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ARTICLES

Freedom from Fear: Liberty and Gendered Violence — Sarah Lu

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LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Editorial Board, I am proud to present the Summer 2020 issue of the *Columbia Undergraduate Law Review*'s print journal. This issue marks the inaugural year of CULR's Print Summer Publishing Program, which seeks to publish works by current CULR print members and alumni. Our summer editing staff is composed of dedicated freshmen eager to get involved in the Columbia community. We are excited to publish the following article, which offers a fresh perspective on current legal problems.

In "Freedom from Fear: Liberty and Gendered Violence," Sarah Lu investigates the role of the state in enabling gendered violence. Analyzing feminist responses to Isaiah Berlin's conceptions of liberty, Lu finds that cases including *DeShaney v Winnebago County* and *Town of Castle Rock v Jessica Gonzales* prioritize a negative conception of liberty. Lu argues, however, that we need to critically question the concept of liberty to endeavor toward gender justice.

With each successive publication, the *Columbia Undergraduate Law Review* strives to cultivate debate and discussion of legal issues, especially among undergraduates. We hope that you enjoy reading our print journal.

Sincerely,
Matthew Sidler
Executive Editor, Print

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

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The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

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I. Introduction and Background

What does it mean to be free? The words "liberty" or "freedom" are particularly difficult to evaluate in light of their relation to the state, disseminating conflicting meanings when it comes to analyzing normative claims of liberty. In debates regarding gender justice, there is always the central issue of collective liberation. Collective liberation exists as an ideal that will inevitably produce internal contestations amongst its advocates; liberty for one woman may not be representative of liberty for another. Recent debates have also shifted the meaning of liberation away from conceptions of the state, emphasizing reliance on the community in areas where the state has failed. This paper seeks to investigate the relationship between negative and positive liberty, a distinction articulated by political theorist Isaiah Berlin. I analyze feminist responses to Berlin's conceptions of liberty, as well as the role of the state in perpetuating or failing to prevent gendered violence in light of the private/public distinction. I also interrogate how cases like *DeShaney v Winnebago County* and *Town of Castle Rock v Jessica Gonzales* enforce and prioritize a negative conception of liberty, enforcing the seemingly irreconcilable divide between negative and positive liberty. In our vision for gender justice, however, it is essential that we look beyond how such conceptions of liberty arise

in reference to state intervention and non-intervention alone.

Isaiah Berlin asked the question of what it meant to be free in the context of the Cold War, offering two opposing concepts of freedom defined as either "negative freedom" or "positive freedom," or negative liberty and positive liberty, respectively. In *Two Concepts of Liberty*, Berlin refers to negative freedom as the state of being wherein one can act unobstructed by others, with "no man or body of men interfer[ing] with my activity."[1] If one is prevented by others from doing what they could do, then they are "unfree," and lack negative liberty. Berlin attributes this conception of freedom as the fundamental concept underlying the political philosophy of English political philosophers, and from this conception *follows* that there be a line "drawn between the area of private life and that of public authority,"[2] as there exists a demarcated space or "area of personal freedom" that cannot ever be violated. In the political theory tradition, we enter varying debates on how "wide" this area should be drawn. Positive freedom, on the other hand, is slightly more complicated; broadly speaking, it indicates a freedom for one's life and decisions to depend on yourself and not on negative or external forces of any kind.[3] When we have positive liberty, we act in a way to control one's life and to realize one's fundamental purposes. Positive liberty therefore asks what one is free to be or by whom they are ruled. The difference between negative and positive liberty entails that the desire for a "free area for action" is not the *same* as the desire to be governed by one's self, or what Berlin delineates as "freedom from" in the negative conception, and "freedom to" in the positive conception. When I refer to a positive conception of liberty, it does not necessarily entail the freedom one secured by being protected to the state. Rather, I aim to evaluate whether and how the state may operate in relation to enforcing certain types of liberty over others.

Berlin's mid-century conception of freedom can be useful in articulating larger claims of gender justice. Constitutional crises ranging from pandemic population control to torture interrogation

tactics have brought into question what it really means to have liberty, and in most debates, it has centered around the idea of negative liberty. We seek to be free from state despotism; from state censorship and control; LGBTQ+ people seek the freedom to be with whichever partner they choose; women seek the freedom to be free from state intervention in private health procedures such as abortion. But feminist responses to Berlin's conception of freedom, such as those penned by Carol Gould or Nancy Hirschmann, raise the question of what it means to frame liberty as purely unobstructed choice, and what it means to delineate an "area of personal freedom" that is often relegated to the feminized, private realm. As Iris Marion Young and Catherine MacKinnon emphasize, the division of the public and private realms relies on the funneling of needs and desires into the private realm. The public citizen is defined in relation to the "womanly" nature of the private realm, a realm that appears to embrace "feeling, sexuality, birth, and death."[4] Such a configuration has contributed to the subordination of women in general, wherein unacceptable rates of violence against women flourish in the context of intimate relationships that have been pushed to the so-called private realm.[5] The following section will analyze how feminist interventions in the public/private distinction play out in *DeShaney* and *Town of Castle Rock*, and what that entails for our theoretical conceptions of freedom.

