Open-Minded Listening

Jonathan R. Cohen
University of Florida Levin College of Law, cohenjr@law.ufl.edu

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"Open-Minded Listening"

Jonathan R. Cohen*
University of Florida Levin College of Law

Abstract

Parties in conflict do not typically listen to one another well. On a physical level they hear what their counterparts say, but on a deeper level they do not truly absorb or think seriously about their counterparts' words. If they listen at all, they listen with an ear toward how they can refute rather than toward what they may learn. This article explores how we might change this. In contrast to prior research examining external aspects of listening (e.g., how being listened to influences the speaker), this article probes the internal side of listening, specifically, whether the listener will allow his mind to be changed by the speaker's words. What facilitates open-minded listening and what impedes it? With the goal of serving their own clients, how can lawyers help their clients better listen to what the other party says? Are there steps third-party neutrals, such as mediators, can take to foster listening among the parties? When "hearing" a case, can judges do so with open minds? Without some degree of open-mindedness among the discussants, many conversations are at root pointless. Conversely, with open-mindedness the possibilities for improved conflict reso-

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tion specifically and social development generally are tremendous.

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**Introduction**

In the spring of 2010, as part of a Supreme Court Historical Society Lecture Series, Justices Antonin Scalia and Stephen Breyer engaged in a televised discussion about constitutional interpretation. As one might anticipate, while there was some agreement between these Justices, there was significant disagreement too. Justice Scalia argued that the original historical meaning of the constitutional text should guide the Court’s interpretation of constitutional provisions. Justice Breyer argued that the Court should also look to other factors when interpreting constitutional provisions, including the provisions' underlying purposes, rather than the original historical meaning of the constitutional text alone. Each Justice is of course trained as a lawyer; it was not long before their discussion became a scintillating debate, with each


2. Id.

3. Id.
voicing his deeply held views. The aim in this article is not to enter the extensive literature on constitutional interpretation, though I would note that the Justices’ undergraduate college majors—Justice Scalia in history and Justice Breyer in philosophy—are predictive of their jurisprudential approaches many decades later. Rather, I would like to report on a particular episode from the debate for it captures well my subject here.

Approximately a half hour into the debate, Justice Breyer raised for the first time the idea of a linkage between examining textual provisions’ purposes and the goal of judicial transparency. Justice Breyer suggested that, as one of the branches of a democratic government, courts should, when possible, write opinions in a way the public can understand. He saw the interpretive approach of looking to textual provisions’ underlying purposes as advancing this end of judicial transparency. As he explained:

[When using “purpose” as a factor when writing an opinion,]
I have the job of writing it down, and I have to write it down in a way you can understand it. And if you think I’m wrong you can complain like mad . . . and I will see it in the paper eventually and begin to take it in. But anyway you can judge what I have written. But if I’m writing and trying to look to history [as Justice Scalia would prefer], I would say you haven’t a clue. And that is one reason I think in a democracy it’s better to look to the purposes. . . . Anyone who is able to read is probably able to follow it if you take the time. The ball is not hidden.

Justice Scalia was surprised by this transparency argument: “That is a new point. I’ve never heard you make that one before, Stephen, that judging is best which is most readily understandable by the people,” he commented. Justice Scalia, however, thought little of Justice Breyer’s idea and launched a forceful rebuttal. Using references ranging from the statutorily dense Employee Retirement Income Security Act (ERISA) code to Portia’s “pound of flesh” decision in Shakespeare’s The Merchant of Venice, Justice Scalia offered a sharp, witty, and erudite refutation of Justice Breyer’s claim. “[Your contention that] it’s a wonderful way for

6. Id.
7. Id.
8. Id.
judges to decide cases if the people can understand what they say, I mean, I never heard that before and I certainly don’t agree with it,” he opined.9 “[W]e spend years in training because the stuff we have to wrestle is difficult; it’s difficult, it’s arcane, and it’s not something within the reach of everybody.”10 Justice Scalia then returned to what he saw as the core issue, namely, that the original historical meanings of constitutional provisions are objective and clear, in contrast to the vague “purposes approach,” which could easily be manipulated to advance Justices’ personal values.11

When Justice Scalia concluded, it was Justice Breyer’s turn to speak again. Mildly exasperated by Justice Scalia’s attack, Justice Breyer’s initial response, which elicited a chuckle from the audience, was not about the substance of their discussion. Instead Justice Breyer retorted, “First, if I did make an argument you haven’t thought of before, I wish you’d think about it [before rejecting it!]”12

This brings me to the subject of this article: open-minded listening. Often we listen to one another, but we do not really listen. We hear, but we do not really hear. Sometimes this is because we are busy, distracted by other things. More deeply, however, often it is because our minds are already made up. If we listen at all, we listen not with an ear toward what we can learn, but toward how we can refute. Sometimes the failure to listen with an open mind results in mild affront, as in the Scalia-Breyer debate above. At other times it results in tragedy. I recently completed a study of a transformational reconciliation following a medical malpractice case where a healthy, three-year-old boy undergoing diagnostic testing died because the medical professionals failed to truly listen when his parents raised concerns about the testing process. As the physician overseeing the clinic where the fatal test was administered later expressed, “More than anything what I take away from this in terms of being a doctor is listening . . . . The one thing about this whole tragedy that struck me most was just that people didn’t listen.”13

