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WHO'S AFRAID OF RELIGIOUS LIBERTY?

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Seeking to prohibit every kind of "discrimination," activists in and out of government threaten the free practice of, among other faiths, Judaism.

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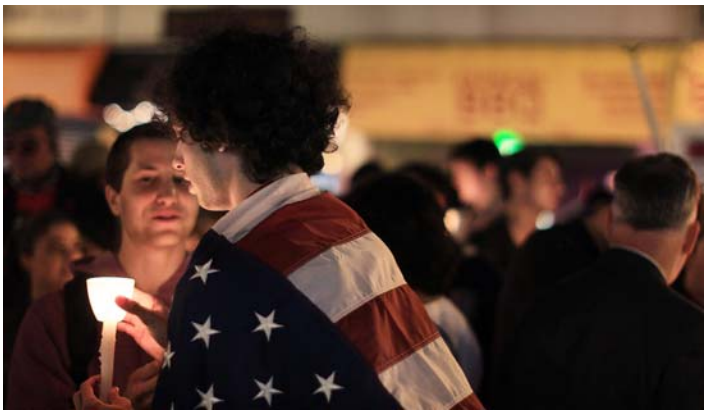

A rally in support of religious freedom in 2010 in New York. Photo by Spencer Platt/Getty Images.

Not so long ago, doubts about the ability of Jews to live and practice Judaism freely in the United States would have been dismissed as positively paranoid: relics of a bygone era when American Jews could be turned away from restaurants and country clubs, when restrictive covenants might prevent their purchase of real estate or prejudicial quotas limit their access to universities and corporate offices.

None of that has been the case for a half-century or more. And yet recent developments in American political culture have raised legitimate concerns on a variety of fronts. To put the matter in its starkest form: the return of anti-Semitism, by now a thoroughly documented phenomenon in Europe and elsewhere around the world, is making itself felt, in historically unfamiliar ways, in the land of the free.

Statistics tell part of the tale. In 2014, the latest period for which figures have been released by the FBI, Jews were the objects of fully 57 percent of hate crimes against American religious groups, far outstripping the figure for American Muslims (14 percent) and Catholics (6 percent). True, the total number of such incidents is still blessedly low; but what gives serious pause is the radical disproportion.

The rise and spread of anti-Israel agitation, particularly on the nation's campuses, is the most common case. Such agitation, expressed in the form of defamatory graffiti, "Israel Apartheid" demonstrations, and the verbal or physical abuse of pro-Israel students, feeds into and is

increasingly indistinguishable from outright anti-Semitism. Even the most zealously "progressive" young Jews are targeted as accomplices-by-definition with the alleged crimes of Zionism. As one student who has fallen afoul of his campus's orthodoxies has lamented, "because I am Jewish, I cannot be an activist who supports Black Lives Matter or the LGBTQ community. . . . [A]mong my peers, Jews are oppressors and murderers." Such is the progressive doctrine of "intersectionality," according to which all approved causes are interconnected and must be mutually supported, no exceptions and no tradeoffs allowed.

Lately, this brand of wholesale anti-Semitic vilification under the guise of anti-Zionism has leapt beyond the precincts of the academy to infiltrate American political discourse, becoming vocally evident on both the political left and the political right and insidiously infecting this year's presidential campaign and party maneuverings. For an analysis of the campus assault's underlying mechanisms and wider effects, Ruth Wisse's *Mosaic* essay, "Anti-Semitism Goes to School," is unsurpassed. So far, the trend shows no sign of abating.

But there is another danger, equally grave though as yet less open and less remarked upon. It is connected with longer-term shifts in Americans' fundamental understanding of themselves and of their liberty, and consequently with the laws that embody and reflect that understanding: in particular, the laws enshrining America's commitment to religious liberty and, relatedly, liberty of association or, as the Constitution has it, assembly. Coming to the fore over issues of personal identity, most saliently in relation to the gay-rights movement, same-sex marriage, and transgender rights, it has resulted in a legal battle in which the radioactive charge of "discrimination," borrowed from the civil-rights movement of the 1960s, is wielded as a weapon to isolate, impugn, and penalize dissenting views held by Americans of faith and informing the conduct of their religious lives.

