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# NOTE: THE RIGHT TO PRIVACY IN WHAT YOU READ: THE FOURTH AMENDMENT IMPLICATIONS OF A BOOK STORE SEARCH

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**SUMMARY:**
... In Tattered Cover, Inc. v. City of Thornton, the Colorado Supreme Court was presented with a conflict between the First and Fourth Amendments. Law enforcement officials sought to search book purchase records from the Tattered Cover book shop, in the hope of linking a suspect to a book found at the scene of a crime. ... In this case, the book purchaser did not have an expectation of privacy in the book purchase records since she voluntarily gave out personal information to the store, and assumed the risk that the clerk would reveal the information to law enforcement officials. ... According to the Colorado Supreme Court, it is within reason for Suspect A to expect a zone of privacy surrounding the book purchase. ... In the context of the Tattered Cover case this section can be seen as authority for the FBI to search a book purchase record for evidence of "clandestine intelligence activities," and to do so without an adversarial hearing beforehand. ... Unlike a "fishing expedition," the police in Tattered Cover had a warrant for the book purchase record and were nevertheless prevented from conducting the search. ... Once a customer has exposed his purchase to a third party, the expectation of privacy has been removed, and a search can proceed. ...

**TEXT:**
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## Introduction

In Tattered Cover, Inc. v. City of Thornton, n1 the Colorado Supreme Court was presented with a conflict between the First and Fourth Amendments. Law enforcement officials sought to search book purchase records from the Tattered Cover book shop, in the hope of linking a suspect to a book found at the scene of a crime. n2 Tattered Cover fought the search, arguing the existence of a constitutionally protected right to privacy in one's choice of reading material. n3 Specifically, the store argued that since the right to receive ideas is protected by the First Amendment, any search of that information runs afoul of the Constitution. The court agreed with Tattered Cover, holding that the combination of protections afforded by the First Amendment to the United States Constitution and the Colorado Constitution outweighed law enforcement's Fourth Amendment interest. n4 The court was especially concerned with the chilling effect that such a search could have on people's desire to receive controversial information. n5

The Colorado Supreme Court erred in its decision to extend First Amendment protections in Colorado. The basis for this error lies in the court's analysis, which focused mainly on First Amendment issues, rather than the Fourth

Amendment and the search requirements it proscribes. In this case, the book purchaser did not have an expectation of privacy in the book purchase records since she voluntarily gave out personal information to the store, and assumed the risk that the clerk would reveal the information to law enforcement officials. n6 Additionally, the recent and tragic events of September 11th place the book purchase records in a zone of privacy that American society is far less likely to recognize as constitutionally protected. Searches of personal information have become a necessity in post-September 11th America, and public safety depends on more active law enforcement. n7 Since the law enforcement officials had a valid warrant at the time of the search, the requirements of the Fourth Amendment were met and the decision of the Tattered Cover court to prevent the search was erroneous.

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I. Facts and Procedure

The controversy in Tattered Cover involved the validity of a search warrant executed by Officer Randy Goin of the Thornton police department. n8 The warrant sought information regarding book purchases of some Tattered Cover customers who were suspects in a narcotics investigation. n9 The validity of the search warrant and the privacy protections courts have extended to the items the warrant sought to discover were at issue in the case. n10

The Tattered Cover case began as part of an ongoing drug investigation conducted by both the North Metro Task Force (hereinafter City of Thornton) and the Drug Enforcement Administration (hereinafter DEA). n11 The agents were monitoring a trailer home located in Adams County, Colorado, during March of 2000, due to their suspicion that it was being used as a methamphetamine lab. n12 The lead investigator on the case was Officer Randy Goin, of the Thornton Police Department. n13 The police believed that four suspects, referred to in the record as A, B, C, and D, lived in the trailer together. n14 However, only A and C were registered with the trailer park management as residents. n15 On March 13, 2000, Agent McFarland of the DEA searched some garbage from the trailer home and uncovered evidence of drug operations as well as a mailing label from Tattered Cover addressed to Suspect A. The label listed an invoice corresponding to the books that were purchased, but made no indication as to their content. n16 The following day, Officer Goin executed a search warrant on the premises, and discovered a methamphetamine lab and some of the product in the master bedroom of the trailer. n17 Because the lab was located in the master bedroom, its occupancy was the central focus for the police. They initially believed that Suspects A and B used the bedroom, but the police were unable to make a conclusive determination. n18

After the search, Officer Goin believed he had probable cause that Suspect A ran the lab, but he wanted to gather more evidence before making any arrests. n19 He turned his focus to the two books seized from the trailer, entitled Advanced Techniques of Clandestine Psychedelic and Amphetamine Manufacture, by Uncle Fester, and The Construction and Operation of Clandestine Drug Laboratories, by Jack B. Nimble. n20 Both books appeared to be new, leading DEA Agent McFarland [*363] to suspect a connection between the books and the Tattered Cover mailing envelope found at the scene. Officer Goin also noted that the books appeared to "fit the dimensions" of the mailer. n21 His next move was to search Tattered Cover's webpage, where he discovered that both books were in fact sold by the store. n22 Based on this discovery, Goin and the DEA served Tattered Cover with a DEA administrative subpoena. n23 The subpoena requested the titles of the books corresponding with the invoice from the mailer, as well as information from any book order ever placed by Suspect A. n24

The owner of Tattered Cover, Joyce Meskis, told her attorney not to comply with the subpoena because it would violate her customer's First Amendment rights. n25 Instead of obtaining a court ordered subpoena with legally binding effect, Officer Goin went to the Adams County District Attorney for a search warrant. n26 However, several prosecutors refused to sign off on the warrant after "voicing concerns about its scope and subject matter." n27 Eventually, one District Attorney told Officer Goin that although he would try to negotiate the release of the information from the Tattered Cover's attorney, Officer Goin should most likely pursue other leads. n28 Instead, without telling the Adams County District Attorney, Officer Goin went to the Denver District Attorney for approval of his warrant. He succeeded, and was authorized to seize the information relating to the transaction in question, and any

additional transactions by Suspect A; the warrant was then approved by a Denver County Court Judge. n29

On April 5, 2000, Officer Goin attempted to execute the warrant, but Meskis called her attorney who promptly called the Denver District Attorney. The District Attorney then persuaded Officer Goin not to execute the warrant until Tattered Cover could contest its validity. n30 The trial court held a hearing on the validity of the warrant because of concerns about the right to privacy implications in the materials the warrant sought to obtain. n31 At the hearing, Tattered Cover presented testimony that executing the warrant in this situation would "have a substantial chilling effect on the willingness of its customers to purchase controversial books." n32 Meskis testified that many of her customers shopped at the Tattered Cover due to its policy of not disclosing purchase records, and that the release of these records would reduce the customer's willingness to buy many types of [*364] books. n33 There was also outside testimony at the hearing about the likely effect of allowing this search. n34

Although the order was stayed pending appeal, the hearing resulted in the trial court granting a restraining order with respect to Suspect A's past purchases, but allowing the police to discover the information relevant to the mailer found at the trailer. n35 In its decision, the court set forth a four-part test to balance the rights and interests of Tattered Cover against those of the local police:

(1) whether there was a legitimate and significant government interest in acquiring the information; (2) whether there was a strong nexus between the matter being investigated and the material sought; (3) whether the information was available from another source; and (4) whether the search was limited in scope so as to prevent the exposure of other constitutionally protected matters. n36

Tattered Cover appealed this decision, and the defendants have accepted the trial court's decision preventing any search of Suspect A's past purchase records. n37 Thus, review was limited to the validity of a search for the material directly related to the mailer, specifically the books purchased by Suspect A that were mailed to the trailer in the package found by police at the scene. n38

II. Court's Analysis

The Colorado Supreme Court began its analysis in Tattered Cover by expressing a desire to consider both the rights of the actual parties in the case and the rights of the general public. n39 To do this, the court divided its analysis into the following sections: (1) the First Amendment, both federal and state, safeguarding the right of the public to buy books anonymously; (2) the tension between this right and the needs of law enforcement under the Fourth Amendment; (3) the need for a pre-seizure hearing in this type of situation; and (4) the application of the test they have created to the facts of the case. n40

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A. The First Amendment Safeguards

From the outset, the court noted that the First Amendment clearly safeguards the right of the public to receive information. n41 While this is not an express provision of the First Amendment, it is an "inherent corollary" that is essential to the protection of the right to privacy. n42 To further emphasize this point, the court quoted extensively from the opinion of Justice Brandeis in Whitney v. California. n43 He wrote that "freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth ... this should be a fundamental principal of American government." n44

The court noted that, in general, bookstores are places for people to explore ideas and perspectives. n45 When you buy a book, you engage in an activity protected by the First Amendment because you are exercising your right to read

and receive ideas. n46 Any government action that infringes on the willingness of customers to buy books necessarily implicates the First Amendment. n47 For example, governmental action limiting bookbuyers' anonymity would result in a chilling effect, because all would know who subscribed to certain ideas. n48 The result of taking away this anonymity would be grave: "First Amendment speech rights would be chilled if people were required to reveal their identities before being able to receive these expressive materials." n49

This need for anonymity is applicable to book buying. n50 "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 specter of a government agent will look over the shoulder of everyone who reads." n51 As a result, the court worried that "fear will take the place of freedom in the libraries... ." n52 Accordingly, search warrants directed at bookstores, demanding information about customers' reading habits, intrude upon First Amendment rights because compelling disclosure threatens to destroy the anonymity upon which so [*366] many customers rely. n53

While the United States Constitution outlines the minimum amount of protection a state is required to afford, each state is free to expand on this protection. n54 Colorado undertook just such an expansion in Bock v. Westminster Mall. n55 In Bock, the Colorado Supreme Court looked to the differences in language between the First Amendment to the United States Constitution and the analogous section of the Colorado Constitution, specifically, Article 2, Section 10. n56 The court acknowledged the extensive history in Colorado of affording broader protection for expressive rights. n57 Based on this history, the Tattered Cover court concluded that it "follows that the right to purchase books anonymously is afforded even greater respect under [the] Colorado Constitution than under the United States Constitution." n58

B. First Amendment Rights vs. Law Enforcement Interests

The court next examined the tension between the right to make anonymous book purchases, and the right of law enforcement officials to use the full breadth of their investigative capacity. n59 The Fourth Amendment, in combination with Article 2, Section 7 of the Colorado Constitution, guards against unreasonable searches and seizures. n60 In order to obtain a warrant, the police must demonstrate that probable cause exists to believe that the object of the search is located in a particular place. n61

Due to this loose standard, conflicts between the First and Fourth Amendments are inevitable when expressive materials are sought, especially because the seizure of documents is "conceptually distinct from a seizure of objects such as guns or drugs." n62 Due to this conflict, the court looked to the Supreme Court for guidance. In Zurcher v. Stanford Daily, n63 the Supreme Court held that when expressive rights are involved, the warrant must comply with the requirements of the Fourth Amendment with "scrupulous exactitude." n64 There, the police served a warrant on a student newspaper seeking photos of a campus [*367] demonstration. n65 The purpose of the search was to discover which demonstrators were responsible for an assault on the police officers present at the event. n66 The newspaper fought the validity of the warrant, saying that the police should have used a subpoena duces tecum because of the First Amendment implications of the search. n67 The Supreme Court rejected this stance, holding that the First Amendment does not entirely preclude a valid warrant that complies with the terms of the Fourth Amendment: n68 "properly administered, the preconditions for a warrant ... should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." n69

In light of Zurcher, the Colorado Supreme Court acknowledged that the First Amendment does not limit the ability of government to seize expressive material. n70 Thus, the court focused its decision on the additional protections afforded by the Colorado Constitution. n71 The court felt that, in this specific circumstance, the protections of the Fourth Amendment (i.e. the preconditions for a warrant) do not go far enough to protect citizens' rights. n72 "Scrupulous exactitude" is insufficient because the government could make an argument in almost every case that expressive materials should be seized under that test, regardless of any chilling effects that could result. n73

As an example, the court used the hypothetical purchase of the Anarchist's Cookbook. n74 In that case, the

"scrupulous exactitude" prerequisite could easily be met. The police could quickly get a warrant approved, since mention of the book title would provide enough specific detail to meet the requirement. n75 Since the police only need the name of a book from Tattered Cover, they would have an easy time meeting the "exactitude" requirement. While this type of broad search could be necessary in certain circumstances, a general application of the rule would result in a broad chilling effect. n76 As an answer to this dilemma, the court turned to the Colorado Constitution for guidance. n77 The Colorado Constitution requires more substantial justification from the government for a search than the Fourth Amendment requires. n78 Before law enforcement can act in a way that can chill the willingness of the public to look at a certain book, law enforcement must make a [*368] heightened showing of need. n79

The court also relied on In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc., to guide them. n80 While that case arose in the context of an investigative subpoena and not a warrant, the overall conclusion of the court was applicable to the issue here. In re Kramerbooks involved subpoenas that sought book purchase records related to Monica Lewinsky. n81 The bookstore fought the search on the basis of the chilling effect discussed in Tattered Cover. n82 There, the court found that the First Amendment was implicated, and set forth a test that could be applied in similar cases. n83 In order to enforce a subpoena of that type, the government must show both a compelling interest or need for the information, and a sufficient connection between the information sought and the criminal investigation. n84 This level of review is referred to as "strict scrutiny." n85

The Tattered Cover court slightly modified this test to address the specific instance where law enforcement sought to seize the purchase records of an innocent third-party bookstore. n86 To do this, the government must show a sufficiently compelling need for the specific customer record. n87 While this test does not specifically include the third or fourth prongs of the trial court's test, their objectives are implicit in the balancing test adopted by the court. n88 The ultimate question in a case like Tattered Cover is whether the need for the record is sufficiently compelling to outweigh the harm execution of a warrant will cause. n89 While it is obviously hard to predict harm, far less danger exists where the record is sought for a reason unrelated to the contents of the materials purchased. n90 In essence, the decision of the court in this area requires the government to show a [*369] compelling need for the information when seeking a warrant for purchase records. n91 After the government makes this showing, the court can consider the trial court's factors to determine its validity. n92 Finally, the court must balance the government's need with the harm to society. n93

