International Journal of Law in Context

http://journals.cambridge.org/IJC

Additional services for ***International Journal of Law in Context:***

Email alerts: Click here
Subscriptions: Click here
Commercial reprints: Click here
Terms of use : Click here

The rights of the dead through the prism of Israeli succession disputes

Daphna Hacker

International Journal of Law in Context / Volume 11 / Issue 01 / March 2015, pp 40 - 58
DOI: 10.1017/S1744552314000354, Published online: 02 March 2015

Link to this article: http://journals.cambridge.org/abstract_S1744552314000354

How to cite this article:
Daphna Hacker (2015). The rights of the dead through the prism of Israeli succession disputes. International Journal of Law in Context, 11, pp 40-58 doi:10.1017/S1744552314000354

Request Permissions : Click here

CAMBRIDGE JOURNALS

Downloaded from http://journals.cambridge.org/IJC, IP address: 132.66.11.212 on 06 Mar 2015

International Journal of Law in Context, 11,1 pp. 40–58 (2015) © Cambridge University Press 2015
doi:10.1017/S1744552314000354

The rights of the dead through the prism of Israeli succession disputes

Daphna Hacker*

Abstract

This paper aims at contributing to the evolving debate over the rights of the dead by providing it with concrete empirical socio-legal context. A pioneering study of succession disputes, conducted in Israel, exposes a gap between a prominent judicial promise to respect the wishes and guard the dignity of the deceased testator, and the actual action taking place behind this rhetoric. The findings reveal that the testator's dignity and wishes are trampled during testamentary procedures, when demeaning allegations about his or her mental and physical competence are allowed, and personal and medical information is exposed, and when the judge approves settlements that diverge from the testator's last will in the name of familial reconciliation, even though in most cases there are no nuclear family ties between the rival parties. These findings are discussed in the light of an original typology mapping the theoretical controversies over posthumous rights, to highlight some of the possible normative implications of the project for the law on the books and law in action related to property division after death.

I. Introduction

Do the dead have rights?[1] Surprisingly, while this question has stirred a vibrant discussion among philosophers, the legal literature on the rights of the dead is scant and has only recently started to evolve (Madoff, 2010, p. 5). While some argue that, at least in the US, there is an accelerating trend to grant greater and greater rights to the dead (Smolensky, 2009; Madoff, 2010), only few systematic attempts were made until now to learn about the ways the law in different countries treats posthumous rights and interests (e.g., Birnhack, 2008; Friedman, 2009; Smolensky, 2009; Madoff, 2010). Furthermore, very little is known empirically on the action taking place in the shadow of the law relevant to rights after death.

This paper aims at addressing this lacuna and at enriching this evolving literature by focusing on the testator's right to dignity in succession battles taking place in the Israeli legal field.[2] The paper is based on a pioneering empirical study, which included an analysis of not only judicial rulings in the

* Law Faculty and Women and Gender Studies Program, Tel Aviv University. Email: dafna@post.tau.ac.il.

This research was supported by The Israel Foundation Trustees (2006–2008) and The Israel Science Foundation (grant No. 514/09). I thank my research assistants Einat Meytahl, Roni Liberson, Nasreen Alemy-Kabha and Dana Naor, and the officials who made the research field accessible. I am also grateful to Gregory Alexander, Michael Birnhack, Glenn Cohen, Hanoch Dagan, Shelly Kreiczer Levy, Shai Lavi, Ray Madoff, Daniel Monk, Yael Tzach, and the anonymous reviewers, as well as to the participants of the symposium 'Dignity on the Margins of Humanity and Beyond', Tubingen University, September 2011; the members of the Israeli Family Law Forum; the participants of the faculty seminar at Cornell University School of Law; and the participants of the advanced students seminar at Hebrew University Faculty of Law, for their comments on previous drafts. Responsibility for the data and opinions presented in this paper is that of the author alone.

1 The debate over the dead's rights is relevant to the deceased's property (Chester, 2007), body, reputation, artistic creation and privacy (Birnhack, 2008), and more recently even to his reproductive autonomy that might lead to posthumous parenthood (Smolensky, 2009).

2 On the 'legal field' concept, see Bourdieu (1987); Hacker (2008).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

Supreme Court and Family Court, but also documents found in the Family Court's files, which reveal the parties' arguments and the results of their out-of-court negotiations. Also, an interview was conducted with the judge who heard most cases in the Family Court studied. This methodology allows a detailed case-study that grounds the philosophical debate over the rights of the dead in a specific socio-legal context. This contextualisation contributes to the discussion of the moral and normative questions related to testation, as well as to the discussion over posthumous rights in general.

The right to dignity was chosen as, under Israeli law, it is a meta-right, related to the very essence of the human and connected to many other rights, including bodily rights, property rights and identity rights (Karp, 1995; Englard, 1999; Barak, 2001). Moreover, human dignity has become a widely utilised concept in many other jurisdictions, with 84 per cent of the world's countries including it in their constitution by the end of 2012, though, in most cases, not as an all-encompassing right as in Israel (Fyfe, 2007; Meltzer Henry, 2011–2012; Waldron, 2013; Shulztiner and Carmi, 2014). Finally, the right to dignity is a useful case-study to examine the rights of the dead, as the Israeli legal system recognises its survival postmortem.[3]

The next part of the paper offers an original typology of the philosophical debate over the question of the rights and interests of the dead. Part III is devoted to the empirical study of succession disputes in Israel, and it details its methodology and findings. Most importantly, the findings reveal a tension between the judicial rhetoric on the judge's duty to protect the dignity of the deceased, and the widespread demeaning claims against the deceased's mental and physical abilities and the ignoring of her will in settlements approved by the court. Part IV will conclude with a discussion of the normative implications of the findings in the light of the theoretical typology offered at the outset, for the law on the books and for law in action related to property division after death.

II. Rights after death – a typology

Philosophical and legal discussions on the dignity of the dead are rare (Meyer, 1995; Smolensky, 2009). However, one can extrapolate on dignity after death from the more general and vivid philosophical debate over posthumous rights and interests. In this section, I would like to offer my own typology of arguments found in this debate, which includes three categories: one that includes arguments recognising interests and rights of the dead; one that includes arguments objecting to the possibility that the dead have interests and rights; and one that recognises the interest of the living to affect events after their death, and the rights of the living this interest might yield.

2.1 The dead have rights

A perception that the dead have rights can be driven by a religious belief in the afterlife. If a person does not cease to exist upon his death, then he can still have a right to dignity. An example of such a belief can be extrapolated from the Jewish religious duty of the children to respect their deceased father. Arye Edrei (2004) argues that this duty can only be understood by accepting a linkage between the action of the living children and the fate of the dead father, a linkage that allows the atonement of the father through the actions of his children. Of course, the acceptance of such a linkage depends on a belief in the survival of the soul and its judgment in the afterlife (Tikochinsky, 1960). Another Jewish theological concept supporting the duty to respect the dead

3 It is unclear to what extent human dignity is relevant to the dead in other jurisdictions. The German Federal Constitutional Court ruled, without elaborating, that the right to dignity, protected by the Constitution, is not interrupted by a person's death; see The German Federal Constitutional Court's Decisions, vol. 30, 173 (1971) (Ger.), suggesting that Israel is not alone in recognising posthumous dignity.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

is the linkage between the human and the divine. Since the human body and soul embody a spark of the divine, they should be respected even after physical death (Kamir, 2002). These concepts are at the base of Jewish law's recognition of the duty to respect the wish of the dead (Edrei 1998), and not to slander the dead (Tikochinsky, 1947, p. 26).