Jews are hardly the only group at risk from developments in this area of progressive agitation; up till now, its main targets have been believing Christians. Perhaps for that same reason, Jews have also not been in the front ranks of those raising an alarm. Nevertheless, the threat to them, and to the practice of Judaism, especially by Orthodox Jews, is very real. Unlike in the past, the threat comes not from private initiatives; it comes from government.

I. Liberal America

How did we get here? Truly to understand today's trends, and to grasp why they are so serious, it would help to remind ourselves of the larger historical context.

In his famous 1790 letter responding to the "expressions of esteem" addressed to him by the Hebrew Congregation in Newport, Rhode Island, President George Washington hailed the presence of Jews in a land where, by contrast to their people's past experience of intolerance and persecution elsewhere, everything was different. So different, in fact, that tolerance

itself—an accommodation that was then selectively being extended to some European Jewish communities—was no longer an issue. In America, for Jews as for any other group, "it is now no more that toleration is spoken of as if it were by the indulgence of one class of people that another [class] enjoyed the exercise of their *inherent natural rights*" (emphasis added). Rather, the president stressed, directly borrowing a phrase from the congregation's address to him, "all possess alike liberty of conscience and immunities of citizenship."

The United States could practice this unprecedentedly "enlarged and liberal policy," as Washington rightly called it, because it featured a very limited national government, one that allowed a large sphere of civil society to flourish outside of government regulation. Thus, in reciprocating the admiring wishes of "the children of the stock of Abraham who dwell in this land," the president voiced his own well-founded wish that they "continue to merit and enjoy the good will of the other inhabitants—while every one shall sit in safety under his own vine and fig tree and there shall be none to make him afraid."

George Washington's words left Jews free to be Jews just as Christians were free to be Christians; with a few exceptions in some states, government was indifferent.

In summoning the prophet Micah's words about sitting in safety under one's "own vine and fig tree," Washington was presuming not only the right to private property but a more general liberty to pursue happiness as one understood happiness. The government would do little to regulate the cultivation of fig trees—or work hours, or employer-employee relations. Regulation would be the exception; liberty the rule. This same open space left Jews free to be Jews just as Christians were free to be Christians; as between faiths, with a few lingering exceptions in some states, government was indifferent.

This was indeed a "liberal policy" for a liberal society—a society in which, as the philosopher Leo Strauss, echoing the first president, would put it a century and a half later, "there are no longer any legal disabilities put on Jews as Jews." But, Strauss went on pointedly, such an arrangement "stands or falls by the distinction between the political (or the state) and society, or by the distinction between the public and the private. In the liberal society there is necessarily a private sphere with which the state's legislation must not interfere." Therefore, in that private sphere, such an arrangement would allow for discrimination.

What this meant in practice was that Wasps were free to keep Jews out of their country clubs, and Jews were free to organize their own clubs. Similarly, Americans were generally free to refuse service to whomever they chose, for whatever reason they chose, and to decide with whom to associate in their daily affairs.

The same held for the free exercise of religion: by its very nature, the very thing that allowed Jews to be free and equal members of American society also allowed private discrimination in matters of faith. Indeed, with some notable exceptions—the persecution of Mormons in the

19th century being a conspicuous example—America was able to guarantee a robust area of religious liberty precisely because, just as the federal government generally left Americans free to act or not to act, to speak or not to speak, so it also left them free to worship or not to worship, to conduct or not to conduct their religious lives, as they chose.

Is that still the case?

II. The Collapse of Civil Society

One can occasionally still see, usually in an old diner somewhere, the venerable sign "We reserve the right to refuse service to anyone." The sign is an anachronism; it does not carry either the force of law or the weight of public opinion. But it once did, and more recently than we might think. For most of American history, for better or worse, the common view was that private institutions, companies, clubs, and so forth had the right to choose with whom to associate and not to associate, whom to accept as customers, whom to decline or refuse to serve. There were, to be sure, exceptions: by law, a small class of businesses, most notably railroads and other conveyances, as well as inns and public amusements, had to take all comers. Somewhat more broadly, the same rule applied to monopolies, like the local grain elevator. The class was narrowly defined precisely because the liberty to associate with whom we choose was recognized as essential in a liberal nation that made a hard distinction between the realm of the state and the realm of civil society.

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When it came to race, early America did not simply allow individuals to "discriminate" if they chose to do so. On the contrary, the government positively required such discrimination. Both slavery and segregation were creations of law. Throughout the South, government not only segregated public places and activities but also forced private corporations—railroads, restaurants, and other places where Americans gathered—to maintain separate sections for blacks and whites.

