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Document-Based Analysis:
Writing to Read Democracy in New York State & These United States

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Document Packet
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Document A: Freedom of Expression in the NYS Constitution (Article 1, Sections 3 and 8)

Source: Article 1, Section 8 of the New York State Constitution
§8. Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. (Amended by vote of the people November 6, 2001.)

Source: Article 1, Section 3 of the New York State Constitution
The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Document B: The First and Fourth Amendments to the US Constitution, 1791

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Document C: New York Civil Rights Law § 79-h (Shield Law), Amended 2019

Special provisions relating to persons employed by, or connected with, news media

Date: The bill (L. 1970, c. 615, § 2) containing what became Civil Rights Law § 79-h was signed into law, effective May 12, 1970, by Governor Rockefeller. In 2008, a bill was introduced in the Senate to extend the Shield Law protections to include bloggers.

Title of Bill: An act to amend the civil rights law, in relation to exemptions provided to professional journalists and newscasters from contempt

Purpose: This bill expands the exemption provided to professional journalists and newscasters from contempt to include employment or association with a web log (blog).

Summary of Specific Provisions: ... Section three amends ... to include "web log" as a medium that a professional journalist and newscasters may use to receive protection for confidential news and receive exemption from contempt.

Justification: Currently, professional journalists involved with newspapers, magazines, news agencies, press associations, wire services, radio or television are protected from being charged with contempt of court for failing to disclose any news obtained in confidence or failing to provide the identity of a confidential source.

New York has a proud tradition of having one of the strongest reporter's shield laws in the country. Yet, in 2008, New York law does not provide protections to journalist bloggers - one of the fastest growing mediums for obtaining news. This glaring omission must not be allowed to continue.

Earlier this year a grand jury subpoena issued by the Bronx District Attorney was sent to the blog Room 8 in an attempt to identify people blogging anonymously on the website. The subpoena threatened the bloggers not to disclose the existence of the subpoena - or face possible jail time. The subpoena was eventually withdrawn.

If legislation is not enacted, there will be more cases of journalist bloggers facing contempt charges and jail time. This will have a chilling effect on free speech and a blogger's ability to aggressively report the news. It is time New York's shield law reflected the reality of 2008 and acknowledges that blogs do exist.

Source:
https://assembly.state.ny.us/leg/?default_fld=&bn=S00431&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y

Document D: Memorandum of Governor Nelson A. Rockefeller, "To Amend the Civil Rights Law in Relation to Contempt," May 12, 1970

Memorandum filed with Assembly Bill Number 5478-B, entitled:
"An Act to amend the civil rights law, in relation to contempt."

APPROVED.

This "freedom of Information Bill for Newsmen" will make New York State—the Nation's principal center of news gathering and dissemination—the only state that clearly protects the public's right to know and the First Amendment rights of all legitimate newspapermen, reporters and television and radio broadcasters.

The bill protects journalists and newscasters from charges of contempt in any proceeding brought under State law for refusing or failing to disclose information or sources of information obtained in the course of gathering news for publication.

The types of information that need not be disclosed by newsmen are written oral and pictorial information and communications concerning local, national or world-wide events or any other matter of public concern or public interest or affecting the public welfare.

Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.

The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information. That this is a real and imminent threat has been demonstrated by the statements of several prominent reporters that valuable sources of information have been cut off because of recent attempts by the Federal Government to require the disclosure of information obtained by reporters in confidence.

A Federal District Court Judge in California has recently recognized, as a matter of constitutional law, that the testimonial compulsion of newsmen may seriously impinge upon or repress the First Amendment rights of freedom of speech, press and association, which centuries of experience have found to be indispensable to the survival of a free society. Accordingly, he prohibited the Federal Government from requiring the disclosure of "confidential associations that impinge upon the effective exercise of…[reporter's] First Amendment right to gather news for dissemination to the public through the press or other recognized media until such time as a compelling or overriding national interest which cannot be alternatively served has been established to the satisfaction of the Court." *Application of Caldwell* (N.D. Cal. Misc. No. 10426, 1970)

At the present time, fifteen other states have enacted legislation extending testimonial privilege to newsmen. This measure affords a stronger safeguard of the free channels of news communication than most existing legislation, by protecting newsmen from being compelled to disclose the information they gather, as well as the identity of their informants…

Document E: Holmes v. Winter, Court of Appeals, NY, 2013

Decision Date: December 10, 2013

Issue: The issue in this case is whether New York's "Shield Law" protects a journalist from being required to reveal a confidential source who provided information for a news story in a subsequent criminal proceeding in another state, in this case, Colorado.

