AFRICAN IMMIGRANTS, INTERSECTIONALITY, AND THE INCREASING NEED FOR VISIBILITY IN THE CURRENT IMMIGRATION DEBATE

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Africans are one of the fastest growing immigrant groups in the United States, yet their presence receives very little attention in public discourse about immigration. In an era where America's immigration policies have grown increasingly insular, African immigrants are particularly at risk of having measures that historically facilitated their entry into the United States, stripped away without recognition of the benefit they pose to them.

This Note argues that the intersectional identity of Black African immigrants, being Black and foreign, renders them effectively invisible in the immigration debate and vulnerable to policies that affect them both due to their Blackness as well as their status as foreigners. It proposes that the Intersectionality framework can serve as a useful tool to shed light on the unique concerns of African immigrants and create policies that directly address them.

Part II of this Note provides a background into the history of African immigration in the United States. Part III introduces the theory of Intersectionality and demonstrates its applicability in the immigration law context. Finally, Part IV applies Intersectionality theory to explore the unique harms

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that African immigrants face in the current Immigration landscape.

I. INTRODUCTION

This Note proposes that the intersectional nature of African immigrants, being both Black and foreign, makes them particularly vulnerable and subject to invisibility in the United States immigration debate. As a result, policies that have historically aided their immigration, such as the

Diversity Visa Program,[1] may be attacked without acknowledgement of the effect these policies have had in increasing immigration numbers for African immigrants.

At the heart of this invisibility is a failure to equate Blackness with foreignness. Much of pre-1965 American immigration laws reflected a blatant attempt to bar Asian immigrants from entering the United States and maintain the White supremacist racial demographic in the United States.[2] Conversely, most Jim Crow laws and the subsequent civil rights legislation that abolished them, primarily addressed the plight of Black people in the country.[3] This Note argues that implicit in these legal trends is the proposition that Asian and Latino heritage represents foreignness while Black heritage, although inferior to White heritage, is domestic.

American laws and legal opinions betray the varying ways that society perceives Asian difference and Black difference. For instance, in Justice Harlan's famous dissent in *Plessy v. Ferguson*, in which he scathingly critiqued the "Separate but Equal doctrine," he also claimed that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."[4] Despite his dissent that argued that Black people should not be subject to segregation laws, Justice Harlan firmly believed in the extreme difference of Chinese people and used it to justify their exclusion from citizenship in the United States.

[1] The Diversity Visa Program is administered by the Department of State under the 1990 Immigration Act, and provides 50,000 immigrant visas through a lottery to citizens of countries and regions historically underrepresented in the United States immigration process. *See generally* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[2] Bill Ong Hing, Immigration Policies: Messages of Exclusion to African Americans, 16 IMMIGR. & NAT'LTY. L. REV. 244 (1994).

[3] Black History Month, 141 Cong. Rec. H. 2041, 2041 (explaining how Jim Crow laws threatened to prevent Black men and women from assimilating into American culture and ushered in the Civil Rights Movements of the 1960s).

[4] Plessy v. Ferguson, 163 U.S. 537, 561 (1896).

This apparent contradiction merely reveals the fact that Blackness, though frequently perceived negatively in American society, has always occupied a certain level of familiarity in the American racial hierarchy while laws pertaining to Asians or Latinos reflect an unwavering belief in their foreignness.

Mae Ngai coined the term *alien citizenship* to describe "persons who are American citizens by virtue of their birth in the United States but who are presumed to be foreign by the mainstream of American culture and at times by the state."[5] This term effectively depicts how American society has historically portrayed Asian Americans and Latinos as a foreign group of people despite their American ties.

This presumption of foreignness, regardless of citizenship, serves as the antithesis to the condition experienced by African and Black immigrants in general, whose shared ancestry with African Americans makes Americans automatically view them as citizens of an American underclass. Currently, no term exists to describe this inverse to alien citizenship and alternate form of Americanization. However, scholars have examined how Black immigrants assimilate differently from other immigrant groups due to their shared race with African-Americans.[6]

This Note explores how African immigrants defy the traditional classifications of the domestic and foreign since they are Black but not American, and foreign yet not Asian or Latino. It argues that intersectionality[7] theory can serve as a helpful tool to understand the interplay between racial and

[5] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 2 (rev. ed. 2014).

[6] MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES 329 (1999).

[7] Leslie McCall defines intersectionality as "the relationships among multiple dimensions and modalities of social relations and subject formations." Leslie McCall, *The Complexity of Intersectionality*, 30 J. WOMEN, CULTURE & SOC'Y 1771, 1771 (2005).

ethnic categories, particularly as they concern African immigrants. While scholars have examined various reasons for low African immigration—including cultural and economic barriers, migration within Africa, and limitations to current immigration laws—few have examined the role that intersectionality may play in limiting African immigration.[8] Policies meant to disenfranchise African Americans serve to also disadvantage African immigrants. Likewise, policies created primarily to affect groups such as Asians and Latinos have also affected African immigrants despite very little recognition or awareness of their presence as immigrants in the United States. Ultimately, immigration policies cannot aid African immigrants as effectively as they should if these immigrants move around the nation invisibly due to their race.[9]

Intersectionality provides a useful framework to recognize the often hidden identity of African immigrants and to develop policies that also acknowledge their existence. Although intersectionality has traditionally been used in the content of Black feminist theory, this Note follows the example of other scholars in demonstrating that this multi-category research paradigm has many advantages for the area of immigration and can shed light on an obscured yet ever-growing immigrant population.[10]

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[8] Hing, *supra* note 2 (arguing that United States immigration policies send a message of exclusion to African immigrants and suggesting reform of United States immigration policy, including allowing extra visas to African immigrants to compensate for historical underrepresentation among immigrant groups).

[9] *See* JOHN A. ARTHUR, INVISIBLE SOJOURNERS: AFRICAN IMMIGRANT DIASPORA IN THE UNITED STATES vii (2000) (providing an in-depth analysis of African migration patterns to the United States and claiming that African immigrants are largely invisible and unknown to many Americans); Roy Simon Bryce-Laporte, *Black Immigrants: The Experience of Invisibility and Inequality*, 3 J. BLACK STUD. 31 (1972) (arguing that Black immigrants are perhaps the least visible immigrant group in the United States and suffer a double invisibility: first from being Black and then also from being Black foreigners).

[10] *See generally* Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research*

First, in Part II, this Note goes through a history of African immigration to the United States and demonstrates how Africans have historically been underrepresented in their immigration numbers. In Part III, this Note will then proceed to introduce the concept of intersectionality as a theory. In Part IV, it reveals how one can apply this theory to African immigrants, and then explains the consequences behind failing to recognize diversity within Black people in the United States, particularly in the past creation of immigration laws and in light of current developments in immigration law, such as President Donald J. Trump's controversial executive orders on immigration.[11] This Note will conclude by demonstrating how using an intersectional framework to shed light on the unique experience of African immigrants can reshape immigration debates by adding a broader perspective and nuance that can better identify and meet the needs of the diverse immigrant community within the United States.