Interestingly, the notion that the dead have rights is not exclusive to metaphysical and religious beliefs. Thirty-five years ago, Raymond A. Belliotti (1979) went as far as to argue that 'A person who claims that dead humans have interests and rights places himself in the position of being considered either a sentimental crackpot, or a likely candidate for a mental sanity test, or perhaps even worse, a beguiling, philosophically seductive sophist' (p. 201). However, several philosophers, including Belliotti himself, insist that dead humans have rights, without then being ostracised by the academic community.[4]

The most cited philosopher in this group is Joel Feinberg. Feinberg (1977) argues: 'the area of a person's good or harm is necessarily wider than his subjective experience and longer than his biological life' (p. 304). According to Feinberg (1984), 'we can think of some of a person's interest as surviving his death, just as some of the debts and claims of his estate do, and that in virtue of the defeat of these interests, either by death itself or by subsequent events, we can think of the person who was, as harmed' (p. 83).[5] While 'self-regarding' interests that are based on desires for personal achievements and enjoyment and 'self-confined' interests that are not related to others cannot survive a person's death, 'other-regarding' and 'public oriented' interests, such as the desire to maintain a good reputation or that one's beloved will flourish, can. Feinberg argues that if we do not accept this, then we cannot accept that death, in itself, is a harm (see also Pitcher, 1984).

Another scholar who argues in favour of posthumous interests is Daniel Sperling. In his book devoted to the issue, Sperling (2008) offers the concept of the 'Human Subject'. This concept is Sperling's way of recognising one's symbolic existence which stretches beyond one's death due to the human belonging to a community and having relationships with others. The Human Subject is the subject holding all human interests belonging to the person whose interests they are, including 'pre-birth interests', 'life-interests', 'after-life interests' and 'far-long interests'. It has a persistent non-material existence in time, and it is the same Human Subject before and after the person has died. It does not have interests, but only holds those of the person; however, it is the Human Subject that is harmed by a harmful condition created after the death of the person, and not the ante-mortem person.

Sperling (2008, pp. 80–86) assumes a connection between interests and rights, and it is his discussion of rights that leaves no doubt that his theory belongs to the group supporting the rights of the dead. He talks, interchangeably, about the dead as rights holders and about the Human Subject as the holder of the rights of the deceased person. These rights include rights related to actions made by and promises made to or by the deceased while alive, as well as rights whose fulfilment was anticipated or hoped for by him, and rights which are consistent with the person being identifiable as a member of the human moral group, including that one's body and

4 Of those that will not be discussed here, see Brecher (2002) ('we have an obligation to the dead no less than to the living'); McGuinness and Brazier (2008) ('the dead are owed some degree of respect'); Kramer (2001) ('For a certain period, then, he can be morally assimilated after his death to the person he was during his lifetime'); Grover (1989); Belliotti (1979) ('I would not assume the truth of any personal immortality thesis but I do think that as a matter of fact each of us does persist after death in a sense . . . it seems prima facie wrong to deny certain things to dead humans; and the reason it is wrong involves their interests in these things (e.g., their interests in a good reputation, proper disposal of their worldly possessions, and considerate handling of their corpse)').

5 Interestingly, in his preliminary writing on the matter, Feinberg argues that interests can exist independently of an interest holder and therefore can survive the holder's death. He later on retracted from this position. See discussion in Madoff (unpublished manuscript).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

character be remembered positively, and the right to be treated with respect. Sperling argues that while rights related to personal characteristics might not last long, since they depend, among other things, on the memories of others, rights related to the deceased's membership in the human moral community may last much longer.

One of the most radical in this group, who also specifically argues for dignity as a driving force for the recognition of posthumous rights, is Kristen Rabe Smolensky (2009). She argues that while according to the Will Theory the dead cannot be bearer of rights, as they are incapable of making significant choices, according to the Interest Theory they can and should hold rights. Smolensky goes as far as discussing the right to vote (which I would argue is based on the Will Theory), suggesting that people can give voting instructions in their last testament or leave a proxy to vote in their stead to be enacted after they die. She abandons this option only with the concern that the dead voters will not have to live with the outcomes of their vote, a fact that might distort their preferences in ways that will be problematic to the living. Nevertheless, Smolensky identifies, and seemingly accepts, four limitations developed by legislators and courts on the rights of the dead: impossibility; the right's importance; the time that passes since the death; and the conflicts between the dead and the living.

To conclude, it seems that most philosophers in this group agree that the free will of a person ceases to exist after physical death. However, the interests of the dead, especially in her relationships with others as well as in her personal integrity, can proceed death and so can yield a duty to dignify the deceased, including in disputes over her state.

2.2 The dead do not have rights

The claims that the dead have rights face a fierce opposition by some philosophers. Those who argue that the dead do not have rights that can be respected or breached point to two problems with the claims that they do. First, the problem of the subject: 'If a person is dead, he does not exist, and so no harm can befall him, for there is no subject for the harm to affect' (Taylor, 2005, p. 312). Second, the problem of backwards causation, in which the effect precedes its cause: if the harm is to a living person, caused after his death, one must endorse 'the metaphysically dubious view that backward causation is possible' (p. 312).

Indeed, among the oppositionists we can find Stephen Winter and James Stacy Taylor, who are both not convinced by the attempts of those who try to overcome these two problems and ascribe rights to the dead, or to their symbolic 'Human Subject' (see also Wilkinson, 2009). As to the problem of the subject, Winter (2010) argues that such attempts 'do not warrant assent to posthumous claim-rights because possessing the kind of interests necessary for claim-bearing requires an entity to have the capacity to experience things as significant' (p. 186). As to the problem of backward causation, Taylor (2005) argues that it cannot be overcome if we accept that 'a person is harmed by an event if that event results in his well-being being lower that it was (or would have been) prior to the event (or that it would have been had the event not occurred)' (p. 314). Ray D. Madoff (unpublished manuscript) adds that attempts such as Fienberg's, which focus on the living being harmed by events after death, create a very peculiar understanding of what it means to be harmed. If these attempts overcome the backwards causation problem, then each one of us 'is walking around currently harmed by the future ills that may befall us, even though we have no knowledge of these future events [and] there is no certainty that these events will, in fact, occur'. Taylor (2005) concludes that the philosophers who argue that the dead have rights have given us no reason to believe that the dead can be harmed: 'The arguments that they developed to support this view have failed, and the intuitions ... that led them to argue for the possibility of posthumous harm can be accommodated without accepting that such harm is possible' (p. 319).

Likewise, Michael J. Meyer (1995), one of the few who has written specifically of death and dignity, argues that the dead lack human dignity. This standing is the logical outcome of Meyer's

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

acceptance of Kant's understanding of human dignity as grounded in autonomy, rationality and moral deliberation, which do not survive a person's death. However, as the next category of arguments demonstrates, this conclusion must not be the end of the discussion on the dignity of the deceased, including in inheritance disputes.

2.3 The rights and interests of the living

Like Winter and Taylor, Joan C. Callahan (1987) is not convinced by Feinberg's efforts to overcome the problems of the subject and of backward causation. She labels such efforts as 'intuitions that cannot be accounted for philosophically', and 'sentiments which are to be accounted for psychologically' (p. 347). Nevertheless, she argues that though the dead can have no interests, since 'A's death is the termination of A and all his capacities, including his capacities to gain or lose', the interests can be passed on to living interest-bearers. This can be done only if living agents take up the stake of a former person. And so, Callahan argues, the obligation to dispense the property of the deceased after she passes away is towards her heirs, not towards her.[6]

A different approach is suggested by Ernest Partridge (1981), who, though sharing Callahan's critique on the rights of the dead, looks for a way to address the strong and common intuitions that the dead can be and should not be harmed. He argues that since humans, while living, share the ability to imagine, anticipate and evaluate reality after their death, they have an interest in affecting events beyond their death. This is part of the human being's 'moral personality' that motivates him 'to make plans and provisions for contingencies that might apply, and in behalf of persons who will live, beyond his own personal lifetime' (p. 256). The survivors, who have similar interests and motivations in the period that will follow their lifetime, are in fact protecting their own interests by respecting the wishes of the current deceased.

Hence, 'harming the dead' and 'protecting the interests of the dead' become loose and figurative expressions under Partridge's theory, relating, actually, to the social contract of the living, for the sake of the living, who find comfort in the social promise that their dignity will be respected after they are gone. Partridge argues that keeping this social promise, though the dead cannot be harmed, does provide us not only with psychological comfort, but also with a just and stable social contract that works for the benefit of all.