C. The Need for a Pre-Seizure Hearing

The court's next task was to address procedural issues raised in this case. n94 It is readily apparent that the protections of the Colorado Constitution are meaningless if a store is not given the opportunity to challenge the search before it takes place. n95 Here, that opportunity was only available because of the police department's decision to postpone the search until the court ruled, a circumstance that is not available in every case. n96 Thus, a hearing is needed to protect both the store and the book buying public. n97 Had Tattered Cover not put up a fight in this case, the city's zeal would have resulted in the disclosure of constitutionally protected items. n98 This shows the importance of providing an adversarial setting in which the store can challenge a warrant of this type. n99 The goal of these hearings is also to consider the rights of innocent customers whose records are uncovered during the search. n100

D. Application of the Court's Test

The court's test required the rejection of the city's requests for the records. n101 Specifically, the city said they needed the records to show the mens rea of the crime. n102 The court rejected this by noting that the police found a fully functional methamphetamine lab in the trailer. n103 This discovery is more determinative of intent than a book's presence at the scene. n104 Second, the city said they needed to determine who occupied the trailer's master bedroom. n105 The court rejected this by showing several alternate, and less intrusive, methods the police could have used to obtain this information. n106 Furthermore, the court noted that the records would not help answer the question, as the mere presence of the book in the room does not [*370] mean Suspect A occupied the room. n107 Finally, the city said they needed the records to connect Suspect A to the crime. n108 The court refuted this as being too broad a reason, as the city never elaborated on the specific reason why the connection existed. n109 Strict scrutiny would have been

violated in this instance because of the chilling effect such a broad search would have had. n110 Suspect A could have bought the book for any number of reasons not connected with the crime, including purchasing the book for a friend, or ordering it for the sake of curiosity without the intention to act. n111 While neither of these seems to be a compelling explanation in this case, the Colorado tradition of protections cautions against allowing such a search on this basis. n112 Taking these arguments into account, the court applied the balancing test to determine that the city had not displayed an interest that was compelling enough to warrant the search. n113 The court determined that none of the justifications asserted by the city could meet the threshold of a compelling interest, thus the book purchase records could not be searched in this case. n114

The court in Tattered Cover demonstrated a desire to avoid the potential chilling effect of allowing book purchase records to be searched. n115 To that end, the court recognized that the Colorado Constitution provided more First Amendment protection than the Federal Constitution, and was sufficient to defeat the Fourth Amendment concerns of Thornton law enforcement. n116 Finally, the court adopted a requirement of a pre-seizure hearing to ensure the validity of all future searches in Colorado. n117 Thus, while the court was aware of the needs of law enforcement, they determined that the rights of Tattered Cover shoppers were entitled to more protection. n118

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## III. Personal Analysis

The Colorado Supreme Court had the authority to extend First Amendment protections as it did. The Supreme Court has long held that individual states have the power to extend the protections of the Bill of Rights as they see fit. However, whether the court should have ruled as it did is open to debate. Despite the court's authority to extend the protections of the First Amendment, the third-party doctrine of the Fourth Amendment must still be applied. In this case, the application of that doctrine should have led the court to allow the search of the purchase records since those records do not fit within a zone of constitutionally protected privacy. In essence, the court missed the point of the issue as they used the First Amendment to invalidate a search governed by Fourth Amendment jurisprudence. The court should have placed more emphasis on the needs of law enforcement and the protections the Fourth Amendment provides; and following those guidelines the court should have allowed the search to proceed.

While the court was correct with regard to Colorado's ability to extend First Amendment protections, it failed to fully address the Fourth Amendment implications of their decision. The court chose to focus on the right to receive information and ideas. However, Tattered Cover was really about the need of law enforcement to search book purchase records, which is a Fourth, not First, Amendment right. The court misapplied its own balancing test by determining that the First Amendment concerns outweighed the Fourth Amendment issues. However, when the facts of Tattered Cover are examined, it becomes clear that there is no absolute First Amendment right implicated, especially in light of the redefinition of American privacy values in the aftermath of September 11th.

### A. Did the Court Have the Authority to Act as it Did?

Because decisions of the United States Supreme Court constitute the law of the land, when states deviate from federal law, there is some concern that federal law will become confused, making it unclear whether protection derives from state or federal law. The Colorado Supreme Court's decision to give the First Amendment rights precedence over Fourth Amendment concerns appears to be a Constitutional contradiction at first glance. However, the decision by the Colorado Supreme Court in Tattered Cover that Article Two, Section Ten of the Colorado Constitution extended the zone of First Amendment privacy protection provided by the United States Constitution is in line with Constitutional precedents. n119 The authority of a state to undertake this extension of First Amendment power was in line with the Supreme Court's decision in Pruneyard Shopping Center v. Robins. n120 The Court stated "our reasoning in Lloyd, however, does not ex proprio vigore limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." n121 Thus, states were granted the power to [*372] exercise their police power and place "reasonable restrictions on

private property, so long as the restrictions do not amount to a taking ... or contravene any other federal constitutional provision." n122 While the Colorado court noted that, generally, the Fourth Amendment supercedes First Amendment concerns, n123 following Pruneyard it was within the discretion of the Colorado court to read the Colorado Constitution as granting protections that extend beyond the First Amendment of the United States Constitution.

B. Should the Court Have Acted as it did?

The court in Tattered Cover should not have used the Colorado Constitution to prevent the search of the book purchase records. While the court had every right to recognize an extension of First Amendment protections in Colorado, it failed to sufficiently address the Fourth Amendment implications of its decision and significantly hindered the abilities of law enforcement in the process.

1. The Third-Party Doctrine

The third-party doctrine has developed through case law, as courts were asked to answer complicated questions concerning the right of citizens to be free from unreasonable searches and seizures. When the Framers originally conceived of the Fourth Amendment their main focus was the protection of property. This view can be seen in Olmstead v. United States n124 where the Court held that wire-tapping a home did not violate the Fourth Amendment. n125 Through decisions like Olmstead, the Supreme Court "rigidly adhered to a conception of privacy that recognized only physical invasions... ." n126 However, as American society became more advanced, the focus that the courts had placed on the property elements of the Fourth Amendment needed to be reconsidered; Katz v. United States n127 served this role.

Katz involved the wiretap of a public phone booth in which the defendant's conversation was recorded. n128 The government contended that, because the phone booth was made of glass and therefore highly visible, there was not an expectation of privacy. n129 However, the Court acknowledged that although there was no actual physical penetration of the phone booth, the defendant entered the booth seeking to exclude the prying ear, not the eye. n130 Consequently, the Court held the wiretap to be invalid, ignoring the physical trespass doctrine from decisions like Olmstead. n131 [*373] The importance of the Katz decision was bolstered by Justice Harlan's concurrence. Justice Harlan articulated a test that would become the standard for Fourth Amendment protection: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement: first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." n132 The defendant in Katz had an expectation that he was entering the phone booth for a private conversation, and this notion of privacy was one that society was prepared to recognize. n133

The third-party doctrine was further developed in both United States v. Miller n134 and Smith v. Maryland. n135 In Miller, agents from the Bureau of Alcohol, Tobacco and Firearms used a grand jury subpoena to obtain bank records for a specific suspect in an illegal whiskey-making investigation. n136 The Court of Appeals held that the police violated Miller's Fourth Amendment rights by forcing the bank to turn over all of his private records. n137 The Supreme Court reversed, and held that the bank records were not private papers and that Miller did not have an ownership or possessory interest in them after he gave them to the bank. n138 Instead, the Court considered the records to be the common business records of a bank that could be shared with third parties. n139 After citing to the test in Katz, the Court held that "it must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate "expectation of privacy' concerning their contents." n140 In Miller, the Court found that there was no expectation of privacy in the contents of the records because "all the documents obtained ... contained only information voluntarily conveyed to the banks ... in the ordinary course of business." n141 Accordingly, "the depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government." n142 Like the bank records, the book purchase records in Tattered Cover were kept in the course of regular business activity. Due to this similarity, the facts of Miller can be extended to the situation presented by Tattered Cover.