II. A BACKGROUND OF THE HISTORY OF AFRICAN IMMIGRATION

Contacts between the African continent and North America go as far back as the 1500s as a result of the Transatlantic Slave Trade.[12] Starting from 1619, the first wave of Africans settled involuntarily in the United States after being captured from their homelands predominantly

Paradigm, 5 PERSP. ON POL. 63 (2007), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/8CE8074159111C98CE34DA2DB7764A90/S1537592707070065a.pdf/when_multiplication_doesnt_equal_quick_addition_examining_intersectionality_as_a_research_paradigm.pdf [https://perma.cc/R92M-NWUF] (discussing calls for a consolidated, intersectional research paradigm which encompasses fields such as anthropology, critical race theory, political science, literary criticism, sociology and many more).

[11] Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (issued Jan. 25, 2017); Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (issued Jan. 27, 2017).

[12] ARTHUR, *supra* note 9.

along the West African coast.[13] The slave trade brought between ten to twenty million Africans to the United States whose skills as farmers, builders, craftsmen, artisans, and healers proved immensely useful to White settlers and played an integral role in the development of American society and culture.[14] Today, Black people in the United States number 38.9 million and comprise 12.6% of the total population of the United States.[15]

Although Blacks have had a long and significant presence within the United States, voluntary migration from Africa is still quite a recent phenomenon.[16] Some of the earliest voluntary African immigrants came from Cape Verde in the early 1800s.[17] These Cape Verdean immigrants began arriving in New Bedford, Massachusetts, where they eventually settled, to work as seamen on the New England ports with the commercial whaling industry and as agricultural laborers.[18]

The twentieth century brought one of the most significant developments in immigration law due to the Immigration Act of 1924.[19] The Immigration Act of 1924 awarded visas to people from particular nations based on the percentage of Americans who traced their ancestry to that

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[13] *Id.*

[14] *Id.*

[15] RANDY CAPS, KRISTEN MCCABE & MICHAEL FIX, MIGRATION POLICY INST., DIVERSE STREAMS: AFRICAN MIGRATION TO THE UNITED STATES 2 (2012), http://www.migrationpolicy.org/sites/default/files/publications/CBI-AfricanMigration.pdf [https://perma.cc/JU28-DBKW].

[16] The majority of voluntary African immigrants to the United States came toward the end of the twentieth century. *Id.*

[17] *Id.*

[18] *See* Bill Ong Hing, *African Migration to the United States: Assigned to the Back of the Bus*, *in* THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA 62 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015); CAPS ET AL., *supra* note 15.

[19] Immigration Act of May 26, 1924, Pub. L. No. 68–139, 43 Stat. 153 (1924).

country.[20] This Act served to maintain racial homogeneity within the United States as the proportion of Americans descended from eastern and southern Europe was smaller than that of those descended from Northern and Western Europe.[21] It also had the ulterior motive of effectively barring immigration from Asia by discounting all Chinese, Japanese, and South Asian persons as "ineligible to citizenship."[22]

A House Report clearly articulated the racially discriminatory purpose of the national origins quota,

> With full recognition of the material progress which we owe to the races from southern and eastern Europe, we are conscious that the continued arrival of great numbers tends to upset our balance of population, to depress our standard of living, and to unduly charge our institutions for the care of the socially inadequate.
>
> If immigration from southern and eastern Europe may enter the United States on a basis of substantial equality with that admitted from the older sources of supply, it is clear that if any appreciable number of immigrants are to be allowed to land upon our shores the balance of racial preponderance must in time pass to those elements of the population who reproduce more rapidly on a lower standard of living than those possessing other ideals.
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> . . . .

[20] *Id.*

[21] Charles J. Ogletree Jr, *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 760 (2000).

[22] Mai Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. OF AM. HIST. 67, 72 (1999).

> [The quota system] is used in an effort to preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity.[23]

Because most African countries were under European rule for much of the twentieth century, their quota allocation as colonies was minimal at best.[24] In fact, the United States recognized the sovereignty of only four African countries, which included Egypt, South Africa, Liberia, and Ethiopia.[25] These sovereign nations along with the colonial protectorates of French Cameroon, British Cameroon, South West Africa, Tanganyika, and Togoland, received assigned quotas of 100 immigrants.[26] In practice, these colonial allocations simply boosted immigration slots for Europeans, while Black Africans similarly did not benefit from the allocations of White settler controlled South Africa.[27]

With only so many means of entry into the United States under the quota system, one method used by some African immigrants to enter the United States was education.[28] Throughout the twentieth century, the United States government sponsored students to come to the country for educational purposes.[29] Olanipekun Laosebikan demonstrates how the sponsoring of students could have served as a method of indoctrination and a means for the

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[23] Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 IND. L.J. 1111, 1128 (1998) (quoting E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 484–85 (1981)).

[24] Hing, *supra* note 2, at 240.

[25] Olanipekun Laosebikan, From Student to Immigrant: the Diasporization of the African Student in the United States 69 (June 27, 2012) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign), http://hdl.handle.net/2142/31922 [https://perma.cc/8XEB-YYEP].

[26] Ngai, *supra* note 22, at 74.

[27] *Id.* at 73.

[28] Bryce-Laporte, *supra* note 9, at 37.

[29] Laosebikan, *supra* note 25 at 91, 104–06.

United States to expand its sphere of influence around the world, particularly with the rise of communism. [30] Some of Africa's most historically prominent leaders including Nnamdi Azikiwe, Nigeria's first president, and Ghana's first president Kwame Nkrumah obtained a degree in the United States during this quota period.[31]

One important consequence of the Immigration Act of 1924 was that it designated student visas as a non-immigrant status.[32] This led the United States government to consider students as passing though the United States for their education, and consequently, did not allow them to settle or immigrate on their student visa.[33] One phenomenon that necessarily arose from this restriction was that of *non-returning*. Laosebikan defines this as a method that African students used in order to stay in the United States and eventually change their status to, at best a permanent residency or another form of immigrant visa category.[34]

The Immigration and Nationality Act of 1965 marked a sweeping change in United States immigration law that reflected the Civil Rights climate of the period. Instead of basing immigration numbers on race and national origin, the new immigration act allowed immigrants to enter based on their family connections and professional qualifications.[35] This new policy prioritized family reunification and the skills immigrants brought with them that could potentially benefit American society. Most notably, it eliminated the blatant

[30] Olanipekun Laosebikan, From Student to Immigrant: the Diasporization of the African Student in the United States 69 (June 27, 2012) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign), http://hdl.handle.net/2142/31922 [https://perma.cc/8XEB-YYEP].

