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RESEARCH ARTICLE

Structural Hobbling: Regressive Harm, Diffuse Responsibility, and Structural Injustice

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Abstract

The past five years have seen a dramatic increase in scholars working to supplement or challenge accounts of structural injustice. Almost without exception, scholars in this area assume that the move from personal responsibility to political or public responsibility will represent a net gain in justice, at least in modern liberal regimes. In this essay, I challenge this assumption and introduce the concept of "structural hobbling" as a parallel cause of injustice, but one whose origins derive from neutral state activities rather than from intentional bad faith or diffuse private action (as in structural injustice). Using health-care regulations as a lens, I offer two narratives of individuals navigating health-care regulations that demonstrate how seemingly neutral regulatory decisions create regressive hobbling effects. Structural hobbling challenges structural-injustice theorists to take more seriously the complex and often subtle ways in which apparently benevolent state activity can create downstream injustice, while adding complexity to existing narratives around public responsibility and what it demands.

Keywords: structural injustice; structural hobbling; health care; regulations; regressive effects

> "[T]he sovereign extends its arms over the entire society; it covers the surface of society with a network of small, complicated, minute, and uniform rules, which the most original minds and the most vigorous souls cannot break through to go beyond the crowd; it does not break wills, but it softens them, bends them and directs them; it rarely forces action, but it constantly opposes your acting; it does not destroy, it prevents birth."
>
> —Tocqueville, *Democracy in America*[1]

[1] Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition of De la Démocratie en Amérique*, ed. Eduardo Nolla, trans. James T. Schleifer, vol. 4 (1840; repr., Indianapolis, IN: Liberty

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Introduction

Iris Marion Young coined the phrase "structural injustice" in her landmark 2011 book *Responsibility for Justice.*[2] While interest in this idea has not died away, there has been a dramatic increase in the past five years in scholars working to supplement or challenge Young's account.[3] Almost without exception, scholars in this area assume that the move from personal responsibility to political or public responsibility will represent a net gain in justice, at least in modern liberal regimes. In what follows, I hope to call that assumption into question. But first, I start with two stories in homage to Young's heroine, Sandy, from the first chapter of *Responsibility for Justice.*

Joseph's story

Joseph[4] is a ninety-one-year-old New Yorker whose dearest wish is to die at home. He currently occupies a bed at a nursing home, but he is lucid and has a clear goal: "to go home, to my books and my music."[5] Joseph's goal for his remaining days seems immensely reasonable on liberal theory and policy grounds. It is low cost and even universalizable as a desire, it honors informed consent, and it is consistent with best practices in medicine for nonagenarians. It is also shared by his closest relative, his daughter Maureen.

Yet both Joseph and Maureen find it almost impossible to honor this simple and reasonable wish. After a recent hospitalization for a urinary tract infection, Joseph's Medicaid-funded home-health agency refuses to return because the fixed low reimbursement rate of state Medicaid for home-care agencies creates perverse incentives to refuse high-needs cases like Joseph's. In its rejection of his case, the agency tells Maureen that his frequent admissions to the hospital meant that the home-health agency lost money on his care.

Because there is no home-health agency willing to take him, Joseph is sent from the hospital to a skilled nursing facility against his and his daughter's express wishes, ostensibly for rehabilitation. While trying to get him released back home, his daughter Maureen is shocked to find out that the nursing home

Fund Press, 2010), 140, https://oll.libertyfund.org/titles/schleifer-democracy-in-america-historical-critical-edition-vol-4.

[2] Iris Marion Young, *Responsibility for Justice* (New York: Oxford University Press, 2011).

[3] Maeve McKeown, "Structural Injustice," *Philosophy Compass* 16, no. 7 (2021), https://compass.onlinelibrary.wiley.com/doi/epdf/10.1111/phc3.12757; Maeve McKeown, *With Power Comes Responsibility: The Politics of Structural Injustice* (London: Bloomsbury Academic, 2024); Madison Powers and Ruth Faden, *Structural Injustice: Power, Advantage, and Human Rights* (New York: Oxford University Press, 2019); Kirun Sankaran, "'Structural Injustice' as an Analytical Tool," *Philosophy Compass* 16, no. 10 (2021): e12780.

[4] Joseph's story comes from a *New York Times* article about his and his daughter's case, but the same story could be told about tens of thousands of patients across the United States. Nina Bernstein, "Fighting to Honor a Father's Last Wish: To Die at Home," *The New York Times*, September 25, 2014, https://www.nytimes.com/2014/09/26/nyregion/family-fights-health-care-system-for-simple-request-to-die-at-home.html. The National Institutes of Health provide an overview of the structural problems with our existing policies in their seminal report *Dying in America* (Washington, DC: National Academies Press, 2015), https://www.ncbi.nlm.nih.gov/books/NBK285681/.

[5] Bernstein, "Fighting to Honor a Father's Last Wish."

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neither she nor her father wants is charging Medicare almost $700 per day, five times more than the cost for round-the-clock home care that would have been more appropriate and that they both would have preferred.

Moreover, nursing homes, including these skilled nursing and rehabilitation facilities, receive more government funding in the patient's first one hundred days after admittance—unlike home-health aides, who typically receive a low flat rate and lose money every time a patient is transferred—creating a perverse incentive to send patients back to the hospital to reset the clock for nursing home payments. A revolving door of hospitalizations and nursing homes for "rehab" leave Joseph with more and more complications, including infections and ulcers from lack of movement and inattention to skin care. At one point, he sits in his own feces for three hours at the nursing home, pressing the button for staff with no response. The infections that result from inadequate nursing care require hospitalization, which increases his stress and his exposure to pathogens while limiting his body's ability to heal.

Meanwhile, hospitals move Joseph out as quickly as possible after admission because Medicare does not reimburse hospitals for staffing as much as for procedures. What Joseph really needs is personal care to avoid infections in the first place. Patients like Joseph without acute and profitable needs get sent to nursing homes for "rehabilitation," even when they do not need rehabilitation, but instead need better grooming and hygiene support.