Indeed, one can argue that this social contract is a major catalyst for people's efforts during their lifetime to accumulate wealth, to bring children into the world, and to earn a good reputation. These efforts are not only socially utilitarian, but also a manifestation of humanity itself, if one accepts Kant's argument that the ability rationally to set ends is what distinguishes humans from animals (Korgaard, 1996, pp. 110–111). By promising humans that the ends they achieved during their life will not be destroyed after their death, society values humanity and allows humans to set long-term ends.

Michael Birnhack (2008) is another scholar who does not accept the notion of the 'rights of the dead' as a general category, yet who is willing to grant some protection to the expectations of the living after they have passed away. This protection is limited by four restrictions: (a) the particular right filter – not all rights and interests survive the death of their holder. Freedom of expression and freedom of movement are examples of rights that lose any meaning postmortem; (b) the socio-legal filter – not all expectations of the living deserve protection after their death. These subjective expectations must be filtered by a reasonableness test that reflects the community's social norms; (c) the representation filter – the representation of the living that is now dead must be a faithful one. Birnhack is suspicious of cases in which the 'rights of the dead' is a claim concealing interests of living persons; and (d) the constitutional balancing filter – even if an

6 Callahan (1987, p. 344) also rebuts the analogy between the deceased's rights and his debts, made by Feinberg and mentioned above. The debts created by the deceased survive his death since there are living debtors and claimants.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

interest or right survives the previous three filters, it might be overcome by other, more important rights and interests. This thesis is a reminder that respecting the social contract related to posthumous expectations does not mean an absolute protection of these expectations, but rather a specific and a collective balancing between them and other interests and rights of the living.

Now that the theoretical framework is set, we turn to the empirical investigation of legal succession battles.[7] It is this investigation that will provide a socio-legal context for the abstract discussion over the rights of the dead, as well as a rich and detailed example that will inspire the discussion over the normative significance of the typology presented above and the balances it yields.

III. Empirical study

Before detailing the research tools used in this study and its findings, a note on terminology is in order. In Hebrew there is only one word to describe 'honour', 'respect' and 'dignity' – *Kavod*. Likewise, to honour, to respect and to dignify are all covered by the Hebrew word *Lechabed*. The Israeli legal scholar Orit Kamir (2002) offers a convincing analysis of the distinctions between the three English words. She understands and determines 'Honour' as the patriarchal opposition to 'Shame'; 'Dignity' as the modern value that sets a universal defensive minimal standard for human interactions; and 'Respect' as the acceptance and non-judgmental tolerance of the uniqueness of each individual, including the provision of the conditions needed for self-realisation. Kamir mentions another meaning of the Hebrew word *Kavod* – 'Glory', which also has other Hebrew synonyms. According to Kamir, 'Glory' is embedded in the metaphysical and religious perception of the human being as connected to the divine, mentioned earlier.

However, in many cases, when tracing, analysing and translating the judgments included in this study, one can only guess at which of the four possible meanings of *Kavod* was intended. As will be described below, usually, there is no indication that the judges contemplated the different meanings of the word *Kavod*, nor made a conscious decision as to which of the meanings they referred when arguing that it is necessary *Lechabed* the deceased testator.[8]

3.1 Methodology

The findings reported here are drawn from a mixed-methods study (Hesse-Biber, 2010), built on three layers:

a. The identification of all published Supreme Court cases dealing with inheritance disputes that were handed down since the establishment of the State of Israel ($n = 442$),[9,10] and the analysis

7 Not all disappointed 'heirs' take their disappointment to court; see Hacker (2014a).

8 There are several Israeli court decisions, though not related to inheritance, that recognise Kamir's semiotic distinctions to the word *Kavod*; see, for example, CrimA (SC) 10828/03 *Taha Nager v. The State of Israel* (2005). Moreover, as Meltzer Henry (2011–2012) demonstrates, the English word 'dignity' signifies different ontological meanings that are used by US judges. However, a detailed analysis of these meanings go beyond the scope of this paper.

9 Under Israeli law, a person has the right to appeal to the Supreme Court over a District Court decision and a right to ask for an appeal over an appeal heard by the District Court. Until the establishment of the Family Courts in 1995–1996, inheritance disputes were heard by the District Courts, and so an appeal to the Supreme Court was a guaranteed right. Since the establishment of the Family Court, appeals are heard first by the District Court, and appeals over these appeals can be heard, subject to the Supreme Court judges' discretion. See *The Courts Law* (Consolidated Version), SH. 198 (1984) (Isr.) §41.

10 The cases of 1948–2006 were located through the index of the hard copy official publication of the Israeli Supreme Court decisions (P.D.), under the rubric 'inheritance'. During 2006–2010 this publication was not printed, and so relevant decisions were traced via the indexes of two of Israel's largest legal virtual databases: Nevo and Takdin, under the same rubric.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

of those that include the terms *Kavod* (dignity, respect, honor) or *Lechabed* (to dignify, to respect, to honor) with relation to the deceased whose estate is litigated ($n = 41$).[11]

b. The analysis of private inheritance conflicts in Israel's largest Family Court (*Ramat Gan*) in the years 2000, 2002 and 2004. First, an archival study was conducted in which 144 files, out of about 200 that were concluded by mid 2007, were analysed. These files allowed for the investigation of the parties' arguments, the content of the will, experts' reports, witnesses' testimonies, and settlement agreements or judicial ruling. In addition, each of this Court's decisions in such conflicts, in files initiated in 2000, 2002 and 2004, handed down by the end of 2010 and available on electronic databases, were located and analysed ($n = 67$, after omitting those decisions located in the previous stage).

A comparative sample included the analysis of 599 randomly selected undisputed probate files in the archives of the Inheritance Registrar and the Rabbinical Court in the same region and period of time.[12]

c. An in-depth interview with the Family Court judge who had heard most of the inheritance and probate procedures at the Ramat Gan Family Court during the archival studied period.[13]

3.2 Findings

3.2.1 The dignity of the deceased testator in Supreme Court rulings

Israeli Succession Law allows almost absolute freedom of testation. A person has the right to decide how and to whom her property will be divided after her death, and can do so without exposing her will during her lifetime and without providing any justification.[14] A dominant justification of this wide freedom of testation given by Aharon Barak (2001), former Chief Justice of the Israeli Supreme Court, is the right to human dignity. In his book on the interpretation of the will, he states that: 'At the basis of the will – as at the basis of a contract – lies a constitutional right. That is human dignity, from which derives the autonomy of the private wish' (p. 59). Hence, according to Barak, the judge 'must take all measures to ensure that the "true" wish of the testator is fulfilled' (p. 59).[15]

11 Of course, there might be additional decisions that relate to the importance of executing the wishes of the deceased and embody some concept of postmortem dignity. However, the decision to concentrate only on those cases that explicitly mention the words *Kavod* or *Lechabed* minimises the methodological limitations stemming from an analysis based on the author's interpretation.

12 According to Israeli law, heirs of a deceased may apply to either the Inheritance Registrar or, if all the heirs consent, to a religious court (the Rabbinical Court in the case of the Jewish population), for inheritance or probate orders. When a will is contested, the dispute might be handled by the Family Court or the Rabbinical Court; see *Succession Law* S.H. 63, p. 249 (1965) (Isr.) §66(a), 151, 155, hereinafter *Succession Law*). My study (Hacker, 2012) revealed that inheritance disputes are rarely heard by the Rabbinical Court, which prefers the conflict to be handled by the Family Court.

13 This paper is part of a large-scale study on inheritance procedures in Israel, which also included in-depth interviews with litigants and lawyers and a historical legislative study. For more details on the methodologies employed in the study, as well as for more of its findings, see Hacker (2010a; 2010b; 2012; 2014a; 2014b).