[31] *Id.*

[32] Immigration Act of May 26, 1924, Pub. L. No. 68–139, 43 Stat. 153 (1924) (Section 4(e) lists students of at least fifteen years of age as "non-quota immigrants.").

[33] *Id.* at 2.

[34] Laosebikan, *supra* note 25 at 119.

[35] Immigration and Nationality Act of 1965, Pub. L. No. 89–236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

racial injustice present within the National Origins Act, as it finally lifted the ban on Asian immigration.[36]

Before 1965, Africans made up one percent of the total immigrant population.[37] With the passage of new immigration reforms that eliminated national origin quotas and allowed immigrants to arrive through family reunification channels, Africans now constitute 2.3 percent of immigrants.[38]

The Diversity Visa Program, which was a 1994 implementation of the 1990 Immigration Act, is another key immigration measure that greatly facilitated African immigration.[39] It provided 55,000 immigrant visas to citizens of countries and regions that were historically underrepresented in the United States immigration process. Additionally, the 1980 Refugee Act broadened the scope of forced migrants entering the United States and facilitated African immigration.[40] Refugees from nations such as Liberia, Somalia, Sudan, Eritrea, and Ethiopia, took advantage of this legislation to build new lives in the United States.[41]

A. Explanations for the Low Representation of African Immigrants in the United States

Although African immigration increased by over one percent post-1965, African immigrants continue to be highly underrepresented as a voluntary immigrant group.[42] There are many arguments that exist to explain the historically low presence of African immigrants in the United States. Perhaps

[36] The 1965 Act's family reunification system provided annual per-country quotas of 20,000 for countries of the Eastern Hemisphere, including Asia, Europe, and Africa. Hing, *supra* note 2, at 246.

[37] Hing, supra note 2, at 240.

[38] *Id.* at 240.

[39] Hing, *supra* note 18, at 61.

[40] Refugee Act, Pub. L. No. 96–212, 94. Stat. 102 (1980).

[41] CAPS ET AL., *supra* note 15 at 7.

[42] Hing, *supra* note 8, at 240.

the obvious and most striking factor that disincentivized potential African immigrants from immigrating to the United States was slavery.[43]

Until Congress banned the African slave trade in 1807, the overwhelming majority of African migration to the United States was involuntary.[44] Furthermore, people of African descent still bore the threat of becoming enslaved until the abolishment of slavery in 1865.[45] With the passage of the Black Codes in the nineteenth century,[46] which effectively criminalized Black life and evolved into the Jim Crow laws of the twentieth century, it was foreseeable that potential African migrants would have considered the United States to have been a less than ideal place to settle as a Black person. Some scholars identify slavery and the legalization of Black racial oppression in America as one reason why there was no need for an explicit exclusion act towards peoples of African descent, as was the case of the Chinese Exclusion Act of 1882 for Chinese immigrants.[47]

Aside from the decidedly hostile climate that the United States posed to Africans throughout much of its history as a nation, conditions within Africa can also explain the historically low numbers of African immigrants to the United States. Until the mid-twentieth century, for instance, much of the African continent was colonized and under the rule of various European countries.[48] This created a situation in which only the very elite and privileged of Africans could have had the means to travel.[49] Moreover, if such individuals wanted to travel, due to familiarity and the previously discussed racial climate in the United States, Europe was

[43] *Id.* at 257.

[44] CAPS ET AL., *supra* note 15 at 1.

[45] U.S. CONST. amend. XIII, § 1.

[46] The Black Codes were enacted in many Southern states in 1865 and 1866 to restrict the freedoms of Black people, including the right to own land. *See generally* Black History Month, 141 Cong. Rec. H. 2041, 2056.

[47] Hing, *supra* note 2, at 244–45.

[48] *Id.* at 240.

[49] *Id.*

often a more favorable option to these African immigrants than the United States.[50] Even migrants such as students who came to the United States during colonization, would have to first stop in their colonizer's country and pick up their passports, before they could proceed to the United States.[51] Inconveniences such as these would have greatly contributed to making Europe a more ideal destination for African immigration. Although the existence of slavery, colonization, and resultant desirability of Europe as a migration destination all have contributed to the low incidence of voluntary African immigration to the United States, the fact remains that United States immigration law has historically failed to create meaningful opportunities for Africans.[52]

Bill Hing articulates various reasons for low African immigration,[53] but does not suggest how intersectionality and the fact that African immigrants are both Black and foreign can explain how immigration policies have affected them in unique ways. For instance, Hing describes how the family reunification focus of the 1965 Immigration Act provided little benefit to African immigrants since they did not have an established presence in the United States.[54] Although he explains that there is a need to come up with policies that will better serve African immigrants, he does not address the lack of recognition of Africans as a distinctive group of immigrants in American public consciousness.[55] For a law to address a population, it must first recognize whom it serves. Asians were the primary targets of racially discriminatory immigration laws for much of American history and as a result, the 1965 immigration act primarily addressed those

[50] *Id.* at 251–53.

[51] Laosebikan, *supra* note 25.

[52] Hing, *supra* note 2, at 240.

[53] *Id.* at 244–61.

[54] *Id.* at 240–42.

[55] *Id.* at 244–61 (listing five explanations for low African immigration which include 1) a history of exclusion; 2) international migration within Africa; 3) Europe as an immigration option; 4) cultural, economic, and institutional barriers; and 5) limitations of the current immigration laws).

wrongs. Although some Africans benefited from these reforms, these benefits were negligible because the laws were not intended for them. As a result of their Blackness and foreignness, policies meant to disenfranchise African Americans ultimately also disadvantaged African immigrants.

Likewise, because of their status as immigrants, policies created for groups such as Asians and Latinos have also affected African immigrants despite very little recognition or awareness of their presence as immigrants in the United States. Thus, immigration laws benefit African immigrants by proxy, since their existence is subject to non-recognition and invisibility. Intersectionality theory helps shed light on invisible groups and better tailor policies to these groups.

III. USING INTERSECTIONALITY THEORY TO EXPLAIN LOW AFRICAN IMMIGRATION

Intersectionality is a framework that considers how various categories of oppression—such as race, gender, and sexual orientation—can work together or "intersect" to produce social inequality and define an individual's identity in a unique way.[56] Intersectionality theory seeks to reveal how using a traditional single characteristic approach to analyzing discrimination can disadvantage people or groups who occupy multiple characteristics simultaneously.

The concept of intersectionality arose in the 1980s in the Black feminist movement largely in response to the perceived Whiteness of feminist legal theory.[57] Scholar Kimberlé Williams Crenshaw coined the term

[56] Leslie McCall defines Intersectionality as "the relationships among multiple dimensions and modalities of social relations and subject formations." Leslie McCall, *The Complexity of Intersectionality*, 30 J. WOMEN, CULTURE & SOC'Y 1771, 1771 (2005).

