality and violence. Norwegian refugees settled Iceland in the mid-ninth century. Icelanders lived in dispersed households, the basic unit of social organization and legal personality, but were organized into a hierarchy of local chieftainships. They met once a year at the Thing, a national assembly that functioned as both the legislative and the judicial branch of government. (The Icelandic parliament is still called the Thing.) Provision was made in the law for care of the poor and compensation of loss from accident. There was no executive branch. Enforcement of decisions by the courts was by the litigants themselves through the elaborate protocol of the feud.

At the annual Thing, the Allthing, the lawspeaker, the only paid officer of Icelandic government at the time, recited the oral law, standing on a prominent outcropping, the Law Rock.[10] He was the repository of the law. It was his responsibility to know the law and consult with other elders if he needed to fill in bits of his knowledge or there was some ambiguity. It is said that when Iceland converted to Christianity around 1000 CE, the lawspeaker of the time, in response to the arrival of Danish missionaries, lay under his cloak for a day and a night and then rose and declared that henceforth Iceland would have

one law and one religion. Until that time there had been both pagans and Christians in Iceland.

Miller describes the intensive event that was the annual Thing:

> Even though Thing meetings accounted for but three weeks of the year, those weeks were more intensely lived and more anxiously anticipated than any other random three weeks. These gatherings were a time for making and renewing acquaintances, contracting marriages, and exchanging invitations to feasts. Above all, the Things were the arenas for intensive legal action; they were the locations where successes and failures were unambiguously on display, where prestige and honor was competed for, and won and lost. Reputations, if not exactly made there, were on display there. The Thing was the one place where a large audience was assured and hence the stakes in social interactions occurring there were higher.[11]

Miller is not so interested in religion as law, so he does not mention the religious event that the Thing must have been as well.

We know about medieval Icelandic law because of the sagas and law codes that were written down four or five centuries later. The law of the Thing was a largely oral culture. The Icelanders' law was a law without writing. What we have—maybe only what we always have about times and places before we live—is echoes of their words. Theirs was a society without a state and without writing but not, importantly, a society without law. Using mostly only the sagas, Miller reconstructs how Icelanders managed their society using law, without any king or sheriffs. The community saw that the law was enforced and justice done. It is a very remarkable story.

How might these few details about Icelandic law help us to think about Hopewell law? Like the Hopewell in the Middle Woodland period, the Icelanders had no real lordship. It was not until later that burial mounds, the signature of aristocratic culture, began to be built. Like the Hopewell, the Icelanders were a pastoral and agricultural people who lived in dispersed settlements. Like the Hopewell, the Icelanders had dealings with their neighbors. They bought and sold things, exchanged gifts, settled disputes over injuries and insults. They punished miscreants. The penalty was fines or outlawry, although sometimes settlements were arranged. They were concerned with honor and prestige. And they were subtle experts at law and legal thinking. Like that of the Hopewell, perhaps, the time of this society was limited, giving way to the big men who began to get rich and build monuments to themselves. In the thirteenth century, Iceland became subject to the King of

Norway and became an increasingly hierarchical society with a larger division between rich and poor.

Since Miller's book was written two decades ago, much more has been written about the conditions and possibilities of government in stateless societies.[12] Thinking of law at the earthworks provides an opportunity to imagine how that might have been done in this place. If the earthworks were a place of periodic assembly of Hopewell peoples, it is not unlikely that it was an occasion for the settling of legal matters. We might imagine marriages arranged, contracts formed, and disputes arbitrated. And we might imagine that, like that of the Icelanders, the law that governed these events drew on understandings of the human person and society that were learned from narratives of the people's history and purposes. But the lawspeaker was not in charge of everyone. He was a resource for the law. It was his job to tell anyone who asked what the law was. There were juries and arbitrators to decide cases. Perhaps it worked something like this at the earthworks. For a time.

Does this imagined picture have any place today at the Earthworks?

