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The Coherence of the Concept of Cultural Property: A Critical Examination

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Abstract: This article asks a simple question: Is cultural property a coherent concept? It answers this question through a critical examination of the concepts of cultural and property that builds on the work of Alan Audi. The article examines concepts of property and culture as they have developed separately in political theory. It suggests that arguments about cultural property are shaped by the discursive structure of the public/private divide. On this basis, the structure of cultural property arguments are critically examined. Then conclusions are drawn about the role of the public/private divide in structuring the tension between culture and property. It is concluded that this tension that defines the concept of cultural property.

INTRODUCTION

Newspaper articles published in the *New York Times* from 1933 to 1939 illustrate the role that cultural policy played in the Nazi program of identification of Jewish citizens and noncitizens, ostracism of those deemed to be of Jewish descent within German society, and confiscation of Jewish property; strategies that ultimately produced the conditions for the annihilation of German and European Jewry.[1] In May 1933, the *New York Times* reported that Goebbels, the Minister of Popular Enlightenment and Propaganda, called a meeting of managers, actors and art directors of German theaters. At this meeting, he reportedly asserted that artists do

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not have the luxury of being "apolitical" because artists are leaders in society.[2] As a result, he also suggested that as the "national mentality" is fixed in the mind of the populace, they would gradually and voluntarily remove Jewish artists from German cultural life. This was because to Goebbels, art was not "international," but a manifestation of the "German popular mentality."[3] Although, as the author of this article noted, the legislation to secure this removal was in fact already in place.[4] Public law was a way of ensuring that even privately artists could not support their Jewish colleagues.

Thus, the legal and political ostracism of Jewish artists[5] and the limitation of Jewish cultural participation were promoted as a key part of Nazi policy. As the *New York Times* reported that, architecture was the "pet hobby" of Hitler and he took a great interest in the arts.[6] As a result, as early as 1935, Tolischus was able to report from Berlin that "[h]aving ostracized the Jews legally, socially and professionally, the National Socialist regime is undertaking the final step in its solution of the Jewish question—namely the economic "liquidation" of the Jews."[7] And by December 1935, the result of this policy was clear, as Tolischus reported that even without a formal law, "cultural organizations" were requiring that Jewish cinema owners and art dealers "aryanize" their property.[8] Aryanization rapidly became an excuse to take Jewish property.[9]

Soon this period of voluntary aryanization of Jewish property (including cultural property) was followed with outright confiscation by the authorities.[10] Moreover, the policy of confiscation was extended to require registration of all Jewish private property.[11] One example of the effect that this requirement had on cultural property was reported in Munich in 1938. The *New York Times* noted that, on the basis of a decree of April 1938 requiring Jewish citizens to declare all antiquities and art, "[e]xperts from the Reich Chamber of Culture, accompanied by members of the Secret Police, today made its tour of homes of formerly wealthy Jews and removed works of art. They were taken in trucks to the National Museum here."[12] As a result, by July 1939, the conditions were such that it was possible for Propaganda Minister Goebbels to address the Congress of German Art and outline a program for Nazi art (based on extensive funding for the arts), which reflected the "common experience of the people."[13] This was possible, he argued, because the "Jewish art salon snare" had been broken, thus reversing the "degradation" of German art by Jews.[14] As he stated, "art is the function of the national life, and to place it in proper relation to the national life is not only a cultural but eminently a political task."[15] This was achieved by ensuring that all artists were members of the "organization of German artists."[16] Thus, the removal of Jewish citizens from German culture, by first ostracizing them and then depriving them of property, produced the conditions that enabled their annihilation.

This historical example highlights the ways in which the *private* protection of property in Nazi Germany was denied to those of Jewish descent in order to prevent *public* participation in culture. It is this tension between the public and the private in cultural property law that this article will investigate. Primarily this ar-

ticle argues that cultural property laws are structured by the push and pull between the private nature of property and the public nature of culture, and that it is the political sphere that mediates this tension. Moreover, this article argues that the tension between the public and the private spheres arises out of the fact that within leading political theories culture is the purview of the state, while property is the purview of everything else—nonstate actors, such as corporations, individuals, and civil society.[17] This divide between public and private exists because there must be public protection of private property (in order to ensure property rights are respected) and, simultaneously, there must be public recognition of property as part of an individual's ability to participate in culture.

To provide theoretical support for the relationship between the public and private in the structure of cultural property disputes, this article will explore the groundbreaking work of Alan Audi. Audi argues that "... discussion surrounding the protection or restitution of cultural property has come to rely on a dizzying array of self-referential and self-justifying series of legal theories and counter theories."[18] On this basis, Audi's work reveals the semiotic[19] structure of cultural property arguments.[20] And this article builds on Audi's work by arguing that this semiotic structure is in fact a manifestation of the public/private divide.[21]

Audi suggests that arguments about cultural property are structured by "argument bites." Argument bites are opposed arguments that are often found together in pairs. These pairs emerge because raising one side of the argument bite often provokes someone competent in these arguments to respond with the argument's counterpoint, the other half of the argument bite.[22] These patterns emerge in response to hard cases that fall outside the easily analyzed legal problem.[23] Audi outlines several categories of argument bites that shape arguments of cultural property. These are competence arguments, moral arguments, rights arguments, administrability arguments, and historical arguments.[24] Later in this article, these categories of argument bites will be reexamined in order to uncover the public/private (culture-property) divide in each argument. Audi ends his analysis by suggesting that "there is still much work to be done."[25] This article takes up Audi's challenge by examining one consequence of the semiotic structure he uncovers; that it is shaped by the tension produced by the public/private divide. Moreover this article will illustrate that this tension is not merely structural, it is a product of the theoretical assumptions on which dominant approaches to cultural property law are based.

In undertaking this critical examination of the structure of arguments about cultural property, this article will take direction from Kennedy's discussion about "how to get started" in critical theory. Kennedy argues that first you should "[i]dentify a distinction that drives you crazy . . . ,"[26] then you should "find in each half of the distinction the things, traits, aspects, qualities, characteristics or whatever that were supposed to be located in the other half and vice versa. This is classically called chiasmus . . . ," from there you can "put the question of whether the distinction you just destabilized corresponds to a real division in reality on hold,

suspend it, or put it in parentheses or brackets (Husserl calls this the *epoch*)—turn your eyes away from it and instead try to figure out why the people who use the distinction work so hard to maintain belief in it. . ."[27] Last, "trace the consequences of this distinction . . ." through use of one of the schools of critique.[28] These steps will be revisited at points throughout this article to bolster the assertion that arguments about cultural property are shaped by the public/private divide. For example, following Kennedy's advice, this article will begin with an examination of the nature of the public/private divide itself. It will then *bracket* this finding to unpack the use of this distinction in cultural property arguments through Audi's (and Kennedy's) semiotic structure of cultural property. From this critical examination, this article will propose that the public/private divide provides a structure in which we can understand arguments about cultural property.

