Chapter 5

Personal Identity in Death: An Aggado-Halakhic Critique

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Great is peace, for even the dead need peace.
SIFREI NUMBERS[1]

This essay explores whether neurological criteria for determining death should be deployed to facilitate culling and transplantation of organs, tissues, and other body parts. I state at the outset that while I draw no definitive conclusions on this matter, I have grave doubts about the propriety of the practice of removal of body parts (called harvesting or retrieval by proponents) from persons declared dead by neurological criteria. The essay explains the nature of my misgivings, and while it touches on technical halakhic arguments and the labile consensus of medical opinion, it ultimately is aggadic in nature, that is, it rests on broader philosophical, literary, existential, and moral considerations. In due course, I will draw on early rabbinic texts as well as contemporary philosophy and literature to make a case for a notion of *persistence of personhood*.

1. *Naso* 42 (ed. Horovitz, p. 47); also found in *Sifrei Deuteronomy* 199 (ed. Finkelstein, p. 237).

If asked, "When does a person cease being a person?" the classical Jewish reply is "Never." It follows that a person should not be obliged to surrender something essential to the maintenance of personhood for the sake of assisting in another person's healing. The primary ethical responsibility of a person is the welfare of that person; it is for this reason that altruistic life-endangerment is a vexing and difficult-to-resolve halakhic question. If (as we shall see) the trajectory of personhood includes the body after death, it follows that bodily dismemberment, whatever the motivation, should be viewed as a matter of utmost severity. For the talmudic rabbis, the individuated person persists in the corpse, and the ongoing safeguarding of that unique person remains society's primary responsibility, most especially the fiduciary responsibility of the near kin.

I stress that these arguments lead to *misgivings* about using neurological criteria to facilitate organ transplantation from a person determined to be, as it is called, brain dead. Misgivings are not the same as outright opposition, and my explorations are meant to inject a perspective that may not have been given full expression in prior discussions; they are not intended to offer categorical judgments or rulings.

The distinction between organismal death and cellular death is a cornerstone of those who argue for neurological criteria to determine death.[2] The distinction appears to be reasonably well reflected in the classic halakhic sources, such as Maimonides' MT Laws of the Impurity of the Dead 1:15:

המת אינו מטמא עד שתצא נפשו. אפילו מגוייד או גוסס, אפילו נשחטו בו שני הסימנים, אינו מטמא עד שתצא נפשו, שנאמר: "[כל הנגע במת] בנפש האדם אשר ימות" (במדבר יט, יג).

A body does not defile until its vitality has departed. Even if he is sliced up or in his death throes, even if the esophagus and trachea are cut – he does not defile until all vitality has departed, as it says: "[Anyone who touches a corpse] belonging to any human being who has died" (Num. 19:13).

2. See, e.g., Fred Rosner and Moshe David Tendler, "Definition of Death in Judaism," *Journal of Halacha and Contemporary Society* 17 (1989): 14–31.

נשברה מפרקתו ורוב בשר עימה או שנקרע כדג מגבו או שהותז ראשו או שנחתך לשני חלקים בבטנו, הרי זה מטמא אף על פי שעדיין הוא מרפרף באחד מאבריו.

If his neck has been broken and most of the flesh along with it, or if he has been sliced like a fish from the back, or if his head has been cut off, or if he has been severed into two pieces at the belly, his [body] defiles even if there still is a twitching in any of his limbs.

On the basis of this and related texts, the argument has been advanced that the permanent, total destruction of the brain, or "brain death," a state given the label "physiologic decapitation," should be seen as conforming to halakhic criteria of death found in classical texts.[3] I now move to problematize this apparent correspondence and to question the application of these criteria to facilitate organ transplantation.

I. HALAKHIC PROBLEM

The correspondence between the notion of death implicit in Maimonides' criteria, on one hand, and the centrality of brain function in medical assessments of the life-death divide, on the other, is close but hardly perfect. Maimonides states that if the neck is broken off or the head is cut off, then death has occurred and the body conveys the ritual impurity of a corpse, "even if there still is a twitching in any of his limbs." This is readily explained by the notion that once the brain has been severed from the body, there is no longer a unified organism and any residual movement is merely a reflexive spasm that gives no evidence of human personhood.

Yet if this is all that Maimonides has in mind, one wonders about the case described as "severed into two pieces at the belly." The case is one of extreme trauma, but should not involve immediate death of the brain. A soldier who sustained such a devastating injury would not be left for dead on the battlefield, but would be evacuated to receive medical attention. To be sure, in Maimonides' day the injury invariably would be fatal, but the point remains that this framing of death with respect to ritual impurity does not support the contemporary idea of brain death.

Advocates of using brain death criteria to facilitate organ transplantation often point to the halakhic assertion that reflexive twitching

3. Ibid., 25.

in a limb does not contradict the determination of death. But there is more to be said about this: Maimonides (MT Laws of the Impurity of the Dead 1:15) also writes that even if the trachea and esophagus have been severed, the person is still considered alive until all vitality has departed.

This Maimonidean passage echoes *Sifrei Numbers* 19:13 (ed. Horovitz, p. 160):

"אשר ימות" - מגיד הכתוב שאין מטמא עד שעה שימות. מיכן אתה דן לשרץ: מה מת חמור אינו מטמא עד שעה שימות, שרץ הקל - אינו דין שלא יטמא עד שעה שימות? או חלוף: מה שרץ הקל הרי הוא מטמא כשהוא מפרפר, מת החמור - אינו דין שיטמא אפילו מפרפר? ת[למוד] ל[ומר]: "כל הנוגע במת, בנפש האדם אשר ימות", שאין ת[למוד] ל[ומר] "אשר ימות". ומה ת[למוד] ל[ומר] "אשר ימות"? מגיד שאין מטמא עד שעה שימות.

"Who has died" – The verse teaches that [the body] does not cause impurity until [the individual] dies. From here one can apply the rule to a creeping thing: just as a human corpse, which is a severe [source of impurity], does not cause impurity until it dies, so too a creeping thing, which is a mild [source of impurity], should not cause impurity until it dies. Or should the reverse [be argued]? Just as a creeping thing, which is a mild [source of impurity], causes impurity even when it is convulsing, so too a human corpse, which is a severe [source of impurity], should cause impurity even when it is convulsing! [The verse] comes to teach you: "Whosoever touches a corpse, the body of a person who has died," for there was no purpose in stating "who has died," so what does it teach you by saying "who has died"? It teaches that a human does not cause impurity until he [or she] has [fully] died.

דנתי וחילפתי, בטל או חלוף, זכיתי לדין כבתחילה: מה מת חמור אין מטמא עד שעה שימות, שרץ הקל - אינו דין שלא יטמא עד שעה שימות?

I made an argument and I reversed it, and the reversal is nullified, and I am left with the original argument: Just as the corpse, which is a severe [source of impurity], does not cause impurity until it is dead, so too a creeping thing, which is a mild [source of impurity], does not cause impurity until it is [fully] dead.

It is worthwhile to pause to reflect on this early halakhic midrash and its use of the verse in Numbers invoked by Maimonides.[4] Let us begin by noting the textual difficulty flagged by the Midrash: The first part of Numbers 19:13 reads, *"Kol ha-noge'a be-meit be-nefesh ha-adam asher yamut."* Jacob Milgrom translates, "Whosoever touches a corpse, the body of a person who has died."[5] The words *"asher yamut,"* "who has died," appear to be superfluous in light of the prior reference to "a corpse." The *Sifrei* draws the conclusion that there is such a thing as a corpse (*meit*) that is not yet considered really dead with respect to ritual impurity, the concern of Numbers 19. The *Sifrei* asserts that this is the *mefarper*, the convulsing body. As long as the body is still moving convulsively, the person is still considered to be not fully dead and does not convey ritual impurity.

The *Sifrei's* close reading of this phrase points to another aspect of the verse's puzzling construction. I refer to the words *"be-meit be-nefesh ha-adam,"* translated by Milgrom as "a corpse, the body of a person." It should be noted that in this translation, *nefesh* is understood to mean "body," not "spirit" or "soul."[6] This reminds us that in the Bible as later for the rabbis, the corpse is still a person; indeed, the corpse is called (counterintuitively to our sensibility) a *nefesh*.