Those nursing homes, in turn, face perverse incentives due to low Medicaid and Medicare staffing rates but very high rehab, physical therapy, and other procedural rates. To stay in business and maintain staff, nursing homes must prescribe some proportion of their patients unnecessary procedures or physical therapy, even though research suggests that physical therapy may even be actively harmful for many of these patients. Meanwhile, nursing homes lack the staff to prevent falls, medication errors, and bedsores, all of which result in rehospitalization. Rotation between numerous places of care increases stress, exacerbates existing risk factors, and increases the chance of medical errors, which is why Joseph keeps being readmitted to hospitals in the first place.[6]

After cycling in and out of hospitals and nursing homes with one brief stay at home until an infection sends him back to the hospital, doctors finally tell Maureen they can do no more for Joseph and urge her to send him home on hospice. The Medicare Hospice Benefit only covers four hours of in-home care a day, though, and Maureen works full time as a teacher. She cannot afford the out-of-pocket expense it would require to supplement those four hours of care. If Joseph takes the Medicare Hospice Benefit, he loses access to the Medicaid home care he needs to be home in the first place.

Eventually, as his condition worsens, Maureen has him admitted to a nursing home hospice (much to his dismay), which is the only institution that will take him, given the conflicting structures and policies of Medicaid and Medicare.

[6] Martin A. Makary and Michael Daniel, "Medical Error: The Third Leading Cause of Death in the U.S.," *British Medical Journal* 353, no. 2139 (2016), https://doi.org/10.1136/bmj.i2139; Thomas L. Rodziewicz *et al.*, "Medical Error Reduction and Prevention," in *StatPearls* (Treasure Island, FL: StatPearls Publishing, 2024), http://www.ncbi.nlm.nih.gov/books/NBK499956/.

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Joseph dies of sepsis three days later, his body covered in extreme pressure ulcers, the result of immobility caused by institutionalization over his last year of life. The sepsis that kills him is likely the result of bacteria picked up across a range of institutions. He never makes it home to his books or his music, in direct opposition to his wishes.

Overall, Medicare and Medicaid pay more than $1 million for Joseph Andrey's care in the last year of his life, most of that the result of frequent hospitalizations and complications from hospital-borne infections. The in-home care that Joseph and Maureen desperately wanted for him would likely have been an order of magnitude less expensive, both by avoiding the complications resulting from uncoordinated care and through lower staffing and overhead costs.

Joseph's wish to die at home is reasonable, cost-effective, and consistent with his preferences and those of his family. It is unjust, on many grounds, that his autonomy was violated while the community paid so much for the treatment that killed him. His wish to die at home was denied not by a soulless bureaucrat, an authoritarian leader, or the cold logic of economic efficiency. Instead, no real decision was made at all. There is no one person or agency to blame, no single law to point to as the source of injustice. Joseph's reasonable and important goal was stymied, instead, by a web of policy restraints that made his wish impossible to fulfill.

Mariana's story

Mariana[7] is a Black mother of two in her early thirties who moved back to her hometown in the Bronx from upstate New York to be closer to her aging parents and to serve her community. She is a certified professional midwife (CPM), a certification that is accepted in thirty-six states and the District of Columbia. She worked hard as a first-generation college student to earn an undergraduate degree in biology and her CPM credential. Her goal is to earn money to pay off her student loans and take care of her two young children while serving women of color by providing safe home births to women in the Bronx. Her research suggests that there is great need and demand for such a service due to serious disparities in maternity care and outcomes in local hospitals. Home birth for low-risk women is cost-effective, very safe, and many women of color strongly prefer care from culturally competent providers, particularly female providers of color. Midwifery is also a path to the middle class and an opportunity for Mariana to own her own small business. Mariana's goal is reasonable and even laudable on liberal grounds.

Yet, when Mariana researches options for pursuing her career in her hometown, she finds much to her dismay that she is unemployable as a midwife. To

[7] Mariana is a composite of a number of women I interviewed over the past seven years for my work on maternity care regulations. Some are CPMs, some are doulas, and some are struggling to navigate the Certificate of Need (CON) system in New York state. Each of the state regulations I discuss here is still in place in New York state at the time of writing. Different states have different combinations of these regulations.

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begin, the CPM certification she holds is not recognized in New York state. New York recently prosecuted a CPM for "impersonating a [licensed] midwife," despite that midwife holding a certification recognized in two-thirds of American states and practicing in a maternity desert in a Mennonite community with few licensed options. Given this active prosecution of CPMs, Mariana is unwilling to risk providing home birth care without state permission.

She does more research and finds that the only legal option she has is to go back to school to get an undergraduate nursing degree as well as a masters, both of which are required for the Certified Nurse Midwife (CNM) certification, which is one of the only available certifications that will allow midwives to practice independently in New York state.[8] Mariana, whose family income hovered around the poverty line while growing up, is still paying off student loan debt for her undergraduate degree and her CPM while trying to save money for her own children's college educations. She cannot afford another four to six years of education, lost earnings, and student loan debt just to get the CNM credential.

Moreover, she is concerned that additional debt would eliminate her ability to practice outside of hospitals, which is her primary goal. Medicaid provides very low reimbursement rates for out-of-hospital births and many homebirth midwives must balance the number of Medicaid clients with full-pay out-of-pocket clients. Additional student loan debt would tip this balance even further toward wealthy full-pay clients. Mariana does not want to serve wealthy clients in Manhattan merely to service additional student loan debt, because her goal is to serve low-income women of color in her own community. She decides that, even if she were to pursue the CNM credential, she would be unable to serve the women she hopes to serve.

Despite having a credential that is legally recognized in thirty-six other states and the District of Columbia, Mariana cannot provide care for women in her community. She cannot legally practice in her own community without risk of prosecution. Even if she were free from fear of prosecution, she cannot bill Medicaid for the care she provides, because Medicaid follows local licensure laws. She also cannot practice in hospitals, because New York does not recognize her credential and hospitals, too, follow state licensing requirements. She hopes there might be another way.