While there are many definitions of culture and property, this article chooses not to try to define such disputed concepts as this is unlikely to yield any fruitful conclusions, only a stalemate. Instead this article will focus on the structure of argumentation that shapes these disputes about cultural property examining political theory related to the separate, but linked, concepts of property and culture. In doing so this article addresses three issues of relevance: First, it addresses the key role that concepts of property play in political organization; second, it explains how these concepts of property are directly linked to our understanding of culture; and third, it examines the effect that these links have on our understanding of cultural property disputes.

Moreover, it is necessary to clarify both the scope of this article and the method it will use. Primarily this requires a statement of what this article will not do: It will not undertake a comprehensive examination of forms of argument in cultural property disputes—in this it will build on the interesting work of Alan Audi. It will also not contain a comprehensive genealogy of the concept of property or the concept of culture. It is not an intellectual history of these ideas. Instead, what this article will do is argue that debates about cultural property are generally framed within the public/private divide, an argument that has not yet been fully developed in work on cultural property. As a result the scope of the analysis in this article is limited to those scholars who are instrumental in highlighting or uncovering the structure of cultural property arguments.

THE PUBLIC/PRIVATE DIVIDE

As Horwitz notes, the public/private divide (or distinction as he calls it) ". . . arose out of a double movement in modern political and legal thought."[29] This distinction, a product of the dominant Northern–Western framework of law, is, as he observes, intimately tied to the concept of sovereignty and the modern idea of the nation-state as the creation of a truly "public sphere."[30] However, this leads to claims of unfettered state power, which ultimately provokes a reaction among nat-

ural rights theorists to establish a private sphere that could protect individuals from these claims of power by the state.[31] It is from this basis that the divide between the public and the private is instituted in law.[32] Further, Barnett notes that this divide used in four different senses: (1) as a distinction between "substantive standards of regulation" (Was the harm to society or an individual?);[33] (2) as a distinction between subjects of causes of action (Is it the government or an individual who brings the claim?);[34] (3) as a distinction between the "subjects of legal regulation"[35] (Is the regulation designed to limit the actions of governments or individuals?);[36] and (4) Distinction in the "institutional framework" for enforcing legal regulation (i.e., should the state or private individuals guide the institutions that enforce the law?).[37] Thus, the public/private divide has multiple, and often overlapping meanings. The words *private* and *public* are used in any or all of these ways, sometimes simultaneously.[38] This divide, in all of its senses, influences the ideas of culture and property expanded upon on this article.

As a result, the public/private divide will be understood here in its broadest sense to refer to actions tied to the nation-state or not.[39] So, it makes sense to understand the divide as Horwitz does; as a theoretical construct that historically

> . . . could approximate the actual arrangement of legal and political institutions only in a society and economy with relatively small decentralized nongovernmental units. Private power began to become increasingly indistinguishable from public power precisely at the moment late in the nineteenth century, when large-scale corporate concentration became the norm. The attack on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had been formerly reserved to governments.[40]

As Horwitz also notes, in the United States, this divide reaches its apex in the late nineteenth century and early twentieth century attempts to scientifically and rigidly separate law from politics by enforcing the separation between the public and the private.[41] The reaction to the rigidity this created was harsh. By the 1930s, the legal realists dismiss the public/private divide as purely ideological and based on political premises. While this progressive approach retreats after World War II as a reaction to totalitarianism,[42] by the 1980s, it was once again common in the literature to argue that this divide was in "decline."[43]

But if the public/private divide is in decline, how can one explain its tenacious nature and its continued use in the literature? It is worth noting that most authors in the dominant tradition, however critical they are of the existence of the public/private divide in practice, have accepted the premise that the divide exists—rationalizing its existence either as a theoretical construct or as a by-product of political philosophy. As Lacey notes, "The difficulty lies in the fact that once one engages in a critique of the division, one gets sucked into the very categorization one is attempting to undermine."[44] Horwitz, too, implicitly notes the continued importance of the divide in the history he sets out. And Kennedy explicitly acknowledges the salience of the public/private divide to legal theory when he writes, "[t]he his-

tory of legal thought since the turn of the century is the history of the decline of a particular set of distinctions—those that taken together, constitute the liberal way of thinking about the social world."[45] Regarding the public/private divide, this means that at a minimum, scholars would agree that this distinction forms a framework in which law takes shape within the tradition of the Global North–West.

Therefore, it is the position of this article that the public/private divide continues to have relevance as a core dichotomy in legal thought in the Western tradition. It will be asserted that this salience persists even if, or especially when, it is difficult to apply in practice. This is because it is at these junctures that invocation of the divide is most obviously incongruous. This inconsistency leads to uncomfortable questions as to why the divide is being used in the first place. The point here is, as Lacey suggests, to see how this divide operates "ideologically."[46] And ultimately to argue that it is deployed strategically for political aims. To build on this point, it is necessary to undertake the second of Kennedy's recommendations, to examine this divide in application in political theory as this will help explain the meaning of the divide and its connection to cultural property. Later, Kennedy's third and fourth recommendations will be returned to in the concluding section of this article.

THE CONCEPT OF PROPERTY IN POLITICAL THEORY

As was demonstrated earlier, the public/private divide is still considered a salient aspect of the framework of law within the dominant legal structure in the Global North–West. From this perspective two things become clear: First, one must understand how this framework manifests itself in the structure of arguments about cultural property. This requires in depth examination of the two components of cultural property; concepts of culture and concepts of property. Second, to understand how culture and property have been interpreted in cultural property one must understand the meaning of these concepts as they have developed (and been criticized) in political theory. From there one can meaningfully assess the way these concepts fall into the semiotic discourse of the public/private divide. Consequently, the logical starting point for this examination is to begin with an exploration of the theories of property which have shaped the concept of property in the Global North. Following on this discussion the concept of culture will then be examined.

Classically, liberal theory conflates the concept of individual liberty with the ability of the individual to own property. As John Locke put it,

> Man being born, and has been proved, with equal title to perfect freedom and an uncontrolled enjoyment of all rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property—that is his life, liberty and estate, against the injuries and attempts by other men, but to judge and punish breaches of that law in others, as he persuaded the offence deserves, even with death itself in crimes where the heinousness of the fact, in his opinion requires it.[47]

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Therefore, Locke considers the right to property as coextensive with people's natural rights and a just social order. Moreover, this quotation is taken from a section "of political or civil society," which implies that Locke is locating property at the root of natural law[48] and on this basis, asserting that property is the root of the political order of society. Consequently, in one rhetorical move, Locke makes the right to private property the ultimate guarantor of political order. This linking of private property and public order is important for understanding later theories of property and makes Locke's work worth examining in some further detail.

