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# THE SILENT PROBLEM: THE IMPLICIT PERSONHOOD DETERMINATION IN *STATE V. MONTOYA*

Erin Phillips\*

## I. INTRODUCTION

Can a dead person still be considered a person under a criminal statute? This unspoken question is at the center of *State v. Montoya*,<sup>1</sup> illustrating how a facially simple and uncontroversial case can actually be very misleading. On appeal in *Montoya*, the defendant argued that the conviction of robbery was unfounded, since the victim was already deceased at the time of theft.<sup>2</sup> The Court of Appeals gave little attention to the argument about the victim's personhood,<sup>3</sup> instead analyzing the case through the lens of a rational link standard,<sup>4</sup> essentially measuring the connection between a homicide and a subsequent robbery in determining whether those acts were sufficiently entwined and causally-related.<sup>5</sup> This standard allowed the Court to circumvent a literal application of the State's robbery statute, which requires the use of force sufficient to remove property from the immediate control of another person.<sup>6</sup>

By failing to explicitly address the issue of personhood, instead relying on an ambiguous standard in order to uphold a conviction under the robbery statute, the *Montoya* Court opened the door to dangerous future determination of personhood. Supported by valid policy concerns,<sup>7</sup> and with the authority of the rational link standard's precedence, the Court positioned itself to uphold the conviction without needing to address the defendant's argument of personhood. However, by using the rational link standard to convict under the robbery statute, the Court did make a statement about personhood, categorizing the victim as a person by default—despite never saying so explicitly. In an attempt to avoid cornering themselves in a legal fiction, the Court did exactly that by upholding the robbery statute and making a *de facto* conclusion that the victim was a person.

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1. See generally *State v. Montoya*, 2017-NMCA-033, 392 P.3d 223.

2. *Id.* ¶ 5.

3. *Id.*

4. *Id.* ¶ 8.

5. *Id.* ¶ 6.

6. N.M. STAT. ANN. § 30-16-2 (1973).

7. See *James v. State*, 274 Ga. App. 498, 503, 618 S.E.2d 133, 138 (2005) (commenting on policy concerns and stating that “[c]ommon sense demands that this be so, else one could avoid a charge of armed robbery by killing one's victim before taking his property.”).

Although the opinion never states its holding as such, *Montoya* could be interpreted as defining a deceased victim as a person with the ability to exercise control over property. Through this lens, dangers of future reliance on *Montoya*'s holding become clear: if a dead person can still be considered a person under a criminal statute, what are the boundaries that define when an entity will or will not be considered a person? The issue of personhood is a controversial and hyper-relevant contemporary legal issue,<sup>8</sup> and given its timely prevalence, the issue of personhood is far too important to be circumvented by the judiciary.<sup>9</sup>

By attempting to avoid the issue through the use of the rational link standard, the *Montoya* Court inadvertently introduced problematic precedent about personhood. The judiciary ought not be able to selectively choose whether to address an issue of personhood. When a court sidesteps the issue, as in *Montoya*, it inevitably takes a stance in the larger debate over personhood and expansive rights. Given the myriad legal and social controversies surrounding the issue of personhood,<sup>10</sup> it is important that the judiciary makes definitive determinations when a personhood argument is raised. Definitive determinations, even if controversial, may help mitigate future ambiguity, unlike default determinations resulting from a court's silence on the issue.

This note will first examine the background and statutory insufficiencies in *Montoya*. Next, this note will explore the *Montoya* Court's application of the rational link standard and the ways in which that standard creates an implicit determination of personhood. Finally, this note will address the ways in which the implicit and inadvertent personhood determination in *Montoya* could be wielded by proponents of the Personhood Movement to propel anti-abortion sentiments.

## II. THE BACKGROUND OF *STATE V. MONTOYA* AND AN INTRODUCTION TO THE RATIONAL LINK STANDARD

A simple and straightforward New Mexico Court of Appeals case, *State v. Montoya* upheld the lower court's conviction of robbery against the defendant.<sup>11</sup> Despite its brevity<sup>12</sup> and lack of controversial holding, the short case portends dangerous precedent because of the court's failure to address personhood. In the case, the Defendant, Joseph Montoya, robbed and killed the victim, Angel Arroyo.<sup>13</sup> After Arroyo's death, Montoya left the scene of the crimes, returned after a few

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8. See Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 78-86 (2013) (outlining the evolution of the Personhood Movement through its inception, around the time of *Roe v. Wade*, through to current legislative proposals and ballot measures across multiple states).

9. See *id.* at 81-86 (describing specific state and federal ballot measures and legislative proposals attempting to recognize fetuses as persons with legal rights and the effects thereof).

10. *Id.*

11. *State v. Montoya*, 2017-NMCA-033, ¶ 1, 392 P.3d 223.

12. Judge Sutin's opinions more commonly expound on the legal backgrounds and theories present in a given case. The short length of this opinion alone seems to indicate a departure from Sutin's typical methods, or at least an inconsistency in his approach. Compare *State ex rel. Children, Youth, and Families Dept. v. Donna E.*, 2017-NMCA-088, 406 P.3d 1033, and *State v. Simmons*, 2018-NMCA-015, 409 P.3d 1030, with *Montoya*, 2017-NMCA-033.

