Mediation: A New Way to Discuss the Complexities of Racialization in the American Workplace

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I. INTRODUCTION

Discussions about race are often centered on individuals and intentional actions while ignoring the more fundamental and severe consequences of racialization\(^1\) in society’s structures and opportunities. As mediation is often a successful tool in going beyond the right-wrong dichotomy,\(^2\) mediation can effectively be used to discuss and alleviate discriminatory practices in the workplace. Increasingly, mediation programs are implemented in communities during intergroup conflicts such as those between gangs and ethnic groups.\(^3\) These types of community-based mediation programs can be used to “encourage the decentralization of control of decision making, the development of indigenous community leadership, and the reduction of community tensions.”\(^4\) By applying mediation programs similar to these community-based mediation programs, mediators can draw out the underlying and unidentified interests related to race in the workplace. Furthermore, mediation resolutions can influence company policy changes that directly challenge institutional, racialized forces. Since workplace discrimination is the product of many institutional relationships, the ability of mediators to reach beyond the surface is imperative to success.

Section II describes structural racialization in America, hitting key points in history to understand the present condition of structural racialization today. Then, the note specifically discusses structural racialization in the workplace. This note includes a thorough discussion of structural racialization in order to properly frame the discussion of race, workplace discrimination, and individual action. Section III defines mediation and analyzes three types of mediation: facilitative, transformative, and evaluative. Section IV proposes that mediators can alleviate discriminatory practices in the workplace by using facilitative and evaluative mediation. Through consistent use of strong, assertive mediators, structural racialization can be directly combated.

II. STRUCTURAL RACIALIZATION IN AMERICA

Discussions about race are unique and often underscored by defensiveness and discomfort. The history of slavery and racial discrimination has developed a stigma that “racism is bad.” Because of this stigma and general discomfort, people discussing issues that implicate race often go out of their way to diminish an actual, thorough discussion of race. This

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\(^3\) For instance, one such program in New York City placed mediators in African American communities to encourage peaceful rather than violent demonstrations after the Rodney King verdict was announced. Daniel McGillis, Community Mediation Programs: Developments and Challenges 21 (1997).

\(^4\) Id. at 10.
discomfort and sometimes outward denial of racism are often summed up in arguments that fall on hasty reasoning, such as the notion that racism in America died with President Obama’s election. However, this type of reasoning obfuscates the truth and leaves the giant elephant of racism in the room. President Obama’s “race speech” given in March of 2008 demonstrated just how big that elephant is. In a moment of both candidness and courage, Obama acknowledged the elephant saying:

Race is an issue that I believe this nation cannot afford to ignore right now. The fact is that the comments that have been made and the issues that have surfaced over the last few weeks reflect the complexities of race in this country that we’ve never really worked through—a part of our union that we have yet to perfect. Understanding this reality requires a reminder of how we arrived at this point. We do need to remind ourselves that so many of the disparities that exist in the African-American community today can be directly traced to inequalities passed on from an earlier generation that suffered under the brutal legacy of slavery and Jim Crow.

President Obama not only claimed that race cannot be ignored but also made the link between institutions and racial disparities. This link is often overlooked by focusing on intentional racist actions. Generally, words and actions are deemed racist only when “intentionally enacted to produce outcomes that injure some or benefit others.” This idea stems from the popular belief that racism is a “matter of individual agency” and that “racism requires that the offending word or act be race-targeted.”

Structural racialization, on the other hand, is a framework that departs from this individualistic conception and recognizes the significance of inter-institutional arrangements and interactions (structures) in society. These structures, especially in complex societies, “help to create and distribute benefits and burdens, and interests in society.” As one’s access to opportunity is produced and regulated by these structures, their “neither natural nor neutral” character creates inequitable racial disparities in the ability of an individual to succeed within the structure. Access to opportunity is assessed by access to social, political, and economic goods.

Social institutional actors, such as schools, businesses, courts, and legislatures, play large roles in the production and reconfiguration of social identities, while the social, economic, and political advantages that whites hold over other Americans.

This argument complements the legal theory of strong colorblindness. Strong colorblindness is a theory that suggests, “we should ignore race altogether so as to achieve racial equality in the future.” This is a reference to political discourse that unfolded after Reverend Wright’s made inflammatory comments claiming America was trying to act like God and shouted, “God Damn America!”


Grant-Thomas and Powell define opportunities as “resources and services that contribute to stability, advancement, and general well-being.” Id. at 8.
“in shaping individual and group well-being.” Andrew Grant-Thomas and John Powell assert that these actors matter for at least three reasons:

First, because of the social goods under their purview (schools and education, hospitals and medical care, faith-based organizations and spiritual guidance, and so on); second, because of the roles they play in mediating access to other institutions; and third, because of the access they provide to social networks with varying kinds and amounts of social capital. These reasons elucidate the interconnectedness of the institutional actors and their significant, formative roles in society. Communities are often linked between these institutions, and the failure of one institution spirals into the others. Historically and currently, American society has denied marginalized groups access to these social goods and social networking through its structurally induced racial inequality.

A. History of Racism in the United States

Understanding how structural racialization functions today requires an analysis of its origin and development. As America’s history begins with its colonial history, so does its understanding of race. During colonial times, “among the educated classes, race prejudice was low and when the Negro was first enslaved, his subjugation was not justified in terms of his biological inferiority.” In fact, Africans were treated in the same way as European indentured servants and American Indians. While this equivalent treatment was still reprehensible, the wrongs suffered by these groups were not based on a modern conception of race. In fact, several decades passed before the modern conception of race formed.

The formation of racial identities in the United States started with Bacon’s Rebellion in 1676. In Virginia, indentured whites and slaves joined in an attempted revolt against the proprietor class because of proposals to extend their terms of bond labor. In effect, Bacon’s Rebellion was a lower class rebellion. In response, the proprietor class “decided to greatly increase the importing of slaves, to reduce the number of indentured servants, and to be much more selective in choosing them.” After retaining more slaves, the Virginia Company developed a control stratum by using poor whites as slave guards. By giving poor whites a policing function, the previous solidarity shown in Bacon’s Rebellion was broken. This separation led to a transformation in colonial society where identity was based upon the

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13 Id. at 12.
14 Id.
15 Id.
18 Myrdal explains that during the colonial time, “when the Negro was first enslaved, his subjugation was not justified in terms of biological inferiority.” Myrdal, supra note 16, at 84.
19 Id.
21 Id.
superiority of the white race. The implantation of a race-based control stratum illuminates how racial hierarchy was not natural but was instead a “more conscious manipulation of society by the elite ruling class.”

