DEPORTATION, THE IMMIGRATION POWER, AND ABSORPTION INTO THE AUSTRALIAN COMMUNITY

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INTRODUCTION

John Locke defined political power in part as "a Right of making Laws with Penalties of Death, and consequently all less Penalties . . ."[1]. Capital punishment, and a wide range of barbaric penalties, are no longer with us.[2] Of the forms of punishment that remain, imprisonment is generally recognized as the most serious. Although generally overlooked deportation must rank not far behind.[3] Like imprisonment, deportation can result in considerable hardship and suffering, not only to the person subjected to the measure, but to his or her family and friends. Losing the right to live in what one regards as one's homeland can be seen as even more serious a deprivation than losing one's liberty.[4]

Given the significance of the measure, it is necessary to consider not just the specific conditions under which the state is entitled to deport someone, but more fundamentally, who it is entitled to deport. As a constitutional issue, debate in Australia has centred on the question of how the Commonwealth's immigration power[5] is to be interpreted. Two views of this power have found favour in the High Court. According to the wide view, irrespective of how long an immigrant has permanently resided in Australia, he never gets beyond the reach of the power. In the words of the well-known aphorism

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[1] *Second Treatise of Government* para 3. John Locke, *Two Treatises of Government*, Peter Laslett (ed) Cambridge University Press, (1960) 308.

[2] For a history of punishment in England, see for instance L Radzinowicz, *A History of English Criminal Law*, Vol 1 (1948), J F Stephen, *A History of Criminal Law in England*, Vol 1 (1883).

[3] Standard works on sentencing theory and practice seem to ignore deportation, implying that it is a social control measure which does not constitute punishment. See for instance, Sir Rupert Cross, *The English Sentencing System* (3rd ed) (1981), Andrew Ashworth, *Sentencing and Penal Policy* (1983), Hyman Gross and Andrew von Hirsch, eds, *Sentencing* (1981). Note that although the Administrative Appeals Tribunal has held that deportation should not be used as punishment, it has acknowledged that its deterrent effect can certainly be taken into account. See *Re Sergi and Minister for Immigration and Ethnic Affairs* 2 ALD 224. See also: *Re Georges and Minister for Immigration and Ethnic Affairs* 1 ALD 331, *Re Frith and Minister for Immigration and Ethnic Affairs* 1 ALD 590, *Minister for Immigration and Ethnic Affairs* v *Daniele* 5 ALD 135 (FC).

[4] See, for instance, *Pochi* v *MacPhee and Another* (1982) ALR 261, per Murphy J. On the comparative seriousness of deportation and imprisonment, see *Re Sergie*, 2 ALD 224; *Re Ceskovic* 2 ALD 453, *Re Stone and Minister for Immigration and Ethnic Affairs* 3 ALN No 81.

[5] *Commonwealth Constitution* s 51(27): "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . immigration and emigration". This is certainly not the only power by which deportation might be supported. See text below.

of Isaacs J (as he then was), "Once an immigrant; always an immigrant"[6]. By contrast, according to the narrow view of the immigration power, at some point an immigrant becomes "absorbed" into the Australian community and passes beyond its scope. This view appeals to Higgins J's counter-proposition that the power is a power with respect to immigration, not immigrants.[7] The High Court is still yet to make a firm choice between these two views.[8] It has, however, tended to support the narrow view, and little doubt is held that it would endorse this view if required to decide the issue. This in turn means that the High Court will be required to look more closely at the concept of "absorption into the Australian community". It is therefore appropriate to attempt to clarify this somewhat mysterious notion. This seems to be especially pertinent given the continuing debate between multiculturalist and assimilationist approaches to immigration and ethnic affairs.

This paper is concerned, then, with exploring the concept of absorption into the Australian community as it pertains to the constitutional issue of the scope of the immigration power. Different criteria for testing absorption are examined to see the extent to which they reflect an assimilationist or multiculturalist outlook. A broad distinction is drawn between "thin" and "rich" interpretations of absorption and the argument is advanced that, because it would be more in keeping with the present multicultural nature of the Australian community, a "thin" interpretation should be adopted in preference to a "rich" interpretation. More specifically, it is suggested that the most appropriate interpretation is one which restricts absorption to nothing more than the question of a period of legal residence in Australia. It is frequently on the grounds of breach of what will be termed the "non-criminality" requirement that the Department of Immigration and Ethnic

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[6] " 'Once an immigrant always an immigrant' . . . He can enter only in pursuance of [the will of the Australian people] . . . and subject to their constitutional right to qualify or withdraw that permission at any time . . . [He cannot] dig himself into this Commonwealth, so as to be irrevocably, so far as the Commonwealth power is concerned, a member of the people of the Commonwealth . . . and thereby escape the immigration power for ever." *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 81-82, *cf R* v *Macfarlane: ex Parte O'Flanagan and O'Kelly* (The Irish Envoys Case) (1923) 32 CLR 518, 555, per Isaacs J.

[7] *Ex Parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 110. *Cf*: ". . . a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community. He may, so to speak, grow out of the condition of being an immigrant and thus become exempt from the operation of the immigration power". *Walsh and Johnson's* case, (1925) 37 CLR 64, per Knox CJ. For other proponents of both the wide and narrow views, see Lane, *The Australian Federal System* 224-230 (2nd ed, 1979).

