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Stone Walls, Cities, and the Law

This article discusses the significance of stone walls as historic structures and reviews some of the relevant laws and ordinances that regulate them. The authors argue that there is legal precedent for treating stone walls as "structures" per the National Historic Preservation Act; they advocate for new laws and amendments to existing state and local laws to ensure their preservation.

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> "We are fragments of the universe, Chips of the rock whereon God laid the foundation of the world...."
>
> — Helen Keller (1910, 9)

> The way granite tugs, tugs the arms, the back that strains to lift, the way granite hugs the earth….
>
> — Daniel Hoffman (2002, 9)

The association among the law, stone walls, and cites dates back thousands of years. In the ancient Near East, for example, the Semitic roots qr, 'r, g-r, and s[/t[r are all cognates,[1] and the biconsonantal words containing these roots (e.g., stone, rock, wall, city, cave, mountain, etc.) belong to the oldest stock of the Semitic vocabulary (Dreyer 1971). In fact, the actual meaning of the word "city" or "citadel" as a permanent communal settlement irrespective of size may have developed from "wall," because a temporary settlement was changed into a city by the erection of a formal boundary or fortification wall, viz., "'what is protected by a stone wall' or what is built on the rock or the mountain …[is a] 'city, citadel'" (Dreyer 1971, 21, 25). The two essential characteristics of such settlements were the surrounding stone wall (or walls) that protected the settlement and the administration of justice by the elders or appointed judges at the city gate (Dreyer 1971).[2] A walled enclave without laws would not enable a "community" and, with no well-defined and protected "commons," laws would be at best unenforceable, at worst inapposite.[3] Such walls, however, did not ensure environmental harmony — the Arcadian myth notwithstanding[4] — but they did provide protection (e.g., the Great Wall of China, Hadrian's Wall, the Ramparts of Quebec City, etc.).

Stone walls are present throughout the American landscape. Based on data contained in an 1872 U.S. Department of Agriculture report titled "Statistics of Fences in the United States," it has been estimated that there were approximately 250,000 miles of stone walls in the northeastern U.S., most of which were in New England. Many walls have since been destroyed, but probably more than half of these remain (Bowles 1939; Allport 1990). The oldest recorded stone wall constructed by Europeans in North America was allegedly built in 1607 by English settlers of the Northern Virginia Company, who attempted permanent settlement along the estuary of the Kennebec River north of what is now Portland, Maine. The existence of older walls constructed by Europeans in the pre-Columbian period (e.g., Blue Mound Stone Wall in Minnesota and Mystery Hill in New Hampshire) — sometimes attributed to Vikings or Celts— remains possible but unproven (Barmore 1985; Feder 1999, 111-131; Thorson 2002).

The stone walls of New England span nearly four-hundred years of construction history, during which many walls have been built, taken apart, and rebuilt multiple times. Most walls, however, probably originated between 1750 and 1850 as accumulations of residue along fence lines when southern, interior, and coastal New England was then a landscape of agricultural villages and family farms, carved from what had previously been a forested wilderness. The half-century between the onset of the American Revolution in 1776 and the rapid industrialization of the mid-1820s was the time of most rapid construction, during which many of these earlier, haphazard walls were rebuilt (Thorson 2002). In spite of their historical importance in protecting human settlements and delimiting significant social and

legal boundaries, stone walls are becoming a scarce commodity in North America. This scarcity is a result of a number of factors, including: natural decay, failure to maintain, and destruction for the sake of reuse of the materials, among others. At the heart of this pattern of destruction is a lack of appreciation for the importance of these historic artifacts, which is reflected generally in national, state, or local laws and ordinances. Despite this bleak assessment, it is possible to make a case for the protection of stone walls via the National Historic Preservation Act (NHPA). This article also reviews the successful attempts to augment the protection of stone walls with explicit legislation enacted at the state and local levels.

LEGAL ISSUES

Until recently, little effort was made by the U.S. government — at any level — or historic preservation advocacy groups to preserve stone walls. While there is federal legislation that calls for the listing of historic properties on the National Register of Historic Places, stone walls ostensibly fall outside the purview of this legislation. As a result, it is difficult to measure the number of feet or miles of stone walls that have been lost over time. Anecdotal evidence, however, reveals numerous stories regarding the demise of historic stone walls. One of the primary reasons that the law does not protect stone walls in the same manner as other historic structures is the fact that the NHPA fails to enumerate stone walls within the definition of historic structures. The NHPA is also considered to be procedural in nature, divesting significant powers to state and local governments to protect historical structures. The majority of states have not included stone walls among protected historic structures.

