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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF HOLMES,

Respondent,

-against-

No. 245

WINTER,

Appellant.

20 Eagle Street
Albany, New York 12207
November 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 245, Holmes v.
2 Winter.

3 Counselor, do you want any rebuttal time?

4 MR. HANDMAN: Yes, three minutes, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes. Sure,
7 go ahead.

8 MR. HANDMAN: Thank you, Your Honor. May
9 it please the court, my name is Christopher Handman.
10 I represent appellant Jana Winter.

11 Both the majority and dissent below in this
12 case recognized a key foundational point, that New
13 York's Shield Law represents a "strong public policy
14 in favor of press freedom."

15 The question in this case is whether that
16 strong public policy should be consulted by New York
17 courts in construing CPL 640.10.

18 JUDGE SMITH: Before - - - do you even - -
19 - do we even have to reach that question in view of
20 the fact that it's actually undisputed that the
21 communication took place entirely in Colorado?

22 MR. HANDMAN: Well, it's actually not
23 undisputed. The record says nothing about where the
24 communication between Ms. Winter and the law
25 enforcement sources took place. There's no - - -

1 nothing in the record about who those law enforcement
2 sources are, whether they're in Colorado or outside
3 of Colorado.

4 JUDGE SMITH: So I guess you're - - -

5 JUDGE GRAFFEO: Does that matter?

6 MR. HANDMAN: It does not matter.

7 JUDGE GRAFFEO: So what matters? Where - -
8 - the place of employment?

9 MR. HANDMAN: No. What matters is that - -
10 - well, in this particular case, I think it helps, of
11 course, that this is a New York journalist working
12 for a New York news organization. I think those are
13 the key aspects of this particular case. That is,
14 after all, what the New York public policy is about.

15 JUDGE SMITH: So hypothetically, you're
16 saying that if a New York journalist gets on a plane,
17 goes to Colorado, interviews a Colorado witness, that
18 journalist is protected by the New York Shield Law?

19 MR. HANDMAN: Oh, sure. Just in the same
20 way that a - - - they - - -

21 JUDGE SMITH: In a Colorado court?

22 MR. HANDMAN: Oh, not in a Colorado court.
23 No, if that jour - - -

24 JUDGE SMITH: But Colorado is the forum
25 court. I mean, this is a - - - this is a Colorado

1 proceeding. You're saying - - - you want us to say
2 that that journalist, who conducted a Colorado
3 interview, can't be subpoenaed to a Colorado court,
4 and have Colorado law control whether she - - -
5 whether it's privileged or not?

6 MR. HANDMAN: Oh, she cannot be under - - -
7 the question is what New York law says. Because
8 after all, this case is about what's - - -

9 CHIEF JUDGE LIPPMAN: Counselor, what's the
10 difference between New York law and Colorado and in
11 Codey, the difference between New York law and New
12 Jersey, in relation to Shield Laws?

13 MR. HANDMAN: The difference between New
14 York's Shield Law, when it comes to confidential
15 sources, is that it's absolute. It's a categorical
16 immunity.

17 CHIEF JUDGE LIPPMAN: No, but what's the
18 difference - - - in Codey, in the New Jersey law,
19 versus the Colorado law?

20 MR. HANDMAN: The difference in Codey is
21 that you had a nonconfidential privilege at issue in
22 that - - - in Codey. And therefore, because you had
23 nonconfidential sources, there was no - - - there was
24 deemed to be no difference between those two cases.

25 But here's the important reason why Codey

1 doesn't matter. This court, at the very first
2 paragraph of the Codey opinion, says it was deciding
3 only a very narrow question, nothing to do with the
4 comparative aspects of the privilege. The only - - -

5 JUDGE PIGOTT: One of the things - - -

6 MR. HANDMAN: - - - question - - -

7 JUDGE PIGOTT: - - - pardon me. But one of
8 the things that occurred to me, because you have - -
9 - you have this absolute immunity standard argument,
10 is if - - - now, I know they're talking about law
11 enforcement was the source, and they had this
12 hearing. Let's assume for a minute that law
13 enforcement is broader than that; that it's the night
14 watchman at the Colorado University, or one of the
15 prosecutors. Is it conceivable that a Colorado court
16 could say, because you're not giving this up, because
17 you're not coming and because you're not giving this
18 up, this is clearly a Brady violation as far as I'm
19 concerned, and I'm dismissing the whole darn case?

20 MR. HANDMAN: I believe that if a Colorado
21 court was faced with that situation, it would - - -
22 it's possible. Who knows what - - -

23 JUDGE PIGOTT: And your argument is that's
24 the way it goes?

25 MR. HANDMAN: Oh, sure. Just as if that

1 same situation were in a New York court in Manhattan,
2 that's the same result. The New York Shield Law is a
3 categorical immunity. So the - - - you put those
4 same factors, the same situation, same defendant,
5 with those same sorts of claims in Colo - - - in New
6 York, the same result applies. That's the - - -

7 JUDGE PIGOTT: You're saying if this guy -
8 - - if this guy shot up a theater in Albany -

9 MR. HANDMAN: Yes.

10 JUDGE PIGOTT: - - -killed twenty-four - -
11 - however many - - - and in all of this, we would not
12 - - - and this person said I got this information
13 from law enforcement, I'm not telling you who, what
14 or where, and it could conceivably be the prosecuting
15 attorney who did this for purposes of tilting the
16 jury in his or her favor, that that's too bad.