This key point in the history of racialized identities demonstrates that individual prejudice is not actually the cause of racism; rather it is “the result of our social racialization process.”

This basic division between the poor white and poor (or enslaved) blacks permeated throughout the early history of the United States through the Civil War. Even political discussions were framed by the workplace divide of Bacon. During emancipation debates, “Northern antislavery politicians argued that the extension of slavery into new territories was a threat to the wage labor workers of the North.” Conversely, slavery supporters appealed to “Northern white workers to oppose abolition because the North would be flooded with African American competitors if slavery ended.” These selling points worked exceptionally well; blacks in Northern states were forced out of the market, leaving them no choice but to take jobs with extremely poor wages and working conditions. White workers directed their frustration at blacks rather than recognizing the actual source of the problem—racial bias.

Worker frustration and emancipation fears triggered race riots all over the country, from Cincinnati to New York City. In Cincinnati, Irish and German laborers “rampaged through the black section of town, burning homes and beating people.” In New York City, laborers went on strike “enraged at having to risk their lives for the freedom of the blacks.” The divisive labor line whose seed was planted after Bacon’s Rebellion resonated loudly in both the North and the South during the Civil War.

During the Reconstruction period following the Civil War, blacks were not met with open arms but instead with Black Codes aimed at the restoration of slavery and jurisprudence that used the Civil Rights Amendments to advocate for corporate rights rather than civil rights. W.E.B. Du Bois noted that during this time, “White workers had been convinced that the degradation of black workers was more important than the uplift of white workers.”

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24 Id.
25 Grant-Thomas & Powell, supra note 8, at 4.
26 Id.
27 Id.
28 Carr, supra note 22, at 17.
29 Id.
30 Michael L. Levine, African Americans and Civil Rights from 1619 to the Present 92, (1996). Even after the Civil Rights Acts of 1866 were passed de jure discrimination often forced blacks into positions of virtual slavery. Darrell Miller, White Cartels, The Civil Rights Act of 1866, And the History of Jones v. Alfred H. Mayer Co., 77 Fordham L. Rev. 999, 1024 (2008). In Mississippi, freed men had to certify that they had employment for the upcoming year and were bound to stay in that employment. Id. If they left their jobs early, “they forfeited their earned wages and could be arrested by any white citizen.” Id. In South Carolina, blacks were not allowed to occupy any position other than that of laborer or farmer unless they paid an annual tax. Id. Furthermore, many employers banded together to refuse to hire freed men leaving many blacks with one option, to return to their former masters for work. Id. at 1025.
31 Levine, supra note 30, at 92.
32 Id at 93.
33 Id.
34 Id.
36 Maritnot, supra note 23, at ¶ 90.
Northern capitalists, “the newly won human rights of former slaves were of interest only insofar as black voters served as check on the political power of the Southern planter elite.” Continued resentment of the Civil War and blacks resulted in the formation of terrorizing organizations such as the Ku Klux Klan, the Knights of the White Camelia, the White Brotherhood, the Council of Safety, the Constitutional Union Guard, and the Pale Faces. Meanwhile, the government took steps demonstrating that support for civil rights for freed slaves had dissipated; the 1872 Congress pardoned nearly all of the Confederate supporters who had been barred from holding office under the Fourteenth Amendment. The Supreme Court “reduced the federal government’s power to defend civil and political rights, giving most enforcement authority to the states” through its decisions in the Slaughter House Cases and United States v. Cruikshank. Thus, the same planter class in control in the South prior to the Civil War continued to rule, thus leaving societal blocks “in the South more rigidly racist than ever.”

After the Reconstruction Era ended in 1877, segregation and Jim Crow laws ran rapidly throughout the South and continued into the 1900s. Most notably, in 1896, segregation was specifically condoned by the Supreme Court in its Plessy v. Ferguson decision which held a Louisiana railroad segregation law constitutional. Andrew Barlow explains that the “very existence of Jim Crow segregation resulted from the potential for racial integration that lay within industrial capitalism. Without the use of state power to keep the races apart and unequal, the system of free labor and capital had the potential to create a non-racial working class in urban America.” Barlow’s sentiment echoes the lesson learned from Bacon’s Rebellion. Jim Crow laws strengthened white identity based on exclusion that was created in colonial America. Only whites had “the privilege to walk anywhere, work anywhere, live anywhere and exclude anyone.” Jim Crow created blatant exclusion from social goods and benefits. Steve Martinot concludes that while these control stratum change with time, “the principles upon which [the

37 Jeffrey Kaplan, The Birth of the White Corporation, 5 By What Authority 1, 3 (2003).
38 LEVINE, supra note 30, at 103.
39 Slaughter House Cases, 83 U.S. 36 (1873); United States v. Cruikshank, 92 U.S. 542 (1876).
40 LEVINE, supra note 30, at 104. Justice Black’s dissent in Connecticut General Life Insurance Company v. Johnson articulated how the Fourteenth Amendment was being used for corporations rather than new citizenship. He states, “If the people of this nation wish to deprive the states of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their own state boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An amendment having that purpose could be submitted by Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose.” Connecticut General Life Insurance Company v. Johnson, 303 U.S. 77, 90 (1938).
41 LEVINE, supra note 30, at 109.
42 Plessy v. Ferguson, 163 U.S. 537 (1896). Justice Brown’s decision made a distinction between legal and social equality and stated that, “If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.” Id. at 552.
43 LEVINE, supra note 30, at 115.
45 Powell and Watt, supra note 35, at 5. “The excluded persons were simply non-white.” Id.
46 Martinot explains that “Jim Crow constituted a system in which impunity was given each white person to exact obeisance from any black person, as an aspect of everyday white social life. Put in place through legislation after 1876 in the south, and by cultural extension in the north, its norm of disenfranchisement divested black people of the right to testify in court against white assailants, thus enabling no legitimate self-defense against incipient violence. Though paramilitary terrorist groups like the KKK served as the vanguard of control stratum, the line between their mob violence and quotidian white impunity was never anything but blurred.” Martinot, supra note 22, at ¶ 90.
control stratum] developed in the colonial era, as the expression of a culture of whiteness deploying norms of violence, systematic terrorism, internal black exile, and a consolidation of white cultural consensus remain in effect [today].”