Lawyers, in my view, tend to be poor open-minded listeners. How often has one heard it said of a child, “Johnnie is such a fine

9. Id.
10. Id.
11. Id.
12. Id.
listener; he should become a lawyer when he grows up”?—almost never! More significantly, many clients are poor open-minded listeners. Lawsuits are usually charged, stressful periods for the parties. Listening with an open mind in the midst of such conflict can be particularly difficult. Ego, anger, fear, and distractedness—to name but a few factors—may all kick in, making parties in conflict particularly resistant to new ideas and information. Ironically, it is precisely when parties are in conflict that the need for open-minded listening is typically greatest. Prior to his assassination, Yitzhak Rabin, the former Israeli general who later received the Nobel Prize for his peacemaking efforts as prime minister, was fond of saying, “You don’t make peace with your friends, you make peace with your enemies.”14 Analogously, the person one needs to listen to most carefully is not the person with whom one agrees but the person with whom one disagrees. This is not to say that one must agree with what the other person says, but that, generally speaking, it is wise to consider seriously their words. Indeed, the client who fails to think deeply about what the other party says may unnecessarily remain embroiled in conflict, missing important opportunities both to resolve and learn from the dispute.

What does it mean to listen to another with an open mind? What facilitates open-minded listening and what impedes it? With the goal of best serving their own clients, how might lawyers assist clients in better listening to what the other party says? Are there steps third-party neutrals, such as mediators, can take to foster listening among the parties? When “hearing” a case, can judges do so with open minds?

This article is in significant part exploratory. The questions above are large ones, and my central goal here is not to answer them fully but to raise them for consideration. While I do believe that there are steps people can take to become better open-minded listeners, I caution the reader at the outset that I have no magic prescription for instantly turning someone who is a poor open-minded listener into a good one, or for guaranteeing that a person who is a good open-minded listener will remain one. I am reminded of a story about humility—a subject related to open-minded listening, for open-minded listening takes humility—that I read years ago, which went roughly like this. A small Jewish community (shtetl) was looking to hire a new rabbi for their town. Rabbis in such towns wielded much power and, unfortunately,

sometimes turned into tyrants. The community sought to fill the position with a rabbi who was both wise and humble—and would remain humble in the years ahead. There were three applicants for the position. One by one the candidates were brought before a panel of community elders to be interviewed, and each candidate was asked the same question: “What can a person do to ensure that he will remain humble throughout his life?” The first candidate paused and then answered, “Recite Psalms each morning for an hour.” When it was his turn, the second candidate replied after some thought, “Begin each day by giving some charity (tzedakah) to the poor.” The third candidate was brought before the elders and, when asked the question, remained silent for some time. Finally he answered, “There is nothing a person can do to ensure that he will remain humble throughout his life.” The selection committee chose the third candidate.

The structure of this article is as follows. Part I begins by offering a definition of open-minded listening and compares this concept with other understandings of listening, including active listening. I discuss factors that impede open-minded listening (distrust of the other party, ego, fear of change, etc.) and factors that promote it (humility, good communication dynamics, acceptance of complexity, seeing one’s own beliefs as in part provisional, etc.) with particular attention to the importance of trusting one’s own capacity for judgment in the open-minded listening process.

Part II turns to the role of open-minded listening in law and conflict resolution. As mentioned, for people in conflict, listening with an open mind can be especially difficult. Are there steps parties can take to help them better listen to what their counterparts say? How might lawyers assist their own clients to better hear the other side? What can mediators do to help parties better listen to one another? How might judges employ open-minded listening in forming their own judgments? There are not perfect solutions to these issues, but often “simple” steps, such as pausing to consider what is true in what the other side expresses or taking the time to articulate the other side’s arguments, can be valuable.

While this article mainly focuses on open-minded listening in law and conflict resolution, open-minded listening also plays a significant role in society generally, and in Part III, I offer some very brief reflections on the linkage between open-minded listening and social development. From intimate family conversations to encounters with strangers in public spheres, whether we listen to others with open minds both significantly influences how events un-
fold and is also deeply constitutive of who we are as people. Part of what makes us "us" is that we listen to one another, and many of the most important things we learn in life we learn through our encounters with others. Especially in a democracy, and particularly in a world where rapid technological advancements give rise to social change and challenges, we need to recognize open-minded listening as a fundamental process of human social development and think seriously about how to educate for it, both within and beyond our formal education systems.

