

## RECLAIMING THE PUBLIC

*Reclaiming the Public* defines and defends the intrinsic value of “the public” that resides in our public institutions and the officials that run them. The book argues that public institutions do not simply act for us but instead speak and act in our name; that is, they represent us. Representation requires that decisions made by public institutions or officials are consistent with the perspectives of citizens. If the decisions satisfy this requirement, these decisions are attributable to citizens, and citizens can be held responsible for them. This theory of political authority accounts for major features of our legal system, such as the noninstrumental grounds for the separation of law-making powers, the non-instrumental value of constitutions, the noninstrumental value of the common law, the limits of privatization, the nature and value of public property, and the impermissibility of using artificial intelligence in setting certain policies and making certain decisions.

Avihay Dorfman is a law professor at Tel Aviv University. His studies elaborate the non-contingent implications of the law for the possibility of establishing forms of valuable and just interactions between, and among, free and equal persons. He is the coauthor of *Relational Justice: A Theory of Private Law* (2024).

Alon Harel holds the Mizock Chair at the Hebrew University of Jerusalem. He has written extensively on political, legal, and constitutional theory. In his recent work, he has shown that legal institutions and procedures have intrinsic rather than instrumental value. He is the author of *Why Law Matters* (2014).

# Reclaiming the Public

**AVIHAY DORFMAN**

Tel Aviv University

**ALON HAREL**

Hebrew University of Jerusalem



**CAMBRIDGE**  
UNIVERSITY PRESS

Cambridge University Press & Assessment  
978-1-009-32716-9 — Reclaiming the Public  
Avihay Dorfman, Alon Harel  
Frontmatter  
[More Information](#)



Shaftesbury Road, Cambridge CB2 8EA, United Kingdom  
One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India  
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781009327169](http://www.cambridge.org/9781009327169)

DOI: 10.1017/9781009327206

© Avihay Dorfman and Alon Harel 2024

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2024

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging-in-Publication Data*

NAMES: Dorfman, Avihay, author. | Harel, Alon, author.

TITLE: Reclaiming the public / Avihay Dorfman, Tel Aviv University;  
Alon Harel, Hebrew University of Jerusalem.

DESCRIPTION: Cambridge, United Kingdom ; New York, NY :

Cambridge University Press, 2024. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2023042494 | ISBN 9781009327169 (hardback) | ISBN 9781009327206 (ebook)

SUBJECTS: LCSH: Public institutions – Law and legislation. | Separation of powers. |

Privatization – Law and legislation. | Government property. |

Artificial intelligence – Law and legislation.

CLASSIFICATION: LCC K1366 .D67 2024 | DDC 320.01/1–dc23/eng/20231003

LC record available at <https://lccn.loc.gov/2023042494>

ISBN 978-1-009-32716-9 Hardback

ISBN 978-1-009-32717-6 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

*For my parents: Nehama and Natan Dorfman, A.D.*

*For my parents: Yehsayahu Harel (Herold) Aliza Harel (Guttman), A.H.*

## Contents

<i>Acknowledgments</i>	<i>page</i> ix
<b>Introduction</b>	1
<b>1 A Public Conception of Political Authority</b>	14
<b>2 Law as Standing</b>	41
<b>3 Speaking in a Different Voice: The Necessity of Institutional Pluralism</b>	64
<b>4 Inherently Public Goods</b>	94
<b>5 Against Privatization as Such</b>	124
<b>6 Public Ownership</b>	149
<b>7 Why Not Artificial Intelligence? The Normative Status of Public Algorithms</b>	171
<b>Concluding Remarks</b>	188
<i>Index</i>	193

## Acknowledgments

Some sections of this book draw on our previous writings, though at times with significant revisions, and we gratefully acknowledge permission for including here from Avihay Dorfman and Alon Harel, *Law as Standing*, 4 OXFORD STUD. PHIL. L. 93 (John Gardner et al. eds., 2021); Avihay Dorfman and Alon Harel, *The Necessity of Institutional Pluralism*, OXFORD J. LEGAL STUD. (forthcoming 2023); Avihay Dorfman and Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67 (2013); Avihay Dorfman and Alon Harel, *Against Privatization as Such*, 36 OXFORD J. LEGAL STUD. 400 (2016); Avihay Dorfman, *Public Ownership*, L. & PHIL. (forthcoming 2023); Alon Harel, Noam Kolt, and Gadi Perl, *Automation as Privatization* (unpublished manuscript).

These papers benefited from comments by many colleagues and by workshop and conference participants at the University of Cambridge, Columbia Law School, Copenhagen Business School, Haifa University, the Hebrew University, Keele University, King's College, Minnesota Law School, the National University of Singapore, the University of Oxford, the conference *Privatization: A Contested Concept* at Tel Aviv University, the Progressive Property Conference, Ramat Gan College of Law, Tel Aviv University, University of Texas at Austin, the University of Chicago, University College London, the University of Toronto, the University of Virginia, and Wissenschaftskolleg, Berlin (Institute for Advanced Studies).

For helpful comments on this manuscript or parts of it we are very grateful to very many who often contributed to the ideas without even being aware that they would ultimately result in a book. These include: Arthur Applbaum, Nick Barber, Debby Becher, Bethany Berger, Brian Bix, Therese Bjorkholm, Billy Christmas, Margit Cohn, Chiara Cordelli, Hanoah Dagan, Michael Dorf, Anthony Duff, Rashmi Dyal-Chand, David Enoch, Chris Essert, Yuval Eylon, John Finnis, Liz Fisher, Stephen Galoob, the late John Gardner, Paul du Gay, Dieter Grimm, Doug Harris, Ori Herstein, David Heyd, Tarunabh Khaitan, Maris Kopcke Tinture, Shelly Kreiczer-Levy, Roy Kreitner, Dimitrios Kyritsis, Henrik Lando, Ronit Levine-Schnur, Rotem Levy, Martin Loughlin, Suzie Love, John Lovett, Doreen Lustig, Andrei Marmor, Gabriel Mendlow, Lukas Meyer, Martha Minow, Kolja Moeller, Hanri Mostert,

Tim Mulvaney, Yossi Nehushtan, Manish Oza, James Penner, Ariel Porat, Iddo Porat, Arthur Ripstein, Marc Roark, Nicole Roughan, Yara al Salman, Assaf Sharon, Adam Shinar, Daniel Schönplflug, Konstanze von Schütz, Anat Scolnicov, Anna Stilz, Victor Tadros, François Tanguay-Renaud, Malcolm Thorburn, Kevin Toh, Kim Treiger, Daniel Viehoff, Sasha Volokh, Nicholas Vrousalis, Rachel Walsh, Jacob Weinrib, Yoel Yakir, and Lorenzo Zucca. Finally, we thank Matt Gallaway of Cambridge UP, and his team, for outstanding and professional support.

Recent developments in Israeli politics (the failed regime overhaul) reinforced our conviction that Reclaiming the Public has important implications for the real world, as the real world is much more fragile than we used to think partly because our public institutions are far more vulnerable to populist and theocratic visions of the general interest.

The authors wish to note the financial support of ISF grant no. 630/13. Alon Harel wishes also to note the financial support of a grant from the German-Israeli Foundation for Scientific Research and Development, GIF grant no. 1557 on the subject of legal populism.