

Involuntary Particularism: What the Noahide Laws Tell Us About Citizenship and Alienage¹

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Abstract: This article argues that the Jewish picture of the Noahide laws, laws thought to apply to all non-Jews but particularly to those who would reside in a Jewish commonwealth, can shed light on how to balance a strong sense of citizenship with reasonable policies towards Lawful Permanent Residents. The article enunciates models for how to adapt the provisions of one legal system to another, shows that the Noahide system demanded that non-Jews accept fundamental aspects of a Jewish worldview in order to live among them, and then applies those lessons to argue for a reinvigorated view of American citizenship and a reconsideration of the meaning of lawful permanent residence.

The inherent tension between emphasizing the importance and exclusivity of citizenship and extending a kind hand to aliens has come to the fore in recent academic literature in the United States. Offering rights too easily to non-citizens minimizes the value of citizenship itself, a problem for those who wish to promote strong identification with the country.² The overriding desire to help aliens, many if not most of whom inhabit difficult lives in the lower socioeconomic classes of society, spurs others to argue for expanding the rights of lawful permanent residents (LPR's), even to where they are indistinguishable from those given to citizens.³

¹ I have appended both footnotes and endnotes to this essay; the footnotes list citations and clarify points in the text. The endnotes take up ancillary issues, those not worth inserting into the text itself.

² For examples of arguments for strengthening citizenship, see in *IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY*, ed. Noah Pickus, (Lanham: Rowman and Littlefield, 1998): Charles R. Kesler, *The Promise of American Citizenship* 3-39, David A. Hollinger, *Nationalism, Cosmopolitanism, and the United States*, 85-99, and Noah M. J. Pickus, *To Make Natural: Creating Citizens for the Twenty-First Century*, 107-139. Prior to that collection, important briefs for this view included Frederick Schauer, *Community, Citizenship, and the Search for National Identity* 84 *MICH. L. REV.* (June 1986) 1504-17, Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship* *GEORGETOWN IMMIGRATION LAW J.* 3:1 (Spring 1989), 1-18, and William N. Eskridge, Jr. *The Relationship Between Obligations and Rights of Citizens* 69 *FORDHAM L. REV.* (2001) 1721-1751.

³ Those in favor of loosening citizenship rules and/or extending greater rights to all aliens (not just Lawful Permanent Residents) include *IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY*, *ibid.*, the following chapters: Kwame Anthony Appiah, *Citizenship in Theory and Practice: A Response to Charles Kesler* 41-47, Joseph H. Carens, *Why Naturalization Should Be Easy: A Response to Noah Pickus* 141-146, and Hiroshi Motomura, *Alienage Classifications in a Nation of Immigrants: Three Models of*

Underlying the debate is a disagreement about the purpose and value of citizenship, especially when it is counterpoised to the sticky questions of when or whether it is proper to discriminate against or deny benefits to people based on their lack of membership in a certain club. This article suggests reasons why, and a model for how, to distinguish between citizens and lawful permanent residents.

We do so by extrapolating from a system that articulated the two categories fairly fully, Jewish law. While Jews were bound by the commandments of the Torah, they also envisioned another set of laws, known as the laws of the sons of Noah or Noahide law,⁴ which applied to all non-Jews.¹ While it was universal, classical Jewish sources also saw Noahide law as a kind of immigration law, in that the Talmud—the authoritative source of Jewish law, edited around 500 CE—set agreement to adhere to Noahide laws and standards as a fundamental requirement in order to be allowed to live in a Jewish commonwealth.⁵ That was already only a theoretical possibility for the rabbis of the Talmud and ever since, but studying the system’s expectations of resident aliens sheds light on how one group of thinkers balanced their keen interest in a strong sense of

“*Permanent Residence*, as well as T. Alexander Aleinikoff, *Citizenship, Aliens, Membership and the Constitution* 7 CONSTITUTIONAL COMMENTARY 1990 9-34, Linda Bosniak, *Universal Citizenship and the Problem of Alienage* 94 NORTHWESTERN U. L. REV. (2000) 963-982 and *Constitutional Citizenship Through the Prism of Alienage* 63 OHIO ST. L. J. (2002) 1285-1325, and Peter J. Spiro, *Questioning Barriers to Naturalization* 13 GEORGETOWN IMMIGRATION L. J. (Summer 1999), 479-519.

⁴ The term Noahide comes from the Jewish view that all people today descend from Noah. The Talmud bSANHEDRIN 56a, actually seems to assume that the commandments were originally given to Adam; why they are referred to as Noahide laws is something of a continuing question, but one that need not detain us here.

⁵ See Maimonides (c. 1138-1204, whose MISHNEH TORAH, an attempt to codify all of Jewish law, whether currently practical or not, we will cite frequently), LAWS OF IDOL WORSHIP 10;6, based on bGITTIN 8b. Note that Maimonides himself prohibits even temporary passage for non-Noahides; his glossator, Rabad (R. Abraham b. David of Posquieres, 1125-1198) disagrees. Maimonides’ view would argue for an even stricter view of how to treat aliens than we offer in the text.

citizenship with a desire to act fairly and reasonably towards outsiders who wished to reside among them.

We will see that even when they saw themselves as thinking universally, Jews were remarkably particularistic in their expectations of non-Jews.ⁱⁱ Resident aliens in a Jewish polity were required to accept fairly specific and fundamental aspects of the Jewish worldview; once they did so, they were welcomed into Jewish society. Since, however, they did not fully attach themselves to the Jewish way of life, they also only received some of the benefits of citizenship.

The particularism of the Noahide laws, we will argue, is simply an example of the necessary particularism of all legal systems, which always implicitly espouse a particular worldview in the details of their laws. Citizens are those members of a society who accept that way of looking at the world, of how society should work, of how citizens need to treat each other and outsiders, and of the proper ways to work for change and improvement within that society. Those who wish to fully join in the endeavor of furthering the prosperity of that society and worldview will become citizens; those who sympathize with essential aspects of the society but choose not to join it fully cannot then expect the full benefits of the system that they have chosen not to join.⁶ Those who refuse to identify with the society's goals and values in even a limited way should not expect the right of permanent residence, and perhaps not even residence at all.

⁶ Some of this work was anticipated by Gordon Lafer, *Universalism and Particularism* in JEWISH IDENTITY eds. David Theo Goldberg and Michael Krausz, (Phil.: Temple U. Press, 1993), 177-211. Lafer, too, explicitly wants to offer a model of universalism and particularism that will be reasonable and attractive even to liberal theorists. At the same time, p. 183, he refrains from translating the Jewish model into an American one, assuming that cultural translation can only offer insights, some of which may be relevant and acceptable to the receiver of that translation. I assume here, instead, that offering my view of how the Jewish model translates to American culture will jumpstart the process of critiquing that model and finding the moments of insight that will produce a smooth translation.

The idea of using Jewish law to reflect on American is not new, but has been cogently critiqued by Suzanne Last Stone.⁷ Responding to a trend started by the late Robert Cover and followed by others,⁸ Stone argued that such analyses often neglect features of Jewish law that make it less salient than it might seem. Specifically, she saw the centrality of divine authority in Jewish law—Judaism’s insistence that adherence to the law be grounded in the belief that God commanded it—as making this system too different from secular law to provide useful comparison.⁹

THREE MODELS OF APPLYING ONE LEGAL SYSTEM TO ANOTHER

Professor Stone obliquely raises the question of how one system, with its particularistic assumptions and worldview, can offer meaningful insight for another, a question we obviously must address before embarking on our endeavor in comparative alienage. Granting her point that systems of law often differ so greatly as to rule out importing elements from one to another, we can still envision three circumstances where transfer is plausible and appropriate.

First, claims of one system may appeal to the members of the other because they are convincing within the second group’s own ways of looking at the world. Theoretically, all or most Americans might decide that the Jewish (or Moslem or Russian

⁷ Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory* 106 HARVARD LAW REVIEW (Feb. 1993), 813-894.

⁸ Stone mentions S.F. Friedell, *The "different voice" in Jewish law: some parallels to a feminist jurisprudence* 67 INDIANA L. J. (Fall 1992), 915-49 and J.W. Singer, *The player and the cards: nihilism and legal theory* 94 YALE L. J. (November 1984) p. 1-70. Other examples are William N. Eskridge, Jr., *supra* note 2, who explicitly acknowledges his debt to Cover for the idea that Jewish concepts of obligation ought to be incorporated into American legal theory and discourse, and Elliot Klayman and Seth Klayman, *Punitive Damages: Toward Torah-Based Tort Reform* 23 CARDOZO L. REV. (Nov. 2001), 221-251.

⁹ Stone, 865-70. What Stone actually says is that Jews’ commit to the practices and messages of their legal system out of a desire to achieve a relationship with God, a wish that a secular system cannot replicate.

or French) view of marriage, or self-defense, or contracts, made sense in an American context as well, and adjust their laws to incorporate that decision.