Is a Stone Wall a Structure?: Traditional Legal Analysis

From the standpoint of a city or town, the question of whether a stone wall is a legal structure is critical because, in the absence of explicit coverage via state or local preservation statutes, the National Historic Preservation Act (NHPA) remains the primary source for protection via the National Register of Historic Places:

> The Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture. Notwithstanding section 1125(c) of Title 15 [of the U.S. Code], buildings and structures on or eligible for inclusion on the National Register of Historic Places (either individually or as part of a historic district), or designated as an individual landmark or as a contributing building in a historic district by a unit of State or local government, may retain the name historically associated with the building or structure (National Historic Preservation Act. 16 U.S.C. § 470a(a)(1)(A)). [Emphasis added.]

The drafters of the NHPA did not define the term "structures." As such, courts are left to rely on the Canon of Statutory Construction to construe its meaning. The Supreme Court has repeatedly held that when a legislature borrows the language of a statute from the jurisprudence of another jurisdiction, the language must be construed in the sense in which the other jurisdiction used it.[5] For example, in *Morissette v. United States* (1952, 246, 250) the Court explained that:

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Consequently, in the absence of an explicit definition,[6] the common law and specific legislative intent must help decide whether stone walls fall generally under the rubric of "structure" and would therefore be potentially protectable under an applicable statute or covenant.

One such representative definition of "structure" that has been derived explicitly from the common law is as "[t]hat which is built or constructed; an edifice or building of any kind" (Bouvier 1914, 3162). A second, more elaborate definition is provided in the *Corpus Juris*:

> [§ 2] B. As Thing – 1. Broad Sense. Any construction; anything composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use; a permanent stationary erection; any production or piece of work artificially built up, or composed of parts joined together in some definite manner; a production composed of parts artificially joined together according to a plan and designed to accomplish a definite purpose; connected construction; something composed of parts or portions which have been put together by human exertion; that which is built or constructed. The term does not apply exclusively to things above the ground.
>
> [§ 3] 2. Restricted Sense. A building of any kind, chiefly a building of some size or of magnificence; an edifice.

An early English decision prior to the beginning of the last century held that the question of whether a wall is a "building structure or erection" within the meaning of s. 75 of the Metropolis Management Act (1862) "depends on the height of the wall and purpose for which it was built" (*Lavy v. London County Council* 1895, 915). The forecourt of a town house had for many years been bounded on the side next to the street by a wall approximately three feet high. The owner of the premises destroyed the existing wall and replaced it with a wall eleven feet high (without the consent of the London City Council), to afford the exhibiting of advertisements and to serve as a boundary to the forecourt. Both the lower and appellate courts were in agreement that the original wall *was not* a "building structure or erection" within the meaning of s. 75, but that the substituted wall *was* a "building structure or erection" within the meaning of the section and that there was consequently jurisdiction to order its demolition. It appears that the court first determined that the purpose of the Metropolis Management Act was to regulate the general line of buildings along the road, subsequently concluding that allowing an appropriately scaled boundary wall was not inconsistent with this purpose, whereas allowing a large, substantial wall clearly violated the intent of the law:[7] "[I]f a man merely puts up a fence to mark off his boundary and preserve his rights as the owner, although in one sense it may be a building, structure, or erection, it is not necessarily a building, structure, or erection which falls within the mischief aimed at by the Act and avoided by s. 75" (*Lavy* 1895, 577).

The proposed construction of a 2,500-foot rubble stone wall of field granite boulders, approximately three-feet high and thick and filled in behind with earth so as to raise the grade of the land to the level of the top of the wall, was enjoined in *Cleveland v. Painter* (1907). There were two covenants at issue: one incorporated in a deed conveying approximately ninety-five acres to the city of Cleveland to be used as park land, and the other incorporated in a deed conveying approximately twenty-six adjoining acres to Ms. Painter to be used to build a private residence, and both prohibited a "building or structure of any kind" within fifty feet of that conveyed to the city.[8] The city sought an injunction to block construction of the wall within the fifty-foot restricted zone. The lower court, reasoning that the word "structure" must be construed with reference to the objective of the restriction (which it found to be the preservation of the city's right to construct a road which, with the adjacent land, should present the appearance of a parkway) determined that this wall would defeat that object. Nevertheless, this judgment was reversed *per curiam* by the Supreme Court of Ohio — unfortunately, without discussion.[9] The court records, however, reveal two possible reasons for the reversal. First, it appears to have been uncontested that Ms. Painter's actual "wall" was an attractive dry wall that served