[57] Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205, 209 (2015).

"intersectionality" in a groundbreaking 1989 article.[58] In this work, Crenshaw argues that a "single axis" framework for discrimination cases that focuses on either race or sex serves to erase Black women since they are at the cross section of these two categories.[59] She describes how courts typically view discrimination cases through the lens of the most privileged groups within each category.[60] In the context of racial discrimination, this means that courts view Black men as the primary victims, while in the context of gender, they look to discrimination against White women. However, Crenshaw argues that this one-dimensional view of discrimination renders Black women invisible because race and gender intersect in ways to produce unique forms of disadvantage in their experiences.

Crenshaw considers three Title VII cases, *DeGraffenreid v. General Motors*,[61] *Moore v. Hughes Helicopter*,[62] and *Payne v. Travenol*[63] to demonstrate the methods in which the law restricts attempts by Black women to recover in discrimination cases because of the intersectional ways in which discrimination occurs in their lives. In *DeGraffenreid*, the court refused to acknowledge that race and gender could operate simultaneously to uniquely disadvantage Black women in a company's seniority system[64] while, in *Moore*[65] and *Payne,*[66] the court viewed Black women as so distinct from Black men and White women that they could not represent either group in class action suits based on either race or sex discrimination. Crenshaw's analysis exposes how Black women's ability to secure justice for their

[58] Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 140 (1989).

[59] *Id.* at 140.

[60] *Id.*

[61] DeGraffenreid v. G.M. Assembly Div., 413 F.Supp. 142 (E.D. Mo. 1976).

[62] Moore v. Hughes Helicopter, 708 F.2d 798 (5th Cir. 1982).

[63] Payne v. Travenol, 673 F.2d 798 (5th Cir. 1982).

[64] DeGraffenreid, 413 F.Supp. at 144.

[65] Moore, 708 F.2d at 480.

[66] Payne, 673 F.2d at 811.

unique discrimination is severely limited by their inability to belong to the fixed categories of race and gender that the law prescribes.

In her book *Alchemy of Race and Rights,* critical race theorist Patricia Williams implies that this rigid characterization is a fundamental trait of American jurisprudence.[67] She details three features of "Theoretical Legal Understanding" as:

> 1. The hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication;
> 2. The existence of transcendent, acontextual, universal legal truths or pure procedures; [and]
> 3. The existence of objective, "unmediated" voices by which those transcendent, universal truths find their expression. Judges, lawyers, logicians, and practitioners of empirical methodologies.[68]

The concept of intersectionality lies in direct contrast to Williams' description of American theoretical legal understanding as it rejects rigid categorization, casts doubt on the universality of racial and gender understandings in society, and implicitly claims that voices outside of the standard legal authorities are worthy of recognition.

Although the term "intersectionality" originated over twenty years ago in the context of Black feminist legal theory, current legal scholarship has explored the types of methodologies that characterize intersectional research as its own paradigm that stands in contrast to traditional unitary

[67] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).
[68] *Id.* at 8–9.

approaches to conceptualizing difference. Scholar Ange-Marie Hancock, for example, defines intersectionality as an approach that incorporates "previously ignored and excluded populations into preexisting frameworks to broaden our knowledge base regarding traditional questions of political science."[69] In order to reveal how intersectionality can serve as a normative theory Hancock suggests that intersectionality proceeds under six key assumptions:

1. There exists more than one category of difference;
2. The relationship among the categories is an open empirical question;
3. The categories contested are enforced at the individual and institutional levels;
4. Each category of difference has within-group diversity that sheds light on the way we think as groups as actors in politics and on the potential outcomes of any particular political intervention;
5. Intersectional research project requires integrative analysis rather than adding together mutually exclusive analysis; and
6. Requires attention to both empirical and theoretical aspects.[70]

An important aspect of Hancock's assumptions reflected most specifically in the fifth assumption, is the idea that intersectional analysis does not merely add together categories and expect equal outcomes from each category. For instance, in the context of race and gender, one cannot predict that race and gender will operate equally in a Black woman's experience of discrimination. Crenshaw explains that "Black women sometimes experience discrimination in ways similar to White women's experiences; sometimes they share very similar experiences with [b]lack men . . . [a]nd sometimes,

[69] Ange-Marie Hancock, *Intersectionality as a Normative and Empirical Paradigm*, 3 POL. & GENDER 248, 248 (2007).

[70] *Id.* at 251.

they experience discrimination as [b]lack women—not the sum of race and sex discrimination, but as [b]lack women."[71] Rather than simply adding categories together, intersectionality exposes the causal complexity between concepts.[72]

In order to apply intersectionality to other contexts, scholars have attempted to devise a distinct methodology for this type of cross-categorical research. For instance, Leslie McCall describes three different approaches to the study of intersectionality.[73] The first approach, *anticategorical complexity*, deconstructs analytical categories based on the assumption that society is too complex to fit into fixed categories which ultimately simplify inequities within society.[74] In the second approach, *intercategorical complexity,* scholars use existing categories to document relationships of inequality among social groups.[75] Finally, the *intracategorical complexity* approach rejects existing categories like the anticategorical approach but focuses on the individuals who are neglected at the points of intersection of these categories.[76] The intracategorical complexity approach describes the inaugural work in intersectionality that Crenshaw used to coin the term.[77]

In addition to a variety of approaches which form a methodology for studying intersectionality, there also exists various methods to describe the type of discrimination against intersectional groups that occurs within the law. For instance, some scholars have suggested that there are two distinct processes through which people face intersectional

[71] Crenshaw, *supra* note 58, at 149.
[72] Hancock, *supra* note 69, at 251.
[73] McCall, *supra* note 7.
[74] *Id.* at 1773.
[75] *Id.*
[76] *Id.*
[77] McCall, *supra* note 7, at 1773.

subordination through the court system.[78] The first type of process, *demographic intersectionality*, describes a type of inequality that occurs in litigation where the courts are the site of intersectional disadvantages or discrimination. Alternatively, the second type of process, *claim intersectionality*, describes a situation in which the law does not adequately provide redress for the intersectional discrimination that occurs in the labor market.[79] Crenshaw's description of the plaintiffs in *DeGraffenreid*, whose claim was rejected because of the lack of a "Black women" class, falls squarely within the definition of claim intersectionality.[80] This is because the plaintiffs alleged that they experienced discrimination in the workplace based on two characteristics—race and gender—despite the fact that this type of discrimination was not recognized by the law.[81]

A. Applying Intersectionality to the Immigration Law Context

Although one predominantly associates intersectionality with the study of women of color, some scholars have attempted to broaden the theory from a content-specific exercise to an empirical research paradigm that can answer new questions and generate strategies for political change.[82] For example, Hancock argues that intersectionality can answer important political science questions concerning how distributive justice, power, and government function in society. Immigration law is one area where intersectional research can have a positive impact. Because immigration

[78] Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991 (2011).