13. See *Montoya*, 2017-NMCA-033, ¶ 2.

hours, and subsequently emptied Arroyo's pockets of any remaining cash.<sup>14</sup> Montoya was convicted of multiple crimes and sentenced to 104.5 years of incarceration.<sup>15</sup> On appeal, defendant raised two challenges to his robbery conviction: that the application of the robbery statute was erroneous because the second robbery occurred after the victim was already dead, and that the defendant was subject to ineffective assistance of counsel because his attorney failed to request an instruction to include theft as a possible lesser included offense.<sup>16</sup> For the purposes of this discussion, only defendant's first challenge is relevant.

The defendant's appeal argued that "a robbery conviction is improper when the robbery both commences and concludes on a dead person"<sup>17</sup> and that robbing a corpse is a legal impossibility.<sup>18</sup> The defendant argued that the conviction for the second robbery was erroneous because "[t]he necessary element of a 'person' for purposes of robbery [was] missing . . . as is the concept that Arroyo could be permanently deprived of his immediate control over anything whatsoever after his death."<sup>19</sup> This assertion was based on the theories that an individual's personhood ceases at the time of their death.<sup>20</sup> Moreover, the defendant asserted claims of legislative intent, arguing that the legislature did not intend for robbery convictions to apply to the type of sequential crimes as in *Montoya*.<sup>21</sup>

The trial court's jury instructions were also at issue in the defendant's appeal, as the instructions did not specify that the jury consider the statutory element of immediate control in reaching its verdict.<sup>22</sup> Arguably, the defendant raised a valid concern that the jury instructions<sup>23</sup> were insufficient,<sup>24</sup> stating that had the instructions more accurately articulated the statutory requirements for robbery, "[t]he jury could have concluded that [defendant] formed the intent to steal [the victim]'s money . . . well after" the victim was killed, and referred to case law arguing that

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14. *Id.*

15. *Id.*

16. *Id.*

17. Brief in Chief for Appellant at 7, *Montoya*, 2017-NMCA-033 (2016) (No. D-412-CR-201300239) (citing *Stephenson v. State*, 29 N.E.3d 111, 116 (Ind. 2015)).

18. Brief in Chief for Appellant, *supra* note 17, at 7.

19. *Id.*

20. *Id.* at 6.

21. Reply Brief for Appellant at 4, *State v. Montoya*, 2017-NMCA-033, 392 P.3d 223 (2016) (No. D-412-CR-201300239) ("Neither the Legislature nor the drafters of the Uniform Jury Instructions appear to have intended to criminalize theft from the body of someone who has been left for dead for several hours, is indisputably dead, and therefore is no longer a 'person' with 'immediate control' over anything of which he can be permanently deprived").

22. *Id.* at 2 ("The state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: 1. The defendant took and carried away U.S. Currency from Angel Arroyo, intending to permanently deprive Angel Arroyo of the property; 2. The defendant took the cash and drugs [sic] by force or violence.") (alteration in original).

23. See *Crim. UJI 14-1620 N.M. R. ANN.*

24. The relevant UJI does include a provision requiring the jury find that property was taken from the immediate control of the victim, but that provision was ostensibly eliminated from the trial court's given instructions. See Brief in Chief for Appellant, *supra* note 17, at 11.

when the intent to steal arises after the sufficient force is already used, the relevant offense is theft, and not robbery.<sup>25</sup>

Despite these arguments, however, the Court of Appeals determined that the lower court's conviction for the second robbery was correct under New Mexico's robbery statute. Although the Court acknowledged that personhood was central to the defendant's appeal, it dealt with the question of personhood only in dicta and ultimately left the issue unresolved.<sup>26</sup> In addressing the defendant's personhood argument, the Court recognized the defendant's ultimate contention: that "personhood ceases upon the death of an individual."<sup>27</sup> The Court went on to reference the manner in which the defendant cited sources "that medically and philosophically wax on life as fundamental to the term 'person' as a term that ceases upon death."<sup>28</sup> With that final reference to the defendant's personhood argument, the Court ceased its discussion of the personhood issue within its short opinion.<sup>29</sup>

The Court turned instead to interpretation of the robbery statute in existing case law dealing with homicides followed by subsequent robberies.<sup>30</sup> Beginning with *State v. Barela*, an unreported 2013 New Mexico Supreme Court case upholding a robbery conviction "where the killing and the taking of the property [were] part of the same transaction of events," the *Montoya* Court introduced the legal theory that ultimately shapes its decision: if the death of a person and a subsequent robbery of that same person are sufficiently interwoven, and the robbery was ostensibly only able to take place because the prior death took place, a defendant will not be able to prevail on a theory of personhood.<sup>31</sup>

Extending beyond *Barela*, the central point in the *Montoya* Court's analysis is that the robbery was "made possible by an antecedent assault."<sup>32</sup> The contextual tie between the homicide and subsequent robbery made the personhood argument less pivotal, because the act of robbery was "directly connected with the original robbery and killing . . . the second robbery can rationally be linked to the murder that enabled the robbery."<sup>33</sup> So long as there is a rational link between preceding events causing the victim's death and the subsequent robbery, application of the robbery statute is valid under this opinion, rejecting the argument that a deceased person cannot be robbed. The Court found the personhood argument inconsequential and held that the robbery statute was correctly interpreted, and through the rational link standard confirmed the lower court's conviction.

