

2024

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THE RIGHT TO FAIL

ALEXANDER A. BONI-SAENZ*

Introduction

In 2013, the Department of Justice entered into a consent decree with the state of New York concerning the lives of 4,000 people with mental illness who had been segregated into group homes in the state.¹ These group homes were overcrowded and dangerous, and New York agreed to move all but the most severely mentally ill people into supportive housing, if they desired it.² This outcome was seen as vindicating the dignity of risk, a foundational value of disability rights scholarship and politics.³ This principle holds that it is normatively desirable for individuals to be able to make their own choices and experience the positive or negative consequences of those choices.⁴

* Professor of Law and Robins Kaplan Distinguished Scholar, University of Minnesota Law School. For helpful comments and questions, I would like to thank Carmelo Barbaro, Sarah Lorr, Robyn Powell, Clare Ryan, Fred Vars, the editors at the *Oklahoma Law Review*, participants in the Oklahoma Law Review Autonomy, Sexuality, and Disability Justice Symposium, the University of Alabama Faculty Workshop, A Workshop on the Clash of Values, Emory Law School, the Law and Society Association Annual Meeting, and the American Association of Law Schools Annual Meeting, where I presented earlier versions of this piece. I would like to thank Adam Kolb for valuable research assistance.

1. See Press Release, U.S. Dep't of Just., Justice Department Obtains Comprehensive Agreement to Ensure New York City Adult Home Residents with Mental Illness Are Afforded Opportunities to Live in the Community (July 23, 2013), <https://www.justice.gov/opa/pr/justice-department-obtains-comprehensive-agreement-ensure-new-york-city-adult-home-residents>.

2. See Mosi Secret, *Ending Long Battle, Cuomo Agrees to Plan to House Mentally Ill*, N.Y. TIMES (July 23, 2013), <https://www.nytimes.com/2013/07/24/nyregion/cuomo-agrees-to-plan-for-housing-mentally-ill-ending-legal-battle.html> (“The administration of Gov. Andrew M. Cuomo agreed on Tuesday to give 4,000 mentally ill people who have been kept in institutional homes in New York City the opportunity to move into their own subsidized apartments”). However, the state apparently resisted attempts to implement the settlement. See Marc Santora, *New York Falls Short in Resettling Mentally Ill Adults, Angering Judge*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/nyregion/adult-homes-mentally-ill-new-york.html> (“The Department of Health had quietly reached an agreement with home operators in state court that would have short-circuited the execution of the federal settlement — without ever informing the federal court.”).

3. See Robert Perske, *The Dignity of Risk and the Mentally Retarded*, MENTAL RETARDATION, Feb. 1972, at 24, 26 (coining the term and noting “that there can be such a thing as human dignity in risk, and there can be a dehumanizing indignity in safety!”).

4. See Gerben DeJong, *Defining and Implementing the Independent Living Concept*, in NANCY M. CREWE, IRVING KENNETH ZOLA & ASSOCS., INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE 4, 20 (1983) (“The dignity of risk is the heart of the [independent living]

Instead of being warehoused, thousands of people with mental illness could now exert some control over their social and physical environments.⁵ In other words, they could experience what many people without cognitive impairments take for granted: the right to fail.

Of those who were moved out of group homes, several relished their newfound freedoms and the abilities to live a “normal life.”⁶ However, many of those who moved out were not ready for independent living. They forgot or refused to take medication to treat their illnesses, engaged in various forms of self-neglect, or went missing and died.⁷ That is to say, they experienced the negative consequences of their decisions. Put more harshly, they “failed.” If they did indeed fail, however, the failure was not theirs alone. The state of New York did not provide adequate supportive services, and it did not adequately assess who might be best served by supportive housing versus other housing arrangements.⁸ Thus, New York also failed its own residents living with mental illness.

This case illustrates that promoting the right to fail is not simply a matter of providing choice. Support matters. This Article explores the conceptual dimensions of the right to fail, particularly the role of support in its conceptualization. The descriptive claim is that both choice and consequence in decision-making are more interdependent in nature than the traditional individualistic framing of the right to fail might suggest. The normative claim is that we should promote the adequacy and legal recognition of support networks in order to vindicate the right to fail, particularly but not exclusively for the population of people with cognitive impairments.⁹

movement. Without the possibility of failure, the disabled person lacks true independence and the ultimate mark of humanity, the right to choose for good or evil.”)

5. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (“Unjustified isolation, we hold, is properly regarded as discrimination based on disability.”).

6. *Frontline: Right to Fail*, at 7:54 (PBS television broadcast Feb. 26, 2019), <https://www.pbs.org/wgbh/frontline/documentary/right-to-fail/> (“I felt like a human being for the first time in so many years.”).

7. See Joaquin Sapien & Tom Jennings, *Living Apart, Coming Undone*, PROPUBLICA (Dec. 6, 2018), <https://features.propublica.org/supported-housing/new-york-mentally-ill-housing-group-homes/> (“[M]ore than 200 interviews and thousands of pages of medical, social work and housing records reviewed . . . show that for some residents, the sudden shift from an institution to independence has proved perilous, and even deadly.”).

8. See *id.*

9. This population includes “all humans with cognitive impairments that are not a typical part of infancy or early childhood. This includes humans with temporary or permanent cognitive impairments, and it includes humans who have had these limitations from birth as well as humans who became cognitively impaired sometime later in their lives.” Richard L.