Segregation was expensive; the laws were designed to ensure that greedy capitalists did not save money by "forcing" whites and blacks to sit next to each other—precisely the happy

outcome that 18th-century political philosophers had predicted would emerge once government left people free to go about their business together. As Voltaire put it in a famous passage about the London stock exchange, "The representatives of all nations meet for the benefit of mankind. There the Jew, the Mahometan, and the Christian transact together, as though they all professed the same religion, and give the name of infidel to none but bankrupts." In the American South and elsewhere, Jim Crow laws subverted the market and the tolerant attitude it fostered.

It was to remedy this situation that Congress would eventually assert the right of the federal government to regulate not only local and state governments but civil society itself in an unprecedented manner. The instrument was the Civil Rights Act of 1964. Outlawing discrimination based on race or color—as well as religion, sex, or national origin—the act aimed mainly at undoing racial segregation in schools, workplaces, and "public accommodations": in essence, what the legal scholar Richard Epstein dubbed "the totalitarian nature of the Old South."

It is difficult for us at this distance to appreciate the radicalism of the Civil Rights Act. Law can change two things. It can change behavior regarding the particular problem it addresses; it can also change how citizens understand the purpose of law and the liberty that law is supposed to protect. The Civil Rights Act did both. A half-century after its passage, we are a very different country.

In many ways, that is an unalloyed good. Legal segregation is long gone: blacks and whites interact and even marry with increasing frequency; African-Americans can and do vote in large numbers across the country; black politicians are common, even in the heart of the South, and one is the president of the United States; unions no longer discriminate against non-whites; and so forth.

This is not the America of pre-1964. As a rule, and without making light of persisting racial problems in American society, today's racism is a much-reduced evil. At this year's Academy Awards, the comedian Chris Rock described the change as a movement from racism characterized by lynchings and burning crosses to "racism" by college sororities or, in his joking words, "'We like you, Rhonda, but you're not a Kappa.'" For much of our society, the contrast drawn by Rock holds true. One could even say that the battle against racial discrimination in civil society, insofar as government can effect change without becoming a dictatorship, is mostly over.

But very few are willing to say so—which in itself suggests how thoroughly the new civil-rights mentality has changed the American understanding of the job of government vis-à-vis the liberty of citizens. In principle, the 1964 Civil Rights Act held that people were still *generally* free to decide with whom to associate, being prohibited from discriminating against only a small list of people in what the Act designated as "protected classes." As Epstein has observed, the original law exempted some small businesses like the proverbial "Mrs. Murphy's boarding house." But it also declared that henceforth almost all businesses, and all charitable

institutions, were, in essence, "public accommodations" in the eyes of the law. As such, the federal government had the right to tell every business whom it must serve or, even, hire.

Although the law was justified under the Constitution's commerce clause, its purpose was not economic. It was social. In the service of that purpose, the government would come to regulate more and more aspects of our lives, creating a federal "police power" of the kind delegated by the Constitution exclusively to states and localities. Over time, and (ironically) as the racial situation improved, the enforcement mechanism applied by bureaucrats and legislators worked to make the law not less restrictive of civil rights but more so.

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It is useful to recall that when the law passed, much of the new intrusion into civil society by government was recognized as a temporary measure, to meet a particular exigency. Even a progressive lion like Justice William Brennan recognized the temporary nature of, for example, affirmative-action programs that ran counter to the colorblind ideal. Indeed, Brennan thought such programs could be justified only as a temporary, remedial measure. A half-century later, however, many Americans have assimilated these intrusions into their understanding of the regular job of government.

Thus, a few years ago, when the Supreme Court scaled back the part of the Voting Rights Act that subjected some districts in the South to special scrutiny, on the grounds that it was no longer 1968 in the South and that such extreme interference with the democratic process was no longer justified, liberals and leftists assailed the decision as a sinister move to repudiate the Voting Rights Act as a whole. Since 1964, moreover, the list of officially "protected classes" has grown beyond the list (defined, again, by race, color, sex, national origin, and religion) stipulated by the Civil Rights Act to include such markers as age, pregnancy, citizenship, familial status, disability, veteran status, and genetic information. Nowadays, the Justice Department has been creating new "protected classes" on its own recognizance, without even a pretense of seeking congressional approval for so radical a change from the originating statute.

