

BLACK WOMEN, POLICE BRUTALITY, AND THE VIOLENCE AGAINST WOMEN ACT: HOW PRO-ARREST POLICIES FACILITATE RACIALIZED AND GENDERED POLICE VIOLENCE

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The Violence Against Women Act (VAWA) is a critical centerpiece of President-Elect Joe Biden’s messaging and proposed agenda on championing women’s rights and equality once he is inaugurated President of the United States in January 2021.¹ Biden has touted his extensive history with the legislation as a testament to his commitment to ending gendered and domestic violence, calling VAWA his “proudest legislative accomplishment.”² While the legislation has arguably contributed to a revolution in the national culture around domestic violence and made significant advancements in increasing protections for some,³ the bill that Biden sponsored in 1993 and its subsequent iterations have not been successful in protecting all women, particularly Black women, against violence. This article will explore the blind spot that plagues VAWA’s pro-arrest policies and endangers the lives of Black girls and women through increased exposure to police and racial and gender stereotyping, which leads to a greater likelihood of arrest, brutality, and involvement with the justice system. The article will also evaluate how the 2019 House and Senate reauthorization bills attempt to address this blind spot, theoretically allowing Biden to supplant the mixed legacy of the legislation, and suggest that more can be done to include Black women in legislation designed to prevent violence against women.

The particular policies most harmful to Black women and girls are the mandatory arrest and pro-arrest provisions. Biden’s proposed bill in 1993 advocated for “model, innovative, and demonstration law enforcement programs relating to domestic violence that involve pro-arrest and aggressive prosecution policies.”⁴ Congress ultimately incorporated and passed the 1993 bill into law through the Violent Crime Control and Law Enforcement Act of 1994.⁵ This legislation converted Biden’s “pro-arrest and aggressive prosecution policies” into grants for the implementation of “mandatory arrest or proarrest programs and policies in police departments.”⁶ In domestic violence situations, mandatory arrest policies require police responding to the incidents to make warrantless arrests if there is probable cause to

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¹ See *The Biden Plan to End Violence Against Women*, BIDEN HARRIS, <https://joebiden.com/vawa/> (last visited Nov. 29, 2020).

² Tara Law, *The Violence Against Women Act Was Signed 25 Years Ago. Here’s How the Law Changed American Culture*, TIME (Sept. 12, 2019, 10:12 PM), <https://time.com/5675029/violence-against-women-act-history-biden/>; Joe Biden, *20 Years of Change: Joe Biden on Violence Against Women Act*, TIME (Sept. 10, 2014, 5:23 PM), <https://time.com/3319325/joe-biden-violence-against-women/>.

³ See Susan B. Carbon, *Celebrating 17 Years of the Violence Against Women Act*, U.S. DEP’T JUST. ARCHIVES (Sept. 13, 2011), <https://www.justice.gov/archives/opa/blog/celebrating-17-years-violence-against-women-act>.

⁴ S. 11, 103rd Cong. (1993).

⁵ Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended at 42 U.S.C. §§ 40001-40703).

⁶ *Id.*

believe any violence occurred, even if the arrest goes against the alleged victim's wishes or involves the arrest of the alleged victim herself.⁷ The Violence Against Women Reauthorization Acts of 2005 and 2013 replaced the "mandatory arrest" language with a strong, pro-arrest approach.⁸ The language and incentives associated with the 1994 legislative text and subsequent reauthorizations have also led to increased adoption of mandatory or pro-arrest state policies in domestic violence cases.⁹

VAWA's pro-arrest policy approach leaves Black women exposed to increased risk of police violence during incidents of domestic violence.¹⁰ VAWA's mandatory arrest provisions led to increased rates of police violence within Black communities.¹¹ A 2007 report to the Department of Justice also found that the expansion of mandatory arrest policy at the state level led to the increased likelihood of dual arrest during domestic violence calls.¹² Dual arrest occurs when police responding to a domestic violence call cannot determine which person is the "primary aggressor", so they arrest both the perpetrator and the victim.¹³ This practice has resulted in an increase in the number of Black women arrested during domestic violence calls.¹⁴ Disproportionate police abuse and brutality against Black girls and women likely arises from damaging and dehumanizing societal images of Black girls and women, such as the "Mammy", "Jezebel" and "Sapphire" stereotypes.¹⁵ #SayHerName, a campaign by the African American Policy Forum intended to raise awareness for the Black women and girls who have been victimized by police brutality, documented a number of police killings of Black women that took place during police responses to domestic violence situations in the context of this pro-arrest

⁷ *Research to Practice Brief*, UNIV. KENTUCKY CTR FOR RESEARCH ON VIOLENCE AGAINST WOMEN (Dec. 2011), https://opsvaw.as.uky.edu/sites/default/files/05_Mandatory_Arrest.pdf.