II. Liberty is Gendered: *Town of Castle Rock* and *DeShaney*

In 2011, the Inter-American Commission on Human Rights (IACHR) issued an astonishing decision on the case of *Jessica Lenahan (formerly Gonzales) v United States of America*. The IACHR found the United States responsible for human rights violations against Lenahan, challenging the principles upheld in *DeShaney v Winnebago County* and *Town of Castle Rock v Jessica Gonzales* that the government had no duty to protect individuals

from private acts of violence. As stated in the IACHR report, the United States had violated Articles I, II, V, VI, VII, IX, XVII, and XXIV of the American Declaration, "by failing to exercise due diligence to protect Jessica Lenahan and her daughters from acts of domestic violence."[6] Some of these Articles include the right "to life, liberty, and the security of his person" (Article I), "to the protection of the law against abusive attacks upon his...private and family life" (Article V), and "to the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights" (Article XVII).[7]

The IACHR decision resulted from an international appeal following the decision of *Town of Castle Rock v Jessica Gonzales (Lenahan) ("Town of Castle Rock")*.[8] *Town of Castle Rock* was both a tragic and shocking example of how the state failed to prevent a terrible act of gendered violence. In June 1999, Lenahan's husband abducted her three daughters while they were playing outside the family home. Lenahan and her children had previously filed a temporary restraining order ("TRO") against her husband for domestic abuse, and upon suspecting that her husband had taken her children, Lenahan called the Castle Rock Police Department ("CRPD"), requesting that the police enforce the TRO against her husband. The police told her there was nothing they could do and proceeded to ignore multiple concerned calls and requests for investigation made by Lenahan during the course of the night. A couple of hours later, Lenahan's husband showed up to the police station with a semi-automatic rifle and opened fire, before being shot down by the police. CRPD found the bodies of Lenahan's three murdered children, Leslie (7), Katheryn (8), and Rebecca (10) in the back of his car.

Lenahan filed suit under 42 U.S.C. § 1983 in *Town of Castle Rock*, alleging that the CRPD had violated the Fourteenth Amendment's Due Process Clause when its police officers failed to respond to her repeated reports that her husband had taken her

children. The §1983 statute provides a mechanism for individuals to sue state government employees and seek remedies for violations of their constitutional rights, so long as the person was acting "under color of statute." Lenahan brought a § 1983 claim that the Castle Rock Police Department had an official policy or custom of failing to respond properly to complaints of restraining order violations and tolerated the non-enforcement of restraining orders by its police officers. These willful and reckless actions were taken with such gross negligence so as to "indicate wanton disregard and deliberate indifference to respondent's [Lenahan's] civil rights."[9]

The Supreme Court decision that followed in *Town of Castle Rock* emphasized a specific conception of negative liberty found in judicial interpretations of the Due Process Clause of the Fourteenth Amendment. The Due Process Clause states that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." Scalia's majority opinion affirmed lower court decisions and emphasized that the "substantive" component of the Due Process Clause did not require the State to protect the life, liberty and property of its citizens against invasion by *private actors*.[10] In other words, the Court did not believe that certain provisions of Colorado law made the enforcement of the TRO against Lenahan's husband necessary. By centering the Court's interpretation of the Due Process Clause on the lack of deprivation or lack of action by the state to *interfere* in Lenahan's situation, the Court's decision appears to be a reasonable one. In reference to a negative conception of liberty where the state should not interfere with Lenahan's private actions, the actions of the town of Castle Rock and CRPD certainly do not constitute a violation at all. Under Berlin's conception of negative liberty and a choice-based conception of feminist freedom, Lenahan was free to contact the police and request them to intervene—she could, in principle, make a series of choices to secure her and her children's

freedom without obstacle. The police simply failed to intervene.