Summary: Petitioner was charged with multiple counts of murder and other offenses arising from a mass shooting at a screening of "Batman" at a movie theater in Colorado. The Colorado state court presiding over the criminal charges issued an order limiting pretrial publicity in the case by either side, including the police. Law subsequently took possession of a notebook that Petitioner had mailed to a psychiatrist before the shootings. Respondent, a New York-based reporter, published an article describing the contents of the notebook. Petitioner filed a motion for sanctions, alleging that law enforcement had violated the pretrial publicity orders by communicating with Respondent. Thereafter, Petitioner successfully sought in the Colorado court a certificate to compel Winter to testify or otherwise provide evidence regarding the identity of the sources that supplied Respondent with the information about Petitioner's notebook. The New York Supreme Court then granted Petitioner's request for the issuance of a subpoena compelling Respondent to testify in Colorado. The Court of Appeals reversed, holding that, based on the New York Constitution, the Shield Law, and existing case law, a New York court could not compel Respondent to reveal the identity of the sources. (Justia)

Background and Facts: On July 23, 2012, while executing a search warrant, the police took possession of a notebook that Holmes had mailed to a psychiatrist at the University of Colorado before the shootings. Holmes asserted that the notebook, which apparently contained incriminating content, would be inadmissible at trial because it constituted a privileged communication between a patient and a psychiatrist. Two days later, the District Court issued a second order addressing pretrial publicity, precluding any party, including the police, from revealing information concerning the discovery of the notebook or its contents. That same day, respondent Jana Winter a New York-based investigative reporter employed by Fox News published an online article entitled: "Exclusive: Movie Massacre Suspect Sent Chilling Notebook to Psychiatrist Before Attack." In the article, Winter described the contents of the notebook and indicated that she learned about it from two unidentified law enforcement sources. Other news outlets also published stories revealing the existence of the notebook.

In September 2012, Holmes filed a motion for sanctions in the District Court, alleging that law enforcement had violated the pretrial publicity orders by speaking to Winter and maintaining that their actions undermined his right to a fair and impartial jury. The District Court then conducted a hearing to investigate the leak. Holmes called 14 police officers who had come in contact with the notebook or had learned about it prior to the publication of the Winter article. All the officers testified that they had not leaked the information to Winter and did not know who had…

Article I, § 8 of the New York Constitution—our guarantee of free speech and a free press—was adopted in 1821, before the First Amendment was rendered applicable to the states … The drafters chose not to model our provision after the First Amendment, deciding instead to adopt more expansive language:

> "Every citizen may freely speak, write and publish his or her sentiments on all subjects … and no law shall be passed to restrain or abridge the liberty of speech or of the press"(N.Y. Const., art. I, § 8).

This was in keeping with "the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events"…

In furtherance of this historical tradition, the legislature adopted the Shield Law in 1970. Among other protections, the statute grants an absolute privilege precluding reporters from being compelled to reveal the identity of confidential sources:

> "Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster … shall be adjudged in contempt by any court in connection with any civil or criminal proceeding … for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication"…

Information subject to the privilege is "inadmissible in any action or proceeding or hearing before any agency" The Shield Law therefore prohibits a New York court from forcing a reporter to reveal a confidential source, both by preventing such a directive from being enforced through the court's contempt power and by rendering any evidence that is covered by the provision inadmissible…

It is clear from the legislative history of these provisions that the legislature believed that such protections were essential to maintenance of our free and democratic society. As a result, New York public policy as embodied in the Constitution and our current statutory scheme provides a mantle of protection for those who gather and report the news—and their confidential sources—that has been recognized as the strongest in the nation. And safeguarding the anonymity of those who provide information in confidence is perhaps the core principle of New York's journalistic privilege, as is evident from our colonial tradition, the constitutional text and the legislative history of the Shield Law.