Equally notable is the translation of Baruch Levine for the words *"be-meit be-nefesh ha-adam"*: "with a corpse belonging to any human being."[7] As Levine observes, "Hebrew *nepes* may refer to dead persons as well as to the living." Yet in Numbers 19:11 (and 19:13), "the sense of *lekol nepes 'adam*, 'belonging to any human being,' suggests

4. See sources and citations in *Mishneh Torah by Moses Maimonides* (ed. Shabse Frankel; New York: Congregation Bnei Yosef, 1993), vol. *Ṭahara*, p. 6. Maimonides' reliance on *Sifrei Numbers* and Numbers 19:13 (*be-nefesh ha-adam asher yamut*) is evident as well in his Mishna commentary to *Oholot* 1:7, as noted by Rabbi Yosef Kafiḥ in his edition of this work (Jerusalem: Mosad Harav Kook, 1963), 149n29.
5. Jacob Milgrom, *The JPS Torah Commentary: Numbers* (Philadelphia: JPS, 1990).
6. This usage appears throughout the book of Numbers. Note, e.g., Numbers. 5:1, *"ṭamei la-nafesh,"* translated by Milgrom as "defiled by a corpse." In his note on this phrase, Milgrom argues that the Hebrew *nefesh* is short for *nefesh meit*, "dead person," as in Numbers 6:6 (Milgrom, *Numbers*, 33, 45; cf. Num. 9:7, p. 68).
7. Baruch A. Levine, *Numbers 1–20* (The Anchor Bible; New York: Doubleday, 1993), 459; cf. 185.

that the reference may be to living persons," especially here, "because the text adds '*asher yamut*.'"[8] Levine, noticing the awkwardness of the sentence construction, as do the rabbis, understands the verse as underscoring that the corpse is still associated with, still belongs to, the living person.

As so often is the case with Midrash, the *Sifrei*'s gloss on this verse, far from being undisciplined eisegesis, actually is the result of meticulous, careful reading of the text surprisingly congruent with contemporary scholarly approaches. For our purpose, the main point is that the biblical text does not disassociate the corpse from the person, assigning the latter to a disembodied soul; rather, the corpse and the person remain linked, entangled even in death.

If Maimonides drew upon the *Sifrei* (among other sources) in formulating his views, this early legal midrash must inform our understanding of his language. I do not see how one could confidently distinguish between *mefarper* (convulsing), which the *Sifrei* considers a sign of life, and *merafref* – Maimonides' term for spasmodic twitching, which is not a sign of life – and reliably assign brain death to the latter and not the former. Indeed, it seems reasonable to assume that a body kept alive with mechanical assistance may well be included in the *Sifrei*'s understanding of "*be-meit be-nefesh ha-adam asher yamut*" – "a body still in the process of dying."

II. THE PROBLEM OF LEGAL BRIGHT LINES

Beyond pointing to specific scenarios and close readings of sources, there is a broader question to be raised about the use of classical Jewish legal texts in this setting. These rabbinic materials are concerned with defining death precisely for legal (halakhic) purposes, such as ritual impurity, marital status, and inheritance. It is important in these contexts to establish readily discernible criteria that will unambiguously answer the questions: Is the person alive or dead? If dead, when did death occur? The motivation for finding bright lines in halakha is similar to that in American law, where clarity and specificity are equally important, for pragmatic reasons.

8. Levine, *Numbers*, 465.

Yet bright and sharp lines seem to be eroded by the complexity and messiness of death. As Michel Foucault has written,

> Death is therefore multiple, and dispersed in time: it is not that absolute, privileged point at which time stops and moves back; like disease itself, it has a teeming presence.[9]

In a similar vein, the philosopher Hans Jonas wrote in 1974:

> We do not know with certainty the borderline between life and death, and a definition cannot substitute for knowledge. Moreover, we have sufficient grounds for suspecting that the artificially supported condition of the comatose patient may still be one of life, however reduced.[10]

Halakha recognizes the messiness. See, for example, *Shulḥan Arukh* YD 370, whose title is "Circumstances where a person is considered dead while still alive."[11] And if a person can be considered dead while still alive, are there circumstances where a person may be alive while in some sense dead?

Reflecting on such sources (which easily could be augmented) leads to the realization that legal determinations of all kinds, especially those regarding death, are always made with respect to a particular domain of law and do not necessarily illuminate the associated human situation to which the law is linked. For example, the determination of the exact moment when a marriage has taken effect is extremely important from a legal point of view, but this determination says little about the quality, ripening, and flourishing of the underlying relationship.

9. Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (trans. A. M. Sheridan Smith; New York: Pantheon, 1973), 142.

10. Hans Jonas, "Against the Stream," in *Philosophical Essays: From Ancient Creed to Technological Man* (Englewood Cliffs, NJ: Prentice-Hall, 1974), 138, quoted in *Controversies in the Determination of Death: A White Paper by the President's Council on Bioethics* (Washington, DC, 2008; www.bioethics.gov), 53.

11. מי הוא החשוב כמת אף על פי שעודנו חי.

In our circumstance, the precise determination of death is a pressing halakhic and legal matter, but the existential experience of death is a different and arguably weightier matter to the individuals involved. Legal bright lines, even if they can be found, do not speak to the question of whether patients should be sustained by mechanical means so that their organs can be "harvested" for transplantation. To quote Jonas again,

> In this state of marginal ignorance and doubt the only course to take is to lean over backward toward the side of possible life.[12]

III. RELIGION AND MEDICAL ETHICS

The consensus of opinion on medical ethics has often shifted; it has proven to be even more pliable than medical knowledge itself. To take one example, in recent memory it was considered advisable, even preferable, to withhold a diagnosis of fatal illness from patients. The paternalistic approach was such that is was considered too shocking for patients to know: patients likely would be harmed and depressed by being told of a fatal illness.

Rabbinic opinion echoed this view. This was especially so with a diagnosis of cancer, which was often withheld from the patient at all costs. If the patient insisted, he might be told that he had a persistent ulceration. Now of course, such an approach would be considered highly inadvisable and even unethical, and rabbinic opinion follows suit. But rather than merely echoing the medical consensus, it seems that the role of religion in general and Judaism in particular should be to question the prevailing assumptions of broader society. This can happen only if halakhists and theologians have a less cozy relationship with the medical community, acting not as cheerleaders but as a counter-voice. In Judaism, such a perspective comes as much from aggada as halakha. As William R. LaFleur has pointed out,

> Contemporary religious authorities, especially in Europe and America, have become loath to do anything other than sanction

12. Jonas, "Against the Stream," 138.

> what is promoted as patently beneficial to humankind; medical technology has its own ethical aura.[13]

Definitions of death will respond to the perceived needs of medical practice. There is danger that death will become what society thinks it needs and medical advances can justify. These cautions arise in part from the discipline of medical anthropology. As Katharine Young has written,

> Medicine inscribes the body into a discourse of objectivity. The body is materialized even as the self is banished.... Pathology's attempt to reinscribe the space of death on the body as precise, to rearticulate the time of death as instantaneous... are attempts to disambiguate the ontological status of the corpse... by conjuring up crisp, clear, clean boundaries in space and time.[14]

The wisdom of Judaic tradition should serve to interrogate current standards of medical ethics, which may reflect Western attitudes that conceal their own parochialism.[15] As Mary Douglas reminds us, "body attitudes are condensed statements about the relation of society to the individual."[16] It is precisely the task of the wisdom of the rabbinic tradition to interrogate the perceived facticity of these societal attitudes. The entirety of the rabbinic corpus, aggada as well as halakha, should be brought to bear in this endeavor.

And indeed, in recent years, the confident assertion that "if there is irreversible total cessation of all brain function including that of the brain stem, the person is dead"[17] has been called into serious question by eminent physicians and ethicists. In December 2008, the President's

13. William R. LaFleur, "Body," in *Critical Terms for Religious Studies* (ed. Mark C. Taylor; Chicago and London: University of Chicago Press, 1998), 36–54.
14. Katharine Young, *Presence in the Flesh: The Body in Medicine* (Cambridge, MA, and London: Harvard University Press, 1997), 1, 127. See also her cautionary remark, drawing upon Mary Douglas and others, that "the interstitiality of transitional states eludes ontological placement" (16).
15. See LaFleur, "Body," 47.
16. Mary Douglas, *Natural Symbols* (New York: Vintage, 1973), 195.
17. Rosner and Tendler, "Definition of Death," 17.