Part I sketches out the contours of the right to fail, describing its normative foundations and application to people with cognitive impairments. Part II describes how an individualistic framing of the right to fail misdescribes both how humans make choices and how they experience consequences. We all make use of support networks for decision-making in various ways, and our choices produce consequences for those networks as well. Part III draws on these insights to suggest ways of ensuring a robust right to fail. These include supporting individuals and their support networks as a matter of policy and recognizing support networks as a matter of law.

I. The Right to Fail

The right to fail is the entitlement to make choices about one's own life, even when there is some nontrivial chance of negative consequences.¹⁰ The fundamental limit on the right to fail is that choices must pose reasonable risks in order to fall within the scope of the right.¹¹ The state paternalistically restricts many choices through a large number of general laws, and these laws demarcate the outer bounds of the right to fail.¹² For example, the state regulates the food supply to curb risks to consumers of eating tainted food,

Cupp, *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69 FLA. L. REV. 465, 472 (2017).

10. See David Soyer, *The Right to Fail*, SOC. WORK, July 1963, at 72, 78 (“The right of self-determination includes the right to fail and it is the life experience itself with its success, failure, and in between that is what really enables the client to evaluate himself and, in the end, to set his goals realistically.”).

11. See Astrid Birgden, *Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison*, 42 MITCHELL HAMLIN L. REV. 637, 659 (2016) (quoting Elspeth M. Slayter, *Identifying Substance Abuse Among Clients With Intellectual Disabilities*, NEW SOC. WORKER MAG. (Oct. 3, 2015), https://www.socialworker.com/feature-articles/practice/Identifying_Substance_Abuse_Among_Clients_With_Intellectual_Disabilities/) (“Of course, we are talking about prudent risks. People should not be expected to blindly face challenges that, without a doubt, will explode in their faces.”).

12. See Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 65 (1972) (defining paternalism as “the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.”). One might oppose paternalistic state intervention on a variety of grounds. See Heidi M. Hurd, *Fudging Nudging: Why ‘Libertarian Paternalism’ Is the Contradiction It Claims It’s Not*, 14 GEO. J.L. & PUB. POL’Y 703, 707 (2016) (describing different schools of libertarian thought).

which has the effect of restricting our choice of food options.¹³ This illustrates that when the potential harm from certain choices is too great, choice will be restricted for everyone. Thus, the right to fail encompasses those choices not otherwise prohibited for the risks they pose to all, a set that varies over time.

The right to fail operates at a high level of generality and encompasses a variety of other rights and their associated choices.¹⁴ The reason for considering the more global right to fail in addition to its component rights is to capture how decision-making authority is sometimes denied in a way that cuts across substantive domains. Most frequently this is because the deprivation is related to some systemic axis of disadvantage, such as disability. For example, people with cognitive impairments are often deprived of the right to fail because their nonstandard mental functioning is perceived as either irrational or dangerous.¹⁵ However, disability is not the only axis of disadvantage through which people might experience such deprivations. For instance, youth of color, particularly Black youth, experience aged racism, an intersectional form of oppression based on age and race that denies them the traditional life stage of adolescence.¹⁶ This life stage is characterized by the ability to experiment and make mistakes—i.e., fail—while learning and forming an identity in the process.¹⁷ The age/race-based deprivation of this life stage and its associated decision-making freedom is also an abrogation of the right to fail.

Denials of the right to fail can be social or legal in nature. Social denials occur when people who have some power over another exert control or influence to deny that person the freedom of choice. For example, caregivers

13. See Emily M. Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CALIF. L. REV. 1173, 1179–84 (2019) (describing the narrow focus of food safety adopted by the Food and Drug Administration).

14. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (“The selection of a level of generality necessarily involves value choices.”).

15. See Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 27 (1993-94) (“A series of behavioral myths has emerged suggesting that persons with mental disabilities are deviant, worth less than ‘normal’ individuals, disproportionately dangerous, and presumptively incompetent.”).

16. See Alexander A. Boni-Saenz, *The Age of Racism*, 100 WASH. U. L. REV. 1583, 1594–1604 (2023) (describing how aged racism operates through the racing of age categories); see also KRISTIN HENNING, *THE RAGE OF INNOCENCE* x–xi (2021) (describing how Black youth do not enjoy a carefree adolescence in the same way as their White peers).

17. See Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1145–48 (2020) (describing the development of the life stage of adolescence).

of people with disabilities might limit their access to choices by limiting their physical or social access to the world at large. This type of segregation or isolation limits exposure to risk, but it limits choice as well. The legal system also restricts the right to fail, but it does so primarily through legal institutions or doctrines that deprive people of the legal authority to make choices in certain domains.¹⁸ A recent high-profile example is the case of Britney Spears. She was subject for many years to guardianship, a system that legally deprived her of the ability to make various personal and financial decisions about her own life and awarded that power to her father instead.¹⁹

The right to fail derives from the principle of dignity of risk, which holds that it is normatively desirable for individuals to be able to make their own choices and experience the positive or negative consequences of those choices.²⁰ This concept grew out of disability rights discourse, which highlighted how people with disabilities were often deprived of the right to fail in various contexts.²¹ As the name *dignity* of risk implies, the most natural normative foundation for it—and by extension, the right to fail—is human dignity. In brief, human dignity is an inherent or unearned status that humans possess.²² This status produces certain demands on society to guarantee a life that is worthy of that human dignity.²³ There are different accounts of what features of human life are fundamental and thus implicitly connected to human dignity,²⁴ but many would converge on the idea that the concept of

18. See Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1210 (2015) (defining legal incapacity doctrines as “any civil or criminal legal doctrine that deems an individual to lack decisional capacity in a particular domain”).