**PART I. OPEN-MINDED LISTENING: DEFINITION, PURPOSES AND OBSTACLES**

The act of listening to others is at least as ancient as language itself, however, in American scholarship, the formal study of listening is fairly recent. Indeed, there is no consensus view of what "listening" is. Listening may be understood, for example, as a process of discrimination (e.g., distinguishing relevant from irrelevant auditory stimuli), information gathering (e.g., listening to a weather report), comprehension (e.g., listening to a story), connection (e.g., a core bond of a relationship), therapy (e.g., helping the speaker to release inner burdens), or simply as an experience (e.g., listening to music). One can listen to what another says, but one can also "listen"—or at least pay attention—to their body language and other non-verbal behaviors. Further, different listeners use different styles when listening. Some listeners are empathetic, and some are sympathetic. Some are rational, and some are emotional. Some like to interject while listening, and some prefer to remain silent. In short, there is much variety both to how listening can be conceptualized and to how it can be practiced.

This article examines a particular style or quality of listening that I call "open-minded listening," and below I will specify what I mean by this. However, before doing so, a further introductory point may be helpful. The process of listening typically involves two parties: a speaker and a listener. Obvious though that may sound, this recognition is helpful to keep in mind, for sometimes

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15. See Graham D. Bodie et al., Priorities of Listening Research: Four Interrelated Initiatives 3 (2008) ("Many trace the origin of listening research to the work of Ralph G. Nichols [from 1948].").

16. Id. at 7. See also Michael W. Purdy, Listening, Culture and Structures of Consciousness: Ways of Studying Listening, Int'l J. Listening 47, 49 (2000) (describing multiple "camps" of listening research).

17. I write "typically" as certain forms of listening (e.g., listening for one's own thoughts, listening to music) do not involve two parties.
listening can be conceptualized primarily as an external activity that the listener “does to” the speaker, while at other times listening can be conceptualized primarily as an internal activity that takes place within the listener’s mind. Legal scholarship, for example, commonly frames listening primarily as an external process. The legal counseling literature frequently discusses the positive effect the lawyer’s empathetic listening may have upon the client and the lawyer-client relationship. In the dispute resolution literature, scholars often discuss the benefits of empathetic listening in terms of the influence “being heard” may have on the speaker’s behavior. There are, of course, internal aspects to listening in each of these cases (e.g., through empathetic listening the lawyer may gain information about the case and must form an understanding of what the client has said). Frequently, however, the primary focus is upon the external side of listening, that is, how being listened to affects the speaker.

In contrast, this article focuses upon the internal side of listening, more specifically, what takes place in the listener’s mind. Will the listener think seriously about the speaker’s words? Is the listener willing to change what he thinks or feels based upon what the speaker says? By open-minded listening, I mean the willingness to allow one’s heart and mind to be changed by what another says. In some cases, this will be a purely cognitive activity. For example, if a commuter driving to work hears a radio broadcast indicating that his regular road is closed and alters his route in response, the listening process is essentially cognitive. In many cases, however, such listening involves a significant emotional component too. Indeed, frequently the greatest barriers to open-minded listening are not cognitive but emotional. Truly listening to the other side might mean having to face the possibility that, on some points at least, the other side is right. Truly listening to the other side might force one to see the world, and even oneself, differently. Note, too, that lis-


19. See, e.g., Douglas Stone et al., Difficult Conversations, 166-67 (1999); Robert H. Mnookin et al., Beyond Winning 49 (2000). Some dispute resolution scholars do describe the need for genuine curiosity when listening. See, e.g., Stone et al., supra, at 168; Andrea Kupfer Schneider, Teaching a New Negotiation Skills Paradigm, 39 Wash. U. J.L. & Pol’Y 13, 29 (2012) (“Being empathetic in a negotiation requires a complex mix of skills—a willingness to hear the other side, open-mindedness or curiosity, good questioning and excellent listening, among others.”).
A listener could change his mind upon hearing the speaker’s words, but he might also need time to mull over what has been said to him. In some cases, such mulling may take seconds or minutes. In others, it could take weeks or even years.

Why listen to others with an open mind? There are many reasons, but let me mention four of the most salient. First is to learn something new. In conflicts, for example, the other party may have different information about events or a different understanding of those events. Even outside of conflict, other people possess different information and different ideas about the world. Open-minded listening is a fundamental means of learning, a core process through which our understanding of the world may be enriched. Second is to better address issues and solve problems. For example, in conflict, the other party’s words may hold within them the key to finding a solution to that conflict. Through listening we may become better able to appreciate the other side’s interests and concerns, and thereby find better solutions to problems. This is true both for individuals and for societies. Third is to nurture relationships. Relationships are usually strongest when people think seriously about one another’s words. I need not agree with what you say, but my considering it seriously is part of what helps “you” and “me” become a “we.” Fourth is to grow. This relates to the prior reasons, especially the first and the third (for by learning new things and through developing relationships with others we grow), yet it is somewhat different. At a deep level, the willingness to listen with an open mind reflects the posture a person takes toward life. One’s willingness to listen concerns how one understands oneself and one’s relationship to the world. Indeed, for some, listening is a key feature of a religious life. To listen with an open mind is to see one’s understanding as a work in progress, as something that may potentially be improved. Listening with an open mind is certainly


21. In my own religious tradition of Judaism, the religion’s most central prayer is called the Shema, a word that literally translates as “listen.” To some, this is understood in terms of obedience, that is, of following rules or instructions an authority dictates (e.g., “listen to what your parents say” or “listen to God’s commandments”). I often associate a different meaning with this prayer, namely, vocational discovery; that people should work at discerning what “God” (for want of a better word) asks of us. See generally ABRAHAM JOSHUA HESCHEL, GOD IN SEARCH OF MAN (rept. ed. 1976). Listening, of course, is a core concept in other religions as well. For a very thoughtful discussion of listening’s spiritual value in legal practice see TIMOTHY W. FLOYD, SPIRITUALITY AND PRACTICING LAW AS A HEALING PROFESSION: THE IMPORTANCE OF LISTENING, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 473-92 (MARJORIE A. SILVER ed., 2007).
not the only way to grow, however it is among the most important ways.