[8] This in itself is a matter of dispute. On the one hand, Michael Coper, for instance, in commenting on *R* v *Director-General of Social Welfare for Victoria; ex parte Henry* (1975) 133 CLR 369, the most recent High Court decision on the issue, said that although this case offered the Court the opportunity of settling this issue, it failed "to resolve it definitely": "It is obvious . . . that the case does little to resolve the controversy about the width of the immigration power". ("The Reach of the Commonwealth's Immigration Power: Judicial Exegesis Unbridled", (1976) 50 ALJ 351, 351 and 355, *cf* 356). On the other hand, Deane J of the Federal Court held in *Kuswardana* v *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186, at 202, that High Court decisions, namely in *Koon Wing Lau* v *Calwell* (1949) 80 CLR 533 and *Henry's* case, established that the legislative power with respect to immigration "does not extend to the exclusion or deportation of a person who has become established as a member of the Australian community". *Cf Re Ang* (1980) 40 FLR 410, *Re Sergi* 2 ALD 224, *Re Stone* 3 ALN No 81.

Affairs seeks to deport an immigrant. One major practical consequence of accepting the proposed interpretation of absorption is that there would no longer be such a requirement.

A number of related issues, however, must be considered as beyond the scope of this paper.

First, this paper is concerned with the concept of absorption only in so far as it relates to the constitutional debate between the wide and narrow views of the immigration power. The concept is also relevant in various other contexts to do with immigration. For instance, under the numerical points system for assessing immigration applications, NUMAS, the likelihood of an applicant's being absorbed into the community is an important factor the Department of Immigration and Ethnic Affairs takes into account in considering his application. More importantly in the present context, absorption is frequently cited in attempts to challenge deportation orders.[9] Admittedly, absorption is relevant in this context in a different way. What is at issue is not whether the legislation under which the Minister acts is within the power of the Commonwealth, but the way in which he has exercised his discretion. This paper will nevertheless refer to recent Federal Court and Administrative Appeals Tribunal cases which have discussed the concept of absorption in the deportation context, although they will not be examined any detail. In that they discuss factors which, it could be argued, are relevant in determining absorption as a constitutional matter, they throw useful light on the concept in this context. This is perhaps not surprising given that absorption in this context is itself a policy issue: the legal question of how absorption is to be defined here is wide open, and the moral and practical considerations discussed in these cases may well be helpful in deciding it. It is worth noting that the concept of absorption was developed in early cases to ameliorate the harsh effects of Australian immigration law as it then existed. The question of what constituted absorption was not, however, considered, let alone settled. Hence the rationale for the present paper.

Secondly, although the paper is concerned with the scope of the immigration power and the interpretation of the concept of absorption into the Australian community in the context of deportation, this is not the only relevant context. Certainly, it is possible to use the immigration power to the benefit of immigrants: consider, for instance, the Whitlam Government's planned use of the immigration power to authorize special grants for immigrants to assist them in the process of settling in Australia. From the point of view of what can be done to help immigrants, of course, the wider the scope of the power the better. It seems reasonable to hold, however, that immigrants have far more to fear than to welcome from governments having greater power to legislate in regard to them. One possibility that is worth bearing in mind, however, is that the immigration power should be regarded

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[9] The other main context in which the issue between the wide and narrow views of the immigration power has arisen is that of attempts to restrict the re-entry of persons who claim to be merely returning home as members of the Australian community. See *Potter* v *Minahan* (1908) 7 CLR 277, *Donohoe* v *Wong Sau* (1925) 36 CLR 404.

as having greater scope in contexts where assistance is to be provided to immigrants, without broadening the power in deportation contexts.[10]

Thirdly, it must be mentioned that the Commonwealth's power to deport is not restricted to the question of the scope of the immigration power. To start with, there is the question of whether, given that deportation is an exercise of executive power, any legislative authority is required. Next, assuming that such authority is needed, the immigration power is not the only relevant head of power. In particular, there is the aliens power (*Commonwealth Constitution* s 51(xix)), but other possibly relevant powers include the trade and commerce power (s 51(i)) the defence power (s 51(vi)), the people of any race power (s 51(xxvi)), the influx of criminals power (s 51(xxviii)), the external affairs power (s 51(xxvi)), as well as the incidental power (s 51(xxxix)). Concerning the aliens power, it should be noted that its exercise is not affected by the constitutional requirement that a person must be an immigrant. Even if an alien is not liable for deportation under the immigration power, he could be so liable under the aliens power.

Finally, the paper will not seek to investigate in detail the issue between the two views of the immigration power as has been discussed by the High Court in the modest number of relevant cases that have come before it.[11] This matter has been considered at some length, if not exhaustively, in the existing literature.[12] It should also be noted that this is not the only issue that has arisen concerning the immigration power, although it is the major one. Issues that have been settled include the proposition that the power extends to entry into Australia for any purpose, and not just that of permanent settlement, as the ordinary meaning of the term "immigration" suggests. It has also been decided that the power extends beyond mere entry, thus giving the Commonwealth Parliament the capacity to regulate the process of absorption into the community. To reiterate, this paper is concerned just with the concept of absorption into the Australian community, and it is concerned with this concept only in the context of trying to spell out a more specific version of the narrow view of the scope of the immigration power.

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[10] Consider the judgments of Jacobs and Murphy J J in *Henry's* case, (1975), 33 CLR 369.

