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Enemies and Outlaws: War and the Public/Private Citizen

Karen Knop

University of Toronto Faculty of Law

Enemy aliens can be sued but cannot sue. For the duration of a war, they can be wronged without remedy. In the English, Canadian, and Australian legal systems, enemy aliens are *ex lex*, outlaws—not metaphorical but actual. While the rule is justified as preventing the enrichment of an enemy alien and the provision of his country with the sinews of war, the rule's asymmetry makes it also a personal license to harm at its most literal.

When international lawyers consider civilians in war, what most often comes to mind is the international *jus in bello*, the branch of humanitarian law that regulates the treatment of civilians injured by military action or subject to occupation. Yet in the first half of the twentieth century and even later, the subject would have conjured up the market side of war as well as its violent side. The concern is with national laws that establish the extent to which peacetime pursuits must change or cease. Although international and constitutional bills of rights now apply to the home front during war, they are preoccupied with the individual's rights and duties relative to the state and not, as these laws are, with the individual as a party to a contract, trader, a private litigant.

The literature on war and citizenship similarly neglects this dimension. One line of inquiry asks whether fighting for one's state is integral to citizenship. The other locus of concern in the literature is the contraction of citizenship and its protections against one's own state in war.

What the literature misses, however, is the effect of war on a third tradition of citizenship, what J.G.A. Pocock distinguishes as the Gaian conception of citizenship. Citizenship is legal status, rather than political participation or cultural membership. It is quintessentially private rather than public, epitomized by civil rights like property, contract and tort, rather than political rights. The key is therefore not the individual's vertical legal relationship to the state, as we most often think of citizenship, but the horizontal relationship between individuals expressed through the state's law and enforced by its courts.

Proceeding from *Amin v. Brown*, a 2005 decision of the English High Court where the defendant relied on the plea of enemy alien, Part I of this Article elaborates on the more straightforward implications of the legal disability of enemy aliens. Part II pursued the rule's significance for citizenship, drawing out the differences between and co-existence of what I will call the public relationship of "enemy" and the private relationship of "outlaw in war. Part II also presents the paradox that it is precisely by attending to the rule's distortion of Gaian citizenship that we find traces of the affirmation of such forms of belonging even in war.