17 MR. HANDMAN: That is exactly right. And
18 that's not just what I'm saying. It's - - -

19 JUDGE PIGOTT: Where did we say that?

20 MR. HANDMAN: Oh, you said it in Matter of
21 Beach v. Shanley - - -

22 JUDGE PIGOTT: That's the best you got?

23 MR. HANDMAN: That's is absolutely the b -
24 - - and where this court said it, you're confronted
25 with a very similar question. The issue there was

1 course, we follow the Uniform Act, but here this is
2 one of those rare, would you call it, extraordinary
3 situations, where New York's public policy is so - -
4 -

5 MR. HANDMAN: Dominant - - -

6 CHIEF JUDGE LIPPMAN: - - - impacted that
7 here we draw the line that beyond the normal, here as
8 to the Uniform Act?

9 MR. HANDMAN: Yes. And that's the nature
10 of the public policy doctrine.

11 JUDGE PIGOTT: Two - - - two reporters are
12 sitting there and this information comes to the two
13 of them. One of them is Ms. Winter and the other one
14 is a Colorado reporter. One of them's going to jail
15 and one isn't, right?

16 MR. HANDMAN: It depends on the nature of
17 the outcome of this particular case.

18 JUDGE PIGOTT: Well, we know - - - we know
19 Ms. Winter's not going to jail, because we say - - -
20 you know, we're protecting her. She's not even going
21 to darken the borders of the state anymore.
22 Meantime, the Colorado person who has the same
23 information says I'm not giving it up; she's going to
24 jail.

25 MR. HANDMAN: But again, the same result

1 applies, Judge Pigott, in a situation in which - - -
2 in this case, if the proceeding were a criminal case
3 in New York court - - -

4 JUDGE PIGOTT: But - - -

5 MR. HANDMAN: - - - and there were journ -
6 - -

7 JUDGE PIGOTT: - - - yeah, but what you're
8 saying is that New York reporters - - - New York
9 reporters have immunity in fifty states, and the
10 territories, and no one can touch them?

11 MR. HANDMAN: What - - - no.

12 JUDGE PIGOTT: While they can touch their
13 own reporters in any way they want, and if we wanted
14 a Colorado reporter back here, I think you're saying
15 when she crosses the New York border, she gets our
16 immunity - - - or he gets our immunity. Right?

17 MR. HANDMAN: Yes, I'm saying that. But
18 it's also important to recognize that if - - - we are
19 not asking this court to apply its law
20 extraterritorially. If, for example, Ms. Winter
21 travels to Colorado on vacation or for work and she
22 is slapped with a subpoena while in Colorado, there's
23 no question that she cannot avail herself of New
24 York's privilege.

25 The question in this case - - -

1 JUDGE SMITH: Well, you - - - so you admit
2 that the - - - that if the case actually goes to
3 trial, the New York Shield Law would not protect her?

4 MR. HANDMAN: Yes, that's - - - I think - -
5 - and that's also reflected in the Farber decision,
6 that - - -

7 JUDGE SMITH: Well, then why - - - so
8 you're not saying that - - - then why are we
9 enforcing - - - what policy are we enforcing? The -
10 - - her policy to avoid process?

11 MR. HANDMAN: No - - -

12 JUDGE SMITH: Her right to avoid process in
13 Colorado?

14 MR. HANDMAN: The key question in this case
15 is one of statutory construction in the first
16 instance, it's what does CPL 640.10 say?

17 JUDGE PIGOTT: But isn't she under - - -
18 isn't she under the court's jurisdiction in Colorado
19 already?

20 MR. HANDMAN: No.

21 JUDGE PIGOTT: She's been there two or
22 three times, right?

23 MR. HANDMAN: She has. But she's always
24 been doing so under protest based on the subpoena.
25 And I think all parties, certainly my colleague on

1 the other side has not suggested that the case is
2 moot or that there's any suggestion that - - -

3 JUDGE PIGOTT: No, this is the first time -
4 - - I thought - - - I thought no matter what she does
5 - - - she can drive through Colorado, she could move
6 there.

7 MR. HANDMAN: Yes.

8 JUDGE PIGOTT: But as far as you're
9 concerned, they can't make her testify.

10 MR. HANDMAN: Oh. If she moves there - - -
11 just to be clear, if she drives through Colorado
12 tomorrow and gets slapped with a subpoena issued by a
13 Colorado court, New York Shield Law has nothing to
14 say about that particular situation.

15 JUDGE PIGOTT: So if we were - - - if we
16 were to decide this thing narrowly and simply say the
17 subpoena looks fine - - - you know, because one of
18 the things that she could do is go there and say I'm
19 not going to give you my source, but I'll tell you
20 who it's not. It's not the prosecutor; it's not - -
21 - it's not - - - those cops did not perjure
22 themselves. She could do that and still protect her
23 source, and we would have done a disservice if we
24 didn't honor that subpoena.

25 MR. HANDMAN: Not so. And again, Matter of

1 Beach says so exact - - - expressly. The same
2 argument was raised there by the dissent in the
3 Matter of Beach, saying look, she can still answer
4 the questions was your source a public official. And
5 the majority in this case said, that's still
6 intruding on the essence of confidential news. The
7 New York Shield Law, it defines news broadly. It's
8 79-h(A)(8). It's new - - - it's not just the source,
9 it's all of the news. And so the question that you
10 just propounded, Judge Pigott, would actually violate
11 the Shield Law in the same way if it was asked in the
12 Manhattan court.

13 JUDGE PIGOTT: I thought about that. But
14 then you make a very fine distinction in the Codey
15 case saying well, we weren't talking about a source,
16 we were talking about outtakes. And that's
17 different. And that - - - and therefore there's a
18 different decision. But you're not really saying
19 that?

20 MR. HANDMAN: No. What we're saying here
21 is that the only - - - and there's no dispute on this
22 record that the only question that is going to be
23 asked of Ms. Winter is who told you this information.