14 The only limitations to this wide freedom are those of age and capacity; alimony that must be paid in case of needy dependents; the prohibition on setting an illegal, immoral or impossible command; the limitation on defining only one heir of an heir, unless all subsequent heirs were alive at the time the will was drafted; and the legal requirement that a person who murdered the deceased, or destroyed or forged her last testament, cannot be her heir. See *Succession Law*, §5, 26, 34, 42, 56 (Isr.)

15 All translations from Hebrew are the author's.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

Indeed, it seems as if Israeli Supreme Court judges have internalised their status as the guardians of the deceased testator's dignity and wishes when inheritance conflicts are brought before them, as this quotation, from *Kalfa (Gold) v. Gold* (1993), demonstrates:

> 'Any struggle surrounding a person's last testament raises the question of the "deceased's dignity" which is interwoven into the general principle of "human dignity", which became a supreme principle in our legal system with the enactment of the Basic Law: Human Dignity and Freedom (1992).[16] In this Court's rulings, from start to finish, before and after the enactment of the Basic Law, runs like a crimson thread the position that where last testaments are concerned, the will of the deceased is granted unique significance. This is according to the grand rule held by us that it is a Mitzvah [religious obligation] to fulfill the wishes of the dead.'[17]

Turning to the whole sample, of the 442 published Supreme Court decisions in inheritance disputes, about 9 per cent mention the dignity (*Kavod*) of the deceased whose estate is litigated or the duty to respect (*Lechabed*) his/her wishes. In the first forty-three years (1948–1991), in which 354 decisions were handed, only fifteen related to the dignity of the deceased. In the last eighteen years (1992–2010), twenty-six of the eighty-eight decisions handed, did so.[18] This dramatic relative increase, from about 1:24 to 1:3, can be attributed to the legislation of the Basic Law: Human Dignity and Freedom which was enacted in 1992. Indeed, in the later years, the judges refer to this Basic Law which states that, among other things, 'There shall be no violation of the life, body or dignity of any person as such', 'There shall be no violation of the property of a person', and 'All persons are entitled to the protection of their life, body and dignity'.[19]It is worth noting, however, that this Basic Law does not mention the dead, and that the history of its legislation does not disclose whether it was taken for granted that human dignity includes posthumous dignity or, on the contrary, that it does not.[20]

The impact of the Basic Law: Human Dignity is evident not only quantitatively, but also qualitatively. Until 1982, respect for the deceased's wishes is mentioned by the judges almost as an *obiter dictum*, and the deceased's dignity is mentioned in relation to relatively peripheral matters, such as the right of the widow to maintenance;[21] and burial arrangements and requests.[22] During the 1980s, we can witness an emerging recognition in the importance and centrality of the deceased's dignity, when the Court declares that respecting the wishes of the deceased is 'a central consideration in the Inheritance Act',[23] 'on which the whole institution of last testament is built'.[24] However, only after 1992 is respecting the wishes of the deceased conceptualised as part

16 Israel does not have a finalised Constitution, but rather 'chapters' of an intended future Constitution, framed as 'Basic Laws'; see Barak-Erez (1994, p. 309).

17 CA 724/87 *Kalfa (Gold) v. Gold*, 48(1) P.D. 22, 28. (1993).

18 The relative diminishing numbers of appeals to the Supreme Court in the second period can be attributed to the establishment of the Family Courts; see *supra* note 9.

19 *Basic Law: Human Dignity and Freedom*, S.H. 1391, p.150 (1992) (Isr.), §2,3,4.

20 The dead were not mentioned in the Israeli parliament's discussions over the Basic Law proposals, examined for this study. See also Karp (1995, ftn 34).

21 CA 100/49 *Miller v. Miller*, 5 P.D. 1301 (1951); CA 95/54 *Skinder v. Schwartz*, 9 P.D. 931 (1955) (the widow's dignified existence is part of her deceased husband's honour).

22 ET 1/51 *Estate of the deceased Bat Artzi v. Minsky*, 8 P.D. 1041 (1954); CA 555/73 *Bank Leumi LeIsrael Trust v. Shapira*, 28(2) P.D. 424 (1974).

23 FH 40/80 *Koenig v. Cohen*, 36(3) P.D. 701 (1982).

24 CA 245/85 *Kleine-Bick v. Goldberg*, 41(2) P.D. 757 (1987).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

of the right to human dignity, and repeatedly connected to the judges' duty to make sure that the last wishes of the deceased, especially as expressed in his will, are executed.

While most of the decisions post-1992 are almost as laconic in relation to the deceased's dignity as those before the Basic Law was enacted, there are some exceptions. For example, in the first decision in a case initiated after the enactment of the Basic Law, the term 'human dignity' appears fourteen times, the term 'the dignity of the living' appears six times, and the term 'the dignity of the dead' appears eight times. In this case, dealing with a bitter familial conflict over the deceased's grave's headstone's shape and inscription, the Court relies on older Supreme Court decisions, on the new Basic Law, and on Jewish law, to support its claim that: 'It is a judicial law that "human dignity" in our matter means, first and foremost, the dignity of the dead, that is the expressed or assumed will of the deceased, and the dignity of the living, that is the will of the deceased's family, those who love him, and his beloveds, whom wish to honor the memory of the deceased.'[25]

Indeed, even in the post-1992 period, only in very few decisions do the judges suggest any explanation or justification for their treatment of the deceased as rights holder and as a subject who should be dignified, honoured and respected. In both periods, the dignity of the deceased testator, and the duty it imposes on the living to respect it, are referred to as axiomatic truths, needing no clarification or elaboration. For example, in *Levi v. Elyakim*,[26] Justice Vitkon simply stated: 'It seems to me ... that the wishes of the dead should be respected as much as possible'; in *Yaakov v. Barashi*, Justice Beinisch briefly argued that: 'It is not for us to judge what is desirable and worthy in dividing a man's property. We are ordered to respect the wish of the testator and only his wish';[27] and in *Sacham v. Rotman*,[28] Justice Cheshin concluded his decision with the statement: 'The wish of a person is his dignity – his human dignity – but the dead lack the capacity to fulfill their wishes and guard their dignity. So we acted to fulfill the wishes of the deceased and to guard his dignity." As also demonstrated by the quote from *Kalfa (Gold) v. Gold* above, the freedom of testation granted by the Succession Law (which does not mention dignity), even before and certainly after the enactment of the Basic Law: Human Dignity and Freedom (which does not mention the dead), is interpreted as a sufficient and satisfactory proof of Israeli law's recognition of the dead's dignity.

This absence of deep judicial engagement with the philosophical and normative complexities related to the notion that the dead have interests and rights, detected in this study on inheritance disputes, was also observed by Michael Birnhack (2008), who studied the rights of the dead in Israeli Supreme Court decisions on reputation, privacy, burial and memorisation. Concerning the dignity of the deceased, he argues: 'The poetics about the right of the dead causes one to forget that this is just an idiomatic phrase, and turns the metaphor into a reality', and concludes: 'it seems as if they [the judges] do not ponder the concept enough, and use it as if the dead has a real right' (pp. 90, 109).