This captures our situation today. A large body of American opinion holds that it is the government's job to prevent any and all discrimination. That belief is pushing government more and more deeply into our daily affairs. Along the way, instead of easing social tensions, it has exacerbated them by establishing a permanent legal relationship between growing classes of legally recognized victims and their designated protectors at every level of society. As each generation assimilates the mindset more thoroughly, we begin to see situations like those on today's campuses, awash in the frantic demand for "safe spaces." There, Jonathan Haidt has written, "the very presence of administrative bodies" in charge of enforcing

non-discrimination "gives rise to intense efforts to identify oneself as a fragile and aggrieved victim." In such a culture, students "must not obtain redress on their own; they must appeal for help to powerful others." And so the cycle of dependency on one side, suffocating paternalism on the other, perpetuates itself.

III. Today's Threats to Religious Liberty

Do any Americans still understand the prohibition of discrimination as an *exception*, and a carefully hedged one, to the general rule of liberty? There is reason for skepticism—and nowhere more so than in the area of religious liberty. With the progressive left's success at passing laws or obtaining court rulings establishing gays as a constitutionally protected class and sanctioning same-sex marriage, the legal arena has shifted from race relations to one of the few remaining pockets of the private sphere that have so far remained relatively secure in (to quote Washington) their "liberty of conscience and immunities of citizenship."

Strictly speaking, the fight is not entirely new. Recall the 1990 decision in the Smith case, in which members of a Native American church who ingested peyote in a religious ceremony had been fired by their employer under an Oregon law criminalizing possession of drugs and were now carrying their appeal to the Supreme Court. The Court, declining to find a justification for religious exceptions to generally applicable laws—in this case, anti-drug laws—let stand the Oregon court's judgment.

Within three years, that ruling would lead to a countervailing action by Congress. It took the form of the Religious Freedom Restoration Act (RFRA), which was designed explicitly to reaffirm and protect the First Amendment guarantee of the free exercise of religion. As Bruce Abramson has written in these pages, "The House passed the bill in a unanimous voice vote. The Senate voted 97-3 in favor." The American Civil Liberties Union supported the act.

> **The ACLU no longer supports the RFRA. Today, even as it claims to defend religious liberty, it proclaims a new danger: that "religion is being used to discriminate against and harm others."**

But the ACLU no longer supports the act. Today, even as it claims to defend religious liberty, the civil-liberties lobby proclaims a new danger: namely, that "religion is being used [by religious believers] to discriminate against and harm others." The better to camouflage this piece of verbal jujitsu, the organization has also adopted a definition of religious liberty as a matter of belief only, separate from the realm of conduct or, as the First Amendment explicitly has it, "free exercise." In similar fashion, the Obama White House has taken to quietly replacing the phrase "freedom of religion" with "freedom of worship," a purely private affair

with no permissible impact on either speech or conduct.

In promoting the new dispensation, the ACLU and the Obama administration are hardly without accomplices—certainly among liberals and Democrats, but even among some conservatives and within the establishment GOP. In one of the early presidential debates this year, Hugh Hewitt asked Governor John Kasich, then still in the running for his party's nomination: "You've said: a same-sex couple approaches a cupcake maker, [and he should] sell them a cupcake. Can we trust you . . . on religious liberty?" Kasich's reply suggested that he didn't recognize a religious-liberty angle at all: "If you're in the business of selling things, if you're not going to sell to somebody you don't agree with, OK, 'today I'm not going to sell to somebody who's gay, and tomorrow maybe I won't sell to somebody who's divorced.'"

The question at issue, however, as Hewitt made clear, was not whether a baker would sell a cupcake to a gay person. The question was whether a baker must be forced to provide his services for a gay wedding even if he regards such an event as wrong or sinful. Must he be compelled to produce a cake, or cupcakes, inscribed with "Congratulations Bob and Jack"? That would be forced expression, formerly regarded as a gross violation of the liberty of conscience enshrined in the First Amendment.