Are there obstacles to listening with an open mind? Yes, there are, and below I will discuss some of them. Before that, however, two more prefatory points are in order. First, if parties to a discussion do not listen to one another with open minds, at a deep level, many of those discussions are essentially pointless. If I am not willing to change my mind based on what you say and you are not willing to change your mind based on what I say, then what is the point of our talking together? Now in some circumstances there may be reasons to (pretend to) listen to another even though one has no intention of changing one’s mind in response to what another says. Generally speaking, however, without some degree of open-mindedness by at least one of the parties, many conversations have little use. Second, some might initially think that the opposite of open-minded listening is either having strong views or expressing those views, but neither is correct; rather, the opposite of open-minded listening is closed-minded listening—or more accurately put, closed-minded “non-listening.” Having views and expressing views are not, at root, “enemies” of open-mindedness (indeed, both can actually be helpful to it). The real issue is the rigidity with which one holds those views. Is one willing to permit one’s heart and mind to be changed by what another says? If yes, then one is engaged in open-minded listening; if no, then one is not.

If open-minded listening can be highly beneficial, especially when parties are in conflict, why do people, either as individuals or as members of larger groups, not engage in it more often? Put differently, what inhibits open-minded listening? Perhaps some psychologist or psychological researcher—of which I am neither—has produced a definitive answer to the question of what inhibits people from listening with an open mind, but if so, I have not found it. There certainly are a number of different branches of psychological research bearing on that question, including research on cognitive dissonance (i.e., people find absorbing information that conflicts with their prior beliefs uncomfortable), confirmation biases (i.e.,

22. Such reasons might include strategic delay and therapeutic benefit to the speaker.

23. I emphasize possibly because whether one ultimately changes one’s mind based upon what another says is not the measure of open-minded listening. Rather one’s willingness to do so (i.e., one’s potential flexibility) is the root issue.

24. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (defining “cognitive dissonance” and offering explanations for why people are drawn towards consistency); JOEL COOPER, COGNITIVE DISSONANCE: FIFTY YEARS OF A CLASSIC THEORY (2007) (reviewing research on cognitive dissonance); Vincent van Veen et al., Neural Activity Predicts
people seek out information that tends to confirm their beliefs),
identity-protective cognition (i.e., people adopt beliefs consistent with
their social sense of identity and “resist revision of those beliefs in the face of contrary factual information”),
dogmatism,
and even the neuroscience of listening (i.e., studying the brain’s physiological activity when a person listens).

Instead of attempting a rigorous analysis of what inhibits people from open-minded listening rooted in a particular theoretical psychological structure, let me simply describe what I see as some of the most salient factors inhibiting open-minded listening. This list of factors is certainly not exhaustive, and while I do believe each of these factors is important, I do not mean to suggest any particular priority among them. I shall divide these between factors inhibiting open-minded listening generally and factors inhibiting open-minded listening in conflict specifically.

A. General Factors Inhibiting Open-Minded Listening

Distractedness. If one’s mind is “somewhere else” when another person is speaking, one will not be able to absorb what the other person is saying. Put differently, being mentally present or “mind-
ful” in the conversation is critical to open-minded listening. Obvi-
ous though that sounds, it is not simple. Perhaps one is thinking
about what one needs to do later in the day or what one should
have done yesterday. Perhaps one is multi-tasking—an approach
that in theory sounds so efficient but in reality often is not, for the
person who focuses upon everything often accomplishes little. Lis-
tening to others with an open mind requires concentration, but all
too often many of us are distracted.

Ego. Often we do not bother to listen to others because we
think they have little to teach us. If one thinks, “I’ve heard it all
before” or “I already know all this,” then why bother to listen? Oc-
casionally such thoughts may be true, but usually they are not.
Humility aids open-minded listening and arrogance undermines it.
Related to this are issues of status and power. Sometimes we tend
to listen more to those of high status or power than to those of low
status or power. For example, a female colleague recently shared
with me an experience she had at a committee meeting. When she
made a point, it was ignored; but when a male colleague made ex-
actly the same point a few minutes later, it was taken seriously. It is
possible, of course, that reasons other than gender explained what
happened; but in her eyes, gender was the most likely culprit.