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25. Brief in Chief for Appellant, *supra* note 17, at 11 ("[W]hen an intent to steal arises after force is used, the offense is theft, not robbery.") (citing *People v. Davis*, 115 P.3d 417, 453 (Cal. App. 4th 2005)).

26. The Court subtly foreshadows its disinterest in the personhood theory as a determinative factor when referring to defendant's reliance on "articles that medically and philosophically wax on life as fundamental to the term 'person.'" See *State v. Montoya*, 2017-NMCA-033, ¶ 5, 392 P.3d 223.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* ¶ 6.

31. See *id.* ¶ 6 (quoting *State v. Barela*, No. 32, 506., 2013 WL 1279111, ¶ 88 (N.M. Mar. 28, 2013)).

32. *Id.*

33. *Id.* ¶ 8.

### III. THE STATUTORY INSUFFICIENCIES IN *STATE V. MONTOYA*

The *Montoya* Court's use of the rational link standard in order to satisfy the requirements of the robbery statute is not controversial on its face. New Mexico's robbery statute states that "[r]obbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence."<sup>34</sup> There are two main requirements within the statute: first, that the property is taken "from the person" or "from the immediate control" of another. The second main requirement of the statute is that property is removed "by use or threatened use of force." In other words, the use of force must be the lever by which property is removed from the victim, who was capable of exercising control over that property.<sup>35</sup>

In *Montoya*, it is logical to assume that the defendant's previous killing of the victim facilitated the taking of the victim's property. Therefore, it is logical to assume that the defendant's previous killing of the victim could satisfy the statutory requirement of force. But the requirement of the victim's ability to exercise immediate control is not so clearly satisfied in *Montoya*. This contention is at the root of the defendant's personhood argument: that a dead person cannot exercise immediate control over its property.<sup>36</sup> It would not be possible for any force used against that dead person to overcome immediate control, since no immediate control could be exercised by the dead person. Simply put: without the deceased victim's ability to exercise immediate control, the robbery statute's requirements could not be satisfied.

Despite this unsatisfied statutory requirement, the Court faced significant policy concerns in support of upholding the robbery conviction. The Court did not want to promulgate the notion that a defendant could kill a person and receive a less severe punishment for subsequently taking the victim's property.<sup>37</sup> This was a valid concern that the Court answered by adopting the rational link standard. The standard provided an avenue through which the Court could rely on an expanded interpretation of the statute, despite unfulfilled requirements. This note will now explain the background of the rational link standard and its application in *Montoya*.

### IV. THE *MONTOYA* COURT'S INTERPRETATION AND APPLICATION OF THE RATIONAL LINK STANDARD

The rational link standard developed in the context of cases similar to *Montoya*, wherein a homicide occurred prior to theft from the victim. The standard examines whether the homicide and the theft were part of the same transaction of

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34. N.M. STAT. ANN. § 30-16-2 (1973).

35. See *State v. Curley*, 1997-NMCA-038, ¶ 4, 989 P.2d 1103 (interpreting Section 30-16-2 and its requirements).

36. See Brief in Chief for Appellant, *supra* note 17, at 7 ("The necessary element of a 'person' for purposes of robbery is missing in this case, as is the concept that Arroyo could be permanently deprived of his immediate control over anything whatsoever after his death.").

37. See *James v. State*, 274 Ga. App. 498, 503, 618 S.E.2d 133, 138 (2005) (acknowledging basis for concern and stating that "[c]ommon sense demands that this be so, else one could avoid a charge of armed robbery by killing one's victim before taking his property.").

events, and if the theft was made possible by the antecedent assault.<sup>38</sup> The rational link standard is logical, especially when considered in light of the aforementioned policy concerns. But the standard is also ambiguous, as its boundaries are not defined, specifically in terms of how much time may pass between the connected acts in order to still be part of the “same transaction” of events.<sup>39</sup>

To introduce the rational link standard, the *Montoya* Court looked first to *Barela* and its supporting authorities: *James v. State*, a 2005 case out of Georgia’s Court of Appeals,<sup>40</sup> and *People v. Navarette*, a 2003 case out of the Supreme Court of California.<sup>41</sup> The *James* Court arguably articulated the clearest explanation of the standard, stating that:

[a]lthough, as an abstract principle of law, one cannot be guilty of robbery if the victim is a deceased person, this principle does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable. If the taking was made possible by an antecedent assault, the offense is robbery regardless of whether the victim died before or after the taking of the property.<sup>42</sup>

The Georgia Court of Appeals interpreted the rational link standard to rely on the “principle” that when the acts in question are a homicide and a subsequent robbery, the notion that a dead person cannot be the victim of robbery is irrelevant.<sup>43</sup> Thus, the rational link standard developed in relation only to particular circumstances where homicide and robbery were at issue. The *James* Court outlined a policy reason for adopting such a standard, similar to the policy concern in *Montoya*, stating that “[c]ommon sense demands that this be so, else one could avoid a charge of armed robbery by killing one’s victim before taking his property.”<sup>44</sup>

Georgia’s robbery statute is more encompassing than New Mexico’s,<sup>45</sup> requiring either force, acts of intimidation, threat, coercion, or sudden snatching.<sup>46</sup> The facts in *James* are distinct from *Montoya*, as they include a *two-week lapse* between the defendant’s killing of the victim and the subsequent theft (contrasted with the hours-long lapse in *Montoya*).<sup>47</sup> This means that the rational link standard was implemented in a situation where significant lapses of time occurred between the acts of homicide and robbery. This begs the question: would the rational link standard ever *not* be applicable, regardless of the length of time between the two acts? The *James* Court applied the standard in a case where two weeks passed between the criminal acts, indicating that a court has significant flexibility in

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38. *See id.* at 502–503, 618 S.E.2d at 137–139.