24 JUDGE SMITH: Suppose - - - suppose the
25 interview took - - - suppose the source flew out to

1 New York to speak to Ms. Winter, and you - - - and
2 then later she takes that ill-advised vacation in
3 Colorado and gets slapped with a subpoena. Are you
4 conceding that she would not have the protection of
5 the New York Shield Law?

6 MR. HANDMAN: Yes. Because in that
7 particular case the traditional notions of
8 jurisdictional - - -

9 JUDGE SMITH: But I'm granted that the - -
10 -

11 MR. HANDMAN: - - - jurisdiction - - -

12 JUDGE SMITH: - - - Colorado has the power.
13 Isn't that a case where under the Restatement
14 Colorado should apply the New York Shield - - - the
15 New York privilege?

16 MR. HANDMAN: I think in that case, of
17 course, the - - - that is an argument that a
18 journalist may want to make. Now, that's argument,
19 by the way - - - and the reason I say it probably
20 would meet with little success, is that the same
21 argument was raised in New Jersey in the Farber case,
22 and the New Jersey Supreme Court rejected it and it
23 proceeded to apply its own Shield Law, and that
24 required a New York Times journalist to serve about
25 forty days in prison as a result of that.

1 minimum, what it means is that when one's career is
2 going to be threatened and imperiled, that that has
3 to be an undue hardship. And I think - - -

4 JUDGE RIVERA: Doesn't that - - - doesn't
5 that then mean that all investigative reporters are
6 excluded from the application of the law, the Uniform
7 Act?

8 MR. HANDMAN: It - - -

9 JUDGE RIVERA: Because it'll be the case
10 for every single investigative reporter, not just Ms.
11 Winter, right?

12 MR. HANDMAN: If - - - if what is being
13 sought is the cu - - - that reporter's revelation of
14 their confidential sources. If the reporter's being
15 subpoenaed to testify in some other proceeding - - -

16 JUDGE RIVERA: No, no, but we're only
17 talking about - - -

18 MR. HANDMAN: - - - yes.

19 JUDGE RIVERA: - - - this?

20 MR. HANDMAN: Yes, but that's the same
21 legislative judgment that the New York legislature
22 has made all along. That's not a radical
23 proposition.

24 JUDGE SMITH: Isn't - - - isn't this, her
25 career is ruined overblown? I mean, there are a lot

1 of states that have less vigorous Shield Laws than
2 New York. There seem to be some investigative
3 reporters who still actually manage to earn a living
4 in those states.

5 MR. HANDMAN: Well, there are two responses
6 to that. The first is that that's actually not the
7 view of this state. Governor Rockefeller, in signing
8 the Shield Law in nineteen - - -

9 JUDGE SMITH: Yeah, but do you have an
10 example of any journalist anywhere whose career was
11 ever ended because he or she burned a source?

12 MR. HANDMAN: Well, no, because most
13 journalists don't burn their sources. And the few
14 examples that my colleague on the other side cited,
15 are situations in which those journalists were
16 released by their sources from their promise of
17 confidentiality.

18 JUDGE PIGOTT: Is our - - - is our statute
19 common, or are we unique in the amount of protection
20 we give to the - - -

21 MR. HANDMAN: You are unique. Just as
22 Governor Rockefeller emphasized, it helps to preserve
23 this state's role as the "nation's preeminent source
24 of news" - - -

25 JUDGE PIGOTT: But it applies - - - it

1 applies to out-of-state journalists who do their work
2 in New York State. They - - - they get the immunity
3 by being here?

4 MR. HANDMAN: Yes. To the extent - - - the
5 statute speaks broadly in terms of any professional
6 journalist, not a New York journalist.

7 JUDGE GRAFFEO: So when would the Colorado
8 Shield Law apply?

9 MR. HANDMAN: The only time - - - if we
10 prevail in this particular case, Colorado Shield Law
11 could apply to Ms. Winter if she were, for example,
12 to be served with a subpoena in Colorado, while she
13 was - - -

14 JUDGE GRAFFEO: What if she's served with a
15 subpoena if she's in New Jersey?

16 MR. HANDMAN: Again, then in that
17 situation, then, I think, New Jersey law is going to
18 apply. And that, now, raises another wrinkle about
19 whether New York's Shield Law could be imported into
20 the New Jersey version of the Uniform Act, which is,
21 of course, a hypothetical this court need not
22 resolve.

23 There's a simpler question in this
24 particular - - - and I realize my time - - - if I may
25 just - - -

1 CHIEF JUDGE LIPPMAN: Go ahead. Finish
2 your thought.

3 MR. HANDMAN: - - - complete the thought.

4 Which is that the key issue is what does
5 the 640.10 procedure require when a subpoena issues.
6 The question - - - that's a statutory question. And
7 the issue, as in all issues, whether Walker or
8 others, is how does public policy inform that?

9 New York Shield Law is a determination by
10 the legislature that these sorts of issues should not
11 subject journalists to the threat of a contempt.

12 CHIEF JUDGE LIPPMAN: Okay, thanks,
13 counselor.

14 MR. HANDMAN: Thank you.

15 CHIEF JUDGE LIPPMAN: You have your
16 rebuttal.

17 Counsel?

18 MR. ARSHACK: Good afternoon. My name is
19 Daniel Arshack, if it please the court.

20 CHIEF JUDGE LIPPMAN: Counsel, is this one
21 of those exceptional cases? Your adversary says that
22 the public policy here is so strong that we have to
23 really not follow the uniform act.

24 MR. ARSHACK: If this is one of those
25 exceptionally cases, the other exceptional cases are

1 those involving priests and doctors and physicians
2 and social workers and psychologists, all people who
3 have testamentary privileges - - -

4 JUDGE SMITH: Are you saying - - -

5 MR. ARSHACK: - - - under certain
6 circumstances.

7 JUDGE SMITH: - - - are you saying we would
8 send a New York priest to Colorado to testify if
9 Colorado didn't have a priest privilege?

