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research article

The Evolution of Search-and-Seizure Law: How New Hampshire and Federal Law Differ

—Randall Lawrence–Hurt (Edited by Jennifer Lee)

Within the American criminal justice system, an individual's freedoms are protected by the very same government which, under certain circumstances, seeks to deprive that individual of those freedoms. For example, the law prohibits growing marijuana at home; but the law also provides that even if a police officer is positive you're doing exactly that, s/he can't enter your home and arrest you without first going through certain legal procedures. Even if your guilt is obvious, if the police ignore those legal procedures, the law will side with you, not with them.

This is part of the long struggle in our nation's history to balance the federal and state governments' punitive powers and protective responsibilities over the citizenry. These powers and responsibilities are expressed in the United States Constitution and each state's constitution, and applied by the United States Supreme Court and the supreme court of each state. Perhaps of most interest to us all are the protections provided by search-and-seizure laws. Each state's laws regarding searches and seizures reflect the federal laws but are not identical, and can, within limits, be tailored to each state's needs or preferences.

During the summer of 2009, funded by a Summer Undergraduate Research Fellowship from the University of New Hampshire, I researched how the decisions handed down by the US Supreme Court affected search-and-seizure law and forced changes in the criminal justice systems of the states, specifically New Hampshire. While much is known about the US Supreme Court's decisions and much has been written about their legacy, very little has been said about the changes within New Hampshire that those decisions caused: in particular, changes in police procedure, evidence admissibility, and court proceedings. My research sought to fill that void.



The author reading search-and-seizure case law.

After ten weeks, hundreds of hours in libraries, thousands of pages of case law, and countless cups of coffee, I compiled a thirty-page report covering in generous detail three inter-related topics: how the interpretation of the Fourth Amendment to the US Constitution by the US Supreme Court has evolved; how the interpretation of Article 19 of the NH Constitution by the New Hampshire Supreme Court has evolved, both by itself and in response to the US Supreme Court; and what all this means for the realities of law enforcement.

That paper is too extensive to summarize here. In this article, I will address the historical context of modern search-and-seizure law, particularly the major change that occurred in 1961, and then move on to consider the primary differences between New Hampshire and federal law, the role of the courts in creating and guiding changes in the law, and the opinions of state law enforcement officials regarding the present state of the law.

The Law Before 1961

The Fourth Amendment to the US Constitution holds that the people are to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizure;" and further that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment was ratified as one of the original ten amendments on December 15th, 1791. These first ten amendments, known as "The Bill of Rights," reflected the reluctance of many citizens to ratify the federal Constitution without clauses expressly prohibiting the federal government and its officers from certain actions. The Fourth Amendment specifically addressed the colonists' recent experience with British soldiers, who routinely entered colonists' homes without a warrant, or with a very vague or broadly worded one, and seized anything they desired.

The few sentences of this amendment are the source of one of the most extensive bodies of case law, interpretation, and legal theory in the United States. What they mean has been debated and interpreted by courts and scholars since they were written. The protections they extend to the citizenry have been expanded, contracted, and redefined by the US Supreme Court for over two hundred years—a process which continues to this day. From their basic application to police searches of a car or home to their modern implications for wiretapping, electronic surveillance, and thermal imaging, these sentences serve to protect one of the rights United States citizens hold most dear: the right to be left alone. The motorist pulled over for speeding, the renter who keeps a bong on his bedroom dresser, and the college student walking around on Friday night with a backpack stuffed with "books" all exercise certain rights under the Fourth Amendment—rights which restrain police action whether the citizen knows it or not.

The New Hampshire Constitution went into effect on June 2, 1784. Article 19 of the New Hampshire Constitution provides, in language similar to that of the Fourth Amendment, what basic regulations apply to searches and seizures conducted by New Hampshire law enforcement. For over 150 years, Article 19 formed the basis of all decisions by the NH Supreme Court regarding whether a given search-and-seizure was legal, whether evidence obtained from it was admissible, whether a warrant was properly issued, and what exceptions to these rules existed. During that time, the NH Supreme Court was the final word on search-and-seizure law in New Hampshire.