39. *Id.*

40. *Id.*

41. *People v. Navarette*, 30 Cal. 4th 458, 66 P.3d 1182 (2003).

42. *James*, 274 Ga. App. at 502–503, 618 S.E.2d at 137–139.

43. *Id.*

44. *Id.* at 503, 618 S.E.2d at 138.

45. *See* GA. CODE ANN. § 16-8-40 (1984).

46. *Id.*

47. *James*, 274 Ga. App. at 502, 618 S.E.2d at 138.

determining whether a homicide and subsequent robbery are rationally linked in terms of the elapsed time between.

The rational link standard was also articulated in *People v. Navarette*, in that “[w]hile it may be true that one cannot rob a person who is already dead when one first arrives on the scene, one can certainly rob a living person by killing that person and then taking his or her property.”<sup>48</sup> However, the facts in *Navarette* are distinct from *Montoya* in that there was evidence illustrating the defendant harbored intent to take money from the victim during the days prior to the homicide and robbery.<sup>49</sup> The element of prior intent lends credibility to the *Navarette* Court’s decision to interpret the homicide and robbery as connected acts, as the facts in the case indicate that the homicide was a means to an end of acquiring the victim’s property. Problematically, *Montoya* does not illustrate comparable facts showing the defendant’s prior intent to take the victim’s property.

California’s robbery statute closely resembles New Mexico’s, as it requires force *or* fear to mechanize the taking.<sup>50</sup> The primary difference between New Mexico’s robbery statute and both California’s and Georgia’s statutes is the element of immediate control. California’s robbery statute requires “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by the means of force or fear.”<sup>51</sup> Georgia’s robbery statute requires the “intent to commit theft” through the taking of “property of another from the person or the immediate presence of another: by the use of force, by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury . . . or by sudden snatching.”<sup>52</sup> All three statutes include the provision that property must be taken “from the person” of the victim, but New Mexico’s statute is more specific in terms of how much control that person must retain over the property. California’s statute says that the property must be taken from a victim’s “immediate presence” and against the victim’s will.<sup>53</sup> The Georgia statute requires that the property be taken from the victim’s “immediate presence.” Neither California’s nor Georgia’s statute is as specific as New Mexico’s in terms of requiring that the victim retain control over the property, although California’s statute comes close by requiring that the property be taken against the victim’s will.<sup>54</sup>

The *Montoya* Court employed the rational link standard in order to uphold a conviction of robbery without having to satisfy all of the statutory requirements. It is possible that the rational link standard developed, in part, in order to account for the ambiguity of statutory requirements for robbery across jurisdictions. When faced with circumstances wherein it seems that the homicide and the robbery are *logically* linked, courts face the hurdle of determining how they are *legally* linked. In *James*, *Navarette*, and even in *Montoya*, the connection between the homicides and the robberies is evident: the acts were performed by the same defendants, the robberies

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48. *People v. Navarette*, 30 Cal. 4th 458, 499, 66 P.3d 1182, 1207 (2003).

49. *Id.*

50. CAL. PENAL CODE § 211 (West 2017).

51. *Id.*

52. GA. CODE ANN. § 16-8-40 (1984).

53. CAL. PENAL CODE § 211 (West 2017).

54. *Id.*



occurred after the victims were killed, and the courts determined sufficient factual support to infer that the robberies were an extension of the killings.<sup>55</sup> But in none of those cases could the courts prove that the victims retained control over property.<sup>56</sup> In order to bridge the gap between the logical connections and the legal requirements, the rational link standard developed to allow courts to decide under a broadened interpretation of the statutes and to make decisions without needing to account for the lack of a victim's retained control.

As articulated in the defendant's appeal, the issue of personhood was not merely relied upon to argue that one may not rob a person who is already deceased.<sup>57</sup> Rather, the issue of personhood was argued to show that the statutory element of "immediate control" was not satisfied. In order to have immediate control over one's possessions, one must be *able* to exercise such control. The Court answered the unsatisfied statutory requirement by adopting the rational link standard in order to avoid a literal application of the robbery statute's required elements. In doing so, it left the personhood question open and the issue wholly unresolved.