According to Locke, the idea that public order rests on a foundation of private property is itself tied to notions of individual liberty. Underkuffler notes that for Locke (and the English Whigs more generally) property is given a broad definition. To Locke, property includes more than things, it is a natural right of persons that is present in nature; for Locke property includes a persons' "lives, liberties and estates"—property includes the human person, his or her dignity and physical property.[49] Underkuffler explains that this broad notion of property produces a "moral space" in which the individual can operate,[50] ideally as a space for self-actualization. In sum: Locke defines property broadly to create a private space for self-actualization of the individual person. Moreover, to Locke property is an a priori qualification for full political participation. As a result, for Locke, private property is a requirement to enter the public.

Consequently, Locke's notion of property is "Janus faced." According to Locke, property is simultaneously the guarantor of private liberty and the ticket to enter the public sphere—and it is this dual nature of property that has endured conceptually. This duality implies that there is a link between the role of the state in protection of the right to property and an individual's ability to self-actualize. Property does this by creating a private sphere in which the individual is free from interference. Conversely, this space creates an opposing public space into which individuals enter when they need to enforce their rights or protect or procure property. Therefore, the relationship between the public and private sphere that Locke identifies creates a conceptual divide that all theories of property, and thus cultural property, must address.

Historically, key theorists adopt Locke's Janus-faced view of property. However, where agreement tends to break down among these theorists is over the nature of the relationship between private property and public participation. One important theorist who disagrees with Locke on this point is Immanuel Kant. Like Locke before him,[51] Kant believes that the state is designed to ensure each person's freedom is respected. Further, like Locke, Kant derives the legitimacy of the state from a social contract. As a matter of fact, Ellis calls Kant's point of view "revisionist contractarianism."[52] However, it is here that the similarities between Locke and Kant end.

Kant's ideal state is a "just community" in which individuals "deal with each other at arm's length."[53] This vision of the state has been called a minimal liberal state[54] because in a departure from Locke, Kant sees the state at as a legal entity

arrived at by social contract to minimally secure an individual's rational interests.[55] Thus, Kant wants to limit individual freedom in the name of the interests of the community in so far an individual's rational interests interfere with the rights of others.[56]Consequently, to Kant, the state's right to act derives from an individual's natural right to autonomy, but this autonomy can be limited in the name of the rational interest of the creation of a civil society.[57]

From this natural right to autonomy, Kant derives all other rights. He does so in a manner that has been called formalistic.[58]This formalism is evident when Kant identifies property rights as rights in which we "presuppose a natural right" but that this "does not mean that we were originally or by nature entitled to property."[59] For Kant, property rights are not natural rights in the sense meant by Locke; they are a right that is a natural consequence of a civil society. It does not predate civil society but is a consequence of people joining together in a state.[60]As Kant explains:

> For although each individual's concepts of right may imply that an external object can be acquired by occupation or by contract, this acquisition is only *provisional* until it has been sanctioned by a public law, since it is not determined by any public (distributive) form of justice and is not guaranteed by any institution empowered to exercise this right.[61]

As such, Kant's approach to property is that prior to the creation of the state property rights are "provisionally" guaranteed because "people will need to appropriate objects in order to survive" and so this right to possess things must be protected as part of the social contract in exchange for other social goods such as political stability.[62] Or as Kant puts "[i]f no one were willing to recognize any acquisition as rightful, not even provisionally so, before a civil state had been established, the civil state would itself be impossible."[63] But to Kant, the main difference is that in civil society the laws of property ensure that property is protected by principles of distributive justice.[64]Thus, for Kant, unlike for Locke, property rights exist prior to the state but are only fully protected once a civil society is created.[65]

From this basis Kant concludes that property rights are not to be held in common and that any form of property right other than private possession is contrary to the political order.[66] A necessary precursor to this, however, is that a "sovereign" actor—the legislator or "ruler of the people"[67]—become (at least in theory) the supreme owner of the land, as this allows for property to be "distributed" as opposed to "aggregated."[68] By this, Kant means that the sovereign must theoretically "possess everything" because it is only if sovereigns hold this ability that they can then truly have the power to distribute the land to individuals.[69] As a result, this means that no group in society (class, etc.) can hold land indefinitely because the sovereign can always withdraw this right with just compensation.[70] However, as Ryan notes, "…. the paradox in all this, if there is one, lies in Kant's emphasis on the external, public sphere and yet, to push most of what we value in like into essentially private concerns."[71] Thus, Kant, unlike Locke, believes that property

rights do not predate but derive from the existence of the state. In sum, Kant, like Locke, sees property as a private right (based on the categorical imperative). However, Kant, even more powerfully than Locke, sees the basis for private property in the public sphere and the power of the sovereign.

This examination of Locke and Kant's theories of property leads to several conclusions of relevance at this point: Key theorists of property identify property as a private right. Key theorists also agree that private property is intimately related to participation in the public sphere. Therefore it can be concluded that that there is a clear relationship between the public and the private spheres within the concept of property. Where agreement breaks down, however, is over the best way to balance the Janus-faced nature of private property. It is this tension between the public and the private within concepts of property that theorists continue to struggle with.

THE RELATIONSHIP BETWEEN THE PUBLIC AND THE PRIVATE SPHERES

A more recent example of a political thinker within the Northern–Western tradition who has wrestled with the relationship between the public sphere and private property is Hannah Arendt. Arendt, like Locke and Kant, categorizes property as a private right. For example, Penner describes Arendt's approach to property as "a realm in which the individual engages in the use of tangible things to provide the necessaries of life. . ."[72] but, in a departure from Kant, it also contains the "mysterious side of a person's existence."[73] Consequently, for Arendt, property is necessary because it creates a space from which an individual can participate in the public sphere.[74] Therefore, unlike the Locke or Kant, Arendt sees property from the perspective of its relationship to public participation, and as a result she is an important thinker on the public/private divide and its relationship to the political.

Arendt argues that under the conditions of modernity the institution of property has been eroded and been replaced with wealth. Unlike property, wealth is just economic power, and while property requires wealth, wealth does not require property.[75] Arendt's complaint is that the modern focus on wealth has led to the decline of the institution of property and therefore of the private sphere.[76]And the decline of the institution of property troubles Arendt because her project is to try to reclaim a space for the public sphere in the wake of totalitarianism.

One of the issues Arendt has with totalitarianism is that it subverts the political space, which she describes as the space in which the public and private spheres meet. In an early essay, Arendt equates the ability to access rights (civil rights particularly) with citizenship. Thus, she recognizes that the "rights of man" were intimately identified with the "rights of peoples in the European nation-state system."[77] This identification of rights with the state is problematic as it creates individuals whose rights are not necessarily recognized by their government, the

stateless.[78] To Arendt, the problem of statelessness highlights a weakness in rights theory more generally—that rights depend on recognition by the state. This equation is fatal for her because, as she puts it, "[t]he calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness or equality before the law and freedom of opinion—formulas that were designed to resolve problems *within* their communities—but that they no longer belong to any community whatsoever."[79] This problem was clearly illustrated in the example of Nazi restrictions on Jewish cultural property that opened this article.