Fear of Change. If we truly listen to what another person says,
we might have to change what we think or do. We might even have
to change how we see ourselves in the world. The civil rights strug-
gle of the 1960s, for example, not only raised the external question
of legal equality for blacks, it also forced whites to confront their
own internal racist attitudes and beliefs (a struggle which continues
to this day). Even where listening does not implicate such deep
issues of identity, change itself can be disconcerting. I suspect that
most people like stability—we feel comfortable with what we al-
ready know. Change creates uncertainties. Listening to others
with an open mind invites uncertainty and, for reasons both good
and bad, often we do not like that.

Good open-minded listeners see their own beliefs as works in
progress: provisional, malleable, and adaptable to new information.

29. On mindfulness and its implications for conflict resolution, see generally Leonard L.
Riskin, The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation
to Law Students, Lawyers, and Their Clients, 7 HARV. NEGOT. L. REV. 1 (2002), and Leonard
L. Riskin, Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Sym-
posium, 61 J. LEGAL EDUC. 634 (2012).

30. Economists have labeled this the “status quo bias” and have found empirical evidence
supporting it. See generally William Samuelson & Richard Zeckhauser, Status Quo Bias in
If one sees one's beliefs as set in stone, then there is no reason to engage in open-minded listening. This also applies to matters of identity. In some cases, listening to another with an open mind may cause one to change not only what one believes, but even how one sees oneself. Indeed, many of our most difficult—and important—conversations in life do implicate our identities. To return to the civil rights example above, as blacks challenged laws and beliefs concerning their purported inferiority, whites were forced to grapple with their own sense of identity, some re-entrenching in their "whiteness" but others embracing their basic, underlying humanity.

**Other Costs Resulting from Change.** Linked to the fear of change are other costs that open-minded listening might trigger. Some may be economic (e.g., "If I listen when you describe harms that I have caused you, will I not then have to compensate you for them?"). Some may be emotional, as when listening to a speaker's story might press upon some strong and unpleasant feeling. Some may be political (e.g., "If I even appear to listen to your ideas, my constituency will think I have become 'soft'"). While generally speaking I do not recommend it, in some instances the decision not to listen to another person may be a sensible one. A utilitarian might frame the issue thus: if the expected costs of listening exceed the expected benefits, then the decision not to listen with an open mind is sensible.

**Resistance to Complexity.** Often we see things in binary terms. In many children's fairytales, for example, the "good" characters are all good and the "bad" characters are all bad. As adults, we are prone to this as well. In much political discourse, "they" are entirely wrong and "we" are entirely right. Reality is usually (though not always) more complex than this, better described in shades of grey than in black and white. A person can be both good and bad. There may be not just one valid way to look at an issue, but three or four. Put differently, listening may rightly complicate our understanding of things. Others may raise points we had not thought of before, points that force us to rethink our oversimplified views.

**Distrusting One's Own Judgment.** Strange though it may sound, one of the most important factors that can inhibit people from listening to others with an open mind is that they distrust their own judgment. The more one trusts one's own capacity to assess what another says—to judge some of it true and some of it false, to judge

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some of it relevant and some of it irrelevant—the more likely it is one will be willing to listen. By contrast, people who do not trust their own internal capacity for judgment often erect blinders to prevent themselves from being exposed to dissonant information and views. Many people have strong views, but the hallmark of the zealot is that he resists hearing information that conflicts with those views. I am not suggesting that it is wrong to have strong views. Rather, my point is that the more one trusts one’s own capacity for judgment, the more likely one is to be willing to listen to others.

B. Conflict-Specific Factors Inhibiting Open-Minded Listening

Hostility of the Encounter. They are not listening to you. You are angry. They interrupt you. Your heart is pounding. When emotions are strong, the lower brain’s “fight or flight” physiology can take over and listening all but ends. As Kenneth Cloke describes,

[people in conflict often] revert to “fight or flight” default settings centered in the amygdyla [sic], or what is sometimes called the “reptile brain,” which stimulates our automatic reflexes during conflict. It is not the activation of these reflexes alone that makes conflict so difficult to handle, but our lack of awareness that they have been triggered.

Note that even if you are trying to listen to them and they create poor conversational dynamics (e.g., interrupting you when you speak), you are likely to become angry at them, which in turn will make it harder for you to listen to them. I am not saying that a person has no influence over the conversational dynamics nor am I saying that a person has no choice of how to respond to another’s actions. Indeed, conflict resolution trainers often try to teach people to respond purposefully, rather than to react instinctively, to provocation. Still, I suspect that more often than we might care to admit, how we respond is significantly influenced by what others do. Fred might walk into the room intending to be a good listener, but if Leo insults him, Fred’s ability to listen with an open mind might quickly vanish.

Listening with an Ear toward Rebuttal. Many conflicts involve arguments and, when in argument, people often engage in “rebut-
tal” listening. They listen with an ear toward how they can refute rather than toward what they may learn. “Here is the crack in their argument. Here is a weak point I can seize upon,” they think. The problem is that as one searches for weaknesses to attack, one may well miss valid points the other side is raising. Rebuttal listeners are often quite focused but too narrowly focused. As previously mentioned, in my view, many lawyers, trained in argumentation, are talented rebuttal listeners but poor open-minded listeners. Related to this is the process of judging while listening. In time one should judge the other party’s words, but if one begins by judging rather than trying to absorb what the other party says, one may well miss a great deal of it.