The *Montoya* Court may have adopted the rational link standard not only to avoid the statutory limitations impeding a robbery conviction, but also to entirely avoid answering defendant's personhood argument. The Court may have deemed the personhood argument too large in scope and too attenuated and unnecessary to answer the perceived central question presented. Although there are not constitutional questions, such as habeas corpus or due process, directly under consideration in *Montoya*, principles of the avoidance doctrine inform the case's underlying tensions. Under the avoidance doctrine, courts are urged to avoid deciding "questions of a constitutional nature unless they are absolutely necessary to the decision of the case."<sup>58</sup> The avoidance doctrine controls federal courts, but may not always control state courts.<sup>59</sup> The prevalence of the avoidance doctrine, however, is likely influential beyond the confines of federal courts, since the doctrine supports judicial restraint and economy, ensuring that courts are not analyzing issues beyond those necessary to answer the immediate questions before them.<sup>60</sup> Despite its confines within federal jurisdiction, the avoidance doctrine may influence (even inadvertently) the conduct of state courts.<sup>61</sup> The *Montoya* Court may have been influenced by principles of the avoidance doctrine in its decision to leave the defendant's personhood argument unresolved.

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55. See generally, *State v. Montoya*, 2017-NMCA-033, 392 P.3d 223; *James v. State*, 274 Ga. App. 498, 618 S.E.2d 133 (2005); *People v. Navarette*, 30 Cal. 4th 458, 66 P.3d 1182 (2003).

56. See generally, *State v. Montoya*, 2017-NMCA-033, 392 P.3d 223; *James v. State*, 274 Ga. App. 498, 618 S.E.2d 133 (2005); *People v. Navarette*, 30 Cal. 4th 458, 66 P.3d 1182 (2003).

57. See generally Brief in Chief for Appellant, *supra* note 17; Reply Brief for Appellant, *supra* note 21.

58. James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 809 (1993).

59. Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994) ("The 'last resort rule' dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis.").

60. See Gardner, *supra* note 58 at 812 ("It has been suggested that the Court's avoidance of constitutional adjudication is justifiable on grounds of judicial economy.").

61. See *id.*

The Court was warranted in adopting the rational link standard to avoid the defendant's personhood argument by prioritizing policy concerns and upholding historical pressures of judicial restraint. But the Court's choice to forego resolving the personhood argument did not result in the issue disappearing. In fact, by adopting the rational link standard in order to avoid statutory shortcomings, the *Montoya* Court ultimately did make an inadvertent, and problematic, determination of the deceased victim's personhood.

#### V. THE INADVERTENT PERSONHOOD DETERMINATION IN *STATE V. MONTOYA*

The *Montoya* Court applied the rational link standard in order to make up for unsatisfied statutory requirements in upholding the defendant's robbery conviction. In doing so, the Court made little mention of the defendant's personhood argument, barely addressing it in the short opinion.<sup>62</sup> The Court's brief mention of the personhood issue may indicate its apprehension of addressing such a complex and controversial topic.<sup>63</sup> Areas of law dealing centrally with the issue of personhood (e.g. reproductive rights, right to aid in dying) are polarizing. This polarizing nature of a personhood question, combined with the established precedence of the rational link standard, may have led the Court to disregard the issue of personhood in *Montoya*. But by not resolving the personhood argument directly, the Court did not free themselves from making a determination. Even through its application of the rational link standard, the Court's failure to definitively address the issue of personhood presents a legal fiction at best and a dangerous precedent at worst.

Even though the *Montoya* Court adopted the rational link standard as a way to circumvent a literal application of the robbery statute, the New Mexico robbery statute still controls interpretation of the case. This means that by upholding the robbery conviction under the controlling statute, the Court determined the deceased victim to be a person. New Mexico's robbery statute requires that the victim exercise immediate control over the subsequently taken property. Whether or not the Court literally applied the statute, by upholding a conviction of robbery the Court implicitly made the determination that the deceased victim *was* able to exercise control over the property ultimately taken by the defendant. In other words, the Court held, however implicitly, that the victim *was a person* even after death.

Without some unambiguous statement that the Court did *not* hold personhood to be required in the rational link standard, or some other overt rejection of the deceased-victim-as-person notion, the Court implicitly conceded that the deceased victim is a person. Without overt rejection of that notion, there is no other interpretation of the implications set forth by the Court. The Court upheld a conviction under the robbery statute which criminalizes the theft of property from the immediate control of a *person* through the use of force. If the Court stated that the deceased victim was not a person, the Court could not have upheld the robbery

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62. See *State v. Montoya*, 2017-NMCA-033, ¶ 5, 392 P.3d 223 (discussing personhood defense in two out of the opinion's twelve paragraphs).

63. See *id.* (indicating apprehension in addressing the personhood theory as a determinative factor when referring to defendant's reliance on "articles that medically and philosophically wax on life as fundamental to the term 'person.'").

conviction under the statute. But by *not* taking a stance, the Court still makes a statement, even in its silence, that the deceased victim was a person.

The Court's assertion—that a dead person is still a person—is a fallacy. The notion that a dead person can exercise control over possessions goes against prevalent scholarship citing the notion that personhood ceases upon the loss of cognitive function.<sup>64</sup> Perhaps the *Montoya* Court recognized that fallacious territory it was entering into. Perhaps the desire to avoid having to make an overt determination of such legal fiction is exactly what drove the Court to adopt the rational link standard. No matter the motivation or the efforts to avoid doing so, the *Montoya* Court ultimately did make a *de facto* determination that the deceased victim was a person. Through this unrecognized or unintended determination of personhood, the future problems caused by *Montoya*'s holding become evident.