One notable difference between federal and New Hampshire search-and-seizure law resulted. Almost everyone knows that illegally seized evidence may not be used to convict someone. This principle, called the Exclusionary Rule, has been a part of federal jurisprudence since 1914. In that year, the US Supreme Court ruled that evidence "taken . . . in direct violation of the constitutional rights of the defendant may not be used against the defendant at trial." (*Weeks v. United States*, 232 U.S. 383) This ruling, however, applied only to federal officers and courts. New Hampshire law, as it had since the state's constitution was ratified, continued to follow the principle that only the relevance of the evidence should matter when determining its admissibility; how it was obtained was not for the trial court to consider. Therefore, even if illegally seized by state officers, all relevant evidence (with the exception of coerced confessions) would be admitted at trial in New Hampshire courts.

The Law After 1961

The Fourteenth Amendment to the U.S. Constitution, ratified in 1868, provided that no state could deprive its citizens of "Due Process of Law." Questions almost immediately arose about what this guarantee meant. Some people suggested the wording meant that no state could deprive its citizens of the protections listed in the first ten amendments to the US Constitution. (At the time, these ten amendments applied *only* to the federal government, although many states had similar protections in their constitutions). The US Supreme Court at first rejected this idea. Eventually, however, the Court began determining on a case-by-case basis which of these amendments the "Due Process Clause" required the States to abide by, that is, which of the Bill of Rights were included, or "incorporated," by the Fourteenth Amendment's requirement.



The United States Supreme Court in Washington, DC.

In 1961 the Court decided that the Fourteenth Amendment and its requirement that states not deprive their citizens of "Due Process of Law" meant that the protections of the Fourth Amendment were now applicable to the individual states. (The case which decided this was *Mapp v. Ohio*, 367 U.S. 643.) Because the US Supreme Court is the final arbiter of what the Fourth Amendment protects, individuals could now appeal to that Court and claim that their Fourth Amendment rights had been violated by any law enforcement officer, whether federal, state, or local. Should it be determined that the Fourth Amendment was violated, the illegally seized evidence would be excluded from trial. The import of "Incorporation," as the decision became known, was that it required all states to exclude evidence seized in violation of the federal Constitution, regardless of whether an Exclusionary Rule existed in the state's own constitution. Therefore, New Hampshire now had to abide by the Exclusionary Rule of the federal Fourth Amendment.

This ruling ended the biggest difference between federal and state laws regarding searches and seizures but did not bring them into total conformity. The US Supreme Court has repeatedly recognized that the Fourth Amendment is only the baseline of search-and-

seizure law, and that states are free to impose greater restrictions on police action than are required by federal law. The NH Supreme Court has noted that the state's constitution "often will afford greater protection against the action of the State than does the federal Constitution." (*State v. Settle*, 122 N.H. 214)

An example of this "greater protection" is the use of drug-sniffing dogs. The US Supreme Court has held that a federal officer may use a drug-sniffing dog to check your baggage or car for any reason. The Court does not consider that action a "search" and, therefore, it is not subject to the Fourth Amendment's restrictions. (*U.S. v. Place*, 462 U.S. 696) The NH Supreme Court, however, has decided that Article 19 of the New Hampshire Constitution is more protective in that area than is the Fourth Amendment. A New Hampshire police officer running a dog along the outside of your car or luggage is considered to be performing a "search." At trial, the officer must be able to demonstrate that, before s/he conducted the search, s/he had an "articulable suspicion" that you possessed illegal drugs. (*State v. Pellicci*, 133 N.H. 523) If a judge determines the police officer didn't have sufficient reason to so believe, any evidence the officer found would (probably) be excluded from use at trial.

In both state and federal search-and-seizure law, restrictions on when and how an officer may conduct a search are important in protecting the rights of the citizenry. Here, again, New Hampshire is more protective in its requirements for issuing legal permissions, known as warrants, to search.

Warrants and New Hampshire vs. Federal Law

Broadly speaking, there are two types of searches law enforcement officers may conduct: searches conducted with a warrant and searches conducted without one (warrantless searches). A warrant can only be issued by a Justice of the Peace or a judge and represents the determination of that Justice or judge that sufficient evidence of wrongdoing exists to justify a search of a specific place and the seizure of specific items.