10 MR. ARSHACK: I'm saying that under 640.10,
11 if Colorado decided that his testimony or her
12 testimony was material and necessary and we found
13 that as a matter of affirmed fact, in New York, then
14 we would send the priest to Colorado, and Colorado
15 would apply its law - - -

16 CHIEF JUDGE LIPPMAN: So - - -

17 MR. ARSHACK: - - - just as - - -

18 CHIEF JUDGE LIPPMAN: - - - so what would -
19 - -

20 MR. ARSHACK: - - - this court - - -

21 CHIEF JUDGE LIPPMAN: - - - what would be
22 an exceptional circumstance like in the footnote to
23 Codey? What - - - what - - - give us an example of
24 what would be so exceptional?

25 MR. ARSHACK: It's - - - I can answer that

1 question two ways.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MR. ARSHACK: The first way is to tell you
4 what it's not. What it's - - - what it's not is the
5 facts of this case, because the facts of this case
6 are virtually indistinguishable from the facts of
7 Codey. And I'll get back to - - -

8 CHIEF JUDGE LIPPMAN: What about Colorado
9 and New Jersey law? How different are they? How
10 different are Colorado and New Jersey law under Codey
11 and Colorado law here?

12 MR. ARSHACK: Well - - -

13 CHIEF JUDGE LIPPMAN: How different are
14 they in comparison to - - -

15 MR. ARSHACK: - - - both Colorado and - - -

16 CHIEF JUDGE LIPPMAN: - - - New York law?

17 MR. ARSHACK: - - - New Jersey permit a
18 balancing test as to whether or not the strong need
19 for the evidence that's being sought outweighs the -
20 - - and in fact, Colorado describes it as the First
21 Amendment interests of the journalist.

22 CHIEF JUDGE LIPPMAN: But you think Codey
23 is controlling?

24 MR. ARSHACK: I absolutely suggest to you
25 that Codey is controlling. And let me answer the

1 second - - -

2 CHIEF JUDGE LIPPMAN: What's the second
3 answer?

4 MR. ARSHACK: Yeah - - -

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MR. ARSHACK: - - - the sec - - - the
7 second point is, first we know that - - - that the
8 facts of this case are not what was ex - - -
9 suggested by Codey in footnote 3, because the Codey
10 court said, no, you have to go and testify in New
11 Jersey. And so what is an example? It's an - - -

12 JUDGE RIVERA: But hadn't the confidential
13 source - - -

14 MR. ARSHACK: - - - interesting conundrum
15 that - - -

16 JUDGE RIVERA: - - - hadn't the
17 confidential source become public?

18 MR. ARSHACK: Well, in - - -

19 JUDGE RIVERA: What was there to protect?

20 MR. ARSHACK: - - - may I answer - - -

21 JUDGE RIVERA: Sorry.

22 MR. ARSHACK: - - - Judge Lippman - - -

23 JUDGE RIVERA: Yes.

24 MR. ARSHACK: - - - first?

25 JUDGE RIVERA: Yes, yes.

1 MR. ARSHACK: And then I have an answer to
2 that as well.

3 JUDGE RIVERA: Thank you.

4 MR. ARSHACK: It's an interesting question.
5 What could it be? And as - - - as we contemplate
6 what it might be, I suggest to you that in the
7 circumstances in which an illegal alien is asked - -
8 - is found to be a material and necessary witness in
9 another state, and that other state, though, has
10 passed a law saying that illegal aliens are not
11 entitled to counsel paid for by the state when they
12 testify. And that illegal alien may incriminate
13 himself when called upon to testify in another - - -
14 in another state. We may say you know, we can't send
15 a citizen to another state that doesn't have some
16 protection - - -

17 JUDGE SMITH: Citizen?

18 MR. ARSHACK: - - - some protection.

19 JUDGE SMITH: You just said he's an illegal
20 alien.

21 MR. ARSHACK: Because he's an illegal - - -
22 exactly.

23 JUDGE SMITH: Then, he's not a citizen,
24 right?

25 MR. ARSHACK: In the hypothetical. That's

1 right. We can imagine that there are a set of
2 circumstances that so shock our conscience - - -

3 JUDGE GRAFFEO: But, you know - - -

4 MR. ARSHACK: - - - that we would say
5 that's just not right.

6 JUDGE GRAFFEO: - - - in New York, within
7 the media industry - - -

8 MR. ARSHACK: Yes.

9 JUDGE GRAFFEO: - - - the protection of
10 confidential sources is almost a sacred right.

11 MR. ARSHACK: It's true.

12 JUDGE GRAFFEO: And our legislature has
13 recognized that. So when you talk about conducting a
14 balancing test, shouldn't we look at the situation
15 and balance it with our public policy versus the
16 Uniform Act?

17 MR. ARSHACK: Our - - - our public policy,
18 like all public policy, is defined by our statutes
19 and by our constitution. And our statute, Civil
20 Rights 79-h, defines what it is that we're
21 protecting. This is a journalist shield. It's
22 called a privilege, but really, it's a shield. And
23 it's a shield in New York State.

24 CHIEF JUDGE LIPPMAN: I think what Judge
25 Graffeo is saying that in our state, let's say, as

1 the media center, the commercial center of the world,
2 that maybe it is such a strong public policy here, as
3 distinct from anyplace else, what it says in our
4 statute and our history of defending press freedom,
5 is it conceivable that it could be so strong that
6 that would be footnote 3?