Perhaps she can work in a birth center as a CPM, under the supervision of an obstetrician or CNM. She is puzzled to find that there are only three birth centers in the entire state, none of which is located in the Bronx. Mariana is entrepreneurial and thinks that perhaps she can fill a need by opening a birth center in partnership with a CNM so that she can practice outside the hospital context. When she researches the process for opening a birth center, the small number of birth centers in New York is explained. New York has a Certificate of Need (CON) law requiring all new health-care facilities—even small outpatient clinics that do not do surgery, such as birth centers—to go through a complex and expensive

[8] She also could pursue a Certified Midwife credential, one that requires an M.S. but not an undergraduate nursing degree. However, because this certification is only recognized in New York and a few other states, without the nursing degree she would be unemployable again if she were to move to another state.

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approval process. It can take as long as two years and hundreds of thousands of dollars in fees before even paying for equipment and personnel. Mariana calls a private health-care consultant whose job is to help companies and entrepreneurs navigate the CON process. Despite offering his services at a reduced nonprofit rate of $40,000, Mariana cannot come close to finding that amount of money, even assuming that she could find a CNM or obstetrician partner and then raise funding for the facility itself.

As she explores ways to crowdsource funding options for the birth center, she looks for spaces that might be suitable. As she looks, however, she finds that the CON process interacts with local building codes to price her out of available buildings in her area. Before she applies for the CON, she must have a facility rented for an entire year, but there are few facilities in her area that meet local code requirements for a medical clinic. Large medical centers with cash reserves comply with these codes by building new buildings in the suburbs, but new construction in the Bronx is extremely expensive and existing housing stock is older and typically fails to meet the demands of the local building codes, such as a mandated ceiling height. She is also frustrated that many of these codes do not apply to her care model. One code requires doorways to accommodate gurneys, which is not the norm in any birth center model in any other state, given that birthing women are typically ambulatory and do not require gurneys. Renovating even the least expensive facility on her list to meet these codes would cost hundreds of thousands of dollars.

Mariana finishes her research and feels defeated. Instead of being able to make a middle-class living serving her community, she continues her work as a phlebotomy technician making close to minimum wage. She assists births on the side as a doula, but she finds that most of the women in her area cannot afford to pay out of pocket for doula care and she struggles to juggle the uncertainty of the schedule with her full-time job. She eventually decides that, given these obstacles, she cannot use her expertise to serve her community. She puts her goals on hold while looking for a better job as a medical technician.

Mariana's desire to earn a living while serving her community is reasonable, cost-effective, and consistent with her preferences and the needs of the most vulnerable members of her community. It is even morally laudable by most standards. Yet, as with Joseph's case, a web of legal and policy restraints made that desire impossible to fulfill.

Structural hobbling in theory and practice

Neither Joseph's nor Mariana's story is rare. According to the National Institutes of Health, most Americans would like to die at home, but like Joseph more than two-thirds will die in institutions for a variety of reasons.[9] Mariana's case is also not uncommon, although it is more difficult to find numbers of who would have liked to build a life in a particular way only to be prevented by arbitrary

[9] NIH, *Dying in America*, 119.

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barriers.[10] Given that 98 percent of American women give birth in hospitals and that the majority of physicians and nurse midwives are white, Mariana's story is likely not unusual either.[11] Either way, these stories are not outliers.

Crucially, both stories involve what to many readers would seem to be deep injustices, namely, individuals with reasonable and deeply held convictions about what should happen to their bodies or how to use their talents in society are stymied by arbitrary and seemingly senseless rules that frustrate their every attempt to navigate them. Even more troubling, these limitations on these individuals make everyone worse off. Both Joseph's and Mariana's goals are consistent with liberal notions of freedom in that they are reasonable, consistent with community needs, and very important to them as individuals. Each also affects areas of life—birth and death—that most people believe to be central to questions of agency, autonomy, and consent.

These injustices, however, do not stem from what we think of as traditional sources of deep injustice, such as racism or authoritarianism. Unlike laws mandating segregation or enforcing redlining, it is difficult to see any of these laws as explicitly unjust. Instead, the injustice experienced by Joseph and Mariana (and, by extension, their families) stems from neutral or even well-meaning laws, such as Medicaid and Medicare at the federal level as well as Certificate of Need and licensing laws at the state level. These laws do not exist to make people suffer; on the contrary, their motivations are often to reduce injustice and reduce suffering. And yet in both examples, the structure of these laws and the way they interact lead to deep injustice, the kind of injustice that arbitrarily prevents people from achieving deeply meaningful and reasonable goals. Such stories do not apply only to health care or occupational licensure. One does not need to stretch the imagination far to see how similar kinds of examples exist in housing, immigration, and criminal justice.

In what follows, I will lay out a theory of what I call "structural hobbling" as a contrast to the account of structural injustice offered by scholars from Young to McKeown.[12] I am agnostic as to whether structural hobbling is itself a subset of structural injustice or another species of injustice altogether, but I hope to demonstrate that current understandings of structural injustice overlook the role of state activity in contributing to structural injustice. Because current understandings of structural injustice are incomplete, theorists miss an opportunity to evaluate how interventions themselves may contribute to the burden of injustice. This injustice, like structural injustice broadly, is generally regressive; it has the most significant hobbling effect on the most vulnerable among us.

[10] Bernie Divall *et al.*, "Plans, Preferences or Going with the Flow: An Online Exploration of Women's Views and Experiences of Birth Plans," *Midwifery* 54 (2017): 29–34.

[11] Christopher Godfrey Fawsitt *et al.*, "What Women Want: Exploring Pregnant Women's Preferences for Alternative Models of Maternity Care," *Health Policy* 121, no. 1 (2017): 66–74.

[12] Young, *Responsibility for Justice*; McKeown, *With Power Comes Responsibility*.