Council on Bioethics published a white paper entitled "Controversies in the Determination of Death" that concluded:

> If being alive as a biological organism requires being a whole that is more than the mere sum of its parts, then it would be difficult to deny that the body of a patient with total brain failure [commonly called "brain death"] can still be alive, at least in some cases.[18]

The council notes:

> Even in a patient with total brain failure, some of the body's parts continue to work together in an integrated way for some time – for example, to fight infections, heal wounds, and maintain temperature. If these kinds of integration were sufficient to identify the presence of a living "organism as a whole," total brain failure would not serve as a criterion for organismic death, and the neurological standard enshrined in the law would not be philosophically well-grounded.[19]

Taking note of this, a recent work by the ethicists Franklin G. Miller (NIH Clinical Bioethics) and Robert D. Truog (Harvard Medical School) states that

> if the cessation of vital functioning of the organism constitutes death, it is difficult to escape the conclusion that patients diagnosed with "total brain failure" are not dead.[20]

Miller and Truog proceed to a conclusion that many would find disquieting: that since "brain-dead" donors remain alive, the dead donor

18. President's Council on Bioethics, *Controversies*, 57.
19. Ibid., 60.
20. Franklin G. Miller and Robert D. Truog, *Death, Dying and Organ Transplantation: Reconstructing Medical Ethics at the End of Life* (New York: Oxford University Press, 2012), 73.

rule must be set aside, to be replaced by "vital organ donation from still-living donors contingent on valid plans to withdraw life-sustaining treatment and consent."[21]

The authors are to be admired for their frankness, but theirs surely is not a suggestion that could find much support among halakhists and other Jewish religious thinkers. The erudite and sobering analysis of Miller and Truog underscores my point that Jewish ethical thought ought not tie itself too closely to the ever-shifting views of the medical community, but should have the fortitude to maintain independent judgment and voice.

IV. WHAT IS *PIQU'AḤ NEFESH*?

Does not the imperative of *piqu'aḥ nefesh* override all other considerations? There are lives to be saved; how can organs be discarded, disposed of, when they are so urgently needed?

The careful study of early rabbinic sources provides an alternative perspective on the term "*piqu'aḥ nefesh*." Nowadays we assume it to mean "saving life" and to provide a mandate that overrides any prohibition (with very few exceptions) and sweeps aside any barrier to rescuing a specific person in danger. But *piqu'aḥ nefesh* in b. *Shabbat* 150a and *Ketubbot* 5a means something rather different: the term refers to discussions in a communal setting regarding matters of life and death, a deliberative process that likely would involve weighing long-term considerations beyond those that present themselves with greatest urgency and pointedness.

This deliberative process is one that Rashi characterizes as "*motzi'in la-or*," "bringing to light" – namely, issues of consequence and significance that have a bearing on the matter at hand.[22] *Piqu'aḥ nefesh* does not necessarily mandate the most immediate and obvious choice for lifesaving. Matters of public policy, precedent, unintended consequences, and the like are well-recognized factors to be considered in decision-making.

21. Ibid., ix.
22. See Rashi to b. *Ketubbot* 5a, s.v. "*mefaqqeḥim*."

To take one celebrated example, Rabbi Meir of Rothenburg was imprisoned in 1286 and, it is said, refused to allow the Jewish community to pay an exorbitant ransom to secure his release, following the mishnaic ruling that "captives should not be ransomed for more than their value" (m. *Gittin* 4:6). Tragically, hostage crises provoke deeply contentious communal debates to this day and often lead to gut-wrenching, painful choices that by their nature cannot ever be fully satisfactory. This surely is not the place to rehearse those discussions and choices; my point is merely to note that the banner of *piqu'aḥ nefesh* cannot be hoisted unreflectively to solve complex issues and forestall reflective examination of all aspects of a question.

The seductions of tangible and immediate benefits may blind us to possible hidden costs and long-term consequences of a utilitarian perspective on the body at death, a view that transforms the corpse from dead person into an assemblage of organs to be "harvested." (The deployment of this term is revealing and unsettling.[23])

In the last few decades, the argument has already shifted character. The celebrated responsum of Rabbi Moshe Feinstein dated 1 Kislev 5745 (November 25, 1984) that accepted the Harvard criteria as a definition of death made reference to an earlier responsum of 5 Iyyar 5736 (May 5, 1976). These responsa added a layer of stringency to the process of determination of death: in certain situations, life support should be continued until there is evidence that the brain has been functionally severed from the body and has suffered complete and irreversible destruction; at this point, life support may be discontinued, the deceased may be prepared for burial, and the process of mourning can begin. That is, the aim of Rabbi Feinstein's responsa was to benefit the person crossing the threshold of death, enabling him or her to avoid a protracted period of pointless extension of mechanical intervention, and facilitating a respectful and speedy burial.

23. LaFleur, "Body," 48, observes that the use of such language by the medical community "indicates that the body is already considered to be a *thing*" (emphasis in original). [Editor's note: For the most part, this term has fallen out of use in medical and bioethical discourse, the preferred term being "retrieval."]

Now, however, the brain death criterion is being used to *extend* the period on mechanical support, in order to maintain organ freshness and facilitate transplantation.[24] The interests of the recently deceased person and his or her family have receded in favor of another constituency and another set of interests.

Nor is this the last stage. The discussion has moved from establishing the permissibility of organ donation after brain death to the obligation to donate and the putative immorality of burying organs deemed useful. Already in several developed Western countries, the official governmental policy is "opt-out" rather than "opt-in," that is, unless explicit instructions are given, it is assumed that a body is available for transplantation.

It is hard to see how, if halakhists and other Jewish religious thinkers adopt a narrow *piqu'aḥ nefesh* view, there will remain any way to justify *not* mandating organ transplantation at brain death. The deceased ceases to be a person with rights, although to be sure, there will be solicitous pronouncements about the soul. But the corpse will be viewed as an aggregation of organs and tissues, a resource to be culled. This surely opens the possibility of definitional legerdemain, manipulating the criteria to maximize access to a valuable resource, while the interests of the dead person and his or her family are marginalized.

V. THE PERSONHOOD OF THE CORPSE

Early rabbinic sources attribute personhood to the corpse: they ascribe sentience and cognition to the bodies of the dead. These sources refer not merely to the souls of the dead, but to the corpse itself, to the body. While the early rabbis considered the moment of death a trigger for some legal determinations, in other ways they considered death an extended process that unfolds slowly, characterized by continuity as much as by discontinuity, and one that never fully concludes.

24. See the responsum of Rabbi Yitzchak Yaakov Weiss (*Minḥat Yitzḥaq* 5:7–8) for part of his critique of organ donation and the brain death criterion.

Tzitzit for Burial

The ongoing personhood of the dead is evidenced by the law that the corpse be buried in *tzitzit*. *Sifrei Zuṭa*, our oldest halakhic midrash, states flatly:

למה נסמכה פרשת מקושש לפרשת ציצית? לומר לך: מת חייב בציצית.

Why was the portion about [the execution of] the man who chopped wood on Shabbat placed adjacent to the portion about *tzitzit*? To say that the corpse is obligated regarding *tzitzit*.[25]

Some *Sifrei Zuṭa* commentators assume that the midrash's concern is to prepare the body for resurrection, under the assumption that mitzvot will be obligatory in the eschaton.[26] If so, this does not indicate the attribution of personhood to the dead.

Other sources, however, do ascribe ongoing personality to the dead. The Babylonian Talmud (*Menaḥot* 41a) records:

אמר רב טובי בר קיסנא אמר שמואל: כלי קופסא חייבין בציצית. ומודה שמואל בזקן שעשאה לכבודו שפטורה. מ[אי] ט[עמא]? "אשר תכסה בה" אמר רחמנא. האי לאו לאיכסויי עבידא. בההיא שעתא ודאי רמינן ליה, משום "לועג לרש חרף עושהו".

Rav Ṭovi bar Qisna said in the name of Shmuel: Garments in a storage chest are obligated regarding *tzitzit*. However, Shmuel would admit that garments made by an old man for his honor [i.e., his funeral] are exempt. Why is that? Because the Merciful One said, "with which you cover yourself" (Deut. 22:12), and these are not made to cover him. Nevertheless, at the moment [of burial], certainly [*tzitzit*] should be placed upon them, because "one who mocks the poor blasphemes his Creator" (Prov. 17:4).