All searches, to be considered legal, must be determined to be "reasonable," a judgment largely left at the court's discretion. One major guideline in determining whether a search was "reasonable," however, is whether a valid warrant to search was first obtained. This is because the supreme courts of both New Hampshire and the US have reached the conclusion that "Warrantless seizures are *per se* unreasonable unless they fall within the narrow confines of a judicially crafted exception." (*State v. Boyle*, 148 N.H. 306) Both courts have established very similar regulations for how a warrant to search may be issued. The differences lie in the exceptions to the warrant requirement which both courts have created.

Currently, there are two notable distinctions between New Hampshire and federal law regarding exceptions to the warrant requirement. The first is found in differing opinions the two courts have over the definition of what constitutes a "search." The use of drug-sniffing dogs, discussed above, is an example of the courts' different definitions. Because the NH Supreme Court is the final word on what the New Hampshire Constitution means, it is free to define "search" differently than does the US Supreme Court.



The New Hampshire Supreme Court in Concord, NH.

The second major difference involves the validity of search warrants. The US Supreme Court has ruled that, assuming the officer applying for the warrant did not deliberately misrepresent the facts, if the magistrate issues the search warrant despite not having enough information to properly do so, the evidence seized pursuant to it is still considered legally seized. (This is known as the "Good Faith" exception.) Put more simply, evidence is considered legally seized according to federal law if there was no misconduct on the part of the officer, regardless of whether the magistrate erred in issuing the warrant. This is not the case in New Hampshire. According to the NH Supreme Court, evidence seized pursuant to an improperly issued warrant, whether or not the officers involved are to blame, violates the New Hampshire Constitution and may not be used at trial. This is another example of state law being more protective than federal law.

The Law and Those who Enforce it

While federal and state legislatures pass laws related to searches and seizures, it is police officers who apply the laws and courts which decide whether their application was legally, that is, constitutionally, correct. Thus, how a given officer understands search-and-seizure law will affect how s/he applies it; and whether s/he applied it correctly or incorrectly will be the issue for the court to decide. Much of the time these decisions are routine and do not result in any noticeable changes in search-and-seizure law. But every once in a while a new situation arises, and the courts must make new law. For example, the advent of computers and how police officers behaved when presented with the opportunity to search a computer's files resulted in courts having to address an issue of searches and seizures which had never arisen before. It is primarily these situations, these decisions on the part of individual police officers, which cause search-and-seizure law to evolve. As such, I found it helpful in my research to interview police officers, prosecutors, and defense attorneys in New Hampshire about their opinions on the evolution of search-and-seizure law in this state and how the law should change, if at all.

All the subjects interviewed agreed upon the importance of placing legal limitations on police action and of curbing the inclination of police to do whatever necessary to catch criminals. When asked whether the public should care if a criminal were convicted on the basis of illegally seized evidence, all the subjects replied in the affirmative. One police chief emphasized that "The public has an obligation to watch over what the police are doing, so that we don't abuse our power." And a former prosecutor similarly stated that "People should still care. Democracy works best when people care about how Constitutional rights are implemented. And we should care, to avoid taking shortcuts."

But when asked how the police should be controlled and whether the Exclusionary Rule (the rule prohibiting illegally seized evidence from being used against a defendant at trial) was the best means of control, the subjects differed. One defense attorney supported the Exclusionary Rule as being constitutionally justified and attacked the notion that civil remedies for police misconduct were sufficient, calling them "hardly appropriate," and saying that "People today have a hell of a lot more rights, because the courts have protected those rights." This position was supported by a prosecutor, who said "The only other remedy is a civil remedy, and you're gonna have a tough time having a jury look at someone who's committed a heinous crime and say 'well, we see that your rights were violated, we're gonna give you a bunch of money.'" Several police chiefs agreed with this sentiment, one of them saying "I totally agree with the Exclusionary Rule."

On the other side, however, both a police chief and a former prosecutor expressed reservations about the Exclusionary Rule. The chief called for a national debate on the issue and, when asked whether the Exclusionary Rule sacrifices too much public safety in order to protect individual rights, replied "Yeah, I think I would say that," and further pointed out

that "From my understanding and from what I've read over the years, we are the only nation in the world . . . that has the Exclusionary Rule." The former prosecutor, while not openly advocating an elimination of the Exclusionary Rule, did say that "If I were designing the system, I wouldn't be in favor of the Exclusionary Rule. I think it's an odd way to enforce Fourth Amendment rights."