I stress the importance of naturalizing the innovation into the host context because I do not want to be misunderstood as arguing in favor of allowing outside systems to shape that of the United States. To claim that the United States should act in a certain way because God commanded x (or whatever justifies that law for the external system) is to speak gibberish in the context of the public debate of the United States. For a mixture of reasons political and principled, this country has long rejected the authority of any but the most general religious framework in structuring the country's laws and institutions. Private belief is a matter of personal conscience, but to be heard in the public arena requires phrasing oneself in terms that stand independently of any particular religious belief.

Even given the restrictions just posited, there will still be circumstances that allow for the reasonable claim that the United States should adopt another legal system's view of a topic. Once we grant that American values and ideals must remain the frame of reference, we can easily imagine occasions where other systems' handling of a particular national concern seems more effective than current American practice, in a way that does not diverge from any American values or ideals. For example, in a world where terrorism plagues many societies, we might find that another country's protocol for how to balance individual rights with the needs of combating terrorism is more effective and appealing than our current practice, and fits smoothly with our prevailing national values. In such situations, we could feel free to adopt that practice in toto.

Where pure cutting and pasting cannot work, it may still be possible to transfer categories of one system to the other, with the details differing from system to system. Nation building provides a good example, since the nation overseeing the building tries to apply broad categories—democracy, tolerance, pluralism— while recognizing that they may be expressed in a vastly different manner than in the original country.¹⁰ The resulting laws reflect the home country, but their underlying categories come from the overseeing nation.

The least intrusive model, the one that best fits our current discussion, argues only for importing broad themes from another legal system. If a religious law insisted that its members pray a certain number of times a day, a thematic application of that law could recognize its underlying assumption that repeated recitations of formulae help people deepen their connection to core values. Picking up on the theme, although not its content, a secular legal system might decide to institute some kind of ritualized recitation, such as the Pledge of Allegiance or the National Anthem, to help its citizens retain their sense of connection to the goals of the larger society.

We will here suggest that that last kind of transference would be helpful in shaping the American discourse about citizenship and alienage. In order to do so, however, we need to unravel the tangle of claims that Judaism made about Noahide law.

CHARACTERIZING NOAHIDE LAW

¹⁰ Note President Bush's comments in his speech of November 5, 2003, calling for Arab states to move towards democracy: "...we are mindful that modernization is not the same as Westernization. Representative governments in the Middle East will reflect their own cultures. They will not, and should not look like us. Democratic nations may be constitutional monarchies, federal republics, or parliamentary systems. And working democracies always need time to develop - as did our own. We've taken a 200-year journey toward inclusion and justice - and this makes us patient and understanding as other nations are at different stages of this journey." Similar views can be found in Noah Feldman's work, particularly his Op-Ed, *A New Democracy, Enshrined in Faith*, NEW YORK TIMES, November 13, 2003.

Previous discussions of Noahide law saw it as a form of natural law, where natural was used as a synonym for intuitive, or a law aimed at developing a minimal political community. We will show that despite indications that the Jews who originally articulated these laws thought of them as rational and minimal, the system actually required non-Jews to understand and accept fundamental aspects of the Jewish worldview—which were neither intuitive nor obvious—before they could reside in a Jewish commonwealth.

As listed in the Talmud, non-Jews must establish a court system,ⁱⁱⁱ are prohibited from committing blasphemy (cursing the Name of God), idolatry, incest, murder, theft, and eating part of an animal that was removed before the animal died. Studying some details of those general requirements will show that these laws were meant to inculcate a fairly Jewish view of four central topics: God, society, sexuality, and food.

Previous academic discussions of the Noahide laws have tended to ignore or failed to recognize its particularism. Hugo Grotius, one of the earliest non-Jewish writers to speak of Noahide law, characterized it as a Jewish version of *ius gentium*, the term used for Roman laws governing relationships between Romans and non-Romans.¹¹ Part of that characterization is the recognition that these laws evinced a Jewish strategy for how to deal with strangers in their midst. *Ius gentium* was assumed to be a universal law, “an intercultural law known to all peoples, later portrayed as a universal law flowing

¹¹ Alasdair MacIntyre, *WHOSE JUSTICE? WHICH RATIONALITY?* (U. of Notre Dame: Notre Dame, 1988), p. 149, first cites Wolfgang Kunkel, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY*, trans. JM Kelly (Oxford, 1973), p. 77 to point out that the norms of *ius gentium* were in fact no more than an extension of Roman law, a description that will be useful in our consideration of Noahide law. On p. 199, MacIntyre notes that *ius gentium* was primarily about relationships between peoples, a characterization we will not find true of Noahide law.

from a natural reason common to all mankind.”¹² Grotius saw Noahide law as an early universal law, the basis for international law.

Since the Noahide laws were universal, Grotius and the majority of those who followed him have assumed that they must be rational, by which they meant that the laws could be intuited even without any external or divine guidance.¹³ Some Talmudic sources also seem to take that view,^{iv} leading writers from Moses Mendelssohn in the eighteenth century, Hermann Cohen in the nineteenth, Martin Buber in the twentieth,¹⁴ and extending to contemporary thinkers such as David Novak and Nahum Rakover,¹⁵ to all assume that the Noahide laws were a Jewish vision of an intuitive universal law.

Marvin Fox, however, argued against the concept of natural law in Judaism, in general and specifically regarding Noahide law .¹⁶ Faced with sources that identified some laws as intuitive, Fox claimed that the Talmud only meant that they were

¹² Suzanne Last Stone, *Cultural Pluralism, Nationalism, and Universal Rights* 21 CARDOZO LAW REVIEW (February 2000), 1213.

¹³For the sake of clarity, we will refer to such laws as intuitive, using the word explicable for laws that could not be inferred independently, but make sense once they are promulgated. I am avoiding the adjectives rational and intelligible because they are ambiguous as to the important question of whether the law is intuitive or merely explicable.

¹⁴ For a discussion of each one’s views, see the relevant chapters in David Novak, *THE IMAGE OF THE NON-JEW IN JUDAISM: AN HISTORICAL AND CONSTRUCTIVE STUDY OF THE NOAHIDE LAWS* (New York: Edwin Mellen, 1983). Note that Novak, *NATURAL LAW IN JUDAISM* (Cambridge: Cambridge U. Press, 1998), 147-49, tries to define natural law differently. He suggests that natural law is a catchall term for laws that humans must promulgate when they come to relate to those outside their communities; it is a law of the limits on behavior that need to be accepted by those who would interact across community lines. While that accurately captures the particularism of any legal system, as I am arguing in the text, it loses the fundamental goal of natural law theorists, finding a law that was both universally binding and universally recognizable as such. Once natural law becomes an extension of a particular community, there is no reason to think of it as natural in any way.

¹⁵ In English, Rakover’s main contributions to the discussion have been *Jewish Law and the Noahide Obligation to Preserve Social Order* 12 CARDOZO LAW REVIEW (1991):1073-1136 and *LAW AND THE NOAHIDES: LAW AS A UNIVERSAL VALUE* (Jerusalem, 1998), a translation of a previous Hebrew book on the same topic.

¹⁶ Marvin Fox, *Maimonides and Aquinas on Natural Law* 3 DINE ISRAEL (1972), pp. 10 and 26. See also J. David Bleich, *Judaism and Natural Law* 7 JEWISH LAW ANNUAL (1988), 5-42.

explicable, that after God had commanded them, they could be explained in a way that all people would accept as reasonable.

To prove that Noahide laws were not supposed to be intuitive, Fox pointed to Maimonides' ruling that non-Jews had to obey these laws because they recognized it as God's command in order to gain the desired reward-- a share in the World to Come.¹⁷ Someone who figures out Noahide law independently, Maimonides wrote, may qualify as wise, but not as one of the Righteous of the Nations, his term for non-Jews who properly fulfill God's wishes.^v Insisting on an awareness of divine command, Fox cogently argues, means that Maimonides was not satisfied with observance of Noahide law as an act of reason or intuition.^{vi}

Rather than argue further about whether Noahide laws were intuitive, it seems most correct to accept the middle position suggested by Rabbi Aharon Lichtenstein, among others.¹⁸ Explicitly avoiding expressing an opinion on the issue of natural law, Rabbi Lichtenstein noted that Jewish sources certainly assumed the existence of an intuitive and universally binding morality.¹⁹ That morality, however, is not coterminous with Noahide law, as Norman Lamm and Aaron Kirschenbaum also wrote.²⁰

¹⁷ LAWS OF KINGS 8:11.

¹⁸ Not to be confused with Aaron Lichtenstein, author of *THE SEVEN LAWS OF NOAH* (New York: RJJ, 1986), to which we refer infra.

¹⁹ Rabbi Aharon Lichtenstein, *Does Jewish Tradition Recognize An Ethic Independent of Halakha?* *MODERN JEWISH ETHICS* (Ohio State, 1975), 62-4. He does not define that morality fully, but it seems to share many of the characteristics of the moral minimalism that Michael Walzer speaks of in *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (Notre Dame: U. of Notre Dame, 1994), 1-21. Of course, since Jewish sources assumed that Noahide law was actually binding on all people everywhere—and given the thickness of Noahide law I am in the process of demonstrating—Judaism seems to have assumed that revelation informed the world of a baseline morality much less thin than the one that all people everywhere could intuitively accept.