25. Ed. Horovitz, p. 288, citing *Maḥzor Vitry* 1:246–47, in turn citing Rabbi Yehuda ben Avraham Gaon, who credits *Sifrei Zuṭa*; other *Rishonim* attribute this to "the Midrash." In any event, this text was known to the early medieval authorities as a midrashic text; see the citations in Yaakov Zev Yaskovitz, *Ambuha de-Sifrei* (Jerusalem, 2000), 356n19.

26. See the sources cited in Efraim Zev Gerboz, *Sappirei Efrayim* (Jerusalem, 1995), 90.

It is possible to construe this as focused on the living rather than the corpse, that is, we must treat the corpse with due respect to inculcate respect among those preparing the dead for burial. The formulation of Rabbeinu Gershom, at least, undercuts this understanding:

שלא יהא חלישות הדעת למת שמחשבין אותו פטור מן המצות.

[We place *tzitzit* on the garment] so that the corpse will not be disheartened by the realization that he is being considered exempt from mitzvot.

The dead have feelings; they have an ongoing emotional life. This certainly is personhood.

The question of whether the dead are to be buried with *tzitzit* remained contentious and not fully resolved for many centuries. Rabbi Jacob ben Asher (d. 1343) rehearses what already in his day was a long and complex discussion of the question (*Ṭur* YD 351) and ends by citing Nahmanides, who states categorically that the dead are buried in a *ṭallit* bearing *tzitzit*. Some *Rishonim* attenuate the force of the well-known dictum that "the corpse is freed of the commandments" with the observation that *tzitzit* are different insofar as *tzitzit* are as great as all mitzvot put together. But if the corpse truly is on the far side of personhood, that should make no difference at all – we do not dress an inanimate object with *tzitzit*.

The uncanny nature of the question of *tzitzit* for burial is underscored by Rabbi Yeḥiel Michel Epstein's *Arukh ha-Shulḥan* (Warsaw; YD 351:3). Epstein conveys what he assures his readers are reliable reports of two great sages who left instructions to be buried in a *ṭallit* with complete and intact *tzitzit*: Rabbi Eliyahu Kramer, better known as the Vilna Gaon, and Rabbi Alexander Ziskind of Grodno, author of *Yesod ve-Shoresh ha-Avoda*. Their instructions were thwarted by error or accident, and in both cases the circumstances were interpreted as heavenly signs to disregard the wishes of the saintly figures and bury them according to the prevailing custom, in a *ṭallit* with one corner's *tzitzit* removed. The fact that Epstein in his soberly legal *Arukh ha-Shulḥan* reports these stories, granting credence to the "heavenly signs," in particular with regard to the Gaon of Vilna, considered the paragon of fidelity to a halakhic practice that eschews heavenly signs, is striking.

Other Examples of Pain and Embarrassment Attributed to the Deceased

Proverbs 17:5 appears elsewhere in the Babylonian Talmud in similar contexts. For example, *Berakhot* (18a) uses this concept for a number of prohibitions relevant to the dead:

לא יהלך אדם בבית הקברות ותפילין בראשו וספר תורה בזרועו וקורא, ואם עושה כן, עובר משום "לועג לרש חרף עושהו"...

One may not walk in the cemetery with *tefillin* on his head, a Torah scroll in his arms, and reading out loud. One who does this violates the verse "One who mocks the poor blasphemes his Creator"...

אמר רחבה אמר רב יהודה: כל הרואה המת ואינו מלוהו עובר משום "לועג לרש חרף עשהו".

Raḥava said in the name of Rav Yehuda: Whoever sees a corpse [on the way to burial] and does not accompany it violates the dictum of "One who mocks the poor blasphemes his Creator."

ואם הלוהו, מה שכרו? אמר רב אסי: עליו הכתוב אומר: "מלוה ה' חונן דל", "ומכבדו חנן אביון".

And if he does accompany the corpse, what is his reward? Rabbi Assi says: To him apply the verses "One who is gracious to the poor lends unto the Lord" (Prov. 19:17) and "One who is gracious unto the needy honors [God]" (14:31).

Once again, this might be dismissed as an adjuration for the living more than concern for the dead, but Rashi's comment leaves the reader with a different impression:

קרי ביה: מלוה את המקום מי שחונן את הדל, ואין לך דל מן המת.

Someone gracious to the needy is considered to be extending a loan to God, and there is *no one needier than a corpse.*

Even more striking is the well-known talmudic dictum (b. *Berakhot* 18b; *Shabbat* 12b):

אמר רבי יצחק: קשה רימה למת כמחט בבשר החי.

Rabbi Yitzḥaq said: The worm is as painful for the dead as a needle in the flesh of the living.

According to Rabbi Yitzḥaq, the corpse feels pain in the grave.

VI. EXCURSUS ON AGGADA AND HALAKHA

At this point some readers undoubtedly will react with annoyance at the invocation of what they consider to be aggadic tropes with no normative force. Is it not a fundamental principle that "we do not rely on aggadot"? Actually, recent scholarship has shown that the demotion of aggadic texts to secondary status began in geonic times and intensified in the medieval period, under the influence of philosophy. While earlier sources recognize the genre distinction between halakha and aggada, they do not privilege the former at the expense of the latter.[27]

Furthermore, scholars are coming to appreciate the great role that narrative plays in ostensibly halakhic material. The title of the recently published *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah*, by Moshe Simon-Shoshan,[28] conveys the thesis well. For Simon-Shoshan, narrative is central to the way in which the Mishna transmits law and ideas about jurisprudence. Another recently published work, *The En Ya'aqov: Jacob ibn Habib's Search for Faith in the Talmudic Corpus*, by Marjorie Lehman, explores ibn Habib's efforts to restore the centrality of aggada.[29] As Lehman says (97),

27. See Suzanne Last Stone's introduction to *Dine Israel: Studies in Halakhah and Jewish Law* 24 (2007): 1–9 (English section), and the essay in the same volume by Yair Lorberbaum, "Reflections on the Halakhic Status of Aggadah," 29–64.
28. Moshe Simon-Shoshan, *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah* (New York: Oxford University Press, 2012). See also Barry S. Wimpfheimer, *Narrating the Law: A Poetics of Talmudic Legal Stories* (Divinations: Rereading Late Ancient Religion; Philadelphia: University of Pennsylvania Press, 2011).
29. Marjorie Lehman, *The En Yaaqov: Jacob ibn Habib's Search for Faith in the Talmudic Corpus* (Detroit: Wayne State University Press, 2012).

Reacting against the curricular success of Alfasi, ibn Habib claimed the aggadot as canonical, sacred texts that had been overlooked.

In my view, aggadic texts must be taken as seriously as halakhic texts. Aggadic considerations are interwoven into the very fabric of our laws and practices and cannot be disentangled without violence. If an authority is tempted to dismiss an aggadic source as mere poetic conceit or an antiquated voice based on outmoded ideas overtaken by subsequent advances in understanding, one must ask whether halakhic materials are subject to the same scrutiny and possible revision.

VII. LIPS MOVING IN THE GRAVE

These reflections set the stage for my next source, a well-known text in the Jerusalem Talmud (*Berakhot* 2:1):

לוי בר נזירא אמר: כל האומר שמועה משם אומרה - שפתותיו רוחשות עמו בקבר.

Levi bar Nezira said: When one recites a teaching [of a departed master] and credits the source, the lips of the person [who is responsible for the teaching] murmur together with [the living tradent] in the grave.

We all may agree that this text is intended to encourage the reporting of one's sources and to inculcate respect for intellectual property, but is the image of lips moving in the grave mere symbolism, a hortatory motif that perhaps has become excessively graphic, not to be taken entirely seriously? Or does the move to dismiss the full force of this text – a move that comes so quickly and reflexively that we may not even notice it – betray our own cultural biases and preconceptions?

It is helpful in this regard to read the continuation of the passage:

מה טעם? "דובב שפתי ישינים" - ככומר הזה של ענבים, שהוא זב מאיליו.

What is the basis? "The fluttering lips of the sleeping" (Song 7:10) – like a heated mass of grapes that oozes of its own accord.

The image is one of persistent organic activity and somatic continuity. Invoking the verse from the Song of Songs, the dead are considered to be "asleep," sleep being a common metaphor for death in antiquity.[30]

The passage continues with even greater vivid concreteness:

ר' חנינא בר פפאי ור' סימון, חד אמר: "כהדין דשתי קונדיטון", וחרנה אמר: "כהדין דשתי חמר עתיק" - אף על גב דהוא שתי ליה, טעמיה בפומיה.