primarily as a boundary and was part of an extensive and appropriate landscaping plan. And second, unlike the city's covenant, Ms. Painter's covenant contained a modifying clause stating explicitly that "nothing herein contained shall be so construed as to prevent the erection by Grantee anywhere on said premises of any kind of fence, hedge or stone wall for enclosing said land or any portion thereof."[10] The absence of damages,[11] combined with the express terms of Ms. Painter's covenant arguably allowed the state Supreme Court to dispose of the case summarily.

The use of textural context and legislative intent to discern the particular meaning of a generic term such as "structure" is not unique to the case of stone walls. It has been applied successfully in many other areas of the law. For example, in *Western Well Works, Inc. v. California Farms Co*. (1923), the court held that within the meaning of the mechanics' lien law "a well is a structure." In *Kanawha Oil & Gas Co. v. Wenner* (1912), the court held that an oil well, within the purview of the mechanics' lien laws is "a structure." In *Helm v. Chapman* (1885), a pit dug in a mining claim was held to be "a structure" within the meaning of § 1185 of the California Code of Civil Procedure, using the words "building improvement or structure." And in *Silvester v. Coe Quartz Mine Co.* (1889), a mine was held to be a "structure" within the meaning of the statute on mechanics' liens. Conversely, in *Lothian v. Wood* (1880), the swings or seats in a dance hall were held to not be "structures" within the meaning of §§ 1183 and 1192 of the California Code of Civil Procedure.

The legal analysis employed in many of these cases is reflected in Judge Richard Posner's "imaginative reconstruction" model. Judge Posner suggests that

> the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him. . . . If it fails, as occasionally it will, either because the necessary information is lacking or because the legislators had failed to agree on essential premises, then the judge must decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand—always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge's, that should guide decision (Posner 1985, 286-287).

Is a Stone Wall a Structure?: Reasoning by Reverse Analogy[12]

An alternative way to discern the legal status of a stone wall, albeit obliquely, is to examine how other objects have been construed when either damaged or in dispute; that is, to look to cases where the courts have analogized to stone walls when attempting to either assess damages or determine ownership. The courts have done so in order to quantify the value of a destroyed bridge and to determine the owner of manure distributed upon the land, in the former case relying heavily upon the analysis in *Reed v. Mercer County Fiscal Court* (1927), a case specifically involving damages for the unauthorized destruction of a stone wall.[13]

In *Reed*, the county held perpetual lease for the purpose of quarrying stone in a strip of land running the length of a stone fence near and parallel to the property line of the landowner. Without excuse or provocation, the county road engineer crushed the stone composing the fence for ballast, then constructed a post-and-wire fence in its place. The landowner sued the county, and the jury returned a verdict in his favor for five dollars. The landowner appealed and argued that the trial court erred in instructing the jury on the measure of damages. The court held that because the landowner was not entitled to a new fence, and the old one could not be restored, he could recover only the value of the fence in its condition at the time of the injury. The court instructed the trial court, on retrial, to omit all reference to the wire fence and to instruct the jury to find for the landowner the reasonable value of the stone fence at the time it was destroyed by "…estimating the present cost of construction of a stone fence similar to the one destroyed and deducting from the amount of such estimate the depreciation which the old fence had suffered by reason of age and use" (*Reed* 1927, 996-997).

It is important to note, however, that the court, *orbiter dicta*, proposed a test that a jury might reasonably use to determine the relative value of a stone fence: "If considered merely as a means of inclosure [sic] the jury might reasonably conclude that for general utility a wire or plank fence would equal or surpass in value such a stone fence, and in reaching their verdict disregard all questions as to the special purpose or objects for which appellant maintained the fence and naturally find only nominal damages" (*Reed* 1927, 996-997).

