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Judging a Book

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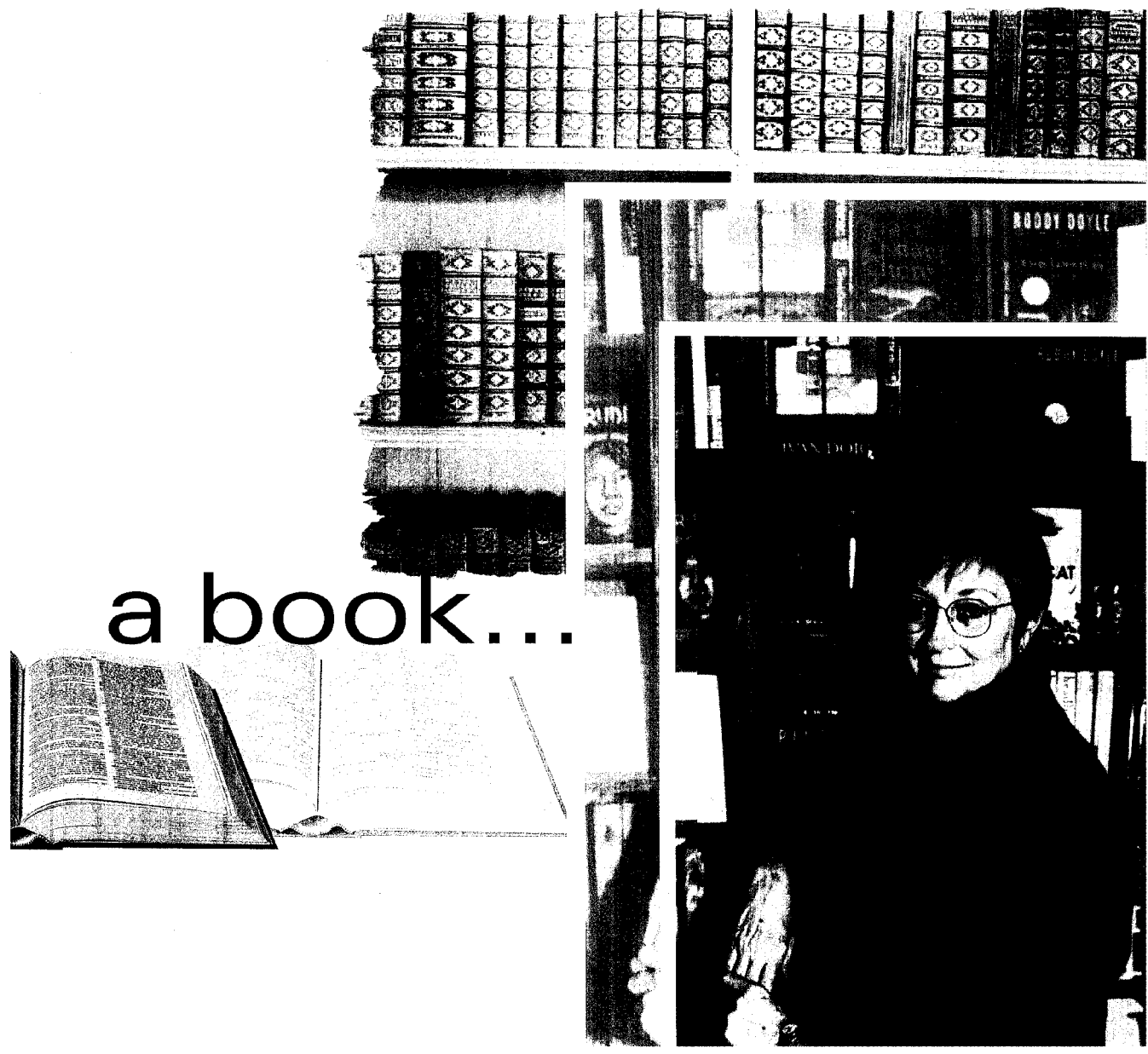
judging

On March 17, 2000, the Tattered Cover Book Store received a "subpena" from the Drug Enforcement Agency ("DEA") and I began a fight to save the First Amendment.

by Joyce Meskis



a book...

On March 17, 2000, the Tattered Cover Book Store received a "subpena" from the Drug Enforcement Agency ("DEA"). The "subpena" required that the Tattered Cover turn over the purchase records of one of the store's customers. Specifically, it asked for the record relating to a mail order purchase, in addition to all other transactions by this particular customer.

I immediately faxed the "subpena" to our attorney, Dan Recht, who informed me that it was an unenforceable administrative subpoena.[1] We discussed the First Amendment implications of this request. Dan said he would call the DEA agent. Dan informed the agent of our First Amendment concerns and stated that the Tattered Cover would not turn over the information based on this administrative request. He invited the agent to obtain a real subpoena that we would then litigate. The agent indicated to Dan that he did not want to do so, and Dan was left with the impression they were going to let it drop.