Moving forward in history, the deterioration of race relations continued as the early twentieth century witnessed increasing housing segregation, the formation of black ghettos, and a continuing declining economic status for blacks.\(^\text{48}\) The ghettos became the most crowded areas of American cities, and because realtors refused to sell homes to blacks in white neighborhoods, there was little a black person could do to get out of the ghetto.\(^\text{49}\) As blacks had limited housing choices, landlords used their leverage to increase rent and forego making necessary household repairs.\(^\text{50}\) During this time, municipalities would allow gambling establishments and prostitution houses within the ghettos while simultaneously preventing them from operating in white neighborhoods.\(^\text{51}\) Meanwhile, new manufacturing plants pushed out skilled, self-employed black laborers while concurrently refusing to hire blacks.\(^\text{52}\) Furthermore, the influx of white immigrants gave employers and unions a preferred group to pull from, leaving only the lowest-paying jobs for blacks.\(^\text{53}\) Michael Levine notes that the dwindling economic prospects and segregated living arrangements (which symbolized white resentment of blacks) left many blacks in despair, causing some blacks to drop out of mainstream society altogether.\(^\text{54}\)

Not all blacks dropped out of the mainstream; many continued to fight for equality which blossomed into the Civil Rights movement.\(^\text{55}\) The National Association for the Advancement of Colored People (NAACP), whose major strategy was to fight for justice in the courtroom, formed early in the century and developed into a political voice for blacks.\(^\text{56}\) However, throughout the first half of the century, progressive strides were continually met with pushbacks, especially in labor efforts. For instance, in the 1930s and 1940s—during a time of tremendous gain in the labor movement under Roosevelt’s administration—labor unions gained power but often refused to welcome blacks.\(^\text{57}\) During Truman’s presidency (1945-1953), he won the support of blacks by integrating the military and increasing social welfare legislation.\(^\text{58}\) Truman’s Justice Department also supported some NAACP cases, notably Shelley v. Kramer.\(^\text{59}\)

\(^\text{47}\) Id.
\(^\text{48}\) LEVINE, supra note 30, at 122.
\(^\text{49}\) Id. at 123.
\(^\text{50}\) Id. “A Chicago real estate operator took out two ads for the same apartment. On read ‘seven rooms, $25’; the other read ‘seven rooms for colored people, $37.50.’” Id.
\(^\text{51}\) Id.
\(^\text{52}\) Id.
\(^\text{53}\) LEVINE, supra note 30, at 123. “The statistics show that blacks rapidly lost economic ground in the late 19th and early 20th century. In Cleveland, 32 percent of black men worked at skilled trades in 1870; over the next 40 years, the figure dropped to 11 percent. In New York, the 1910 figure was below 5 percent.” Id.
\(^\text{54}\) Levine writes that “They abandoned all efforts to find jobs, spent their time standing idly on the streets, gambled, drank heavily, had loose sexual morals, and often engaged in crime. Such people, later known as the underclass, became a permanent part of the ghetto.” Id. at 124.
\(^\text{55}\) Id.
\(^\text{56}\) Id. at 160.
\(^\text{57}\) Id. at 164.
\(^\text{58}\) Id. at 174.
\(^\text{59}\) Shelley v. Kramer, 334 U.S. 1 (1948). The Court struggled with that fact that the restrictive agreements, alone, would be constitutional because the discrimination occurred between private individuals. Id. at 13. The Court noted that the Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or
that held restrictive covenants based on race were unconstitutional. Following this lead, in 1954, Attorney General James McGraney filed a brief in the landmark case *Brown v. Board of Education* where he argued that segregation in schools was unconstitutional. Despite these substantial gains, Truman’s Congress failed to abolish state voting poll taxes, failed to bar segregated terminals in interstate transit, failed to make lynching a federal crime, and continually rejected most of the civil rights legislation Truman proposed. Following Truman’s presidency, Eisenhower took a hands-off approach to civil rights resulting in considerable governmental inaction.

Persistent government inaction throughout the mid-fifties created an even greater need for civil rights advocates to push for a national social movement. During the late 1950s and early 1960s, some of the most significant and celebrated civil rights protests occurred. This was the era of Rosa Parks, Martin Luther King Jr., the Greensboro Sit-In, and the March on Washington. The nonviolent protests of the era left people battered on the streets and imprisoned in jail cells. After one nonviolent protest, Martin Luther King Jr., was imprisoned in Birmingham Jail where he sat down and wrote a letter which described the appalling situation and painful experiences of the time:

Perhaps it is easy for those who have never felt the stinging darts of segregation to say, “Wait.” But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can’t go to the public amusement park that has been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five-year-old son who is asking: “Daddy, why do white people treat colored people so mean?”…then you will understand why we find it difficult to wait.

Dr. King’s stirring words depict the picture of inequality in a more comprehensive framework; in the passage above, he not only identifies intentional racist acts that people commonly associate with racism, but he also identifies the structural system that has his “brothers in an air-tight cage of poverty,” and the unconscious, implicit racism that he fears is affecting his own child’s “little mental sky.” Recognizing the unconscious and structural elements of discrimination is

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60 LEVINE, supra note 30, at 174.
61 Brown v. Board of Education, 347 U.S. 483 (1954). Chief Justice Warren identified the harm of segregation as “the feeling of inferiority as to their [blacks] status in the community.” Id. at 495.
62 LEVINE, supra note 30, at 174.
63 Id. at 177.
64 Id.
65 The sheer fact that the civil rights movement was a contemporary movement erodes the possibility that a color-blind society exists.
67 Id.
imperative when discussing issues of race and inequality as well as many of the policies and problems that occur in the workplace, in housing, and in virtually every dimension of society.