⁸ Violence Against Women Reauthorization Act of 2005, Pub. L. No. 109-62, tit. IV, 119 Stat. 2960 (2006); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IV, 127 Stat. 54 (2013).

⁹ *Mandatory Arrests*, BATTERED WOMEN'S JUST. PROJECT, <https://www.bwjp.org/our-work/topics/mandatory-arrests.html> (last visited Nov. 29, 2020).

¹⁰ Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 14 WM. & MARY J. WOMEN & L. 1, 43 (2017) (citing BETH RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* (2012)).

¹¹ *Id.* at 87-89 (citing David Hirschel & Eve Buzawa, *Understanding the Context of Dual Arrest With Directions for Future Research*, 8 VIOLENCE AGAINST WOMEN 1449, 1456-58 (2002)).

¹² Elizabeth Nolan Brown, *Joe Biden Should Stop Bragging About the Violence Against Women Act*, REASON (Oct. 29, 2020, 10:00 AM), <https://reason.com/2020/10/29/joe-biden-should-stop-bragging-about-the-violence-against-women-act/>.

¹³ DAVID HIRSCHTEL, EVE BUZAWA, APRIL PATTAVINA, DON FAGGIANI & MELISSA REULAND, *EXPLAINING THE PREVALENCE, CONTEXT, AND CONSEQUENCES OF DUAL ARREST IN INTIMATE PARTNER CASES* xiii (2007).

¹⁴ Jacobs, *supra* note 10, at 87-89 (citing Hirschel & Buzawa, *supra* note 11, at 1456-58).

¹⁵ Nnennaya Amuchie, *"The Forgotten Victims" How Racialized Gender Stereotypes Lead to Police Violence Against Black Women and Girls: Incorporating an Analysis of Police Violence Into Feminist Jurisprudence and Community Activism*, 14 SEATTLE J. SOC. JUST. 617, 635-47 (2016). "Within American society, images of Black women consists [sic] of three different stereotypes: (1) the nurturing, self-sacrificing, matriarchal 'Mammy'; (2) the hyper-sexualized, promiscuous, whore 'Jezebel'; and (3) the sassy, angry, hot-tempered 'Sapphire.' . . . The Mammy, Jezebel, and Sapphire stereotypes perpetuate the maltreatment of Black girls and women and lead to police violence."

legislative approach.¹⁶ Although the legislation was intended to provide more tools and empowerment to survivors of domestic violence, legislators like Biden failed to address the specific danger of increased police presence in Black communities, resulting in the unjust arrests of Black women survivors and bystanders as primary aggressors and the increased use of lethal police force against Black women.¹⁷

The increased likelihood of arrest and brutality associated with VAWA's pro-arrest approach help pave the pathway for Black girls' involvement with the juvenile justice system. Even though the purpose of VAWA was not to address intra-family domestic disputes between parents and their children, VAWA-inspired pro-arrest policies in state domestic violence law led to increased arrests of Black girls in domestic disputes.¹⁸ Black girls are arrested and detained for intra-family in-home disputes at disproportionate rates, which increased compared to boys' arrests between 1996 and 2005 after VAWA was passed.¹⁹ Black girls are also more likely to experience police violence correlated with police belief in the Sapphire stereotype.²⁰ Police often perceive Black girls to be too "loud" or to allegedly "[talk] back" to authority figures.²¹ The perceived disrespect possibly triggers a masculinity or legitimacy threat to male officers and results in incidents of unjustified police violence against Black girls.²² The subjective determinations of loudness arise from the racialized police perception of these stereotypical traits in Black girls, and have disastrous effects when paired with exposure to pro-arrest policies in response to domestic violence calls.²³

The routine reauthorization of VAWA in 2021 presents an opportunity for Congress to begin to rectify the pro-arrest policy approach and for Biden to redeem himself on the claim that his signature piece of legislation protects all women. The 2020

¹⁶ KIMBERLÉ WILLIAMS CRENSHAW, ANDREA J. RITCHIE, RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* 22–23 (2015). On February 18, 2015, a Black woman named "Janisha Fonville was shot to death by a Charlotte police officer who was responding to a domestic violence complaint involving Fonville and her girlfriend. The officer. . . claimed that Fonville lunged at him with a knife. Her girlfriend, the only other person on the scene, maintains Fonville was over six feet away from the officers, and stood a mere five feet tall, posing no direct threat to the officer who shot her." On February 16, 2014, police officers fatally shot Yvette Smith, a 47-year-old Black woman, when responding to a domestic disturbance complaint between two men in her household. "Smith. . . opened the door for the officers and was shot almost immediately in the head and the stomach. The Officers first alleged that Smith had a gun, but that claim was retracted the next day."