Rabbi Ḥanina bar Pappai and Rabbi Simon, one said: It is like a person who drank spiced wine; the other said: It is like a person who drank aged wine – even though he has already drunk it, the taste lingers in his mouth.

What are we to make of this? Did these rabbis not know that bodies decompose in the grave? Here we cannot readily dismiss what appears to be an imaginative flight of fancy to a lack of scientific knowledge: people in antiquity had occasion to view disinterred corpses. With all this, the texts assert that there indeed is a residue of somatic vitality in the grave, even in remains that are partially decomposed. More: the deceased author of a teaching derives pleasure when he is duly credited. The pleasure resides in the body; the corpse remains a person, self-aware and sentient. As Rashi puts it in the parallel passage in the Babylonian Talmud (*Bekhorot* 31b):

"דובבות" - נעות, והנאה הוא לו, שדומה כחי.

"[The lips] flutter" – [i.e.,] move, and this is pleasurable, insofar as he thus is like a living person.

It will be helpful at this point to recall that for the rabbis, body and soul are inseparably linked. As Reuven Kimelman has written,

30. See Allen Kerkeslager, "Jewish Pilgrimage and Jewish Identity in Hellenistic and Early Roman Egypt," in *Pilgrimage and Holy Space in Late Antique Egypt* (ed. David Frankfurter; Leiden and Boston: Brill, 1998), 125.

> While others of dualistic tendencies exalted the soul and denigrated the body, the rabbis de-divinized the soul and de-demonized the body. The result enhanced the body-soul linkage.[31]

The early rabbis envisioned resurrection, rather than immortality of the soul, as the appropriate eschatological hope. Just as the body cannot function without the soul, the soul needs the body: it has no independent existence. And "the micro-reunion of body and soul upon awakening adumbrates the great awakening of the future."[32] That is, death indeed is extended sleep, with the body and soul never completely separated.

VIII. CAVEAT REGARDING RESURRECTION

A clarification may be in order at this point. By invoking resurrection, I do *not* mean to advance the argument that transplantation should be forbidden because it makes resurrection impossible. Sadly, history has provided God with more severe challenges than this to overcome at the eschaton in order to accomplish resurrection.

Rabbi Shneur Zalman of Liadi in his *Tanya*[33] speaks of resurrection as the ultimate miracle, a breakthrough of *Sovev*, the Divine Absolute, the quality of total transcendence, into *Memaleh*, the contingent and mediated world of history. Resurrection will transform all; if, as I believe, God will accomplish it despite the horrors of the Holocaust, God will not be hindered by a transplanted organ.

31. Reuven Kimelman, "The Rabbinic Theology of the Physical: Blessings, Body and Soul, Resurrection, and Covenant and Election," in *The Cambridge History of Judaism, Vol. 4: The Late Roman-Rabbinic Period* (ed. Steven T. Katz; Cambridge, UK, and New York: Cambridge University Press, 2006), 946–76 [953].
32. Ibid., 955. It would appear that for the rabbis, the core of personhood resides in the body more than the soul. This is evident from the familiar morning blessing "א-לוהי נשמה שנתת בי, טהורה היא..." "My God, the soul that You have placed within me is pure...." The "me" clearly is the body, not the soul.
33. Shneur Zalman of Liadi, *Iggeret ha-Qodesh*, no. 17. For an English translation, see the bilingual edition, translated by Jacob Immanuel Schochet (London: Soncino Press for Kehot Publication Society, 1973), 482–86.

IX. DEATH AS A KIND OF SLEEP

For the rabbis, the way we envision persons who are dead determines how we see them when they are alive; the very idea of continuity of personhood is dependent on understanding death as a kind of sleep. I am not claiming for the rabbis merely that respect for the corpse sensitizes and ennobles the living (although that is true); rather, for the rabbis, a crucial aspect of the concept of personhood is the belief that the person is still a person even in death. My term for this is "relational persistence."

This belief indeed is essential for national as well as personal continuity. As Jon Levenson has shown, God's power over death is an essential element in biblical Israel's sense of its identity and history.[34] The belief in God's power over death, while ripening over time, is not a late arrival, and relates to persons as well as the nation as a whole in a coordinated way. For the rabbis, resurrection was "indispensable to their vision of divine revelation and human redemption and renewal alike."[35]

The nexus between death-as-sleep and belief in personal and national survival was advanced by a great Hasidic master, the Maggid of Kozienice, in his *Avodat Yisrael* (*Vayyishlaḥ*, s.v. "*shalleḥeni ki ala ha-shaḥar*"). His comment is based upon Genesis Rabba 78, which glosses Genesis 32:27, and offers an interpretation of Lamentations 3:23: "They are new every morning; great is Your faithfulness":

אמר ר' שמעון בר אבא: עד שאתה מחדשנו בכל בקר ובקר, אנו יודעין שאמונתך רבה לגאלנו.	Rabbi Shimon b. Abba said: Because You renew us every morning, we know that great is Your faithfulness to redeem us.
אמר ר' אלכסנדרי: עד שאתה מחדשנו בכל בקר ובקר, אנו יודעין שאמונתך רבה להחיות לנו את המתים.	Rabbi Alexandri said: From the fact that You renew us every morning, we know that great is Your faithfulness to resurrect the dead.

34. Jon D. Levenson, *Resurrection and the Restoration of Israel: The Ultimate Victory of the God of Life* (New Haven and London: Yale University Press, 2006).
35. Ibid., xiii.

Sleep is a lesser death, and death therefore is a more intense form of sleep. The experience of waking up every morning provides encouragement for the belief in resurrection. As the Kozienicer Maggid shows, the aptness of the analogy requires that the person even in death have some ongoing vitality, what he calls *hevel de-garmei*, "vapor in the bones":

לא שהמת מת לגמרי ואחר כך יברא בריה חדשה, רק הגם שהאדם מת, על כל פנים נשאר בקרבו איזה משהו וענין דושם חיות שיחול עליו ברכת תחיית המתים לעתיד לבא...

The dead are not completely dead. We ought not understand resurrection as a completely new creation; rather, even though the person has died, there remains some trace of vitality upon which the blessing of resurrection will take effect in the eschaton...

שגם כשהאדם מת, נשאר איזה הבל דגרמי, שיקום על ידי זה לעתיד לבא כשירצה היוצר להעמידו...

for although the person has died, there remains some vapor in the bones through which revival will take place in the eschaton, when the Creator chooses to restore the person to life...

וד' אלכסנדרי אמר משל כזה לענין הגאולה האמיתית שאנו מחכים לה, שאי אפשר להבין אותה על בוריה איך יעשה ה' נס הגדול בארץ לרומם קרן ישראל מכל צרותיהם. אכן "ממה שאתה מחדשינו לבוקרן" וכו' אנו רואים שנשאר בקרבינו קיסתא דחיותא, ודחמי השם יתברך בצרותינו להושיע אותנו מיד הקמים עלינו.... ובוודאי יש בקרבינו אור זרוע מאת ה', שיתעוררו רחמיו לגאולה שלימה...

And Rabbi Alexandri offered an analogy regarding the true redemption that we await, for it is quite impossible to understand it fully: how will God perform such a miracle to lift up Israel high, out of all her troubles? But since we observe the daily miracle of waking in the morning from sleep, we conclude that there remains [in the national body as well] a measure of vitality and divine mercy, in spite of our troubles, to deliver us from all our adversaries.... We surely have within us a "light sown" (Ps. 97:11) by God so that His mercies will be aroused for the complete redemption...

כי הגאולה השלימה נקרא גם כן תחיית המתים, חיי הנפשות.

for the complete redemption is also called resurrection – the resurrection of our spirits.

As the Kozienicer Maggid points out, the midrashic passage in Genesis Rabba (quoted above) compares the experience of waking up every morning from sleep to two miraculous events: resurrection from death, and redemption of Israel from exile. All three are based on ongoing vitality: much like arising from sleep, Israel's national revival in the messianic era and resurrection of the dead depend on some ongoing substrate of vitality, some "vapor in the bones," upon which to base the revival.

X. RECONCILIATION AFTER DEATH: APOLOGIZING AT THE GRAVE

Maimonides' Laws of Repentance is a justly famous section of the *Mishneh Torah*, his fourteen-book code of Jewish law and theology. In addition to repentance, Laws of Repentance addresses philosophical issues such as freedom of will, divine foreknowledge, and the nature of the afterlife. It concludes with a rapturous description of the love of God as the most sublime human aspiration.

