THE ALIEN AND THE ASIATIC IN AMERICAN LAW. By Milton R. Konvitz. New York: Cornell University Press, 1946. Pp. 299. $3.00.

This treatise on the two chief outcasts of our constitutional system, the alien and the Asiatic, is a timely probing of the depth of our American democracy. Its list of legal atrocities constitutionally committed upon Americans or would-be Americans who did not have the foresight to be born in the proper places has all the macabre fascination of old ethnology books which recount the horrors found by missionaries among benighted peoples lacking properly supported agencies of civilization and true religion.

Today, more than ever, such a study has meaning even for native-born Americans of whitest ancestry. For none of us can be sure of rights which are denied to the meanest member of society. And since the Supreme Court in *Korematsu v. United States*[1] has held that American citizens of a feared or hated stock may be taken from their homes and put behind barbed wire without notice of charges, indictment, jury trial, or other opportunity to be heard in self-defense, all of our civil rights are subject to forfeiture if nations or races from which any of us are descended become feared or hated.

Indeed, the implications of the *Korematsu* case go even further. For, apart from the fact that a number of American citizens, of the same racial strain as Korematsu, refused to take a test oath of allegiance after imprisonment, the only ground advanced in the Supreme Court opinion for upholding the domestic deportation of American citizens without trial or hearing was the ethnological ignorance of the Court as to the truth or falsity of the theories upon which the military acted.

The language of the Court, "we cannot reject as unfounded. . . . We cannot say that the war-making branches of the Government did not have grounds for believing. . . . we could not reject the finding . . . ," taken in conjunction with the anthropological opinions of the Commanding General concerning "ties of race, culture, custom and religion," leaves all our civil rights dependent upon race theories of generals and upon the extent to which judges are equipped to identify decayed anthropological doctrines.

The extent to which discriminations based on race and alienage have been written into our Federal and State laws, particularly in the years since the first World War, is not generally appreciated. So far as I know, the only comprehensive effort to trace the scope of such discrimination prior to Professor Konvitz's work was made under Nazi auspices in an effort to prove that Americans were doing circumspectly or hypocritically what the German Government did more honestly.[2]

The list that Professor Konvitz gives us of discriminations against aliens

1. 323 U. S. 214 (1944).

2. A chapter of this dissertation by Heinrich Krieger on American Racial Law appears under the title *Principles of the Indian Law and the Act of June 18, 1934,* 3 GEO. WASH. L. REV. 279 (1935).

and Asiatics that have been upheld by the courts is impressive and dismaying About a hundred Supreme Court cases bearing on the constitutionality of such discriminations are patiently analyzed. The cases cover exclusion and deportation of persons considered to be aliens, disallowance of citizenship, denaturalization, exclusion from various professions and occupations, disabilities with respect to landholding, segregation, miscegenation, registration, and internment. What stands out in a review of these cases is the consistency with which the Supreme Court has followed the pseudo-science of the "superior Aryan race" invented by the precursors of Fascism, Gobineau and Houston Chamberlain. And this, as Professor Konvitz demonstrates, has not been merely a matter of yielding to popular waves of hysteria that culminate, from time to time, in legislation. Rather, the Court has repeatedly pressed the claims of racist theory beyond any existing legislative expression. Although Congress put a stop to the naturalization of Chinese in 1882, it was the Supreme Court, speaking through Mr. Justice Sutherland, that in 1922 put a stop to the naturalization of other Asiatics.[3] And when it put a stop to the naturalization of Asiatics it provided itself with a bootstrap to uphold discriminatory land laws, a year later.

> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."[4]

Thus we denied the most basic of human rights to half the world's population, discredited western liberalism in Asia, and stirred up resentments which finally culminated in war. It became a simple matter thereafter to argue that descendants of human beings so mistreated by us must hate us, that "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken,"[5] and that as a matter of self-preservation we must put behind barbed wire the children of parents whom we wronged a generation ago. This pattern, based on fear or hatred of racial groups we have injured, is not entirely a new pattern in American constitutional law. It began in our relations with Indians—about which Professor Konvitz is substantially silent, despite the claims of the blurb writer on the back cover. It took new roots when Congress decided in 1882 that the best way to stop violence against Chinese immigrants was to bar them from our land and that the best way to prevent violation of their rights as citizens was to prevent those who were already here from acquiring citizenship. But the real impetus to racial intolerance came in the wake of the first World War, in

3. Ozawa v. United States, 260 U. S. 178 (1922); United States v. Thind, 261 U. S. 204 (1923).

4. Terrace v. Thompson, 263 U. S. 197, 220 (1923).

5. General De Witt's words, quoted in Korematsu v. United States, 323 U. S. 214, 241 (1944).

accordance with a Chinese proverb that the first result of a war is for the adversaries to adopt each other's vices. It was in that atmosphere that we wrote on our statute books in 1924 that Germans are four times as worthy of admission to our country as Hungarians, that Japanese are not worth admitting at all, etc. And it was in this atmosphere that Justice Sutherland, in 1922 and 1923, wrote the historic opinions of the Supreme Court which put a stop to the naturalization of Japanese,[6] Hindus, and other Asiatics, on the basis of a super-Aryan myth that excludes even the original Aryans of India,[7] not to mention children born in Bethlehem and other towns of Asia Minor.[8]

With that characteristic love of buck-passing which is so fundamental a part of the judicial process the ethnic views of the Court in 1923 were ascribed to the Founding Fathers, who were not present to deny the charge. The draftsmen of the 1790 Naturalization Act, we are told, had thought of white men as blue-eyed and light complexioned and while the word "white" might possibly be stretched to cover the "dark-eyed, swarthy people of Alpine and Mediterranean stock,"[9] it could not be stretched to include Caucasians of darker hue. One wonders: Is this a nation or a beauty contest that Justice Sutherland is talking about?

So far as I know, the annotators have never gone to work on the Declaration of Independence. But when they do, they will find in Professor Konvitz's book a good many potential footnotes to the phrase about all men being created equal: for example, that Chinese immigrants are unable "to make any change in their habits or modes of living";[10] that English aliens cannot be trusted to operate pool rooms in a law-abiding manner;[11] and that the Anglo-Saxon names of our earliest legislators are an index of their racial origin and of an intent to legislate for "their kind."[12] These are cardinal dogmas of a judicial anthropology that will one day have the same respect from thinking men that is now paid to the judicial economics of earlier decades.

The case materials and the legislation with which Professor Konvitz deals are dissected with a deft scalpel that uncovers the unspoken premises and hidden consequences of statutes and decisions. Relevant legal and sociological literature is brought to bear on the issues analyzed. Frequent reference to arguments in briefs before the Court illuminates the scope of decisions. Apt quotations from biographies of the justices help to clarify judicial motivations. The volume is thus an excellent example of the realistic jurisprudence that has now moved from the stage of manifestoes and polemics to the stage of constructive workmanship.

If there are weak spots in the volume, it is only fair to say that, by and

6. Ozawa v. United States, 260 U. S. 178 (1922).
7. United States v. Thind, 261 U. S. 204 (1923).
8. *In re* Almed Hassan, 48 F. Supp. 843 (1942).
9. United States v. Thind, 261 U. S. 204, 213 (1923).
10. Chinese Exclusion Case, 130 U. S. 581, 595 (1889).
11. Clark v. Deckebach, 274 U. S. 392 (1927).
12. United States v. Thind, 261 U. S. 204, 213 (1923).

large, they are not original with the author. One finds, for instance, the common notion that propositions are either positive or negative and that the latter are harder to prove than the former[13]—which overlooks the ever-present possibility of finding positive synonyms for negative terms and *vice versa.* There is the unguarded statement that immigrants do not furnish their share of leaders of liberal and radical thought[14] which is no truer than the view that immigrants are as a class liberal or radical. The statement that Arizona Indians may not marry whites[15] has not been true since 1942.[16] In Arizona, Indians are the only people who can marry whom they please. But these, like the typographical errors that mar some footnote citations, are all trivial defects in a work that contributes so largely to the understanding of our Constitution and our national ethics.