The Smith Court expanded on the Miller holding that the nature of a defendant's relationship with a third-party can determine his expectation of privacy. Smith involved a pen register installed by the police on the defendant's [*374] home telephone. n143 The police did not obtain a warrant for the installation of the register. n144 However, they used it to track a call from Smith to a victim he was harassing, and eventually used the information to obtain a warrant for a search of Smith's home. n145 The Supreme Court began its discussion by noting that, unlike Katz, the contents of the conversation were not recorded, but only the numbers that were entered into the phone. n146 The Court doubted that the general population actually entertains any expectation of privacy in the numbers that they dial. n147 All telephone users convey numbers to the telephone company, and realize that the phone company can record the numbers because they receive them with their bill. n148

Once the Court established that Smith had no expectation of privacy, they addressed whether society was prepared to recognize such a right, should it exist. n149 "This court consistently has held that a person has no legitimate expectation of privacy in the information he voluntarily turns over to third parties." n150 Thus, when Smith used the phone, he voluntarily conveyed information to the phone company and exposed it to public use. n151 This decision, combined with Miller, completed the development of the third-party doctrine.

When Tattered Cover is examined in light of the third-party doctrine, it can be argued that the Colorado Supreme Court erred in its analysis by denying the search and protecting the records. The court held that the Colorado Constitution provided a right to privacy in the purchase records of the bookstore. n152 While the court acknowledged that, apart from the "scrupulous exactitude" test for warrants, "the First Amendment places no special limitation on the ability of government to seize expressive materials under the Fourth Amendment," they nevertheless held the search invalid under the Colorado Constitution. n153

[*375] It can be argued that the third-party doctrine is not applicable here because the bookstore has its own First Amendment concerns. Yet, this position is clearly countered by the type of information being disseminated in this case. Bookstores do have an inherently expressive element to their operation, and are protected by the prohibition in First Amendment case law on content-based restrictions. However, the bookstore in this case is also facilitating a crime, leading society to be less concerned with the First Amendment implications of this search: this position is supported by a close reading of the Supreme Court precedent on the issue. As the Court stated in Brandenburg v. Ohio:

The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. n154

A book entitled The Construction and Operation of Clandestine Drug Laboratories can be viewed as a means to produce lawless action, as its sole purpose is to educate the reader on the aspects of an illegal operation. Due to this, the search for readers of these types of books is not a content-based restriction on speech, rather it can be seen as an attempt to prevent lawless action which the Supreme Court has deemed a reasonable restriction on speech.

The Colorado Supreme Court ignored the third-party doctrine and its clear application to this case, regardless of the provisions of the Colorado Constitution. The first question under the Katz analysis is whether Suspect A possessed an expectation of privacy in this case. n155 Suspect A purchased a book about manufacturing narcotics from a retail store, where the clerk was able to determine who purchased the book, and where the book was going. n156 This fact must be examined in light of the language of Miller, which directs an examination of the nature of the documents to determine if there is an expectation that their contents will be protected. n157 A book purchase record is a record of who bought what book, when, and for how much. Like a bank record, this type of record can be characterized as a business record. Suspect A was aware that the clerk at the Tattered Cover would know what book she purchased, and where it was going; this information was provided voluntarily. Had Suspect A wished to view the materials anonymously, she could have done so at a library with complete privacy and anonymity.

[*376] An analogy can also be drawn to Smith, where the Court doubted that the general public had an expectation of privacy in the numbers dialed into a telephone. n158 Similarly, it would be difficult for a court to conclude that people, in general, expect that the titles of the books they buy will be kept in complete secrecy. Most books are purchased at a book store or internet site where customers voluntarily convey information about themselves to a clerk. Once this information is given to a third party, the expectation of privacy is gone. Alternatively, Justice Marshall's dissent in Smith considers the use of the pen register to be "an extensive intrusion" into a person's private affairs because of the vital role phones play in our daily lives. n159 Yet, the seizure of a book purchase record does not fit the category of an extensive intrusion into private affairs. Books, while possessing educational and cultural value, are not as integral a part of modern life as the telephone. While the book itself may contain more expressive content than the phone numbers, at issue in Tattered Cover was not the content of the book, but the business record showing that a book was purchased. Seizing a business record with regard to an isolated book purchase is far different from the constant supervision of a man's phone calls that Justice Marshall found offensive. Additionally, Justice Marshall expressed some concern about abuse of the power to examine phone dialing records since, unchecked, this power could allow law enforcement to keep track of undesirables or uncover confidential sources for journalists. n160 However, these concerns are easily vitiated with a warrant, a procedure noticeably absent from the Smith case but present in Tattered Cover.

2. Policy Implications from the Court's Decision

The court, by denying the search, deprived law enforcement of a valuable tool. In the post-September 11th world the scope of law enforcement has expanded, and the willingness of many private individuals to accept intrusion into their personal lives by law enforcement has expanded with it. The Tattered Cover court's decision to restrict the search of the book purchase records hampers the ability of law enforcement to protect people by limiting the resources with which police can work.

One of the considerations raised by Zurcher is the issue of reasonableness and, in this case, whether society is prepared to recognize the particular expectation of privacy as reasonable. n161 According to the Colorado Supreme Court, it is within reason for Suspect A to expect a zone of privacy surrounding the book purchase. However, given the current state of American society, this assumption is far less reasonable and, consequently, an insufficient basis for Fourth Amendment protection. Like the situation in Smith, it is unreasonable to assume Suspect A expected privacy protection in a book purchase, especially when the information was voluntarily conveyed to the clerk.

Many commentators and legal theorists have addressed the scope of the right [*377] to privacy. One such commentator is Daniel Solove, who addressed the scope of modern privacy extensively and contended that information "enables the government to assemble a profile of an individual ... ." n162 Abuse of this information can lead to three distinct harms: (1) a rise of the totalitarian state; (2) the chilling of democratic activity; and (3) bureaucratic dangers. n163 Specifically, Solove contended that the third-party doctrine "poses one of the most significant threats to privacy in the twenty-first century." n164 As a solution, Solove noted that "protecting privacy requires an architecture that regulates the way information may be collected and used." n165

Although Solove's views on the right to privacy are correct when analyzed against the bulk of twentieth-century American ideals, September 11th dramatically altered the analysis. In today's world, Solove's conception of privacy hinders the ability of government to keep society safe. Had it not been for the tragic events of September 11th, American society would have been in a more liberal position, and far more likely to accept a book purchase as within a reasonable zone of privacy. However, September 11th changed American attitudes towards privacy drastically, especially when issues of national security are involved. Law enforcement has an increased desire to obtain information, including information about the public's reading habits. n166 The private sector, which had traditionally opposed such requests for information, has also become more willing to supply information. n167

While the Tattered Cover case does not involve the traditional national security concerns of terrorism and border security that are commonly associated with the phrase, the decision does have national security implications. National

security involves stability within the home front as well as safeguards against international concerns. Due to this, a large scale drug case such as Tattered Cover does relate to the ability of people to feel safe in their community, and does implicate a distinct, yet equally important, national security concern from those raised on September 11th. While the fear created by the drug manufacturer is not one of terrorist attack, their activities still raise concerns about the security of our citizens, and implicate many of the same issues raised by the September 11th attack.