19. See Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851, 1853–55 (2022) (describing the Britney Spears guardianship case).

20. See Perske, *supra* note 3, at 26.

21. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 991 (2003) (describing how disability activists sought to define independence in terms of decisional independence, or “in terms of agency, freedom from paternalistic institutions, and the ability to live a full life in the community”).

22. See SUZY KILLMISTER, *CONTOURS OF DIGNITY* 129–30 (2020) (articulating human dignity as a status in which we accord others recognition and respect on the basis of membership in the human community).

23. See Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 11 (2007) (“[G]overnment is charged with securing for citizens a comprehensive set of necessary conditions for a life worthy of human dignity.”).

24. See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 72–80 (2000) (outlining ten core capabilities—life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one’s environment (political and material)).

choice, at least in certain domains that are particularly important, would be part of such a life.²⁵ Another dignitarian justification for the right to fail identifies risk as a part of the human condition. Consequently, there is a certain indignity when individuals are cut off from choice due to an overriding concern with safety.²⁶ In other words, to err is human, and we as humans should be permitted to err.²⁷

There are two additional normative arguments for the right to fail that overlap to some degree with the dignitarian justification but sound more in the values of autonomy or utility.²⁸ An autonomy-infused view would emphasize the importance of having the ability to be the authors of our own lives, setting our own goals and the paths that we travel to arrive at them.²⁹ Put differently, it is natural that the book of each person's life is filled both successes and failures, and the latter are tolerable because they are the product of the choices that the individual made as an act of self-determination. Similarly, a more utilitarian justification would highlight the benefits of experimentation to determining what life path might be best for a person.³⁰ Allowing people to exercise decision-making authority in this way helps to develop the capacity for quality decision-making.³¹ Conversely, to

25. See, e.g., Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1265 (2013) (arguing that certain decisions that are connected to fundamental capabilities must be capable of delegation so that their exercise can be guaranteed).

26. See Perske, *supra* note 3, at 26.

27. See ALEXANDER POPE, AN ESSAY ON CRITICISM I. 525 (London, Lewis 1711).

28. See Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 349–50 (2018) (noting the importance of establishing multiple normative grounds to establish overlapping consensus).

29. See GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 20 (1988) (understanding autonomy as “a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values”); JOSEPH RAZ, THE MORALITY OF FREEDOM 370 (1988) (“The autonomous person is part author of his life.”).

30. See JOHN STUART MILL, ON LIBERTY 41 (Batoche Books 2001) (1859) (“[T]here are many truths of which the full meaning *cannot* be realized, until personal experience has brought it home.” (emphasis added)).

31. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 59 (1995) (“Commonsense learning theory suggests that we learn to judge by trial-and-error and by imitation. We must be exposed to a range of particulars, which we try repeatedly to judge, with our mistakes corrected by a teacher, or in some cases by nature itself (as when you are learning to judge pop flies). This is trial-and-error.”). In fact, some theorists understand failure as generative of other ways of being. See [JACK] HALBERSTAM, THE QUEER ART OF FAILURE 2–3 (2011) (“Under certain circumstances failing, losing, forgetting, unmaking, undoing, unbecoming, not knowing may in fact offer more creative, more cooperative, more surprising ways of being in the world.”).

deny people this learning process is to stunt the development of life skills and resilience, leading to poorer decision-making and outcomes.³²

While many might be persuaded by these normative arguments, they may also be nervous about extending the right to fail to people with cognitive impairments. This nervousness usually stems from a concern that providing too much choice to members of this group will inevitably lead to bad decisions and self-harm.³³ As an initial matter, it is important to recognize the heterogeneity of the population of those living with cognitive impairments.³⁴ These impairments can affect various different aspects of mental functioning, such as cognitive processing, emotional regulation, or social interaction.³⁵ The conditions that lead to cognitive impairments are similarly diverse, including such wildly different conditions as Down Syndrome, dementia, and schizophrenia. The point is that even if the concern with extending the right to fail is valid in some circumstances, it does not apply with equal force to all people with cognitive impairments.

One can understand this concern as a variant of the argument that certain choices should be removed from the scope of the right to fail due to the unreasonable risks they pose. Here, the argument would be that we should remove certain *individuals* from being valid exercisers of the right to fail because their decision-making is inherently and unreasonably risky or will lead to self-harm. However, some potential for self-harm is a natural byproduct of granting choice in the context of risk, and this understanding is baked into the right to fail.³⁶ You are generally permitted to spend all of your money on frivolous things or to give all of your wealth away to strangers. You can enter into emotionally damaging relationships or have sex with consenting partners who you know will expose you to sexually transmitted

32. See Birgden, *supra* note 11, at 659 (quoting Slayter, *supra* note 11) (“Knowing which chances are prudent and which are not—this is a new skill that needs to be acquired. . . . [A] risk is really only when it is not known beforehand whether a person can succeed.” (alteration in original)).