[79] *Id.* at 993.

[80] *Id.*

[81] *Id.* at 994.

[82] Hancock, *supra* note 69, at 249.

addresses questions of race, gender, and outsider status, it is an inherently intersectional terrain.[83]

In her book, *Impossible Subjects*, Mai Ngai reveals how immigration policy not only dictates who receives citizenship and residency rights, but it also racializes groups.[84] She explains how immigration policy is "constitutive of Americans' understanding of national membership and citizenship, drawing lines of inclusion and exclusion that articulate a desired composition—imagined if not necessarily realized—of the nation."[85] Ngai argues that immigration policy reflects important ideas about who belongs in America and who does not. The majority of her work focuses on how this racialization has historically affected Chinese and Latino immigrants in contrast to their White counterparts.

To illustrate, Mai Ngai references the 1924 Immigration Act and argues that, while immigrants from Europe gained a common White identity upon entering the United States, "Chinese, Mexicans and Filipinos—acquired ethnic and racial identities that were one and the same. The racialization of the latter groups' national origins rendered them unalterably foreign and unassailable to the nation."[86] The 1924 national origins quota system rendered the ethnicities of Asian and Latino immigrants in a permanently foreign state despite their ties to America. Ngai uses the term *alien citizenship* to describe "persons who are American citizens by virtue of their birth in the United States but who are presumed to be foreign by the mainstream of American culture and at times by the state."[87]

The very fact that African immigrants move almost invisibly through immigration law can be more than likely

[83] Peter Margulies, *Asylum, Intersectionality, and AIDS: Women With HIV As a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521, 522–23 (1994).

[84] NGAI, *supra* note 5.

[85] *Id.* at 5.

[86] Ngai, *supra* note 22, at 70.

[87] NGAI, *supra* note 5, at 2.

attributed to their condition of being both Black racially, yet foreign as far as their ethnic or national identity. Just as Crenshaw argues that Black men and White women are the primary subjects in the context of race and sex discrimination respectively, so too in the immigration space are Asians and Latinos perceived primarily as foreigners regardless of their citizenship, while Black people, despite facing discrimination, are primarily assumed to be American citizens.[88] This idea bears interesting consequences for a person who is both Black and foreign.

B. Impact of Blackness on Immigration Channels for Africans

Intersectionality theory can provide a helpful means of understanding how African immigrants exist and, at times, experience both their racial and national identity. For instance, many of the restrictions on African immigration converge with limitations on the rights of native-born African Americans. For instance, the United States Supreme Court's 1857 *Dred Scott* decision, which prevented persons of African descent from becoming citizens, shut out foreign as well as native-born Blacks from American citizenship.[89] This time period is significant because even as far back as the early nineteenth century, Cape Verdean immigrants began arriving to work as seamen on the New England ports.[90]

The Immigration Act of 1924 is another instance in which African immigrants were disenfranchised through regulations meant for African Americans. Although the law did not explicitly target African immigrants, their status as both Black and African served to disadvantage them in an indirect manner. For example, because the law created quotas based on the current U.S. inhabitants descended from the foreign region in question, and African Americans were not counted for the purposes of awarding quotas to foreign

[88] Ngai, *supra* note 22, at 70–72.
[89] Scott v. Sandford, 60 U.S. 393, 393–94 (1857).
[90] *See* CAPS ET AL., *supra* note 15 at 2.

nations, African countries could not receive a quota allotment despite the large numbers of African descendants already in the United States. Had African Americans been counted in the quota allotment, African nations would have received nine percent of available immigration slots and European nations would have received 13,000 fewer slots.[91] Although it was arguably impossible to determine exactly which part of Africa descendants of enslaved Africans originated from, had the quota system truly been about equating immigration numbers with national origins, quota positions could have been allocated to continental Africans, regardless of their precise national origin. Nevertheless, determining true national origin was never the goal of this Act. Instead, maintaining White supremacy and writing racial hierarchies into immigration law appeared to be the underlying objective of the legislation. In order to ensure this outcome, Black people in the United States could not be accounted for, thereby limiting the immigration opportunities of their foreign African counterparts.

C. The Effect of Anti-Asian Policies on African Immigration

Just as policies concerning African Americans affected African immigrants, so too have many immigration policies that targeted Asians.[92] Even ostensibly positive immigration policies for African immigrants, in fact, arose from a desire to exclude Asian immigrants. For instance, the Naturalization Law of 1870 remains an extremely significant development in the history of African immigration as it allowed for the naturalization of "aliens of African nativity and persons of African descent."[93] The Congressional records from debates

[91] Ngai, *supra* note 22, at 72.

[92] The Chinese Exclusion Act of 1882 prohibited the immigration of all Chinese laborers, Pub. L. No. 47–126, 22 Stat. 58 (repealed 1943). Likewise, the quota system of the 1924 Immigration Act deemed all Chinese, Japanese, and South Asians as persons "ineligible to citizenship." Pub. L. No. 68–139, 43 Stat. 153 (amended in 1965).

[93] Naturalization Act of 1870, 16 Stat. 254.

at the time demonstrate the various arguments that led to the passage of this bill.[94] A grant of naturalization to foreign Blacks came as a result of most senators' reluctance to grant that same right to Chinese immigrants.[95] They painted African immigrants as a model group that stood in stark contrast to the unwanted Chinese. A New York Times editorial even described how bringing in additional African immigrants would provide valuable labor in southern states such as Mississippi.[96]

Ironically, Senator Warner, who proposed the amendment that gave naturalization privileges to foreign Africans, did not contemplate immigrants from Africa in his proposal.[97] Instead, the debate demonstrates that his focus lay more with immigrants from Latin America who were of African descent.[98] Some scholars contend that allowing naturalization for foreigners of African descent arose from the lack of significant populations of this group immigrating to the United States, in contrast to the Chinese, as well as the idea that few African immigrants would actually take advantage of the Act.[99] It is telling that this facially beneficial change in immigration law likely arose without people from the actual continent in mind and instead as a way to justify withholding the right of citizenship from an unwanted group.

The Naturalization Law of 1870 is just one of many ways in which immigration law has affected African immigrants without actually targeting them as a distinct group. In some cases, the indirect impact is not always positive. For instance, the 1965 Immigration Act helped

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[94] CONG. GLOBE, 41st Cong., 2d Sess. 5155 (1870).

[95] *See* Laosebikan, *supra* note 25, at 42; Best et al., *supra* note 78.

[96] Laosebikan, *supra* note 25, at 44.

[97] *Id*.

[98] *Id*.