Distrust of the Other Party. Sometimes parties in conflict fear that if they listen to the other side, they will be taken advantage of—the enemy, in other words, is not to be trusted. Trust is a core piece of communication, and if one does not trust the other party, why listen to them? Would a general want his soldiers listening to the enemy’s propaganda broadcasts prior to a battle? Of course not. When we distrust our counterparts, we may fear—sometimes wrongly but sometimes rightly—that their words are designed to gain them a strategic advantage. This concern is not entirely irrational. While parties in conflict may sometimes overly discount the other side’s words, listening can involve strategic risks. Just as one might not want to “bargain with the devil,” there may be cases where not listening to the other side does make sense.

Restricted Channels of Communication. For conflicts to be resolved constructively, communication is usually essential. Ironically, a feature of much conflict is that the channels of communication themselves become significantly restricted. Once fighting has broken out between nations, “they” recall their ambassador and “we” recall ours. In domestic lawsuits, lawyers often instruct the parties not to talk with one another. “Whatever you do,” says each lawyer to his client, “do not speak with the other side, or even to third parties, for whatever you say could be used against

34. Social psychologists have demonstrated a phenomenon called “reactive devaluation”—if the other side to a conflict advances a proposal, parties respond more negatively to the proposal than had they advanced the same proposal themselves. See Lee Ross, Reactive Devaluation in Negotiation and Conflict Resolution, in BARRIERS TO CONFLICT RESOLUTION, 27-42 (Kenneth J. Arrow et al. eds., 1995).

35. See generally ROBERT H. Mnookin, BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT (2010) (discussing whether to negotiate with a party one perceives as evil).
you in court.\textsuperscript{36} Though indirect communication (e.g., through neutral nations, via the lawyers, etc.) may slightly ameliorate the situation, when the parties cannot talk to one another directly, listening can be very difficult.

C. Some Stages of Open-Minded Listening

Despite the obstacles, many people are good, open-minded listeners. How do they do it? I do not believe there is a single, cookbook answer to that question. Different people approach listening differently and the root issue is what helps a particular individual listen well. Perhaps what is critical for Jane is that she slept well the night before the dialogue, for Bill that he is well fed so that his blood sugar does not dip too low, and for Jim that he is first in touch with his own anxiety, for only then will he actually absorb what the other person says. Nevertheless, sometimes a model can be useful even if it does not apply perfectly to every case. When I think about open-minded listening, a basic, four-stage process comes to mind. I consider the first, third, and fourth stages as essential, and the second stage as optional but often very helpful.

Stage I: Hear the Other Side’s Words

An old saying claims that we have two ears and one mouth so that we can listen twice as much as we speak. A variant upon this might be that we have two ears and one mouth because listening is twice as hard as speaking. I for one am a natural interrupter. It has taken me years of effort—and I still often fail—to hold my tongue when other people are speaking to me. At the most rudimentary level, listening involves hearing what the other person says. Conversely, one of the most basic ways of not listening to others is to never give them the chance to talk to you. At a deeper level, hearing what the other person says goes far beyond non-interruption. An open-minded listener is a curious, hungry, or digestive listener who seeks to learn new things through the conversation.\textsuperscript{37} Good open-minded listeners are also patient. Much like empathy, open-minded listening often involves suspending one’s judgment and leaving one’s internal frame of reference, at least for a period of


time. Later one can assess what the other party has said, but before assessing, one must first absorb it.

Stage II (Optional): Try to Articulate What They Have Said

I describe this stage as optional, but often it is helpful to articulate your understanding of what the other person has said. You might articulate that understanding back to them (a process labeled “active listening”)\(^{38}\), or you might simply articulate that understanding to yourself. Expressing that understanding to them through active listening does have benefits. If you misunderstood what they said, expressing your understanding to them affords them the opportunity to correct it (a process sometimes calling “looping”).\(^{39}\) Yet, even if you do not articulate your understanding back to them, articulating your understanding to yourself can be very helpful. Suppose a person receives a letter. It is one thing to read it silently to oneself. It is another thing to actually express, in one’s own words, what that letter says. Reading the letter is a passive activity, while articulating its contents is active. Articulating the letter’s contents makes one think more closely about the substance of the letter and the logic of its claims. Like an actor playing a character on stage, expressing the other side’s arguments brings one much closer to “standing in their shoes” than merely hearing the other side’s arguments. The process of articulation, in other words, can significantly influence one’s understanding.\(^{40}\)

Stage III: Ask Oneself: “What Can I Learn from What They Said?”

The third, and I believe often most difficult stage of open-minded listening, is asking oneself questions such as: “What is true in the other sides’ words?” or “What can I learn from what they said?” Often we listen with an ear toward refuting the other side’s statements. With an eye toward prevailing in argument, we focus upon what is false in the other side’s words. Good open-minded listeners take a different approach. It is not that they totally ignore (though they may temporarily suspend) critical examination of the false, but they also make sure to ask what they can learn by think-


\(^{39}\) MNOOKIN ET AL. supra note 20, at 63.