Recently, there has been a great deal of academic work on the effects of the September 11th tragedies on American conceptions of privacy. "If we lose this war against terrorism, no civil liberties will survive. The civil liberty we should be most concerned about right now is the right of all Americans, and non-Americans too, to live their lives in peace ... ." n168 This idea is the motivation behind the USA [*378] PATRIOT Act, signed into law by President Bush on October 26, 2001. n169 This Act changed the manner in which the United States operates, and is considered one of the most extensive expansions of the government's surveillance authority. n170 First, the Act changed the immigration laws, allowing Immigration and Naturalization Services (hereinafter INS) to deport those detainees that provide support to a certified terrorist organization rather than those who actually engage in terrorist activity. n171 Second, the Act allowed the United States to indefinitely detain suspected terrorists until they are either deported, or determined to be ready for release by the Attorney General. n172 Third, the Bureau of Prisons is now permitted to monitor the conversations lawyers have with their clients, if the client is suspected of terrorist activities. n173 The government is also allowed to engage in ethnic profiling by conducting voluntary interviews of young men entering the United States from countries that harbor terrorism. n174 The language of section 215 of the PATRIOT Act has been applied to the book record search as it grants authority to the FBI to obtain a search warrant for "any tangible thing (including books, records, papers, documents, and other items) for an investigation ... to protect against international terrorism or clandestine intelligence activities." n175 The Act also allows warrants for these materials to be obtained without having an adversarial hearing. n176 In the context of the Tattered Cover case this section can be seen as authority for the FBI to search a book purchase record for evidence of "clandestine intelligence activities," and to do so without an adversarial hearing beforehand. While allowing a search of this type is a clear departure from the traditional rules protecting free speech, it is a clear indication of the shift in the scope of law enforcement post-September 11. n177

[*379] Some commentators argue that government should be allowed to go even farther than it has. Alan Dershowitz has put forth a persuasive argument that torture should be allowed "to prevent the commission of a terrorist act." n178 Another proposal for increased law enforcement is the repeal of the visa waiver program, which facilitated entry into the United States for certain visitors, including both Zacarais Moussaoui and Richard Reid. n179 While ending the visa waiver program will not "eliminate the ability of terrorists to enter the United States ... ," it will likely reduce the ease with which they may do so. n180

These expansions of government power show both an increased commitment by the government to improve national security, and an increased willingness by many Americans to allow it. Clearly, the attacks took a society that was once very concerned with the protection of personal privacy and liberty, and began to change it into a society that, while still concerned about privacy rights, was more willing to balance that interest against the needs of a nation to be protected against future attack.

Of course, there is a counterpoint to those who advocate an enlargement of government surveillance power. There is always the fear that, as Benjamin Franklin wrote, a sacrifice of "essential liberty for temporary security will have neither liberty nor security." n181 While it is true that the United States has survived "presidential assassination, domestic riots, and economic depression," n182 those events pale in comparison to the terrorist attacks of 2001. While many nations have been forced to deal with domestic turmoil during their history, few have had to endure the terror of a catastrophic sneak attack like that of September 11th. It is against this backdrop of terrorism, and the American response to it, that the Tattered Cover court rendered its opinion.

One result of the events of September 11th is a change in American attitudes toward privacy and a reduction in the public's ability to maintain anonymity. n183 This was overlooked by the Tattered Cover court when they preserved the anonymity of the book purchaser. The court failed to see the dangers of total anonymity in modern American society,

but it is not alone. The value of anonymity is laid out by another recent commentator, Julie Cohen: "the freedom [*380] to read anonymously is just as much a part of our tradition, and the choice of reading materials just as expressive of identity, as the decision to use or withhold one's name." n184 Once this freedom is gone, government will have the ability to conduct random fishing expeditions for information, conduct automated investigations from databases, or use databases for mass roundups of people deemed to be suspicious. n185 While these are valid criticisms of the current system, the idea of assumption of risk (the third-party doctrine) from Miller and Smith cannot be overlooked.

Cohen may be correct about the importance of the right to receive information anonymously, but her ideas do not address the situation presented in Tattered Cover. Cohen addressed a situation in which someone, through no fault of his own, has had his privacy invaded and his book or idea preferences examined. In Tattered Cover, however, Suspect A placed her book choices at issue, and law enforcement sought to examine them as a result of a direct warrant, not the result of a general "fishing expedition." Suspect A could have found an anonymous way to read the books in question (such as the library), and maintained her right to privacy in the process. Had she done so, it is highly unlikely that law enforcement could have found out about it, and even more unlikely that they would have pried into the details of the reading choice. What Suspect A did do was use a retail store to find the book. In so doing, she voluntarily exposed her book choice to a third party, assuming the risk that the clerk might be asked to disclose her choice. There is no sales clerk/purchaser privilege, and therefore Suspect A's right to privacy is eroded when her book choice was exposed to a third party.

A final concern of recent commentators is the "fishing expedition," the possibility that law enforcement could abuse the Fourth Amendment by using it as a tool to conduct background searches of anyone deemed suspicious. However, Solove responded to this concern with his analysis of the warrant requirement: "The warrant requirement reflects Madison's philosophy of government power by inserting the judicial branch in the middle of the executive branch's investigative process." n186 Thus, law enforcement's having to obtain a specific warrant prior to a search protects the individual who wants to conduct private (legal) activity. Theoretically, a journalist who wishes to protect a source or an activist with controversial ideals will not fear law enforcement since the warrant requirement will prevent government from conducting a search based merely on suspicion, or upon a desire to scare those who disagree. In essence, the warrant allows the court to act an as intermediary between an often overzealous law enforcement regime and those who need protection. The warrant requirement remains valid after September 11th because the search requirements of the Fourth Amendment continue to apply to law enforcement activity. Thus, even with an increased desire by law enforcement to search what once were private areas, the fact that a specific warrant must still be obtained from an impartial court prevents the government from "fishing" for information, even in an age that may have embraced an expansion of [*381] governmental search ability. n187

Unlike a "fishing expedition," the police in Tattered Cover had a warrant for the book purchase record and were nevertheless prevented from conducting the search. n188 The court addressed the controversy over the warrant's validity by establishing a need, in Colorado, for a pre-search hearing to determine the validity of a warrant. n189 While the outcome of that hearing in the Tattered Cover case was incorrect, the procedure is an excellent idea. Having a pre-search hearing provides an acceptable additional level of protection to private individuals wishing to retain privacy. However, the court should have limited its inquiry to the Katz factors and allowed a search only if those factors were met. Had the Tattered Cover court done this, it is clear that the search could have proceeded. n190

3. A Modern Definition of Privacy

At the core of the privacy debate lies the difficulty of defining private information. The Tattered Cover court said book purchase records are private, however this was an incorrect conclusion. Several solutions to the definition dilemma have been developed. One definition is that "intimacy is the chief restricting concept in the definition of privacy." n191 However, if intimacy is the standard, the information in Tattered Cover could hardly meet it. The title of a book you buy is, at best, considered personal information, but it certainly is not of an intimate nature.