²⁰ A. Kirschenbaum and N. Lamm, "Freedom and Constraint in the Jewish Judicial Process" 1 *CARDOZO LAW REVIEW* (Spring, 1979), p. 120ff. See also Bleich, *Judaism and Natural Law*, supra note 16, pp. 13-25.

The details of the Noahide laws we are about to lay out lead to that same conclusion. Regardless of whether the Noahide laws were intuitive in their broad outline, their details^{vii} go far beyond any kind of intuitive or natural law. Reviewing these particularistic pieces of Noahide law will reveal the *nomos*, the underlying vision of the kind of a world its adherents should inhabit, embedded within Noahide law. Noahide laws, we will now see, obligate non-Jews to view themselves as members of a society dedicated to a joint set of beliefs rather than as individuals free of positive obligation to the society as a whole, to concede the existence of a single God and to refrain from rebelling against Him,²¹ to adopt a radically strict respect for rights to property and life, to be aware of proper and improper forms of sexuality, and to recognize the seriousness of making use of animals as food. Proving those statements will ready us for considering how that should affect our consideration of American citizenship and alienage.

DINIM—A SOCIAL SYSTEM

The commandment to establish courts has received too much attention for us to meaningfully summarize it here.²² What we can show, however, is that it was geared towards forming a sense of a cohesive society, not just one that headed off conflict among its inhabitants.^{viii}

The extent of cohesion that was expected depends on is a matter of dispute among medieval Jewish scholars as to the scope of the obligation. Maimonides claimed that this commandment explained why all the people of Shechem²³ --in the Biblical story of the

²¹ Several adjunct rules for Noahides—prohibitions that the Talmud saw as capital crimes, but did not imagine a human court punishing—indicate that they were also expected to recognize the special status of the Jews, see *infra*.

²² See Novak, *supra* note 14, and Rakover, *supra* note 15.

²³ GENESIS 34.

abduction and rape of Dinah-- deserved their deaths at the hands of Simeon and Levi. In his view, all those present were capitally obligated to protest and judge their prince's abduction of Dinah, the daughter of Jacob; their failure to do so made them liable for death.^{ix} In addition to solving the theological problem of how two admired figures, progenitors of Tribes of Israel, could commit mass murder, Maimonides here expresses a forceful view of non -Jews' responsibility to insure the observance of the Noahide laws.

His assumption of extensive observer-responsibility is itself certainly not intuitive, as shown, at the very least, by Nahmanides' (a thirteenth century Catalonian Talmudist and Biblical commentator) rejecting it.²⁴ Nahmanides instead sees the obligation of *dinin* as mandating the establishment of a system of civil law.^x He did not set clear parameters for what this system had to cover, but gave numerous examples, including "theft, overcharging, withholding wages, bailments, rape and seduction, torts, lending, business, and so on."²⁵

Although Nahmanides does not fully define that civil law, the sixteenth-century R. Moses Isserles assumed that non -Jews had to adopt *Jewish law* in these areas.²⁶ Jewish civil law, let us note, is certainly not intuitive; its laws are derived, analyzed, and elaborated in extensive and complex Biblical and Talmudic discussions, with debates at most stages of the process, indicating that even those who grew up in the system were not able to intuit the law in any simple manner. Isserles, too, would have to be placed on the list of those who see Noahide law as particularistic.

²⁴ COMMENTARY TO THE TORAH, trans. C. Chavel, GENESIS 34;13.

²⁵ COMMENTARY TO THE TORAH, GENESIS 34;13. Nahmanides incorporated an obligation to set up a court system in this set of laws as well, but as a positive obligation, not a possible capital crime.

²⁶ RESPONSA REMA, 10. R. Moses Sofer, RESPONSA HATAM SOFER 6:14 and R. Eliezer Waldenburg, RESPONSA TSITS ELIEZER 16;55 analyze Rema's view at length, and Sofer at least seems to accept it.

Even if Nahmanides thought that *dinin* meant that non-Jews would make their own laws,²⁷ he may still not have thought of those laws as intuitive. Rather, he may have assumed that the *types* of laws were intuitive, but that there was a range of equally acceptable laws dealing with the issues raised by those areas of law. In addition, his allowing non-Jews to write their own laws in *this* area implies that the rest of the system, where they did not have such power, was not accessible to intuitive rule-making. Whether we follow Maimonides or Nahmanides in either of his versions, then, we have only a weak form of natural law, and much of Noahide law left unexplained.^{xi}

Although these perspectives of the commandment differ sharply from each other, they nonetheless each envision non-Jews as obligated to create a cohesive society rather than just avoiding conflict among citizens. This is most clear for Maimonides, who sees the Noahides as capitally responsible for the behavior of others in their society. For Nahmanides and Isserles, the scope of laws they required still goes beyond the minimal needs of a working society.^{xii}

One final aspect of *dinin* is the Talmud's assumption that each of the seven Noahide laws was punishable by death, including theft of a minimal amount of money.²⁸ This severity of punishment gives the impression that adhering to the standards of the seven Noahides was the bare minimum that justified human existence; violating any of these laws, to any extent, meant that the person had forfeited the right to life. That, too,

²⁷ As did R. Naftali Zevi Yehudah Berlin, in his commentary on R. Ahai Gaon's SHEILTOT, HAAMEK SHE'ELAH. Berlin pointed out that Psalms 147:20—"He has not done so to any nation, nor has he informed them of laws [*mishpatim*]" seems to assume that God only gave a full civil law to Jews.

²⁸ The contrast with Jews, who would not incur the death penalty for some of these same acts, needs to be discussed fully in a different context. Suzanne Last Stone provides insightful commentary, from a different perspective of Noahide law than suggested here, in *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law* 12 CARDOZO LAW REVIEW (1991), 1179.

is not only not intuitive, but makes a very Jewish assumption, that one's right to life depends on adhering to standards of behavior set by God rather than by man.

GOD—IDOLATRY

The commandments to forego all idolatry and to refrain from blasphemy obligate non-Jews in a Jewish model of monotheistic belief²⁹ and basic submission to the Creator. Considering that paganism was alive and well in the societies where Jews lived well beyond the completion of the Talmud—Christianity did not conquer the Roman world until the fourth century, and Persia was pagan even beyond then-- it is hard to imagine that Jews thought that these rules were intuitive.^{xiii} Talmudic references that seem to say that the prohibition of idol worship was intuitive must then have meant only that non-Jews could readily understand why Jews, who believed in one God, would outlaw idol worship so forcefully.^{xiv}

More specifically, the Noahide rules force non-Jews to learn and understand *Jewish* views of what it means to worship a deity. We can easily understand that non-Jews would be prohibited from worshipping any idol according to its ordinary manner of worship (*ke-darkah*); what becomes more surprising is the system's calling for the death penalty for a non-Jew who bows down, offers incense, sacrifices, or libates to an idol;³⁰ in contrast, other acts of admiration and love for the idol—kissing, hugging, washing, dusting-- do not incur the death penalty. The forms of worship that make the list for capital punishment are those that constitute an *avodat penim*, an act of worship that occurred within the sanctuary of the Temple itself.

²⁹ One of the prohibited forms of idol worship is accepting the idol as a God.

³⁰ bSANHEDRIN 60b.

When a system asserts that particular acts count as worship regardless of the interpretation of those acts in the minds of the people performing them, it is privileging those acts, announcing that Temple forms of worship carry an objective weight not true of other forms of affection or obeisance. To adhere to this law properly and avoid the death penalty, non-Jews would have to engage and understand Jewish rules for each of these kinds of worship.³¹

Although non-Jews could obey the Noahide blasphemy regulation without any particularly Jewish knowledge—the law simply prohibits cursing God, using any term that clearly refers to Him³²-- they are nonetheless being required to recognize and accept Judaism's views of the consequences of certain kind of behavior towards God.

MURDER

Criminalizing murder is intuitive, but the particular rules codified by Noahide laws are not nearly as obvious. The killing of a fetus (abortion), a terminally ill patient, or bringing about another's death indirectly but deliberately (such as by tying her up where a train will run over her) all qualify as capital murder in the Noahide system.³³ American society's raging debate about abortion and assisted suicide show that these are not intuitive rules; more than that, these rules show that the Noahide system expected

³¹ LAWS OF KINGS, 9;2, based on bSANHEDRIN 56b, which ties a Noahide's liability into a Jew's being killed by a court for his worship. It would be possible for a non-Jew to ignore the Temple element of the prohibition and just learn the technicalities of the types of worship for which a Jew would be punished. Even so, he would have to learn a Jewish view of idol worship in order to live his Noahide life.

³² LAWS OF KINGS 9;3.

³³ Ibid., 9;4.

people to treat all human life, however underdeveloped or certain to end, as out of bounds to human actions to end it³⁴

INCEST

Incest laws as a class may be intuitive,³⁵ but the Noahide version is certainly not. Maimonides concluded³⁶ that non-Jewish men were prohibited from engaging in intercourse with their mothers, father's wives, married women, maternal sisters, men, and animals,³⁷ primarily based on the Talmudic parsing of the first verse in Scripture that discusses human marriage.