## VI. BACKGROUND AND FRAMEWORK OF PERSONHOOD THEORY

Although the issue of personhood ultimately centers on “the fundamental question of who counts for the purpose of the law,” there has been no judicial consensus as to how to apply or function within personhood theory.<sup>65</sup> The theory of personhood, or the legal metaphor of personhood,<sup>66</sup> is inherently problematic because although defined as an “entity ‘given certain legal rights and duties of a human being,’”<sup>67</sup> it is often conflated to hold the same meaning as humanity.<sup>68</sup> The most difficult questions in determining personhood center on “whether the entity in question can be regarded as human.”<sup>69</sup> The answer to that question varies, as “[d]ifferent jurisdictions have created different thresholds for personhood and different distributions of rights, . . . such that the same individual or entity might be recognized as a person in one place and property in another.”<sup>70</sup> Under the common law tradition, “legal personhood is disparate and diffuse,”<sup>71</sup> and “[t]he meaning of legal personhood shifts significantly depending” on who is discussing the distinction, and under what theory of legal framework.<sup>72</sup>

The Federal Constitution does not offer a definition of person, nor does it “delineate who or what is included in the concept of ‘person’ for purposes of

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64. See Alexis Dyschkant, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. ILL. L. REV. 2075, 2097 (2015) (“Medical scholars and legal experts agree that death occurs when one experiences brain death.”).

65. Harv. L. Rev., *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001) (“[N]o coherent body of doctrine or jurisprudential theory exists regarding this legal metaphor.”).

66. *See id.*

67. Dyschkant, *supra* note 64 at 2076.

68. *See* Harv. L. Rev., *supra* note 65 at 1747.

69. *Id.*

70. Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL’Y 45, 64 (2012).

71. *Id.* at 65

72. *See id.* at 68

bestowing” constitutional rights and protections.<sup>73</sup> Despite the inconsistent definition, interpretation, and application of personhood, the concept carries “normative, ethical and political force” and is both a legal fiction and a very tangible concept through which individuals access legal rights.<sup>74</sup> The ability to bear and exercise those rights is a key feature of legal personhood.<sup>75</sup>

Although routinely equated with humanity, personhood is a distinct categorization in the eyes of the law. Arguably, most legal questions regarding a human being deal with that human being as a person, therefore, the concepts of humanity and personhood do not warrant distinction in those common scenarios.<sup>76</sup> But broadly equating humanity and personhood ignores that the terms have fundamentally different definitions, as “[h]uman’ refers to a biological category and ‘person’ refers to an entity with a set of capabilities,”<sup>77</sup> such as exercisable rights. Humanity and personhood, although often equated to hold the same meaning, ought not be treated as synonyms, given that distinction.<sup>78</sup>

But the judiciary often finds itself at the center of the tension between humanity and personhood, especially within the controversial realms of reproductive rights. The Personhood Movement, an encompassing term for the national trends among abortion opponents to establish the legal personhood of fetuses, is rooted in Justice Blackmun’s language in *Roe v. Wade*: “[i]f the suggestion of fetal personhood is established . . . the fetus’ right to life would be guaranteed specifically by the [Fourteenth] Amendment.”<sup>79</sup> Leaning on this claim, the Personhood Movement consists of efforts within State Constitutions to add provisions asserting the rights of any human being starting at the moment of fertilization, as well as community-organizing efforts to affect political, legislative, and social change supporting the recognition of fetuses as persons.<sup>80</sup> The ramifications of the Personhood Movement are easily seen: if fetuses were recognized as persons beginning at fertilization, the controlling law regarding a woman’s right to access healthcare affecting the fetus (including abortion) would be more heavily regulated and restricted.

Although the Personhood Movement is based in the realm of reproductive rights, its influence can be seen in other legal realms, including the right to aid-in-dying and the rights of permanently comatose individuals. As within the controlling

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73. Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 574 (2013).

74. Matambanadzo, *supra* note 70 at 68.

75. See Dyschkant, *supra* note 64 at 2078 (“The key feature of a legal person—the ability to bear rights and duties—is commonly associated with humanity.”).

76. See *id.* at 2091 (“One motivation for equating legal persons with humans (or human like things) is that most humans are persons, and so we can usually equate the two concepts and ‘not worry about why we do so.’”).

77. *Id.*

78. See *id.* (arguing “that the near equivocation of ‘humanity’ with ‘personhood’ obscures the definition of a legal person as one who is capable of bearing rights and duties. Specifically, the connection between ‘human’ and ‘person’ obscures any discussion of what it actually means to be *capable* of bearing rights and duties.”) (emphasis added).

79. *Roe v. Wade*, 410 U.S. 113, 156–157, 93 S.Ct. 705, 728 (1973).

80. See Will, *supra* note 73 at 580 (describing efforts by Personhood USA and other groups within the Movement to affect pro-life agenda-based change).

reproductive rights framework, wherein a fetus is not recognized as able to exercise rights or have interests in protection under the Constitution, adult humans who are permanently comatose and approaching their end of life are regarded as unable to exercise their rights.<sup>81</sup> There is a clear distinction between the two realms, since permanently comatose adults are definitely considered humans, while fetuses have not been universally categorized as humans.<sup>82</sup> Similarly, permanently comatose individuals are at the end of their life, versus fetuses that precede a human life.<sup>83</sup> Despite these distinctions, however, a corollary exists between the two categorizations and the controversies they cause.