In the last fifty years, perhaps the most “visible” progress has been made in Civil Rights. The Civil Rights Movement produced legislation that ended Jim Crow, refused federal aid to segregated schools,\(^69\) and ensured voting rights.\(^70\) During the late 1960s, President Johnson was able to pass legislation that aided the poor, including Medicare and Medicaid, which opened the Office of Economic Opportunity and expanded the federal food stamp program.\(^71\) Despite the progress made, blacks continued to lag behind whites. For instance, in 1969, blacks earned less than two-thirds that of whites, and black unemployment was double that of whites.\(^72\) Furthermore, with the onset of other political movements in the 1970s, “black equality had to compete with new causes for public support.”\(^73\) The 1970s economy also meant few job opportunities for blacks because of the national stagflation that caused many whites “to worry that a bigger slice [of the economic pie] for blacks would mean a smaller one for them.”\(^74\)

The 1970s, however, was also the time that affirmative action policies came into force.\(^75\) The rationale behind these policies, such as raising the proportions of blacks in the workforce, was based upon the reasoning that “after systematically oppressing blacks for more than 300 years, whites could not fairly expect blacks to compete on an equal basis; blacks needed, and were owed, special consideration.”\(^76\) This controversial policy led many Americans to move further to the political right.\(^77\)

The social policies of Nixon and Ford reflected this discontent

\(^{68}\) “Race occupies many domains, not just what is in our explicit, conscious mind. There are two other important areas on which to focus. One is what is in our unconscious mind, also referred to as implicit mind. The second is the effect of our institutional and cultural interactions in our society.” The unconscious mind represents about 98% of the mind, leaving only 2% conscious. Thus, while people may often assert that they are not making decisions based on race, this accounts for only the 2% of their mind that they are aware of. John A. Powell, *Understanding the Unconscious Side of Racism*, HUFFINGTON POST, ¶ 4, http://www.huffingtonpost.com/john-a-powell/understanding-the-unconsc_b_377213.html (last visited Mar. 28, 2011).

\(^{69}\) In 1964, 2% of black students in the South were in integrated schools; in 1968, 20% were. By 1970, 90% of the southern states had desegregated their schools. However, “desegregated” schools did not necessarily mean equality, in some schools, all the black children were taught in the basement and not in classroom with white peers. Levine, *supra* note 30, at 192.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id.

\(^{73}\) Id. at 209.

\(^{74}\) Levine, *supra* note 30, at 209. As such, Americans became more reluctant to support equality for economic opportunity.

\(^{75}\) Id.

\(^{76}\) Id. at 210. Many people opposed affirmative action policies claiming that it is effectively a form of reverse discrimination and that “American society should be based on equal rights for individuals, regardless of the racial, religious, ethnic, or other group to which one might belong.” Id. The use of racial classifications was analyzed by the Supreme Court in its decision in Regents of University of California v. Bakke, 438 U.S. 265 (1978). Justice Powell’s opinion articulated some of society’s concerns with Affirmative Action by stating that, “Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.” Id. at 298.

\(^{77}\) Id.
with affirmative action; Nixon eliminated War on Poverty programs, and Ford outwardly opposed affirmative action.\textsuperscript{78}

In 1976, Carter placed civil rights back in the political discourse; Carter appointed the first black woman to the cabinet and strengthened civil rights enforcement agencies.\textsuperscript{79} However, his attention to civil rights was still moderate, and he was demolished in the 1980 Presidential race by Ronald Reagan who “seemed to believe that racial discrimination had nearly disappeared and was no longer a problem of any real significance.”\textsuperscript{80} In fact, Reagan’s Assistant Attorney General for Civil Rights argued in the Supreme Court that affirmative action should be outlawed.\textsuperscript{81} Reagan notoriously opposed social welfare programs believing that programs for the poor “destroyed individual initiatives and kept the poor in poverty.”\textsuperscript{82} Levine states that the most troubling part of Reagan’s policies may have been the “strong public endorsement they received when he ran for reelection in 1984.”\textsuperscript{83} Following Reagan’s lead, George Bush continued the same civil rights policies. For instance, Bush vetoed a bill that was to set aside a handful of Supreme Court decisions that “seriously hampered civil rights enforcement.”\textsuperscript{84}

The last twenty years have been riddled with the same civil rights questions and misconceptions. While President Clinton began the 1990s by strongly supporting affirmative action, his Republican Congress aggressively tried to eliminate it.\textsuperscript{85} Race riots continued to take place—and continue to take place.\textsuperscript{86} While there were fair housing laws in place, housing segregation remained in practical effect.\textsuperscript{87} Data from the 1991 Federal Reserve Board showed that “blacks at every income level had only half as much chance as whites at the same income level to get a home mortgage.”\textsuperscript{88} While statistical analyses used in discrimination cases showed clear racialized disparities during this time, the U.S. Supreme Court was hostile to looking at the results of such studies.\textsuperscript{89} This hostility trickled down throughout the circuit courts as the Second Circuit found a statistical study “meaningless” that presented evidence that being African American “reduced an employee’s likelihood of being promoted by 33 percent.”\textsuperscript{90} In this case,

\textsuperscript{78} Id. Ford also vetoed major bills aimed to help the poor such as bailouts in financially troubled cities and cut back on food stamp allocation. \textit{Id.} at 211.

\textsuperscript{79} Id. at 212.

\textsuperscript{80} Id.

\textsuperscript{81} L\textsc{e}V\textsc{i}NE, \textit{supra} note 30, at 212.

\textsuperscript{82} Id. at 213.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 216.

\textsuperscript{86} The Los Angeles riot of 1992 is one of the most prominent contemporary race riots. \textit{Id.} A man recorded a group of Los Angeles police officers beating Rodney King, an African American, after they apprehended him during a high speed chase. King filed suit against the police officers for the beating, but the officers were acquitted. In protest of the acquittals, race riots ensued which resulted in the death of thirty-eight people, the arrest of over 4,000 people, and the destruction of nearly 3,700 buildings. \textit{Id.}

\textsuperscript{87} Id. at 230.

\textsuperscript{88} Id.