7 MR. ARSHACK: That - - -

8 CHIEF JUDGE LIPPMAN: Or, I think, your
9 answer's going to be, under Codey, no.

10 MR. ARSHACK: Well, Codey - - -

11 CHIEF JUDGE LIPPMAN: Is that correct?

12 MR. ARSHACK: - - - Codey established
13 footnote 3. And Codey said, it's okay to send a
14 journalist to another jurisdiction to disclose a
15 confidential source. And that's - - -

16 JUDGE RIVERA: Can we get back - - -

17 MR. ARSHACK: - - - the answer to your
18 question, Judge.

19 JUDGE RIVERA: - - - to - - - by the way,
20 I'm not so clear on the analogy to the undocumented
21 individual who's seeking representation and - - - and
22 the media. But let's get to - - -

23 MR. ARSHACK: I'll answer your first
24 question - - -

25 JUDGE RIVERA: - - - answer that, but let's

1 get to - - -

2 MR. ARSHACK: - - - and then I'll answer

3 your second - - -

4 JUDGE RIVERA: - - - let's get to the one -

5 - -

6 MR. ARSHACK: - - - your second question.

7 JUDGE RIVERA: - - - that I have pending.

8 MR. ARSHACK: Absolutely right. Judge

9 Ellerin was the judge who wrote the Appellate

10 Division First Department case in Codey that this

11 court overturned. And she explained the facts in

12 Codey where she said that the confidential - - - it

13 was the confidential information in Codey that - - -

14 that caused her to unders - - - that caused her to

15 understand that the journalist shield would protect a

16 journalist from being sent to New Jersey.

17 And she said, and she identified the

18 affidavit of the ABC reporter whose affidavit was

19 based on confidential information before he was sent

20 ultimately - - - or would have been sent ultimately

21 to New Jersey. Of course there was a mootness issue

22 in Codey, and I would suggest to you that - - -

23 JUDGE RIVERA: All right, I'm not - - -

24 MR. ARSHACK: - - - perhaps the mootness -

25 - -

1 JUDGE RIVERA: - - - understanding the
2 response. So my question was, does it - - - isn't it
3 different if in Codey the source is already public?
4 I'm sorry, I'm not understanding your response to
5 that question.

6 MR. ARSHACK: The - - - the issue in Codey,
7 as it was framed for the court, was based on
8 confidential information. And the court was faced
9 with a mootness issue. And by the time the court
10 dealt with it, it was publicized. But the issue that
11 both the Appellate Division dealt with and that the -
12 - - and that this court in resolving - - -

13 JUDGE ABDUS-SALAAM: So you're saying - - -

14 MR. ARSHACK: - - - the issue - - -

15 JUDGE ABDUS-SALAAM: - - - the difference
16 between sources - - -

17 MR. ARSHACK: - - - was faced with was not
18 a confidential - - -

19 JUDGE ABDUS-SALAAM: - - - and information
20 - - -

21 MR. ARSHACK: - - - information - - -

22 JUDGE ABDUS-SALAAM: - - - confidential
23 sources and confidential information are equivalent
24 as far as you're concerned? That's - - - is that
25 what you're saying?

1 MR. ARSHACK: No, no. The - - - the Civil
2 Rights Law describes what is protected in New York
3 State. And what's - - - and the only thing that's
4 protected in New York State is a journalist from
5 being found in contempt for not disclosing a
6 confidential source.

7 JUDGE RIVERA: And not the material?

8 MR. ARSHACK: A confidential source.

9 JUDGE RIVERA: But not the notes? The
10 notes that might reveal the source?

11 MR. ARSHACK: Well, if it - - - well
12 certainly.

13 JUDGE SMITH: But he - - -

14 MR. ARSHACK: If it revealed - - -

15 JUDGE SMITH: - - - but he - - -

16 MR. ARSHACK: - - - if it revealed the
17 source. That's right. But that - - -

18 JUDGE SMITH: - - - it wasn't - - -

19 MR. ARSHACK: - - - right.

20 JUDGE SMITH: - - - wasn't the identi - - -
21 in Codey, wasn't the - - - the source had already
22 voluntarily come forward, at least to a prosecutor.
23 Right?

24 MR. ARSHACK: It's true. And that - - -
25 and that - - - and you put your finger, Your Honor,

1 on the interesting aspect of the journalist shield,
2 and that is that it is a protection for the
3 journalist not a protection for the source, unlike
4 the priest-penitent or doctor-patient or social
5 worker privileges. The journalist shield is only a
6 protection for the journalist from what - - -

7 JUDGE GRAFFEO: Well, isn't that who - - -

8 MR. ARSHACK: - - - from being held in
9 contempt. The fact that somebody comes - - -

10 JUDGE ABDUS-SALAAM: Isn't that what we're
11 dealing with now - - -

12 MR. ARSHACK: I'm sorry, Judge.

13 JUDGE ABDUS-SALAAM: Isn't that what we're
14 dealing with now, the journalist who wants to keep
15 her source confidential without having to go to jail?

16 MR. ARSHACK: What we're dealing with here
17 is under 640.10, the State of Colorado relying on the
18 Uniform Act, saying we need this person because we
19 have some questions that we'd like to ask. That's
20 what we're dealing with.

21 We're not dealing with anybody - - -

22 JUDGE ABDUS-SALAAM: What are the questions
23 they want - - -

24 MR. ARSHACK: - - - holding this person in
25 contempt.

1 JUDGE ABDUS-SALAAM: - - - what are the
2 questions they want to ask her? Isn't it clear from
3 the subpoena itself that they want to ask her who her
4 source is?

5 MR. ARSHACK: Certainly that's - - - that's
6 the question that's going to be asked to her when she
7 gets there. And when she gets there, she will do
8 exactly what this court instructed a person can do in
9 Codey; they can - - - they can either testify as
10 asked or they can litigate the issue. That's what
11 this court said - - -

12 JUDGE SMITH: What about - - - what about -
13 - -

14 MR. ARSHACK: - - - in Codey.

15 JUDGE SMITH: - - - what about the conflict
16 of laws. I mean, do - - - what should we - - - in
17 deciding this case, do - - - is there some record,
18 some fact or some assumption we should make about
19 where the communication took place?