[11] See, in particular, *Potter* v *Minahan (1908)* 7 CLR 277; *The Irish Envoys* case (1923) 32 CLR 518, *Walsh and Johnson's* case (1925) 37 CLR 36; *O'Keefe* v *Calwell*, (1949) 80 CLR 533; *Koon Wing Lau* v *Calwell* (1949) 80 CLR 533; *R* v *Director-General of Social Welfare (Vic): ex parte Henry* (1975) 133 CLR 369. Important Supreme and Federal Court decisions include; *R* v *Governor of the Metropolitan Gaol; ex parte Molinari* (1961) 2 FLR 477; *R* v *Green; ex parte Cheung Cheuk To* (1965) 113 CLR 506; *Ex parte Black; Re Morony* (1965) 83 WN (Pt 1) (NSW) 45; *Kuswardana* v *Minister for Immigration and Ethnic Affairs*, (1981) 35 ALR 186.

[12] See for example, G H Moore, "The Immigration Power of the Commonwealth", (1928) 2 ALJ 5; Jean Malor, "Deportation under the Immigration Power", (1950) 24 ALJ 3; K Ryan, "Immigration, Aliens and Naturalization in Australian Law", in D P O'Connell (ed), *International Law in Australia* (1965) 465; P H Lane, "Immigration Power", (1966) 39 ALJ 302; Prof P H Lane, *The Australian Federal System*, (1979); H A Finlay, "The Immigration Power Applied", (1966) 40 ALJ 120; Michael Coper, "The Reach of the Commonwealth's Immigration Power: Judicial Exegesis Unbridled", (1976) 50 ALJ 351; R D Lumb and K W Ryan, *The Constitution of the Commonwealth of Australia: Annotated* (1981); W A Wynes, *Legislative, Executive and Judicial Powers in Australia* (1976).

1. THIN AND RICH INTERPRETATIONS OF ABSORPTION, AND THE MULTI-CULTURALISM DEBATE

As P H Lane points out, quoting from Knox CJ, "[I]f the narrow view of s 51(xxvii) is to be preferred and if at some stage a former immigrant is outside the grasp of a retrospective law under s 51(xxvii), the question then arises, how does an immigrant 'in the course of time and by force of circumstances, cease to be an immigrant and ... (become) a member of the Australian community'?"[13] The concept of absorption certainly is, in the words of Dixon J (as he then was), "very vague".[14] But one cannot disagree with Lane that "however vague may be the conception of absorption into the Australian community, that vagueness cannot be a subconscious pretext for abandoning the task of deciding when an immigrant settles (or for discriminating against the narrow view of s 51(xxvii))"[15].

It will prove useful to distinguish between two broad types of interpretation of this concept. On the one hand, there are what could be termed "thin" interpretations of the concept, that is, interpretations which treat the concept in a reasonably straightforward and mechanical way. Such interpretations presume that absorption can be assessed by basically quantitative factors. For instance, an immigrant can be regarded as a genuine member of the Australian community if he has resided permanently in Australia for, say, five years, and fulfilled some minimal "good behaviour" requirement (which can be measured quantitatively itself). For example, not being convicted of a crime which carries a maximum sentence of one year or more for a first offence, or not having himself been sentenced for longer than this period could be considered such minimal "good behaviour" requirements.[16] There are, of course, numerous variations on this basic model. For instance, in response to the present "moral panic" regarding drug taking, special provisions can be included to make it more difficult for drug traffickers to become absorbed into the Australian community, and hence easier to deport them.

In contrast with "thin" interpretations of the concept of absorption into the Australian community, there are what could be called "rich" interpretations. These look into the "quality" of an immigrant's period of residence in Australia beyond some minimal "non-criminality" requirement. The positive contribution an immigrant may have made to the Australian community is considered. If either no contribution or insufficient contribution can be found, it is asked whether he or she has not been too great a burden on the community. The underlying premise is that the onus is on the immigrant to show that he or she is "worthy" of permanent residency in Australia. On this approach, one looks at the immigrant's conduct and lifestyle since entry into Australia in far more detail than is required by thin interpretations. Relevant considerations here include family, employment, and other social and economic ties with Australia.

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[13] P H Lane, "Immigration Power", (1966) ALJ 302, 306.
[14] *Koon Wing Lau* v *Calwell* (1949) 80 CLR 533, 577.
[15] Lane, *supra* n 13, 307.
[16] See for example, Migration Act 1958 (Cth) s 12.

The distinction between thin and rich interpretations of the concept of absorption is, of course, one of degree rather than kind. The main point that needs to be borne in mind is that the richer the interpretation that is offered, the more controversy arises as to the choice of criteria. Criteria concerning the "quality" of an immigrant's period of residence in Australia obviously raise more problems about the choice of values than do merely quantitative criteria, such as the length of this period. For instance, are economic and material values in general to be preferred as against cultural and spiritual ones? In particular, the question arises as to whether an assimilationist or multiculturalist approach to immigration and ethnic relations is being favoured. How is one to decide between mainstream values, and those of the various ethnic communities? In the next section a number of criteria for determining absorption, criteria currently in use where absorption is at issue in relation to deportation cases, will be examined. Before doing so, however, it will prove beneficial to try to clarify various viewpoints in the multiculturalism debate.

It seems that four main positions in this debate need to be distinguished. The first is what could be called the "naive assimilationist". According to this view, immigrants bring nothing of value to Australia except their labour-power. That a high proportion of immigrants come from non Anglo-Saxon cultural backgrounds is at best an inconvenience and at worst a threat to mainstream society that must be resisted. Immigrants should do their best to discard their different cultural backgrounds and set about becoming "proper" Australians as soon as possible.