The verse reads “therefore shall a man leave his mother and father and cleave to his wife and they shall be one flesh,”³⁸ which allows the Talmud to assert that sexuality cannot be expressed with one's parents (since the man is supposed to leave his parents, with the father's wife standing in for the father himself), must create a physical cleaving of the sort that only men and women can create (not men and men),³⁹ must be with one's own wife as opposed to somebody else's, and must be of the kind of union that could turn them into one flesh, which rules out bestiality.

³⁴ The seriousness of these rules has led some to question whether Noahides were allowed to wage war; for discussion, see J. David Bleich, *CONTEMPORARY HALAKHIC PROBLEMS II* (New York: KTAV, 1983), 159-66.

³⁵ Although, interestingly, Nahmanides was unsure of the reason for the prohibition; rejecting Maimonides' view that it was aimed at lessening human sexuality generally, he instead viewed the matter as an esoteric secret, see his *COMMENTARY TO LEVITICUS 18:6*.

³⁶ Other medieval authors understand the Talmudic discussion differently, but not in ways that affect our discussion here.

³⁷ *LAWS OF KINGS 9:5-8*. Note that Maimonides devotes significantly more space to his discussion of incest and of eating a limb cut off of a living animal than to the other Noahide laws, perhaps because these were least intuitive.

³⁸ *GENESIS 2:24*.

³⁹ Again, the assumption that homosexuality is prohibited is not intuitive, either in Talmudic times or our own; its inclusion in the Noahide laws is an expression of the view that sexuality must create a man-woman bond.

Sexuality, in this presentation, is an extension of marriage and procreation; only those relationships that *could be* marital and/or lead to children are allowed.⁴⁰ Marriage, and therefore sex, could only happen outside the original nuclear family and only with partners who could theoretically lead to offspring.⁴¹ Even without insisting that sex happen only within marriage, Noahide law was requiring that it take the form of a marital act, and that it not interfere in any preexisting marriage.^{xv}

THEFT

Like murder, theft is intuitive, but the Noahide reaction to it goes beyond that. Theft of even the most minimal amounts of money, even if the victim of the theft is himself not the rightful owner, incurs the death penalty. In the most extreme example, if one non-Jew steals any amount of money from a thief who himself stole that money, *both* would be liable for death.^{xvi} More than seeking to protect property, which could obviously be done through less extreme measures, Noahide law was making clear that violating others' rights to their possessions forfeited one's own right to life in that society.

EVER MIN HAHAY—THE LIMBS OF A LIVING ANIMAL

Those who see Noahide law as either natural law or a minimal political law identify the prohibition of *ever min hahay*, eating the limb of an animal that was removed

⁴⁰ Although non-Jews have no obligation to marry every time they wish to engage in sexual intercourse, see Maimonides, *LAWS OF MARRIAGE* 1:4.

⁴¹ This is particularly true given that Rashi, in his Commentary to Genesis, reads the “one flesh” as meaning the baby that a couple could produce.

while it was still alive, as one of cruelty to animals.⁴² That would be true if the rule forbade *cutting off* the limb of an animal, but it only actually prohibits *eating* a limb that was cut off before the animal's death. In trying to understand its purpose in the code, we need to focus on what the rule actually addresses, not the issue that jumps out at us first.

Recalling that Jewish tradition thought that Adam was not allowed to eat meat at all⁴³ suggests that *ever min hahay* (limb from a living animal) was a food prohibition, not a cruelty one. When, after the Flood, God allowed people to eat meat (in Judaism's reconstruction of early human history), He required them to insure that the meat was dead before they ate it. Animals were now acceptable sources of food, but they only became so after they had died or been killed. The seriousness of the prohibition was to stress how off limits animals were expected to be while they were still alive.

Taken together, the seven Noahide laws thus obligate those who would live as resident aliens in a Jewish society to accept fundamental Jewish ideas in four areas of life—the relationship to God, to sex, to others' lives and property, and to animals as food. Resident aliens would not need to become Jews to be tolerated,⁴⁴ but they would have to accept and adopt basic Jewish beliefs in realms that go to the core of self-perception.

⁴² A. Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law* 12 CARDOZO LAW REVIEW 3-4 (Feb.-March, 1991), 1147. David Novak, *supra* note 14, 245, sees all the possible "min hahay" prohibitions, such as meat from a living animal and blood from a living animal, as violations of the order of nature. Aaron Lichtenstein, *THE SEVEN LAWS OF NOAH*, 2d ed. (New York: RJJ School, 1986), 56 sees the rule as teaching two principles, the first of which is cruelty to animals. His other reason is the one we suggest in the text.

⁴³ bSANHEDRIN59b.

⁴⁴ This toleration, I would point out, is not the same as the American model; since it is basically a religious system, it is more akin to the Ottoman millet system described in M. Walzer, *ON TOLERATION* (New Haven: Yale, 1997), 17-18.

Were this all of Noahide law, it would already teach us a great deal.⁴⁵ To round out our picture, however, we need to consider two more aspects of that system, its codifying rules that emphasize the differences between Noahides and Jews and its expectation that Noahides would go beyond these rules and observe a set of unenforced obligations.

ACKNOWLEDGING THEIR OTHERNESS

Although the status of a *ger toshav*, the Jewish legal term for a lawful permanent resident of a Jewish commonwealth, earned the non-Jew equal support in the minimal social welfare network,⁴⁶ several rules highlight the system's insistence that non-Jews remember, recognize, and respect their status as outsiders. First, the *Sifre*, an extra-Talmudic collection of authoritative Scriptural inferences, rules that even such non-Jews may not live in Jewish cities.⁴⁷ The requirement to set up separate communities stresses that they are being accepted and tolerated, but only as outsiders; full inclusion requires conversion.

Similar themes underlie Talmudic statements about the significance of a non-Jew striking a Jew, observing the Sabbath, and studying Torah. In each case, the Talmudic rhetoric stresses non-Jews' need to be aware of their status as outsiders to a special community.

In the first example, the Talmud characterizes a non-Jew striking a Jew as akin to striking God. That phrasing emphasizes the Talmud's assumption of Jewish

⁴⁵ The Talmud records other laws that some included in the Noahide corpus, but we do not need to analyze them for our current discussion.

⁴⁶ Jews are required to support the non-Jewish poor as well as their own, see Maimonides, *LAWS OF GIFTS TO THE POOR* 7:1 and Rabad's gloss to *LAWS OF PROHIBITED RELATIONS* 14:8.

⁴⁷ *SIFRE, DEUTERONOMY* 259. Rabad, *ibid*, assumes that Maimonides would maintain that rule even today, while he himself only draws that distinction when the Jewish commonwealth is fully functional.

exceptionalism, that the Jews' more detailed legal system gives them a special status as God's most public representatives on earth. As such, striking a Jew becomes more than a simple tort, it becomes an offense against God Himself.⁴⁸

The other two examples involve areas of Jewish life that were seen as so particular to Jews that non-Jews were not allowed to take part; the Talmud assumed, in fact, that God would treat non-Jews' trespassing these boundaries as a capital crime. Study of Torah was seen as the vehicle of a unique bond between God and the Jewish people,⁴⁹ so that a non-Jew who studied Torah deserved death for breaking into this bond.⁵⁰

The right to take a day a week to cease all productive activity—the Sabbath -- was also seen as a special gift to the Jewish people; human beings had to devote every day to being productive, to contributing to the settlement of the world.^{xvii}

Part of being a resident alien in a Jewish land, then, was recognizing the limits that status placed on participating in the majority society. Full participation was readily available, but only to those who actually converted to the culture, lifestyle, and, in this case, religion of the majority.

POSITIVE ASPECTS OF NOAHIDE LAW

Until now we have only reviewed the prohibitions of Noahide law, but several sources suggest that there were positive expectations as well. A tantalizing Talmudic

⁴⁸ bSANHEDRIN 58b with Maimonides, LAWS OF KINGS, 10;6. I do not want to be misunderstood as saying that Jews saw themselves as better than those non-Jews; I only mean that their role as public agents for God meant that an attack on Jews had overtones that an attack on an ordinary human being would not.

⁴⁹ bSANHEDRIN 59a.

⁵⁰ This prohibition is not nearly as exclusionary as it seems; non-Jews were certainly allowed to study the Noahide laws, which, as we saw supra, could be quite extensive. In addition, as we will see infra, a non-Jew could decide to keep laws other than the minimal list, and could then be free to study those as well. It was studying Torah as a self-contained religious activity without practical ramifications which the Talmud meant to limit to Jews, since that study is an act of worship that God granted only to Jews.

statement as well as non-Jews' right to voluntarily accept specific commandments highlight the system's assumption that codified Noahide law was a minimum; non-Jews were expected to supplement the prohibitions of Noahide law with (self-initiated) practices that give positive content to their spiritual existence.⁵¹

In Tractate *Hullin*,^{xviii} the Talmud mentions that non-Jews accepted thirty positive commandments, although it hastens to add that they only managed to stay faithful to three of those.^{xix} Without trying to fully unpack the statement, it shows the Talmud's approval of non-Jews' independently legislating obligations outside of the original Noahide corpus.