In sections nine and ten of chapter two, Maimonides presents his formulation of the classic talmudic dictum that if one has injured or offended one's fellow, the first step in repentance is to appease the offended person and make whole any monetary damages; only afterward may one seek forgiveness from God. He then writes (section 11):

החוטא לחבירו ומת חבירו קודם שיבקש מחילה מביא עשרה בני אדם ומעמידן על קברו ויאמר בפניהם: "חטאתי לה' א־להי ישראל ולפלוני זה, שכך וכך עשיתי לו".

If one wronged his neighbor and the offended individual died before the offender had the opportunity to ask forgiveness [and he now desires to do so], he should gather ten people, position them on the grave and say in their presence, "I have sinned to the Lord, God of Israel, and to this person (mentioning his name), for I did such-and-such to him."

This practice begs for explanation. Why does the person seeking forgiveness go to the grave of the offended party if as we are so often told, it is the soul that survives, presumably "in heaven," and the body is just an empty shell? And what role is served by the ten people placed at the grave? Clearly, Maimonides, the talmudic passage upon which his description is based (b. *Yoma* 87a), and all the later authorities who follow him consider the grave – that is, the place where the body was interred – as the location of the person. More than that, that person still can be petitioned for forgiveness, and the place to petition is where the person is located – the grave.

What about the ten people, the *minyan*? The simplest understanding is that the *minyan* invites the presence of the *Shekhina*, the Divine Presence (see m. *Avot* 3:7; cf. m. *Megilla* 4:3). It also may be that the *minyan* lends solemnity and weightiness to the event, giving the apology a formal, juridical quality. But the most striking aspect of this apology is that it is directed to the person in the grave (*li-peloni zeh, she-kakh ve-khakh asiti lo*). The person seeking forgiveness must apply to the aggrieved person, who is still to be found where his remains were interred. The apology is directed to the earthly remains, because that is where the *person* still is. The point is even stronger in the Jerusalem Talmud's version of the formula, in which the (dead) person is addressed directly, in the second person:

מית - צריך מפייסתיה על קבריה ומימר: "סרכית עלך".

If [the aggrieved person] has died, the offender must placate him at his grave and say, "I have sinned against you."

Later authorities add fascinating details to this law. Rabbi Yisrael Meir Kagan (Poupko), in his *Mishna Berura* (606:2, gloss 13), notes that if the offense was perpetrated after the injured party died, it is not necessary to go to the gravesite; rather, one should go to the place where the insult occurred. This is revealing of the logic of this law: if the insult happened after death, then the offense indeed is to the abstract reputation of the person, so the place to go for the rite of contrition is the location where the insult was uttered, but in a circumstance where the offense was directed against the person during life, one is still in relationship with, in conversation with, *the person*, whose physical presence survives death, and one therefore must seek out that physical presence to offer one's apology and seek forgiveness.

This law reveals a further dimension of rabbinic attitudes toward the *meit*, the corpse. The sources adduced previously are primarily concerned with preserving the dignity of the corpse, avoiding hurt to his or her feelings. This source goes farther: not only does the person in the grave have feelings to be considered, but he or she is capable of receiving apologies and of forgiving. If the mark of nobility is the ability to forgive, then the corpse in the grave may be dead but is eminently capable of nobility and graciousness: personhood indeed!

Even where no offense has been committed, the living are required to address the dead directly and offer them encouragement. In j. *Berakhot* 9:2 we read:

העובר בין הקברות, מהו אומר? "ברוך אתה ה', מחיה המתים".

What does one say when passing among graves? "Blessed are You, Lord... who resurrects the dead."

ר' חייא בשם ר' יוחנן: "ברוך נאמן בדברו ומחיה המתים".

Rabbi Ḥiyya said in the name of Rabbi Yoḥanan: "Blessed... faithful in His word and who resurrects the dead."

ר' חייא בשם ר' יוחנן: "היודע מספרכם הוא יעורר אתכם, הוא יגלה את העפר מעל עיניכם. ברוך אתה ה', מחיה המתים".

[Another version:] Rabbi Ḥiyya said in the name of Rabbi Yoḥanan: "The One who knows your number, He shall waken you; He shall remove the dust from upon your eyes. Blessed are You, Lord, who resurrects the dead."

ר' אלעזר בשם ר' חנינא: "... אשר יצר אתכם בדין וכלכל אתכם בדין וסילק אתכם בדין ועתיד להחיותכם בדין. היודע מספרכם הוא יגלה עפר מעיניכם. ברוך מחיה המתים."

Rabbi Elazar said in the name of Rabbi Ḥanina: "... who created you justly, sustained you justly, took you from this world justly, and will one day revive you justly. The One who knows your number, He shall waken you; He shall remove the dust from upon your eyes. Blessed are You, Lord, who resurrects the dead."[36]

36. For the Babylonian Talmud's version, see *Berakhot* 58b; cf. Maimonides, MT Laws of Blessings 10:10; *Shulḥan Arukh* OḤ 224:12.

The blessing surely is intended to strengthen the belief among the living in resurrection. But if that is all the composers of this benediction had in mind, they need not have framed it in the second person, as direct address to the corpses, as the latter two versions of the blessing are. In these two versions, the deceased are being addressed: *they* are being given assurance that their current state is not permanent.

The phrasing of the latter versions of the blessing in the Jerusalem Talmud text (not found in the Babylonian version) is clear and unequivocal: "He shall waken *you*; He shall remove the dust from upon your *eyes*." We the living are speaking to the dead, to the corpses, offering them hope and encouragement: God knows exactly how many bodies lie here; you all are secure in God's mindful gaze, and one day your eyes will open again.

XI. HUMAN PERSONHOOD: REAL OR ARTIFACT? BORGES AND THE RABBIS

The linkage between attitudes toward the dead and personal identity surfaces in the works of a great modern writer, Jorge Borges. Borges' conclusions, however, are the reverse of those we have been exploring. The rabbinic idea of sentient personhood after death can be considered the exact opposite of Borges' skepticism about personal identity, in death as in life. The last line of a short Borges parable reads:

> He knows that the dead man is illusory, the same as the bloody sword weighing in his hand and himself and all his past life and the vast gods and the universe.[37]

The unreality of the dead underscores the illusory quality of life.

Borges mocks the idea of personal identity in his famous "Borges and I," which explores the dissociation between the celebrated author and the human being behind the body of work. The tiny vignette concludes:

> I shall remain in Borges, not in myself (if it is true that I am someone), but I recognize myself less in his books than in many others.... Thus my life is a flight and I lose everything and everything belongs to oblivion, or to him. I do not know which of us has written this page.[38]

37. "A Problem," in Jorge Luis Borges, *Labyrinths: Selected Stories and Other Writings* (ed. Donald A. Yates and James E. Irby; New York: New Directions, 1964), 245.

This dissociation is the precise reversal of the import of the rabbis' "*siftotav dovevot ba-qever*" (lips fluttering in the grave), so concerned with retaining the association between the author and the words with undiminished intensity, even in the grave.

Granted that Borges would acknowledge with enthusiasm and gratitude the connection between his fictions and rabbinic narrative, it remains the case that their respective projects point in opposite directions. One of Borges' main themes is the problematic nature of the self, while the rabbis, by contrast, cultivate by every means at their disposal the belief in the enduring vitality and continuity of the individual human self.

XII. KOLAKOWSKI AND INDIFFERENCE IN DEATH

The belief in ongoing vital personhood even in death inculcates empathy with one's own future self. As Leszek Kolakowski has written,

> All negativities of life are explicable as manifestations of indifference...
>
> In dying and in the death of loved ones, what is most acute is precisely that they become indifferent towards us, absorbed irrevocably in the place whence they ostentatiously demonstrate a complete lack of interest in us. This sudden loss of interest produces the unease which is felt at the sight of a corpse of a known person: an object, still being identified with a person, but incapable of a personal contact with us. Equally, the anticipation of our own death, that is, the projection of a world without our presence, reveals to us the indifference of Being and only for that reason it is difficult to bear...
>
> Thus, it is not Nothingness that we fear, but a world grown totally indifferent, which has organically ceased to notice our

38. "Borges and I," in Borges, *Labyrinths*, 246–47.

imagined presence in it – that presence which is assumed in our imagined absence.[39]

Kolakowski's profound reflection helps us understand the paradoxical asymmetry regarding fear of death: why does the imagined absence of the individual in the world after death incite dread while the equally vast period of time before one's appearance in this world does not provoke equal terror? The answer is that only after one has lived on this earth does *indifference* come into play; it is the world's indifference to one's former presence and projected absence that is the ultimate affront to personhood.