¹⁷ Jacobs, *supra* note 10, at 84–85.

¹⁸ FRANCINE T. SHERMAN, *UNINTENDED CONSEQUENCES: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE MANDATORY AND PRO-ARREST POLICIES AND PRACTICES ON GIRLS AND YOUNG WOMEN* 5–6 (2015).

¹⁹ *Id.*

²⁰ See Jacobs, *supra* note 10, at 67; Amuchie, *supra* note 15, at 643–46.

²¹ Jacobs, *supra* note 10, at 67.

²² *Id.*

²³ See JAMILA J. BLAKE & REBECCA EPSTEIN, *LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS* 4 (2019); REBECCA EPSTEIN, JAMILA J. BLAKE & THALIA GONZÁLEZ, *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD* 5 (2017) (citing Jamila J. Blake, Bettie Ray Butler, Chance W. Lewis & Alicia Darenbourg, *Unmasking the Inequitable Discipline Experiences of Urban Black Girls: Implications for Urban Educational Stakeholders*, 43 *URBAN REV.* 93 (2003)).

reauthorization hung in limbo throughout the 116th Congressional session due to disagreement in the two chambers of Congress on an unrelated gun violence issue.²⁴ Both versions of the reauthorization bill, however, struck the “proarrest” language in the purpose of the legislation and replaced it with “offender accountability and homicide reduction,”²⁵ purportedly to improve the criminal justice response and increase survivor and community safety through “voluntary alternative and community-based methods of survivor safety and community perpetrator accountability.”²⁶ This amendment contributes to a slight shift in the original framing of the bill from a 1990s “tough on crime” law that focused on funding increased activity of law enforcement to a framing that prioritizes non-law enforcement endeavors to address violence against women, such as transitional housing and civil legal assistance.²⁷ In 2021, the new Democrat-controlled congress has an opportunity to make this shift.

Although these policies are in the spirit of activists’ recommendations to shift resources away from law enforcement and into communities, they do not yet sufficiently protect Black women and girls against domestic and police violence. Activists have also called for replacing juvenile justice processing after experiences of domestic violence with state Medicaid and community health system services, federally funding community-oriented initiatives, and further research to develop model state domestic violence legislation.²⁸ While Biden may be able to superficially sanitize the legacy of his signature piece of legislation in accordance with a focus on racial justice by continuing to associate his name with this latest reauthorization of VAWA,²⁹ he must publicly acknowledge the harms against Black women in particular and advocate for the more progressive policies recommended by activists going forward.

The damaging consequences of the 1994 VAWA and subsequent reauthorization bills on Black women were perhaps unintended, but not unforeseeable given the systemic racism of law enforcement as an institution. The next VAWA reauthorization and the next four years of the Biden-Harris administration present an opportunity for change, progress, and the creation of a platform to uplift experiences that may previously have fallen into political and legislative blind spots. The women

²⁴ The House bill includes progressive measures on gun violence in intimate partner relationships and closes “the boyfriend loophole.” The NRA’s strong influence in the Senate has kept the bill for reauthorization in committee and off the Senate floor. See Jay Willis, *Why Can’t the Senate Pass the Violence Against Women Act?*, GQ (Dec. 13, 2019), <https://www.gq.com/story/senate-violence-against-women-act>.

²⁵ S. 2920, 116th Cong. (2019); H.R. 1585, 116th Cong. (2019).

²⁶ See THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2019: TAKING IT TO THE SENATE, NAT’L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE 17 (2019).

²⁷ See Kate Pickert, *What’s Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), <https://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/>.

²⁸ Sherman, *supra* note 18, at 11–12.

²⁹ *But see* Jonathan Martin, Alexander Burns & Thomas Kaplan, *Biden Walks a Cautious Line as He Opposes Defunding the Police*, N.Y. TIMES (June 8, 2020), <https://www.ny-times.com/2020/06/08/us/politics/biden-defund-the-police.html>. Biden opposes defunding the police, an effort that would cement his commitment to reallocating resources away from law enforcement and their penchant for racially oppressive practices.

VAWA aims to protect do not belong to a monolith, and subsequent legislative attempts should be guided by an understanding of intersecting oppressions at the crossroads of race and gender. Particularly in the fight against sexual and gendered violence, the next administration should seek to center the lived experiences and lessons of Black female survivors and activists.