From the meager discussions on the dignity of the dead found in the Supreme Court decisions related to inheritance I have studied, it seems that a dominant justification for it is Jewish law. In both periods, several judges[29] refer to the statement found in the *Mishnah* that it is a religious

25 CA 1482/92 *Hagar v. Hagar*, 47(2) P.D. 793 (1993).

26 CA 447/63 *Levi v. Elyakim*, 18 P.D. 505 (1964), at p. 508.

27 CA 6198/95 *Yaakov v. Barashi*, 52(2) P.D. 603 (1998), at p. 611.

28 CA 1182/90 *Sacham v. Rotman*, 46(4) P.D. 330 (1992), at p. 347.

29 For example, in the decisions ET 1/51 *supra* note 22; CA 724/87, *supra* note 17; RCA 3130/05 *Estate of the deceased A.R v. General Legal Guardian of the state of Israel* (unpublished, 14 September 1996); CA 719/97 *Aharon v. Aharony*, 54(3) P.D. 469 (2000).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

obligation to uphold the words of the dead (*mitzvah le-kayem divrei ha-met*).[30] This reference is usually made without citing the religious source and without an explanation as to why a religious obligation, which, as mentioned earlier, is connected to the theological concept of Glory, should guide the civil court.[31]

Moreover, the judges do not discuss the controversy among the sages, as well as among modern scholars, concerning the obligatory nature of this statement (Edrei, 1998). This controversy is rooted in the tension between, on the one hand, the statement in the *Mishnah* that one must uphold the words of the dead, and, on the other hand, the fact that the Old Testament does not recognise freedom of testation and states cogent intestate rules.[32] Hence, the implied or direct link some Supreme Court judges create, when deciding inheritance disputes, between the religious obligation to uphold the words of the dead and the duty to execute the will of the deceased in the name of his right to dignity, is dubious. Moreover, with the exception of the widow's right to maintenance,[33] and the obligatory nature of a request of a dying person,[34] Jewish religious guidelines relevant to the dignity of the deceased and to inheritance conflict, such as that it is forbidden to slander the dead (Rakover, 1962),[35] are not mentioned by the judges. Nor do they mention more general literature on the Jewish religion's perception of respect for the dead.[36]

Another justification that can be (barely) extracted from the Supreme Court decisions is the affinity between the dignity of the dead and the dignity of the living. The judges say: 'As to the sharing of last honor to a person, that includes the honor of the living and the dead together . . .';[37] 'The wish of a person is part of human dignity (the wish of a person is his dignity).[38] We shall guard the dignity of the dead that is the dignity of the living';[39] 'Freedom of testation and the *Mitzvah* to fulfill the wishes of the dead are two sides of the same coin – the two are extracted from human dignity and from the personal autonomy extracted from that dignity . . . One can add that into the respect of the wishes of the dead is diluted an element of self-interest. "For they that honor Me I will honor, and they that despise Me shall be lightly esteemed", so were we taught by the inscribed (Shmuel A, 2, 30), and to our concern: If we honor the will of our fellow-man those surviving us will honor our will.'[40] While the first quotations create an unexplained leap from the living to the dead, the last one clearly echoes the social contract theory discussed above.

30 Bavli, Gittin 14, 1. The *Mishnah* is the first major written record of what was oral Jewish law, shaped at the beginning of the third century. It is conceived as an authoritative codex of laws and judgments, secondary only to the Old Testament.

31 *The Foundations of Law Act*, SH. 978 181, p.163 (1980) (Isr.) states in art. 1 that: 'Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity, and peace, of Israel's heritage.' By 'Israel's heritage', the Israeli legislator meant, first and foremost, Jewish Law. The Supreme Court judges disagree on the circumstances in which this section becomes relevant, and do not use it often; see Tenenbaum (2003). In any case, this article, as well as the controversies surrounding it, are not mentioned in the Supreme Court decisions studied in relation to the dignity of the deceased or the duty to respect their wishes.

32 The Book of Numbers (*Bamidbar*) 27, 8–11.

33 *Supra* note 21.

34 CA 245/85, *supra* note 24 (in this case the judge states that the position of Jewish law is irrelevant).

35 On slandering the dead, the courts can first and foremost rely on the Israeli law of defamation that prohibits defamation after death; see *Defamation Prohibition Law*, S.H. 464, p. 240 (1965) (Isr.), §5.

36 For example, Tikochinsky (1947).

37 ET 1/51, *supra* note 22, at p. 1057.

38 This is a Hebrew saying (*Retzono shel adam kvodo*).

39 CA 1212/91 *LIBI Foundation v. Bienstock*, 48(3) P.D. 705 (1994), at p. 732.

40 CA 4660/94 *Israel Attorney General v. Lischitzky*, 55(1) P.D. 88 (1999), at p. 116.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

Finally, in one case it is clear that while the judge refers to the dignity of the deceased, he actually means the dignity of the deceased while he was living and not at the time the decision was handed down.[41] Moreover, two decisions mention the dignity of the testator only in relation to when he was living, leaving room for the interpretation that the judges do not recognise the rights of the dead.[42] Usually, however, this distinction between the living testator and the deceased testator disappears. For example, Justice Rivlin stated that: 'The need to respect the wishes of the dead is an expression of the autonomy of the private wishes, based on the dignity of a person … The right of the deceased to deal with his assets after his death also became a constitutional property right today.'[43] Hence, it seems as if the judge thinks that the dead have wishes and rights, and can act even after their death.

To conclude, judicial rhetoric places the judge as the guardian of the deceased's dignity. However, this rhetoric is usually presented with no explanation, but rather as a reflection of an axiomatic notion that the dead have rights that should be respected. Notwithstanding the importance of studying Supreme Court decisions in inheritance disputes, one must remember that they are but the small tip of the litigation pyramid in this legal field. One must look at the action taking place in the lower instances to learn more about the dignity of the deceased in legal battles over their estate.

3.2.2 The dignity of the deceased testator in the Family Court

Out of the eighty-five Family Court decisions studied,[44] ten mention the dignity of the deceased or the duty to respect the wishes of the dead: slightly more than 10 per cent. The similarities to the sample of the Supreme Court decisions do not end here, as the Family Court judges also accept the notion that the dead have dignity that must be respected as axiomatic truth. Perhaps because the Family Court is a magistrate's court, one does not find here even the minimal attempts of the Supreme Court to explain or justify this notion.

More importantly, the archival study in the Family Court also permitted a rare glimpse at what happens to the dignity of the deceased testator in the shadow of the law, behind the judicial rhetoric found in the Court's rulings. This part of the study looked not only at the judge's decision, but also at the statements of claims, court protocols, the last testament of the deceased, medical files, experts' reports, and settlement agreements between the parties – documents never studied before in the context of inheritance disputes.

Indeed, 125 of the 144 files studied in the Family Court archive included the will of the testator.[45] Hence, the study permitted an examination of the arguments raised by the parties in the statements of claims and during Court hearings, as well as of the gap between the wishes of the testator, as expressed in her last will, and the outcome of the legal procedure, shaped, in the majority of cases, by a settlement between the rival parties. I will claim that both these arguments and this gap harm the dignity of the testator, a concern, at least to those who hold the view that the dead have a right to dignity, or that there is a good reason for a social contract allowing testation and posthumous good reputation.

41 CA 365/60 *Lunstein v. Lunstein*, 15 P.D. 933 (1961).

42 CA 682/74 *Yekutiel v. Bergman*, 29(2) P.D. 757 (1975); CA 719/97, *supra* note 29 (although in this case, in the same paragraph, Chief Justice Barak related to the writing of a will as an expression of the dignity of the testator and his property, and to the duty to 'respect the wishes of the dead').

43 *Schwartz v. Beith Ulpena Beith Aharon and Israel*, 54(2) P.D. 215 (2000), at p. 223.

44 These are substantial decisions in which the judge rule in favour of one of the parties, and not technical decisions in which the judge only approves an out-of-court settlement, found in the rest of the studied files.

45 On the will as a risk factor of succession conflicts, see Hacker (2014a).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

3.2.2.1 Arguments raised by the parties

The objections attacking the validity of the will are one manifestation of trampling on the testator's dignity in testamentary disputes. The Israeli Succession Law sets several requirements for the validity of a will, such as that a minor cannot write a will nor be a witness to a will; that a written will has to be signed by the testator; and that a will that is not written in the handwriting of the testator has to be verified by two witnesses.[46] Nevertheless, the findings reveal that most of the objections to a will do not rely on these formal requirements, but on Article 30 of the Law that states that 'A testamentary provision made under duress, threats or undue influence, or as a result of trickery or fraud is void'. Indeed, 84 per cent of the objections to a will included claims such as that the deceased was mentally ill, manipulated, did not know what she was doing, was too weak to insist on her wishes, or was under the influence of drugs. Many of these claims portray the testator, when alive, as an empty vessel, an object with no independent will who was controlled by others while losing her intellectual capacity.[47]

The hearings in court further threaten to violate the dignity of the testator. Since most objections are based on claims related to her mental and physical condition or her subordination to the manipulation of others, the hearings usually include the opening of her medical file, a psychiatrist's opinion that will analyse it, and testimonies concerning the most private and personal matters. Hence, these procedures severely violate the testator's right to privacy, if indeed this right survives her death, and might contribute to her un-dignifying portrayal.