This idea goes far to explain why it is so important for the rabbis to imagine an ongoing bodily presence in the grave, a presence that anchors personhood, that is self-aware, and that can be the locus of an ongoing relationship with the living. Indifference is impossible if the dead are still here, still among us, still capable of feeling and interaction with those they have influenced and continuing to murmur words of wisdom.

Kolakowski's larger argument, as his title, *The Presence of Myth*, suggests, is that mythic modes of thinking are indispensable to human existence and societal functioning, and will always live in creative tension with more rationally based modes of reasoning. One cannot be prioritized at the expense of the other, and neither ever will completely vanquish the other. This is reminiscent of what Lakoff and Johnson have shown about metaphor: far from being "mere poetical or rhetorical embellishments," metaphors are fundamental to human thought and presence in the world:

> It is as though the ability to comprehend experience through metaphor were a sense, like seeing or touching or hearing.... Metaphor is as much a part of our functioning as our sense of touch, and as precious.[40]

If we choose to understand the rabbinic notion of somatic persistence as myth or metaphor, it loses nothing of its reality and normative force.

39. Leszek Kolakowski, *The Presence of Myth* (trans. Adam Czerniawski; Chicago and London: University of Chicago Press, 1989), 70–71.

40. George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago and London: University of Chicago Press, 1980), 239.

It is the governing principle that secures our very idea of personhood, of individual and national identity.

XIII. COMPARISON TO POSTHUMOUS REHABILITATION

It will be fruitful to compare the rabbinic ideas presented here with the notion of posthumous rehabilitation, clearing the name of a person wrongly accused of a crime. The practice is most prominently associated with the aftermath of the Stalinist era in the former Soviet Union, where many loyal Communists were falsely accused of disloyalty and treason and tried in infamous show trials. Many were executed or died in prison. At a later time the injustice was recognized and a number of such individuals were posthumously rehabilitated.

Nelson Lande has argued that there is a duty to rehabilitate such individuals.[41] In his exposition, he engages the views of George Pitcher, who in an article entitled "The Misfortunes of the Dead"[42] argues that it is "possible for something to happen after a person's death that harms the living person he was before he died."[43] This is meant to explain why, even though in Pitcher's view "the dead are now just so much dust,"[44] the dead can be wronged. Pitcher asserts that this actually means harming a living person's future interests, anticipated reputation, etc.

For his part, Lande tentatively and cautiously moves in the direction of affirming that a person can be wronged after death. Although, as he is quick to point out, from a philosophical perspective "there does not exist an entity, *y*, which can acquire the property of being wronged," – that is, rationally speaking, there is no personhood after death and the body is just so much dust – nevertheless, "our ordinary ways of speaking about the dead do seem to lend support to this response." In a separate but related suggestion, Lande offers the possibility that when we speak of a person as being wronged after death, the characterization may be construed as referring to

41. Nelson P. Lande, "Posthumous Rehabilitation and the Dust-Bin of History," *Public Affairs Quarterly* 4:3 (1990): 267–86.

42. George Pitcher, "The Misfortunes of the Dead," in *The Metaphysics of Death* (ed. John Martin Fischer; Stanford, CA: Stanford University Press, 1993), 159–68; originally appeared in *American Philosophical Quarterly* 21:2 (1984), 183–88.

43. Ibid., 162.

44. Ibid., 160.

the person atemporally, without reference to a specific time period. In any event, Lande claims that posthumous rehabilitation is a moral imperative and struggles to find a philosophical rationale for this duty.

The rabbis surely concur with the notion of moral imperatives to the dead, but instead of engaging in complex philosophical argumentation, they unhesitatingly assert the personhood of the dead, anchored not just in the soul, but in the physical remains. For them, the duty to clear a name need not be tied to abstractions such as "ante-mortem reputation," but is an ongoing consequence of relational persistence with the (physical remains of the) person. Interestingly, the rabbis are not the only authorities from antiquity who attribute some residual awareness to the dead. Pitcher quotes Aristotle to this effect:

> So it appears that the dead are affected to some extent by the good fortunes of those whom they love, and similarly by their misfortunes.[45]

Pitcher is utterly puzzled by this statement of Aristotle and attempts to understand it in light of his own construct "that an ante-mortem person can be harmed (or benefited) after his death."[46] But it is more likely that Aristotle meant exactly what he said and that the idea of some residual sentience after death was widespread in the world of antiquity, among Hellenistic philosophers as well as Jewish sages. In fact, the idea that the dead can be harmed appears as far back as the Bible, which treats the denial of honorable burial and the violation of one's corpse as a terrible punishment reserved for the most heinous sinners.[47]

Turning to a very different type of example, a favorite target of vicious anti-Semites is the Jewish dead. Gravestones are toppled, shattered, and daubed with slogans and insignia of hate. Of course, one way to interpret such activities is as a threat and warning to living Jews and their communal institutions. While this is undoubtedly correct, I would

45. Pitcher, "Misfortunes," 163, quoting Aristotle, *Nicomachean Ethics* 1:11 (trans. J. A. K. Thomson).
46. Ibid., 164.
47. See, e.g., Isaiah 14:18–20; 22:15–19.

argue that attacking a gravestone has the added dimension of violating the honor of the dead: the haters are conveying the depth, intensity, and boundlessness of their hatred, which reaches even to the grave. And Jewish communities, understanding the crimes in precisely that way, frequently respond not just by restoring the gravestones, but with a formal ceremony of reconsecration to which civic leaders are invited. Those who have been attacked – the dead – must be returned to full dignity and honor.

An example of this type of incident occurred in the Jewish cemetery of Vilna in 1920, when anti-Semitic vandals disinterred corpses of Jews and buried horses in their place. The essayist and mystical thinker Hillel Zeitlin responded with a powerful poem-prayer that protests to God at the desecration, speaking of the bodies as God's "dwelling place defiled," God's "sanctuary rendered unclean," God's "chariot shattered."[48] Notably, it is the *corpses* of the pious Jews that are being referred to as God's dwelling place, sanctuary, and chariot.[49]

CONCLUSION

I have been asked by the editor of this volume to express a bottom-line conclusion: am I for or against organ transplantation from individuals declared "brain dead"? In response, I must say that I have a hard enough time deciding difficult matters for myself, let alone giving advice to others. And halakhic decision-making is entirely out of my domain. Rather, I see this essay along the lines of a dissenting opinion, with homage to Justice Charles Evans Hughes, who is quoted as having said that "dissent is an appeal to the brooding spirit of the law, to the intelligence of a future day."

48. I draw here on the recently published superb collection of Zeitlin's writings edited and translated by Arthur Green under the title *Hasidic Spirituality for a New Age: The Religious Writings of Hillel Zeitlin* (New York and Mahwah: Paulist Press, 2012). The prayer-poem, titled "The Holy Ones," was translated by Joel Rosenberg and appears on pp. 195–96.
49. An intuitive belief in the persistence of personhood also seems to play a key role in the recent dispute of Elie Wiesel with the Mormon Church surrounding posthumous proxy baptism of Jews. The more one envisions the dead as retaining their personhood, the more offensive is the attempt by another group or religion to appropriate their identities.

In this case, it is my hope that perspectives, voices, and considerations that have been neglected or suppressed will be restored to life, given their dialogic due and weight in the deliberative process of individuals and society as a whole. I am arguing that choosing to refrain from organ donation by medical intervention in the death process should be considered as an ethical stance. Murmuring lips deserve to be attended to with care and respect.[50]

In this essay, I have developed two basic arguments. The first relates to the inherently gradual and messy nature of dying as an aspect of life, in contrast to "death" as a legal category. Texts should not be forced to speak to situations they did not envision and were not meant to address. The wisdom of bringing halakhic texts with bright-line definitions to bear on liminal states is dubious at best. The result is a category error. The desire for quantification and precisely observable metrics should not tempt us into ascribing certitude and clarity to the great chasm of uncertainty and unclarity.