These ideas are expanded on in Arendt's discussion of totalitarianism. She notes in her discussion of the "total domination" necessary for totalitarianism that it is an advance on previous horrors not because "everything is permitted" under totalitarianism, an idea she notes that was present in utilitarian versions of liberal political theory, but that under totalitarianism—and this "normal people" reject—"everything is possible."[80] Norris argues Arendt believes "totalitarianism's ideological thinking and the breakdown of the structures that allow for political action in concert cripple common sense."[81] Consequently, Arendt begins from the position that totalitarianism "destroys" the private—the sphere (as seen in the examination of Locke and Kant) of which property is a part.[82] This is an implicit criticism of the way that totalitarianism can use the state to ignore or subvert individual rights. As she notes, "The destruction of a man's rights, the killing of the juridical person in him, is a prerequisite for dominating him entirely."[83] Therefore, to Arendt, totalitarianism obliterates the private sphere leaving no space for the individual. Obliterating the private sphere, she argues, destroys the individual then cannot participate in politics—exercise political judgment—so that they are, as a consequence, unable to enter the public sphere.[84] On this basis, Arendt views the removal of individual rights and destruction of the "judicial person" as a key step in "dominating them entirely."[85] For Arendt it is the relationship between judicial recognition of the person, protection of their property and then the ability to be fully recognized politically that is central.[86] And once the individual is fully dominated, as Arendt notes, everything is possible.

Some of the unresolved issues these observations raise[87] form the basis of Arendt's general political theory, which is developed in her work *The Human Condition*. In this work, Arendt is concerned with the sphere of the active life (the *vita activa*)—which, in classical philosophy, was always contrasted with the preferred category of the life of the mind (the *vita contemplativa*)—a sphere that she felt defined an "underappreciated" series of activities that had come to the fore in modern society.[88] To Arendt, the human condition is bounded by the finality of death, and in between birth and death, people live an active life. An active life is comprised of labor, work, and action. Each of these "activities" is carried out in a different "condition" or sphere of life. Labor is carried out in the "earth"(the "terrestrial" or physical sphere of life); work is carried out in the "world" ("civilization" and action)."[89] Each of these spheres is defined by its relationship to two further principles, which are freedom and distinction. Labor is

least related to freedom and distinction because it is biologically tied to the basic physical need to "produce and consume" in order to live; work is closer to freedom and distinction because it is tied to the need to produce and consume, but for utility, not survival. Work produces things, creating unnatural "spaces," such as art or politics, which bring us together. Thus, work builds a space in which individuals can be distinct and create things to last beyond themselves.[90] Work, she defines as free. Last, she holds that action is the "quintessential political activity" because it "allows humans to initiate a new course of events."[91] Action is the epitome of freedom because it uses "diverse human agents" who act, and act in ways that have meaning (e.g., through speech, an innate human activity).[92] It is through this freedom that humans "reveal their political genius."[93] And for Arendt, politics is a positive activity in which people coordinate on common concerns. Thus, it is quintessentially a "public activity."[94]

It is in contrast to the space required for public activities that the private emerges. As Arendt notes, "[i]t is with respect to this multiple significance of the public realm that the term 'private' in its original sense, has meaning. To lead an entirely private life means above all to be deprived of things essential to a truly human life: to be seen and heard by others, to be deprived of an 'objective' relationship with them that comes from being related to and separating from them through the intermediary of a common world of things, to be deprived of the possibility of achieving something more permanent than life itself. The privation of privacy lies in the absence of others; as far as they are concerned, private people do not appear and therefore it is as though they did not exist. Whatever they do remains without significance or consequence to others."[95] Therefore, the destruction of the public (which Arendt worries about earlier in the work) would also lead to the destruction of the private.[96] This leads her to conclude that there is a "profound connection" between the public and the private, which reveals itself most fully in the idea of property and wealth as outlined earlier. She says that in premodern society, "[p]rivacy was like the other, the dark and hidden side of the public real, and while to be political meant to attain the highest possibility of human existence, to have no private place of one's own (like a slave) meant to be no longer human."[97] Thus, in a manner similar to Locke,[98] she recognizes property as a historical precondition to political participation, as it gives an individual the means (and freedom) to enter the political.[99]

However, Arendt argues that in the modern world these two ideas are divorced, and that this divorce began with the rise of society. "[T]he rise of housekeeping, its activities, problems and organizational divides—from the shadowy interior of the household into the light of the public sphere . . ."—has, Arendt believes, challenged both the private and the political.[100] For Arendt the rise of social, the emergence of activities formerly private, has had the effect of making property public; a point she makes through discussion of the rise of the term "commonwealth."[101] And she argues, because property has become public, it has been narrowed conceptually to include the person itself, a proposition she traces to Locke (and his

labor theory of property). Moreover, she believes this narrowing is dangerous. As she writes: "[t]he greatest threat here is not the ability of private ownership of wealth but the abolition of property in terms of a tangible worldly place of one's own."[102] The removal of a physical space of property leads, in Arendt's view to the revelation of things that "should be hidden."[103] Thus, she argues that "[t]he most elementary meaning of the two realms [the public and the private] indicates that there are things that need to be hidden and others that need to be displayed publicly if they are to exist at all."[104] To Arendt, this distinction is illustrated in the private (not negative) nature of goodness, once public, it is no longer the "good."[105] Therefore, to summarize to this point: Arendt divides the human condition into three activities, labor, work, and action. Politics takes place in the sphere of action—where people take action in a plurality of individuals—and so the political must be public. In order for there to be a functioning political sphere, there must be a corresponding private sphere. Thus like the other theorists examined earlier, Arendt holds that a clear separation between the public and private is essential to the political.[106]

This need to separate the public and private leads Norris to note that for Arendt, "[p]olitical action consists of public speech and deed in a condition of plurality. Because it is essentially concerned with public appearance, politics is the realm of *doxa*, of opinion."[107] And if there is to be a plurality of people who act in public (separate from their private selves), who express their opinion to others there must be a way of deciding between those actions, of judging them as a political action.[108] Consequently, Arendt bases her discussion of the ability to participate in politics (and thereby entering the public) on the ability of individuals to judge, a concept she borrows, from Kant in his *Critique of Judgment*. In this work Kant argues that our judgments of beauty are shared publicly,[109] as opposed to mere questions of taste, which are personal. Beauty is a universal standard because it stems from our ability to "think in place of others," a process that allows us to go beyond our mere subjective opinions and create a universal standard.[110] Thus, in a neat rhetorical move, Arendt incorporates Kant's aesthetic theory of judgment, which is often linked with culture, into her notion of the political. This is crucial for her because she moves her notion of culture into the public sphere. Her question, as Norris notes is "how to create a model of political judgment that will allow some judgments to be recognized as superior to others without collapsing this plurality into identity."[111] Borrowing from Kant she argues that it is this ability to noncoercively "woo" others to our opinion that allows us to exercise political judgment.[112] Arendt then uses the idea of political judgment to explain how private individuals can participate in the political sphere and by extension in the public sphere.