33. See Slayter, *supra* note 11.

34. See Kathryn Kaye & Jim Grigsby, *Medical Factors Affecting Mental Capacity*, in CHANGES IN DECISION-MAKING CAPACITY IN OLDER ADULTS 61, 61–91 (Sara Honn Qualls & Michael A. Smyer eds., 2007) (describing the various conditions that can cause cognitive impairments).

35. *Id.*

36. See Debjani Mukherjee, *In Practice: Discharge Decisions and the Dignity of Risk*, HASTINGS CTR. REP., May-June 2015, at 7, 7 (“If you combine common dictionary definitions of ‘dignity’ and ‘risk’ . . . they help you to understand the term as conveying that individuals are ‘worthy of honor and respect’ even when they make decisions that may increase ‘the possibility that something bad or unpleasant . . . will happen.’”).

infections. Further, both individuals with and without cognitive impairments make irrational choices that bring harm to themselves, making the line between people with and without cognitive impairments blurry.³⁷ Thus, we should hesitate before limiting the right to fail simply because of the possibility of making bad choices or even because a bad choice has been made in the past.³⁸

That being said, this argument against extending the right to fail to people with cognitive impairments certainly applies to at least some in this population, specifically those whose decision-making will lead to significant harm on a consistent basis. This was the unfortunate reality for at least some people with mental illness who were deinstitutionalized in New York without the provision of adequate supports. In these cases, it is theoretically consistent with the right to fail to deny decision-making authority, at least on a temporary basis. These deprivations should ideally be as limited as possible, lasting only as long as the potential for consistent harm lasts.

In addition, the proper long-term solution—and the one that respects the human dignity of people with cognitive impairments—is not continuing deprivation. Instead, it is creating individualized conditions that promote the capabilities for choice and that allow for a meaningful chance of success in decision-making, if possible.³⁹ This includes exploring ways to craft

37. See Julian Wolpert, *The Dignity of Risk*, 5 TRANSACTIONS, INST. BRIT. GEOGRAPHERS 391, 400 (1980) (“Normal people have a cloak of competency to cover their inabilities and their failures to perform tasks which the experts have programmed for us as normal. We are not universally competent and do some things better than others and we fail frequently.”); Marguerite R. Hertz et al., *Mental Patients and Civil Rights: A Study of Opinions of Mental Patients on Social and Political Issues*, 1 J. HEALTH & HUM. BEHAV. 251, 258 (1960) (finding little difference between the opinions of mental patients and employees of a mental institution with regards to social and political issues).

38. See SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 90–91 (2009) (“In this view, the problem is not paternalism per se; the problem is paternalistic *discrimination*. The problem is singling out a particular, historically disadvantaged class of people for exclusion based on safety concerns.”). Such impulses may be the product of sanism. See Perlin, *supra* note 15, at 29–30 (“‘Sanism’ is an irrational prejudice of the same quality and character as other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry. It infects both our jurisprudence and our lawyering practices.”).

39. See Elizabeth Anderson, *Justifying the Capabilities Approach to Justice*, in MEASURING JUSTICE: PRIMARY GOODS AND CAPABILITIES 81, 96 (Harry Brighouse & Ingrid Robeyns eds., 2010) (noting that a person’s capabilities are a “product of her internal endowments, her external resources, and the social and physical environment in which she lives”); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 169 (2006) (“Good care for a person with a mental impairment—and good

decisional supports so that people with cognitive impairments might exercise influence over their lives.⁴⁰ This approach undoubtedly requires the expenditure of societal resources. Rights have costs, and the right to fail is no different.⁴¹ Further, there are often tradeoffs when contemplating how to allocate resources to different societal priorities, including rights. One should not understand this point, however, as an argument that the right to fail is not worth pursuing. Instead, it is to highlight what truly vindicating the right to fail for all people would require.

II. Choice, Consequence, and Support Networks

As revealed from the discussion thus far, the right to fail is often framed in individualistic terms.⁴² The individual is the rights-bearer who makes choices and faces the consequences of those decisions. The right to fail protects that decision-making authority from global threats that cross substantive decision-making domains. This is all true in the sense that each of us is the main character of our own story. However, most narratives usually have supporting characters as well, lest the story lapse into an unexciting monologue.⁴³ Similarly, most people are surrounded by a support network, a set of individuals that assist them and on whom they rely.⁴⁴ The

public policies supporting care—must be knowledgeable about and attentive to the particular nature of the person’s impairment.”).

40. See MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990) (arguing that disabilities are not solely the impairment but also the social context that renders the impairment a disability); Ron Amundson, *Disability, Handicap, and the Environment*, J. SOC. PHIL., Mar. 1992, at 105, 110 (“A handicap results from the interaction between a disability and an environment . . .”).

41. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (arguing for cost consciousness with respect to rights and exploring the ways in which rights have costs).

42. This “independence frame” has strategic and political benefits. See BAGENSTOS, *supra* note 38, at 30 (“[T]he independence frame was not useful merely as a way of obtaining external political support in a conservative era. It was useful also as a way of mobilizing support for the disability rights movement among people with disabilities themselves.”).

43. See John Braithwaite, Review Essay, *Narrative and “Compulsory Compassion”*, 31 LAW & SOC. INQUIRY 425, 428 (2006) (discussing the importance of intersecting and co-created narratives).