We thought the matter was over. However, early in April Dan received a call from Fran Wasserman at the Adams County District Attorney's office. Mr. Wasserman told Dan that a search warrant was being sought in order to obtain the information that the DEA "subpena" had requested from the Tattered Cover. Dan felt that Mr. Wasserman hoped to avoid the search warrant by getting Dan's permission to obtain the information. Dan asked if he could have until the end of the next business day before any action was taken to give him time to contact his client. Mr. Wasserman agreed.

I was incredulous when Dan called to tell me about his conversation with Mr. Wasserman. A search warrant! No opportunity for further judicial review! We agreed to mull over the situation and discuss it the following day. However, before we had an opportunity to have that conversation, there were four law enforcement officers (soon to be joined by a fifth) in my office, search warrant in hand. I could not believe it! I raised the First Amendment issues, talked about the *Kramerbooks* case, which put a greater burden on authorities when it came to searches and seizures of constitutionally protected material,[2] all to no avail. The officers allowed me to contact Dan, who persuaded them to hold off on the execution of the warrant for a week after a series of conversations with the officers and Mr. Allen, in the Denver District Attorney's office, who had signed off on the warrant.

The search warrant had been narrowed somewhat from the original request. It required the Tattered Cover to turn over detailed information concerning the mail order shipment, plus all transactional information relating to that same customer during a one-month period.

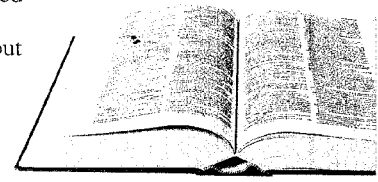
We filed for and received a temporary restraining order halting the execution of the search warrant. This allowed us to litigate the subpoena in the Denver District Court. That case was heard in October 2000, and the judgment rendered half a loaf to each side. Judge J. Stephen Phillips denied authorities (the North Metro Drug Task Force) access to our customer's purchase records over the one-month period. However, the judge ordered the Tattered Cover to provide the information regarding the specific mail order shipment it had contained.

The facts leading up to the search warrant unfolded over time. Apparently, late in 1999 and early in 2000, the North Metro Drug Task Force was investigating a suspected methamphetamine lab in a trailer home in Adams County. During the course of that investigation, they sifted through the trash outside of the home. In so doing, they found the leavings of a meth lab as well as an empty mailing envelope with a Tattered Cover mailing label on it addressed to a person living in the trailer home. That label also had an invoice number printed on it which could be used to identify the shipment.

The leavings of a meth lab found in the trash gave police probable cause to obtain a search warrant for the trailer home. In searching the home, they found a small meth lab in a bedroom. They also found two new looking books on the manufacture of methamphetamines. Neither had Tattered Cover inventory control stickers on them. One was still in a wrapper. Testimony in court also alleged that neither had the appearance of having been read.

The police found that there were as many as five or six individuals living in or frequenting the trailer home. They concentrated on identifying the occupant of the bedroom. A list of suspects emerged, our customer being Suspect A. Suspect A's address book was found in the bedroom, along with other documents with the names of other individuals. A lot of effort went into building the prosecution of this case, but it all came to a screeching halt with the issue of trying to tie the meth books to Suspect A. The police testified that they saw this as a "piece of the puzzle."

However, when Fran Wasserman was approached to sign off on the search warrant in Adams County, he refused to do so. He indicated to the officers that more investigation was needed. He asked them to check the books for fingerprints and told them that they needed to interview the suspects connected with the trailer home. They proceeded to dust the books, but found no useful fingerprints. The officers did not do the interviews in compliance with Mr. Wasserman's request. Instead, they sought the search warrant from another jurisdiction-Denver.



I knew very little about the investigation when the police arrived at the Tattered Cover with the search warrant from the Denver County Court. As our conversation unfolded, I asked one of the officers if our customer (Suspect A) had been contacted so that permission could be obtained for me to turn over the information. The officer said that they had not because the suspect was not the sort to give permission. I thought that might indeed be true if those particular books regarding the manufacture of methamphetamine had been sent in the mailer. If they had not, our customer may have given permission for the police to find out what had been in the mailer. In any case, it seemed to me that there was little to lose in asking, and something might be

gained. The officer stressed that they just wanted the information regarding the mail order shipment. I asked the officer what would happen if this did not reveal what they expected it to. He replied that they would then take the next step, which I interpreted to mean that they would seek additional records from the Tattered Cover.