Conceptually, Arendt's notion of "political judgment" leads to a need to protect private property as part of the private sphere within which this wooing can occur. Thus, Arendt, in this regard, is not so different from Locke and Kant in her identification of property as private and separate from the public sphere. However,

Arendt tackles head on the problem of how to connect the public and private spheres, seeing them as mutually constitutive. Moreover, she does so without resorting to Kant's weak notion of contractarianism, which is open to exploitation by the state. Instead she turns Kant's theory on its head—she uses his theory of aesthetic judgment as an alternate conceptualization of the political. In making this link between aesthetics and politics (a link which Norris notes hasn't been uncritically received),[113] Arendt implicitly joins judgments of cultural worth—beauty and so forth—with political judgments; two issues that would otherwise seem opposed when looking at the idea of cultural property, since property is commonly seen as part of the private sphere, and culture is often thought of as a public good. However, Arendt provides a potential link between these two concepts through the idea of political judgment.

Thus, Arendt, together with Kant and Locke illustrate a pattern in leading political theories of property in which property is structured by the relationship between the public and the private. As is evident from this review, the public and private share a dichotomous relationship in which the preservation of each sphere is necessary for the existence and functioning of the other. Moreover, Arendt's use of Kant's theories aesthetic judgments adds a third element to this divide—the political as the link between the private and participation in the public sphere. And crucially, Arendt provides us with a clear link between ideas of culture and ideas of property, which makes Arendt's theories of property particularly important in the discussion of culture. These theories will now be examined in more detail.

THE CONCEPT OF CULTURE IN POLITICAL THEORY

The examination of the concept of culture in political theory picks up where the discussion of the concept of property left off—with a discussion of the work of Arendt. This is because, as noted earlier, Arendt's work on political theory raises a link between the concept of property and the concept of culture. In fact, unlike Locke or Kant, Arendt connects the public and the private (and thus property and culture) through her discussion of the concept of judgment and its role in political participation. In this discussion she focuses specifically on the role of culture in judgment, and thus implicitly links culture, the private and the public. Thus, Arendt's theory is a key link between culture and property within Northern–Western political, and consequently legal thought.

In her essay "The Crisis in Culture: Its Social and Political Significance,"[114] Arendt writes that "culture and politics belong together because it is not knowledge or truth which is at stake, but rather judgment and decision, the judicious exchange of opinion about the sphere of public life and the common world and the decision of what manner of action is to be taken in it. . ."[115] The link between the two concepts is found in "the capacity to judge," which is "a specifically political abil-

ity. . .the ability things not only from one's point of view but in the perspective of all those who happen to be present."[116] Arendt's political judgment is a specific type of judgment, which is valid for all those whose points of view the one making the judgment considers.[117] Additionally, since the judgment is theoretically based on objective information, this act of judging is public.[118] Moreover, because it is based on putting oneself in the place of others, and then (as noted earlier) wooing them to a point view, it is a political act, since it allows a judgment (generally thought of as private) to become public.

Interestingly, Arendt's act of political judgment is also about producing culture. For Arendt, culture is a specifically political act—a judgment made as to what is valid culture by considering the views of all those who the person making the judgment considers valid.[119] Consequently, Arendt stands for the idea that judgments about culture are political. In sum: According to Arendt, cultural judgments are a type of political judgment and therefore cultural judgment acts as a link between private opinions and public appreciation of culture. Thus, culture is inherently public because judgments about culture take place in the same way as political judgments. Moreover, according to Arendt, culture is removed from the private sphere by its need to be politically judged. Therefore Arendt's notion of culture builds on the public/private divide identified in the discussion of property in the previous section. Previously, it was concluded that for each of the key theorists in the dominant Northern–Western tradition, public participation rested on a strong private sphere, identified with a concept of property. This section examined how Arendt extended this discussion of the divide between the public and the private to include the idea of political judgment and how political judgment mediates between private ideas of taste and public ideas of culture. Consequently, one can derive from Locke and Kant the clear idea that property is situated within the private sphere and from Arendt that culture is located in the public sphere through the process of political judgment.

CRITICAL ANALYSIS

The preceding section asserted that arguments about cultural property are shaped by the public/private divide. Moreover, the discussion of the concepts of culture and property establishes that within the dominant framework, culture is considered a public concept and property is considered a private concept. This distinction produces tension because there is a need for public protection of private property (in order to ensure property rights are respected) and a need for the public recognition of property as part of one's ability to participate in culture. As such, legal arguments about cultural property are defined by the opposition of culture as public and property as private.

From this point of view, the "argument bites" that Alan Audi identifies are a natural result of the tension between the private nature of property and the public

nature of culture. The basis of Audi's semiotic examination is the observation that the self-serving, "imperfect," nature of legal arguments has not been recognized outside of legal academics, when in fact many of the actors in cultural property argument (anthropologists, curators, government actors) are engaged in a substantive argument over "ownership" of cultural property.[120] Audi here is hinting at a bigger problem within cultural property arguments that this article will now expand upon.

As noted at the outset of this article, Audi outlines several categories of argument bites that shape arguments of cultural property. To be clear, these are competence arguments, moral arguments, rights arguments, administrability arguments, and historical arguments.[121] However, within each of these categories, he identifies several argument bites that can now be examined in order to uncover the existence of a tension between the public and the private (culture and property) in each argument. Before beginning, it is important to note that this analysis is intended to deepen or add to Audi's prescient analysis, not negate it. Moreover, it will not be possible to examine each argument in detail (although it is argued that this could be done), so samples of each category of arguments will serve to make the point.

For example, in competence arguments, Audi identifies the following argument: "Source nation patrimony laws should not be enforced in domestic (market country courts) because they are against public policy *versus* source nation patrimony laws establish ownership and we must honor ownership as defined by the state in question out of deference, public policy or comity."[122] The first "competence" argument, that source nation patrimony laws are against public policy, is the public argument. Culture is inherently public, and private laws of other nations should not interfere with the policy of a state that has determined that this piece of property is part of its culture. The second argument is essentially the opposite. Private property rights are valuable in and of themselves, and rights to property of other states should be protected, regardless if the property has public (cultural) value.