A more sophisticated position is "modified assimilationism". This view acknowledges as a regrettable fact that if large numbers of immigrants are taken from non Anglo-Saxon backgrounds, mainstream Australian culture is bound to be affected as a result. An evolutionary process, whereby mainstream culture is influenced by exposure to immigrants from different cultures, although not radically transformed by such exposure, is only to be expected. Although the existence of ethnic cultures in Australia is accepted, it is stressed that they have a transitional status only, and that they will "wither away" as assimilation progresses. Contrary to naive assimilationism, this view acknowledges that assimilation is a natural process which takes time to complete. While assimilation is to be encouraged, then, it is not to be forced upon immigrants.

The third view could be described as "weak multiculturalism". This view accepts the idea that Australian society consists and will continue to consist of numerous cultural groupings. The diversity of cultures is tolerated and even welcomed, but only in a rather superficial way. It is granted that minority groups make for a more interesting and diverse society, but they are taken no more seriously. The emphasis is entirely on what the minority groups can offer to mainstream Australia, rather than there being any serious suggestion of reciprocity. While the independence and autonomy of minority cultures is acknowledged, they are seen as politically marginalized and impotent.

According to strong multiculturalism, however, it is not simply a matter of acknowledging the diversity of cultures. Rather than being viewed merely

as subjects of curiosity, ethnic groups are seen to have a significant role to play in the life of the society as a whole. They are to be respected, and not merely tolerated. The dominant culture is viewed as having some responsibility to repond to the demands they place upon it. Separate ethnic communities are to be encouraged and supported, not so much for the contribution they can make to building a diverse, cosmopolitan society, but rather for the benefit such communities can offer to the individuals from whom they are constituted. Instead of being sidelined, such communities are viewed as fully part of the social and political process.

Of course, these four positions could be spelt out further. Each opens up a range of more highly developed philosophies. They can best be seen as models or "ideal types", which differ in degree rather than kind. They do, however, provide a framework for examining the various criteria for absorption detailed below.

2. CRITERIA OF ABSORPTION

To turn to examining various criteria for absorption into the Australian community, the most obvious consideration to start with is period of permanent residency in Australia. Obviously one cannot become absorbed into the community without being geographically located in the community. This consideration appears to be quite neutral insofar as the multiculturalism debate is concerned. (This is not to deny that sophisticated, but probably specious arguments, could be advanced to the effect that people from different cultural backgrounds experience time differently.) What is the appropriate length of time, is a question of debate. Obviously any particular period will appear arbitrary.[17] One possible area of difficulty is judging when, if at all, in the case of a prohibited immigrant – or rather, prohibited non-citizen[18] – permanent residency commences. As mentioned in the Introduction, it is clear that Parliament can place conditions on absorption.[19] This does not mean, however, that it is able to extend the period indefinitely, so that an immigrant can never be absorbed. Such a position would presuppose acceptance of the wide view of the immigration power. One apparent condition on absorption is that time should only "begin to run" when the immigrant's presence in Australia is legal.

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[17] The Department of Immigration and Ethnic Affairs takes five years to be the standard period. *Cf Re Williams and Minister for Immigration and Ethnic Affairs* 2 ALN No 84, *Re Ang and Minister for Immigration and Ethnic Affairs* 2 ALD 785, *Re Radovanovic and Minister for Immigration and Ethnic Affairs* 5 ALN No 69, *Re Elkington and Minister for Immigration and Ethnic Affairs* 5 ALN No 139. On a period of imprisonment not counting towards absorption, see *Re Gillespie and Minister for Immigration and Ethnic Affairs* 5 ALN No 348. On the non-criminality requirement generally, see *Re Instandar and Minister for Immigration and Ethnic Affairs* 2 ALN No 56, *Re Mitos and Minister for Immigration and Ethnic Affairs* 5 ALN No 318. See *Re Mitos* also for a statement of considerations relevant to determining whether an immigrant should be deported.

[18] See Migration Amendment Act 1983 (Cth).

[19] *R* v *Green; ex parte Cheung Cheuk To* (1965) 113 CLR 506, *R* v *Forbes; ex parte Kwok Kwan Lee* (1971) 124 CLR 168.

A connected criterion is what could be termed the "non-criminality" requirement. This is the requirement that, during the "probation" period an immigrant cannot be convicted of a crime beyond a certain level of seriousness (measured, for instance, by the maximum penalty for a first offence), or cannot receive more than a certain sentence as a result of a conviction. As with the period of permanent residency in Australia, this criterion of absorption might be thought to be neutral on the multiculturalism question. It must be remembered, however, that crime is a social construct, different societies making radically different decisions as to the types of behaviour they choose to criminalize. Conduct that is perfectly acceptable in one community may be total anathema in another. Different societies have markedly diverging attitudes regarding, for instance, corruption in public life, drug trafficking, and taking private retaliation for crimes committed against members of one's family. More obviously, sexual practices that are strictly prohibited in one society are openly tolerated in another. A non-criminality requirement, then, is not necessarily as ethnically neutral as it might first seem to be. Careful attention would be required for cultural bias to be avoided.