For permanently comatose individuals, tensions typically arise when considering whether or not to terminate life support. In those situations, the comatose individual is literally unable to assert any rights or state any preferences.<sup>84</sup> Without that ability, any caregivers must base their decisions off of the directives given by the individual prior to entering their comatose state.<sup>85</sup> Likewise, a court would be left to infer that the personhood of that comatose individual stems from the fact that they were once active persons.<sup>86</sup> The controversy regarding the rights of permanently comatose individuals typically revolves around determining whether the pre-comatose directives were valid, thus affecting subsequent decisions of life support termination.

Analyzing *Montoya* through these personhood frameworks is relevant because, although the frameworks deal with distinct factual scenarios, the fundamental question is consistent throughout: when will a court recognize a human being as a person? Implicit in that question are moral tensions which may account for why the concept of personhood is so controversial. Because personhood and humanity are often conflated as synonymous terms, determinations of one's personhood begs analysis of one's most basic existence. The Federal Constitution may not provide a definition for "person," but it has certainly upheld as paramount the individual interest associated in a human's exercise of dignity, autonomy, and identity.<sup>87</sup> The New Mexico Constitution has similarly recognized these rights as inherent to its citizens in its "Inalienable Rights" Clause, which protects "certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of

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81. See Dyschkant, *supra* note 64 at 2096 ("Both fetuses and the comatose are incapable of exercising rights and adhering to duties.").

82. See *id.* at 2096 ("There are some relevant differences between fetuses and the comatose . . . that may explain the[ir] different treatment . . . First, the comatose are clearly humans, while the Supreme Court has held that some fetuses are not").

83. See *id.*

84. See *id.* ("The comatose were once persons, and so it is easier to extend their personhood. Because the comatose individual, however, is incapable of expressing interests or exercising rights, we must rely on her expressed interests before she became incompetent").

85. See *id.* at 2097 ("The Court thus holds that in order to withdraw lifesaving support from a comatose person, there must be clear and convincing evidence of a wish to withdraw life sustaining treatment").

86. See *id.* at 2096–2097 ("The comatose were once persons, and so it is easier to extend their personhood").

87. See *generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

seeking and obtaining safety and happiness.”<sup>88</sup> These expansive protections relate to countless aspects of a human being’s life and identity, protecting one’s ability to marry, to retain privacy, and to be free from intrusion. In other words, these rights have defined society’s guiding principles of human existence, and disruption of those principles causes rightful discomfort.

In the context of *Montoya*, the Court would have been rightfully uncomfortable when faced with the daunting task of dealing with a question of personhood. Moreover, the Court may have seen the personhood question as irrelevant to the scope of their decision. But given the controversial position of personhood within the evolution of society, the Court’s apparent discomfort ought not outweigh the necessity of taking clear and definitive stances when issues of personhood are raised. It is objectively uncomfortable to ask whether a deceased victim is still a person, because to do so may deny significance or reverence for the victim’s life. Because the concepts of humanity and personhood are so closely related, even asking the question of whether a deceased victim can still retain rights is uncomfortable, as it tugs at society’s moral and ethical values. But even when faced with this discomfort, the Court cannot afford to be ambiguous on issues of personhood.

What is being protected when we attempt to protect the rights of a deceased victim (or a fetus or permanently comatose individual)? A claim that a fetus, a permanently comatose individual, or a deceased victim retain the rights of personhood may be rooted in protecting society’s own interests, rather than the interest of those entities in question.<sup>89</sup> That societal discomfort with addressing the rights or lack thereof was likely present in the *Montoya* Court’s decision. There, the Court determined that the deceased victim was a person, albeit implicitly. As aforementioned, the Court’s holding was significantly rooted in policy concerns to ensure that criminals could not receive lower convictions for theft by also taking the life of their victims. But the determination that the deceased victim was a person may have been based on a silent discomfort felt by the Court in explicitly saying the deceased victim, who suffered a violent death, would no longer be considered a person in the eyes of the law. Articulated as such, that would have been an unsavory stance for the Court to have taken.

## VII. JUDICIAL OPTIONS IN ADDRESSING PERSONHOOD AND *MONTOKYA*’S IMPLICIT SUPPORT OF THE PERSONHOOD MOVEMENT

The *Montoya* Court had a difficult decision on their hands, as policy concerns rightfully guided the decision to uphold the conviction. In order to answer those policy concerns and the conviction, the Court had to reach beyond the statute towards the rational link standard, since a literal application of the robbery statute would not have been sufficient to uphold the conviction. But whether intentional or

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88. N.M. CONST. art. II, § 4.

89. See Will, *supra* note 73 at 582 (“In an interesting article, Jessica Berg outlines a different kind of personhood framework where she suggests that a claim to the protections of legal personhood in the context of the non-sentient (those without interest or consciousness) must be based not on the entity’s own interests (since it has none), but on the protection of interests of others.”) (citing Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 396, 375–379 (2007)).

not, the Court ultimately determined that the deceased victim was a person and in doing so opened a door to potentially dangerous reliance in the future. Although it may seem unlikely that a Personhood Movement proponent would seek out *Montoya* as a resource to support claims that state legislatures should consider fetuses as persons and expand their afforded rights, it is *possible*.<sup>90</sup> It is possible because the *Montoya* Court determined by default that, because the conviction of robbery—a crime against *persons and property*—was upheld, the deceased victim of the crime was necessarily a person. In response to the first question of this note, “can a dead person still be considered a person under a criminal statute,” the *Montoya* Court offered a silent but definitive answer of “yes.” Were a Personhood Movement proponent to rely on *Montoya*, they would be able to argue that the boundaries of what defines personhood have expanded.