The officers made it clear that they were not investigating the Tattered Cover for illegal activity. I was sure that was the case, because the Tattered Cover is a law-abiding business. I tried to make it clear that the Tattered Cover did not intend to stand in the way of a criminal investigation. As an establishment, we are in agreement with authorities that meth labs are a scourge on the community. We support the police in the difficult job they do. But, for the Tattered Cover, an individual consumer's book purchase has serious First Amendment implications. We also believe that it is incumbent on the police to protect and honor our First Amendment rights. This case requires a balancing of the necessity of the information the government seeks against important constitutional protections.

As the afternoon wore on, I asked one of the officers how having a book in one's possession could play a role in a conviction for illegal activity. He replied that it could be introduced into evidence to establish the suspect's state of mind. Curiously, months later he would say that the information regarding the book purchase was sought to establish residency in the bedroom (the police had residency in the trailer home established). Why then, did the police only focus on the books about methamphetamines? Were there other books in the bedroom? What would have been the outcome if the Tattered Cover had not sold the meth books to this suspect? Would that have freed Suspect A of suspicion? I did not think that was likely. How important exactly was this "piece of the puzzle?" Was a "compelling need" (a higher standard than probable cause) clearly established? Given all of the evidence, would there still have been a case without the books? Conversely, if the whole case hung on the books, was it a viable case?

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Some have asked me why I did not declare victory after the decision of the District Court. Would turning over this information really impact our freedom to read? I believe it would. Therefore, the Tattered Cover decided to appeal the decision of the District Court. Briefs were submitted to the Colorado Supreme Court and the oral arguments were heard on December 5, 2001. I am writing this at the end of February 2002 as we await the decision of the court.

While the Tattered Cover is not arguing that the First Amendment enjoys absolute protection, it is arguing that there should be and is a higher standard of protection. It is, after all, one of the very most important pillars of our government. In the *Kramerbooks* case, a District of Columbia District Court Judge ruled that Kenneth Starr, in his subpoena of Monica Lewinsky's book purchase records, could not have unfettered access to such information in his investigation of President Clinton's activities. She ruled that he must demonstrate a compelling need for the information as it relates to such an investigation, which is a higher standard than probable cause.[3] That case never made it to the next step

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Tattered Cover v. Thornton:

by Corey Ann Finn

The Colorado Supreme Court handed down *Tattered Cover v. Thornton* on April 8, 2002.[1] The court found in favor of Joyce Meskis' bookstore, the Tattered Cover, holding that the search warrant of a bookstore customer's purchase record was unconstitutional.[2]

In 2000, the Drug Enforcement Agency and the North Metro Task Force were monitoring a trailer in Adams County, Colorado, because they suspected that its occupants were manufacturing methamphetamine.[3] Having searched through the trash of the trailer and having executed a search of the trailer pursuant to a warrant, investigators needed to connect one of four occupants of the trailer to the meth lab found in the trailer's bedroom. Suspecting a connection between the books found in the bedroom on the manufacture of methamphetamine and an empty mailer from the Tattered Cover found in the trash, investigators served the Tattered Cover with a DEA administrative subpoena, requiring information about the order sent to Suspect A and all other purchases made by the suspect. About this initial subpoena, the Colorado Supreme Court said that "[u]sing such a subpoena was ordinarily a successful technique for DEA officers, though such a subpoena lacks any force or legal effect."[4] Meskis, through her attorney, informed investigators of her unwillingness to comply because of her concern for the privacy of the bookstore's customers.

Investigators then sought and received a warrant from a Denver County court, which they attempted to execute. Pursuant to Meskis' attorney's request, the district attorney who signed off on the warrant voluntarily stayed its execution so the bookstore could litigate it (in fact, the Tattered Cover did receive a Temporary Restraining Order from the court).

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employers' information may override the interests of a state that has no policy favoring sharing information.[38]

A potential solution to all these problems is allowing the parties to nail down the applicable state law by including a choice-of-law clause in their employment contracts. This can potentially ensure enforcement of the clause against application of state law that protects employees or raiding employers. The Restatement provides that the law designated in the contract is not enforced as to a regulatory issue if:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[39]

Since the chosen state is often the employer's headquarters or at least a branch office, the main issues concern, not the relationship with the chosen state,[40] but whether another state has a fundamental policy against enforcement and that state's interests outweigh the chosen state. The cases reach varied results, but a review of 67 restrictive covenant cases involving choice-of-law clauses shows that clauses were enforced in 39 cases, not enforced in 25 cases, and interpreted as inapplicable in three cases. To be sure, further analysis is necessary to determine the marginal effect of the clause - that is, whether the court would have reached the same result under either law. But the courts' tendency to enforce contractual choice suggests that the clauses may have some effect in inducing courts to enforce
restrictive covenants.