20 MR. ARSHACK: Where the communication took
21 place is no doubt in - - - in Colorado. That's where
22 it happened. We know that from - - -

23 JUDGE SMITH: He said the record - - -

24 MR. ARSHACK: - - - from their briefs.

25 JUDGE SMITH: - - - doesn't say that.

1 MR. ARSHACK: Well, they say it in their
2 brief at page 45.

3 JUDGE SMITH: They - - - okay.

4 MR. ARSHACK: They say it took place in
5 Colorado- - -

6 JUDGE PIGOTT: They're saying it doesn't
7 make any difference.

8 JUDGE SMITH: If it took - - - if it took -
9 - -

10 JUDGE PIGOTT: He's saying it doesn't make
11 any difference. You think it does?

12 MR. ARSHACK: I think that it's
13 instructive. But I - - - frankly, I agree with him
14 that it doesn't ultimately make any difference. What
15 it is instructive of, however, is establishing the
16 obvious primal interest - - - primary interest that
17 Colorado has in resolving this issue - - -

18 JUDGE RIVERA: Well, it doesn't make any -
19 - -

20 MR. ARSHACK: - - - of perjury by a police
21 officer.

22 JUDGE SMITH: Isn't that - - - isn't that a
23 pretty big difference, that Colorado has an obvious
24 primal interest in resolving the issue? Why do we
25 have to go any farther than that?

1 MR. ARSHACK: That's what the Uniform Act
2 is for. A state says we have an interest - - -

3 JUDGE SMITH: Okay, okay.

4 MR. ARSHACK: - - - in this testimony.

5 JUDGE SMITH: But if this - - - but
6 wouldn't it be a harder case if they were subpoenaing
7 a New York journalist to testify about a New York - -
8 - communication with a New York source? Wouldn't - -
9 - wouldn't our public policy be much more directly
10 threatened, then? You say we don't have any public
11 policy or there is no public policy.

12 MR. ARSHACK: Oh, no. I don't say that,
13 Judge. We - - - we have public policy. And we've
14 established that the public policy in New York State
15 is that New York journalists subpoenaed in New York
16 State to give testimony about a source in New York
17 State, cannot be held in contempt in New York State.
18 That's our public policy.

19 JUDGE RIVERA: But isn't - - -

20 JUDGE SMITH: I thought - - - go ahead.
21 I'm sorry.

22 JUDGE RIVERA: But isn't what underlies
23 that policy is our concern about access to news for
24 the public, that there's a tremendous public
25 interest, and that's the history behind this

1 particular Shield Law?

2 MR. ARSHACK: Absolutely.

3 JUDGE RIVERA: Okay, so - - - thank you.

4 So if indeed it doesn't matter if it's in Colorado or

5 New York, then doesn't it vitiate the Shield Law?

6 MR. ARSHACK: No, it doesn't - - -

7 JUDGE RIVERA: Saying that if it - - - if

8 it happened in Colorado - - -

9 MR. ARSHACK: We're entitled - - -

10 JUDGE RIVERA: - - - it doesn't matter.

11 MR. ARSHACK: I understand the question.

12 We're entitled in New York State to establish our - -

13 - the public policy of what we do in New York State.

14 That's what our legislature does. That's what they

15 did under the New York Civil Rights Law. They said

16 in New York State, you can't compel a journalist in

17 New York State to - - -

18 CHIEF JUDGE LIPPMAN: Yeah, but it's a - -

19 -

20 MR. ARSHACK: - - - give up a source.

21 CHIEF JUDGE LIPPMAN: - - - stronger case

22 if it's a New York reporter and a New York source,

23 right?

24 MR. ARSHACK: Is it a stronger case?

25 CHIEF JUDGE LIPPMAN: Or does it matter?

1 JUDGE RIVERA: But aren't we protecting the
2 access - - -

3 MR. ARSHACK: If a - - - if a - - -

4 JUDGE RIVERA: - - - to the news? Aren't
5 we protecting the access - - - the public interest in
6 the news gathering process. Isn't that, at the end
7 of the day, what we're most concerned with?

8 MR. ARSHACK: That was the motivation for
9 the enactment of 79-h. I agree with - - -

10 JUDGE RIVERA: So - - -

11 MR. ARSHACK: - - - you that.

12 JUDGE RIVERA: Okay, so how - - -

13 MR. ARSHACK: In this case - - -

14 JUDGE RIVERA: - - - how is it we will not
15 - - -

16 JUDGE GRAFFEO: Well - - -

17 JUDGE RIVERA: - - - undermine that goal if
18 we allow this particular reporter to go to Colorado
19 and be put in the same position she'd be put in in
20 New York under your example, if the communication was
21 in New York, to decide whether or not to be held in
22 contempt or give up her sources?

23 MR. ARSHACK: For two reasons. One, that's
24 not her choice. As this court said in Codey, she can
25 testify or she can litigate this issue in Colorado.

1 Of course as you know, she is litigating this case in
2 - - - this issue, this exact issue, in Colorado
3 already.

4 And the third - - -

5 JUDGE SMITH: When she lit - - - when or
6 when she litigates it or as she litigates it, surely
7 the Colorado court has to decide which Shield Law
8 applies, doesn't it?

9 MR. ARSHACK: That will be a decision that
10 the Colorado court will make.

11 JUDGE SMITH: And if - - - if the
12 communication was in Colorado and the case is in
13 Colorado, that becomes an easy question, doesn't it?