In moral arguments, Audi identifies the argument that "property should be considered the inalienable (nontransferable) property of states *versus* cultural property is property like any other (feely alienable)."[123] This argument is a straightforward instance of the public/private divide. The first argument, that property is the alienable property of the state treats cultural property as inherently public (as long as one identifies the public solely with the state, which we often do in practice). The second argument, cultural property is freely alienable, is clearly an instance of privileging cultural property as private property. Similarly, his argument that "buyers should not have to check the provenance of objects" is a statement that there is no public interest in the history of objects of cultural property. A requirement of due diligence would imply that a spurious provenance might in some way override the private property rights. So naturally, this opposite argument appears in the second half of the argument bite that "buyers should be

obligated to exercise due diligence to check provenance of objects."[124] Unsurprisingly, this second argument about due diligence implies a public interest in objects of cultural property.

Along similar lines, in his "rights arguments," Audi identifies the following argument bite: "States have the right to limit export or trade of cultural property *versus* people have the right to dispose of cultural property however they wish."[125] Again, at its root, this is an argument that falls into the public/private divide, with the first argument stressing the public interest in cultural objects, the second object stressing its private property nature. On this point, it is not surprising that in his administrability arguments, he uses the following argument: "Forcing buyers to verify provenance is unduly burdensome *versus* We do not want to give buyers an incentive to turn a blind eye to wrongdoing."[126] In this case, the argument bite begins by taking the private part of the argument—we do not want to inhibit private property transactions. Conversely, the implication that private property transactions should not be supported when they cover up wrongdoing implies a public interest in objects of cultural property. Finally, Audi examines historical arguments of cultural property. One example of he gives of these arguments is as follows: "The state or group claiming title to this property has no historical claim to the property because so much time has elapsed *versus* the state or group claiming the title has a historical claim for a fact specific reason."[127] While this argument initially seems to be an argument of international versus national approaches to cultural property, it can also be read as an argument for private property rights to be enforced versus public claims of groups or states to property based on arguments of culture.

While Audi does not raise this specifically, it is clear that sitting in the background of arguments about cultural property is the public/private (a.k.a. culture/property) divide. Further, Audi asserts that these argument bites are used "mechanically,"[128] but this article will also suggest that this semiotic structure is used instrumentally—as a rhetorical move by states or actors to advance whichever claim (public or private) that best matches their interest in a given property. This potential for instrumentality becomes particularly evident when one examines the arguments that Audi argues "cluster" together. These arguments cluster together through rhetorical moves that Kennedy calls *operations*—traditional patterns or ways of making these arguments.[129] By raising one argument in the cluster, one automatically calls attention to the other arguments in the cluster with which one could support or counter the argument.[130] Last, clustering ultimately leads to "nesting "or reproduction of these stock arguments, which ultimately ends up structuring cultural property arguments in patterns.[131] However, the discussion of leading approaches to culture and property earlier illustrates that these patterns are not merely structural, they are a product of the theoretical assumptions on which dominant approaches to cultural property law are based. In sum, this analysis adds to Audi's analysis by asserting that the argument bites he uncovers are an instrumental product of the public/private divide.

The discussion of property as private and culture as public was specifically developed in the work of Locke and Kant. This section added to this analysis by demonstrating that Audi's argument bites operate through the tension of the public/private divide. This tension can be diagramed as follows:

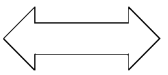
Private Public

Property _____ Culture

But this diagram is not yet complete. As was noted earlier, Arendt argues that the relationship between the private and the public is mediated through the political through the act of judgment as it is through judgment that culture moves from the private sphere into the public sphere. Thus, much as the legal realists asserted earlier in the last century, it would seem that the political acts as a basis for determinations of cases of cultural property. This is evident in the fact that when examined in practice, as in the example of Nazi policy on Jewish cultural property, that opened this article, the divide is used both ways. As the discussion of Arendt earlier indicated, the political is the space in which the public and private meet. Therefore, the political is what acts as the bridge between the concepts of culture and the concepts of property.

As such, a revised schema for understanding arguments of cultural property is as follows:

Property Culture



Politics

Therefore, the relationship between culture and property in the cultural property argument is theoretically dichotomous, but how the divide is negotiated or which argument is chosen in a given case is inherently political. It is used instrumentally. Culture is public, but it depends on the protection of private property and property is private but it depends on the public protection of property. Therefore it is clearly the political that mediates or allows for this relationship between the public and the private to develop. Culture and property are opposed concepts, mediated instrumentally through the filter of the political.

CONCLUSION

To return to the opening premise, this article asks a deceptively simple question. Are arguments about cultural property structured by the public/private divide? In short, the answer to this question is yes. This divide, which is well entrenched in

political theories and by extension in legal theory, is found to apply to the concept of property and the concept of culture. Moreover, this article asserts that these concepts operate as opposite poles of argumentation, but between these two poles any argument advanced is based on what is politically expedient, so this divide is mediated by the political. Finally, this structure then gave further depth to the understanding of the argument bites that often shape arguments of cultural property. In sum, arguments about cultural property are in fact shaped by relationship between the public sphere and the private sphere, as mediated strategically by political judgment.

This last point goes some way to answering the question bracketed earlier concerning continued relevance of the public/private divide. The divide is not ironclad, in fact, it serves a different purpose—it allows those who are making claims about cultural property to argue from side of the divide that serves its interest best. These interests will be mediated instrumentally, that is, politically. This goes some way to further explaining the apparent difficulty of advancing many cultural property claims through law. Thus, this article begins to fill a gap in the literature between the debates over the role of the state in protecting cultural property. Future research will expand on this final point and will examine the practical application of this model. Critical legal scholars argue that there are "unconscious" aspects to law,[132] so this future work will argue that debates about cultural property are intimately tied to this legacy of Northern–Western political theory and the privileged position it grants to ownership (individual or state). This leads to two final points. The model of cultural property outlined in this article has more general application within the area of cultural property. Consequently, future research will explore how the public/private divide in fact shapes debates about the national or international nature of culture, by its privileging of the nation-state as the primary protector of property rights to goods of cultural worth. Other promising avenues for application of this are to explore the replication of this divide in transnational cultural property disputes, such as restitution cases. Finally, feminist critiques of the public/private divide can also be applied understanding the complex nature of the divide itself and its continued salience. Future work will take up all these challenges.

ENDNOTES

1. The process of annihilation of European Jewry in Nazi Germany followed a specific pattern and development. Hilberg, *The Destruction of the European Jews*; See also, Rich, "Genocide as a Sociopolitical Process," 402. Most prominently, Hilberg proposes the following schema for the destructive process: definition, dismissal of employees and confiscation of business firms, concentration, exploitation of labor and starvation of members, annihilation and confiscation of personal effects. Hilberg, *The Destruction of the European Jews*, 267. For purposes of this article, Miller's simplification of Hilberg's schema will be used. Miller identifies his schema as beginning with identification of the Jewish population, then ostracism of the Jewish population, then property confiscation, and last annihilation. Miller, *Nazi Justiz*, 3. Rickman, *Conquest and Redemption*, 10.