But let us look at a different construction of freedom to analyze this case. What makes the decision in *Town of Castle Rock* so egregious is the relegation of domestic violence and gendered violence to the private realm, in addition to framing the actions of the police as non-depriving. As Scalia notes in majority opinion, there is a "well-established tradition of police discretion" in regards to enforcing a TRO, and state law did not give Lenahan an entitlement to the enforcement of such an injunction because the State does not have an obligation to intervene in private affairs.[11] "The serving of the public rather than private ends [Lenahan's domestic dispute] is the normal course of the criminal law because criminal acts....strike at the very being of society."[12] In "Berlin, Feminism, and Positive Liberty," Nancy Hirschmann highlights the issue of labeling an instance such as Lenahan's repeated outcries for police intervention as a private, internal matter in reference to Berlin's conceptions of liberty. Hirschmann's theory articulates a feminist critique of Berlin, in which she discusses the following: In situations where courts and police openly disbelieve women who report abuse and violence, the feelings of shame, guilt, anger, and helplessness that may arise in a woman are labeled as "internal feelings that come out of the self as an isolated identity."[13] Young and MacKinnon have similarly discussed the notion of pushing public desires into the area of the private, wherein the private is designated as the particularistic and feminine. *Town of Castle Rock* follows a similar axis of compartmentalization as outlined by Hirschmann, Young, and MacKinnon. The case isolates Lenahan's husband's actions as a personal domestic squabble, a private affair that the police have no imperative to intervene in. It treats Lenahan's feelings of fear towards her husband and personal motivations for calling the police as simply immaterial to the case. But as Hirschmann would argue, Lenahan's feelings are not simply personal; nor can they be confined to the private realm.

Rather, they are manifestations and expressions of public policy, attitudes, political structures, and decisions. Like the actions of her husband, Lenahan's calls for help "reflect particular, even if frequently unrecognized, values and relationships of power that systematically privilege some over others."[14]

Berlin's negative conception of freedom is therefore insufficient to justify the theoretical underpinnings of *Town of Castle Rock* as well as our analysis of how exactly Lenahan was violated. Berlin's conception of positive liberty, on the other hand, is one that resonates in Justice Stevens and Justice Ginsburg's dissent: the failure to observe minimal procedural safeguards in a matter of gendered violence could indeed lead to "erroneous deprivation" of freedom. While the dissent focuses on whether the TRO could create a "property interest" that is protected from arbitrary deprivation by the Due Process Clause, Stevens outlines the central question in reference to the positive entitlement of police protection. The question at the heart of the case, then, lies here: "Did respondent have a right to police assistance comparable to the right she would have possessed to any other service the government or private firm might have undertaken to provide?" If the CRPD offered a certain set of services and guarantees, then Lenahan's reliance on the guarantee of police protection meant that CRPD's actions were indeed a failure to adhere to Due Process. Stevens and Ginsburg's analysis reveals their positive conception of the freedom that Lenahan herself was entitled to.

Recall that the decision in *Town of Castle Rock* promotes an understanding of freedom that is limited to negative liberty: the state did not intervene or violate Lenahan's "area of personal freedom,"[15] and as a result, there is no positive entitlement to any citizen in having their family secured and protected from violence. However, as Carol Gould discusses in "Retrieving Positive Freedom and Why It Matters," a citizen's entitlements should not only be protected by the liberty of non-intervention. Rather, the power of

choice or conscious activity in securing one's own ends, concepts that both negative and positive liberty appear to promote, are found in individuals who are necessarily socially intertwined. "[B]ut individuals are fundamentally interdependent, such that their activity depends on the care and nurturance of others, on solidarity with others, and on a set of social, economic and political institutions that provide for the conditions of free activity and self-transformation."[16] This feminist interpretation of what it means to have freedom in the context of choice suggests for our analysis of *Town of Castle Rock* that CRPD did not only fail to intervene in a socially dependent issue that should concern the public, i.e. domestic violence, they also *deprived* Lenahan of the ability to care for her children. When "the line between action and inaction [is] often in the eyes of the beholder,"[17] the line between positive and negative liberty, as well as the distinction between the public and private, become increasingly blurred. *Town of Castle Rock* is just one case out of many that exemplify heavily gendered conceptions of liberty and privacy in the law.