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Anatomy of structural hobbling

Both Joseph's and Mariana's stories share the following criteria:

(1) The individuals are subject to a constellation of rules and regulations that make it difficult, if not impossible, to act in a choiceworthy way in their current context. They are therefore *unfree.*
(2) As the name suggests, this hobbling does not stem from a single unjust or even misapplied law or regulation, but instead stems from the structure of a suite of regulations and how they interact with one another. As a result, *responsibility is diffuse* and reform difficult.
(3) The hobbled individuals, in part because they have few options, are subject to relatively *high levels of domination* because the constraints place them under the arbitrary power of another. This domination, like responsibility, however, is diffuse, extending across and compounding over a range of agencies and actors.
(4) As a result of this unfreedom, the individuals in question are unable to make the most appropriate choice for their specific situation, which creates tangible harm. At the very least, they are, on average, *worse off* than they would be if they were not hobbled in their pursuit of reasonable, important life goals. Being free to pursue reasonable, important life goals is a reasonable expectation in a modern liberal state. In each of these cases, a person with greater resources, status, health, or time might be able to escape the constraints altogether, which makes it at least likely that structural hobbling is regressive and will have the greatest impacts on the most vulnerable among us, thus contributing to *injustice.*
(5) Finally, in many if not all of these cases, the community is likely worse off than it would be in the absence of structural hobbling. In Mariana's case, the community loses her expertise and education. In Joseph's case, the community (via Medicare) pays much more than it should for substandard care.

What is structural hobbling and why does it matter?

In what follows I use the term "hobbling" in part because it lacks existing use in the political theory and philosophy literature, but also because hobbling describes a way of limiting someone without completely constraining them. Unlike direct coercion, hobbling aligns with Alexis de Tocqueville's definition of democratic despotism, as hobbling "encloses the action of the will within a smaller space."[13] The term itself means to "restrict the activity or development of someone,"[14] but it can also be used to describe tying the legs of a horse together or, even more darkly, crushing the bones in a person's feet and ankles.

[13] Tocqueville, *Democracy in America*, vol. 4, 140, https://oll.libertyfund.org/titles/schleifer-democracy-in-america-historical-critical-edition-vol-4.

[14] *Merriam-Webster Dictionary*, s.v. "hobble," https://www.merriam-webster.com/dictionary/hobble.

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Hobbling also does not require a motivated agent. Someone can be hobbled by a rock or can be hobbled by becoming entangled in a net left carelessly on the ground. We do not need to identify a single responsible agent for either Joseph's or Mariana's hobbling.

The primary effect of hobbling is to limit freedom. It may also increase domination. It also often comes with a variety of other side effects, including harm and injustice. Coercion,[15] exploitation,[16] or manipulation[17] are often wrongful, even though one could think of legitimate and/or nonwrongful examples of each. Likewise, hobbling typically is wrongful because it makes choiceworthy action more difficult.[18] One major goal of this essay is to highlight the grey and nebulous area where otherwise acceptable state regulatory powers become wrongful. Doing so closes the gap in Young's and McKeown's accounts of structural injustice that imply that structural injustice is largely caused by state *inactivity* rather than by *state activity itself.* Structural hobbling also suggests that state activity to address injustice in one sphere may contribute to injustice in the form of hobbling in another sphere of public or private life. Health-care regulation to create access, for example, may constrain the ability of providers to provide high-quality care. Moreover, such externalities of addressing injustice are unlikely to be obvious at the outset and are therefore difficult to account for during democratic deliberation.[19] Structural hobbling, then, provides a more complete picture of the landscape (or map) of injustice than most accounts of structural injustice provide.[20]

Structural hobbling as a form of structural injustice

As noted at the outset, the phrase "structural injustice" was coined by Young, although the concept is not necessarily new. The literature on structural injustice, both new and old, focuses on aggregate effects of individual actions or rules

[15] Denis G. Arnold, "Coercion and Moral Responsibility," *American Philosophical Quarterly* 38, no. 1 (2001): 53–67; Alan Wertheimer, "Remarks on Coercion and Exploitation," *Denver University Law Review* 74, no. 4 (1997): 889–906.

[16] Matt Zwolinski, "Structural Exploitation," *Social Philosophy & Policy* 29, no. 1 (2012): 154–79.

[17] Joel Rudinow, "Manipulation," *Ethics* 88, no. 4 (1978): 338–47.

[18] Thus, I ignore situations in which one might hobble an animal for its own good, as might be the case for horses. The hobbling on which I focus reduces *choiceworthy* action, not merely action per se.

[19] In my research, midwives I interviewed were often ignorant of the existence of impactful regulations until they had to comply with them. This is likely true of most other heavily regulated professions. I know from experience that it is also true of education. One would certainly not expect voters to be *more* aware of the effects of regulations than are the professionals whose work is directly impacted. The same is likely true of patients and other affected groups. The epistemic problem becomes relevant again later on.

[20] For more on this point, see David Schmidtz, *Elements of Justice* (New York: Cambridge University Press, 2006), 20, where he argues that "successful theories are maps" and "[m]aps do not tell us where we want to go." Structural hobbling allows us to map a particular kind of (constrained) terrain, but does not necessarily tell us what an ideal terrain will look like in each case.

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that contribute to disparate and harmful effects on different groups.[21] Even more broadly, the literature on what could be called structural injustice focuses on class,[22] gender,[23] race,[24] and colonialism.[25] Outcomes of structural injustice include racial disparities in health care and environmental degradation,[26] disparate policing and imprisonment,[27] racial oppression,[28] the mortgage crisis,[29] and others.[30] Much of the structural injustice literature focuses on corporate power and exploitation,[31] social norms,[32] and discriminatory rulemaking.[33]

In general, much of the structural injustice literature focuses on patterns of *individual-level* behavior that, in the aggregate, create structurally unjust outcomes, such as patterns of white flight from urban areas[34] or decisions in the housing market, as in Young's example of Sandy. Less attention has been paid to the way neutral or even seemingly well-meaning laws and rules, achieved via democratic deliberation and representation, might contribute to structurally unjust systems and/or domination and unfreedom. An account of structural hobbling can fill this gap.

Why isn't structural hobbling just structural injustice, full stop?

Readers are often impatient with neologisms and for good reason. The justification for coining the phrase "structural hobbling" is that there exists, in its

[21] Iris Marion Young, *Responsibility for Justice*, repr. ed. (Oxford: Oxford University Press, 2013); Iris Marion Young and Danielle S. Allen, *Justice and the Politics of Difference*, rev. ed. (Princeton, NJ: Princeton University Press, 2011).