That statement, somewhat off the beaten path of the Talmudic discussion of non-Jews,^{xx} could not on its own support a claim that they were expected to develop a positive relationship with God as well. In the midst of its discussion of the Noahide laws, however, the Talmud notes that its list includes only prohibitions, not requirements of action,⁵² suggesting that there might be an extensive set of positive obligations not clearly codified in the Talmud. Indeed, the next sentence asserts that non-Jews must exercise justice,⁵³ while other Talmudic statements assume that non-Jews were required to give charity and to bear children.⁵⁴

⁵¹ These would be what Joseph Carens refers to as aspirations, see *supra* note 3, p. 142.

⁵² bSANHEDRIN 58b-59a. To the extent that classical sources do not carefully outline a set of responsibilities, they implicitly assume wide latitude for those who seek to fulfill the general goals mentioned.

⁵³ As opposed to just avoiding committing injustice.

⁵⁴ For giving charity, see the discussion bSANHEDRIN 57b, which excludes women from functioning as judges, and then asserts that GENESIS 18;19's reference to Abraham's commanding his children, including women, to "do justice and righteousness" meant that the men would do justice and the women would give charity. In terms of childbearing, bSANHEDRIN 59b seems to obligate only Jews, as noted by Tosafot *ad loc*, but bGITTIN 41a-b and bYEVAMOT 62a assume a Noahide responsibility to have children as well, as already codified in the eighth century SHEILTOT of R. Aha of Shevaha, no. 165.

Taking that positive obligation seriously means that Jews saw non-Jews as obligated by a law that taught them basic propositions about life, but that also reminded them to expand that minimal law in positive ways. Somewhat similar to Adam's original mandate to "work and preserve" God's garden, non-Jews were supposed to bear children, give charity, set up a just society, and live productive lives, with the exact definition of those later terms left open to the sincere judgment of the non-Jews involved.^{xxi}

ADOPTING JEWISH VERSIONS OF WORSHIP

For those non-Jews uncomfortable with such an open-ended set of requirements, one more option was available, an option that is particularly surprising in light of our earlier discussion. Jewish authorities generally assumed a non-Jew's right to observe any commandments of the Torah other than the Sabbath and Torah study and to be rewarded by God for that action.

Most surprisingly, Maimonides allows a Jew to circumcise a non-Jew, as long as the non-Jew intends the act to fulfill the Biblical commandment of circumcision. I note this in particular because the Bible and Talmud⁵⁵ assume that circumcision, like the Sabbath, created a covenant between God and the Jewish people;⁵⁶ letting non-Jews circumcise without any intention of converting allows them into a circle that might otherwise be clearly thought of as exclusive to the Jewish people.^{xxii}

The question of how open Judaism is to the performance of its commandments by non-Jews is vigorously debated,^{xxiii} but it offers at least one option for fleshing out a non-

⁵⁵ For example, bSHABBAT 132a, which assumes that the right to circumcise on Shabbat is more obvious than the right to perform other commandments that would ordinarily be seen as violations of Shabbat because GENESIS 17 uses the term *berit*, covenant, thirteen times in its discussion of circumcision.

⁵⁶ Or, at least, the descendants of Abraham, see Maimonides' comments on the descendants of Keturah, LAWS OF KINGS 10:8. Maimonides, in fact, assumes that all Arabs should perform circumcision on the eighth day, since the descendants of Ishmael have been mixed with those of Keturah.

Jew's obligations towards God. That does not mean that non-Jews are *supposed* to undertake such obligations, or that these obligations are the only way for a non-Jew to have a successful relationship with God. Jewish writers' raising that possibility, though, offers one final proof that Noahide law was not seen as the end of a non-Jew's road, but the minimum base from which to build a fulfilled relationship with God.

TRANSLATING JEWISH LAW TO AMERICAN IMMIGRATION CONCERNS

We have seen that a Jewish commonwealth would demand that any resident aliens in its midst adopt practices that inculcate and observe fundamental principles of the larger Jewish society. Those resident aliens would have to see themselves as members of a society that prevented injustice, they would have to recognize only a single God whom they could not blaspheme, they would have to strictly respect the sanctity of property that was not their own and of life, and they would have to limit their intake of animal flesh to that of animals that were already dead. Beyond that, they were supposed to adopt positive goals such as childbearing and giving charity, and, more broadly, developing a vision and a practice of how to serve the single God.

The universalist model of having one legal system inform another would argue for the United States to adopt the entire Noahide system. Since Jewish law thought of this as the bare minimum of acceptable society, Jews might hope that any non-Jewish society would adopt those laws as well. Fine for the traditionalist and believer,⁵⁷ that model only works for those already convinced of the second system's greater rightness than the first.

The second option does not concede nearly as much to Noahide law. In a structural adaptation, we would note that Noahide law picked on God, society (meaning

⁵⁷ A Google search for "Noahide" turned up more than 5,000 hits, among them several sites dedicated to delineating and promoting observance of the Noahide laws.

property and personal rights), sexuality, and food as areas to legislate for resident aliens. Taking the categories but not the content, we might then argue that resident aliens should be specifically regulated in those areas as well. Here too, however, Professor Stone's complaint about trying to import what is essentially a religious system into what is essentially a secular one still rings true.

What the Noahide system does suggest, however, is a general social principle that current U.S. law ignores. That is, Noahide law stresses, *inter alia*, that Jewish society stands for different values than other societies. Those who would join that society, even partially, must be introduced to, and accept upon themselves, fundamental aspects of that society's worldview. Full citizens, of course, need to accept the whole picture; partial citizens—and anyone allowed to live in a society for the rest of his or her natural life is at least a partial citizen—need to commit to the basic beliefs of that society.

THE PARTICULARISM OF CULTURES

That becomes relevant to other countries, including the United States, when we remember that *every* society, no matter how universalist in its rhetoric, actually espouses a particular worldview, both in terms of definition of the good life and of how to get there. Robert Cover noted twenty years ago that law always constitutes a *nomos*, a vision of an ideal world towards which that society strives.⁵⁸ Stanley Fish repeatedly reminds his readers of how much every human being and every society is locked into its own assumptions about how the world should and does work.⁵⁹

⁵⁸ Robert M. Cover, *Foreword: Nomos and Narrative* 97 HARVARD L. REV. 4 (1983-4), 4-68, reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* eds. M. Minow, M. Ryan, and A. Sarat (U. of Michigan: Ann Arbor, 1993).

⁵⁹ Fish, *THERE'S NO SUCH THING AS FREE SPEECH* (New York: Oxford, 1994) and *THE TROUBLE WITH PRINCIPLE* (Cambridge: Harvard, 1999) are two of the recent examples. Clifford Geertz' *THE INTERPRETATION OF CULTURES* (New York: Basic Books, 1973) and *LOCAL KNOWLEDGE* (New York:

Recognizing this necessary particularism of our-- and any-- culture can help us articulate a vision both of citizenship and of alienage. Citizens are members of a society dedicated to a set of ideals and a worldview of how to best actualize them. Of course, in countries like the U.S. where citizenship is granted by birth, society needs to educate its children about those ideals as well, but the goal of that education is to inculcate whatever the society sees as its central values and processes.

That self-definition needs to be adjusted frequently, as societies change over time. The United States today would not define itself exactly as the Founding Fathers would have, so that we could not simply expect prospective citizens to read the Founders' writings in readying themselves for citizenship. But American society does differ from the rest of world, and the extent of a person's acceptance of and participation in those differences should determine his or her acceptance in that society.

It is not my intent here to articulate or promote a view of those defining ideals, since more qualified people have already done so, from many perspectives, and I have no reason to think that my own vision is more persuasive than that of others. What seems unequivocal, though, is that the United States, as a society, stands for important and significant ideals, and that part of citizenship is embracing those ideals, certainly theoretically, and, where possible, actively.

Those ideals, I should add, are not completely defined by adherence to the Constitution and to the laws of this country. I can *be* a racist while not acting on it in any illegal ways, but in so doing I am not in fact a good citizen of this country, which has, finally, made an aversion to racism a basic principle of its society. The set of ideals I am

Basic Books, 1983) also points out that the complex interaction of all the various parts of society, the thick description of its culture, work together to articulate a particular vision. See, too, Alasdair MacIntyre, *WHOSE JUSTICE? WHICH RATIONALITY?* (Notre Dame: U. of Notre Dame, 1988).

speaking of here includes the Constitution—in its broad understanding, recognizing that some elements of its interpretation are still quite contentious—the laws of this country, and the underlying worldview and principles—the ones shared by the vast majority of the society as a whole-- that inform those laws.