2. F. T. Birchall, "Propagandist Art is Nazis' Demand," *The New York Times*, 10 May 1933, 10.

3. Birchall, "Propagandist Art is Nazis' Demand."

4. Birchall, "Propagandist Art is Nazis' Demand."

5. Further, as part of this separation of Jews from German society, the Nazi propaganda machine became increasingly interested in defining who was Jewish. See Hilberg, *The Destruction of the European Jews*, 31.

6. Associated Press, "Hitler Upholds Art, Scores Jews," *The New York Times*, 12 September 1935, 9.

7. O. D. Tolischus, "Nazis in New Drive on Jews in Trade," *The New York Times*, 8 October 1935, 13. The decree as quoted in Miller, *Nazi Justiz*, 98; See also, Dean, "Seizure of Jewish Property in Europe," 22; Miller, *Nazi Justiz*, 98; For further discussion see, e.g., Miller, *Nazi Justiz*, 98–99; See also Alders, "Organized Looting," 173.

8. O. D. Tolischus, "Germany Delays New Law on Jews," *The New York Times*, 19 December 1935, 22.

9. See, for example Rickman, who notes that "Soon the practice of Aryanization increased evolving into an institution where outright confiscation became the practice." Rickman, *Conquest and Redemption* 17.

10. By December 1938, there was a comprehensive degree requiring "liquidation or forced sale" of any business deemed a Jewish "commercial establishment." Bajohr, "Aryanization and Restitution in Germany," 37.

11. In Germany, registration was required by decree of 26 April 1938. Bajohr, "Aryanization and Restitution in Germany," 37; Rickman, *Conquest and Redemption*, 14.

12. "Munich Jews Art Taken," *The New York Times*, 18 November 1938, 3; See also Miller, *Nazi Justiz*, 98 where this example was first brought to my attention.

13. "Goebbels Sees Art Restored to Folk," *The New York Times*, 16 July 1939, 20.

14. "Goebbels Sees Art Restored to Folk."

15. "Goebbels Sees Art Restored to Folk."

16. "Goebbels Sees Art Restored to Folk."

17. As Olsen notes "The distinction between the public and private can of course mean several different things. The two public/private dichotomies that are most important to feminist analysis of U.S. law are the State/Civil Society dichotomy and the Family/Market dichotomy." This first dichotomy "distinguishes 'the State' from the rest of society." It is this notion of the public and private that is referred to throughout this article when the term public/private divide is used. See Olsen, "International Law," 157. See also Lacey, "Theory into Practice." This divide, it has been argued, is also central to the legal relations between states (and therefore cultural property claims) in so far as international law (a) excludes the private (internationally or domestically) from its purview, or (b) uses the public/private divide strategically to the detriment of the private (and thus, feminists argue, women). See Engle, "After the Collapse of the Public/Private Distinction," 143 ff. These critiques have provoked a response in the literature (see, e.g., Lacey, "Theory into Practice," 100 ff), but it is outside the scope of this article to address them all here. These critiques are important in establishing the point that the public/private divide is central to our world view in the modern West and so are key to understanding the structure of arguments about cultural property as well as its exclusions and weaknesses.

18. Audi, "Semiotics of Cultural Property Argument," 131–132. I undertake this analysis in full awareness of the trenchant comments on Audi's work in the same journal and Audi's rejoinder.

19. Semiotics is defined as the "[t]he study of signs or symbols and their use or interpretation." Oxford Dictionaries. http://oxforddictionaries.com/view/entry/m_en_gb0754040#m_en_gb0754040.007 (accessed 9 May 2011).

20. Audi, "Semiotics of Cultural Property Argument, "132.

21. Although many argue that ideas such as the "public" or "private" originate in Roman law, I will begin from the supposition that there is something fundamentally different about these conceptual oppositions as they have been applied in modern political writings in the Global North or West as they refer to the "state" and "everything else." See, for example and contra, Barnett, "Four Senses of the Public Law," 270, n. 5. Further, by the terms "Global North or Northern," I refer to

the fact that global difference is hard to conceptualize and that the theorists discussed here are not representative of all traditions. This is coupled with the term *Western* in order to refer to the fact that these theorists come from a specifically European tradition. See Del Casino, *Social Geography*, 26.

22. See Audi," Semiotics of Cultural Property Argument," 133; See generally, Kennedy, "A Semiotics of Legal Argument," 325, 329.
23. Audi," Semiotics of Cultural Property Argument," 134.
24. Audi, "Semiotics of Cultural Property Argument," 134–136.
25. Audi, "Semiotics of Cultural Property Argument," 150.
26. Kennedy, "The Semiotics of Critique" 1189.
27. Kennedy, "The Semiotics of Critique" 1189.
28. Kennedy, "The Semiotics of Critique" 1189.
29. Horwitz, "History of the Public/Private," 1423
30. Horwitz, "History of the Public/Private," 1423.
31. Horwitz, "History of the Public/Private," 1423.
32. Kennedy would argue that this is part of the "liberal way of thinking about the social world." As a result he would also argue that that these distinctions are on the decline. See Kennedy, "Decline of the Public/Private," 1349. This article is interested in the existence of the distinction and its effects and so fits nicely into Kennedy's discussion of the decline of this distinction.
33. Barnett, "Four Senses of the Public Law," 268 ff.
34. Barnett, "Four Senses of the Public Law," 269, ff.
35. Barnett, "Four Senses of the Public Law," 270 ff.
36. See generally, Barnett, "Four Senses of the Public Law," 270ff.
37. Barnett, "Four Senses of the Public Law," 271, ff.
38. Barnett notes that these relationships are "strategic" in so far as once one aspect of the category is invoked it often leads to one of the other forms being used as well. This bolsters the argument for instrumentality made in this article. See for example, Barnett, "Four Senses of the Public Law," 272–273.
39. See, for example, Olsen, "International Law," 157, as discussed above.
40. Horwitz, "History of the Public/Private," 1428.
41. Horwitz, "History of the Public/Private," 1425.
42. Horwitz, "History of the Public/Private," 1427.
43. See Horwitz on Stone. Horwitz, "History of the Public/Private," 1427; See generally, Kennedy, "Decline of the Public/Private."
44. Lacey, "Theory into Practice," 101.
45. Kennedy, "Decline of the Public/Private," 1349.
46. Lacey, "Theory into Practice," 102.
47. Locke, *Second Treatise*, 38 (s. 87).
48. Locke, *Second Treatise*, 35 ff.
49. Underkuffler, "On Property," 138; Ideally Underkuffler wished to recover such a broad definition of property for U.S. Constitutional jurisprudence.
50. Underkuffler, "On Property," 138.
51. Ryan, *Property and Political Theory*, 73–74.
52. Ellis, "Citizenship & Property Rights" 545.
53. Ryan, *Property and Political Theory*, 76.
54. Ryan, *Property and Political Theory*, 76.
55. Ryan, *Property and Political Theory*, 79.
56. Reiss, "Introduction," 22.
57. Reiss, "Introduction," 22.
58. Ellis, "Citizenship & Property Rights," 549.
59. Williams, "Kant's Concept," 34.
60. Williams, "Kant's Concept," 38.
61. Kant, *The Metaphysics of Morals*, 138.