Another solution is to define privacy through a focus on relationships: n192 "The issue is not the conceivable risk

of betrayal, but rather which risks people ought to assume and which risks people should be insured against." n193 While this has been called a "relationships oriented" approach, it is really nothing more than the assumption of the risk idea that runs through both Miller and Smith. In Miller, Miller's relationship with the bank was one that did not gain Fourth Amendment protection because Miller knew the bank officers had his personal information. n194 In Smith it was the relationship with the phone company that fell short of protection due to the assumption that Smith had to know the phone company recorded the numbers he dialed, and thus "assumed the risk" that information could be released. n195 Under this test, the Tattered Cover facts fall short of Fourth Amendment protection. The relationship a customer has with the clerk of a store can hardly be referred to as a confidential relationship, since the customer knows [*382] that the bookstore keeps business records of the transaction, and "assumes the risk" that that information could be released to law enforcement.

It is apparent that society lacks a definition of privacy that would prevent the search of the book purchase records in Tattered Cover, and that the Tattered Cover court stretched the definition it did have to improperly include book purchases. Thus, society's inability to recognize the purchase of a book as a constitutionally protected activity prevents the second prong of the Katz test from being met. While people should certainly have the freedom to receive information free from the supervision of government, that activity is not absolutely protected. Once a customer has exposed his purchase to a third party, the expectation of privacy has been removed, and a search can proceed. So long as law enforcement can provide a specific warrant seeking specific materials, then the third-party doctrine must allow a search of records such as book purchases. The warrant requirement will prevent the government from undertaking the expansive "fishing expeditions" that Solove feared, while at the same time allow them to improve public safety and satisfy the increased demand for national security that has arisen in the post-September 11th United States.

Conclusion

The court in Tattered Cover reached the wrong conclusion because it not only misread the issue but failed to follow societal trends. The court delivered an opinion that was essentially grounded in the First Amendment; while it was correct in its analysis of Colorado's expansion of the First Amendment protections, it failed to see the Fourth Amendment implications of the decision. Rather than protect a vital privacy right in this case, the court hindered the ability of law enforcement to operate effectively. In so doing, the court ignored the needs of American society in the post-September 11th world. The court's opinion would have been reasonable in pre-September 11th society, yet when the terrorist attacks are taken into account the court's decision loses a great deal of credibility.

It is essential to remember that courts and judges operate in the same world, and experience the same events as the rest of society. This fact makes it unrealistic to expect, in fact dangerous to expect, any court to operate in a manner that does not incorporate societal preferences into its decisions. The court's balancing test takes on an entirely new meaning when September 11th is considered, as the increased need for security has diminished the burden on government to justify a search. What once could have been considered an invasion of privacy could now be looked upon as an excellent security measure, and it is apparent that the court in Tattered Cover did not sufficiently consider this view when rendering its decision.

Suspect A did not expect a zone of privacy when the book was purchased because she knew the clerk was recording what book she bought. Furthermore, the zone of privacy Suspect A wanted recognized is not one that society is prepared to recognize at this time. After September 11th, many Americans are far more willing to allow searches of their personal information, and government is far more eager to look at those materials. There is no definition of privacy in use now that protects third-party records of the type at issue in Tattered Cover. Given these attitudes, the Tattered Cover court should have allowed the records to be searched, thereby [*383] rendering an opinion consistent with the goals of the Fourth Amendment and the security needs of a recently wounded nation.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsGeneral OverviewCriminal Law & ProcedureSearch & SeizureSearch WarrantsExecution of WarrantCriminal Law & ProcedureTrialsBurdens of ProofProsecution

**FOOTNOTES:**

n1. *44 P.3d 1044 (Colo. 2002).*

n2. *Id. at 1048-49.*

n3. *Id. at 1050.*

n4. *Id. at 1056, 1059.*

n5. Id.

n6. *Id. at 1050.*

n7. As an example, consider the fact that some of the September 11th terrorists took flight lessons prior to the attacks. While records of who was enrolled in pilot school could have been considered private prior to September 11th, those types of records are now considered to fall within the scope of government examination. Michael Elliot, They had a Plan: Long Before 9/11, the White House Debated Taking the Flight to al-Qaeda, CNN Online, at www.cnn.com/2002/ALLPOLITICS (Aug. 12, 2002).

n8. *Tattered Cover, Inc., 44 P.3d at 1048.*

n9. *Id. at 1048-49.*

n10. *Id. at 1047, 1051.*

n11. *Id. at 1048.*

n12. *Id. at 1048-49.*

n13. *Id. at 1048.*

n14. *Tattered Cover, Inc., 44 P.3d at 1048-49.* The names of the suspects were withheld at the city's request; however, the court took judicial notice of the fact that suspects A, B, C, and D were all real people whose identities were known to the police. *Id. at 1048 n.1.*

n15. *Id. at 1048.*

n16. Id.

n17. Id.

n18. Id. The police were unable to make this determination despite the fact that they found A's personal address book and two other books in the room. Id.

n19. *Id. at 1049.*

n20. *Tattered Cover, Inc., 44 P.3d at 1049.*

n21. Id. The Court noted that neither of the books had been read. In fact, one was still in its wrapper, though fingerprint analysis indicated that the books had been handled. *Id. at 1049 n.5.*

n22. Id.

n23. Id. Using an administrative subpoena is ordinarily a successful technique for the DEA, though the subpoena itself lacks any legal effect because it is not court ordered. Due to this, it acts as a "request" for information, as opposed to a court sanctioned subpoena which acts as a "demand" for information. Id.

n24. Id.

n25. Id.

n26. *Tattered Cover, Inc., 44 P.3d at 1049.*

n27. *Id. at 1049-50.*

n28. *Id. at 1049.*

n29. *Id. at 1049-50.*

n30. *Id. at 1050.*

n31. Id.

n32. *Tattered Cover, Inc., 44 P.3d at 1050.*

n33. Id.

n34. Id. A member of the American Library Association testified about the chilling effect mentioned by Meskis. A bookstore owner from the state of Washington also testified about the concerns of his customers arising from a case similar to this one. Id.

n35. Id.

n36. Id.

n37. Id.

n38. *Tattered Cover, Inc., 44 P.3d at 1050.* Tattered Cover never revealed what books were sent to Suspect A and denied that the information was even inculpatory as to Suspect A. Rather, it contended that customers have a First Amendment right to privacy in their book purchase records regardless of their inculpatory value. *Id. at 1050 n.8.*

n39. *Id. at 1051.*

n40. Id.

n41. Id.

n42. *SeeBd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 867 (1982)* (stating that the

right to receive information is "an inherent corollary of the rights of free speech and press... ." because "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them... ."); see also *Stanley v. Georgia, 394 U.S. 557, 565 (1969)* (holding that "if the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

n43. *274 U.S. 357 (1927).*

n44. *Id. at 375* (Brandeis, J., concurring).