In *F.A. Bartlett Tree Expert Co. v. Stamper* (1948), the appellant was engaged in constructing a power line along a creek. It was necessary to cut certain trees and underbrush along the right-of-way so that the poles could be set and the power lines strung. The appellee brought a suit against the appellant for damages, alleging that the operation was conducted in a careless and negligent manner by the appellant in that trees, brush, and debris were left in and along the creek. During a heavy rainstorm, this debris washed down the creek and over and against the property of the appellee, obstructing and blocking the progress of the water so as to cause a bridge to be washed out and destroyed, ultimately leading to additional crop and property damages. The court held that

> …the proper measure of damages in this case, as to the bridge, is the reasonable value of the bridge at the time it was destroyed; this to be ascertained by estimating, as of the time of its destruction, the cost of constructing a bridge similar to the one destroyed and deducting from the amount of such estimate the depreciation which the old bridge had suffered by reason of age and use. *While we find no Kentucky case involving the measure of damages for the destruction of a bridge, we are of the opinion that the measure of damages would be the same as in the destruction of a rock fence* as we held in the case of Reed v. Mercer County Fiscal Court, 220 Ky. 646. (*F.A. Bartlett Tree Expert Co. 1948,* 754).[14] [Emphasis added.]

Apart from London Bridge, most bridges (and many stone walls) are not bought and sold and therefore do not have a market value. The market value measure, therefore, becomes irrelevant when a bridge owner seeks to recover damages. Recognizing that applying a market value approach to such property would be wholly speculative, the court in *Vlotho v. Hardin County* (1993) concluded that the proper measure of damages for the loss of a bridge occasioned when a county engineer tore it down without authorization[15] was the actual or real value of the bridge, determinable through evidence about the bridge's original cost, age, use, condition, and utility, as well as its aesthetic and historical significance value, citing favorably to *Bangert v. Osceola County* (1990), a case involving the intrinsic valuation of trees above and beyond their mere aesthetic value:

> Commercial market value as damages is appropriate when the trees have no special use and their only worth to the owner is their value as wood products. This is not the case here. Plaintiffs had allowed these trees to stand for special purposes other than for commercial use. The record is undisputed that the trees were maintained for sentimental and historic reasons, for shade and windbreaks, as well as for environmental, wildlife and special landmark purposes. Consequently, plaintiffs' damages may be greater and not less than their commercial loss. As the trial court did not consider intrinsic damages other than that due to an aesthetic loss, we remand for consideration of these damages on the present record.[16] (*Bangert* 1990, 190)

In *Sawyer v. Twiss* (1853), the claim involved the common-law theft of fifty loads of manure, made on a farm owned and occupied by the defendant and heaped in piles around the barn. The farm was subject to a mortgage by a third party, as were some of the livestock that made the manure. The remainder of the livestock were owned outright by the third party and kept by the defendant for him. The manure, believed by a deputy sheriff to be the personal property of the defendant, was attached and sold by the sheriff at public auction to satisfy a judgment rendered against the defendant and was

purchased by the plaintiff. Subsequent to the sale, and before the plaintiff had removed the manure, the defendant used it on the farm. The court held that manure made upon a farm for the purpose of maintaining the farm is attachable for the debts of the owner of the land neither as personal property, nor separately from the farm itself. The court reasoned that

> …as between grantor and grantee of a farm, the manure lying in heaps in the fields, or deposited about the barns and barnyards on the premises, passes with the real estate. *It is an incident and appurtenance of the land, and part of the real estate*, like the fallen timber and trees, the loose stones lying upon the surface of the earth, *and like the wood and stone fences erected upon the land, and the materials of such fences when placed upon the ground for use, or accidentally fallen down.…We regard it, too, as having strong resemblances, as to its connection with the realty, with the fences upon the land, which, though attached to the land in many cases by gravity alone, are yet beyond question parts of the realty itself* (Sawyer 1853, 346, 348).[17] [Emphasis added.]

The notion that fences upon the land are unquestionably part of the "realty" and not mere "personalty" is found in other mid-nineteenth-century cases as well.[18]

State and Local Legislation Pertaining to Stone Walls: Gap Filling

In the absence of federal legislation that protects stone walls as historic structures, some states and localities have passed their own laws and regulations. While they vary significantly in approach, local and state legislatures in New England have taken aggressive measures in an effort to preserve the historic stone walls that lace the countryside in the northeastern United States.