A case that demonstrates these risks is *In the Matter of the Estate of M.*[48] In the statement of claims, the brother of the deceased testator objected to the will. He argued that the testator had suffered from Alzheimer's disease for the previous twenty years, that the testator's wife tried to be nominated as his guardian and that is why they divorced, that he was manipulated by his nieces who convinced him that one of his brothers (not the objector) was cheating him, that the will was forced on him, and that he was under the influence of drugs. During the hearings, the medical file of the testator was revealed; a psychiatrist's opinion, a video-recording of the testator explaining his motives, and an expert opinion regarding the authenticity of the video were submitted; and three family members and the lawyer who signed the testator's will gave testimony about his mental condition. The attempts of the objector to prove that the testator suffered from dementia and was manipulated failed, and the Court ruled that the will should be executed. However, the dignity of the deceased testator, including his right not to be slandered and his right for privacy, was not mentioned by the judge in his thirty-one-page decision.

3.2.2.2 Parties' settlements

The ending of the example above, with a judicial ruling on whether the allegations against the mental abilities of the deceased are valid, is the exception to the rule. In most cases handled by the Family Court, before, but mainly during or after, private and demeaning information about the testator has been exposed, be it true or false, the dispute is settled with an agreement between the parties.[49] This is another stage in which one could argue that the dignity of the deceased is compromised.

---

46 *Succession Law*, *supra* note 12, §19, 20, 24, 26.

47 Schoenblum (1987, pp. 647–649) also found undue influence to be the most prevalent argument in will contests in Tennessee. For the gendered dimensions of objections to a will, see Murthy (1997–98); Hacker (2010b).

48 Since I got access to unpublished materials, I do not cite the Family Court procedures number, nor the names of the parties, to protect the privacy of the individuals involved.

49 The common practice of out-of-court settlements is not unique to inheritance procedures, nor to Israel; see Hacker (2008, p. 2).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

Of the 114 procedures that included an objection to a will,[50] only thirty-two ended with the will executed as ordered by the testator. In most of these cases ($n = 20$) the objection was removed,[51] in six cases the parties agreed to the execution, and in six cases it was the judge who ruled that there were no grounds for the objection. However, in the remaining cases, constituting 72 per cent of the sample, the outcome of the procedure differed from what the testator requested in what appears to be her last will. While in three of these cases this is due to the judge's ruling that the last will was invalid and thus did not reflect the true wishes of the testator, in the rest of the cases ($n = 79$) the outcome differs from the testator's will, although there is no ruling that the will is invalid.

In this last category of seventy-nine cases, the outcome is shaped by a settlement between the rival parties, with the active or passive support of the judge. In nineteen cases, the difference between the will and the outcome is minor, amounting to only a few hundred dollars. But in 76 per cent of the cases ($n = 60$), the difference is substantial, leaving the wishes of the testator, as expressed in her last will, eradicated by the parties' negotiation. For example, *In the Matter of the Estate of E.*, the deceased explicitly disinherited his daughter, explaining in his will that she had taken sums of money that belonged to her brothers. However, the parties reported to the Court that they agreed that the will was written under undue influence, and that the estate should be divided according to the Succession Law default rules, which split the estate between all siblings equally. The judge approved this settlement without referring to the parties' claims regarding the will. Another example is the case *In the Matter of the Estate of L.*, in which the testator left his entire estate to his neighbour since she 'cared for me devotedly and faithfully'. Two of his wife's relatives, whom the testator had specifically disinherited, contested the will, arguing legal incapacity and undue influence, and presenting a previous will in which they were the sole beneficiaries. The settlement that the Court approved divided the estate so that the neighbour received 50 per cent and the two relatives 50 per cent.

There is an apparent tension between, on the one hand, the wish to respect the dignity of the deceased by preventing parties from slandering her and violating her privacy when arguing and trying to prove undue influence and mental incapacity, and, on the other hand, an aspiration to respect the dignity of the deceased by making sure that her last wishes are fulfilled. The first should lead to the encouragement of negotiation and settlement between the rival parties, while the second should lead to an investigation of the true mental, physical and emotional condition of the deceased when she wrote her will, which is to be determined by the judge. Judge Shaul Shohet, the judge who handled most inheritance cases at the Family Court I studied,[52] explains how he managed this tension:

> 'The client of the court, in objections to a will, is actually the deceased . . . I have to respect the wishes of the dead, to do whatever is possible to learn about his wishes . . . So you can ask me, if the wishes of the dead are of supreme importance why do you suggest a compromise? In most of the compromises I have suggested, maybe ninety-five percent, the will is executed. The

50 Four more cases were excluded from the sample, since the file did not include the required information about the outcome of the procedure.

51 One reason the objection is removed can be a compromise by the parties, according to which the heirs deliver a part of the estate to the objectors, without notifying the court. Such informal agreements are not recorded in the court files. The normative discussion in Section III is relevant also to such circumstances and the conditions provided there will diminish this phenomenon, if existing.

52 Judge Shohet was a Family Court judge during 1998–2007 (see ‹http://elyon1.court.gov.il/heb/cv/fe_html_out/judges/k_hayim/160540466.htm›), and was interviewed after his nomination to the Tel Aviv District Court.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

> minute the will is executed, I have executed the wish of the dead. The fact that the one who won agrees to give a sum or something to the other party – this is no longer [a concern of] the dead.'[53]

Thus Judge Shohet perceives a settlement which he might encourage or just approve as respecting the dignity of the dead testator, since the will is technically executed. He views the divergence from the substance of the will as a mere transaction between the living parties.

Judge Shohet testified that he considers inheritance disputes to be family disputes, which indeed encourages him to propose settlements that will end the conflict:

> 'It is a family dispute that can affect future generations. When a brother fights a brother, or when the nieces no longer speak with each other. Believe me, I have invested hours and days and mental strength [in reaching compromises]. And I had more than few cases in which they came to me and shook my hand and they hugged. And I saw much importance in it, sometimes more than in a regular family case. Because it is a conflict with many more family members involved.'

The judge went further and connected his encouragement of settlements with the alleged wishes of the deceased testator:

> 'What would the dead say if he thought that what he wrote [in his will] could create such a terrible and dreadful conflict among his kids, among his family members, etc.? Maybe he would have thought twice for this matter? ... At each stage I trickle the option of a settlement of the matter. This is the dead's wish.'

However, one must remember Birnhack's 'representation filter', mentioned in Section II, and his suspicion that 'dead claims' rhetoric might be used to promote the interests of the living. Indeed, when evaluating the tension Judge Shohet describes between the wish to dignify the testator by executing his will and the wish to promote familial reconciliation among the living, and the reasons he gives for preferring the latter, one should take into account the study's findings on the rival and settling parties' kinship with the deceased and among themselves. While in 82 per cent of undisputed procedures for will execution in the Inheritance Registrar, and 97 per cent of such procedures in the Rabbinical Court, the initiator of the procedure is the son, daughter or married spouse of the deceased, in the testation conflicts in the Family Court these figures drop to 53 per cent. Moreover, in only 48 per cent of testation conflicts are the objectors to the execution of the will a child or a married spouse. In fact, only in 30.5 per cent of the cases, did the deceased, initiators and objectors belong to the same nuclear family. In some cases both the initiators and objectors had close familial ties with the testator but not with each other, such as a second wife and children from a previous marriage. In other cases, they are either remote family members, such as grandchildren, nieces or nephews, or the relatives of the spouse, or not family at all, such as care givers or institutions.[54] Hence, it is very clear from the findings that, in most testation disputes, family reconciliation cannot justify judicial encouragement and approval of settlements, which leaves the question of the genuine wishes of the deceased undetermined and her dignity violated, because there are no significant familial ties between the rival parties to be preserved.