\textsuperscript{89} This hostility began with the Court’s refusal to evaluate statistics that showed racial disparities; instead, the defendant had to specifically show intentional racial discrimination. R\textsc{u}D\textsc{o}L\textsc{p}H\textsc{h} A\textsc{L\textsc{e}x}\textsc{a}n\textsc{d}, \textit{R\textsc{a}c\textit{i}sm, A\textsc{f\textsc{f}r\textsc{i}c\textit{a}n A\textsc{m}\textsc{e}r\textit{i}c\textsc{a}ns, A\textsc{n}\textsc{d S\textit{c}o\textsc{r}\textit{i}al J\textit{us\textsc{t}i}c\textsc{e}}, 116 (2005). In McCleskey v. Kemp, a capital punishment case arising out of Georgia, the defendant tried to use research that showed that “capital punishment was most likely being meted out for defendants who have been convicted of killing White persons.” \textit{Id.;} See McCleskey v. Kemp, 481 U.S. 279 (1987).

\textsuperscript{90} A\textsc{L\textsc{e}x}\textsc{a}n\textsc{d}, \textit{supra} note 89, at 16.; See Robinson et al. v Metro North, 267 F.3d 147 (2d Cir. 2001).
the plaintiffs—namely, 1300 employees—tried to prove a company’s racial discriminatory practices by introducing evidence that African Americans were three and half times as likely to be disciplined for the same violations as white workers.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{powell and Watt, supra note 20, at 4.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Andrew Grant-Thomas & john a. powell, Structural Racism and Color Lines in the United States, in 21\textsuperscript{st} CENTURY COLOR LINES: EXPLORING THE FRONTIERS OF AMERICANS MULTICULTURAL PRESENT AND FUTURE 8 (2008).\footnote{id.\footnote{id.\footnote{id.\footnote{id. at 10.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}\

91} The difference in discipline was statistically strong, occurring less than 1 time in 1000.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id. at 10.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}\

92} Despite this difference, the Court did not find that the study showed racial discrimination.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

93} Today, the same hostility of racialized statistics exists despite the fact that large disparities in treatment and benefits of African Americans continue. For instance, neighborhoods remain as segregated as they did during Jim Crow—a clear result of restrictive covenants and private lenders refusing to sell to African Americans.\footnote{powell and Watt, supra note 20, at 4.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

94} Because of the rampant poverty within these black neighborhoods, the communities’ schools are directly affected by inadequate funding.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

95} Poorly functioning schools lead to lagging educations, higher drop-out rates, and lower college admissions.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

96} Thus, black families still have “little access to local jobs, transportation, and adequate education.”\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

97} These factors are all interconnected, and their interconnectedness is “all part of the structural racialization framework that demonstrate how structures operate to produce racialized results.”\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

98} One example of structurally-induced racial inequality is the relationship between college admission policies and Advanced Placement (AP) classes. Grades earned in AP classes are one of the most influential factors in the college admissions process.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

99} Students who have taken AP classes are more likely to “get into their preferred schools, receive generous financial aid, and graduate on time or early because of the course exemptions they may receive.”\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

100} Because white students are considerably more likely to attend schools that offer such courses, “counting AP performance heavily in admissions decisions is unfair and promotes inequality.”\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

101} There are three structural elements to this example. First, college admission policies make college access partially reliant on students’ access to AP courses in high school.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

102} Second, the college admissions disregard the fact that high school participation in the AP program is extremely uneven.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

103} Finally because of the history of racial inequality, many minority students are in school systems that do not offer any AP classes.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

104} This structural example requires an analysis of interactions between institutions: housing markets, K-12 education, higher education, school district boundaries, educational funding arrangement, labor markets, and residential zoning practices.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{Id.\footnote{id. For instance, in California during the 1990s, fifteen percent of the public schools offered no AP course, but seventeen percent offered over fifteen. id.\footnote{Grant-Thomas, supra note 99, at 10.\footnote{id.}}\

105} The relationship between these institutions ultimately promotes racialized outcomes
in higher education. The joint operation of these institutions creates the cumulative effect of structural racialization.

Inter-institutional relationships create racialized outcomes in many areas in society, especially in the workplace. While the Civil Rights Act of 1964 “helped open the doors to college and universities that previously were off-limits to blacks,” college-educated blacks are still disadvantaged. The Economic Policy Institute reports that “college-educated blacks are almost twice as likely to be unemployed as their white counterparts.” The 2011 unemployment rate for blacks with bachelor’s degrees is 9.9 percent while the same rate for whites is only 5.5 percent. In Ohio, the overall unemployment rate for African-Americans is expected to reach 20%, a 25-year high. Andrew Grant-Thomas explains that in order to explain this discrepancy “you have to first look at the human capital all college educated people have.” African-Americans still suffer between the type of education and experience they have compared to that of whites, which is influenced by a series of opportunities and institutional discrepancies.

B. Structural Racialization in the Workplace

Continuing racial disparities and disputes in the workplace must be viewed within this broader structural framework, paying particular attention to the historical foundation of race and understanding between institutional relationships. Taking the Virginia Company example discussed earlier, institutional workplace discrimination becomes apparent. There, the corporations, fearful after Bacon’s rebellion of a poor white-slave alliance, developed an identity for the poor white as a prison guard which successfully severed ties based on class and illuminated differences based on color. While this strategy may superficially look like a means to divide and conquer opponents, it effectively did much more than this; it developed an identity for the poor white man that was completely based on excluding others. John a. powell suggests that this history implies that racial divisions “were less than a natural order or phenomenon, and much more of a conscious manipulation of society by the elite ruling class.”

The legacy of white identity based on exclusion remains a powerful factor in the workplace, and especially prevalent in unions. From the late nineteenth century through the New Deal era, thousands of blacks found work on the railroads. At this time, powerful railroad unions

106 Id.
107 Randy Tucker, Workplace Equality for Blacks Remains Elusive; College-educated blacks are almost twice as likely to be jobless, data show, DAYTON DAILY NEWS, Jan. 17, 2011, at A5.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 See Marinot supra note 23, at ¶ 64.
114 powell & Watt supra note 20, at 3.
115 Id.
116 Id.
formed, but nearly all of the unions “banned African Americans by constitutional provision.”

Despite union strikes for white-only hiring policies, railroads and other industries had an incentive to hire blacks because they could pay them at least 10-20% less than whites. Thus, about 100,000 blacks worked for railroads but could not join unions. Unions continued to fight black inclusion up until 1944 when the U.S. Supreme Court ruled that railroads must represent all workers fairly, including African Americans, because they had been granted a monopoly by the Railway Labor Act.