Rhode Island

In 2001, the Rhode Island legislature enacted a statute that criminalizes the theft of historic stone walls. Under its provisions, those who commit or attempt to commit the theft of historic stone walls are "civilly liable to the property owner for the cost of replacing the stones and any other compensable damages related to the larceny" (Rhode Island General Laws (b)). The plain language of this statute reveals the value ascribed to stone walls by the legislature to be replacement costs. Employing a "carrot-and-stick" approach to the preservation of stone walls, the Rhode Island legislature also enacted a law allowing municipalities to provide a tax exemption of up to $5,000 for property owners with historic stone walls located on their real property (Rhode Island General Laws (c)). Cities across the state have followed suit. In 2004, the City of Portsmouth, Rhode Island, passed the Portsmouth Stone Wall Ordinance, which requires prior approval from the local government before a property owner may alter or remove a historic stone wall (Portsmouth, R.I., Stone Wall Ordinance 2004). Violators of this ordinance may be punished with a fine ranging from $100 to $500 for each offense. Tiverton, a neighboring town of Portsmouth, is considering the adoption of a similar ordinance (Tiverton, R.I., Draft Stonewall Preservation Ordinance 2005). Not all local ordinances pertaining to the protection of stone walls are punitive in nature. For example, Middletown's ordinance does not contain a penalties section (Middletown, R.I., Town Code 1998). The town's ordinance specifies only a review process to prevent alteration or removal of stone walls without notice. However, it does not state any penalty if the ordinance is violated.

New Hampshire

By contrast, the State of New Hampshire does not currently have any statutes that prevent the sale and removal of stone walls situated on private property (New Hampshire Division of Historical Resources 2010). Proposed legislation currently under consideration would increase the penalty for stealing

stone walls from private property to between three and ten times the value of the stolen stone. Like the Rhode Island legislation, the proposed New Hampshire legislation suggests that the value of a stone wall should be determined in relation to the cost of replacement. In this instance, however, the legislature has deemed replacement costs alone to be insufficient compensation, as evidenced by the multiplier.

This pending legislation is not the first time that agencies of the State of New Hampshire have considered the importance of preserving the state's stone walls. In 1990, the New Hampshire Department of Transportation, in consultation with the State Division of Historical Resources and the Federal Highway Administration, developed a stone wall protection policy (Washer 2006). The policy establishes a committee to evaluate the impacts of road-building projects on historic stone walls, offering full or partial protection for these historic structures. This policy is further supplemented by New Hampshire's Scenic Roads Ordinance, which provides minimal protection for stone walls affected by road maintenance projects.

Apparently, New Hampshire is not as aggressive as Rhode Island in legislating stone wall protection at the state level. Despite lack of strong state support, there are still a few communities that have enacted ordinances to protect walls bordering town-owned roads. The Heritage Commission of Hollis is just beginning efforts to enact a stone wall preservation ordinance (Hollis Heritage Commission Minutes 2005). The presence of a stone wall preservation ordinance has not always afforded the necessary protections in other cities across the State of New Hampshire. For instance, while the town of Weare has an ordinance targeted at preserving stone walls on public property (Weare 2003), the ordinance has been widely violated by builders since its enactment (Skinner 2004).

Other municipalities in the State of New Hampshire are attempting to protect their stone walls through ordinances less directly targeted at preservation. For example, Keene, New Hampshire, seeks to protect its stone walls through scenic-road designation (Keene, N.H. Code of Ordinances (a)). By designating a road as scenic (excluding Class I or II highway), any repair, maintenance, reconstruction, or paving work involving tree or stone wall removal cannot take place without the consent of the planning board or official municipal body (New Hampshire Scenic Roads Ordinance; Keene, N.H. Code of Ordinances (a)). In Keene, as well as the community of Franklin, stone walls are being protected through the use of historic districts (Franklin, N.H. City Code; Keene, N.H. Code of Ordinances (b)). These ordinances require either a certificate or permit to regulate activities in a historic district or in a review of development proposals in these areas. Other New Hampshire communities seek to preserve stone walls via subdivision regulations. In Lyndeborough, the planning board is explicitly required to consider the presence of existing stone walls together with other criteria when reviewing any proposed subdivision (Lyndeborough, N.H., Subdivision Control Regulations).

Connecticut

The State of Connecticut had more than twenty thousand miles of stone fences in 1871 (Southeastern Connecticut Guide). In spite of their abundance, the state has enacted few laws to preserve these historic structures. Similar to New Hampshire, however, the Connecticut legislature did enact a scenic road ordinance to protect stone walls bordering highways (Connecticut Scenic Road Ordinance (a)). Connecticut's ordinance appears to protect private property rights as well, by allowing designation of a scenic road only when a majority of owners with properties abutting the concerned highway support such a designation (Connecticut Scenic Road Ordinance (b)). While a petition to designate a scenic road by ten persons who do not own property that abuts the road may be sufficient in New Hampshire, Connecticut law dictates both proximity and consent (Keene, N.H., Code of Ordinances (c)).