Two responses to this claim might be that a) the U.S. makes an ideal of giving its citizens the freedom *not* to care about the welfare of the society and b) that, empirically, Americans do not share any common set of ideals. To the first, I concede that part of our vision of freedom is to allow actions and thoughts that we vigorously oppose, but that does not mean that we condone holding those views, or see those who hold them as benign elements of society. Part of our vision of a tolerant society—itsself perhaps one of our central current views of what America is-- is that we do not penalize action or inaction just because we find it distasteful. Our allowing citizens to remain ignorant of this society's goals does not indicate approval of their so doing.

That the bonds of American society have frayed in recent years is also readily conceded; part of the goal of this article is to call for a conscious national reconsideration and rearticulating of the general principles that bind the vast majority of us together.⁶⁰ Whether those ideals are electoral democracy, individualism, libertarianism, equality of all peoples, or some combination of those and other ideals I have left off the list,⁶¹ a

⁶⁰ I am careful to discuss the “vast majority” because I agree with Stanley Fish that no principle will cover all of this country; even in a tolerant mood, however, I think society's needs for self-definition should mean that what ninety percent of a society accepts as absolutely fundamental can legitimately be made a part of citizenship

⁶¹ I think an important contribution to this discussion is the idea of super-statutes suggested by William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 DUKE L. J. (2000-2001), 1215-1276. In their definition, super-statutes are those that (1215) “successfully penetrate public normative and institutional culture in a deep way,” and see them as (1216) “foundational principles against which their rights and obligations are set.” An awareness and conscious acceptance of just such foundational principles is what I am arguing for, both for citizens and for lawful permanent residents.

vigorous debate about how to properly articulate the fundamental beliefs of this country would go far to reminding Americans of how much they share in common, regardless of their beliefs about abortion, homosexuality, or other hot-button issues of the day.

Coming to some consensus about what we mean by citizenship would inherently allow us to improve education of our citizens towards that citizenship,⁶² and to make citizenship more than just membership in a club, or a set of rights and obligations.⁶³ The full rights and responsibilities of being an American would devolve to those who accept and adhere to the American worldview, and who agree to work to further the prosperity of the society that adopts that worldview.^{xxiv}

A THIN CREED FOR ALIENS

My main concern here, though, is with aliens. Recognizing the *nomos* aspect of law, we can better identify what separates Americans from non-citizens. At this time, resident aliens, who have been granted the right to live in this country for the rest of their lives, are not required to commit to fundamental American ideals; they must swear adherence to the Constitution, they must commit to observing the laws of this country, but they need not agree or accept any of our fundamental principles or worldview. While certain formally identified ideologies have been seen to be so inimical to that of the United States, such as membership in a Communist party, that it could exclude someone

⁶² As discussed by Amy Gutmann, *DEMOCRATIC EDUCATION*, (Princeton: Princeton U., 1999).

⁶³ As noted by Cover, but more recently by Eskridge, *supra* note 8.

from permanent residence, a person who held that ideology without formal affiliation would never be asked to declare his or her belief in the principles of this country.⁶⁴

To give a stark example: A person who firmly believed in the importance of a strong monarchy or was opposed to the Bill of Rights could come to this country, agree to abide by our laws, and then work to appeal or amend that or any other aspect of this country's workings without having violated any of his or her commitments in coming to our shores. While I am all in favor of the free speech principles that allow people to promote their various agendas, I think we all ought to recognize the difference between advocating for ideas that are "un-American" and ones that are not yet accepted by Americans.

Furthermore, when admitting people to this country—an inflow we constantly need to regulate—it seems unarguable that we should prefer, and perhaps limit, immigrants to this country to those who are willing to commit, in principle as well as in practice, to our most fundamental ideas of the best way to foster a healthy society.

This lacuna in the law becomes all the more remarkable when we recognize the truth of Alexander Aleinikoff's claim naturalization is relatively routine once immigrants are accepted as LPR's.⁶⁵ If securing a permanent visa is what determines whether a non-American lives in this country for the rest of his or her life (and becomes a citizen a few

⁶⁴ The law does require such commitments of nonimmigrants who seek adjustment of status after arriving in the U.S., INA § 245. Those who get their visas abroad, either for family reunification, employment, diversity, or asylum reasons are not, as far as I have been able to ascertain, required to commit to any version of American ideals. The rules for becoming a citizen are available in many sources. A simple summary of those rules can be found in the INS' *Guide to Naturalization*, available in pdf format at <http://www.immigration.gov/graphics/services/natz/English.pdf>. For a more technical description, there are any number of legal handbooks and casebooks. I used *Immigration and Nationality Law Handbook, 2000-2001: Vol. I Immigration Basics* R. Auerbach, ed. in chief, (American Immigration Lawyers Assoc., Washington, DC).

⁶⁵ T. Alexander Aleinikoff, *supra* note 3, 15. Others, including Linda Bosniak, *Universal Citizenship and the Problem of Alienage* 94 NORTHWESTERN U. L. REV. 3 (Spring 2000), 963 and Peter J. Spiro, *supra* note 3, dispute the ease of naturalization, noting especially the barrier presented by language requirements.

years later, should he or she choose to do so), that should be the point at which we insure that this person in fact sympathizes with the American Project or Creed or Dream.

Of course, we cannot expect foreigners to immediately accept all the facets of that project. Luckily, as Michael Walzer points out, worldviews can be expressed in thicker and thinner forms.⁶⁶ The Noahide laws, we have shown, were a thinner form of the thick Jewish worldview, dealing only with the most central issues and in a much more attenuated form than in the system as a whole. Translated to American terms, LPR's could be required, upon arrival (or before leaving their home countries) to commit to some modest version of that American Creed, but enough of it that they are committing to actually joining American society and its worldview to a minimal extent.⁶⁷

LANGUAGE, RIGHTS, DUAL CITIZENSHIP: OTHER ISSUES FOR LPR'S

Aside from suggesting that America needs to articulate its worldview clearly, both for its citizens and for those who would at least partially join, the Noahide model promotes a particular view of language requirements, aliens' rights, dual citizenship, and the "transitional" model of alienage suggested by Hiroshi Motomura.

The requirement for citizens to demonstrate proficiency in English has come under attack in some articles, on the grounds that prospective citizens can understand and accept their responsibilities in other languages as well. Remembering that a legal system represents a worldview strongly suggests including language proficiency in citizenship

⁶⁶ Michael Walzer, *THICK AND THIN* (Notre Dame: U. of Notre Dame, 1994).

⁶⁷ I recognize, as Noah Pickus points out, *supra* note 2, p. 123, that people can lie; nonetheless, demanding a commitment of people is a strong educational tool for the majority. While some will simply utter the words without taking them seriously, many (citizens as well) will internalize the values thus articulated as part of their conduct of themselves in American society.

requirements. Language shapes how people think and express themselves;⁶⁸ once we recognize that law inherently inculcates a worldview, it makes sense to require citizens to be able to think and express themselves in the language of the system.

Rights, Noahide law points out, come in three versions. There are the rights of human beings by virtue of their humanity, rights of partial members of society-- as recognition of partial common cause-- and rights of citizens, which express the fraternity and mutual fructification that comes with sharing a particular worldview.⁶⁹

Rights in America ought to work the same way. Some minimal rights of welfare should extend to all those present in society (regardless of citizenship status), simply because they are human beings in our midst. Those who come to join society partially, by accepting permanent residence, would have access to a broader, but not complete, set of rights.⁷⁰ The differentiation is not for its own sake, but as part of reminding ourselves and others that the *nomos* of America is what allows the society to flourish, and the full benefits of that flourishing properly devolve only to those who are sworn to promoting the country's continued welfare.

The articulation of the American creed will also help answer dual citizenship questions. There are numerous countries in the world which, while not holding to the same *nomos* as the United States, are nonetheless close enough to predict few times of conflict for citizens of both. Other countries' worldviews present much more significant problems for citizens' ability to serve both countries fully at the same time. Rather than

⁶⁸ This has been pointed out numerous times; I most recently saw it in Marian Sigman and Lisa Capps, *CHILDREN WITH AUTISM: A DEVELOPMENTAL PERSPECTIVE* (Cambridge: Harvard U. Press, 1997).

⁶⁹ As articulated well by Hollinger, *supra* note 2. Hollinger calls for also developing a national narrative to express our core ideals.

⁷⁰ Differentiating those rights would again need to be a political process; I think we would want to try to distinguish between privileges and rights; LPRs would get the latter but not the former.

deciding on dual citizenship as a general policy, the Noahide example suggests that political decisions would need to be made about each country separately, to see whether its worldview corresponds well enough to the American one to expect that citizens could reasonably identify with both countries at the same time.⁷¹

Finally, the Noahide example suggests that Hiroshi Motomura's convincing call for immediately granting certain rights so as to foster LPRs' transition to citizenship⁷² should be encased in some other rubric. When immigrants arrive in this country, they might choose whether they intended to become citizens after the waiting period or not. Those who asserted their intent to naturalize could be given a wider basket of benefits immediately, as Motomura suggested, fostering their transition. Of course, if they failed to naturalize after some set period of time, they would revert to being ordinary LPRs, with the more limited rights and benefits involved.