[22] Erik Olin Wright, *Class Counts: Comparative Studies in Class Analysis* (Cambridge: Cambridge University Press, 2000); Karl Marx and Friedrich Engels, *The Communist Manifesto* (1848; repr., New York: International Publishers Co., 2014).

[23] Susan Moller Okin, *Justice, Gender, and the Family*, 3rd ed. (New York: Basic Books, 1991).

[24] Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993).

[25] Catherine Lu, "Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress," *Journal of Political Philosophy* 19, no. 3 (2011): 261–81.

[26] Powers and Faden, *Structural Injustice.*

[27] Katherine Beckett, "The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration," *Annual Review of Criminology* 1, no. 1 (2018): 235–59.

[28] Clarissa Rile Hayward, "Responsibility and Ignorance: On Dismantling Structural Injustice," *The Journal of Politics* 79, no. 2 (2017): 396–408.

[29] Lisa Herzog, "What Could Be Wrong with a Mortgage? Private Debt Markets from a Perspective of Structural Injustice," *Journal of Political Philosophy* 25, no. 4 (2017): 411–34.

[30] McKeown, "Structural Injustice"; Herzog, "What Could Be Wrong with a Mortgage?"

[31] Ruth J. Sample, *Exploitation: What It Is and Why It's Wrong* (Lanham, MD: Rowman & Littlefield, 2003); McKeown, "Structural Injustice"; McKeown, *With Power Comes Responsibility.*

[32] Cristina Bicchieri, *The Grammar of Society: The Nature and Dynamics of Social Norms*, illus. ed. (New York: Cambridge University Press, 2005).

[33] Young and Allen, *Justice and the Politics of Difference*, 235.

[34] Brooks Depro, Christopher Timmins, and Maggie O'Neil, "White Flight and Coming to the Nuisance: Can Residential Mobility Explain Environmental Injustice?" *Journal of the Association of Environmental and Resource Economists* 2, no. 3 (2015): 439–68; Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002).

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current form, a blind spot in the literature on structural injustice. The blind spot is twofold. First, when the structural injustice literature engages with the state, it tends to focus on rules and regulations that result from the state acting in bad faith, such as cronyist agreements with corporations to facilitate pollution or discriminatory housing regulations such as red-lining.[35] Sometimes, as in the literature on exploitation, commentators assume that corporations are operating in complete isolation rather than with considerable help from the state.[36] The assumption seems to be that in most cases of structural injustice the state is either silent or acting in bad faith in a way that could be clearly corrected, usually by additional state activity. The structural injustice literature focuses much less on the way well-intentioned or even neutral regulations and laws might work to contribute to structural injustice.[37] This is a concerning oversight not only because whether the state is acting in good or bad faith is frequently a matter of subjective opinion and accounts will differ by political affiliation rather than any objective standard, but also because failing to take into account the unintended structural results of otherwise well-meaning or neutral state activity and how different decisions by the state compound each other will seriously underestimate the prevalence of structural injustice and the harm and unfreedom that results. It will also affect the kinds of solutions thinkers offer to injustice writ large.

While Young originally characterized structural injustice primarily as the aggregate effects of otherwise neutral individual decisions, she explicitly ignored state action in her first iteration, arguing that structural injustice is distinct from "that which comes about through individual interaction and that which is attributable to the specific actions and policies of states or other powerful institutions," both of which she would presumably label "injustice," full stop.[38] Others, such as McKeown, criticize this approach, arguing that a structural-injustice lens should, of course, account for abuses by government as well as other formal institutions.[39] Yet in McKeown's book-length treatment of structural injustice, her chapter "Structural Injustice in Practice" only references corporate power and mentions lobbying only as a way for corporate entities to wield political power.[40] The chapter on political responsibility for justice centers on solidarity as the political solution to corporate-originated injustice and fails to mention any concrete examples of legal, political, or regulatory rules that do

[35] Lu, "Colonialism as Structural Injustice"; Young, *Inclusion and Democracy*; Powers and Faden, *Structural Injustice.*

[36] Zwolinski, "Structural Exploitation."

[37] Michael Munger calls this bias (in other contexts) "unicorn governance." Michael Munger, "Unicorn Governance," *Foundation for Economic Education*, August 11, 2014, https://fee.org/articles/unicorn-governance/. He argues that theorists will often compare existing corporate actors to "unicorn" (or ideal) political actors who have never existed. Comparing real corporate actors against ideal government actors ignores political corruption, graft, fraud, and the many incentives that political actors have to engage in harmful or dishonest behavior. It also overlooks the incentives corporate actors might have to engage in beneficial behavior.

[38] Young, *Responsibility for Justice*, 45.

[39] McKeown, "Structural Injustice."

[40] McKeown, *With Power Comes Responsibility*, chap. 4.

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not stem from corporate influence. An edited volume on the topic similarly lacks any sustained (or otherwise) analysis of injustices that are primarily or even secondarily caused by political or state power.[41]

Second, apart from the neutrality question, Young's contention seems to be that state-caused injustice is discrete and identifiable, as in the case of Jim Crow laws, whereas structural injustice is diffuse and difficult to pin down. Young's analysis, however, ignores those areas where, just as in the case of neutral individual actions, neutral state activity could contribute to structural injustice. When she does reference government activity, it is generally of two kinds: government's failure to act or government acting in bad faith. Young does not provide examples of neutral or good-faith regulations contributing to structural injustice—at least not as her classic examples.