In May 2006, the Connecticut legislature enacted Public Act No. 89 prohibiting encroachment on open space without prior approval (An Act Concerning Encroachment on Open Space Lands). Under the terms of the act, destroying or moving a stone wall falls within the definition of the term "encroach" (An Act Concerning Encroachment on Open Space Lands

§1(a)). Any person who violates this ordinance may be ordered either to "restore the land to its condition as it existed prior to such violation or shall award the landowner the costs of such restoration, including reasonable management costs necessary to achieve such restoration" (An Act Concerning Encroachment on Open Space Lands §1(c)).

In Connecticut, much of the power to preserve historic stone walls has been divested from the state legislature to the local governments. Many municipalities have begun to embrace the opportunity to regulate stone walls. The town of Harwinton, Connecticut, recently received media attention regarding local efforts to preserve stone walls (Mulvihill 2006a; Mulvihill 2006b). In February 2006, the city enacted an ordinance requiring residents to obtain a permit to alter or remove stone walls situated on private property which serve as highway boundaries (Harwinton, Conn. Ordinance Concerning the Preservation of Highway Boundary Stone Walls). Violators of this ordinance may be fined up to $100 for each violation (Harwinton, Conn. Ordinance Concerning the Preservation of Highway Boundary Stone Walls, §6). This ordinance does not apply to stone walls situated on the interior of private property. Several other towns in the state are following suit. The towns of Columbia and Washington have begun consideration of ordinances which would afford some protection to stone walls (Columbia Meeting Minutes 2006; Washington Commission Minutes 2006).

Massachusetts

Massachusetts also seeks to protect its stone walls through the adoption of a scenic byways statute. Section 15 of Chapter 40 of the General Laws of Massachusetts states that "[a]fter a road has been designated as a scenic road any repair, maintenance, reconstruction, or paving work done with respect thereto shall not involve or include the cutting or removal of trees, or the tearing down or destruction of stone walls, or portions thereof …" (General Laws of Massachusetts (b)). In addition, another provision of the state code seeks to penalize those who illegally tear down a stone wall. Those found in violation of this provision of the code may be fined $10 (General Laws of Massachusetts (c)). Given the minimal penalty, cities in Massachusetts are left responsible for enacting local ordinances to better protect these historic structures.

A number of cities or towns in Massachusetts, including Sutton, Marlborough, Barnstable, and Ashby, have enacted scenic road regulations that include provisions targeted at protecting stone walls (Sutton, Mass., General By-laws; Marlborough, Mass., City Council Order; Barnstable, Mass., Town Code; Ashby, Mass., Town By-laws (a)). Interestingly, these local scenic road ordinances frequently specify that only when demolition of stone walls exceeds a certain length can the mischievous act be classified as "Tearing Down or Destruction of Stone Walls" (Ashby, Mass., Town By-laws (b)). As such, a stone wall may be torn down in small segments without triggering a penalty.

New York

The State of New York is also dotted with historic stone walls but has few regulations pertaining to their preservation. Even its scenic byways law does not explicitly address the issue (New York Scenic Byways). As a result, most of stone wall preservation efforts are initiated at the local level. For instance, the City of Bedford's Comprehensive Plan states:

> Bedford informally protects its stone walls. During the subdivision process, the Planning Board encourages the applicant to preserve stone walls on the property by limiting the number of driveway cuts and by drawing lot lines to correspond to stone walls. The Superintendent of Highways tries to avoid widening town roads where there are stone walls, and when necessary, tries to avoid undercutting the walls. Where stones have fallen, the road crews either put them back near the wall or take them to the town crusher. Wherever possible, the stones should be left on the homeowner's property near the wall, to avoid the extra future expense of wall rebuilding and to maintain the original look of the walls.

While the comprehensive plan does effectively draw attention to the city's desire to protect historic stone walls, the permissive language in this provision does little more than encourage property owners and local politicians to consider their preservation. Similarly, the town of Lewisboro relies on general language contained in the special character overlay district of the town's zoning ordinance to protect removal of stone walls (Lewisboro, N.Y. Town Code). On the whole, stone wall preservation in New York still relies heavily on the development review process and the desire of private property owners to protect these historic structures.