Once blacks were admitted to unions, little changed in their treatment. During union protests for wage increases, whites would often request blacks to protest alongside them. However, “after the strike was over, the white [workers] expressed hostility toward the black union members, and harassed them despite their participation in the strike, as if their blackness rendered them closer to the strikebreaker than their actions placed them to the union.” In fact, whites would often acknowledge that the exclusion of blacks undercut labor efforts, but the sentiment was articulated by one Texas firearm that “we would rather be absolute slaves of capital, than to take the negro into our lodges as a[n] equal brother.” Marinot explains that the treatment of black workers after strikes shows how the relationship between whites and blacks was affected by the labor union’s segregation policy. Once the strike was over, the workers divided based on color to resume the roles given to them and fall back on racialized identity.

In the early twentieth century, the American Federation of Labor President, Samuel Gompers, warned his following that “Caucasians are not going to let their standard of living be destroyed by the Negroes, Chinamen, Japs or any other.” The discriminatory practices of Unions are recognized and explained by many people; even Chief Justice Warren noted in United Steelworkers v. Weber that “the gross discrimination against minorities to which the Court adverts—particularly against Negroes in the building trades and craft unions—is one of the dark chapters in the otherwise great history of the American labor movement.” Currently, the struggle has been transformed into a battle with affirmative action. The debate around affirmative action “demonstrated the problem of racial allocation of union benefits that characterized nearly a century and a half of black-union relations.” Racial discrimination continues to be a highly contested issue but having conversations that address the issue is essential if society is to move forward. These necessary conversations can begin in mediations about discriminatory practices.

The union-minority struggle illustrates the difficulty in discussing discriminatory practices, fully understanding the issues involved, and creating solutions that target not just

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118 Blacks were also banned from other trade unions such as the Boilermakers, the International Association of Machinists, and the Blacksmiths. Id.
119 Id. at 239.
120 Id.
121 Id. at 244.; See Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).
122 Marinot, supra note 23, at ¶ 64.
123 Id.
124 Bernstein, supra note 116, at 238.
125 Id.
128 Id. at 218.
129 Gompers, supra note 126, at 283.
individual reform but structural reform. Since mediation is traditionally used between two parties, it may be difficult to see how mediation can go beyond discriminatory actions and reach the entire structure. This note suggests, however, that to actually address an inequality in any single area, the entire structure in which the inequality arises must be analyzed. Absent the holistic approach, mediators will only be reacting to symptoms rather than inoculating the disease. Furthermore, because intentional racist behavior is often times the effect of structures, mediators must be ready to break down these disputes into several parts. Once the problem is viewed in its structural context, the mediator will be able to design a more effective solution which may incorporate employer policy changes and educational programs. Mediation decisions may also be used as a template for creating structural changes in the system. For instance, if a company experiences ongoing claims of racial discrimination, the mediation decisions which incorporate a structural analysis of the problem can be used by the company to create hiring practices that combat the structural inequalities in the system. Ultimately, since successful mediation incorporates flexible structures and the ability to define and control the process, the mediator may have the best chance of clarifying the issues and encourage understanding between the parties.

III. MEDIATION PRACTICES

As disputes involving race tend to be framed in a simplistic manner, either overemphasizing intentional racism or ignoring structural issues altogether, it is imperative that dispute resolution centers on interactive, robust dialogue. As mediation resolves issues by using third parties to facilitate face-to-face discussions, mediation is the tool that should be used when resolving disputes involving race. Part III discusses mediation generally and then elaborates on common types of mediation: facilitative, transformative, and evaluative mediation.

A. Mediation

Mediators vary in assertiveness and willingness to give suggestions. Despite this, mediations share common characteristics. All mediators must create a safe environment so that parties feel like they can reveal their thoughts and emotions. Trust in the mediator as well as the process is essential to dispute resolution. Successful mediation sessions rely on several broad factors: (1) mediation assumes the issues are resolvable, (2) mediators define and control

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130 Grant-Thomas & powell, supra, note 8, at 4
131 SELMA MYERS & BARBARA FILNER, MEDIATION ACROSS CULTURES, 21 (1993).
132 See, powell, supra, note 5.
133 Id. at 32.
134 Id.; See MARICK MASTERS & ROBERT R. ALBRIGHT, THE COMPLETE GUIDE TO CONFLICT RESOLUTION IN THE WORKPLACE 144-45 (2002) “Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution.” Mediators often “wear the hat of a housekeeper, ringmaster, educator, communicator, and innovator.” Id.
135 Id.
137 Id.
the structure of the process, (3) feelings are useful and can be discussed in order to clarify issues for the parties, (4) flexible environments are used depending on the context, (5) mediation encourages respect and understanding of the parties’ values, (6) mediation is premised on confidentiality which encourages openness and risk-taking between parties, and (7) mediation agreements are consensual which equalizes power.\textsuperscript{138} This open and constructive framework is designed to facilitate an “in-depth exploration of personal issues” and “address future behaviors.”\textsuperscript{139}

Most mediation models include four main stages: “an opening stage, an information-gathering stage, an exchange/negotiation stage, and an agreement stage.”\textsuperscript{140} The opening stage begins with an introduction which describes the roles and expectations of individuals involved and sets ground rules for the process.\textsuperscript{141} The second stage focuses on the individual perspectives in the conflict.\textsuperscript{142} During this stage, the mediator summarizes the issues and constructs an agenda based on her understanding of the issues identified.\textsuperscript{143} In the exchange/negotiation stage, the mediator helps the parties understand the other party’s point of view and identifies real interests.\textsuperscript{144} Identifying real interests will be particularly significant when dealing with unconscious racism.) After the interests are properly identified, the mediator will use strategic paraphrasing and transition into the agreement stage.\textsuperscript{145} In the final stage, the resolution is achieved by exploring options, generating criteria for evaluating those options, and finally selecting an option.\textsuperscript{146} Moreover, the mediation process is conducted in a “non-judgmental nature” that focuses on the articulation of real interests and goals.\textsuperscript{147}

B. Types of Mediation

Mediators use different techniques and assert various levels of control based on context and style.\textsuperscript{148} Mediators serve as the “catalyst that enables the parties to initiate progress toward their own resolution of issues in the dispute.”\textsuperscript{149} This note will discuss facilitative, transformative, and evaluative mediation.