[99] *Id*. ("The final decision to include foreign Africans as one of the two races eligible for naturalization is likely influenced by the relative absence of significant populations of foreign persons of African descent and the perception by Senator Warner and others that few African immigrants would ever take advantage of this Act.").

remedy the Asian exclusionary policies that had previously characterized United States immigration law through its family reunification and skill-based focus. Although it led to significant gains in Asian and Latino immigration, it did little to impact African immigration.

To illustrate, Asian and Latino groups saw an immediate rise in immigration with the passage of the 1965 Immigration Act. Between 1961 and 1970, Latin American immigration rose from fifteen to thirty-nine percent of the total immigrating population.[100] Likewise, Asian immigration increased to thirteen percent of the total immigrating population, and by 1981, thirty-three percent of immigrants were coming from Asia.[101]

Despite the clear increase in Asian and Latino immigration numbers, the effects on African immigration were negligible at best. Law professor Bill Hing describes how the 1965 law did little to facilitate African immigration from African countries.[102] This is because of the 1965 law's focus on family reunification, which required immigrants to have a family connection before arriving in the United States. This meant that the law simply reinforced the low numbers of groups, such as Africans, who were historically underrepresented as immigrants in the nation. For instance, in 1990, only 9,316 Africans immigrated to the United States using the immediate relative category, which accounts for three percent of the total.[103] Figures such as this meant that African countries did not come close to taking advantage of the 20,000 visas available to them under the family and occupational categories after 1965.[104]

[100] Walter Jacob, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 303 (1992).

[101] *Id.*

[102] Hing, *supra* note 2.

[103] *Id.*

[104] Hing, *supra* note 18.

As Black people, African immigrants have historically been vulnerable to legislation meant to disenfranchise African Americans. At the same time, their status as immigrants also meant that immigration policy has affected them in unique ways. Due to their historic underrepresentation in immigration, the family reunification policies that characterized the 1965 immigration reforms did little to benefit African immigrants as they primarily targeted Asians and Latinos. The above discussion demonstrates how the intersectional identity of African immigrants has historically contributed to their low numbers in the United States.

IV. APPLYING INTERSECTIONAL THEORY TO EXPLORE THE UNIQUE HARMS AFFECTING AFRICAN IMMIGRATION

A. Visa Denials, Demographic Intersectionality, and Claim Intersectionality

Principles from intersectionality theory help in understanding the present challenges African immigrants face as a result of their dual identity. African immigrants are vulnerable to both demographic intersectionality and claim intersectionality, which are the two types of intersectionality issues that arise in the legal context.[105]

Demographic intersectionality occurs when discrimination or stereotyping targets people who occupy two or more demographic categories.[106] Instances of demographic intersectionality occur in the discrimination faced by many potential African immigrants with United States consulates through visa denials.[107] The United States Consulate has been known to provide guidelines to employees detailing how certain groups, such as Nigerians, are more prone to fraud.[108]

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[105] Best et al., *supra* note 78.

[106] *Id.* at 994.

[107] *Id.*

[108] Olsen v. Albright, 990 F. Supp. 31 (1997) (holding that policies instructing adjudicators of nonimmigrant visas to follow fraud profiles

This categorization makes Nigerians more susceptible to visa denial than Europeans and even some Asian immigrant groups.[109] Although this designation can be viewed simply as a question of nationality, upon further scrutiny, the lines between race and nationality are quite blurred. For example, in *Olsen v. Albright*, the court described evidence of manuals which detailed how certain areas in Brazil were more prone to fraud than others.[110]

Notably, these fraud-prone areas were also the areas in Brazil with a high concentration of Black Brazilians. Officers were instructed to regard anyone from these areas as suspect unless older or well-traveled.[111] *Olsen* demonstrates how race and nationality function together within the content of immigration to produce discrimination. Attempts to delineate where racial discrimination ends and nationality discrimination begins prove futile when dealing with immigrants who are both Black and foreign. In the case of Nigerians and Black Brazilians, one could characterize their unequal treatment in visa applications as simply a product of fraudulent behavior. Yet if predominantly White consulate officers look upon Black visa applicants and automatically view them as non-trustworthy and criminal, then there most certainly exists a racial aspect to the discrimination which is intertwined in their nationality.

In addition to demographic intersectionality, African immigrants are also vulnerable to claim intersectionality. *United States v. Okoronkwo* concerned five defendants convicted of filing false income taxes.[112] One of the

based on factors such as race or national origin constituted unlawful discrimination).

[109] *Id*. at 34 ("According to Consular Section Head Patricia Murphy: 'Another body of guidelines is not post-specific but nationality-specific[.] For example, Filipinos and Nigerians have high fraud rates, and their applications should be viewed with extreme suspicion, while British and Japanese citizens rarely overstay, and generally require less scrutiny.'").

[110] Olsen v. Albright, 990 F.Supp. at 34.

[111] *Id*. at 33.

[112] United States v. Okoronkwo, 46 F.3d 426 (1995).

defendants, Ezinwa, claimed the district court failed to properly conduct *voir dire* since it did not thoroughly question jurors about prejudice against the Nigerian nationality of all but one of the defendants.[113] The court rejected this argument on the basis that the constitution does not require questioning prospective jurors about racial or ethnic bias unless there are special circumstances.[114] Despite the defendant's contention that his case involved special circumstances due to the flood of fraud cases involving Nigerians, the court maintained that special circumstances involved a crime of violence. Furthermore, the jurors had been asked to take into consideration the defendant's race, nationality, or "unusual-sounding names."[115] *Okoronkwo* demonstrates a challenging situation in which a potentially glaring site of difference in the form of stereotypes associated with Nigerians could have played a role in juror decisions, yet the court chose not to address potential bias despite noting the defendants' "unusual names." It is very possible that the defendants were also impacted by their Black skin color, yet the combination of both racial and national bias was not deemed sufficient enough for the court to recognize.

B. Lack of Representation in the Creation of New Policy

The invisible state of African immigrants bears important consequences for the creation of new policy that has the potential to increase their immigration. As discussed earlier, the family reunification-centered policies that characterized the 1965 Immigration Act did not significantly benefit African immigrants, whose immigration numbers were too small and recent to have an established family presence within the United States to help them take advantage of such reunification policies. Africans have instead benefited from the diversity visa, which was passed

[113] *Id.* at 433.
[114] *Id.* at 444.
[115] *Id*. at 434.

through the 1990 Immigration Act[116] as well as the Refugee Act.[117]

Despite how the Diversity Act has served as an entry point for Africans, the primary intended targets for its inception were Irish and Italian immigrants.[118] In fact, during the lobbying for the diversity visa, representatives of African immigrants were absent from the floor.[119] In response, Senator Edward Kennedy's office contacted members of the Congressional Black Caucus to seek support for the diversity provisions.[120] However, the Congressional Black Caucus took no position on the issue as they felt that it was not particularly damaging to the Black community.[121] This exchange demonstrates how the invisibility and lack of representation of African immigrants plays out in politics and negatively affects their influence on immigration law.