Law Today

In June 2002, Barbara Crandell was arrested for criminal trespass when she entered the Moundbuilders Country Club to pray on Observatory Mound. Julie Shaw tells the story in the *Newark Advocate:*

> Considered by some Native Americans as an elder or grandmother, the 73-year-old woman of Cherokee descent regularly prays at the various mounds and earthworks in Ohio. "It's something made by native people, my people. It's a connection to my heritage, my race of people," Crandell said from her Thornville home. She has said that she went to pray at the earthworks on June 26 for the people affected by the fires in the West. She got tired and went to rest on the observatory mound, she has said. The observatory mound where she was sitting lies near the fairway to the No. 10 hole. Golfers on the 10th tee inside the earthen circle sometimes first shoot their balls toward the observatory mound, then on their next shots, try to drive the balls toward the 10th hole, which lies on the other side of the circle. According to Crandell's account, she was taunted by two golfers, then asked to leave by the country club's president, Skip Salome. Salome left and returned with two Newark police officers. After arguing with Salome and the officers, Crandell threw her cane at Salome, then was arrested and taken off the course.[13]

Crandell was convicted by a jury of criminal trespass. On appeal the court held that because the Ohio Historical Society is a private entity, her civil rights claim was not applicable, as there was no state action.[14]

Again we see the lone figure, the romantic hero of our imagination—and maybe of hers. But law is not a story of lone figures. Law is a social story. What law can we see at Observatory Mound today? Both public and private law governs her activities. There is the law of her religious tradition that compels her. Prayer is a rule-governed activity; rules determine what you say and where you say it, to whom it is addressed, whether it is silent or spoken, how your body should be arranged. There are also the rules of the golf course. And, like all places in the United States, the area encompassed by the Newark Earthworks is subject to a mind-boggling amount of government legal regulation, by the City of Newark, by Licking County, by the State of Ohio, and by the federal government, to start with. But there are underlying Indian land claims and international law haunting this place as well.[15]

Take the Octagon, where Barbara Crandell made her small act of protest, her claim to prioritize a law not of golf or of trespass but of obligation to the gods. Who owns this land? The area in which the earthwork we call the Octagon resides was given to the Ohio Historical Society in 1933 and leased by the Moundbuilders Country Club (a lease that has subsequently been extended through 2087). Modern legal title to land in this part of Ohio begins with the Northwest Ordinance and the Treaty of Greeneville that settled the Indian wars that followed the Revolution.[16] Ohio was the first of the western states carved out of the Northwest Ordinance to be surveyed and divided into homesteads. Various parcels were conveyed for various purposes. Present-day Licking County, where the Newark Earthworks are located, was part of the United States Military District, a portion of Ohio that was divided and given to continental soldiers after the war.[17] The City of Newark was founded in 1802. On what does all of this ownership rest? A murky and bloody claim to title founded in discovery and conquest, followed by treaties and purchases of dubious legality, subject to ongoing litigation.[18]

Widening the lens, we will see national and international legal regimes laying claim to jurisdiction. As others discuss in this volume, the land on which the Newark Earthworks stand is subject to federal legislation protecting Indian objects and remains, including the Native American Grave Repatriation Act. The United Nations Declaration on Rights of Indigenous Peoples announces the intentions of the world toward subject peoples. And finally the 1972 World Convention on the Protection of the World Cultural and Natural Heritage is enlisted to recognize and cultivate these sites.

How does one begin to imagine a law of the earthworks, a law particular to the earthworks that honors their history, in such a thicket of "law-stuff"? Is there a legal line to be drawn from the people of the Octagon to the people of Newark? Can we make the kind of connection that those who claim its sacred status imply? It is significant to remember that the Icelanders did not invent and maintain their law in isolation. Their law drew on the Nordic and Germanic traditions they brought with them, interacted with Christian laws, and was in ongoing and evolving negotiation with Norwegian legal demands. And yet the Icelandic parliament is still called the Thing and still traces its history to the lawspeaker and the Law Rock.