Turning to richer criteria of absorption, it is necessary to look at both family ties and social ties in general. Is one more "absorbed" into the Australian community if, for instance, one's spouse, child, or parent is a permanent Australian resident? Family connections have been strongly emphasized in recent cases.[20] The question arises whether attention should be restricted to just these relatives. There are obvious implications regarding the multiculturalism debate in so doing. Some cultures distinguish far more sharply than do others between the immediate and more distant family circle. To place too much emphasis on the nuclear family could involve discriminating against certain people, in particular, those who have lost most or all of their immediate family as the result of war or natural disaster. It should also be noted that stressing family ties generally could well result in discrimination against the first generation of immigrants from a particular country, as opposed to later generations of immigrants.

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[20] On the importance of family ties, see for example: *Re Ang and Minister for Immigration and Ethnic Affairs* 2 ALD 785 (1980) 40 FLR 410; *Re Sevis and Minister for Immigration and Ethnic Affairs* 2 ALN No 118; *Re Baglar and Minister for Immigration and Ethnic Affairs* 3 ALN No 3; *Re Tombuloglu and Minister for Immigration and Ethnic Affairs* 3 ALN No 11; *Re Vincenzo Barbaro and Minister for Immigration and Ethnic Affairs* 3 ALN No 81; *Re Stone and Minister for Immigration and Ethnic Affairs* 3 ALN No 81; *Re Purvis and Minister for Immigration and Ethnic Affairs* 5 ALN No 68; *Re Lee and Minister for Immigration and Ethnic Affairs* 6 ALN N214; *Prasad* v *Minister for Immigration and Ethnic Affairs* 7 ALN N79. For the relevance of the effect on the family of deportation, see: *Re Barbaro and Minister for Immigration and Ethnic Affairs* 3 ALD 1; *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247; *Re Kannan and Minister for Immigration and Ethnic Affairs* 1 ALD 489; *Re Habchi and Minister for Immigration and Ethnic Affairs* 2 ALD 623; *Re Sevis and Minister for Immigration and Ethnic Affairs* 2 ALN No 118; *Tabag* v *Minister for Immigration and Ethnic Affairs* 5 ALN No 8; *Re Batur and Minister for Immigration and Ethnic Affairs* 5 ALN No 172; *Re Ili and Minister for Immigration and Ethnic Affairs* 5 ALN No 184; *Re Mullin and Minister for Immigration and Ethnic Affairs* 5 ALN No 357. On the relevance of the question of whether an immigrant's marriage is similar to an Australian one, see *Re K B and Minister for Immigration and Ethnic Affairs; Re N B and Minister for Immigration and Ethnic Affairs* 4 ALN No 163.

Next there is what could be termed economic ties (not that they may not equally be social ties). Some would claim that the immigrant who is employed in full-time work is more absorbed into the community than one who is unemployed. The sort of occupation a person is engaged in might also be considered relevant. Decisions here obviously could reflect different social values, since some occupations are more prestigious than others.[21] Naturally, questions arise here as to what constitutes "work", and more generally, what counts as being a "useful" member of the community. The problem of low status being attached to certain essential roles such as home-making and child rearing must be noted. There is the danger that communities which devote more of their resources to such occupations, and to building community relations generally, will be prejudiced as against communities which are more singlemindedly concerned with the pursuit of material wealth.

Other economic considerations might display cultural biases even more clearly. Consider the question of whether an immigrant has purchased his or her own home, and more generally the issue of the extent of the assets he or she has accumulated since arriving in Australia.[22] A further "rich" criterion is an immigrant's knowledge of English.[23] This issue clearly reflects cultural bias, resting as it does on the assumption that membership of the Australian community is restricted to being part of the mainstream English-speaking community. A connected "rich" criterion which is even more controversial concerns the immigrant's country of origin. Many would simply assume that persons from some countries, for instance Anglo-Saxon ones, are likely to be absorbed more readily into the Australian community. (Consider the former disparate treatment of alien and non-alien immigrants.) Other criteria of absorption into the Australian community that have been resorted to include whether the immigrant has applied for Australian citizenship,[24] and whether he or she has voted in federal and state elections.[25]

The moral of the above brief examination of these criteria for absorption into the Australian community seems to be clear. If the present cultural diversity Australia exhibits is to be respected, the High Court should opt for as

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[21] On the relevance of employment, see: *Re Ang and Minister for Immigration and Ethnic Affairs* 2 ALD 785; *Re Tabag and Minister for Immigration and Ethnic Affairs* 4 ALN No 58; *Re Kominkoski and Minister for Immigration and Ethnic Affairs* 4 ALN No 199; *Re Roberts and Minister for Immigration and Ethnic Affairs* 6 ALN N100; *Re Lee and Minister for Immigration and Ethnic Affairs* 6 ALN N214. See also *R* v *Governor of the Metropolitan Gaol; ex parte Molinari* (1961) 2 FLR 477. On the relevance of an immigrant making a contribution to his own ethnic community, see *Re Fiumani and Minister for Immigration and Ethnic Affairs* 4 ALN No 197.

[22] On the relevance of acquisition of real estate, see: *Re Sergi and Minister for Immigration and Ethnic Affairs* 2 ALD 224; *Kuswardana* v *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186; *Re Stone* v *Minister for Immigration and Ethnic Affairs* 3 ALN No 81. See also *O'Keefe* v *Calwell* (1949) 77 CLR 261. Note that the possession of substantial realizable assets may be a factor favouring deportation. See *Re Tombuloglu and the Minister for Immigration and Ethnic Affairs* 3 ALN No 11.