44. See Robyn M. Powell, *Care Reimagined: Transforming Law by Embracing Interdependence*, 122 MICH. L. REV. (forthcoming 2024) (manuscript at 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4605241 (“Central to disability justice is universal interdependence, which holds significant implications for reimagining care. . . . [I]t acknowledges that all people, disabled or not, fundamentally rely on others in diverse ways.”). Just because individuals rely on others does not mean that one’s support network is always

people who comprise support networks are usually family members or friends. However, people will often enter the market to seek out assistance in exchange for compensation as well, making use of everyone from attorneys to astrologers, personal care assistants to doctors.⁴⁵

One of the things that a support network assists us with is making choices, be they mundane, such as what outfit to wear on a given day, or fundamental, such as whether to have a child. There are various ways in which a network might provide decisional support, including formulating preferences, exploring option sets, making a final decision, communicating with third parties with respect to the decision, or implementing the decision that has been made.⁴⁶ The degree to which people engage with a support network for any given choice will also vary by person. Some individuals may rely on support networks more because they desire input or because they feel that they require assistance (for instance, because impairments limit some functional capacity). Others may engage support networks seldomly or only when absolutely necessary out of a desire to go it alone.

This reliance on others is not simply a facet of decision-making. Feminist theorists have long argued that the human experience is characterized by interdependence rather than or in addition to independence.⁴⁷ None of us has the capacity to survive on our own after birth, and this dependency continues

beneficial to the person who relies on them. Support networks can also be oppressive, exerting influence in ways that diminish choice or harm the person that relies on them. See Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 4 (2012) (“Perpetrators of domestic elder abuse (i.e., elder abuse which occurs outside of an institutional setting) are disproportionately family members of the victim (primarily adult children and spouses of the victim).”).

45. See Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 509 (2019) (noting the ever-expanding list of professional licensing regimes).

46. See MICHAEL BACH & LANA KERZNER, LAW COMM’N OF ONTARIO, A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY 73 (2010), <https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf>.

47. See Susan Dodds, *Dependence, Care, and Vulnerability*, in VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 181, 181 (Catriona Mackenzie et al. eds., 2014) (“[F]eminist and communitarian critics have argued that this conception of the person fails to acknowledge the inevitable primary dependency on others that is a condition of embodied human existence and discounts the developmental, relational, and social constitution of human selves.” (citations omitted)); Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 3–31 (Catriona Mackenzie & Natalie Stoljar eds., 2000) (summarizing the different feminist critiques of autonomy while arguing for a reconfiguration, rather than abandonment, of the concept for feminist theory).

throughout the lifecourse, even if its salience may vary drastically across it.⁴⁸ Similarly, we all construct our senses of self and identity in relation to others, not only as children with our caregivers but also throughout adulthood with peer groups, friends, and colleagues.⁴⁹ In the words of John Donne, “No man is an island.”⁵⁰

The interdependence of decision-making with regard to choice is mirrored with respect to consequence, particularly when the support relationship is not marketized. In the individualistic framing of the right to fail, consequence is a natural counterbalance to the freedom of choice and implicitly justifies it. This is so because of the assumption that the consequences of success or failure will fall solely on the decision-maker. This assumption in part drives the conclusion that the person making the decisions deserves that freedom of choice because they must bear the consequences of said choices, whether they be good or ill.

However, this misdescribes how consequence operates in practice. While the individual making any given choice is likely experiencing the bulk of the consequences from the decisions taken, those around the person might also experience the consequences, either directly or indirectly. In the language of economics, each individual’s decisions create externalities for third parties, particularly when those third parties’ lives are intertwined with the primary decision-maker.⁵¹ This reality creates something of a dilemma in conceptualizing the right to fail. On the one hand, the right to fail requires vesting decision-making authority in the individual whose life is involved. On the other hand, some of the rationales for the right to fail suggest that decision-making authority is justified, at least in part, by the fact that the person exercising decisional authority also experiences the consequences triggered by the exercise of that authority.⁵²

48. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 18 (2000) (“All of us were dependent as children, and many of us will be dependent as we age, become ill, or suffer disabilities.”).

49. See JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 3 (2011) (“The individual self is, then, constituted in an ongoing, dynamic way by the relationships through which each person interacts with others.”).

50. See JOHN DONNE, *Devotions Upon Emergent Occasions: Meditation XVII*, in 3 THE WORKS OF JOHN DONNE 574, 575 (Henry Alford ed., London, Parker 1839).

51. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 353 (1997) (defining negative externalities as “effects that impose nonconsensual costs on others”).

52. See *supra* text accompanying notes 29–31 (discussing how autonomy and utility arguments depend in part on the consequences falling on the primary decision-maker).

This might lead us to think that legally vesting some decision-making authority in third parties who experience the consequences of decisions by a primary decision-maker is appropriate, particularly if those individuals also expend effort providing decision-making support. As a legal matter, joint decision-making is not unheard of, but it is usually limited to certain situations, such as joint ownership of property or the parenting of children.⁵³ In these situations, there is a clear justification and need for that shared legal authority, namely the object or person in which both parties have a legal interest and responsibility.⁵⁴ Expanding that shared legal authority more broadly to various life decisions would raise several practical issues that would be difficult to surmount.⁵⁵ This is not to say that joint decision-making might not be consistent with the right to fail for certain types of decisions, but a general turn to life decision by committee seems to be in tension with the individualized decision-making that is core to the right to fail.