One's chief regret is that the volume is too short. The author's sympathy for the downtrodden leads him to terminate his analysis when he finds an injury done to an alien here which we should resent if it were done to an American abroad. But this appeal to justice is generally unconvincing to those—and they are not all "corrupt politicians"[17]—who think a nation's judges and law-makers have enough to do in protecting their own citizens. What would carry more weight in such quarters—which are highly and properly influential—would be a demonstration that while discrimination seldom destroys an outcast group, it very often corrupts the group that practices it and comes to rely upon it.

We have developed a civilized criminal law not by idealizing burglars, but by recognizing that the welfare of each of us depends upon the existence of legal procedures that accord even to burglars certain basic constitutional rights. Perhaps if the defenders of our civil liberties made less effort to arouse sympathy for cranks and Communists whose rights have been invaded and concentrated more on the harm that is done to the public health and safety when certain necessary apertures in the social anatomy are sealed, they would find more receptive audiences. Certainly the right to advocate unpopular ideas is of interest to very few, but the right to hear and consider such ideas put forward by others is of interest to all of us.

So, too, I think that a critique of our treatment of Asiatics and aliens, as of Negroes, Indians, Jews, and other under-privileged minorities, would be far more effective if, instead of concentrating on the effects of persecution upon the lives and feelings of the victims, a stronger analysis were made of the effects of such persecution in weakening our democracy, threatening our peace and security, imposing upon our Government new burdens of bureaucracy, and undermining the national economy. It seems to me that the critique

13. P. 223.
14. P. 36.
15. P. 232.
16. Ariz. Laws 1942, c. 12, § 1; Ariz. Code Ann. § 63-107 (Supp. 1945).
17. P. 157.

which Professor Konvitz gives us would be vastly strengthened if he went on to analyze the injury done to society when we cannot hire a nurse to tend a sick child because she has not yet been naturalized, or cannot be naturalized because of her ancestry; when we cannot buy fresh and wholesome vegetables at reasonable prices because good farmers are driven off the soil for racial reasons; when we find ourselves involved in war situations because State legislatures are reckless in their insults to foreign nationals without ballots; when we are deprived of the aid of great scientists and much-needed technicians by a gerrymandered immigration law which makes the acceptibility of pilgrims to these shores dependent upon their ancestry rather than upon their capacities to contribute to American life; or when our intellectual life and the development of a more mature labor movement are dampened by threats of deportation and by the growth of a "thought-police" bureaucracy that shows no signs of dissolving as our alien population dwindles.

It is well that one who appraises a course of decisions should make explicit the ethical assumptions from which he proceeds. This Professor Konvitz does with candor. On the title page of the volume appears a provision of the Mosaic law: "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself."[18] Judged by that civilized standard we have fallen a long way in the last quarter century of our national life. Yet, for the sake of the record, it should be noted that this was a statutory standard to which even the judges and administrators of the nation to whom the Mosaic law was given often failed to adhere. There is not much to choose between the "chosen people" theories of Ezra in *Ezra* 10: 16-17 and of Justice Sutherland in 260 U. S. 178 and 261 U. S. 204.

Still, the commandment of Leviticus 19: 33-34 retains its vitality and its capacity to inspire human effort after more than 20 centuries. Perhaps the Declaration of Independence will, too.

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TOTAL WAR AND THE CONSTITUTION. By Edward S. Corwin. New York: Alfred A. Knopf, 1947. Pp. 182. $2.50.

FROM the moment I became interested in Constitutional Law, the works of Edward S. Corwin of Princeton have been indispensable to me. First I was told, and then I learned for myself, that in the field of the Constitution and the Supreme Court he is a leading historian, interpreter and commentator.[1] Needless to say, I turned to this volume of five lectures on *Total War and the*

18. Lev. 19:33–4.

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1. One may note, with or without comment, how many great students of the Constitution and the Court do not teach in law schools.