[23] See *Donohoe* v *Wong Sau* (1925) 36 CLR 404, *R* v *Governor of the Metropolitan Gaol; ex parte Molinari* (1961) 2 FLR 477.

[24] On the relevance of having applied for Australian citizenship, *Re Pochi and Minister Immigration and Ethnic Affairs* 2 ALD 33.

[25] On the relevance of having voted in federal and state elections, see *Re Ang* 2 ALD 785, *Re Sevis* 2 ALN No 21.

thin a view of absorption as possible. The richer the view it considers, the more it will become embroiled in the multiculturalism debate. This is something which, given the High Court's traditional aversion to tackling what it regards as political issues, it would be loathe to do. Indeed, it is submitted that a particular "ultra thin" interpretation of the concept of absorption should be adopted. According to this interpretation absorption is limited to nothing more than a flat period of legal residence in Australia. On this proposal, there would be no further requirement of establishing an intention to settle permanently in Australia.[26] Central though this intention has been held to be, there seems to be good reason to abandon this requirement of absorption. The objective criteria discussed above, for instance, employment, purchase of a home in Australia, knowledge of English, are usually taken as relevant on the grounds that they provide evidence of such an intention. But if these considerations should be disregarded, as is proposed, it appears that the matter for which they are supposed to constitute evidence should similarly be treated as irrelevant. There seems little point in retaining the requirement of the intention to settle permanently in Australia if one is left just with subjective criteria for assessing the existence and genuineness of such an intention. Furthermore, the existence of such a requirement seems to favour a particular sort of person, namely the one who tends to make long-term plans as opposed to the person who is more inclined to act spontaneously. More generally, such a requirement seems to favour people possessing what could be called "Prostestant" attitudes, as against those whose forms of life offer greater scope for innovation.

Another consequence of accepting the suggestion that absorption into the Australian community should be established merely by a flat period of legal residence is that there is no longer any requirement of community acceptance. That is, this view of absorption rejects what is generally referred to as the principle of bilaterality. Various writers, however, have stressed the importance of this concept, and so would scarcely be happy with its rejection. To cite just one of them:

> One principle, it is submitted, clearly emerges from the legislation as it does from the cases. The process by which an immigrant may pass from the condition of being an immigrant to that of a member of the community is one that requires the full and free consent of that community. Absorption cannot be achieved unilaterally. However much an immigrant may desire to integrate, however much on the facts he may have become assimilated, the community must at some stage have signified its acceptance of him as a member or prospective member.[27]

It is not clear, however, whether there is any genuine advantage to be gained from retaining this concept. At least, it is questionable whether there is much to be gained from keeping it in the minimal sense in which it is regarded as satisfied by a flat period to be abused, to be relied upon to support the

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[26] On the relevance of intention to settle permanently in Australia, see for example, *Re Ang* 2 ALD 785.

[27] H A Finlay, "The Immigration Power Applied", (1966) 40 ALJ 120, 120. See also P H Lane, *The Australian Federal System* (1979) 218-220, K Ryan, "Immigration, Aliens and Naturalization in Australian Law", in D P O'Connel (ed), *International Law in Australia* (1965) 465, 471, and *Kuswardana* v *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186, 193.

idea that absorption can only occur through an immigrant's being accepted by the mainstream Australian community. According to this view, acceptance by his own ethnic community is insufficient.[28] A further consequence of retaining any substantive requirement of bilaterality is that such a requirement appears to discriminate against those who choose to lead secluded rather than ordinary sociable lives.

An even more controversial aspect of the view of absorption endorsed in this paper is the abandonment of what has been called the "non-criminality" requirement. The question arises of why, through the measure of deportation, Australia should not take the opportunity of ridding itself of those immigrants who have committed serious crimes. Certainly, many would regard such "cleansing" of the population as one of the important functions of deportation as a general practice. There are, however, two important objections to this view.

First, to take the point of view of the individual deported, it must be kept in mind that, following as it often does upon a period of imprisonment, deportation can amount to double punishment. Where this occurs, the immigrant criminal is treated fare more harshly than his Australian counterpart. It seems that equity demands, however, that the two be treated similarly, and one not punished more severely than the other. It might be suggested, however, that the matter is not just one of individual fairness or rights, but concerns something which has been held to be of paramount importance in deportation cases, namely the best interest of the Australian community as a whole. What would have to be considered here, however, is how this notion is to be interpreted. There are two matters in particular that warrant attention. There is the danger, first, of too much weight being attached to short-term considerations, and secondly, of an unduly majoritarian view being adopted. Respect for rights would be greatly weakened as a consequence of succumbing to either of these dangers. It seems undeniable, however, that it is in the community's best interests that all genuine rights be properly observed, and that in general individuals be treated as fairly as possible. It can scarcely be questioned that justice is the most important social virtue.[29] Any reasonable interpretation of the notion of a community's best interests must, it seems, give due regard to this fact. It seems equally the case that justice is an indivisible notion, and therefore it is the community as a whole which loses if one of its members is denied justice. (Of course, it cannot be argued that immigrants do not deserve equal justice because they are not members of the community, for this is to beg the whole question of whether they have not been absorbed into the community, and so are no longer immigrants.)