In fact, *Town of Castle Rock* draws much of its constitutional reasoning from *DeShaney v Winnebago County Department of Social Services, et al. ("DeShaney")*,[18] a case which similarly relies on Berlin's negative conception of freedom. The suit also involved § 1983 claims that Melody DeShaney brought on behalf of her son, Joshua DeShaney. Joshua was abused and physically beaten by his father, Randy DeShaney, for years. Winnebago County authorities first learned that Joshua may have been a victim of child abuse in January 1982, when the father's second wife notified the police that the father had previously hit Joshua. The father denied the allegations brought forth by the Winnebago Department of Social Services ("DSS"). In 1983, Joshua was admitted to a local hospital with multiple bruises and abrasions, upon which a physician at the hospital suspected child abuse and notified DSS. DSS obtained an order from a juvenile court to place Joshua in temporary custody of

the hospital, but an ad hoc committee consisting of psychologists, police detectives, county lawyers, and DSS caseworkers decided that there was insufficient evidence of child abuse to retain Joshua in custody of the Court. The juvenile court dismissed the case. A continuous cycle of abuse by Joshua's father and dismissal by DSS authorities followed until March 1984, when Randy DeShaney beat Joshua so severely that he fell into a life-threatening coma. The medical scans in the record revealed brain hemorrhages caused by traumatic injuries to the head that were consistent with years of physical abuse; Joshua was so severely brain damaged that he was expected to spend the rest of his life institutionalized. Joshua's mother then proceeded to bring the § 1983 claim that respondents had "deprived petitioner of his liberty interest in bodily integrity, in violation of his rights under the substantive component of the Fourteenth Amendment's Due Process Clause, by failing to intervene to protect him against his father's violence."[19] The district court ruled in favor of Winnebago County and the other respondents in its decision for summary judgment, which was subsequently affirmed by the Court of Appeals.

DeShaney conveys a similar separation between the public and the private as emphasized in *Town of Castle Rock*. In *DeShaney*, the Supreme Court affirmed the Seventh Circuit's decision that DeShaney had not made an actionable § 1983 claim, under the reasoning that the Due Process Clause does not require state or local governmental entities to protect its citizens from "private violence and other mishaps not attributable to the conduct of its employees."[20] Again there appears a fundamental separation between the public and private realm when it comes to notions of seemingly interpersonal violence and conflict; from the case, we garner that child abuse is not something that the state has a duty to intervene in or prevent. "Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[21] While child

abuse does not necessarily equate to gendered violence, the public/ private distinction again serves to articulate a masculinized sense of negative liberty in which the only freedom that matters is that "man can act unobstructed by others."[22] In a feminized private realm that embraces "feeling, sexuality, birth, and death,"[23] it becomes obvious where the mother and Joshua's justified grievances stand in relation to an overemphasized conception of negative liberty. The maternal care and love in a mother attempting to right the wrongs of her child's abuse are depicted as nothing more than an interpersonal grudge. In fact, cases like *DeShaney* suggest this grievance *should* be confined to the private realm.

Further, it is clear that the Supreme Court does not characterize DSS' failures to intervene as affirmative, depriving acts. Laura Oren discusses the nature of the state-created danger doctrine in cases like *Town of Castle Rock* and *DeShaney*, noting that these cases are especially disheartening because they depend on the "narrow distinctions between mere passivity and more affirmative acts."[24] According to Oren, most § 1983 claims regarding state-created danger fail, because the requisite "affirmative act" was missing (citing *Kneipp v Tedder*, *Dwares v the City of New York*). But in looking at the facts regarding *DeShaney*, it is quite clear that there were a series of affirmative actions or steps taken that explicitly deprived Joshua in his future ability to develop various capacities, widen and deepen relationships, and realize long-term projects and goals.[25] This sense of positive liberty, as articulated by Gould, is how Joshua's deprivation of liberty should have been framed. Randy DeShaney's cycle of abuse was severely limiting for Joshua, and such a cycle was intensely exacerbated by the DSS' intentional negligence when it came to Joshua's case. The respondents did not merely fail to protect Joshua once. After his first hospital admission and release, Joshua was treated for abuse-like injuries a month later, which the DSS caseworker concluded that there was no basis for action.[26] The DSS caseworker made monthly visits to the DeShaney

home in the next six months, noticing that Joshua had suspicious injuries on his head and had not been enrolled in school, but took no action.[27] In November of that same year, the emergency room notified DSS that Joshua had been treated again for injuries they believed to be caused by child abuse, and DSS *still took no action*. Yet, according to the Court, the state's awareness of such abuse "played no part in their creation, nor did it do anything to render him more vulnerable to them."[28]