Noahide law in the Jewish system thus highlights one model of how to deal with outsiders who wish to come into a nation's midst, having nothing to do with whether that nation is bound by belief in a common religion or just a common view of how the good life operates. To the extent that immigrants intend to remain outsiders, the host society nonetheless has to insure that they understand and respect the central and crucial values of that society. In doing so, the aliens become partial members with access to some of the benefits of that membership.

⁷¹ Early readers of this piece wondered what would happen to a citizen of such a country—Communist Russia, for example—who did not want to renounce that citizenship in the hopes that the home country would one day change to be more similar to the United States. To the extent that the LPR wished to maintain ties with that home country, I argue that he or she would have to remain an LPR and not a citizen.

⁷² See Motomura, *supra* note 3, 200.

Putting such a system into place—the practical lesson I would recommend drawing from our study of the Noahide system-- requires clearly articulating this country's central values, or at least engaging in a political process to decide what form those values take at the present historical moment. That statement of values can strengthen citizenship, both birthright and naturalized, making it more than a set of rights or membership in a club, turning it into a commitment and an obligation to participate in fostering the good health of the society that articulates this particular view of the world.

Aside from the thick creed to be used by citizens, adapting the ideas of the Noahide system would promote developing a thinner version of that creed as well. Outsiders would be expected to commit to that version, as the price of entry into a society whose workings differ—greatly or minimally—from the workings of their home society.

The point of demanding this of permanent residents is not to set up a barrier to entry into American society. Indeed, I see no reason why those who hope to naturalize need to wait a full five years from entry. To the extent that they understand what America is and means, and can present reasonable evidence of the sincerity of their attachment to this country and an understanding of ideals entailed in that attachment, I see no reason that five years should be the magic time period.⁷³ The point of demanding this is so that we all, citizens and not, understand what it means to be an American, and take seriously membership in that society, whether as a citizen or as an LPR, in order, as our founding phrase goes, to form a more perfect Union.

⁷³ Those fleeing oppression, for example, can commit to America relatively soon after arrival; assuming they have been absorbed into the society to a reasonable extent, they could be naturalized earlier.

ENDNOTES

ⁱ The issue of positive requirements for Noahides is fairly complex; we will raise some ideas about that *infra*. Similarly too complex to discuss here is the question of how Jews expected non-Jews to learn of these responsibilities, although I hope to address it elsewhere. J. David Bleich, *CONTEMPORARY HALAKHIC PROBLEMS II* (New York: KTAV, 1983) and Michael Broyde, “*The Obligation of Jews to Seek Observance of Noahide Laws by Gentiles: A Theoretical Review*” *TIKKUN OLAM: SOCIAL RESPONSIBILITY IN JEWISH THOUGHT AND LAW* eds. David Shatz, Chaim I. Waxman, and Nathan J. Diament (Northvale, NJ: Jason Aronson, 1997), 103-144 have argued that Jewish law does not obligate Jews to teach these laws to non-Jews, although some sources required giving information when requested.

Broyde, 123-4, discusses Maimonides’ statement, *LAWS OF KINGS* 8:10, which seems to require coercing observance of the Noahide laws. I agree with the view that Maimonides only meant that to apply within the Land of Israel or any territories conquered by the Jewish nation, since he does not assume any general obligation for Jews to wage war to convert non-Jews to the Noahide system, see *LAWS OF KINGS* 5:1. 8:10 should be read as saying that Jews are required to secure adherence to the Noahide laws from any non-Jews who come under their control.

ⁱⁱ At least for Talmudic Jews and their successors. I hope to show elsewhere that Jews thought of pre-Sinaitic Noahide law, meaning the Noahide law incumbent on non-Jews before the giving of the Law at Sinai, as intuitive; with the codification of Jewish law at Sinai, Noahide law was changed as well.

ⁱⁱⁱ Perhaps because it goes most directly to judgments about the justice of a particular society, these laws have been discussed more than all the others, making brevity on this issue almost impossible to achieve. One central question worth mentioning is the Talmud’s assumption that the seven Noahide commandments include only prohibitions; how the commandment to set up courts or law qualifies as a prohibition is unclear. Maimonides’ version, which says that all members of a non-Jewish society are liable for any public violation of the Noahide laws that they do not try to stop, seems to see it as a prohibition against sitting silent when these laws are being breached. Nahmanides, however, sees *dinin* as a commandment to set up a system of civil law; the capital punishment would accrue to those judges who neglected to combat violations that they were supposed to judge.

^{iv} Two sources in particular are cited as support for the natural law view. First, *bERUVIN* 100b notes that in the absence of revelation, human beings could nonetheless have learned certain lessons from animals—modesty from the cat, theft from the ant, incest from the dove, and sexual etiquette from the rooster. Those who see the Noahides as natural law, of course, go a good deal farther than that. The second source, *bYOMA* 67b, interprets the Bible’s distinction between laws and statutes. Laws, the Talmud says, are those rules that should have been written even had they not been. The Talmud then gives five examples, all of them Noahide laws, suggesting that the Talmud saw these as intuitive rules necessary even in the absence of revelation. Here, natural law claimants need to explain the missing other two, as well as the details of the law we will mention below.

^v Many textual versions of that comment have Maimonides denying that such a person is *even* wise, but that is not our issue. For one discussion, see Jacob I. Dienstag, *Natural Law in Maimonidean Thought and Scholarship* *6J EWISH LAW ANNUAL* (1987), 64-77.

^{vi} Some support for Fox’ position actually comes from a medieval thinker ordinarily mentioned as among those who accepts the existence of a natural law. Proponents of the idea that natural law was part of medieval Jewish thought point to several thinkers who speak of laws open to human reason, beginning with Saadya Gaon in the tenth century. Joseph Albo in the fifteenth was the first to use the actual Hebrew term for natural law, *dat tiv`it*, as one of his three categories of law. He says, *BOOK OF PRINCIPLES*, I;7, that laws are either natural, by which he means they are applicable to all people everywhere, conventional, meaning that they vary to accommodate the different social, physical, economic, and political conditions among societies, or religious, commanded by God through a prophet.

In a different discussion, I;25, Albo considers whether religious law would have to be universal as well. Were religious law legislated from God’s perspective, it would have to be, since God is one and the same throughout the world. The variations among peoples and societies, however, leave room for more

than one divine law. Those laws could not differ on fundamental matters, but they could take into account the different audiences to whom they were being addressed. As an example, Albo points to the differences between Noahide law and Sinaitic; although both are religious laws, they address different groups of people and therefore differ in their particulars.

The comparison shows that Albo considered Noahide law to be a religious rather than a natural law. He also recognized the possibility that laws that *are* universal might still not be natural; they might be those subsections of God's law that God chose to apply universally. Albo thus does not identify natural law with the Noahide law; since the Noahide law is also universal, it tends to render the concept of natural law fairly insignificant in Jewish thought.

^{vii} Even if we assume that these rules are general and intuitive in their basic form but particularist in their details, we will have achieved the position taken in the text: while Jews might have seen themselves as universalistic in their prescriptions for non-Jews, they necessarily incorporated their own worldview in those rules, so that non-Jews would have to learn and understand important Jewish ideas to be able to thrive in a Jewish commonwealth. See Maimonides, LAWS OF KINGS 10;1, who stresses their obligation to learn Noahide laws, and his assuming that a Noahide who violated one of those laws even out of ignorance would be nonetheless capitally liable.

^{viii} As has been argued by Suzanne Last Stone, *supra* note 28, 1159 and *passim*. She contrasted Noahide law, a system that develops a moral political life with Sinaitic law, which seeks to develop a covenantal community with God. In her more recent *The Jewish Tradition and Civil Society*, ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY eds. S. Chambers and W. Kymlicka (Princeton: Princeton U. Press, 2002), p. 154, she characterizes the Noahide laws as “the moral order given by God to humanity...consisting of seven basic human obligations...and to establish a system of justice. The nations of the world thus also potentially constitute societies of moral significance whose basic purpose is to establish justice in the social sphere...” We can easily imagine, however, working polities that do not treat theft or even murder as a capital crime, let alone incest. The other laws as well, as we will show *infra*, do not only combine to develop a moral society, but one that develops at least a minimal relationship with God.

^{ix} This view of corporate responsibility for immorality in one's midst goes much further than current theories. Maimonides' ruling also seems to assume that the people of Shechem would not have been taking their lives into their hands by protesting their prince's actions, since he and most authorities do not envision a Noahide requirement to be killed rather than transgress one of their laws, see J. David Bleich, 7 JEWISH LAW ANNUAL (1988), 13, n. 22.

^x Nahmanides assumes that violation of any of the laws promulgated under this rubric would also incur the death penalty. If so, however, it is unclear why *gezel*, theft, was singled out as one of the Noahide laws. This might suggest that at least the laws included in *dinin* were open to lighter punishments as well. See the next note for a discussion of the possibility that capital punishment is not obligatory.