14 MR. ARSHACK: If I were a Colorado jurist,
15 I would think it would be an easier question.

16 JUDGE SMITH: Well, but then - - - and I
17 guess what I'm saying is, if indeed, this is a case
18 to which Colorado law clearly applies once the
19 witness is there, why - - - why doesn't that end the
20 discussion? Why do both of you seem to think it
21 doesn't matter which law applies?

22 MR. ARSHACK: I think it doesn't matter
23 which law applies because I think the issue is not
24 focused - - - should not be focused on the journalist
25 shield. I think - - -

1 JUDGE SMITH: You think - - - you say - - -

2 MR. ARSHACK: - - - the only issue - - -

3 JUDGE SMITH: - - - you're saying that even
4 if this is a communication that New York would
5 protect, or that Colorado should protect under normal
6 conflict of laws principles, but if we think - - -
7 that we have to trust Colorado to protect it. We
8 can't - - - we can't say we're - - - our public
9 policy is so strong we're not sending her to
10 Colorado?

11 MR. ARSHACK: Our public policy is
12 nonexistent when it comes to whether or not we should
13 send any particular type of witness anyplace. Our
14 public policy is only that we don't hold journalists
15 in contempt in New York.

16 JUDGE SMITH: I assume you limit that to
17 the United States?

18 MR. ARSHACK: Say?

19 JUDGE SMITH: You do limit that to the
20 United States. You might have a little pause if it
21 were Iran?

22 MR. ARSHACK: Well, it's funny that you
23 should say that, because in 1924, we held a witness
24 in contempt and had him sent over from England to
25 testify here, and fined him for not coming when he

1 didn't come in the first place.

2 JUDGE RIVERA: Is it an undue hardship to
3 send this reporter?

4 MR. ARSHACK: No.

5 JUDGE RIVERA: Why not?

6 MR. ARSHACK: Undue hardship relates
7 exclusively to the process of getting to a place and
8 - - -

9 JUDGE RIVERA: Where does it say - - -

10 MR. ARSHACK: - - - not what the witness -
11 - -

12 JUDGE RIVERA: - - - that in the statute?

13 MR. ARSHACK: - - - I'm - - -

14 JUDGE RIVERA: Where does it say that in
15 the statute?

16 MR. ARSHACK: The statute says that it
17 relates to familial - - - and this is defined by
18 Matter of Tran (ph.) - - - by any familial, monetary,
19 or job-related hardship.

20 JUDGE RIVERA: So why is this not a job-
21 related hardship? She says I won't be able to work
22 again as an investigative reporter if you - - - if I
23 go and I'm forced into this position.

24 MR. ARSHACK: Because what that does, Your
25 Honor, is bootstrap the public policy argument into a

1 hardship analysis. And that's not where it belongs.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MR. ARSHACK: That same - - -

4 CHIEF JUDGE LIPPMAN: Go ahead, finish your
5 thought. I'm sorry, counselor.

6 MR. ARSHACK: That - - - that exact same
7 argument could be raised for someone who's called to
8 another state to testify about misbehavior in their
9 industry and therefore becomes unemployable within
10 their industry.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 MR. ARSHACK: And we've seen that happen.
13 Testimony is a burden.

14 CHIEF JUDGE LIPPMAN: Thank you, counselor.
15 Appreciate it.

16 Counselor, rebuttal. Counselor, why should
17 we - - - why should we speculate as to what Colorado
18 is going to do? Why - - - what do we know what
19 they're going to do? Isn't it possible that - - -
20 that, you know, she would go there, and then that
21 they would say you don't have to give up your source?

22 MR. HANDMAN: Well, I actually don't think
23 that that's a fair speculation. As Justice Saxe
24 below said, it's a near certainty that the court - -

25 -

1 CHIEF JUDGE LIPPMAN: Do you think the - -
2 - do you think so?

3 MR. HANDMAN: As the record now stands, and
4 if you look at page 93 - - -

5 CHIEF JUDGE LIPPMAN: But why is it a
6 certainty? Go ahead.

7 MR. HANDMAN: Well, if you look at page 93-
8 94 of the Appendix, in paragraphs 13 - - - 12 and 13
9 of the certificate that prompted this whole hearing,
10 the Colorado judge already makes two of the three
11 findings needed to overcome Colorado's porous Shield
12 provision. The third one is whether James Holmes'
13 interests are going to outweigh Jana Winters'.

14 The judge - - -

15 CHIEF JUDGE LIPPMAN: Well, what if the
16 Colorado court said it's in the public interest that
17 this information came out?

18 MR. HANDMAN: Well, I think that the
19 problem with that, Your Honor, is that the Colorado
20 court has already held that this evidence supposedly
21 implicates Mr. Holmes' right to a fair trial, right
22 to due process, and right to an impartial jury, under
23 both the Colorado and U.S. Constitutions. I don't
24 think reading the tea leaves that he's now going to
25 say well, Ms. Winter's testimony is actually going to

1 overcome that.

2 But be that as it may, I don't think it's
3 relevant for this particular reason. We don't want
4 New York courts to be engaged in that. So long as
5 there is a public policy or a porous privilege that
6 doesn't provide the same protections that New York
7 provides its journalists, the same - - - the very
8 threat that the legislature was concerned about
9 exists.

10 As Governor Roche - - -

11 JUDGE PIGOTT: But by doing that, you're
12 saying that you either - - - you either adopt our law
13 - - - any one of you forty-nine states - - - or
14 that's too bad.

15 MR. HANDMAN: Well, actually that's the way
16 pu - - -

17 JUDGE PIGOTT: Let me give you an example.
18 You have a murder in Chautauqua County - - - this
19 actually happened. A guy from Pennsylvania drives to
20 Chautauqua County and is alleged to have shot the
21 superintendant of schools. Now, this didn't happen,
22 but let's assume for a minute that you got a
23 journalist in Erie, Pennsylvania who says I have the
24 information on his motive. And they'd really like to
25 know what the motive is, because that puts the case

1 together.