As Justice Marshall and Justice Blackmun's dissent outlined, the Court's baseline in *DeShaney* is the absence of positive rights in the Constitution, and a "concomitant suspicion of any claim that seems to depend on such rights."[29] The Court construes Melody DeShaney's claims as focusing on inaction and only tangentially about action, but it is wrong to simply say that the state "stood by and did nothing."[30] It in fact actively intervened in Joshua's life through the DSS child protection program, and acquired more certain knowledge that Joshua was in grave danger.[31] Joshua was deprived of the usual state interventions against violence *and* the promise that the child protection system, as carried out by DSS caseworkers, would protect him. And in that sense, Joshua "got neither end of the bargain,"[32] experiencing a double deprivation of positive liberty in which he lost 1) *the enabling conditions of freedom*[33] to live without violence and harm, and 2) *the equality of agency*[34] in which all his future possibilities of conscious choice and activity to realize one's life purposes became severely limited by traumatic brain injury. This deprivation is largely ignored in favor of determining whether there was a causal link between the actions of Winnebago authorities and their deprivation of Joshua's negative constitutional liberty. Joshua's rights to live and have access to government services in order to carry out a meaningful life are construed as "an entitlement to government aid,"[35] as opposed to feminist conceptions of freedom wherein people should have prima facie equal positive liberty in order to sustain the conditions of self-development. The former type

of reasoning is directly cited by Justice Scalia in *Town of Castle Rock*, where he notes that the procedural component of the Due Process Clause does not protect everything that might be described as a "benefit."

When looking at *Town of Castle Rock* and *DeShaney*, we must critically examine how ideas of liberty or freedom become evaluated against the gendered axes of public and private. For § 1983 claims, there are typically three levels of fault for state action: negligence, deliberate indifference, and conduct that shocks the conscience. The "shocks the conscience" standard is the highest standard to apply in Fourteenth Amendment cases,[36] but as Oren notes, "It can take a lot to shock the conscience of some courts."[37] The absorbance of conscience-shocking behaviors such as domestic abuse, child abuse, and murder is partly due to the notion that negative liberty is to be prioritized above all else in constitutional claims, and partly due to how freedom becomes divided in reference to a public/private distinction. One's freedom to care for their children or live out a meaningful life without fear of violence and abuse is negated in favor of the idea that freedom without state obstruction should be prioritized above all else. *Town of Castle Rock* and *DeShaney* demonstrate the difficulty in determining what is truly conscience-shocking when filtered through the gendered lens of liberty.

III. Gendered Violence and Police Power

I have so far emphasized the lack of state protection in cases involving severe violence and/or abuse. While the natural tendency is to point towards stronger state protections, more intervention on behalf survivors of gendered violence, and significant legal reforms, I further argue that we should push back on this framework, especially in light of gender justice goals that are better served by abolitionist and decarceral frameworks that seek to deconstruct notions of a police state. Amna Akbar, for example, discusses an abolitionist

approach in relation to policing to transform the relationship between the state and society; violence is "endemic to police" and all police departments participate in the enforcement of racialized, gendered, and classed violence.[38] Katherine Franke's work on the moral hazards of pursuing LGBTQ+ rights in tandem with the interests of the state also articulates how strategies from certain movements can be co-opted to obscure statist goals and motivations.[39] With these frameworks in mind, it is necessary to propose a vision of both negative and positive freedom beyond increased policing and state intervention. This section explores several cases in which police intervention and state action not only failed to prevent gendered violence, but also exacerbated it, punishing survivors simply for surviving. How can we promote a sense of collective liberty that exists beyond the state?

When we examine gendered violence in relation to policing, we see that the most "conscience-shocking" and egregious forms of violence often involve the re-traumatization that the survivor has to endure after attempting to find justice within the confines of the law. Many of these cases cycle through the legal system without ever making it to the Supreme Court as *Town of Castle Rock* and *DeShaney* did, and the police are usually the worst perpetrators of additional traumatization and violence. In "An Unbelievable Story of Rape," journalists Christian Miller and Ken Armstrong investigate and publish the story of a rape survivor named "Marie." Marie was raped in her bedroom when she was 18 years old. She was bound, gagged, raped, and asked to shower—the man had done this before with deft expertise. Marie called the Lynwood County Police Department for help but the two investigating detectives found several "inconsistencies" they thought to be evidence that Marie was making the rape up: the order in which Marie had indicated she called a friend after the rape was stated differently from when she had provided a written statement.[40] A couple days later, the two male detectives confronted Marie, telling her that there

were inconsistencies and discrepancies in her statement. The story and the evidence didn't match. The detectives asked why she was making the story up, why she would lie about rape, and, was she "pretty positive or actually positive" that the rape had happened?[41]

Marie didn't want to spend time at the police station. She had spent her entire life in the foster care system and had been abused by those who she thought she could trust. Miller and Armstrong recounts how she "flipped the switch…suppressing all the feelings she didn't know what to do with," and proceeded to write another statement in which she left "no doubt" that the rape was a lie.[42] Later that year, Marie had received a letter from Lynwood County that she had been charged with filing a false report, which was punishable by up to a year in jail. Wanting to put the incident behind her, Marie eventually took a plea deal that required mandatory mental health counseling, supervised probation, and a $500 fine to cover the court's costs. The criminal citation was signed by one of the detectives who worked on the case, who was "certain" that Marie had lied. "The police had spent a lot of resources chasing that lie. The law said her lie was a crime. Really, it was as simple as that." Two and a half years later, a man named Marc Patrick O'Leary was arrested in Colorado for serial rape.[43] He had raped several women in the same fashion he had raped Marie: bound and gagged them, telling them to shower and taking their sheets after. O'Leary was only found due to coincidence: a female police officer in Golden, Colorado, had realized that a case she was working on was similar to a case in her husband's jurisdiction.