Turning to the second point concerning abandonment of the non-criminality requirement, it appears morally objectionable that a nation should be able to freely "export" those immigrants it sees as problematic. It seems only fair that in deciding to accept a certain group of immigrants, the host country should take the bad with the good. Alternatively, if this is thought to be going too far, it being inevitable that a country in Australia's favour-

[28] On the relevance of being absorbed into one's ethnic community, see *Re Sergi*, 2 AILD 224. *cf* P H Lane, "Immigration Power", (1966) 39 ALJ 302, 307.

[29] John Rawls, *A Theory of Justice* (1972).

able position will to a large extent be able to choose the immigrants it wants (there is, of course, no pragmatic reason why it should not do this), then at least the various criteria for selecting immigrants should operate only at the initial stage of assessing applications to come to Australia as permanent residents. Such selection should not be viewed as a continuing process which can go on even years after an immigrant has arrived in Australia. It is quite repugnant to suppose that despite having lived in the country for a considerable time an immigrant is still "on probation" and liable, if certain circumstances arise, to be deported.

The "ultra thin" interpretation of the notion of absorption could be endorsed by following a different path. The underlying moral issue is that of the stage at which it is no longer justifiable to deport a person. To start with, exile is no longer given serious consideration as a form of punishment. While there are continual calls for the reintroduction of both capital and corporal punishment, no mention is made of exile. (Note, however, extremist demands in the United Kingdom to "repatriate" non-white Britons, not that such "repatriation" is put forward as punishment.) It is interesting to speculate as to why this is the case. Perhaps the most plausible explanation is that exile is essentially an imperialist notion, for it suggests the possession of colonies to which one can be exiled. Alternatively, it may simply be considered as too inhumane, although how it can be regarded as more inhumane than capital punishment is not easy to see. However, it is not necessary to investigate the reason for its demise here. It needs only to be acknowledged that exile is no longer a practice of our community.

Given this fact, it seems quite legitimate to rephrase the question of when deportation is no longer justified as the question of when deportation becomes exile. (More accurately, that deportation constitutes exile is sufficient for it to be unjustified, but not necessary.) Exile presupposes membership of the Australian community, or, if this is to beg the question of what constitutes such membership, permanent resident status at the very least. The relevant point here is that for persons other than immigrants, such a status is obtained very easily, simply by being born in Australia. It is not asked of native-born Australians, what family, social, or economic ties, for instance, they have with Australia. Despite the fact that it is scarcely treated as controversial, it seems quite arbitrary to take birth as the relevant criterion. What seems to make this choice plausible is the general (but certainly not universal) truth that most persons spend some period of time in the country in which they are born. It is the latter which gives rise to any genuine moral right to reside permanently in the country rather than the former. It is through living in a country that one develops any real connection with it. To put the point another way, the selection of birth as the relevant criterion can be explained by purely pragmatic considerations. Quite apart from considerations of privacy, it is obviously far easier to maintain reliable birth records, which in any case serves other purposes, than records of individuals' possible movements into and out of the country in question. Passports are, of course, a relatively recent invention.[30]

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[30] See Robert S Lancy, "The Evolution of Australian Passport Law", (1982) 13 Melb Uni Law Rev 428.

Returning to the relevant moral point, it seems inconsistent to demand of immigrants that they satisfy a more stringent criterion than native-born Australians in order to be treated as members of the Australian community. And the equivalent criterion, or at least, the closest to an equivalent criterion, appears to be a period of residence in Australia. Indeed, except for the practical difficulties just mentioned, it seems plausible to propose that this criterion be applied universally, and replace the criterion of birth. Persons born in Australia, then, should not be regarded as having permanent resident rights until they have resided in the country for the requisite period of time.[31] The more that is required of immigrants to be regarded as fully-fledged members of the Australian community, the more deportation looks like exile.

3. CONCLUSION

This paper has set out a contrast between what have been called "thin" and "rich" interpretations of the notion of absorption into the Australian community in the context of the constitutional dispute between the narrow and wide views of the immigration power. The paper has defended thin as against rich interpretation and has argued for the adoption of an especially "thin" interpretation, one which takes into account no more than an immigrant's period of legal residence in Australia.

While the argument cannot be developed further here, there are various matters which should at least be mentioned. It might be pointed out, to start with, that insufficient cognizance has been taken of the radical nature of what is being suggested. Many will obviously be unhappy with the proposed abandoning of the non-criminality requirement, and will not be convinced by the arguments in favour of this move as they stand. A further objection, to which more attention will be devoted here, is that it is highly implausible to hold up cultural neutrality as an ideal. According to this objection, to be absorbed into a community is necessarily to be absorbed into its culture. And if this is the case, the mainstream culture of the host country must be granted a predominant status.

This may be taken as merely a semantic objection, as holding that the term "absorption" is being misused. On this reading, we are not providing an alternative interpretation of the concept of absorption, but replacing it with a weaker concept. Absorption is essentially an assimilationist notion, so no multicultural interpretation can be provided for it. Understood this way, however, the objection is not particularly serious. It can be overcome by replacing the concept of absorption by a thinner concept, for instance, that

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[31] Consider the related proposition that a native born Australian can lose his permanent residency status, and come within the ambit of the immigration power, in virtue of a long period of absence overseas. See, for instance, *Potter* v *Minahan* (1908) 7 CLR 277. This is not necessarily a corollary of the view we are defending. It is quite open for us to accept the proposition, with all due apologies to Isaacs J, that "once an Australian, always an Australian". (Of course, this proposition need not necessarily apply where Australian citizenship, as opposed to permanent residence status, is concerned. There are a number of standard ways in which Australian citizenship can be lost, for instance, by obtaining the citizenship of a foreign country, or serving in its armed forces.)

of permanent residency in Australia. Such a concept can be appealed to directly, rather than as offering an interpretation of the concept of absorption.