Until recently, the common American reply to Hewitt's question would have been: "It's the baker's right to decline; the customer should find another baker." Live and let live. That a Midwestern governor like John Kasich wouldn't view it that way says much about how things have changed. But then, even Gary Johnson, the Libertarian party's candidate for the presidency, also embraces the contemporary view. When asked about a similarly hypothetical case of a Jewish baker being asked to bake a Nazi cake, Johnson invoked the supposed "principle that, when a business opens its doors to the public, that business enters into an implied contract to serve *all* of the public." Formerly, few Americans would have asserted that any such "implied contract" existed. But the new understanding of businesses as "public accommodations" has transformed our conception of private institutions and enterprises, for-profit and not-for-profit alike.

In his *Mosaic* essay, Abramson ably summarized the key religious-liberty cases that sprouted in the period immediately after the passage of laws prohibiting discrimination against gays and/or sanctioning gay marriage, as well as the opposing efforts, including through state-level versions of RFRA, to carve out exceptions and otherwise push back against the anti-religious campaign. Since the publication of Abramson's essay last year, the list of cases has expanded, and it casts a stark light on the issue of whether religious believers are the offending party, using religion (as the ACLU contends) actively to discriminate against and harm others, or are being targeted by a campaign to eliminate their own right of free association and free exercise of religion.

Item: A federal ruling this May states that the failure to address as female a patient who though biologically male claims to be a female can open a doctor to lawsuits, loss of federal funding, and investigation by the federal Office of Civil Rights. The rule is said to derive from

various federal acts, including the 1964 Civil Rights Act; it includes no protection for religious persons or providers who on religious grounds believe in the biological reality of maleness and femaleness. Note that the rule is not about requiring doctors to provide service, or at least necessary service, to all comers; it is about what words a doctor is allowed to use to describe male and female.

Item: The governor and human-rights commission of the state of Washington recently acted to force a Seattle pharmacy to cease its practice of declining, on religious grounds, to fill prescriptions for abortifacients, instead referring customers to other nearby pharmacies. The Ninth Circuit sided with the state, and in June of this year the Supreme Court let that ruling stand.

Item: In Iowa, the state civil-rights commission and others acted to prohibit a church from expressing "biblical" views on human sexuality and to compel it to open its separate restrooms and showers to persons of the opposite sex. (Iowa's version of the Civil Rights Act similarly mandates opening such facilities to persons based on their "gender identity" rather than their biological sex.) The church sued for the right to express its views and to conduct its practices in accordance with its religious beliefs. At last report, the state civil-rights commission had partially backed down.

Item: A bill now before the Californian state senate would curtail the freedom of Christian colleges and universities to operate in accordance with their beliefs. It proposes to limit the current religious exemption from federal regulations to that small handful of institutions that specifically train pastors or theology teachers. If passed, this will effectively open to lawsuit and materially jeopardize the dozens of other schools in California—Christian, Jewish, and Muslim—that on the basis of the religious exemption have been able to follow their faith in hiring and instruction practices as well as in the conduct of student life.

Protesting this move to deprive religious institutions of long-recognized and long-protected rights, the legal scholar Michael Helfand, writing in the *Wall Street Journal*, has cited an 1872 case in which the Supreme Court held that "people who join together to pursue religious objectives implicitly consent to the institution's rules, [thereby] granting it some legal autonomy to set its policies." In Helfand's view, "the state should recognize that."

Making a similar point in a more bracingly acerbic tone, the columnist Holly Scheer has written in the *Federalist*:

> It seems sensible that if you don't want an education imbued with the values of a religion—any religion—attending classes at a religious school would be a poor choice for you. This is not a day or age of limited academic choices. California alone has hundreds of college and university options. Of its 281 accredited four-year options, only 42 are religious.

Let me simplify this. If a Jewish education isn't your speed, don't attend American Jewish

> University. If you aren't interested in a Muslim university, don't attend Zaytuna College. And if you don't want to go to a Christian college, avoid them.

Alas, few these days are as sensible as Holly Scheer, or as closely attuned to the meaning of the American way. And here is where the danger to the freedom of Jews to be Jews becomes painfully manifest. Although the secularizing and leveling fires of today's activists are aimed mainly at Christians, the precedents that are being set would apply no less to Jewish day schools, colleges, and synagogues as well as to kosher restaurants and community centers. In the name of non-discrimination, zealots could make it increasingly difficult for religious Jews to educate their children as they see fit or possibly even cause them to lose the right to do so.

Although the secularizing and leveling fires of today's activists are aimed mainly at Christians, the precedents that are being set would apply no less to Jews.