Marie's case reveals the extent to which state involvement and intervention in acts of gendered violence can perpetuate further violence against survivors. This is not something that police or legal reform will simply solve. Rather, the occupational culture, sexism, and "highly masculine organizational hierarchy" of police form a context that promotes sex discrimination, harassment, and violence against women.[44] Policing is a systemic issue of gendered violence

that extends beyond just Lynwood; according to FBI statistics, Marie's initial case brought to the police was one of the four labeled as "unfounded" by the Lynwood police. From 2008 to 2012, Lynwood classified 10 out of the 47 rapes reported in that county as unfounded, or a staggering 21.3 percent.[45] National figures drawn from agencies covering similar-sized populations for false rape accusations is approximately 4.3 percent—Lynwood's figure was five times higher than this reported average.[46] Even if widespread reforms were implemented to encourage police to intervene and fully investigate issues of gendered violence, whether it be the actions of Lenahan's husband or Marie's rapist, they simply do not address the root of the cause: why have we allowed the police such a broad swath of agency and power in determining when and why women's trauma should be believed? The extent to which "police discretion" plays such a prominent role in dictating the amount of negative *and* positive liberty that a woman should have is the root of the disease, and bad policing or lack thereof are just its core symptoms.

Of course, it is helpful to analyze such symptoms. The bizarre nature in how we treat policing and the criminal legal system as the false bedrocks for justice become even more contradictory when we discuss the issue of police sexual violence. According to a 2015 national-scale study on police sexual misconduct, "Police work is conducive to sexual misconduct. The job affords unique opportunities for rogue police officers to engage in acts of sexual deviance and crimes against citizens they encounter." This is not only due to the police officers themselves, but also because of "the context of police work—the same framework that provides the basis for legitimate policing."[47] In the same study, criminologists identified 548 cases in which police were arrested for sex-related crimes from 2005 to 2007. The identified cases involved police that were employed by 328 state, local, and special law enforcement agencies located in 265 counties and independent cities spanning 43 states and Washington, D.C.[48] Other notably terrible findings include the

fact that survivors of police sexual violence are disproportionately young, with 73 percent of cases studied involving survivors who were less than 18 years of age.[49] 48 percent of the cases investigated included officers that were off-duty, and more than 25 percent of cases involved an officer who had been named individually as a party defendant in at least one federal civil court action pursuant to 42 U.S.C. § 1983.[50] The likelihood that a police officer will lose their job is only 1.2 times greater if the arrested officer *had already been sued pursuant to §1983*. Other parallel investigations included a study compiled by *Buffalo News*, which had combed through news reports and court records to compile a database of over 700 credible cases of police sexual misconduct from 2005 to 2015. In fact, police sexual misconduct is so rampant that it generates more citizens than any other factor except for excessive force, and one law enforcement official was involved in a case of sexual abuse or sexual misconduct at least every five days.[51]

The cases that illuminate this issue highlight that gendered violence exists *because* of what is deemed as legitimate policing. Police intrusion into the "private area of freedom" that is supposed to guide any evaluation of constitutional deprivation is ignored, and to a large extent, legalized. Police act alone and remain largely free from direct supervision, commonly encounter vulnerable citizens who are subject to the power and coercive authority granted to police, and operate during hours at night that provide low public visibility.[52] Barriers to reporting and the widespread legal doctrine of qualified immunity mean that survivors face an unnecessarily difficult process in holding police accountable.[53] Take, for example, the case of 18-year-old Anna Chambers: Anna's case was widely publicized on *BuzzFeed* in 2018, after she had been raped by NYPD detectives Eddie Martins and Richard Hall.[54] Martins and Hall stopped Anna and her friends for marijuana possession while they off-duty and in their car. Anna's friends were let go, but Anna was handcuffed, driven away, and placed in the back of a police van,