Ruling: The Court of Appeals held that New York's Shield Law provides an absolute privilege that prevents a journalist from being compelled to identify confidential sources who provided information for a news story.

Source: http://www.courts.state.ny.us/ctapps/Decisions/2013/Dec13/245opn13-Decision.pdf

Document F: Dissenting Opinion, Smith, J. (Holmes v. Winter, Court of Appeals, NY, 2013)

I agree with the majority that New York's Shield Law reflects a strong public policy of the state to protect confidential sources, and that that policy would justify, in a proper case, a refusal to issue a subpoena under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. I do not think this is a proper case, however, because the allegedly privileged communications took place wholly in Colorado, and the New York Shield Law does not apply to them.

The majority is holding, in substance, that a New York reporter takes the protection of New York's Shield Law with her when she travels—presumably, anywhere in the world. This seems to me an excessive expansion of New York's jurisdiction, one that is unlikely to be honored by other states or countries or to attain the predictability that the majority says is its goal.

The majority makes the superficially appealing argument that New York journalists and their sources cannot safely assume that their conversations will be confidential unless the New York Shield Law follows the journalist everywhere ...It is true that the universal application of New York law would enhance certainty—but that is a result that New York courts do not have the power to achieve. The majority says: "New York journalists should not have to consult the law in the jurisdiction where a source is located ... in order to determine whether they can issue a binding promise of confidentiality"—but they will always have to do that, despite today's decision, because they cannot be assured that New York courts will decide every case. If Winter had been subpoenaed when she was in Colorado—or if she were to be subpoenaed at some later date, when she travels to Colorado again—no New York court would be involved, and if a Colorado court chose to enforce the subpoena she would have to choose between disclosing her sources and committing contempt. There is nothing the New York courts can do about that.

The simple fact that no one jurisdiction can rule the world is the reason conflict of laws rules exist. The majority's choice to ignore those rules in this case seems to me unjustified, and unlikely to produce either harmony among judicial systems or predictable results in cases that involve a claim of journalist-source privilege.