As the California example suggests, legislation at the state or federal level would affect Jewish educational institutions that uphold traditional teachings about marriage. Like the church in Iowa, Jewish religious institutions could also find it necessary to sue just to protect their right to teach the biblical understanding of sex and sexuality. The same logic would apply elsewhere as well: for example, to a law penalizing the use of the "wrong" sex pronoun about someone claiming to be transgender, or compelling yeshivas or other religious schools, in the name of non-discrimination law, to hire openly gay teachers on pain of losing their tax exemption (a possible precedent being the Court's 1984 ruling against Bob Jones University, which had banned interracial marriage and dating).

Catholic charities in Boston no longer offer adoption services because the state insists they do so in a manner that violates Catholic doctrine. That would apply to Orthodox agencies, too. Bans on kosher slaughter and circumcision, long on the to-do list of activists, might not be far behind. Nor might basic internal arrangements of traditional Jewish communities and religious institutions necessarily escape scrutiny: one can imagine, for instance, a situation in which a transgender Jewish man might sue for access to a mikveh designated for use by women.

Traditional Judaism, after all, depends entirely on discriminating in the original sense of distinguishing: between holy and profane, Sabbath and weekday, man and woman, Jews and others. Such discriminations cannot be reworked without transforming classical Judaism into something unrecognizable to many Jews. Will Jewish institutions be able to withstand today's freewheeling assault on religious liberty? Or will the enforcers of state-mandated "non-discrimination" not rest easy until they complete their Orwellian campaign of *positive* discrimination against every last dissenter from the progressive line?

IV. Anti-Liberal and Anti-Jewish

> America has long been distinguished by a vibrant and independent civil society, one possible only when voluntary associations can meet freely in public spaces and public institutions and when they can limit their membership and leadership to persons who share their beliefs. This means that groups will exist that we like and groups will exist that we do not like.

Thus writes Michael W. McConnell, director of the constitutional law center at Stanford Law School, in connection with a 2011 case in which a small Christian student group at a public-university law school in San Francisco was denied a right to meet on campus because of its belief that, in McConnell's paraphrase, "sexual relations are immoral outside of traditional marriage." The case went to the Supreme Court, which upheld the school's policy.

What does this signify? Evidently, McConnell comments, it signifies that voluntary associations *cannot* necessarily "meet freely in public spaces and public institutions," but instead that "governments can effectively pick and choose which groups are permitted to use public property." And what does *that* signify? It signifies that the framers of the First Amendment had it wrong. They "thought they had guaranteed all associations the right to meet, with the sole limitation that they behave peaceably. That freedom has slipped away."

The framers "thought they had guaranteed all associations the right to meet, with the sole limitation that they behave peaceably. That freedom has slipped away."

What goes for the freedom of association goes also for the freedom of expression and of religion: thanks to today's "anti-discrimination" crusade, they, too, are slipping away. Already in his 1962 lecture, "Why We Remain Jews," from which I have been quoting, Leo Strauss warned against efforts to end "discrimination," period. This enterprise, he predicted, would kill liberalism. "The prohibition against every 'discrimination,'" he said, "would mean the abolition of the private sphere, the denial of the difference between the state and society, in a word, the destruction of liberal society." (Sensitive to the newly invidious sense of the term "discrimination," Strauss insisted on using it only with quotation marks. "I would not use it of my own free will.") Absent that private sphere, he concluded, Jews would no longer be free to be Jews in America.

Today's post-Christian, anti-Christian bigots have set themselves against the "large and liberal policy" that to George Washington also left Jews free to be Jews, to associate with whom they chose, and to live by the teachings and practices of their tradition: liberties that, along with legal equality, became enshrined as of natural right in the American Constitution. One would hope that this same large and liberal policy lies so deep in the American DNA that

the national immune system will finally respond in time to repulse the latest attack on it. Doing so, however, will entail recovering both specific laws and an idea of justice based upon treating Americans as individuals who "all possess alike liberty of conscience and immunities of citizenship"—that is, upon the ideal of live and let live.

In today's fevered political climate, one cannot help wondering how much of the felt national anger might be traceable to the juridically abetted effort to force all Americans onto a uniform cultural page. If that is the case, restoring a healthier understanding of liberty would be good not only for traditional Jews and Christians but for all Americans. In furthering that restorative effort, American Jews have a collective interest, a historical responsibility, and a role to play.