The objection might be raised as a substantive point, however, that one must have genuinely become a member of the Australian community to escape the immigration power. Being a member of the Australian community involves far more than just residing here permanently. The principle of bilateriality cannot be disposed of so easily. Certainly this principle carries with it connotations of "good citizenship", of fitting in well with mainstream Australian society. Implied in this principle is a model of what it is to be a good Australian, a model which does not leave any room for an immigrant's retaining his own ethnic identity. Such connotations must, however, be resisted, as incompatible with a liberal and pluralist society, especially one which has recently gained a new aspect to its diversity through immigration from a large number of cultures. A point made earlier is equally relevant here. It is inequitable to place greater demands on immigrants than on native-born Australians concerning the issue of being a "good Australian". Whatever this phrase is taken to mean, there is no necessity that native-born Australians fulfil such a requirement. There is no question of their facing exile if they fail whatever test this requirement lays down. As a matter of equity, then, neither should any "good Australian" requirement be placed on immigrants. As argued earlier, it is arbitrary to take as one's touchstone the question of whether a person is born in Australia or not.

If this reply is thought unsatisfactory, however, a different strategy, which has already been hinted at, can be adopted. Conceding the necessity for finding a place for the notion of bilaterality, it can be argued that it is sufficient to be accepted by the Australian community that one is accepted by one's own ethnic community. On this approach, the salient fact to which appeal is made is that the Australian community is presently a multicultural one, and therefore no greater demand can be made than that a person is accepted by one of its component sub-communities. There are still, however, difficulties with this approach, which suggests that the option of denying bilaterality altogether, rather than attempting to provide a multicultural interpretation of the notion, is preferable. To start with, it needs to be determined what counts as being accepted by a community. This question is as real in the case of ethnic communities as it is with the mainstream community. Secondly, even a multicultural interpretation of the notion of bilaterality prejudices the person mentioned earlier who prefers a secluded existence to a sociable one.

Two further points are worth raising. First, it has been stated that the flat period of residence to satisfy the requirement of absorption should be legal residence. It might well be questioned, however, why this requirement should be insisted upon. Why should it not be as much open to the prohibited immigrant (or non-citizen) be become absorbed into the Australian community as the legal immigrant? Certainly, many would argue that it is absurd to drop this qualification. As Barwick CJ said in *R* v *Forbes; ex parte Kwok Kwan Lee*: "It scarce needs saying that a prohibited immigrant may not by any means become a member of the Australian community whilst he is a prohibited immigrant. By the very description he is not a person having any

title to remain in the country".[32] While the issue is not as straightforward as Barwick C J suggests, it being pertinent to ask why an immigrant's presence in Australia is considered illegal, it still seems that this requirement must be insisted upon for pragmatic reasons. It would merely be to encourage illegal immigrants if they were to know that they could automatically gain permanent resident status if they remained undetected for a sufficient period of time. At the very least, there would need to be a stringent test for someone illegally in Australia to be considered as absorbed into the community, and therefore beyond the range of the immigration power.

Finally, no attempt has been made to specify the relevant period of legal residence. As stated earlier, any particular period will appear arbitrary. It seems reasonable to suggest, however, that the period should fall somewhere in the range of three to five years. How would such a view affect the deportation powers the Minister presently possesses under the Migration Act 1958 (Cth)? These powers can be summarized briefly. Under s 12, he can order the deportation of a non-citizen who has been residing permanently in Australia for less than ten years, and has been both convicted of an offence and sentenced to imprisonment for at least one year. Under s 14, deportation can be ordered against a non-citizen who has resided permanently in Australia for less than ten years, and who has been convicted of one of a number of specified security offences, irrespective of the sentence he may have received. Finally, s 18 provides for the deportation of prohibited non-citizens.[33]

Section 18 is unaffected by the view defended here. As pointed out above, the flat period of residence required for absorption remains legal residence. However, the two other sections would require alteration, although this would be straightforward. Suppose four years were the stipulated period for absorption into the Australian community. After such time had elapsed, deportation would no longer be possible (at least as supported by the immigration power). The change required to these two sections, quite simply, is that reference therein to "ten years" would have to be altered to "four years". If it is thought that this unduly limits the power of the Commonwealth to deport, particularly in relation to those who might be thought of as "security risks", the arguments above in favour of restricting the use of deportation should be recalled. Deportation can not only amount to double punishment, but a specially severe form of punishment at that. It can constitute grossly inequitable treatment of immigrants in comparison with native born Australians. Where the person subjected to the measure regards himself as a member of the Australian community, deportation is equivalent to exile. Furthermore, placing those convicted of security offences in a special category is inherently dangerous, the idea that certain people constitute "security risks" being highly susceptible to political manipulation. In conclusion, then, there are sound reasons for confining the Commonwealth's power to deport in the way that has been argued for in this paper.

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[32] (1971) 124 CLR 168, 173.

[33] See Geoffrey A Flick, "Immigration Appeals", (1985) 59 ALJ 427, 432-3, for a useful summary of changes to the Minister's deportation powers brought about by the 1983 amendments to the Migration Act 1958 (Cth).

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