What is called for is epistemological modesty and humility in the face of the great mystery, and it is religion that should have the courage to call for that modesty and humility. I am indeed concerned about the prospect of mischief when ostensibly incontrovertible diagnostic criteria are harnessed to compelling social need. There is a danger that death will become a borderland subject to definitional gerrymandering for the sake of maximizing utility.

The second argument relates to the rabbinic attribution of personhood to the corporeal remains of the deceased. This stance is so deeply held, so variously articulated and with such vivid insistence, that it evidently reflects a core rabbinic value that we would do well to take seriously. I grant that there is a metaphoric aspect to this stance, but again invoking Lakoff and Johnson, "metaphor is as much a part of our functioning as our sense of touch."

For the rabbis, the cultivation of personhood requires that humans continue to relate to corporeal remains as person. The embodied trajectory

50. Donation of an organ such as a kidney by a living donor is an entirely different circumstance and should be addressed separately.

of the human narrative requires that the narrative not end at death. To quote Caroline Walker Bynum, writing in a related context:

> Identity is labile, problematic, threatening, and threatened.... Without change, we have no story. All we can hope for is that the traces of our story perdure in the body we are becoming. It is when shape no longer carries story, when the traces or vestiges are completely erased, that identity is lost.[51]

The rabbis insist that personhood and identity are too precious ever to be lost, so they regard bodily remains as holding that personhood.

The importance of human embodiment, so central in classic rabbinic culture, diminished as the philosophical approach to Judaism achieved dominance. In recent years, however, scholars have noted how embodiment is essential to cognition and to the very sense of self. As Kent Bloomer and Charles Moore have put it:

> One of the most hazardous consequences of suppressing bodily experiences and themes in adult life may be a diminished ability to remember who and what we are.

By neglecting body image and haptic experience,

> we risk diminishing our access to a wealth of sensual detail developed within ourselves – our feelings of rhythm, of hard and soft edges, of huge and tiny elements, of openings and closures, and a myriad of landmarks and directions which, if taken together, form the core of our human identity."[52]

Without embodiment, it is hard to see how individuation can be maintained after death. Indeed, one scholar has argued recently that Maimonides' idea of immortality has no room for individuation. Alfred Ivry writes:

51. Caroline Walker Bynum, *Metamorphosis and Identity* (New York: Zone Books, 2001), 182.
52. Kent C. Bloomer and Charles W. Moore, *Body, Memory, and Architecture* (New Haven and London: Yale University Press, 1977), 44.

> The intelligibles that comprise a person's acquired intellect do not remain individuated in that person after death. They lack a material principle of individuation.... At the level of the acquired intellect, there is no person choosing to know... no personality.

As the person who has attained wisdom leaves the world of physicality,

> one takes leave of oneself, abandoning the particular for the universal. As long as one wishes to know the truth, he or she is a recognizable individual. Once a person *attains* the truth, all or most of it, that individuality is lost.[53]

Ivry does not mention it, but this may be the meaning of Raavad's intriguing and enigmatic critical comment on Maimonides' presentation of *Olam ha-Ba*, the World to Come, which in Maimonides' view is a non-corporeal state of enhanced comprehension of divine truth. In MT Laws of Repentance 8:4, Maimonides writes:

וחכמים קראו לה דרך משל לטובה זו המזומנת לצדיקים "סעודה".	The sages called this felicitous state prepared for the righteous, "a feast."

Raavad responds to this by saying:

ואם זו היא הסעודה, אין כאן כוס של ברכה.	If that is the feast, then there is no cup of blessing.

Raavad likely is thinking of talmudic passages that describe an end-time feast for the righteous where they partake of food and drink. One such passage (b. *Pesaḥim* 119b) has the cup of blessing, i.e., the cup of wine over which Grace is recited, passed from Abraham to Isaac to Jacob to Moses to Joshua. Each one in turn declines the honor of reciting Grace over the cup until David accepts the cup and leads the assembled in Grace.

53. Alfred L. Ivry, "Maimonides' Psychology," in *Maimonides and His Heritage* (ed. Idit Dobbs-Weinstein, Lenn E. Goodman, and James Allen Grady; Albany: SUNY Press, 2009), 51–60 [57].

What is notable about this talmudic eschatological narrative is not only its unabashed corporeality, but the highlighting of the personhood of each of the participants. Each biblical figure until David declines the honor of the cup of blessing because of some problematic feature of his life story. Even if we take the eating and drinking metaphorically, it is evident that the World to Come feast, however understood, engages the participants in the full richness of their personalities and biographical complexity, all of which remain intact.[54] Hence Raavad's objection to Maimonides' presentation of an afterlife that however intellectually and spiritually sublime, appears not to have room for the robust complexity of individuation and personality.[55]

By contrast, in the classic rabbinic sources, death signals loss of physical control of one's body, but not loss of personhood and identity, which are still vested in their corporeal locus. "There is no one needier than a corpse," as Rashi puts it, and precisely for that reason, the interests and integrity of the remains are to be vigorously safeguarded by the living, who are not merely honoring the dead, but maintaining the thread of personhood established in life and not broken in death.

As detailed above in the section on posthumous rehabilitation, some contemporary theorists are eager to preserve the common-sense notion that the living have enduring obligations to the dead but are at pains to explain

54. For a full exposition of the cup of blessing, see *Talmudic Encyclopedia* (Jerusalem: Yad Harav Herzog, 2006), s.v. "*kos shel berakha*." For a discussion regarding Raavad's attitude toward philosophy and anthropomorphism, see Isadore Twersky, *Rabad of Posquieres: A Twelfth-Century Talmudist* (Philadelphia: Jewish Publication Society of America, 1980), 258–300.

55. I have deliberately refrained from introducing qabbalistic considerations into this essay. If one wishes to pursue this aspect of the subject, a place to begin may be the essay of Bezalel Safran, "Rabbi Azriel and Nahmanides: Two Views of the Fall of Man," in *Rabbi Moses Nahmanides (Ramban): Explorations in His Religious and Literary Virtuosity* (ed. Twersky; Cambridge, MA: Harvard University Press, 1983), 75–106. See also Charles Mopsik, "The Body of Engenderment in the Hebrew Bible, the Rabbinic Tradition and the Kabbalah," in *Fragments for a History of the Human Body* (ed. Michel Feher with Ramona Nadaff and Nadia Tazi; Cambridge, MA: MIT Press and Zone Books, 1989), 1:49–73. For an introduction to the perspective of the Zohar on death and survival of personhood, see *The Wisdom of the Zohar: An Anthology of Texts*, arranged by Fischel Lachower and Isaiah Tishby, with introductions and explanations by Tishby (trans. David Goldstein; Littman Library of Jewish Civilization; New York and London: Oxford University Press, 1989), 2:831–63, "Death."

how this can be so in light of the conviction that the dead are "now just so much dust." The rabbinic tradition, by contrast, affirms relational persistence. That is, our obligations to the dead are not mere unilateral ethical principles or noble, floating abstractions, but bilateral commitments that maintain the relationships that the living enjoyed when *they*, the dead, were alive. And this in turn requires that the dead retain their individuated identities and personhood, a personhood vested in physical remains.

To be sure, this rabbinic view does not in and of itself rule out altruistic postmortem donations, but it surely should give us pause and call into question sweeping campaigns urging donation on presumed ethical grounds. At a minimum, it should require the living – especially those entrusted with direct fiduciary responsibility – to be genuinely aware of the issues, actively involved in every decision, vocally and vigilantly assertive in protecting the rights of their dead, the neediest and most vulnerable persons of all.

Speaking of the contrast between the experiences of observing burial and witnessing a cremation, the Bengali writer Nirad C. Chaudhuri noted:

> In the case of burial, it is possible to imagine a suspended prolongation of bodily life and an ultimate resurrection of the body, with which our love is entangled.[56]

It is that ongoing, reciprocal, loving entanglement that engenders *ṭum'a*, ritual uncleanness (see m. *Yadayim* 4:6), the *ṭum'a* of the corpse being, paradoxically, a marker of enduring human presence and relationship. Intact burial indeed is *piqu'aḥ nefesh* – the vigorous safeguarding of person and personhood, most especially the personhood of those with whom we have shared love and life.[57]

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56. Nirad C. Chaudhuri, *Thy Hand, Great Anarch!: India 1921–1952* (Reading, MA: Addison-Wesley Publishing Company, 1989), 108.

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HALAKHIC REALITIES

COLLECTED ESSAYS ON ORGAN DONATION

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