

Defending Public Liberty



By Paul Engel

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- Can there be such a thing as liberty without differing opinions and actions?
- Can government regulate your freedom of speech, press, property, and association?
- How far can government go to enforce politically approved norms?

There are certain ideas that we find detestable, concepts we find repulsive, and even some actions we cannot abide. Do we have the right to tell other people that they must live by what we find acceptable? How many dystopian novels are based in the idea that only approved thought is allowed in society? Benjamin Franklin, writing as Silence Dogood, said:

“Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or control the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

[Benjamin Franklin as Silence Dogood, No. 8, 9 July 1722](#)

What will you do to protect public liberty? What will you allow, not because you approve, but because you recognize the right of others to live differently than you?

The question in the case *Carpenter v. James* seems to be quite simple. Can the State of New York force Emilee Carpenter to do

business in a way that violates her conscience? I refer to freedom of conscience because of the breadth of rights at stake in this case. Emilee Carpenter runs a wedding-photography business, “Emilee Carpenter, LLC”. She brought suit against the Attorney General of New York, Letitia James, the Interim Commissioner of the N.Y.S. Division of Human Rights, and the District Attorney of Chemung County, New York, seeking a preliminary injunction to prevent New York’s public accommodation laws from being enforced against her.

Plaintiff initiated the present suit after learning about New York’s public accommodation laws. She believes that those laws “threaten[] her ability to operate her business according to her faith” and “restrict[] what she could post on her studio’s website and social media sites and what she could say to prospective clients.” ... There are four provisions in dispute; three contained in the New York Human Rights Law and one contained in the New York Civil Rights Law.

Carpenter v. James – District Court Decision on Injunction

Since Ms. Carpenter cites four provisions of New York State law that violate her rights, let’s start by looking at them.

Accommodation Clause

The first provision is what Plaintiff refers to as the “Accommodation clause.” New York’s Human Rights Law provides: “It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof. ...Plaintiff does not dispute that her business is a “public

accommodation" subject to the law."

Carpenter v. James – District Court Decision on Injunction

While Ms. Carpenter does not dispute that her business is a public accommodation, the first thing we should do is define what a public accommodation is. In simple terms, the word public means:

a: of, relating to, or affecting all the people or the whole area of a nation or state –public law

b: of or relating to a government

c: of, relating to, or being in the service of the community or nation

Definition of public, Merriam-Webster online dictionary

For something to be public, it must be publicly owned or in the service of the community. And the definition of accommodation is:

something supplied for convenience or to satisfy a need: such as

a: lodging, food, and services or traveling space and related services –usually used in plural – tourist accommodations on the boat –overnight accommodations

b: a public conveyance (such as a train) that stops at all or nearly all points

Definition of accommodation, Merriam-Webster online dictionary

So how does a privately owned photography business become a publicly owned convenience to satisfy a need such as lodging or transportation? The answer is: Lawyers. When I researched the term "public accommodation", I found that most legal dictionaries define a public accommodation as anything that was open to the public. I did find one reference to a 2009

case Bishop v. Henry Modell Company, where the attorney for Mr. Bishop paraphrased the law as:

A place of "public accommodation" is defined as an establishment either affecting interstate commerce or supported by state action, and falling into one of the following categories: (1) a lodging for transient guests located within a building with more than five rooms for rent; (2) a facility principally engaged in selling food for consumption on the premises, including such facilities located within retail establishments and gasoline stations; (3) any place of exhibition or entertainment; (4) any establishment located within an establishment falling into one of the first three categories, and which holds itself out as serving patrons of that establishment; or (5) any establishment that contains a covered establishment, and which holds itself out as serving patrons of that covered establishment.

Bishop v. Modell – Opinion

The court, however, did not agree.

[The defendants] argue that the Modell's store is not a "public accommodation" within the meaning of the statute. We agree. ...

The text of § 2000a does not explicitly include retail establishments, ..., and case law confirms that retail stores are not places of public accommodation within the meaning of the provision. ...

Over the course of a 41-page Complaint and over 80 pages of briefing in opposition to defendants' motions to dismiss, plaintiff's sole factual allegation to support this argument reads, in its entirety, as follows: "That MODELL'S stores serve food to the public or provide entertainment for the customers."

Bishop v. Modell – Opinion

So by the standard of the law and the opinion of the Bishop v Modell court, Ms. Carpenter's business is not a public accommodation. It's not a lodging, it's not principally engaged in selling food, it's not a place of entertainment, and although she may have an office, as a wedding photographer the service she provides would happen outside of her offices. Even if we consider a photography business a "public accommodation", those laws are in violation of the Fifth Amendment to the Constitution of the United States.