While later contributors to this literature define structural injustice more broadly as the aggregate effects of both socioeconomic and sociopolitical activities, in their analyses of the latter they, too, tend to ignore sociopolitical activities with neutral or benevolent goals that nevertheless contribute substantially to structural injustice. Madison Powers and Ruth Faden, for example, disagree with Young that structural injustice can result from "the cumulative effect of multiple, uncoordinated, morally benign decisions of diverse agents," arguing instead that the primary cause of structural injustice, on their reading, is intentional oppression or bad-faith actions by government and corporate actors.[42] When governments fail, they fail because they fail to act or act in bad faith. Kirun Sankaran's analysis looks at socioeconomic causes of structural injustice ranging from exit and voice to social contagion, but does not outright discuss benign or neutral regulations.[43] He does argue, as I will discuss below, that democratic reasoning about how to eliminate structural hobbling may be as likely to undermine justice as support it, for some of the same reasons I will discuss.[44] However, the most recent contributions to the literature continue to emphasize the role of private or corporate actors, usually operating in bad faith, and almost entirely neglect neutral or even well-meaning political and state contributions to structural injustice.

Mapping injustice and structural hobbling

We can arrange the causes of injustice in a matrix, as in Table 1. The quadrant represented by unintended consequences of neutral or good-faith state activity is underdeveloped in the structural-injustice literature.[45] Structural hobbling fills this fourth quadrant of causes of injustice.

[41] Jude Browne and Maeve McKeown, eds., *What Is Structural Injustice?* (New York: Oxford University Press, 2024).

[42] Powers and Faden, *Structural Injustice*, 3.

[43] Sankaran, "'Structural Injustice' as an Analytical Tool."

[44] Sankaran, "'Structural Injustice' as an Analytical Tool," 6.

[45] We do have some possible examples from the international development literature; while these are not framed in the context of structural injustice, they could be. Daron Acemoglu and James Robinson, *Why*

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Table 1. Causes of Injustice

CAUSES OF INJUSTICE	STATE AND QUASI-PUBLIC ACTIVITY	PRIVATE ACTIVITY
BAD-FAITH MOTIVES	**Public Bad Faith**: Eugenics, red-lining, Jim Crow laws[46] **Responsibility**: Discrete public **Reform**: Discrete public action	**Private Bad Faith**: Pollution and other externalities[47]; positional goods or social contagion[48] **Responsibility**: Targeted public or private **Reform**: Discrete public action
NEUTRAL/ GOOD-FAITH MOTIVES	**Public Neutral/Good Faith** **Structural Hobbling:** Webs of regulations with significant downstream effects on justice and freedom **Responsibility**: Diffuse public action **Reform**: Unclear	**Private Neutral/Good Faith** **Structural Injustice**: Housing decisions and general vulnerability to aggregate effects of neutral decisions[49]; international development[50] **Responsibility**: Diffuse private action **Reform**: Public action

Structural hobbling also carries with it a different kind of scrutiny regarding state power than do other causes of injustice. While much of the structural-injustice literature—and indeed, the domination literature—emphasizes expanding voice and empowering the state to take on injustice where it exists in areas like gender, race, and environmental degradation, structural hobbling emphasizes the importance of reducing opportunities for state power, to preserve or help build exit options for vulnerable people. Young, in fact, explicitly tasks institutions with "doing everything that can be done to foster substantive opportunity for everyone to achieve well-being and a good chance to enact their life plans," citing the withdrawal of regulatory authority as a primary cause of lowered well-being and structural injustice.[51] As other theorists counter, there exists a real danger that attempts to solve injustice inadvertently will breed more injustice, due either to the compounding effects of regulations or the way in which those regulations end up being used by interested or powerful parties.[52] Thus, the different quadrants of our injustice matrix result in very different solution toolkits. A structural-hobbling lens will require that rules, regulations, and laws emanating

Nations Fail (London: Profile Books, 2013); William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin Press, 2007).

[46] Harriet Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* (New York: Anchor Books, 2008); Young, *Inclusion and Democracy*.

[47] Powers and Faden, *Structural Injustice.*

[48] Sankaran, "'Structural Injustice' as an Analytical Tool."

[49] Young, *Responsibility for Justice.*

[50] Easterly, *The White Man's Burden.*

[51] Young, *Responsibility for Justice*, 20–21.

[52] Sankaran, "'Structural Injustice' as an Analytical Tool."

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from the state be subject at the very least to some kind of scrutiny (more on this below) to assess their potential contribution to structural injustice. The standard structural-injustice lens, on the other hand, results in a much lower degree of scrutiny toward state regulatory power. In some cases, it even implies a requirement to broaden that power to address existing injustices because that lens focuses on a different cause of structural injustice in the first place.[53]

Third and more narrowly, a theory of structural hobbling contributes to the structural-injustice literature by emphasizing the downstream ethical impacts of regulatory webs. In Joseph's case above, it is not only Joseph and his daughter who are being hobbled, but also his providers, who are unable to provide the most appropriate kinds of care. Because regulatory webs hobble providers and directly affect the kind of care that providers can offer, there will be serious real-world impacts on everything from informed consent to nonmaleficence. Healthcare providers (and a range of other professionals) should be concerned about the effects of regulation on the ethical practice of their professions. Recent work suggests that many are.[54] In this sense, structural hobbling radiates outward, affecting not just those who are directly hobbled, but also their families, communities, and everyone who participates in the choice landscape where structural hobbling exists.

Finally, Sankaran notes that we need to refine structural injustice for use as an analytical tool. He argues that the demands of justice are easier to understand if we differentiate different origins of injustice, from built environment to state action to firms to civil society organizations to educational or demographic patterns and "how their interactions might present unique problems."[55] It is, in fact, this latter goal of identifying the way in which neutral or well-intended government regulations interact with each other and with the choice landscape that I am primarily interested in here.

Structural hobbling and responsibility

Whatever one calls it, the phenomenon that structural hobbling describes carries enormous moral import and has serious implications for liberal democratic theory broadly. Structural hobbling contributes to unfreedom and domination by making choiceworthy actions more difficult, harms individuals by making them worse off than they would otherwise be in the absence of these rules and regulations, and contributes to and compounds structural injustice by concentrating harm on the most vulnerable and least privileged members of the community. Both Joseph's and Mariana's stories point to a broader concern. If liberal-democratic theorists of all stripes want to protect human agency and autonomy and prevent regressive harms, they should pay much more attention to the regulatory background constraints that exist in high-stakes areas of human life. They should pay

[53] Browne and McKeown, *What Is Structural Injustice?*; McKeown, *With Power Comes Responsibility*.