What does it mean to notice the multiplicity of law, to notice that whatever story it might tell itself, or that political theologians might tell, the state does not have a monopoly on violence or law. One version of legal pluralism, like religious pluralism, is the simple observation that there is a lot of "law-stuff," just like there is a lot of religion stuff—all jostling up against each other. Global legal history is being retold with these ideas in mind. The best new work on legal multiplicity shows how law is continually made.[19]

Indigenous legal studies are flourishing today around the world. Some of the most interesting of this work argues that sovereignty is not a zero-sum game. Rejecting the notion in political theory that sovereignty means absolute control over a particular territory, these writers are making the case that you cannot understand law with these concepts alone.[20] Building on critiques of sovereignty by scholars in both indigenous legal studies and others, Justin Richland, like Miller, shows us how the Hopi, without a state, make room for their law in a context of overlapping jurisdiction.[21]

Richland recounts the efforts of the Bureau of Indian Affairs in the 1930s to persuade the Hopi that they should reorganize as a "tribe," a designation that made no sense in the Hopi sociopolitical order because Hopi villages were self-governing and autonomous, and even within villages power was significantly dispersed. In Richland's telling, Oliver La Farge, representing the federal government, was eventually successful at overcoming Hopi resistance but only after significantly adapting his account to Hopi ways of government. Richland explains:

> Thus it was that La Farge faced not only the decentralization of Hopi communities into several villages, but the thoroughly ambiguous dispersal and diffusion of social power within each Hopi village into various clans, ritual sodalities, and their overlapping authorities when he first came to the

> reservation to proffer the BIA's idea of a single Hopi tribe under a unified tribal government. And the representatives of the various Hopi villages made sure to remind La Farge of this every time he spoke to them. Sometimes the questions the Hopi villagers put to La Farge were direct, as during one of his first meetings in the village of Shungopavi, where he reports that he was asked, "Was I sure this wouldn't hurt the clan organization?" and flatly told "We are already organized."[22]

Organization can take many forms.

Richland suggests that, rather than focusing on the limits to Hopi sovereignty, in the past or today, by focusing on "jurisdiction"—the reach of the law—one can see how a decentralized society like the Hopi maintains autochthonous legal and political ways within the limits of its sovereignty. Detailing several intravillage property disputes from recent cases before the Hopi tribal courts, Richland shows how disagreements over Hopi tradition provided the occasion for the tribal court to reinforce traditional Hopi practices with respect to the protection of traditional knowledge and how "tradition operates as a mode of jurisdiction, pointing up the limits of an emergent Hopi sovereignty and the potentiality for exceeding those limits."[23]

Drawing from these two brief legal histories—that of the Icelanders and that of the Hopis—one might begin to suggest a framework for thinking of law at the Newark Earthworks outside the constraining political ideology of the nation-state and empire. I am not suggesting that such horizontal and pluralistic ideas of law provide perfect justice but that understanding law this way allows us to see the people assembled at the Circle or the Octagon more fully. Not all societies are as law inclined as the Icelandic or the Hopi, but all the ones we know about use law to make a space for regularizing human relations, resolving disputes, and performing justice.

Conclusion

If we assume that all people have "law-stuff"—that is, that they have governments, rules that they live by, and a need for dispute resolution—we can begin to imagine some of the possibilities at the earthworks. Lacking writing, perhaps they had "lawspeakers" as the Icelandic peoples had, persons who were responsible for the oral transmission of the law. Perhaps they used the occasion of periodic pilgrimages or festivals or ceremonies to convene courts, to settle inheritance and descent matters, and to arrange marriages. Disputes

might have been settled by chiefs or law specialists of some kind. Oracles may have been consulted to resolve difficult evidentiary questions. In difficult cases, ordeals may have been used. Certainly there were institutions relating to property use, trade agreements, and practices of exchange. Perhaps taxes were collected. Perhaps executions were performed. Certainly all of these practices would have depended on and reinforced what we would call religious cosmologies and anthropologies. Perhaps the calendars they saw in the sky organized legal work as well as religious work.