1. Facilitative Mediation

Facilitative mediation is based on two guiding principles: (1) that of self-determination and (2) that a neutral third party “facilitates communication among the parties, promotes

\textsuperscript{138} MYERS & FILNER, supra note 131, at 21-22.
\textsuperscript{139} Id. at 20.
\textsuperscript{140} Id. at 23.
\textsuperscript{141} Id. This mediation is usually set an informal tone which hopes to incite a participatory process. Id. at 24.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} MYERS & FILNER, supra note 131, at 25.
\textsuperscript{145} Id. at 26.
\textsuperscript{146} Id.
\textsuperscript{147} Id. Unlike other dispute resolution processes, mediation offers a unique emphasis on interests rather than simple considerations of factual matters. KOVACH, supra note 2, at 58-59. This focus on interests focuses on “what people really want or what means the most to them in terms of the ultimate outcome.” Id.
\textsuperscript{148} MASTERS & ALBRIGHT, supra note 134, at 144. Mediators use techniques that “differ in their degree of directedness or control.” Id.
\textsuperscript{149} Id.
understanding of the issues, focuses the parties on their interests and seeks creative problem solving, including creative solutions outside the legal normative box.”

The facilitator will often focus more on the emotional aspects of the dispute and encourage the parties to fully discuss the factors that led to the dispute. Focusing on the manner in which things are said is important to the facilitator, not simply on what is said. The facilitator plays an active role in the promotion of the flow of information and aids the parties in moving beyond preconceived notions. Despite this active role, the mediator does not share her opinion on the possible solutions, as doing so could diminish the feeling of impartiality. Moreover, the facilitator keeps the parties grounded and focuses on a robust dialogue that includes emotions and reaches beneath the surface issues.

2. Transformative Mediation

Transformative mediation concentrates on the conflict interaction itself. It is a “process in which third parties work with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive.” The mediator helps the parties make “interactional shifts” of empowerment and recognition. The goal of this form of mediation is to have “parties recapture their sense of competence and connection, reverse the negative conflict cycle, reestablish a constructive interaction, and move forward on positive footing.” Since this form is particularly focused on the individual autonomy and prerogative, transformative mediators strain to avoid giving explicit advice.

3. Evaluative Mediation

Evaluative mediation is a form of mediation that focuses more on legal rights rather than personal interests. The basic belief of evaluative mediation is that the parties can benefit “when a knowledgeable and objective third party provides guidance about substantive issues and

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151 Nancy Kauffman & Barbara Davis, *Matching Parties’ Goals with Mediation Styles*, in HANDBOOK ON MEDIATION 105, 106 (Thomas E. Carboneau et al. eds., 2006). Focusing on the emotional aspects “empowers parties to take hold of the reins of decision-making after airing their differences; it recognizes the parties’ inherent right to control their own destinies.” *Id.*
155 *Id.*
157 *Id.*
158 *Id.* at 53.
159 *Id.* at 77.
the merits of their positions.”  

It is not uncommon for these mediators to make assessments about the parties’ arguments throughout the process. This form of mediation utilizes the mediator as a teacher, which can be a large part of the purpose of mediator in the first place. Participants often have difficulty understanding the conflict from their adversary’s position and even discover information about the dispute they did not know.

IV. MEDIATION CAN COMBAT RACIALLY DISCRIMINATORY PRACTICES

This note suggests using a combination of facilitative and evaluative mediation when resolving disputes that either explicitly or implicitly involve race. Since the history of U.S. racism and the creation of racialized identities is not well known, but extremely important to understanding race in the United States, having a mediator who is versed in this history is necessary. A mediator who understands the historical and structural issues involved in racism will be able to help the parties achieve a more holistic and transformative resolution.

Facilitative mediation produces an environment that thrives on dialogue, focuses on emotion, and generates respect for the other party. This focus allows the process to delve into reasoning behind actions and helps to eliminate mistaken preconceived notions—essential steps when talking about race. This facilitative framework should be used with an evaluative mediator. The assertive leadership given by evaluative mediators allows for more interaction and instruction from the mediator, which ultimately allows for more comprehensive solutions. The use of educated and race-sensitive mediators is integral to finding solutions that actually address all of the issues involved.

1. Using Systems Thinking

Mediators should employ systems thinking when resolving disputes. Systems thinking recognizes that problems are “not comprehensible by searching for single causes or by trying to reduce problems into their separate components for individual analysis and resolution.” This theory accounts for the interdependency of groups and agents. powell argues that the organization and relationship between the parts of a system “as much as the components themselves” actually “shape the outcomes and behaviors.” powell explains that workplace discrimination in not solely a product of the actions of the employer and employee, “it is the relationship between those two people, the history of segregation, slavery, uneven and unequal

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161 Id.
162 Id.
164 Id.
165 Levin, supra note 160, at 269.
166 Id.
167 John a. powell, Talking About Race: Toward a Transformative Agenda, in RESOURCE NOTEBOOK, 15 (Kirwan Institute, 2010).
168 Id. at 15. Systems thinking is intended to be used as a perspective “from which we can better understand how to design solutions and craft effective interventions to challenge these problems.” Id.
169 Id. This idea is referred to as “emergence” which acknowledges that “the whole is greater than the sum of its parts.” Id.
rights, and a host of other factors that all work together and in different ways in a way that results in discriminatory behavior.”

Workplace discrimination is an example of a complex system where outcomes and behavior patterns do not flow from intentions. While a traditional view of causality is linear, the systems thinking approach is not; “each effect has multiple causes, and each cause has multiple effects.” Therefore, notions of “cause and effect” are not singular; one component does not cause an outcome in a system, rather “it only modifies existing processes which produce those outcomes.”

Causality is multiple and cumulative, influencing domains over time. Using systems thinking merely requires being “attentive to relationships within the system and to the response from the system to our interventions.” Systems thinking generates a more accurate picture of action and consequences because it “follows the ripple to the end of the pond,” thereby illustrating the larger effects throughout the entire system.

2. Mediation Session

In the actual mediation session, the mediator will need to use systems thinking when designing the problem, the organization of the mediation, and the final solution. Using systems thinking is particularly vital when designing the problem itself, especially since problem designs are “traditionally presented as single-solution problems.” The systems thinking mediator will be able to identify the parties’ needs holistically. For instance, in a traditional discrimination dispute, the needs of the employee may be to be treated fairly, to be given an equitable wage, to be respected, or to be able to participate in company programs that foster dialogue between employees and management.