Several subjects expressed frustration at the fact that New Hampshire law is, in some respects, more restrictive of police action than federal law. One former prosecutor maintained that "Federal law has given greater discretion to law enforcement officers, and I think that discretion is generally well used." New Hampshire's lack of a "Good Faith" exception to the Exclusionary Rule frustrated some police officers as well. Overall, though, the police officers interviewed did not seem to have strong objections to the law as it is. One police chief expressed this position well by saying "It's what [the New Hampshire courts] say our Constitution says. States are allowed to have constitutions that provide their citizens with more rights, so to speak, than the federal Constitution, and that's what they say."

Whether this relatively disinterested attitude expressed by some subjects was simply professional demeanor or actual private opinion is unclear. On one level or another, though, all the police officers interviewed accepted the current legal situation in New Hampshire and recognized that it was their place to enforce the current law and not attempt to overtly change it. One police chief said "Those are the rules we play by," and another admitted that, even despite his dislike of the Exclusionary Rule, the strict regulations governing police power are "the nature of the world we live in, in the United States, and I'm not so sure that it shouldn't be that way."

Like it or not, that's the way the law in New Hampshire is. It is more restrictive of police action than federal law and gives greater weight to the importance of individual privacy. It is the product of New Hampshire's legal history and the philosophy of its supreme court, and it is a result of the federal system of government which the U.S. Constitution established. Above all, it is a subject of great importance to everyone, for search-and-seizure law is the most personal of law.

Many thanks to Professor John Cerullo for his guidance and mentoring throughout my research, for proofreading more drafts of my paper than I think he'd care to remember, and for his unflagging faith in my ability. I also owe much gratitude to Dr. Charles Putnam for pointing me in the right direction from the very beginning, and for being a wealth of useful information. Thanks to my interview subjects, who sacrificed hours of their busy lives to answer my questions. And, of course, thanks to the Supreme Court of the United States. This research wouldn't have been possible without it.

References

All cases cited may be found online at www.westlaw.com, or www.findlaw.com.

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Author Bio

*Doing scholarly research in a field where little has been done was very satisfying for **Randall Lawrence-Hurt**, a political science major from Tuftonboro, New Hampshire. For his Summer Undergraduate Research Fellowship, he spent many hours reading and comparing federal and New Hampshire search-and-seizure law cases. This resulted in a thirty-page report, which he then narrowed and focused for his Inquiry article. Randy met his (future) mentor, Dr. John Cerullo, in 2007 during the University of New Hampshire's Justice Studies Budapest program. "I thoroughly enjoyed Professor Cerullo's teaching style," Randy said, "and his willingness to converse about a range of historical, political and legal topics with students." Although the research topic Randy finally chose was not a specialty of Dr. Cerullo's, Randy knew that he would "ask the questions I needed to answer and challenge me to pursue different ways of thinking," which was "exactly the kind of mentoring I needed."*

Randy graduated in December 2009 with a Bachelor's of Arts in political science. He is taking time off from school to get a certificate for teaching English as a second language and also to continue his work with the UNH Mock Trial program. Spending some time abroad is in his future plans before going to law school.

Mentor Bio

Dr. John Cerullo, a professor of modern European history at the Manchester campus of the University of New Hampshire, arrived there in 1981, when UNH-M was Merrimack Valley College. His research and teaching interests have ranged from intellectual history to legal theory and legal history. Over the last ten years, his research has been mainly on subjects pertaining to modern French history, and his most recent publications have addressed various aspects of the Dreyfus Affair and the theory and practice of French military justice prior to World War I. As faculty supervisor of the Justice Studies Budapest Program in the fall of 2007, he taught a course titled "Law and the Legacy of the 20th Century: Issues in Contemporary European Jurisprudence," which Randy attended.

It was enormously gratifying to work with Randy on this project," Dr. Cerullo said. "He is one of the finest students I have known in my nearly thirty years as an academic. I learned a great deal from him about the theory and practice of criminal justice in New Hampshire, and especially about Fourth Amendment issues." The fact that New Hampshire legal history is nearly untouched by scholars, Dr. Cerullo noted, is almost certainly attributable to there being only one law school in the state, Franklin Pierce, which is a rather young institution. "There is plenty of work to be done in this field," he said. "I hope Randy will return to it someday, and I hope other students will be inspired by his achievement to address other aspects of it."