2 Now, if she's in Pennsylvania, or he's in
3 Pennsylvania, their law applies. You're saying the
4 minute that that journalist comes over the border,
5 regardless of whatever her - - - he or she thought
6 her protections were in Pennsylvania, that she now
7 gets New York's protection, right?

8 MR. HANDMAN: Yes. I mean, if New York is
9 trying to subpoena her to testify, it's categorically
10 barred by the Shield Law.

11 JUDGE PIGOTT: So you've defeated the
12 entire Uniform Act.

13 MR. HANDMAN: No, what we've done is - - -

14 JUDGE PIGOTT: You're saying it doesn't
15 apply to us.

16 MR. HANDMAN: The Uniform Act - - -

17 JUDGE PIGOTT: I mean, as a journalist, of
18 course.

19 MR. HANDMAN: Yes. But just as the usual
20 rules about honoring subpoenas is undermined by the
21 Shield Law. The Shield Law is a deliberate attempt
22 by the legislature to carve out one narrow exception
23 from - - -

24 JUDGE GRAFFEO: Is there some particular
25 statutory language that indicates it's to have

1 extraterritorial effect?

2 MR. HANDMAN: Well, it's certainly not - -

3 -

4 JUDGE GRAFFEO: Since this communication
5 occurred, apparently, outside our borders.

6 MR. HANDMAN: Let's be clear. The record
7 says nothing about where this communication existed.

8 JUDGE SMITH: Doesn't your brief concede
9 it?

10 MR. HANDMAN: No, it doesn't concede it.
11 Our point is, for the sake of argument - - -

12 JUDGE GRAFFEO: Let's assume it occurs in -
13 - -

14 MR. HANDMAN: Yes.

15 JUDGE GRAFFEO: - - - in Colorado.

16 MR. HANDMAN: And here - - - and I want to
17 get - - -

18 JUDGE GRAFFEO: What's in the statute that
19 can give us a sense of comfort - - -

20 MR. HANDMAN: Here's - - -

21 JUDGE GRAFFEO: - - - that this statute
22 applies to communications or the acquisition of
23 confidential information outside New York borders?

24 MR. HANDMAN: Here's where the statutory
25 language shows that the broader public policy

1 embodied by the statute applies. Section 79-h,
2 subdivision (a) paragraph (8) defines news. And it
3 defines news in a broad way to be any pictorial,
4 oral, written communication dealing with local,
5 national, or worldwide affairs.

6 The idea that New York, prideful as it was
7 about being the center of dissemination and gathering
8 news throughout the world, would limit its
9 protections to reporters talking to sources in New
10 York about parochial and New York affairs, flies in
11 the face of the way the legislature broadly defined
12 news to be worldwide events.

13 You don't become the global leader of news
14 gathering and dissemination if all you're doing is
15 reporting on the metro desk.

16 JUDGE SMITH: Even though your time's up,
17 can I ask - - - I have a question if I can - - -

18 MR. HANDMAN: Sure.

19 JUDGE SMITH: - - - about undue hardship.
20 Aren't you - - - isn't it a danger that if we find
21 undue hardship here, we're making the rule that hard
22 - - - that you can find hardship in the content of
23 the testimony? A lot of people, it's a hardship to
24 admit to embarrassing things in court. Is that
25 really - - - can you go into a - - - can you resist a

1 subpoena like this on the ground, oh, I'm going to -
2 - - they're going to ask me whether I'm cheating on
3 my wife, and I'm going to have to tell them?

4 MR. HANDMAN: Well, and this actually picks
5 up on a question that Judge Rivera asked my friend,
6 where in the statute is that language. Here's the
7 language in the statute in 640.10 subdivision (2).
8 It talks about the undue hardship of not only
9 attending but also testifying. It says "attending
10 and testifying".

11 JUDGE SMITH: So you're saying that is a
12 legitimate - - -

13 MR. HANDMAN: Yes.

14 JUDGE SMITH: - - - that's - - - the "I
15 don't want to talk about cheating on my wife" is
16 legitimate in this?

17 MR. HANDMAN: No, I'm not saying that that
18 particular objection would be legitimate. What I'm
19 saying, though, is that - - -

20 JUDGE SMITH: That is a hardship, you know?

21 MR. HANDMAN: Oh, I - - -

22 JUDGE RIVERA: A familial - - -

23 MR. HANDMAN: Without implicating myself,
24 I'm willing to concede that for the sake of argument.
25 But - - -

1 JUDGE RIVERA: One would hope it's a
2 hardship.

3 MR. HANDMAN: Right.

4 JUDGE RIVERA: But it does fit under the
5 familial category?

6 MR. HANDMAN: And that's language from the
7 First Department's case. I'm actually - - - I think,
8 a stronger source for my argument is actually from
9 the text of the statute itself, 640.10(2), which
10 talks about attending and testifying.

11 And I will just close with this thought,
12 which is that we're not saying that anytime someone
13 is asked to testify and the substance of that
14 testimony might make it embarrassing or a problem,
15 again, I think you look to the very nature of the
16 backdrop. And what we know, for example, at least in
17 this state, the nature of how you define "undue
18 hardship" under the New York version of the Uniform
19 Act, is that you look to the same public policies.
20 It's not backdooring anything. It's taking account,
21 as this court always does, of the permissible public
22 policies that inform the way we construe our
23 statutes.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 MR. HANDMAN: Thank you.

1 CHIEF JUDGE LIPPMAN: Thank you.

2 MR. ARSHACK: Thank you.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 Appreciate it.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Holmes v. Winter, No. 245 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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