This situation also reveals how having an intersectional identity that is often mistaken with that of an American group can also disadvantage African immigrants. Here, Senator Kennedy assumed that the Congressional Black Caucus could represent African immigrants. Nevertheless, given the American citizenship of native Black Americans, they saw nothing to gain through taking a position on immigration policy. Thus, similar to examples of how Black women could not seek relief based on race or gender, African immigrants' interests were not being met in lobbies representing immigrants, nor could they be met in domestic Black groups such as the Congressional Black Caucus. This example demonstrates the importance of identifying the uniqueness of the Black and foreign identity that African immigrants experience and how these identities have the

[116] Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990).

[117] Refugee Act, Pub. L. No. 96–212, 94 Stat. 102 (1980).

[118] Jacob, *supra* note 100, at 298.

[119] *Id.* at 323.

[120] *Id.* at 324.

[121] *Id.*

power to limit the creation of new policy that takes African immigrants' interests into account.

C. Failure to Recognize African Immigrants Makes Laws that Facilitate their Immigration More Vulnerable to Attack

The invisibility of African immigrants also has a negative impact when the benefits Africans derive from certain immigration policies go unnoticed. This becomes particularly important when such policies are under attack. On February 13, 2017, for instance, Senator Tom Cotton of Arkansas and Senator David Perdue of Georgia introduced the "Reforming American Immigration for Strong Employment Act," or the "RAISE Act," which eliminated the Diversity Visa Program.[122]

Bills such as these bring many arguments against the diversity visa to the forefront. For instance, some argue that the lottery is susceptible to fraud and could also serve as a way for terrorists to enter the United States.[123] While these arguments betray very racialized views of who or what serve as a threat to the United States, other arguments criticize the diversity visa's failure to carry out its purported mission of increasing the diversity of those who immigrate to the United States.[124] In fact, some scholars have gone so far as to term the diversity visa "anti-diversity" because of its original intention to increase immigration from Europe.[125] This

[122] S. 354, 115th Cong. (2017) (the bill also seeks to reduce the number of family-sponsored immigrants, replacing these programs with nonimmigrant visas, and limit Presidential discretion in admitting refugees).

[123] Anna O. Law, *The diversity visa lottery: A cycle of unintended consequences in United States immigration policy*, 21 J. AM. ETHNIC HIST. 3 (2002).

[124] Andowah A. Newton, *Injecting Divesity into U.S. Immigration Policy: The Divesity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States*, 38 CORNELL INT.'L L.J. 1049, 1050 (2005).

[125] *Id.*

perceived need to increase European immigration arose as lobbyists felt that Americans of European descent had been in the United States for too long a period of time to benefit from the family reunification centered policies that the 1965 immigration reforms brought.[126] At the same time, the diversity visa explicitly prevented regions which had benefited from family reunification policies such as Asia and Latin America from entering the lottery.[127] As a result of these realities, some view the diversity visa as simply an attempt to restore the demographics of the country to its pre-1965 state and counter the influx of Asian and Latino immigrants that 1965 immigration reforms allowed.[128]

While this argument is valid, eliminating the diversity visa based on its apparent European preference ignores the fact that it is one of the main sources of entry for many African immigrants. Unlike Asian and Latino immigrants, African immigrants often did not have family members in the United States to benefit from the reunification policies of the 1965 immigration reform. Thus, the diversity visa's existence becomes all the more imperative for African immigrants' access to immigration compared to many other groups. This situation suggests that the analysis of the effectiveness of immigration laws has to occur in a more nuanced fashion that takes into account the existence of more obscure groups such as African immigrants.

D. Importance of Recognizing African Immigrants in the Wake of President Trump's Executive Orders

President Donald J. Trump's 2017 executive orders provide a helpful context for revealing the ways in which the intersectional identity of African immigrants renders them uniquely vulnerable in the current political climate. Specific

[126] *See* Jacob, *supra* note 100 at 308.

[127] *See* Newton, *supra* note 124 at 1054.

[128] *See*, *e.g.*, Jacob, *supra* note 72, at 299 (discussing Congressional concern over the rise of non-English-speaking immigrants from Asia and Latin America after the 1965 Act).

provisions in his newly signed executive order may pose a substantial risk to the future status of African immigrants in the United States. These provisions include the prioritization of deportations for those with criminal charges,[129] the elimination of the Visa Interview Waiver Program,[130] the temporary suspension of entry through refugee visas[131] and the broad-brush painting of immigrants as prone to fraudulent behavior.[132]

On January 25, 2017, President Trump signed into law an executive order entitled "Enhancing Public Safety in the Interior of the United States."[133] This Order established priorities for removal of undocumented immigrants, disqualified sanctuary cities from federal grants and made a public comprehensive list of criminal actions committed by aliens available to the public.[134] Section 5 of the Order prioritizes deportation for those who "have been charged with any criminal offense, where such charge has not been resolved" or "have committed acts that constitute a chargeable criminal offense."[135]

While this provision could seem insignificant and even reasonable to some, in reality, it poses a unique risk to African immigrants. Black people are far more likely than any other demographic in the United States to be arrested, convicted, and imprisoned in the criminal justice system.[136] In fact, Black people are arrested at 2.5 times the rate of White people.[137] This criminalization of Blackness even manifests

[129] Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (issued Jan. 25, 2017).

[130] Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (issued Jan. 27, 2017).

[131] *Id.*

[132] *Id.*

[133] 82 Fed. Reg. 8799 (issued Jan. 25, 2017).

[134] *Id.*

[135] *Id.*

[136] JULIANA MORGAN-TROSTLE & KEXIN ZHENG, BLACK ALLIANCE FOR JUST IMMIGRATION, THE STATE OF BLACK IMMIGRANTS PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM 15 (2016).

[137] *Id.* at 15.

itself within the immigration court context as Black people are overrepresented in removal proceedings.[138] Although only 5.4% of the undocumented population in the United States is Black, 10.6% of those in removal proceedings are Black.[139] Because the above executive order does not distinguish between those who have been found guilty of a crime and those who are merely charged, all interactions with the police may render Black immigrants at risk of deportation.

The threat of negative encounters with the police unfortunately exists in spite of Black people's attempts to obey the law. The case of Ahmadou Diallo, an unarmed Guinean immigrant, who was shot and killed by four NYPD plain clothed police officers because he matched the general description of a serial rapist, serves as a cruel reminder of how the criminalization of Blackness exists apart from individual actions.[140] Moreover, it solidified the reality that African immigrants are not exempt from the dangers of being Black in America.

As of this writing, President Trump's most controversial executive order was arguably "Protecting the Nation from Foreign Terrorist Entry Into the United States."[141] Much has already been said about the Order's controversial banning of entry from citizens from six designated countries, yet it also contains additional provisions that are especially damaging to African immigrants.[142] For instance, Section 3 of the Order suspends the Visa Interview Waiver program and instead requires all visa applicants,

[138] *Id.* at 20.