To conclude, while the judicial rhetoric presents the courts' main role in succession battles to guard the dignity of the testator, in practice, the legal procedure tramples the deceased's dignity

53 Interview conducted by the author, 29 October 2009.

54 For a detailed analysis of the triangles of relationships between the testator, the initiators and the objectors, see Hacker (2014a).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

by allowing demeaning allegations about his mental and physical competence while alive, the exposure of personal information and medical record, and settlements that diverge from his last will in the name of familial reconciliation, even though in most cases there are no close family ties between the rival parties. Hence we end up with another example of the gap between legal promises and the actual outcomes of legal procedures (Aviram, 2010). Whether the gap should be maintained, or minimised by modifying the promises or by changing the actions taking place in the shadow of the law, is a question calling for a normative discussion that will bridge the empirical findings described in this section with the theoretical framework set in the previous one.

IV. Normative concluding discussion

Perhaps because of my sociological background, and definitely because I do not hold a religious belief in the afterlife, I am most convinced by Ernest Partridge's theory of the social contract of the living for the sake of the living, which includes a promise to respect some of one's wishes after one's death. As discussed above, according to this theory, the dead do not have a right to dignity or any kind of interest, since they are unable to benefit nor to be harmed, and 'exist' only in the memory of others. However, as humans, we have a psychological need to give our lives meaning and to find comfort in the face of our inevitable death. Moreover, as a society, we have a utilitarian interest in people being productive, including by procreation and by the accumulation of wealth, and in people's morality and excellence, which are reflected in their good reputation. These extremely important psychological needs and social necessities can be promoted by, and perhaps are even dependent on, promising to respect the wishes of the living after they die, and by keeping this promise over time. Moreover, understanding human society in Kantian terms as a 'Kingdom of Ends' links the promise made to the living not to destroy their property- and identity-related ends upon their death to the right to human dignity and respect (according to Kamir's terminology discussed above), but only that of the living.

The rejection of the arguments that the dead are rights holders and the acceptance of the social contract theory have normative implications on different aspects of the accelerating legal trend, mentioned in the 'Introduction', to grant more and more rights to the dead. I would like to point to three such implications related to the postmortem distribution of property, which is at the heart of inheritance legal procedures.

First, if the deceased testator does not have a right to dignity then it cannot be the basis for freedom of testation. From the social contract theory perspective, freedom of testation is not a natural right but rather a freedom society can allow, limit or balance in face of other social interests, such as distributive justice. Even if one accepts the link between this freedom and the dignity of the human as a setting-ends subject, it does not mean absolute freedom of testation. The living can set ends, and by these fulfil their humanity, knowing that a portion of their estate will be guaranteed by law to their spouse or offspring, or be used to the benefit of society through taxation (see also Fellows, 2013; Hacker, 2014b), as indeed is the case in several European jurisdictions (Levy, 2008). Moreover, if the dignity of the living is the heart of the matter, then wills that harm the dignity of those left behind can be objected in the name of the living's rights, as in the case of daughters disinherited by their parents due to cultural or religious gender discrimination (Levy and Pinto, 2012). Such arguments would have to be balanced in the face of the importance of keeping the social promise to the living that some of their wishes will be respected after their death. All in all, jurists will have to ground their intuition that the property wishes of the deceased should be respected on other grounds than posthumous property rights or the right to dignity of the dead.

Another normative implication of the philosophical typology presented above relates to the debates over formalism in inheritance law (e.g. Corinaldi, 2008, pp. 208–219). One could argue

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

that the dignity of the testator requires that her property wishes be respected even if her will does not follow the formal requirements of the law, and that the courts should search for the testator's intentions when they are unclear in the will. However, the social contract theory provides us with the 'contract' metaphor and allows us to demand the living to leave very clear instructions, according to formal requirements, as to their property division. If such requirements are needed to execute a real-estate contract, for example, while the parties are alive, this is even more the case when the testator initiating the will, based on the social contract, asks for things to happen after he is gone. If the will is not formally and clearly drawn up, society, through its legal system, cannot guarantee its execution. Educative measures should be taken to explain to laypeople the importance of following the formal testament legal requirements, in drafting what for many of them will be the most significant legal document they ever sign, as it governs all their property, and not only an apartment or a car.

The third normative implication relates to settlements in legal inheritance disputes. Here, the move from the dignity of the deceased to the social contract theory changes the role of the judge. She is no longer the advocate of the dead, or the mediator between rival parties allegedly concerned about the deceased's dignity, but rather society's representative preventing greedy individuals from jeopardising a collective, intergenerational, social agreement. I would argue that as long as freedom of testation is part of this agreement, no settlements should be allowed, and the judge will have to rule for the execution of the will, unless she is convinced it does not reflect the wishes of the testator, or it harms protected social interests as discussed above. In my opinion, the social contract is so important as to justify the judicial time needed for ruling. Of course, the living parties will always be able to informally settle, but under the 'ruling rule' I suggest, they will do so only if the circumstances are such that the dead's wishes are unclear or immoral.

Since, as suggested above, the social contract theory leads to an obligation to write a formally valid will and limits the judge's discretion in overcoming formal defects, and since parties will know that no settlement is formally allowed, I believe we will witness even fewer testamentary conflicts than we witness now.[55] Such a decline will minimise ungrounded slander and privacy violation related to the testator's physical, emotional and mental condition, and hence will advance society's ability to keep its promise to the living that their dignity will not be harmed after death.

Whether one is convinced by Partridge's theory, as I am, or by any other theory on the harms, interests and rights of the dead, there are the problems of a theoretical deficiency, created by the judges' treatment of the dignity of the deceased testator as an axiomatic truth, as well as of a normative dishonesty created by the gap between the judicial rhetoric on the importance of the testator's dignity and the ways the memory of the deceased testator is trampled and her wishes ignored during legal succession battles.[56] Only by adopting one of the theories on the rights of the dead described above, or by developing a new theory on posthumous interests and rights, can a consistent balance of interests and rights of all those involved be struck to guide us in the law of inheritance, both on the books and in action, as in other fields of law relevant to the dead.

Until such a theory is developed by the legislature and the judges, people should be warned against the breach of the social contract (or the violation of their posthumous dignity) which occurs during legal succession disputes. They should refrain from writing a will unless it substantially deviates from the default inheritance rules, and if they insist on drafting a will they

55 My study, as well as others, found that objections to wills are the exception, and that the vast majority of probate orders are issued with no interference; see Hacker (2014a).

56 For a similar gap found in Israel in the cases of sperm retrieval from the dead and organ donation from the brain-dead, see Hashiloni-Dolev, Hacker and Boaz (2014).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

should record themselves writing it, get a psychiatric opinion verifying their sanity at the time of testation, obtain two young competent witnesses who will live to testify that the testator knew what she was doing, and construct legal measures to punish those who object to their will groundlessly. Without such cautionary measures, writing a will becomes a posthumous dignity risk, or at least a cause for concern and discomfort during life.

References

AVIRAM, Hadar (2010) 'Does the Law Achieve Its Goals? Answers from the Empirical Research Realm', in Daphna Hacker and Neta Ziv (eds), *Is Law Important?* Tel Aviv: Tel Aviv University, 27–61 [in Hebrew].

BARAK, Aharon (2001) *Interpretation in Law – The Interpretation of Wills*. Jerusalem: Nevo Publishers [in Hebrew].

BARAK-EREZ, Daphne (1994) 'From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective', *Columbia Human Rights Law Review* 26: 309–355.

BELLIOTTI, Raymond A. (1979) 'Do Dead Human Beings Have Rights?' *Personalist* 60: 201–210.

BIRNHACK, Michael (2008) 'The Rights of the Dead, the Freedom of the Living', *Tel Aviv Law Rev*iew 31 (1): 57–114 [in Hebrew].