As a moral matter, however, this argument has some force. We exercise choice not in a vacuum, but in a social world in which we are connected to countless others. Thus, it may be the case that we have a moral responsibility to address the radiating consequences of our decisions. Many do so by consulting with members of their support network to solicit input or obtain buy-in for their choices, while others might try to find some way of taking the costs on themselves, internalizing the externality.⁵⁶

This type of interdependency in decision-making is captured well in the “two-body problem” that many couples in academia face, when two partners face challenges in finding employment in the same location.⁵⁷ The choice to accept or decline any particular offer of employment has significant effects on a spouse as well as on the relationship, often leading to some form of joint

53. See, e.g., Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1332–44 (1993) (discussing advantages to group ownership of property).

54. See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1575–76 (1998) (exploring how property logic might apply to the allocation of parental rights in the child custody context).

55. For example, the consequences of decisions can be difficult to predict, so how do we select the relevant third parties? As most decisions have radiating consequences, how do we draw the line between those decisions that require third-party involvement and those that do not?

56. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348–49 (1967) (describing how property rights emerge as a way to internalize externalities).

57. See generally LISA WOLF-WENDEL ET AL., *THE TWO-BODY PROBLEM: DUAL-CAREER-COUPLE HIRING POLICIES IN HIGHER EDUCATION* (2003).

decision-making or bargaining around the distribution of costs and benefits.⁵⁸ These interdependencies do not exist solely in a marital relationship but can extend out to more distant family relations, friends, or acquaintances as well.⁵⁹

When the primary decision-maker does not consult their network or fails to mitigate the costs that might fall on it, members of the network might exercise an exit option, leaving the relationship.⁶⁰ However, many members of a support network may feel like they cannot or often simply will not sever their relationships with an individual in this way, especially if that person is living with cognitive impairments.⁶¹ Doing this risks serious harm for a person who relies on the support provided by members of the network, and that may be perceived as a worse outcome than bearing some of the costs of poor decisions. With this in mind, the next Section explores the ways to support the support network and remove the barriers to legal recognition of support networks.

III. Operationalizing the Right to Fail

Recognizing the existence of support networks and the interdependencies they create can surface some of the primary threats to the right to fail as well as potential solutions. The first threat is the lack of an adequate support network, which may have several causes. There may simply be no one qualified and available to serve in a support role. Perhaps a support network never existed, or maybe it dwindled over time as its members moved or passed away.⁶² Alternatively, members of the support network may be available, but they are not qualified to assist an individual needing support.

58. See Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 227–36, 255–60 (2011) (describing different instances of marital bargaining).

59. Members of a support network who are in a market relationship with the primary decision-maker may have less input into the decision-making process, but any negative consequences they might experience are mitigated by the monetary compensation they receive.

60. See ALBERT O. HIRSCHMAN, *EXIT, VOICE & LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 22–25 (1970) (describing the exit option).

61. See Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward A Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 580 (describing the "interlocking and self-renewing networks of care" that ideally constitute family relations).

62. See Thaddeus Mason Pope, *Unbefriended and Unrepresented: Better Medical Decision Making for Incapacitated Patients Without Healthcare Surrogates*, 33 GA. ST. U. L. REV. 923, 942–52 (2017) (describing the population of unbefriended elders, or older adults needing decisional support).

This problem may be exacerbated if a person has unique needs for decisional support due to cognitive impairments. Finally, even if a network is robust and capable, it is possible that its members will simply choose not to provide decisional support. This may be due to a concern with the harm that might befall the primary decision-maker from the choices they might make. However, members of the support network may also have a more self-interested motive in doing so, namely avoiding the potential negative consequences that might fall on them for choices made by the primary decision-maker.⁶³

How precisely to achieve the goal of network adequacy is beyond the scope of this Article. It is nevertheless worth pointing out that the current social arrangements are far from adequate. For those who possess significant economic resources, there is the possibility of turning to the market and purchasing the services of trained professionals or others to form a support network.⁶⁴ However, the cost of market care puts it out of reach for most, and the industry is plagued by problems of low quality created by the lack of professionalization, poor working conditions, and low pay.⁶⁵ The public sector could theoretically fund the provision of supports both for individuals needing decisional support and members of existing support networks.⁶⁶ But currently, this type of public provision is relatively sparse, as illustrated by

63. See William H. Turnley & Daniel C. Feldman, *The Impact of Psychological Contract Violations on Exit, Voice, Loyalty, and Neglect*, 52 HUM. REL. 895, 908–17 (1999) (describing how neglect can be an alternative response to exit, voice, or loyalty in certain types of relationships and situations).

64. See S. Mitchell Weitzman, *Legal and Policy Aspects of Home Care Coverage*, 1 ANNALS HEALTH L. 1, 4–5 (1992) (listing the major market providers of home health and personal care).

65. See Peggie R. Smith, Essay, *Who Will Care for the Elderly?: The Future of Home Care*, 61 BUFF. L. REV. 323, 335 (2013) (arguing that poor pay and working conditions contribute to low availability and quality in home care).