^{xi} The strictness of Noahide law, both in terms of punishment and evidentiary requirements, is another nonintuitive aspect of *dinin*. Each of these crimes (including theft of a minimal amount of money) incurs capital liability. Several scholars, traditional and academic, have argued that capital punishment for these crimes was not required, just permitted. R. Aaron Soloveitchik, *In the Matter of the Noahides* (Hebrew) 19 BEIT YITSHAK (5747/1987), 336, makes that claim; he further labels as cruel any society that punishes offenders more harshly than necessary. Similarly, Arnold Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law* 12 CARDOZO LAW REVIEW 3-4 (Feb.-March, 1991), 1153, argues that the term used for Noahide culpability translates as “is killed,” as opposed to “is liable for death,” which specifically means should be given the death penalty. In a slightly different expression of the same fundamental idea, R. Joab Joshua Weingarten (1847-1922) RESPONSA HELKAT YOAV Appendix 14, suggested that if non-Jews made their own laws on interpersonal issues—although he cites theft and burglary as examples, when they are in the original seven Noahide laws—they would be allowed to institute a lower level of punishment, since their established law becomes a kind of communal foregoing of their right to kill offenders.

I find the arguments unconvincing, for several reasons. First, J. David Bleich, CONTEMPORARY HALAKHIC PROBLEMS II (New York: KTAV, 1983), p. 345 points out that Maimonides clearly required the

killing of offenders, as otherwise he could not have justified the brothers' eradication of the town of Shechem. Unless the townspeople were capitally liable for their failure to execute their prince, Shechem, for abducting Dinah, the brothers' conduct is unjustifiable. Second, the argument would presumably apply to all the Noahide laws, but there is no good reason, from a Jewish perspective, to punish murder, idolatry, or incest with anything less than death.

R. Weingarten's argument regarding burglary or, even better, fraud, is more plausible. Perhaps those laws that are legislated as part of the obligation of *dinin* according to Nahmanides could be open to communal agreement to set a lower level of punishment. The capital crime would be the failure to set up a legal system at all, with pieces of the system punished to different extents. In terms of the other prohibitions—including direct stealing—I do not see what gives the community the power to neglect giving the punishment the Talmud assumes.

Evidence requirements for non-Jewish are also not intuitive, as the Talmud allows (or requires) killing a non-Jew even on the basis of one reliable witness' testimony, even before one judge, see bSANHEDRIN 57b. Maimonides seems to assume no need for a formal court proceeding, as he accepts Simeon and Levi's killing of Shechem as execution of judgment, but TOSAFOT AVODAH ZARAH 64b, s.v. *Eizehu ger* does not.

^{xii} The law of bailments, for example, may be purely functional, avoiding disagreements about the parties' various responsibilities, but they go well beyond a minimal standard of what a society needs in order to function. Nahmanides, Isserles, and others' assuming that non-Jews were required to set up a more extensive system of civil law inherently forces those societies to confront questions of the kinds of bonds they expected among their citizens. This in turn would forge a sense of group identity as opposed to seeing themselves as a group of individuals who happen to live in close proximity to each other.

^{xiii} Even Maimonides, who thought that the existence of a single God was a logically demonstrable proposition, recognized the difficulty in intuiting it on one's own. In his view, LAWS OF IDOL WORSHIP 1;3, Abraham spent thirty-seven years struggling with the issue before deciding that there was only one God.

^{xiv} It is in that sense that Maimonides speaks of the rationality of Biblical law in the end of the Guide as well; he means that he can supply reasons that a rational person can appreciate, but not necessarily intuit or feel compelled to follow once the reasons are presented.

^{xv} The concern of Noahide incest laws with maternal lineage—so that intercourse with a maternal half-sister is prohibited, but not with a paternal one—is largely unexplained in the Talmud. Since Noahide law *did* recognize paternal lineage in other areas, most notably inheritance, see bKIDDUSHIN 17b, Maimonides, LAWS OF INHERITANCE 6;9, SHULHAN ARUKH HOSHEN MISHPAT 283; 1, we need to explain why maternal lineage became the focus here. I believe that the greater physical connection to a sister through the mother explains the incest prohibition. A sexuality that insisted that people move away from their original family in finding partners might reasonably prohibit all siblings that came physically out of the same body, while ignoring the genetic bond that extends from the father. Incidentally, other medieval authorities defined the non-Jewish incest prohibitions differently. For one example, see R. Meir Abulafia's YAD RAMAH, SANHEDRIN 57b-58b.

^{xvi} See LAWS OF KINGS 9;9, based on bAVODAH ZARAH 72a. Maimonides includes all forms of theft in this category, including withholding wages.

^{xvii} This is the implication of bSANHEDRIN 58b, which derives the prohibition from GENESIS 8;22's reference to never ceasing productivity, "day or night." Like with the study of Torah discussed in footnote 49, this prohibition is not as restrictive as it sounds. Hatam Sofer (R. Moses Sofer, 1762-1839), in his novellae on the tractate, noted that vacations and leisure activities are also part of productivity when they are for the purpose of rejuvenating oneself, as, presumably, are charitable, volunteer, and family activities.

^{xviii} 92b. The version of this statement found in JERUSALEM TALMUD, AVODAH ZARAH 2;1 says that they *will* accept these thirty in the future. In addition, there is no consensus about what those thirty are; R. Samuel b. Hofni Gaon had one list in his Biblical commentary, GENESIS 34:12, published by A. Greenbaum (Jerusalem: Mossad haRav Kook), 52-58. R. Menahem Azariah of Fano, TEN ARTICLES,

ARTICLE ON INVESTIGATING THE LAW III;21, has a different one. Their lists, incidentally, do not emphasize the idea of self-initiated legislation that I have in the text; however, their lists also try to subsume the discussion in HULLIN into discussions elsewhere-- either Scripture or the Talmud—while the examples that the Talmud gives in HULLIN do not easily fit those categories.

^{xix} The three laws non-Jews did keep were not writing marriage contracts for men, not selling human flesh in public, and honoring Torah. The first two are ways of mitigating apparently widespread violations of some of the Noahide laws themselves. The question of marriage and marriage contracts among men only arises when a society has already foregone a prohibition on homosexuality itself, and is testing how far that permissiveness will go. So, too, restricting the marketing of human flesh indicates a society that has long trampled the boundary restricting the eating of flesh to that of dead animals.

These two examples suggest that the “laws” that the Talmud envisioned the Noahides accepting were ways to avoid complete disregard for commandments they had already ceased observing. The reference to their respecting Torah might be construed the same way—while they did not actually observe the rules the Torah set up for them, they still respected the document, a remnant of the original ideal that the Torah had expected of them. The Talmud’s assertion that even there, in the attempt to retain something of Noahide law, the non-Jews only succeeded at keeping up with three of the thirty, gives some sense of the Talmud’s attitude towards the non-Jews of their time.

^{xx} The comment appears as an explanation of ZECHARIAH 11;13’s reference to thirty pieces of silver. This, apparently, led most medieval commentators to dismiss this statement as part of a midrashic attempt to reconcile various parts of Scripture, meaning they did not have to deal with it in practical terms.

^{xxi} Many authorities, starting with R. Nissim of Kairouan in the tenth century, asserted that non-Jews were obligated in any logical commandment; he gives the example of honoring one’s mother and father. A full discussion of that issue is beyond our focus here. In addition, with modern society’s realization of the limitations of appeals to intuition, the value of this category has become severely limited, as indeed our analysis itself suggests.

^{xxii} Maimonides, LAWS OF CIRCUMCISION 3;7 and Responsum 148. Maimonides is citing a source that I have not been able to identify, but his comment, 3;8, that the foreskin is disgusting, and his assumption, GUIDE FOR THE PERPLEXED III;49, that circumcision serves to reduce sexual desire, make circumcision an almost intuitive practice for those who wish to maintain a healthy control over their sexuality. In that context, it makes sense to leave this option open to non-Jews as well.

^{xxiii} R. Yosef Caro, in his glosses to LAWS OF CIRCUMCISION 3;7, assumed that Maimonides only allowed circumcision for the sake of conversion; Radbaz, (R. David ibn Abu Zimra, 1479-1573, Spain, Israel, and Egypt), writing about LAWS OF KINGS 10;10, excluded non-Jews from commandments that require holiness and purity, such as wearing phylacteries (*tefillin*); R. Moses Feinstein (1895-1986), RESPONSA IGGEROT MOSHE YOREH DE’AH 2;7 only allowed non-Jews to keep commandments relating to donations to the Temple, giving charity, and so on, but nothing particular to Jews. On the other hand, in addition to Maimonides, R. Abraham Gumbiner (1637-83), MAGEN AVRAHAM 304;12 and BEUR HALAKHAH (R. Israel Meir Kagan, 1839-1933) to the same text assumed that a non-Jew could accept various commandments in the course of becoming a *ger toshav* and, in so doing, render them obligatory upon himself for the rest of his life.

^{xxiv} Some commentators, such as Peter J. Spiro, footnote 3, point out that we expect naturalizing citizens to know more than birth citizens; if true, I see that as a flaw in our educational systems rather than our conception of citizenship. From my perspective, it would be perfectly reasonable to require birth-citizens to demonstrate an awareness of, and allegiance to, the thicker version of American principles in order to maintain full citizenship rights.