In response to potential future reliance on *Montoya*, there should be an amended solution for contemporary decisions dealing with personhood, given the relentless efforts of the Personhood Movement.<sup>91</sup> One option would be to adopt a tiered approach to addressing questions of personhood. Such a tiered approach might hold:

that ‘personhood’ is a concept that admits of degrees and shades of gray. According to this theory, beings should be considered ‘full-fledged’ persons if they should be the bearers of all of the rights and obligations that our legal system has to offer. Contrarily, they should be considered ‘partial’ persons if they should only have the privilege to enjoy some of the rights that our constitutional and statutory provisions confer to persons.<sup>92</sup>

If the *Montoya* Court had adopted a similar tiered approach to addressing the defendant’s personhood argument, then it may have been able to definitively speak to why, for the purpose of their decision, the deceased victim was going to be considered a “partial” person, retaining the rights to control the property attached to their body. Had such a clarification been made, the Court may have been able to freely uphold the robbery conviction and satisfy the policy concerns without also inferring a broad yet unspoken determination of the victim’s personhood status. A tiered approach to personhood questions could generally assist courts or legislators in achieving goals without drawing drastic implications that could affect the rights

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90. The first draft of this article was completed in December 2017. On October 6, 2018, Brett Kavanaugh was confirmed to the United States Supreme Court after a contentious nomination process. While it is unknown exactly when, it seems inevitable that the current Supreme Court Justices will hear a case challenging *Roe v. Wade*. So, while it is, indeed, still unlikely that a Personhood Movement proponent would seek out *Montoya* as a resource to support claims assigning legal rights to fetuses, and thus restricting access to safe, legal abortion care, the confirmation of Justice Kavanaugh could be seen as a signal of a new era of abortion litigation that may require more prevalent reliance on cases like *Montoya*.

91. See Steven R. Morrison, *Personhood Amendments After Whole Woman’s Health v. Hellerstedt*, 67 CASE W. RES. L. REV. 447, 466–67 (2016) (summarizing issues leading into *Hellerstedt* and subsequent ramifications of the *Hellerstedt* Court’s holding that Texas state law provisions placed an undue burden on women seeking abortions, and therefore violated the Constitution.).

92. Luis E. Chiesa, *Of Persons and the Criminal Law: (Second Tier) Personhood as a Prerequisite for Victimhood*, 28 PACE L. REV. 759, 762 (2008).

of women seeking reproductive healthcare or those who wish to access end-of-life assistance.

This discussion does, at least in part, center on the importance of establishing clear judicial stances through consistent language: why didn't the *Montoya* Court just *say* why it wasn't going to decide on the personhood issue, even if the reason was that it did not want to enter into a controversial realm? Why didn't it just *say* that it was not going to decide the case based on personhood because it thought the precedent based on policy concerns was more important to ensuring the safety of society than addressing the defendant's claim? Because doing so would have meant making an *overt* statement, either that the dead person was or was not a person. Understandably, the Court didn't want to make such a determination, or simply did not think their inevitable personhood determination was relevant or impactful. No matter the motivations, a state court cannot afford to avoid such an argument. And, ultimately, the Court's refusal to speak to the personhood argument resulted in a determination that the deceased victim was a person. Given that the Court made a determination that it presumably did not want to make, a more deliberate approach would have been beneficial. This could have been solved by a tiered approach, allowing the Court to define its own boundaries of personhood to fit the *Montoya* facts without interfering with the Constitutional provisions with which its holding intersected.

#### VIII. CONCLUSION

The *Montoya* Court needed to uphold the lower court's robbery conviction due to overwhelming policy concerns.<sup>93</sup> Because the Court could not achieve this end through a literal application of the robbery statute, the Court turned to the ambiguous but logical rational link standard in order to show that because the defendant's crimes were sufficiently related to one another, as the robbery was made possible by the antecedent assault, the conviction could be upheld.<sup>94</sup> Despite the Court's admirable motivation to address policy concerns, within its decision to uphold the robbery conviction was a silent determination that the deceased victim was, in fact, still a person after their death. This problematic determination means that *Montoya* implicitly held that a dead person is still a person in the eyes of the law. This holding could mean that, as national efforts continue to pass legislation expanding the recognition of fetuses as persons and of permanently-comatose individuals as non-persons, *Montoya* could be relied upon to show just how far one New Mexico court was willing to go in order to expand the scope of personhood rights.

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93. See *James v. State*, 274 Ga. App. 498, 503, 618 S.E.2d 133, 138 (2005) (commenting on policy concerns and stating that “[c]ommon sense demands that this be so, else one could avoid a charge of armed robbery by killing one's victim before taking his property.”).

94. See *State v. Montoya*, 2017-NMCA-033, ¶ 6, 392 P.3d 223.