The mediator may then try to fractionalize the issue into component parts and link issues that are contingent upon others.

After the needs and interests of the parties are identified, the mediator will design the organization of the mediation. Setting the agenda for the mediation can be a highly strategic step for the mediator. There are several agenda approaches a mediator might take from dealing with issues ad hoc, from the most difficult to the least difficult, to letting the parties decide which issues to discuss, etc. In a mediation focused on framing the structural racialization issues, the

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170 Id.
171 Id. In fact, an individual’s intentions may altogether “be thwarted by the interaction of that individual’s decisions with the behavior of others.” Id. at 16.
172 John A. Powell, Talking About Race: Toward a Transformative Agenda, in RESOURCE NOTEBOOK 16 (Kirwan Institute, 2010).
173 Id.
174 Id.
175 Id.
176 Id.
178 Id.
179 Id.
180 Kovach, supra note 163, at 183.
181 Id.
182 Kovach, supra note 163, at 183. Kovach explains that “when and how each of the issues is approached for discussion and resolution will influence the progression of the mediation.” Id.
183 Id. Kovach lists nine approaches: 1) ad hoc, 2) simple agenda, 3) alternating choices by the parties, 4) principled, 5) less difficult first, 6) most difficult first, 7) order of importance, 8) building-block or contingent agenda, and 9) tradeoff or packaging. Id. at 184.
mediator must focus on the most difficult issue first—determining how institutions are interacting to produce the discriminatory behavior. This determination will be made by looking at several factors: the opportunity structures in a specific location, the location’s history of discrimination, and employer practices.

The mediator then can begin the process by airing out the problems and allowing both parties to discuss their emotional responses to the dispute. In fact, because mediation is centered on the parties’ interests, the parties must “take a very active part in the process.” During this point of the mediation, the parties can enjoy more speaking time while the mediator asks questions to facilitate the discussion and determine what the parties want and what they think is occurring. The mediator should direct the conversation by asking questions that engage the parties to consider more than the surface-level dispute and explicitly talk about race. The mediator can begin by asking the parties: “What are the issues that need to be negotiated?”; “What are the secondary issues that need to be negotiated?”; “How does race play a part in this dispute?” and “Are there other factors that are influencing the alleged discriminatory behavior?” By having the parties consider these questions themselves, the mediator is directing the conversation outside the realm of individual action which will broaden the picture of the dispute in the parties’ minds as well as reduce the animosity between the parties. Thereafter, the mediator will be able to clarify and prioritize the interests that unfold from the discussion.

In the third step of the mediation, or the solution design, the mediator should incorporate more of the evaluative techniques. The evaluative model provides for a strong leader-mediator who is more involved and offers assessments during the process. Here, the mediator can begin with tackling the surface-level problem. For instance, if the parties were mediating workplace discrimination based on a company’s lay-off policy, the negotiation agreement can first direct a targeted response to alleviate the harm. Then, the negotiation may design a transparent lay-off policy that does not unevenly harm minorities. Since a racially discriminatory lay-off policy is a multi-dimensional problem, the negotiation agreement will need to address the entire system involved. The lay-offs could have been made using factors that seem non-racial initially, but after a systematic evaluation, the mediator may find that the policy is racialized. For instance, if the lay-off policy was based on seniority or education level, these are factors that disproportionately harm African Americans because of a history of reduced access to education and career opportunities. From this point, the mediator can introduce solutions that account for these inter-institutional relationships. In this lay-off example, the employer may end up

\[\text{\textsuperscript{184}}\] Andrew Grant-Thomas and John Powell explain that “If the functional interdependence of institutional actors and networks in generating social outcomes is the first, permissive face of structural racism, then the fragmentation of decision-making authority across the institutions and networks that mediate those outcomes is critical corollary. The fragmentation of decision-making authority has important implications for racial equity. First, absent efforts at coordination, even well-intentioned actors can produce misaligned and therefore discriminatory policies and practices. Many minority males in large urban school systems enter a “school-to-prison-to-dropout pipeline” created by education and juvenile justice systems working at cross-purposes. Structural Racism and Color Lines, Grant-Thomas and Powell, supra note 99, at 16.

\[\text{\textsuperscript{185}}\] Kauffman & Davis, supra note 151, at 106.

\[\text{\textsuperscript{186}}\] Kovach, supra note 2, at 59.


\[\text{\textsuperscript{188}}\] Kovach, supra note 2, at 59.

\[\text{\textsuperscript{189}}\] Levin, supra note 160, at 267.

\[\text{\textsuperscript{190}}\] Grant-Thomas & Powell, supra note 99, at 16.
revamping her entire employee selection process, implementing broad race-conscious policies or find another creative solution that reflects that discriminatory practices are not just a matter of individual action but are influenced by a plethora of other factors. Ultimately, these mediation decisions that connect the individual to the structural influences can be used to generate long-term policy changes in the company.

V. CONCLUSION

Racial discrimination is not simply a matter of individual action; it is multi-dimensional process that needs to be fully analyzed. Disparities that exist between blacks and whites are a product of structural racialization. Because of the relationships between society’s institutions, racial discrimination in any context is a product of multiple factors. Thus, when mediating workplace discrimination, proper attention must be paid to the system as a whole from the relationship between two people to the history of slavery and segregation and to the prevalence of uneven and unequal rights. As mediators are uniquely empowered to facilitate constructive conversation and develop solutions that incorporate multiple interests, they should be heavily utilized in workplace discrimination disputes. Assertive, systems-thinking mediators can do more than resolve disputes between two people; they can use their mediation results to drive targeted changes in workplace policy. Moreover, because of the interconnectedness of institutions policy changes in the workplace may even help alleviate discrimination in other institutions.

191 “Many events may contribute or cause the same thing, and it is not always so easy to separate out which event is primary or even if there is a primary cause.” Powell and Watt, supra note 20, at 19. This understanding of cumulative causation also suggests that “traditional methods of understanding the causes of discriminatory effects seriously understates their impact.” Id.
192 powell & Watt, supra note 20, at 17.