Beyond the Northeast

Stone walls are not unique to the northeastern United States. In Kentucky, stone walls, commonly called rock fences, are noted for bringing tourism to the state, including the Bluegrass region (Dry Stone Conservancy Mission and History). As a result of the economic draw of its historic rock walls, the state has enacted legislation to preserve them and organized the Dry Stone Conservancy to educate the public and train dry-stone masons. A Senate bill (SCR 130), which encourages the Kentucky Heritage Council and Dry Stone Conservancy of Kentucky to document rock fences worthy of preservation and to develop standards for preservation and protection, was recently enacted into law in March 2006 (SCR 130). The local communities have also enacted their own ordinances to protect stone walls. In Lexington-Fayette County, it is an offense to remove stone walls located within the public right-of-way without obtaining a permit (Lexington-Fayette County, KY. Code of Ordinances (a)). Anyone convicted of stealing or vandalizing a rock fence may be fined $300 to $500 per five linear feet (Lexington-Fayette County, Ky. Code of Ordinances (b)). Despite the passing of such ordinance in the early 1990s, news about community homeowners tearing down stone walls as a result of ignorance of city ordinances was reported (Fortune 2006). The same trend follows suit in Texas. In Blanco County, nearly seventy-five percent of the county's one-hundred miles of rock walls have been destroyed since 1860, even though these stone walls are recognized by locals as important cultural artifacts (Knott 2004). What remains clear is that the need for public education is a critical first step in facilitating efforts to preserve stone walls nationwide. Further, efforts must be made at local, state, and national levels to draft regulations that protect these overlooked historic artifacts.

Resolution: Stone Walls are Structures

There are many compelling and exemplary reasons to preserve stone walls. Some of these include habitat, cultural heritage, landforms, human ecology, aesthetics, education, and sense of place (Deike 1998; Dobson 2001; Goldsworthy 2000; Kruhm 1995; and Thorson and Thorson 1998). Although there is not a body of consistent case law that would oblige a court to interpret the term "structure" in preservation ordinances to include stone walls, the case law does unequivocally suggest that the meaning of the term must be determined by taking a holistic view of the statutory landscape and all related materials. For example, in deciding that a miner, who was hired as an independent contractor, must receive the same statutory protections accorded employees, Judge Learned Hand wrote: "It is true that the statute uses the word 'employed,' but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant" (*Lehigh Valley Coal Co. v. Yensavage* 1914, 552; Walker 2001).

It would be equally absurd to exclude stone walls from the class of protected objects by preservation ordinances, given their inherent ability to simultaneously represent the historical, cultural, and environmental foundation of our towns and cities. In the absence of strong federal legislation to the contrary, stone walls will be protected only to the extent that state and local legislatures take an interest in these relics of the past or property owners themselves recognize the historic value of these structures. Much work remains to be done to ensure that the ruminations of Robert Thorson a decade ago do not become prescient:

> On a dreary day in January, 2001, I was stuck in traffic heading westbound on Interstate 84 near Hartford, Connecticut. In the lane beside me was a large flatbed truck, an eighteen-wheeler with New York plates, loaded with twelve open-air wooden crates. Within each crate was more than a thousand pounds of fieldstone. Some of the stones were lichen covered; others were yellowish brown, the color of subsoil. Their lithology indicated a source from the eastern highlands of Connecticut, perhaps Hampton, Scotland or Canterbury. Watching part of eastern Connecticut head west was sad enough. Even sadder was watching part of our common heritage head west as well. Something felt terribly wrong. Clearly, someone had owned the stone and had sold it. Clearly, someone had wanted the stone and bought it, perhaps for what will turn out to be a beautiful garden. I don't question an individual property owner's rights to sell or buy stone. I love stone as much as anyone. I also love the fact that others love stone enough to buy it at substantial cost. But, at the same time, I have no doubt that tearing old walls down to make new ones is something like taking apart antique furniture simply to use the wood. It's not that we will run out of stone, because we can always get it from quarries, rather than from ancient walls. But we may run out of woodland walls, the closest thing we have to classical ruins in New England (Thorson 2002).

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ENDNOTES

1. That is, they originated from the same basic radicals in Proto-Semitic.
2. For another example, see De Vaux (1997, 152-64).
3. The early modern history of Albany, NY, provides a pithy example of such symbiotic development (Rittner 2001).
4. Arcadia is a mountainous region of the north-central

Peloponnesus in southern Greece, which was envisioned in both ancient and Renaissance poetry and art as a kind of pretechnological utopia, where human beings lived in complete — and sustainable — harmony with nature. This "Arcadian" society was often thought to pre-date the Dorian invasion, the introduction of the Olympian Pantheon and the establishment of the Greek city-states. Recent evidence, however, suggests that beginning about 7000 B.P., the prehistoric inhabitants of Greece already may have caused, through millennia of poor land management, some of the severe erosion and environmental degradation that created the present-day landscape of dry shrubs and rocks (Runnels 1995).