[54] Lauren Hall, *The Medicalization of Birth and Death* (Baltimore, MD: Johns Hopkins University Press, 2019).

[55] Sankaran, "'Structural Injustice' as an Analytical Tool," 8.

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particularly close scrutiny to rules that appear arbitrary or unnecessary to most people, that increase domination and unfreedom, and that create harm or contribute to injustice (often both). But what form should this scrutiny take? Whose responsibility is it to avoid or untangle structural hobbling?

Structural hobbling shares with structural injustice the insight that responsibility for the injustice is diffuse, meaning that no one agent can take responsibility for it. Authors such as Young and McKeown typically argue that this diffuse responsibility changes the landscape of moral responsibility in important ways, seen clearly in the title of Young's book *Responsibility for Justice.* McKeown and other structural-injustice scholars argue that we have a collective responsibility to correct or ameliorate injustice precisely because individual-level solutions will be insufficient to address most cases of structural injustice.[56]

Yet structural hobbling evades *both* individual and public responsibility in ways that structural injustice alone does not. One could, as Young suggests, imagine an individual response to the situation of the soon-to-be-homeless Sandy; individual landlords could, for example, take action to keep rents reasonable and keep tenants in their homes. Yet both the individual landlord and Sandy as a tenant will continue to be pressured by broader structural forces that contribute to unaffordable housing. Individual responsibility is an imperfect but available approach. The preferable and longer-term solution, both Young and McKeown suggest, is to take political responsibility for Sandy's plight and address the broader problems with the housing crisis via positive state action. Predictably, neither Young nor McKeown suggests loosening public restrictions (that is, state restraint) on the creation of new housing stock.

Structural hobbling, on the other hand, dodges both kinds of responsibility. Not only that, but because of the nature of state involvement, structural hobbling *prevents* individual responsibility for injustice because each person must follow rules dictated by some higher authority. Crucially, carving out exceptions to these rules—unlike in Young's landlord case—exposes these individuals to the coercive power of state punishment. While Young's landlord might be able to accept a smaller profit margin to keep Sandy in her home, the actors who contribute to structural hobbling risk punishment if they do anything other than what they are told. The hospital physician who releases Joseph to a rehabilitation center is not empowered to change the rules of Medicare or how hospital policies respond to those regulations. Short of risking her license, the physician is compelled by the broader regulatory structure to act in a way that actively harms her patient and violates his wishes. Because individual responsibility for structural hobbling would require individuals to act in direct opposition to state requirements, we not only cannot ask them to risk their jobs or licenses to assist, but we cannot even say they have a responsibility *not* to hobble other people in the first place. While we might argue about whether Sandy's landlord has a responsibility not to evict her, he at least has the freedom not to do so. No one in our structural-hobbling examples has that same freedom. They are, in effect, merely following orders.[57]

[56] McKeown, *With Power Comes Responsibility*, 45.

[57] For an illuminating alternative approach as it relates to policing, see Jake Monaghan, *Just Policing* (New York: Oxford University Press, 2023).

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At the same time, structural hobbling evades Young's solution of public responsibility in similarly pernicious ways. McKeown, following Young, optimistically argues that "[p]olitical solidarity is the grounds for individual and collective empowerment and will lead to effective collective action."[58] Yet neither Joseph nor Mariana is even aware of the restrictions they will face until they are already hobbled. In the health-care context, the people hobbled are often geographically spread out, lack a common identity, and cannot easily communicate with each other to share their experiences.[59] Moreover, many of these identities shift rapidly, defying stable solidarity. Being terminally ill is, by definition, a short-lived identity. Birthing women, cancer patients, and candidates for surgery may all be hobbled in different and important ways, but all occupy their identities for relatively short periods of time. Even if such solidarity can be created—as we see in patients' rights organizations or maternity-care interest groups—it is a daunting task to identify an action plan when the hobbling is the result of multiple interacting regulations at different levels of government created by different responsible parties who may themselves be long gone. This explains, in part, why suggestions for health-care reform are so varied and often conflicting. No one can agree on how to fix things because we are still struggling to identify exactly where the problem starts.

The complex and opaque regulatory webs that contribute to structural hobbling challenge any democratic response. The average person may feel deep sympathy for Joseph but have no idea how to help him, preventing solidarity of purpose. She certainly does not know enough to deliberate, lobby, and vote in a coordinated and targeted way. Even if she did, she must lobby different policymakers or learn about (potentially hundreds of) different policies at different levels of government, sometimes hidden within agency administrative policy that most citizens cannot easily access. If a candidate or party supports eliminating one kind of structural hobbling but advocates regulations that contribute to a different kind of structural hobbling, what is a thoughtful voter to do? Reforming or preventing regulations that contribute to structural hobbling creates a complex, multilevel collective action problem exacerbated by epistemic limitations.

Structural hobbling and regressive harms

Whether preventing or untangling structural hobbling is possible through standard democratic processes, we may nevertheless have both an individual and a collective responsibility to develop ways to combat it. This is in part because of the effect structural hobbling has on the most vulnerable among us. Structural hobbling as a phenomenon is fundamentally regressive because it compounds unfreedom and injustice in regressive ways. It does so by eliminating or reducing exit options by closing off alternatives. If we are to think of justice as a kind of

[58] McKeown, *With Power Comes Responsibility*, 180.

[59] When I interviewed midwives in New York about why the birth-center model of care was so rare, most midwives assumed it was due to market forces, not to government regulations increasing the cost of entry. Midwives only knew that a reasonable alternative was rare and difficult to achieve, but not *why*.

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map,[60] the map with extensive structural hobbling contains very few navigable paths. It is filled with steep cliffs and crevasses that channel individuals on certain paths and restrict their ability to move in directions they would otherwise choose. Unlike diverse landscapes, which contain sanctuaries to rest, hide, or cover to flee, a structurally hobbled landscape is relatively barren, unidirectional, and sparse but contains (artificially) deep pits that are difficult to escape. The path of care Mariana would have offered Black pregnant women in the Bronx would have been qualitatively different from the care offered by standard hospitals, yet such a path (still) does not exist.