\(^{40}\) See generally Martin F. Hunt, Jr., Open- and Closed-Mindedness, Belief-Discrepant Communication Behavior, and Tolerance for Cognitive Inconsistency, J. PERS. SOC. PSYCHOL. 35, 35-37 (1968) (dogmatic subjects who wrote down arguments opposing their beliefs were more prone to change their beliefs).
ing seriously about the other side's perspective. Sometimes one can learn things that are factually true by listening, such as information that one did not previously know. Sometimes one can learn things that are emotionally true by listening, such as the feelings and emotions behind the other side's words.

Often we think of the truth in binary terms—things are either true or false. One of the challenges of open-minded listening is that truth can have multiple dimensions. Some things are either true or false (e.g., it is true that the Earth is larger than the Moon), but in social situations, often the truth is not so binary. Both this can be true and that can be true. Indeed, many conflicts are more like diamonds with many facets than they are like batteries with two distinct poles. It may be true that I should not have shoved you, and it may also be true that you should not have called me a name. And it may also be true that you would not have called me a name if I had not ignored you the day before, and also true that I would not have ignored you had the acoustics in the cafeteria been better.

Stage IV: Work to Arrive at a Deeper Understanding

Once one has identified new truths in what the other side has expressed, the challenge for the open-minded listener is to give these truths serious consideration. Can I create for myself a new understanding that accounts both for what I already knew and for what I have learned from the other side? A philosopher might label this process as thesis, antithesis, and synthesis. Often social reality is complex, and through open-minded listening we can arrive at more complex understandings of complex realities. Of course, if one does not learn anything new in the other side's words, then there is no need to revise one's original thinking. However, if one does learn something new, the challenge is to grapple with it.

Sometimes the process of grappling is limited in scope: "I thought I had a full picture of what caused the accident, but as I heard your description of the events, I realized that there were factors I had not considered." Sometimes that grappling requires deeper inner work: "I thought that I was a good spouse, but once you told me how much time I spent at the office and how little time I spent with you, I really had to rethink things." Either way, once one commits to listening with an open mind, the challenge becomes wrestling with what one learns.

41. See Roger Fisher et al., Beyond MachiavelI: Tools for Coping with Conflict 21-35 (1994) (explaining that exploring partisan perceptions is valuable for resolving conflict).
PART II. OPEN-MINDED LISTENING IN LAW AND CONFLICT RESOLUTION

A. Lawyers Serving Clients by Fostering Open-Minded Listening

When one imagines lawyers serving clients, the lawyer as counselor is not usually the first image that comes to mind. Courtroom heroes engaged in advocacy epitomize the pinnacle of lawyering in the popular mind, be they fictional (e.g., *To Kill a Mockingbird*’s Atticus Finch or *Legally Blonde*’s Elle Woods), or real (e.g., Johnny Cochrane’s defense of O.J. Simpson, “If [the glove] doesn’t fit, you must acquit”). Yet lawyers serve clients not only by advocacy but through other means too. When lawyers interview clients, they can provide their clients with an opportunity to express their problems to another person, which itself can be therapeutic, for some clients have no one else in whom to confide. When lawyers counsel clients, they can help their clients think through different ways of approaching the clients’ problems. When lawyers negotiate settlements for clients, they can help clients reach outcomes far more beneficial than they could through litigation.

One way in which a lawyer may help serve the client is by fostering the client’s open-minded listening toward the opposing side. “What about what the other side is saying is true?” the lawyer might ask the client, or, “How do you think the other side perceives what took place?” I am not suggesting that the lawyer begin the legal counseling process with those questions. As with other sensitive subjects, before broaching such questions, it is usually best for the lawyer to have empathized with the client first—for the client to clearly know that the lawyer is on his or her side—and only after trust between the lawyer and client has been established should the lawyer discuss with the client how the other side sees things. Yet once such trust is in place, raising such questions can provide a client with tremendous service. In part, doing so may result in strategic benefits. To prepare well for trial, the lawyer must know both the strengths and the weaknesses of the client’s case. Often the greater service, however, may come simply from helping the client better understand the dispute and the choices he faces.

42. See Cohen, supra note 36, at 273 (recommending that the lawyer generally wait to raise questions of the client taking responsibility for his or her actions until after trust has been established).

43. Suppose, for example, that most if not all of the opposing side’s claims are true. The client’s responses might then range from adversarial denial (“I still want to fight this”) to complete acceptance of responsibility (“I want to apologize, including offering to compensate them for the harm I caused”). The choice of response is ultimately the client’s and not the
When disputes are better understood, they can be better addressed, and by facing (rather than simply ignoring) the truth in what the opposing side says, better solutions to problems may sometimes be found. If the other party is angry because one’s client did such and such, then facing those facts may be necessary to finding a resolution, if not a creative solution. Additionally, facing the truth in what the other side says may help the client avoid repeating errors in the future. For many people, behavioral patterns can be persistent, and until we learn from our errors we continue to repeat them.\(^4^4\) Facing the truth behind the other side’s words does not, of course, guarantee that such behavior will not return. However, I expect that the chances of such behavior returning are much greater where one fails to face the truth than when one faces it.