66. These strategies are in line with what many feminist scholars have long advocated for, namely socializing the costs of dependency. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 22–33 (1995). The alternative—privatizing the costs of dependency—not only harms those who might need decisional support by disincentivizing the provision of such support but also inevitably leads to inequalities in support received by class and support provided by gender. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2200 (1995) (“Those who care for inevitable dependents are often themselves dependent—a derivative dependency that stems from their roles as caretakers and the need for resources that their duties generate. This type of dependency is not inevitable, nor is it universal. It is socially defined and assigned, and that assignment is gendered.”).

the example of deinstitutionalization in New York.⁶⁷ Some combination of reforming private-care markets to increase supply and quality and increasing public financing for supportive services will likely be necessary.⁶⁸

The case of individuals who have a present and capable support network that is otherwise uncooperative is trickier. It is difficult to police an unsupportive support network directly because the ways in which it might limit decision-making are likely to be subtle exercises of social influence or control that are hidden from public view.⁶⁹ Even if an unsupportive support network were more visible, however, it is not clear that judicial micromanagement of support activities is either desirable or possible.⁷⁰ This suggests that social or cultural, rather than legal, strategies may be best suited to this particular problem.⁷¹ It also highlights the fact that it may be difficult to eradicate all infringements on the right to fail without a broader change in sociocultural attitudes towards decision-making for people with cognitive impairments.

While the network adequacy problem affects everyone, people with cognitive impairments face an additional and unique threat to the right to fail that comes directly from the legal system. Specifically, various legal institutions and doctrines deprive individuals of legal decision-making authority in certain domains, even if they have an adequate support network in place. These institutions and doctrines disparately impact people based on a variety of characteristics, including class, disability, gender, race, or their combinations.⁷² However, many of them purport to address the issues of

67. See *supra* text accompanying notes 1–8.

68. In addition, enforcement of certain laws already on the books, such as the Americans with Disabilities Act, will help to push for further resourcing of the right to fail through satisfaction of its legal requirements. See Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1362–67 (2022) (arguing for tougher enforcement of the ADA along with family court reforms to vindicate the right to fail for parents with disabilities).

69. See *Hyatt v. Wroten*, 43 S.W.2d 726, 728 (Ark. 1931) (“Undue influence is generally difficult of direct proof. It is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances surrounding the testator . . .”).

70. See Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412, 443 (2022) (warning about the dangers of judicial intrusions into the family sphere).

71. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 948–56 (2011) (summarizing the advantages and disadvantages of court-centered approaches to social change).

72. See Jasmine Harris, *The Political Economy of Conservatorship*, UCLA L. REV. (forthcoming 2024) (demonstrating how the guardianship system has historically targeted various groups) (on file with author).

mental incapacity due to cognitive impairment, making people with cognitive impairments especially vulnerable to them.⁷³

The primary way to address this particular threat is through legal reform. Specifically, instead of depriving individuals of the ability to make choices by focusing only on cognitive impairments, the legal system should expand their capacity inquiries to assess whether there is an adequate support network in place that might make such a legal deprivation unnecessary. This approach is consistent with the Convention on the Rights of Persons with Disabilities, which requires the provision of legal capacity on an equal basis to people with and without cognitive impairments.⁷⁴ In short, this means that the legal system should strive to legally recognize supported decision-making when appropriate. While everyone makes use of support in life and in decision-making at some point in their lives, supported decision-making is a term of art that has emerged to refer to situations in which people with cognitive impairments make use of decisional supports.⁷⁵

There are already developments underway aimed towards this goal. Several states have passed statutes legally recognizing various forms of supported decision-making, though they vary significantly on the details, including how much power and legal control they award members of the

73. See Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16–55 (1990) (detailing the history of mental incapacity law).

74. See U.N. Secretary-General, *Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, art. 12(2), U.N. Doc. A/61/611 (Dec. 6, 2006), https://treaties.un.org/doc/source/docs/A_61_611_E.pdf [<https://perma.cc/WU4J-8UKX>] (“States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”); Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF, no. 2, 2012, at 8, 8 (suggesting a move to supported decision-making may be necessary); Eilionóir Flynn & Anna Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, 32 BERKELEY J. INT’L L. 124, 142 (2014) (arguing that only supported decision-making models are permissible under article 12 of the Convention on the Rights of Persons with Disabilities).

75. See Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1120 (2013) (describing supported decision-making as a situation in which “an individual with cognitive challenges is the ultimate decision-maker but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual’s words and behavior to determine his or her preferences”).

support network.⁷⁶ At the judicial level, courts in some states have informally recognized supported decision-making in the context of guardianship, even in the absence of a supported decision-making statute. Specifically, there are several cases in New York in which judges have declined to impose guardianship on individuals with cognitive impairments who had an adequate support network in place.⁷⁷ This contextualized analysis of functional capacity in the guardianship context serves to address a major threat to the right to fail for people with cognitive impairments.

Legal scholars have also been identifying specific ways in which the right to fail is abrogated in other decision-making domains and offering solutions. For example, the family regulation or policing system—also known as the child welfare system—terminates parental rights and prevents parents from exercising parental decision-making authority.⁷⁸ Parents with cognitive

76. See generally Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313 (2021) [hereinafter Kohn, *Legislating Supported Decision-Making*] (describing and critiquing these statutory developments).