The choice landscape for Joseph and Mariana is unnecessarily complicated, if not completely unnavigable. For both Joseph and Mariana, alternatives exist but regulatory clusters explicitly destroy those alternatives or prevent them from being born (to use Tocqueville's phrase). If either had been well-off, they could have simply bought a metaphorical helicopter to avoid the constraints altogether.[61] Structural hobbling often creates double tragedies because, as individual choices are artificially constrained, the people who rely on those choices are exposed to domination and unfreedom as well. In Mariana's case, her potential clients live in a constrained choice landscape because she has been hobbled and her children lack access to the financial benefits her alternative path would have brought. Joseph's hobbling makes his daughter's financial well-being much more precarious. Predictably, those most in danger in such a landscape are those who are already vulnerable, such as those with mobility constraints, those living close to subsistence, those facing discrimination who cannot count on assistance from their fellow citizens, and so on. In a justice landscape characterized by regulatory webs, both harm and injustice compound.

Moreover, a lack of exit options facilitates manipulation, domination, and coercion of the hobbled by discrete government agents and providers, which again will fall most heavily on the most vulnerable, including those most likely to interact with government agents in the first place. Moving beyond Joseph's and Mariana's cases, it is no accident that the highest levels of domination by or vulnerability to domination by discrete agents is found where heavy regulation overlaps with poverty: child protective services,[62]

[60] Schmidtz, *Elements of Justice.*

[61] We see this in the growth of concierge medical care, where well-off people buy their way around standard regulated care. Interestingly, home birth has long been a form of accessible concierge care that allowed disadvantaged or oppressed women to avoid standard hospital care. Predictably, regulators responded and limited access in many states. See Jenny M. Luke, *Delivered by Midwives: African American Midwifery in the Twentieth-Century South* (Jackson, MS: University Press of Mississippi, 2018), and Hall, *The Medicalization of Birth and Death*, for extensive discussions of black midwifery as an exit strategy from racist medical practices.

[62] Eli Hager, "CPS Workers Search Millions of Homes a Year: A Mom Who Resisted Paid a Price," *NBC News*, October 13, 2022, https://www.nbcnews.com/news/us-news/child-abuse-welfare-home-searches-warrant-rcna50716; Dorothy Roberts, *Torn Apart* (New York: Basic Books, 2022); Sarah C. M. Roberts and Amani Nuru-Jeter, "Universal Screening for Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting," *The Journal of Behavioral Health Services & Research* 39, no. 1 (2012): 3–16.

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policing,[63] and immigration.[64] That neither Joseph nor Mariana can afford to unhobble themselves is not the fault of poverty alone, but of the way poverty interacts with regulatory burdens.

The regressive effects of many government regulations demonstrate an important addendum to or even correction of Young's characterization of structural injustice. It is not merely because of the accidents of poverty or status that one's options are limited, as she argues, but because government actions of various kinds interact with each other in unpredictable ways to destroy alternative choiceworthy paths, eliminate sanctuaries from domination, and increase the unfreedom of the existing choice landscape. It is not only that wealth and status allow people to exit constrained choice environments, but that wealth and status also allow people greater freedom to replicate eliminated options in the private sphere, such as when wealthy families hire private tutors or private physicians to get the kind of services they cannot get in the regulated education or medical markets. It is not usually the wealthy who suffer from regulations limiting who can braid hair,[65] how drug laws interact with child welfare service regulations,[66] who can open an in-home daycare center,[67] or who can practice medicine.[68] It is not wealth per se that protects these individuals from hobbling, but the way wealth allows individuals to build a more diverse, pluralistic choice landscape, including sanctuaries from regulatory harm, domination, and injustice outside of the regulated sphere.[69]

Conclusion

Structural hobbling raises many of the same questions as Young's conception of structural injustice, except that we must also question how the state can or should be held responsible for injustice that stems from neutral or good-faith

[63] Monaghan, *Just Policing*; Radley Balko, "How Municipalities in St. Louis County, Mo., Profit from Poverty," *Washington Post*, September 3, 2014, https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/; Radley Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces* (New York: PublicAffairs, 2013).

[64] Ilya Somin, *Free to Move: Foot Voting, Migration, and Political Freedom*, rev. ed. (New York: Oxford University Press, 2020).

[65] *Sylla v. Kohler et al.* (2014), https://ij.org/wp-content/uploads/2014/06/wa-hair-braiding-complaint-6-17-14.pdf.

[66] Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage, 1997); Roberts, *Torn Apart*.

[67] Jennifer Brookland, "Inside Detroit's 24-Hour Child Care: A Fragile Lifeline for Working Parents," *Detroit Free Press*, October 27, 2022, https://www.freep.com/in-depth/news/local/michigan/2022/10/27/24-hour-child-care-detroit-fragile-lifeline/69573122007/.

[68] Barbara Ehrenreich and Deirdre English, *For Her Own Good: Two Centuries of the Experts' Advice to Women* (New York: Anchor Books, 2005); Richard W. Wertz and Dorothy C. Wertz, *Lying-In: A History of Childbirth in America* (New York: Free Press, 1977).

[69] For a related discussion, see James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998).

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state actions. Whom do we hold accountable and from where do we expect redress? Is it those who lobby for protectionist regulations? Bureaucrats who fail to explore the immediate and downstream costs of various regulatory burdens? Elected officials, whose concerns about short-term reelection might make them insensitive to longer-term costs? Voters themselves, whose lack of familiarity with most of the details of the vast majority of state law- and rule-making allows them to be manipulated easily by the media, elected officials, political action committees, lobbyists, and others? On what level of government can we focus responsibility? Local? State? Federal? Each interacts with the other in complex and unpredictable ways. Where does responsibility for structural hobbling rest and how can we work to protect the reasonable goals of our most vulnerable community members? Given these difficulties, what analyses, processes, and procedures can we develop for a truly responsible liberal-democratic regime? What responsibility do we individually and collectively have to the Josephs and Marianas in our communities?

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