62. Ryan, *Property and Political Theory*, 83.
63. Kant, *The Metaphysics of Morals*, 138.
64. Kant, *The Metaphysics of Morals*, 138.
65. Kant, *The Metaphysics of Morals*, 137–138. Kant argues that only the distributive justice of coercive law can fully ensure these rights, which may or may not be fully protected otherwise.
66. Ryan, *Property and Political Theory*, 81.
67. Kant, *The Metaphysics of Morals*, 141, 144.
68. Kant, *The Metaphysics of Morals*, 148.
69. Kant, *The Metaphysics of Morals*, 148.
70. Kant, *The Metaphysics of Morals*, 148.
71. Ryan, *Property and Political Theory*, 75.
72. Penner, *Idea of Property in Law*, 215.
73. Penner, *Idea of Property in Law*, 215.
74. Penner, *Idea of Property in Law*, 216.
75. Penner, *Idea of Property in Law*, 216.
76. Penner, *Idea of Property in Law*, 216.
77. Baehr, *Portable Hannah Arendt*, "Rights of Man," 32.
78. Baehr, *Portable Hannah Arendt*, "Rights of Man," 34.
79. Baehr, *Portable Hannah Arendt*, "Rights of Man," 36.
80. Baehr, *Portable Hannah Arendt*, Origins of Totalitarianism," 122.
81. Norris, "Arendt, Kant," 174.
82. Norris, "Arendt, Kant," 174.
83. Baehr, *Portable Hannah Arendt*, Origins of Totalitarianism," 132.
84. Norris, "Arendt, Kant," 174.
85. Baehr, *Portable Hannah Arendt*, Origins of Totalitarianism," 132.
86. The consequences of this denial are eloquently discussed in Baehr, *Portable Hannah Arendt*, "Origins of Totalitarianism," 132ff.
87. As Baehr notes, "In the early fifties Arendt had planned to write a coda [to the Origins of Totalitarianism] on the totalitarian elements of Marxism. . . ," which eventually became a series of works that includes Between Past and Future, infra and the Human Condition. He cites to Bernard Crick who calls these "footnotes" to her earlier work. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxvii.
88. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxviii.
89. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxviii.
90. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxviii–xxix.
91. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxix.
92. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxix.
93. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxx.
94. Baehr, *Portable Hannah Arendt*, "Editor's Introduction," xxx.
95. Baehr, *Portable Hannah Arendt*, "The Human Condition," 205.
96. Baehr, *Portable Hannah Arendt*, "The Human Condition," 207.
97. Baehr, *Portable Hannah Arendt*, "The Human Condition," 208.
98. Thanks to Zoran Oklopcic for making this connection more explicit.
99. Baehr, *Portable Hannah Arendt*, "The Human Condition," 208–209.
100. Baehr, *Portable Hannah Arendt*, "The Human Condition," 191.
101. Baehr, *Portable Hannah Arendt*, "The Human Condition," 210.
102. Baehr, *Portable Hannah Arendt*, "The Human Condition," 212.
103. Baehr, *Portable Hannah Arendt*, "The Human Condition," 213.
104. Baehr, *Portable Hannah Arendt*, "The Human Condition," 214.
105. Baehr, *Portable Hannah Arendt*, "The Human Condition," 214–215.
106. This position has been contentious and has led her to stances that many, including this author, would criticize. Baehr notes her relationship to feminism, her position on affirmative action, and her position on desegregation. See, for example, Baehr's introduction in *Portable Hannah Arendt*,

xxxiv ff, and "Reflections on Little Rock", 231. This commitment to the public and private led Arendt into some morally frought territory as it is precisely the relationship between the public, private and political that allows for the very ambiguity Arendt herself sought to avoid. It is impossible to hermetically seal these categories as she would have preferred. Further, some have argued that Arendt's distinction was always historically untenable. As Norris notes, "The questionable accuracy of Arendt's account of the Greek experience has led some critics to reject her fundamental distinction between the public and the private." Norris, "Arendt, Kant," 169; although Norris himself is not convinced of this argument from historical inaccuracy, it is an important point to note. Norris, "Arendt, Kant," 169–170. Finally, her commitment to these spheres shows how important they are within the Northern–Western political tradition.

107. Norris, "Arendt, Kant," 170.
108. Norris, "Arendt, Kant," 170–174.
109. Norris, "Arendt, Kant," 166, 175.
110. See generally, Norris, "Arendt, Kant," 166–167.
111. Norris, "Arendt, Kant," 166.
112. Norris, "Arendt, Kant," 167.
113. Norris, "Arendt, Kant," 174.
114. Arendt, *Between Past and Future*, 197–226, "The Crisis in Culture."
115. Arendt, *Between Past and Future*, 223, "The Crisis of Culture."
116. Arendt, *Between Past and Future*, 221, "The Crisis of Culture."
117. Arendt, *Between Past and Future*, 221, "The Crisis of Culture."
118. Arendt, *Between Past and Future*, 220, "The Crisis of Culture."
119. See generally discussion of Arendt, above.
120. Audi, "Semiotics of Cultural Property Argument," 131–132.
121. Audi, "Semiotics of Cultural Property Argument," 134–136.
122. Audi, Semiotics of Cultural Property Argument," 134.
123. Audi, "Semiotics of Cultural Property Argument," 134.
124. Audi, "Semiotics of Cultural Property Argument," 135.
125. Audi," Semiotics of Cultural Property Argument," 135.
126. Audi, "Semiotics of Cultural Property Argument" 135.
127. Audi, "Semiotics of Cultural Property Argument," 136.
128. Audi, "Semiotics of Cultural Property Argument," 136.
129. Audi, Semiotics of Cultural Property Argument," 136, See generally Kennedy's discussion of operations at Kennedy, "Semiotics of Legal Argument" 329 ff.
130. Audi relying on Kennedy, Audi, "Semiotics of Cultural Property Argument," 137.
131. Audi, relying on Kennedy. Audi, "Semiotics of Cultural Property Argument," 137–138.
132. As Goodrich notes in his study of the link between legal rhetoric and psychoanalysis: "The analysis of unconscious aspects of legal decision-making is not a new theme either within European or Anglo-American legal thought." Goodrich, "Jani Anglorum," 108.

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