[139] *Id.*

[140] Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man is Killed*, NY TIMES (Feb. 5, 1999), http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html [https://perma.cc/R5MS-GFRT].

[141] Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (issued Jan. 27, 2017).

[142] The six countries are Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.*

including repeat applicants, to undergo a visa interview.[143] This measure increases the burden of getting a United States visa for both immigrant and non-immigrant applicants and also introduces the possibility of bias within the visa process. As mentioned earlier, the visa interview is a site where United States officials can impose their biases onto applicants, which has an especially negative impact on Black applicants.[144]

With this new order, even those who have undergone the visa application process earlier and simply want to renew their visa, will once again have to subject themselves to visa interviews. To make matters worse, the Trump Administration has framed the need for this measure around the idea that many immigrants come to the United States on a fraudulent basis.[145] African immigrants are often perceived as more fraudulent than immigrants from other areas and having the assumption of fraudulent behavior as the baseline in the interaction with consulate officers makes for a worrisome prospect.[146]

In addition to eliminating the Visa Interview Waiver program, the foreign terrorism executive order also suspends the Refugee Admissions program for 120 days.[147] While news coverage mainly focused on how this order would affect targeted Muslim-Majority nations like Syria, in reality, this measure has huge implications for the African continent as a

[143] The Visa Interview Waiver Program allows certain applicants seeking to renew a United States visa stamp in their passport to submit their documentation to receive the visa without having to appear for a personal interview with a United States consular officer. *See* 8 U.S.C. § 1202.

[144] Ogletree, *supra* note 21, at 762.

[145] Section 4 of the Order reads "Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis." Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (issued Jan. 27, 2017).

[146] Ogletree, *supra* note 21, at 762.

[147] Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, § 6 (issued Jan. 25, 2017).

whole regardless of religious affiliation. As a matter of fact, thirty-seven percent of refugee arrivals to the United States come from Africa.[148] Furthermore, the highest number of refugees from any nation come from the Democratic Republic of Congo.[149] Somalia, which was also on the executive order, sends the fourth largest amount of refugees under the Refugee Admissions program.[150] The data reveals that suspending the Refugee Admissions program in the name of terrorism prevention ultimately suspends one of the most important channels for African immigrants to enter the United States.[151]

E. Failing to Recognize the Intersectionality of African Immigrants Warps the Immigration Discussion

The final harm that occurs with the failure to recognize the intersectional position of African immigrants in the United States is that it warps the discourse surrounding immigration and creates dichotomies between immigrants and African Americans specifically where they may not already exist. An intersectional view of immigration would not be complete without analysis of the cross sections and connections between African Americans and immigrant groups. For instance, some scholars talk about resentment between the two groups since immigrants have used their relative freedom from discrimination, group cohesiveness, and access to capital to perform better economically than African Americans who still face discrimination.[152]

While this phenomenon may be true for certain groups, the discussion fails to take account of how African immigrants

[148] Monica Anderson, *African immigrant population in the U.S. steadily climbs*, PEW RESEARCH CENTER, Feb. 14, 2017, http://www.pewresearch.org/fact-tank/2017/02/14/african-immigrant-population-in-u-s-steadily-climbs/ [https://perma.cc/YXB3-K26J].

[149] *Id.*

[150] *Id.*

[151] CAPS ET AL., *supra* note 15, at 10.

[152] Margulies, *supra* note 83, at 533.

often face the same types of racial discrimination as African Americans. As discussed earlier, the 1999 police shooting of Guinean immigrant, Amadou Diallo, in New York revealed this shared racial victimization.[153] While some in the burgeoning African immigrant community in New York had thought themselves immune to the racial profiling faced by African Americans, this shooting dispelled all such notions of exemption from America's racial hierarchy.[154]

Although Africans may experience invisibility as immigrants, their race often renders them hyper-visible when it pertains to racial profiling. Professor Joan Fitzpatrick aptly reveals how prejudice effects different immigrants in various ways when she describes how "[f]alse perceptions of foreignness thus pose a risk to Mexican Americans. African immigrants like Diallo, in contrast, are at risk because they are subject to the same racial stereotyping as African Americans born in the United States, and are suspected without reasonable cause of involvement in drug trafficking and violent crime."[155] This "[f]alse perception of membership in the indigenous community"[156] complements Mai Ngai's notion of "Alien citizen" where Asians and Latinos are viewed as foreign in spite of their citizenship.[157] Fitzpatrick sheds light on a phenomenon where African immigrants are viewed as indigenous to the United States and are thus subjected daily to the racial stereotyping and brutality that threatens African Americans. To assume that the interests of African Americans and immigrants diverge completely ignores the racial discrimination that African immigrants experience as Black people.

[153] Cooper, *supra* note 136.

[154] Joan Fitzpatrick, *Race, Immigration, and Legal Scholarship: A Response to Kevin Johnson*, 2000 U. ILL. L. REV. 603 (2000).

[155] *Id*. at 603.

[156] *Id.* at 610.

[157] Ngai, supra note 5.

V. CONCLUSION

Considering the risks faced by African immigrants particularly due to their race forces one to reshape the nature of immigration discourse from one of binary oppositions to a more nuanced approach that takes into account how the interests of immigrants can converge and diverge based on their different racial backgrounds. To talk of immigrants as Asians or Latinos fails to capture the diversity within the groups that arrive in the United States and acknowledge the various faces of immigration.

The longer a group remains obscured, the harder it becomes to create policies facilitating their immigration, and the more likely measures that already benefit them can be attacked. The prevalence of African immigrants affected by President Trump's Executive Orders, illustrates a scenario in which both race and immigration status render African immigrants especially vulnerable. Because measures such as prioritizing deportations for those with criminal charges directly implicate Blackness, these issues are key areas for the Congressional Black Caucus to intervene. Unfortunately, the lack of intersectional analysis of the "Muslim ban's"[158] impact, obscures the fact that it directly targets citizens of three African countries and bears consequences for countless more both within and outside the United States.

Reshaping the immigration discourse to include an intersectional approach to analyzing African immigrants also forces one to consider the diversity within the catch-all "African American" race, into which Black people in the United States are grouped. While Amadou Diallo demonstrates the shared interest that African immigrants have in ending police brutality, so too does the reluctance of the Congressional Black Caucus to support the diversity visa demonstrate that the interests of African immigrants and Native Blacks may align and diverge at different points.

[158] Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (issued Jan. 27, 2017).

Whereas some may shy away from this fact out of fear of causing division and undermining coalition between Black people in America, the acknowledgement of the diversity amongst Black people can help tailor policies that better target groups on the margins and ultimately create more robust channels for their immigration to the United States.