where the officers had taken turns raping her. A loophole in New York State law permitted the NYPD's conduct in Anna's case as legal, and charges against her rapists were dropped due to "credibility issues."[55] Or take the case of Lukasz Skorzewski, a NYPD police officer who failed to properly investigate the sexual assault of a woman named Rachael Stirling. After he allowed Stirling's rapist to go free, Skorzewski proceeded to botch *another* sexual assault investigation; he had attempted to rape the victim whose sexual assault he was assigned to investigate (and was subsequently named as a defendant in a §1983 suit filed by that victim).[56] From domestic violence victims who themselves were sexually assaulted by the investigating officers,[57] to an underage girl who was raped repeatedly by officers investigating the sex trafficking ring she was a part of,[58] to police officers who chased an immigrant massage worker to her death,[59] gendered violence amongst the police is indeed endemic. As of 2019, thirty-one states had a loophole in their laws that allowed for police officers to legally have consensual sex with individuals in custody,[60] despite the obvious imbalances in coercive power that the police ultimately retain.

As Akbar emphasizes, "Policing works differently for differently situated people. Police play a function of social control and regulation along gender, sex, race, and class."[61] Aside from considerations of intersectionality where policing should be framed as both a gendered and racial issue, ensuring collective liberation for women means operating beyond the criminal-legal system where policing is still viewed as a neutralizing force of justice. Many of the cases mentioned above were unveiled or brought to light by journalists. We know of them and seek to remedy their injustice not because they were rendered intelligible through legal claims, criminal complaints, or successfully seeking remedy in a civil liability system in which behavior that "shocks the conscience" is in the eye of the beholder. Many of them were dropped. Any formal conception of liberty within the larger gender justice movement therefore falters

without the necessary analysis of a woman's existence in a coercive police state.

IV. Conclusion

To be free is not necessarily to only be free from government intrusion. While Berlin's concepts of negative and positive liberty present a series of contradictions within themselves, they can be helpful to articulate gender justice goals of collective liberation by analyzing how these meanings of liberty become socially embedded through the law. Feminist critiques of positive liberty as requiring a set of baseline conditions to pursue a meaningful life with opportunities and choices can help us build a better conception of freedom. This is not to imply that every action by the state should function as something that it can be constitutionally liable for or that state intervention in issues of gendered violence is absolutely necessary to be free. In the context of *Town of Castle Rock*, liberty was wielded as a false signifier for freedom from the state; with Marie, the police arm of the state reduced her story to silence. Instead, I argue for a vision in which we critically question concepts like liberty, freedom, justice, and policing in the context of what goals those terms have been used to carry out, because they are often distorted by our existing discourses on gender and freedom.

[1] Isaiah Berlin, "Two Concepts of Liberty," *Four Essays On Liberty* (1958), 2.
[2] Ibid, 4.
[3] Ibid, 8.
[4] Iris Marion Young, cited in Kelly, *Domestic Violence and the Politics of Privacy* (2003), 37.
[5] Catherine Mackinnon, cited in Kelly, 39.
[6] *Jessica Lenahan (Gonzales) et al. v United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 7/98, ¶ 2 (2011).
[7] Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: https://www.refworld.org/docid/3ae6b3710.html [accessed 13 May 2020].
[8] *Town of Castle Rock v Gonzales*, 545 U.S. 748 (2005).
[9] *Town of Castle Rock v Gonzales*, 545 U.S. 748 (2005), 754.
[10] *Town of Castle Rock v Gonzales*, 545 U.S. 748 (2005), 759.
[11] *Town of Castle Rock v Gonzales,* 545 U.S. 748 (2005), 760.
[12] *Town of Castle Rock v Gonzales*, 545 U.S. 748 (2005), 765.
[13] Nancy J. Hirschmann, "Berlin, Feminism, and Positive Liberty" in *Isaiah Berlin and the Politics of Freedom: Two Concepts of Liberty 50 Years Later*, ed. Bruce David Baum and Robert Nichols (Routledge 2013), 196.
[14] Ibid.
[15] Isaiah Berlin, "Two Concepts of Liberty," *Four Essays On Liberty* (1958).
[16] Carol Gould, "Retrieving Positive Freedom and Why It Matters" in *Isaiah Berlin and the Politics of Freedom: Two Concepts of Liberty 50 Years Later*, ed. Bruce David Baum and Robert Nichols (Routledge 2013).
[17] Laura Oren, "Some Thoughts on the State-Created Danger Doctrine: Deshaney is Still Wrong and Castle Rock is More of the Same," *Temple Political & Civil Rights Law Review* 16, 1 (2006), 53
[18] *DeShaney v Winnebago County Department of Social Services*, 489 U.S. 189 (7th Cir. 1989).
[19] *DeShaney v Winnebago County Department of Social Services*, 489 U.S. 189 (7th Cir. 1989), 1000.
[20] Ibid, 1002.
[21] Ibid, 1003.
[22] Isaiah Berlin, "Two Concepts of Liberty," *Four Essays On Liberty* (1958), 3.
[23] Iris Marion Young, cited in Kelly, *Domestic Violence and the Politics of Privacy* (2003), 37.
[24] Laura Oren, "Some Thoughts on the State-Created Danger Doctrine: *DeShaney* is Still Wrong and *Castle Rock* is More of the Same," 58.
[25] Carol Gould, "Retrieving Positive Freedom and Why It Matters" in *Isaiah*