BOURDIEU, Pierre (1987) 'The Force of Law: Towards a Sociology of the Juridical Field', *Hastings Law Journal* 38: 814–853.

BRECHER, Bob (2002) 'Our Obligation to the Dead', *Journal of Applied Philosophy* 19(2): 109–119.

CALLAHAN, Joan C. (1987) 'On Harming the Dead" *Ethics* 97(2): 341–352.

CHESTER, Ronald (2007) *From Here to Eternity? Property and the Dead Hand*. Lake Mary, FL: Vandeplas Publishing.

CORINALDI, Michael (2008) *The Law of Succession, Wills, Succession and Probate*. Tel-Aviv: Israel Bar-Publishing House [in Hebrew].

EDREI, Arye (1998) '"To Fulfill the Wishes of the Deceased." On the Validity of Wills in Rabbinical Literature', *Hebrew Union College Annual* 65: 105–141 [in Hebrew].

EDREI, Arye (2004) 'Atonement for the Deceased, A Legal Approach', *Mehkari Talmud VeMidrash*, The Bialik Institute 1–28 [in Hebrew].

ENGLARD, Izhak (1999) 'Human Dignity: From Antiquity to Modern Israel's Constitutional Framework', *Cardozo Law Review* 21: 1903–1928.

FEINBERG, Joel (1977) 'Harm and Self-Interest', in Peter Michael Stephan Hacker and Joseph Raz (eds), *Law, Morality and Society*. Oxford: Clarendon Press, 285–308.

FEINBERG, Joel (1984) *The Moral Limits of Criminal Law: Harm to Others*. New York: Oxford University Press.

FELLOWS, Mary Louise (2013) 'Eighteenth-Century Moral Sentiments in Defense of Twenty-First Century Estate Tax: What Adam Smith and Jane Austen Can Teach Us', in David W. Brennan, Karen B. Brown and Darryll K. Jones (eds), *Beyond Economic Efficiency in United States Tax Law*. New York: Kluwer Law & Business, 217–242.

FRIEDMAN, Lawrence M. (2009) *Dead Hands*. Stanford: Stanford Law Books.

FYFE, James (2007) 'Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada', *Saskachewan Law Rev*iew 70: 1–26.

GROVER, Dorothy (1989) 'Posthumous Harm', *Philosophical Quarterly* 39(156): 334–353.

HACKER, Daphna (2008) 'A Legal Field in Action: The Case of Divorce Arrangements in Israel', *International Journal of Law in Context* 4(1): 1–33.

HACKER, Daphna (2010a) 'Soulless Wills', *Law and Social Inquiry* 35(4): 857–983.

HACKER, Daphna (2010b) 'The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought', *Journal of Empirical Legal Studies* 7(2): 322–354.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

HACKER, Daphna (2012) 'Religious Tribunals in Democratic States: Lesson from the Israeli Rabbinical Courts', *Journal of Law and Religion* 27(1): 59–82.

HACKER, Daphna (2014a) 'Disappointed "Heirs" as a Socio-Legal Phenomenon', *Oñati Socio-Legal Series* 4 (2): 243–263.

HACKER, Daphna (2014b) 'Intergenerational Wealth Transfer and the Need to Revive and Metamorphose the Israeli Estate Tax', *Law and Ethics of Human Rights* 8(1): 59–101.

HASHILONI-DOLEV, Yael, HACKER, Daphna and BOAZ, Hagai (2014) 'The Will of the Dead – Three Case Studies', *Israeli Sociology* 16(1): 31–53 [in Hebrew].

HESSE-BIBER, Sharlene Nagy (2010) *Mixed Methods Research: Merging Theory with Practice*. New York: Guilford Press.

KAMIR, Orit (2002) 'Honor and Dignity Cultures: The Case of KAVOD and KVOD HA-ADAM in Israeli Society and Law', in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse*. Amsterdam: Kluwer Press, 231–262.

KARP, Judith (1995) 'A Few Questions on Human Dignity According to the Basic Law: Human Dignity and Freedom', *Hebrew University Law Review* 25: 129–159 [in Hebrew].

KORGAARD, Christine M. (1996) *Creating the Kingdom of Ends*. Cambridge: Cambridge University Press.

KRAMER, Mattre H. (2001) 'Do Animals and Dead People Have Legal Rights?', *Canadian. Journal of Law & Jurisprudence* 14(1): 29–54.

LEVY, Shelly Kreiczer (2008) *The Intergenerational Bond – Rethinking Inheritance*. Unpublished PhD dissertation, Faculty of Law, Tel Aviv University.

LEVY, Shelly Kreiczer and PINTO, Meital (2012) 'Property and Belongingness: Rethinking Gender-Bias Disinheritance', *Texas Journal of Women and the Law* 21(1): 120–152.

MADOFF, Ray D. (n.d.) 'Can the Dead be Harmed? Insights from Two Thousand Years of Philosophy', unpublished manuscript, on file with author.

MADOFF, Ray D. (2010) *Immortality and the Law: The Rising Power of the American Dead*. New Haven, CT: Yale University Press.

MCGUINNESS, Sheelagh and BRAZIER, Margaret (2008) 'Respecting the Living Means Respecting the Dead Too', *Oxford Journal of Legal Studies* 28(2): 297–316.

MELTZER HENRY, Leslie (2011–2012) 'The Jurisprudence of Dignity', *University of Pennsylvania Law Review* 160: 169–233.

MEYER, Michael J. (1995) 'Dignity, Death and Modern Virtue', *American Philosophical Quarterly* 32(1): 45–55.

MURTHY, Veena K. (1997–98) 'Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?', *Cardozo Women's Law Journal* 4: 105–135.

PARTRIDGE, Ernest (1981) 'Posthumous Interests and Posthumous Respect', *Ethics* 91(2): 243–264.

PITCHER, George (1984) 'The Misfortunes of the Dead', *American Philosophical Quarterly* 21(2): 183–188.

RAKOVER, Menachem (1962) 'On Slander and Its Punishment in Jewish Law', online: ‹http://www.daat.ac.il/daat/kitveyet/sinay/allashon1-4.htm› [in Hebrew].

SCHOENBLUM, Jeffrey A. (1987) 'Will Contests – An Empirical Study', *Real Property, Probate and Trust Journal* 22: 607–660.

SHULZTINER, Doron and CARMI, Guy E. (2014). 'Human Dignity in National Constitutions: Functions, Promises and Dangers', *American Journal of Comparative Law* 62: 461–490.

SMOLENSKY, Kristen Rabe (2009) 'Rights of the Dead', *Arizona Legal Discussion Paper*, 06-27.

SPERLING, Daniel (2008) *Posthumous Interests: Legal and Ethical Perspectives*. Cambridge: Cambridge University Press.

TAYLOR, James Stacy (2005) 'The Myth of Posthumous Harm', *American Philosophical Quarterly* 42(4): 311–322.

TENENBAUM, Abraham (2003) 'On the Proper Status of Hebrew Law', *Sharei Mishpat Law Review* 3(2): 393–423 [in Hebrew].

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212

TIKOCHINSKY, Yechiel Michal (1947) *The Bridge of Life*, Vol. 1. Jerusalem: n.p. [in Hebrew].
TIKOCHINSKY, Yechiel Michal (1960) *The Bridge of Life*, Vol. 3. Jerusalem: n.p. [in Hebrew].
WALDRON, Jeremy (2013) 'Is Dignity the Foundation of Human Rights?', *New York University Public Law and Legal Theory Working Papers*. Paper 374, online: ‹http://lsr.nellco.org/nyu_plltwp/374›.
WILKINSON, T. M. (2009) 'Daniel Sperling, Posthumous Interests: Legal and Ethical Perspectives', *Journal of Value Inquiry* 43: 531–535.
WINTER, Stephen (2010) 'Against Posthumous Rights', *Journal of Applied Philosophy* 27(2): 186–199.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 06 Mar 2015 IP address: 132.66.11.212