77. The case of *Simone A.* is illustrative. See Proceeding for Appointment of a Guardian for Simone A., No. 2018-XXXX, 2020 WL 6153653, at *2, *4 (N.Y. Sup. Ct. 2020). Simone is a woman with “autism spectrum disorder, anxiety, obsessive compulsive disorder (OCD), adaptive ‘functioning deficits,’ and non-verbal learning disorder (NVLD).” *Id.* at *2. Simone’s mother petitioned for guardianship because she believed Simone could not make financial or medical decisions on her own, and she was worried about dangers Simone might encounter out in the world. *Id.* at *1, *4. The court declined to impose guardianship, using the following reasoning:

The relevant inquiry, however, is not whether an individual can manage herself and her affairs devoid of any familial, social or professional support. Indeed few of us, neurotypical or diverse, successfully navigate our own lives without the input, advice, and counsel of those whom we trust and upon whom we rely. From choosing a college to finding a job, from being in a relationship to getting married, from deciding where to vacation to whether to undergo a medical procedure, we naturally consult with others to varying degrees as part of the decision-making process. That does not render us in need of guardianship, no matter how much we may prefer that someone else make the difficult decisions for us in life. While an adult with developmental disabilities may require greater support, here, the appropriate legal standard is not whether the petitioner can make better decisions than Simone, it is whether or not Simone is capable of making decisions with the support she has.

Id. at *4. The court recognized Simone’s mother’s work, but did not believe a “sincere but speculative fear of unspecified dangers” was sufficient to deprive Simone of legal decision-making authority. *Id.*; see also Kohn, *Legislating Supported Decision-Making*, *supra* note 76, at 347 n.161 (collecting similar cases from New York).

78. See Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/GJ84-WCSF>]

impairments are especially likely to have their children removed and parental rights terminated, even when many can parent effectively with appropriate supports.⁷⁹ Vindicating the right to fail in this context requires the provision of supportive services but also the recognition of “supported parenting,” in which courts favor limited terminations and examine the presence of a support network when applying parental-fitness statutes.⁸⁰

The right to fail is also implicated in the realm of sexuality. Legal incapacity doctrines serve to vitiate sexual consent amongst those with cognitive impairments, putting the sexual partner of the person lacking capacity at risk of criminal prosecution by the state.⁸¹ Additionally, these doctrines can create further barriers to sexual expression by imposing liability on third parties for allowing sexual activities to transpire. Long-term care institutions in particular often serve as the support network for people who lack legal capacity to consent to sex. These institutions create highly sex-negative environments to steer well clear of the legal liability that sex among their residents might entail.⁸²

The recognition of supported decision-making in this context requires adopting a network consent model of sexual consent, in which a judicial inquiry would include both an analysis of the volitional capacity of the person with cognitive impairments and an evaluation of the adequacy of a support

(arguing for the “family regulation system” terminology). Several scholars have critiqued the system as privacy-infringing, punitive, and harmful to the welfare of children and their parents, particularly those marginalized by race, class, or disability. *See, e.g.*, DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (detailing the race and class dimensions to the family regulation system); Sarah H. Lorr, *Disabling Families*, 76 *STAN. L. REV.* (forthcoming 2024) (arguing that the family regulation system both discriminates against people with disabilities and produces disability).

79. *See* Robyn M. Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Laws*, 101 *WASH. U. L. REV.* 423, 455–65 (2023) (detailing the ableism in termination of parental rights laws); Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 *CUNY L. REV.* 127, 141–45 (2016) (summarizing the empirical research on parenting by people with intellectual disabilities).

80. *See* Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities as Parents: The ADA and the CRPD*, 57 *FAM. CT. REV.* 21, 23–26, 30–33 (2019) (describing problems with parental termination statutes and suggested limited terminations and supported parenting as alternatives).

81. *See* Boni-Saenz, *supra* note 18, at 1207–13.

82. *See id.* at 1213–15 (describing sex-negative environments for older adults with cognitive impairments residing in long-term care institutions).

network.⁸³ Such a legal reform would both legally recognize supported decision-making in the area of sexual consent and provide an avenue for long-term care institutions to safely promote sexual expression among their residents with cognitive impairments while avoiding harsh legal liability.

These are only a couple of examples of how supported decision-making might be recognized in the realms of sexuality and parenting. In general, the operationalization of the right to fail must be tailored to the domain in which supported decision-making would be implemented.⁸⁴

Conclusion

The right to fail creates a zone of freedom where decision-making about one's life can proceed unimpeded. To complete our conceptual understanding of this right, we must understand that support networks help to uphold this zone of freedom and also experience the consequences of its existence. Thus, in order to truly vindicate the right to fail for everyone, but particularly people with cognitive impairments, we must ensure the adequacy of support networks, assist the members of those networks, and legally acknowledge their existence as an alternative to legally depriving people of decision-making authority.

83. See Alexander A. Boni-Saenz, *Advance Consent and Network Consent*, in ROUTLEDGE HANDBOOK OF DISABILITY AND SEXUALITY 222, 228–31 (Russell Shuttleworth & Linda R. Mona eds., 2021) (describing how network consent would function for people with cognitive impairments); see also Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1, 2 (2016) (proposing sexual advance planning as an additional solution to legal incapacity in the realm of sexuality).

84. See Alexander A. Boni-Saenz, *Legal Age*, 63 B.C. L. REV. 521, 565–67 (2022) (discussing the need to particularize legal reforms to the domains in which they operate).