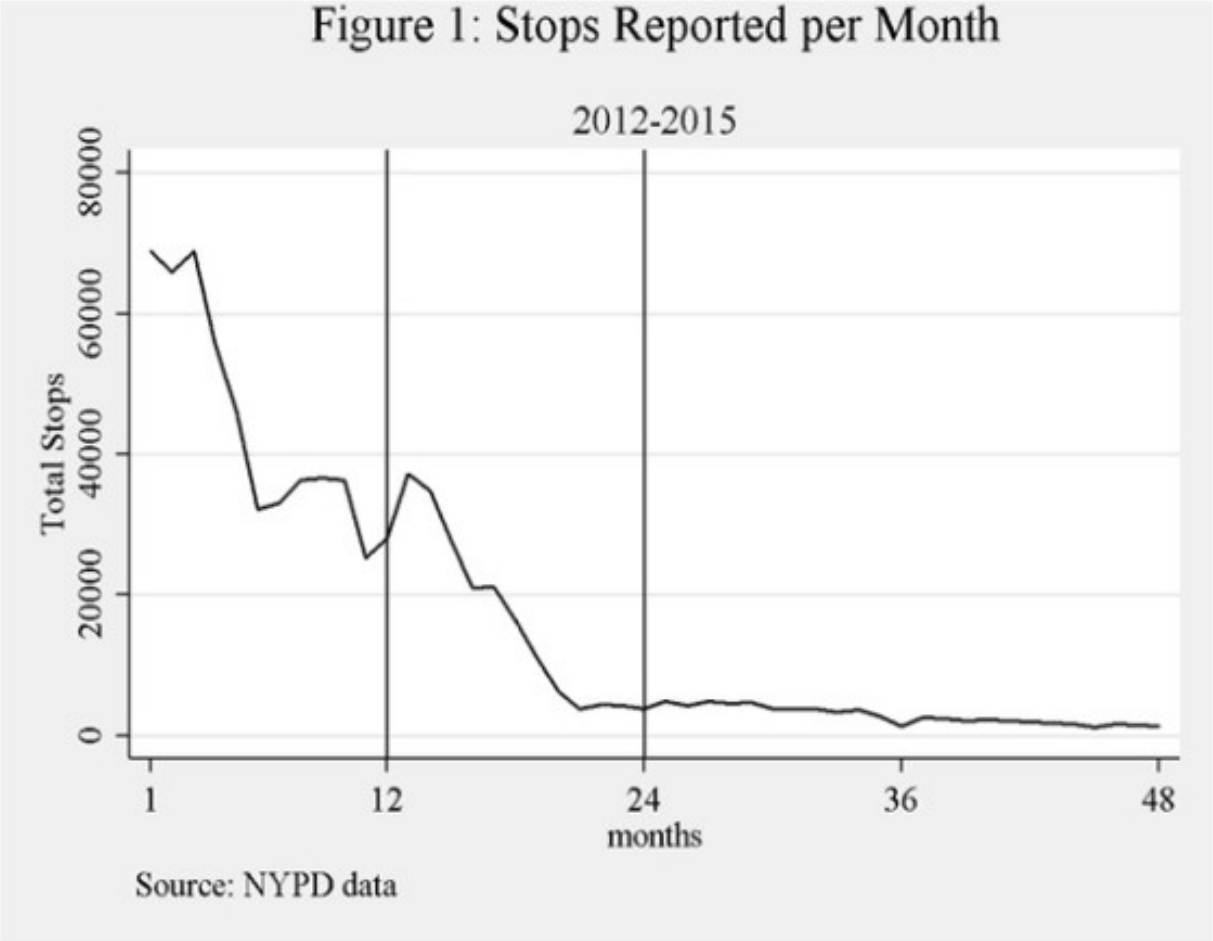
Source: http://www.courts.state.ny.us/ctapps/Decisions/2013/Dec13/245opn13-Decision.pdf

Document G: Security against unreasonable searches, seizures and interceptions in the *New York State Constitution, Section 12*

§12. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

(New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

Document H: Stops and Searches of Citizens by the NYPD 2012-2015



Document I: Racial Distribution of Citizens Stopped by "Stop and Frisk" Policies in New York City, 2013-15

Table 1: Racial Distribution of Suspects Stopped, 2013-2015

Year	Stops (N=)	Black (%)	Hispanic (%)	White (%)	Asian/PI/NA (%)	Other (%)	Unknown (%)
2013	191,851	54.4	28.6	10.8	3.9	1.48	0.6
2014	45,787	53.1	27.2	11.9	5.4	1.6	0.6
2015	22,563	52.9	28.8	11.1	5.2	1.3	0.5

Note: PI=Pacific Islander; NA=Native American.

Document J: Rivera v. Smith (Court of Appeals, NY, 1984)

Decision Date: November 27, 1984

Case Summary: Edwin Rivera, who is a Muslim and is incarcerated at the Attica Prison, was selected at random for a pat frisk. When a female correction officer approached him to conduct the frisk, Rivera objected and asked for a male officer to perform the search, based upon his religious beliefs, as embodied in the Holy Qu'ran, that all persons should be "modest of their person…" and should not submit to contact towards the opposite sex.

Background and Facts: The facts of the case, as paraphrased and quoted from the Court's Decision, are these:

Petitioner (a Muslim inmate) was selected to be frisked by a female officer at the prison. Petitioner asked that a male officer frisk him, on the ground that his religious beliefs forbade touching by a female. A pat frisk of the particular manner described, done by a female, would have involved physical contact violative of a major tenet of petitioner's religious creed.