n45. *Tattered Cover, Inc., 44 P.3d at 1052.*

n46. Id.

n47. Id.

n48. See id. (stating "anonymity is a shield from the tyranny of the majority," as it serves to "protect unpopular individuals from retaliation - and their ideas from suppression - at the hand of an intolerant society."). *Id. at 1053* (quoting *McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995)).*

n49. Id. at 1053 (citing *Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965)).*

n50. Id.

n51. *Tattered Cover, Inc., 44 P.3d at 1053* (quoting *United States v. Rumely, 345 U.S. 41, 57-58 (1953)* (Douglas, J., concurring)).

n52. Id.

n53. Id.

n54. Id. at 1054.

n55. Id. (citing *Bock v. Westminster Mall, 819 P.2d 55, 58 (Colo. 1991)).*

n56. Id. (citing *Bock, 819 P.2d at 59).*

n57. *Tattered Cover, Inc., 44 P.3d at 1054* (citing *Bock, 819 P.2d at 59)* (noting the differences between the Colorado Constitution and the United States Constitution). The Colorado Constitution reads: "no law shall be passed impairing the freedom of speech; every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty ... ." The Court in Bock contrasted this with the United States Constitution, which uses a negative command to protect speech, by providing that "Congress shall make no law ... ." Colorado, as the language shows, uses an affirmative declaration that carries with it more weight, and "enhances the already preferred position of speech under the First Amendment of the United States Constitution."). *Bock, 819 P.2d at 58.*

n58. *Tattered Cover, Inc., 44 P.3d at 1054.*

n59. Id.

n60. Id.

n61. Id.

n62. *Id. at 1055.*

n63. *436 U.S. 547 (1978).*

n64. *Tattered Cover, Inc., 44 P.3d at 1055* (citing *Zurcher, 436 U.S. at 564).*

n65. *Zurcher, 436 U.S. at 551.*

n66. Id.

n67. *Id. at 563.* A subpoena duces tecum is a warrant to "produce the thing." While it carries the same legal force as a search warrant, there are two important distinctions. First, a subpoena duces tecum allows the party being searched to produce the item voluntarily, rather than have the police search his or her belongings for it. Second, and more importantly to the newspaper in Zurcher, a subpoena duces tecum can be quashed by the party being searched before the search is carried out. *Id. at 562 n.8.*

n68. *Id. at 565.*

n69. Id.

n70. *Tattered Cover, Inc., 44 P.3d at 1055.*

n71. *Id. at 1056.*

n72. *Id. at 1055.*

n73. Id.

n74. Id.

n75. Id.

n76. *Tattered Cover, Inc., 44 P.3d at 1055-56.*

n77. *Id. at 1056.*

n78. Id.

n79. Id.

n80. Id. (citing *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc., 26 Media L. Rep. 1599, 1600 (D.D.C. 1998)).*

n81. Id.

n82. *Tattered Cover, Inc., 44 P.3d at 1055-56* (citing *Kramerbooks & Afterwords Inc., 26 Media L. Rep. at 1600).*

n83. Id. at 1056-57 (citing *Kramerbooks & Afterwords Inc., 26 Media L. Rep. at 1600-01).*

n84. Id. at 1057. The court cited *Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963),* as an example of the "compelling state interest" portion of the test and *Buckley v. Valeo, 424 U.S. 1, 64 (1976),* as an example of "substantial relation." The purpose of the test is that "government action must not chill the exercise of fundamental expressive rights any more than absolutely necessary." *Tattered Cover, Inc., 44 P.3d at 1057.*

n85. *Tattered Cover, Inc., 44 P.3d at 1057;* see also *United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000)* (noting that "this type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure").

n86. *Tattered Cover, Inc., 44 P.3d at 1058.*

n87. Id.

n88. Id. The four prong test used by the trial court was (1) whether there was a legitimate and significant government interest in acquiring the information; (2) whether there was a strong connection between the investigation and the material sought; (3) whether the information was available from another source; (4) whether the search was limited enough to prevent the exposure of other constitutionally protected materials. *Id. at 1060.*

n89. *Id. at 1059.*

n90. Id.

n91. Id.

n92. *Tattered Cover, Inc., 44 P.3d at 1059.*

n93. Id.

n94. Id.

n95. Id.

n96. Id.

n97. Id.

n98. *Tattered Cover, Inc., 44 P.3d at 1059.*

n99. Id.

n100. Id.

n101. *Id. at 1061.*

n102. Id.

n103. Id.

n104. *Tattered Cover, Inc., 44 P.3d at 1061.*

n105. *Id. at 1062.*

n106. Id. These methods included fingerprinting that was never followed up on, a clothing exam of the bedroom closet that never took place, and the lack of any DNA analysis. Id.

n107. Id.

n108. *Id. at 1063.*

n109. Id.

n110. See *Tattered Cover, Inc., 44 P.3d at 1063 n.29* (noting that if the books in question had been related to a different topic the connection would be more attenuated and more likely to be the valid subject of a warrant).

n111. Id.

n112. Id.

n113. *Id. at 1056-59.*

n114. *Id. at 1063.*

n115. Id.

n116. *Tattered Cover, Inc., 44 P.3d at 1055-56.*

n117. *Id. at 1061.*

n118. *Id. at 1060.*

n119. *Tattered Cover, Inc., 44 P.3d at 1055.*

n120. *447 U.S. 74 (1980).*

n121. *Id. at 80, 81* (citing *Cooper v. Cal., 386 U.S. 58, 62 (1967)* and diverging from its holding in *Lloyd Corp. v. Tanner, 407 U.S. 551, 552 (1972)*, where the Court entertained "the question of whether under the Federal Constitution a privately owned shopping center may prohibit the distribution of handbills."). *Pruneyard, 447 U.S. at 80.*

n122. *Id. at 81.*

n123. *Tattered Cover, Inc., 44 P.3d at 1055.*

n124. *Olmstead v. United States, 277 U.S. 438, 464 (1928)).*

n125. Daniel J. Solove, Digital Dossiers and the Dissipation of Fourth Amendment Privacy, *75 S. Cal. L. Rev. 1083, 1086 (2002)* (citing *Olmstead, 277 U.S. at 464).*

n126. Id. at 1086 (citing *Olmstead, 277 U.S. 438).*

n127. *389 U.S. 347 (1967).*

n128. Id.

n129. *Id. at 352.*

n130. Id.

n131. *Id. at 353.*

n132. *Id. at 361* (Harlan, J., concurring).

n133. *Katz, 389 U.S. at 361.*

n134. *425 U.S. 435 (1976).*

n135. *442 U.S. 735 (1979).*

n136. *Miller, 425 U.S. at 437.*

n137. See *id. at 439* (noting that the Court of Appeals cited *Boyd v. United States, 116 U.S. 616, 662 (1886)).* The Boyd Court held that "compulsory production of a man's private papers to establish a criminal charge against him ... is within the scope of the Fourth Amendment to the Constitution." *Boyd, 116 U.S. at 622.*

n138. *Miller, 425 U.S. at 440.*

n139. Id.

n140. *Id. at 442* (citing *Couch v. United States, 409 U.S. 322, 335 (1973)).*

n141. Id.

n142. Id. at 443.