5. For example, see *Willis v. E. Trust & Banking Co*. (1898, 307-308), in which the court held that language must be construed in the sense in which it was understood at the time in that system from which it was taken. See also Felix Frankfurter, who stated "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it" (1947, 537). Compare this with *Evans v. United States* (1992), which dealt with the definition of extortion under the Hobbs Act.
6. One such example is found in Chapter 49 of the General Laws of Massachusetts. Section 21 reads as follows: "A fence or other *structure* in the nature of a fence which unnecessarily exceeds six feet in height and is maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance. Any such owner or occupant injured in the comfort or enjoyment of his estate thereby may have an action of tort for damages under chapter two hundred and forty-three" (General Laws of Massachusetts (a); *See Rideout v. Knox*, 19 N.E. 390 (Mass. 1889)). [Emphasis added.] Another example is found in a recent statute passed in Rhode Island specifically criminalizing the theft of historic stone walls: "For the purposes of this chapter, 'historic stone wall' is defined as a vertical *structure* of aligned natural stone, originally constructed in the 17th, 18th, 19th or 20th centuries, to designate a property boundary between farmsteads or to segregate agricultural activities with a single farmstead or to designate property lines. This definition includes new stone walls which closely approximate the appearance of adjoining stone walls with respect to coursing, stone type, joint width, construction and distribution of stones by size (Rhode Island General Laws (b))." [Emphasis added.]
7. "There is a wall of a certain height - two or three feet high - which would not in any way, I take it, disturb the uniformity of a street; then there are walls of a greater height - twelve or fourteen feet, or even more - which would absolutely destroy the uniformity of that frontage, and absolutely defeat the purposes of these provisions" (2 Q.B. 577). Compare this with Justice Kennedy's comment: "Where the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not possibly have intended,' we need not apply the language in such a fashion." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring and joined by Rehnquist, C.J.) (quoting *United States v. Brown*, 333 U.S. 18, 27 (1948), and *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting)) (citations omitted).
8. Deed to the City, *Painter v. Cleveland*, 92 N.E. 1121 (Ohio 1910) (No. 11-358); Record at 30, Painter (No. 11-358); Deed to Lydia E. F. Painter; Record at 40, Painter (No. 11-358).
9. Surprisingly, it is still occasionally cited as good law for the proposition that a municipality needs a statutory grant of authority to acquire property outside of its corporate limits (Vaubel 1975, 427 n.10).
10. Deed to Lydia E. F. Painter; Record at 44.
11. With respect to damages, the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort. This is done either by giving the injured person specific restoration for that which was taken from him or her, or by giving him or her its value, together with, in either case, compensation for the deprivation during the period of detention (Restatement (Second) of Torts 1979).
12. For a recent discussion of reasoning by reverse analogy, see Prade and Richard 2009.
13. In an earlier case, the U.S. Supreme Court had affirmed damages for the destruction of a substantial stone wall due to "voluntary waste," but there was no analysis as to how the damages were quantitated (*Bostwick* 1877). The court noted "the stone wall taken down and carried away amounted to 505 perches [i.e., 1.58 miles of stone], and was worth $3.50 per perch."
14. In *Hughett v. Caldwell County* (1950, 96), the court also cited favorably the *Reed* analysis "[t]he measure of damage varies according to the facts of different cases, and particular and peculiar property calls for whatever seems just and sufficient to make the injured party whole."
15. "In November 1989 county personnel, acting pursuant to a directive from Vlotho, tore down the Eagle City Bridge. This bowstring bridge was built in the 1870s. It was made of wrought and cast iron. Few remain in existence in Iowa." (*Vlotho* 1993, 351).
16. Citations omitted.
17. Citations omitted.
18. For an example, see *Glidden v. Bennett* (1861, 307), stating "[b]ut the proper view is that this fence was not a fixture, for permanent buildings and fences are more properly considered as parts of the realty than as fixtures." Another example is *Hackett v. Amsden* (1885, 436), stating "[w]hatever the rule may be elsewhere, it seems to be settled in this State, that suitable materials, deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon, pass by a conveyance of the land as a part of the realty; and being a part of the real estate—or, as they are sometimes called, chattels real,—they are not attachable as personal property."

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