This brief review of the law suggests that the parties gain something from these choice-of-law clauses, even if they are frequently not enforced. Where the law of a contractually selected state is fairly similar to that of another state whose law would apply in the absence of contractual choice, but where the law of the two states might go either way with close facts, the court likely will apply the selected law. Thus, a firm may be able to gain predictability by contracting for the application of the law of a state that has experience with these clauses or has enforced the particular clause or clauses in relevant industries.[41] Also, even if the two potentially applicable laws differ significantly, a court may choose to apply the less regulatory statute where the fact situation is arguably not covered by the more regulatory statute.[42]

However, these clauses do not give employers perfect protection. The problem is that states enforce their own "fundamental" policies, while at the same time refusing to apply the laws of states that have weak contacts with the contract. This often means protecting local employers against employers based out of state. Consider, for example, *Application Group, Inc. v. Hunter Group, Inc.*,[43] in which a California state court protected a local employer raiding an employee of a Maryland firm despite a Maryland choice of law clause. Applying the Restatement[44], the court held that California's anti-non-compete policy applies to employment involving performance of "services for California-based customers" even if the employee had no prior contact with California and does not reside in California. The court reasoned:

> In this day and age—with the advent of computer technology and the concomitant ability of many types of employees in many industries to work from their homes, or to 'telecommute' to work from anywhere a telephone link reaches—an employee need not reside in the same city, county, or state in which the employer can be said to physically reside. California employers in such sectors of the economy have a strong and legitimate interest in having broad freedom to choose from a much larger, indeed a 'national,' applicant pool in order to maximize the quality of the product or services they provide,

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in the judicial process because Ms. Lewinsky struck a deal with Mr. Starr and voluntarily turned over the records.

The Tattered Cover, in its case, urged the court to apply the compelling need standard. We argued that the government did not demonstrate a compelling need for the information to make their case, nor did authorities exhaust their other alternatives in gathering information. Only when there is compelling need and there are no other alternatives should First Amendment guarantees be set aside.

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The government argued that the information sought was only a business record, that they could not care less what the suspect read, and that it could be used to establish a state of mind. They contended that a book purchase is no different than a hardware purchase record when it comes to a criminal investigation. I fundamentally disagree.

Entering books into evidence that are found at a crime scene is one thing. Seeking out who bought what from a bookstore is another. Purchasing, borrowing or "reading a book is not a crime."[4] To edge closer to using a customer's book purchase records as an acceptable way of determining criminal behavior is disquieting at best, and downright frightening at worst. Whether as a reporter seeking information, an iconoclast harmlessly pushing the envelope of societal acceptance, or even someone potentially contemplating illegal behavior, reading is not a crime.

The Tattered Cover is appreciative of the thoughtful consideration Judge Phillips gave to his decision. While we are in disagreement with part of that decision, we could not agree more with the chilling effect that he addressed when speech is thwarted. Judge Philips stated: "It is clear that the First Amendment of the Constitution protects the right to receive information and ideas, regardless of social worth, and to receive such information without government intrusion or observation." [5] He went on to quote the late Supreme Court Justice Douglas on the necessity for such protection:

> Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation. The press and its readers will pay a heavy price in harassment. But that will be minor in comparison with the menace of the shadow which government will cast over literature that does not follow the dominant party line. If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land. Through the harassment of hearings, investigation, reports, and subpoenas government will hold a club over speech and over the press.[6]

When they heard about this case, hundreds of our customers took the time to call or write to us in support of our stand, underscoring this message and raising their own concerns about privacy and the chilling effect on the First Amendment of requiring bookstores to turn over to the police information regarding the purchases of customers.

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When the trial court held that officers could seize the record of the purchase that was delivered in the mailer, but denied them the right to confiscate other records of the same customer, the Tattered Cover appealed.

In its decision, the Colorado Supreme Court explained "how the First Amendment and Article II, Section 10 of the Colorado Constitution safeguard the right of the public to buy and read books anonymously, free from governmental intrusion."[5] Accordingly, the court developed a test for whether law enforcement officials may seek to seize the book purchase records of an innocent, third-party bookstore in order to gather evidence against a customer. The test requires the government to demonstrate a compelling need for the information sought. "The court must then balance the law enforcement officials' need for the bookstore record against the harm caused to constitutional interests by execution of the search warrant."[6] The court also held that "an innocent, third-party bookstore must be afforded an opportunity for a hearing prior to the execution of any search warrant that seeks to obtain its customers' book-purchasing records."[7] In this hearing, the court is to apply the test created by the Colorado Supreme Court.

In applying this test to the Tattered Cover search warrant, the court looked at the government's three justifications for wanting the record of the suspect's purchase: (1) to prove that the suspect had the necessary mens rea to be prosecuted for the manufacture of methamphetamine, (2) to prove that the suspect lived in the bedroom where the meth lab and books were found and (3) to connect the suspect to the crime. Analyzing each one separately, the court held that the government showed no sufficiently compelling interest to outweigh the potential chilling effect on the right to buy books anonymously.