n143. *Smith, 442 U.S. at 737.* "A pen register is a device that records the numbers entered into a telephone." *Id. at 736 n.1.* As an example, think of your recent phone bill which contains a copy of the numbers you called - these were obtained by the phone company using a pen register.

n144. *Id. at 737.*

n145. Id.

n146. *Id. at 741.* The Court of Appeals, in evaluating the validity of the search, held "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system." *Id. at 738.*

n147. *Id. at 742.*

n148. Id. "Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." *Id. at 743.*

n149. *Smith, 442 U.S. at 743* (citing *Katz, 389 U.S. at 361).*

n150. Id. at 743-44 (citing *Miller, 425 U.S. at 442-44).* See also *Hoffa v. United States, 385 U.S. 293, 294 (1966)* (noting that Hoffa, President of the Teamsters, was convicted of attempting to bribe a juror at trial.) *Id. at 294.* Proof for Hoffa's conviction came from Edward Partin who, acting for the government, heard Hoffa discuss this crime in his hotel room. Id. The Court held that Hoffa was not relying on the security of his hotel room when making the statement; rather he was relying on his misplaced trust that Partin would not repeat the information. *Id. at 302.* The Fourth Amendment, in essence, does not protect a wrongdoers misplaced belief that the person he voluntarily confides in will not reveal information. Id.

n151. *Smith, 442 U.S. at 744.*

n152. *Tattered Cover, Inc., 44 P.3d at 1056.*

n153. *Id. at 1055.*

n154. *Brandenburg v. Ohio, 395 U.S. 444, 447 (1969);* see also *Texas v. Johnson, 491 U.S. 397, 409-10 (1989)* (before citing the Brandenburg language, the Court urged that a full consideration of the circumstances of each case be made to determine the First Amendment implications of the action. The Court focused on the showing of a compelling state interest, which can be met in the Tattered Cover case due to Colorado's interest in preventing the manufacture and sale of narcotics). *Johnson, 491 U.S at 409-10.*

n155. *Katz, 389 U.S. at 361* (Harlan, J., concurring).

n156. The fact that the book was presumably purchased via mail order (due to the envelope found at the scene) is not a determining factor in this case because the clerk filling the order was exposed to the same information about the purchaser as he would have been had the book been purchased at the store.

n157. *Miller, 425 U.S. at 442-43.*

n158. *Smith, 442 U.S. at 744.*

n159. *Id. at 751* (Marshall, J., dissenting).

n160. Id.

n161. *Zurcher, 436 U.S. at 560.*

n162. Solove, supra note 125, at 1084.

n163. Id. at 1084-85.

n164. Id. at 1087.

n165. Id.

n166. Id. at 1096.

n167. See id. at 1097 (citing, as an example, the Tattered Cover bookstore who vigorously opposed the warrant for the book purchase record.) However, since September 11th, however, it is less clear whether stores like the Tattered Cover will oppose searches in the same vigorous manner.

n168. Jan C. Ting, Unobjectionable But Insufficient - Federal Initiatives in Response to the September 11 Terrorist Attacks, *34 Conn. L. Rev. 1145, 1147 (2002).*

n169. Id. (citing USA PATRIOT Act of 2001, Pub L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 18 U.S.C.)).

n170. Marc Rotenberg, Forward: Privacy and Secrecy After September 11, *86 Minn. L. Rev. 1115, 1116 (2002).*

n171. Ting, supra note 168, at 1149.

n172. Id. at 1150.

n173. Id. at 1151.

n174. Id. at 1152.

n175. USA PATRIOT Act 215 (codified as amended in scattered sections of 50 U.S.C.).

n176. Id. The authority under section 215 to search book purchase records has been put to the test recently by the Bear Pond Bookstore in Vermont. That book shop has begun granting customer requests to purge book purchase records after the transaction has been completed, thus eliminating any subsequent search by law enforcement. To their credit, the U.S. Attorney's office has responded that all bookstores are free to do what they want with their business records provided they are not destroying records already the subject of an investigation.

David Gram, Vt. Bookseller Purges Files to Avoid Potential "Patriot Act' Searches, Tampa Bay Online Associated Press, at http://ap.tbo.com/ap/breaking/ MGAA1J6RFCD.html (Feb. 21, 2003).

n177. However, many bookshops and libraries around the country are now fighting back against the right of law enforcement to search their records. See Librarians Chafe Under Federal Patriot Act Restrictions, The Herald Sun.com, at http://heraldsun.com/nationworld/national/30-376985.html (Jul. 31, 2003). One library in Boulder, Colorado purges customer files every week and posts signs warning patrons that their records may be reviewed later. This practice is taking hold across the nation, and has been pushed to the forefront of the debate in Washington by Senator Russ Feingold, who introduced a bill in August 2003 seeking to limit the authority of the FBI to gather records under the act. However, the article noted that the Tattered Cover does not purge its purchase records due to "business considerations," while maintaining that privacy "remains an integral part of [their] philosophy." Additionally, it must be noted that the Justice Department does recognize the concerns libraries have, and maintains that libraries are not a target; rather, libraries are one of a plethora of institutions subject to a business records search. Id.

n178. SeeTing, supra note 168, at 1151 (citing Alan M. Dershowitz, Is There a Tortuous Road to Justice?, L.A. Times, Nov. 8, 2001, at B19) (discussing the use of truth serums, physical pressure, and outright torture). While many would view this as an extreme measure, Professor Jan Ting notes that: "Even those who would prefer to have thousands of innocents fall victim to terrorism rather than torture a terrorist, might be persuaded to try to save those lives if the only cost was monitoring the conversations of terrorists without compromising their rights at trial." Id.

n179. Id. at 1158. Moussaoui is the alleged "twentieth hijacker" from September 11 currently on trial in federal court, and Reid is the "shoe bomber" who attempted to destroy a plane with his explosive laden shoes.

n180. Id. at 1159.

n181. Rotenberg, supra note 170, at 1134.

n182. Id. at 1135.

n183. Solove, supra note 125, at 1103-04.

n184. Julie E. Cohen, A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace, *28 Conn. L. Rev. 981, 1012 (1996).*

n185. Solove, supra note 125, at 1108-09.

n186. Id. at 1126.

n187. The fishing expedition is further prevented by the right of the bookstore to purge purchase records upon request, as the Bear Pond bookstore in Vermont has begun to do recently. SeeGram, supra note 176 (discussing one book shop's efforts to purge book purchase records).

n188. *Tattered Cover, Inc., 44 P.3d at 1050.*

n189. *Id. at 1060.*

n190. The pre-seizure hearing is a sound procedure despite language in the PATRIOT Act obviating the need for such a hearing. See supra notes 175-76.

n191. Solove, supra note 125, at 1153 (citing Tom Gerety, Redefining Privacy, *12 Harv. C.R.-C.L. L. Rev. 233, 263 (1977)).*

n192. Solove, supra note 125, at 1154.

n193. Id. at 1155.

n194. *425 U.S. 435 (1976).*

n195. *442 U.S. 735 (1979).*

n196. J.D. from Temple University expected 2004. I would like to thank Professor Laura Little for her wisdom and guidance, the journal staff for all their hard work, and my family for their support. I also wish to dedicate this note to the memory of my father, Samuel Klein, and thank him for his constant inspiration.