Berlin and the Politics of Freedom: Two Concepts of Liberty 50 Years Later, ed. Bruce David Baum and Robert Nichols (Routledge 2013), 109.
[26] *DeShaney v Winnebago County Department of Social Services*, 489 U.S. 189 (7th Cir. 1989), 1001.
[27] Ibid.
[28] Ibid, 1006.
[29] Ibid, 1008.
[30] Ibid.
[31] Ibid.
[32] Laura Oren, "Some Thoughts on the State-Created Danger Doctrine: *DeShaney* is Still Wrong and *Castle Rock* is More of the Same," 61.
[33] Carol Gould, "Retrieving Positive Freedom and Why It Matters" in *Isaiah Berlin and the Politics of Freedom: Two Concepts of Liberty 50 Years Later*, ed. Bruce David Baum and Robert Nichols (Routledge 2013), 110.
[34] Ibid.
[35] *DeShaney v Winnebago County Department of Social Services*, 489 U.S. 189 (7th Cir. 1989), 1003.
[36] Dan Margolin Cecka, "It's Time for the Fourth Circuit to Rethink *DeShaney*" (2016), 697.
[37] Laura Oren, "Some Thoughts on the State-Created Danger Doctrine: *DeShaney* is Still Wrong and *Castle Rock* is More of the Same," 54.
[38] Amna Akbar, "Toward a Radical Imagination of Law," 93 *New York University Law Review* 405 (2018), 435
[39] Katherine Francke, "Dating the State: The Moral Hazards of Winning Gay Rights," 44 *Columbia Human Rights Law Review* 4 (2012), 1-46.
[40] Christian T. Miller and Ken Armstrong, "An Unbelievable Story of Rape," *ProPublica* (2015), accessed 13 May 2020, https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Philip Matthew Sr. Stinson, et al, "Police Sexual Misconduct: A National Scale Study of Arrested Officers," 26 *Criminal Justice Policy Review* (2015).
[45] Christian T. Miller and Ken Armstrong, "An Unbelievable Story of Rape," *ProPublica* (2015), accessed 13 May 2020, https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story.
[46] Ibid.
[47] Philip Matthew Sr. Stinson, et al, "Police Sexual Misconduct: A National Scale Study of Arrested Officers," 26 *Criminal Justice Policy Review* (2015), 665-666.

[48] Ibid, 673.
[49] Ibid.
[50] Ibid.
[51] Matthew Spina, "When a protector becomes a predator," *Buffalo News* (2013), accessed 13 May 2020, https://s3.amazonaws.com/bncore/projects/abusing-the-law/index.html.
[52] Philip Matthew Sr. Stinson, et al, "Police Sexual Misconduct: A National Scale Study of Arrested Officers," 26 *Criminal Justice Policy Review* (2015), 665.
[53] Ibid, 666.
[54] Albert Samaha, "An 18-Year-Old Said She Was Raped While In Police Custody. The Officers Say She Consented," *BuzzFeed News* (2018), accessed 13 May 2020, https://www.buzzfeednews.com/article/albertsamaha/this-teenager-accused-two-on-duty-cops-of-rape-she-had-no?bfsource=relatedmanual.
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[56] Meg O'Connor, "IT WAS ALMOST WORSE THAN THE INCIDENT ITSELF," *The Appeal* (2019), accessed 13 May 2020, https://theappeal.org/it-was-almost-worse-than-the-incident-itself/.
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[59] Dan Barry and Jeffrey Singer, "The Case of Jane Doe Ponytail" *New York Times* (2018), accessed 13 May 2020, https://www.nytimes.com/interactive/2018/10/11/nyregion/sex-workers-massage-parlor.html.
[60] Katherine A. Heil, "The Fuzz(y) Lines of Consent: Police Sexual Misconduct with Detainees," *South Carolina Law Review* (2019), 70.
[61] Amna Akbar, "Toward a Radical Imagination of Law," 93 *New York University Law Review* 405 (2018), 443.

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