No person shall ... be deprived of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment V

Most people, when they think of property, think of land or things. However, James Madison had a more detailed view:

This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

In the former sense, a man's land, or merchandise, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

James Madison – For the National Gazette, 27 March 1792

Yes, Ms. Carpenter has a property in the merchandise she owns, including the cameras, lighting, and other equipment for her business. She also has a property in her business, since she exercises exclusive control over it and attaches value to it. She has property in her opinion and the ability to profess and act on it. Lastly, she has a property of the free choice of the objects on which she employs her skills as a photographer. Since these “public accommodation laws” deprive her of control of these properties without a governmental process that protects her rights (due process), these laws violate her rights protected under the Fifth and Fourteenth Amendments to the Constitution of the United States.

Denial and Unwelcome Clauses

The second provision is the “Denial clause,” which makes it unlawful to “publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place [of public accommodation] shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status.”

Carpenter v. James – District Court Decision on Injunction

The third provision is the “Unwelcome clause,” which prohibits a public accommodation from publishing, circulating, issuing, displaying, posting, or mailing any written or printed communication to the effect that “the patronage or custom [] of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.”

Carpenter v. James – District Court Decision on Injunction

The denial and unwelcome clauses blatantly violates Ms. Carpenter's free speech rights. Many people, including Ms. Carpenter's lawyers, jumped right to the First Amendment's Free Speech Clause. Of course, all of them ignore the actual language of the First Amendment:

Congress shall make no law ... abridging the freedom of speech,

U.S. Constitution, Amendment I

Yes, many claim that the Fourteenth Amendment "incorporated" the First Amendment to the states, but that is patently ridiculous since only the national legislature is called Congress. What this law does violate is the Freedom of Speech and Press clause of the New York State Constitution:

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.

Constitution of the State of New York, Article I, §8

Since this law prohibits Ms. Carpenter's ability to speak, write, and publish freely in regard to her sentiments on same-sex marriage, it violates the state's constitution.

The New York Civil Rights Law

The fourth provision is found in New York Civil Rights Law § 40-c. That statute reads: "No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation, gender identity or expression, or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his or her civil rights, . . . by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state." N.Y. Civ. Rights Law § 40-c(2); see

also id. § 40 (stating that “[a]ll persons within . . . this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations”).

Carpenter v. James – District Court Decision on Injunction

Apparently, when the law states that no person shall be subject to discrimination, that does not include people who disagree with the politically acceptable standards in Albany, NY. I’ve already dealt with the “public accommodation” question, so here I want to deal with the civil rights question.

the nonpolitical rights of a citizen especially: the rights of personal liberty guaranteed to U.S. citizens by the 13th and 14th amendments to the Constitution and by acts of Congress

Definition of civil rights – Merriam-Webster’s Online Dictionary

The basic question is, do you have the right to force others to do business with you against their will? Remember, we’re not talking about a law that prohibits photographers from working at same-sex weddings, we’re talking about someone being forced to do so against their will. These “public accommodation” laws require people into involuntary servitude:

1 : a condition in which one lacks liberty especially to determine one’s course of action or way of life

2 : a right by which something (such as a piece of land) owned by one person is subject to a specified use or enjoyment by another

Definition of servitude – Merriam-Webster Online Dictionary


Involuntary servitude is strictly prohibited by the Thirteenth Amendment except as punishment for a crime.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

[U.S. Constitution, Amendment XIII, Section 1](#)

Conclusion

By passing this law to avoid discrimination, the State of New York has created discrimination. In an attempt to protect civil rights, the State of New York is destroying them. By dismissing all claims against the defendants with prejudice, Judge Frank Geraci has effectively condemned those who do not agree with same-sex marriage to involuntary servitude to a political cause with which they disagree. As Benjamin Franklin said:

“Without Freedom of Thought, there can be no such Thing as  Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

[Benjamin Franklin as Silence Dogood, No. 8, 9 July 1722](#)

By picking and choosing who has the right to speak, the State of New York and the District Court for the Western District of New York have denied Ms. Carpenter, and by extension all of those who live in that state, the right to speak freely. By establishing an approved way of thinking, the State of New York and this judge have denied freedom of thought, destroyed public liberty, and is thereby destroying wisdom. You may vehemently disagree with Ms. Carpenter’s position, and you are free to not do business with her, but if you claim the right to control what other people can say and do, you also are destroying liberty. In his Silence Dogood article, Benjamin Franklin went on:

“This sacred Privilege is so essential to free Governments, that the Security of Property, and the Freedom of Speech always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own. Whoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech; a Thing terrible to Publick Traytors.

[Benjamin Franklin as Silence Dogood, No. 8, 9 July 1722](#)

We already know that a majority of the New York State Legislature, the previous governor, and judge Geraci are willing to subdue freedom of speech, making them public traitors. Are you prepared to join them?

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