Perhaps over time these religious cosmologies and anthropologies changed or were refitted as political and legal practices changed. If we imagine shifts to more centrally organized political formations from more dispersed settlements, maybe the new chiefs or kings produced legal codes and began to insist that legal decisions conform to royal purposes. And if there was a hierarchical order, for example, as Steve Lekson suggests was the case in Chaco Canyon,[24] perhaps there were sumptuary laws as in the Aztec capitals, laws that regulated what commoners could wear. But everything we know about such changes suggests that there was ongoing pushback and the continuing presence of legal pluralism even in these kingdoms and empires.

The modern effort to separate law and religion has turned out not to work very well. As Bruno Latour might say, we have never been modern.[25] Separation has only produced hybrid forms.

We know that there is a lot of law that does not fit the statist definition of law: customary law of various kinds, transnational law, religious law. But we find it hard to imagine law without the apparatus of the modern state. Why would people obey law that is not backed up by the violence of the modern state? Where does law come from if not from the modern legislature?

Newark invites us to think in the gaps of the American legal imagination. And if one of the purposes of preserving these places is to educate our children about other ways of living, perhaps we can see a lawspeaker beckoning to them as well as the shaman. Imagining the people who built these remarkable places as immune from law does not serve them or us. It reproduces a postcolonial politics in which native peoples are idealized and infantilized. Why should we not imagine them as having a sophisticated law to match their sophisticated astronomy and building capacity? Why should we not imagine a law of Newark that was not produced by the UN or the US government?

Notes

I would like to thank Kay Read and Kathleen Self for teaching me some things about how to think about oral societies.

1. See Hively and Horn, "Hopewell Cosmography at Newark and Chillicothe, Ohio."

2. Center for the Electronic Reconstruction of Historical and Archaeological Sites, *EarthWorks*. Thanks to John Hancock for providing me with a copy of this CD-ROM. See also Hancock, "The Earthworks Hermeneutically Considered."

3. Julie Shaw, "Mounds Home to Varying Opinions: Earthworks the Site of a Curious Dilemma," *Newark Advocate Reporter,* Aug. 11, 2002, http://www.newarkadvocate.com/news/stories/20020811/topstories/409718.html.

4. For a recent exploration of the problematic figure of the shaman, see Kehoe, *Shamans and Religion*.

5. M. Brown, *Who Owns Native Culture?*

6. Cover, "The Supreme Court, 1982 Term—Foreword," 4.

7. Ibid.

8. Llewellyn and Hoebel, *The Cheyenne Way,* 42.

9. William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago: University of Chicago Press, 1990).

10. William R. Short, "Viking-Age Laws Legal Procedures," http://www.hurstwic.org/history/articles/society/text/laws.htm.

11. Miller, *Bloodtaking and Peacemaking,* 21.

12. See, for example, James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, CT: Yale University Press, 2009).

13. Shaw, "Mounds Home to Varying Opinions."

14. *State v. Crandell,* 2003-Ohio-2512.

15. For a marvelous introduction to the backstories of Indian law and federal Indian law, see Goldberg, Washburn, and Frickey, *Indian Law Stories.*

16. Knepper, *The Official Ohio Lands Book,* is a thorough account of the history of the appropriation, surveying, and granting of land in Ohio.

17. Ibid.

18. R. Williams, *The American Indian in Western Legal Thought*.

19. See, for example, Benton and Ross, *Legal Pluralism and Empires, 1500–1850.*

20. See, for example, Bruyneel, *The Third Space of Sovereignty.* Frank and Goldberg, *Defying the Odds,* uses a dual concept of sovereignty, political sovereignty, and cultural sovereignty to describe the Tule River Tribe's autonomy.

21. Justin B. Richland, "Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty," *Law & Social Inquiry* 36 (2011): 201–34. Richland cites Bradin Cormack's important book *A Power to Do Justice.*

22. Richland, "Hopi Tradition as Jurisdiction," 14.

23. Ibid., 220.

24. Lekson, *A History of the Ancient Southwest.*

25. Latour, *We Have Never Been Modern.*