The Court's "analysis starts with the proposition that with the closing of the prison doors behind him an inmate loses, or must endure substantial limitations on, many rights and privileges he previously enjoyed, a status justified by the character of our penal system…Nevertheless, a prisoner does not lose all rights during incarceration but rather retains those rights that are not inconsistent with his status as an inmate or with the legitimate penological objectives of the prison institution.. In the context of religious freedom, it is clear that the prisoner maintains the right to free exercise of religion under the first amendment of the Federal Constitution…, although the Supreme Court of the United States has yet to delineate the breadth of this right. New York law, section 3 of article I of our State Constitution provides that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind". This free exercise right has expressly been extended to those incarcerated in New York correctional facilities by section 610 of the (state's) Correction Law. in which the Legislature recognized the positive effect that religion can have in rehabilitating convicts and in shaping their behavior while in prison. These provisions of New York law manifest the importance which our State attaches to the free exercise of religious beliefs, a liberty interest which has been called a "preferred right"

While the rights of incarcerated persons are given great importance in this area, these rights do not prevent a prison from imposing reasonable restrictions upon those rights; inmates cannot be afforded free exercise rights as broad as those enjoyed outside the prison setting. So it is, as with many things, a balancing test, if you will, between the rights of the inmates to their free exercise of religion, and the rights of the prison to impose reasonable restrictions upon those rights for the sake of prison safety.

The Supreme Court found that Rivera's Muslim beliefs compelled him to avoid contact with members of the opposite sex outside of marriage. This view was supported by the testimony of Dr. Gohlman that the Qu'ran requires Muslims to avoid such physical contact, even when clothed, but that the "sin" of such

contact might be forgiven if one's will to prevent it is violated in an emergency. Further support for Rivera's religious belief was provided by the testimony of Shakir. Nor did respondent ever challenge the sincerity or *bona fides* of petitioner's religious convictions...Inasmuch as the Appellate Division affirmed Supreme Court's findings, these factual determinations are beyond the scope of our review. Supreme Court further found that, based on Officer Valentine's description of the manner in which pat frisks are performed, a pat frisk by a female correction officer involves physical contact which is violative of the religious creed of a male Muslim inmate. This finding, too, having been affirmed at the Appellate Division, is not reviewable in our court, there being evidence for its support in the record."

"The question thus becomes whether the impingement on Rivera's religious convictions caused by a routine pat frisk conducted by a woman officer is outweighed by a legitimate institutional need or objective of the correctional facility. The Superintendent and the correction officers assert two interests which, they contend, justify application to Muslim inmates of their policy that pat frisks be performed by all officers without regard to the officer's sex. Prison officials are charged with the responsibility, among other things, to secure their institutions against escape, to prevent the transfer or possession of contraband, and to protect the safety of inmates and prison employees. To carry out these formidable tasks in the volatile setting of our correctional institutions requires that prison officials be vested with broad discretion in their formulation of security-related policies."

"In the limited circumstances of the present case, however, it has not been shown that legitimate security objectives are advanced by having female correction officers randomly pat frisk Muslim male inmates. When petitioner was approached by Officer Ricks there were other male officers in the vicinity who could have performed the search. Further, Officer Valentine testified that during random frisks she had observed that 12 inmates were searched by 12 guards, of whom 8 were male officers."

Ruling: "The Supreme Court found that, based on the Department of Correctional Services' previous prohibition on pat frisks by officers of the opposite sex and its continued policy that more restrictive searches be performed by officers of the same sex as the inmates searched, the only security interest advanced in not providing such protection for pat frisks is the avoidance of the delay required to respond to a Muslim's objection. The court concluded that such delay would be minimal inasmuch as Muslim inmates can easily be identified by the prayer caps which they are allowed to wear and thus officers can readily determine which inmates should be frisked by male guards. Accordingly, it has not been established that security interests call for the use of female prison guards to perform random pat frisks of male Muslim inmates in violation of the latter's religious beliefs."

Document K: Concurring Opinion, Kaye, J. (Rivera v. Smith, Court of Appeals, NY 1984)

"I write separately to emphasize my own understanding that the declaratory relief is narrowly confined to the particular facts of this case, based on the record made below. This court, as well as both lower courts, have noted that the declaration is made "in the limited circumstances of this case." Since this appeal involves a collision of important interests, shared by the State -- that of inmates in the free exercise of their religious beliefs, that of correction officers in equal employment opportunity, and that of prison administrators, who must be accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security"-- it seems desirable to underscore certain of those circumstances.