B. Mediators and Open-Minded Listening

One of the great opportunities mediation affords the parties is the chance to hear what the other party is saying. Whether as embodied in a small step such as the mediator establishing a rule against interruption or in the overall process of mediation, mediation offers an important opportunity for listening and learning.\(^4^5\) Indeed, sometimes lawyers bring their clients to mediation for that very reason. There may be points that lawyers think their own clients need to hear; and rather than highlighting those points and risking appearing disloyal, lawyers bring their clients to mediation for some “reality checking,” viz., to hear the mediator express those points.

Mediation also helps to promote open-minded listening by resurrecting communication. By the time parties reach the need for mediation, often many, if not all, lines of communication between them have been severed. When those lines of communication end, thinking seriously about the other side’s views often ends too. Some mediators may specifically address that by asking the parties either jointly or in caucus, “What is true in what the other side has said?” Other mediators may wish to avoid terms such as “true” and “false” (e.g., because they believe such things are unknowable or because they fear such terms will lead to a backward-pointing “blame lawyer’s. The lawyer, however, can serve the client well as a counselor by helping him better understand his choices. See id. at 280.


45. Indeed, at least one school of thought sees promoting the parties’ understandings of the conflict as mediation’s central goal. See Gary Friedman & Jack Himmelstein, Challenging Conflict: Mediation Through Understanding (2008).
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and use the softer language of "perception" (e.g., "Can you understand how the other side perceives what occurred?"). Other mediators may trust that the process will raise such questions implicitly. By having the parties sit down face-to-face and listen without interruption while the other side tells its story, a stage for open-minded listening has been set. Will open-minded listening always ensue? Certainly not. Sometimes it does, however, and when it does, the mediation process has played one of its greatest roles.

C. The Need for Open-Minded Listening in Judgment

Among the many qualities one would hope to find in judges (and other neutrals, such as arbitrators and jurors) I would place the capacity for open-minded listening near the top of the list. Qualities such as impartiality, discernment, intelligence, courage, and fair-mindedness are certainly important too, but without the ability to listen with an open mind, in the blink of an eye the process we call judgment can transform into a process of ex post rationalization—with their minds already made up, judges produce reasons to support their positions—rather than a process rooted in inquiry.\(^47\) Now, I am not saying that maintaining an open mind is simple, but where conflicting sides of a story are being presented to a judge, I believe it is essential. A good judge, in other words, should try to hear what is valid both in Party A's account and in Party B's account. Sometimes, of course, the merits lie entirely with one side. Often, however, the merits do not, and the real work of good judgment lies in the task of trying to understand the complexity of the truth.

There is an ancient teaching from Jewish law that I find particularly instructive on the importance of listening when judging. By way of background, Rabbis Hillel and Shammai were each leading Jewish jurists from the first century CE who headed different, and often opposing, schools of thought (called "Beth Hillel" and "Beth Shammai," respectively) regarding the interpretation of Jewish law. The Talmud reports:

For three years there was a dispute between Beth Shammai and Beth Hillel, the former asserting, ‘The halachah [Jewish law] is in agreement with our views’ and the latter contend-

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46. See Fisher et al., supra note 39, at 23 ("Coping with conflict means coping with the way people think and feel. In any conflict people think and feel differently from one another, and the issue is not whose perceptions are 'true' and whose are 'false.'").

47. On the rapidity with which people subconsciously jump to conclusions, see generally Malcolm Gladwell, Blink: The Power of Thinking Without Thinking (2005).
ing, 'The halachah is in agreement with our views'. Then [a
heavenly voice announced, 'The utterances of] both are the
words of the living God, but the halachah is in agreement
with the rulings of Beth Hillel'. Since, however, both are the
words of the living God' what was it that entitled Beth Hillel
to have the halachah fixed in agreement with their rulings?
Because they were kindly and modest, they studied their
own rulings and those of Beth Shammai and were even so
humble as to mention the [rulings] of Beth Shammai before
theirs.  

In reading this passage, two points are of particular note. First,
even though Beth Shammai and Beth Hillel had conflicting views,
both were considered "the words of the living God." The truth was
not understood as an either-or proposition but as a both-and phe-
nomenon. Second, the Talmud gives an explanation for why Jewish
law followed Beth Hillel's position. In addition to their kindness
and modesty, the Talmud notes that Beth Hillel studied both "their
own rulings and those of Beth Shammai and were even so humble
as to mention the [rulings] of Beth Shammai before theirs." Beth
Hillel, in other words, considered both its own positions and the
opposing positions seriously. Such consideration is a hallmark of
good judgment. Good judging wrestles seriously with whatever
merit may be found in both sides' accounts.

PART III: OPEN MINDED LISTENING AND
SOCIAL DEVELOPMENT

The primary focus of this article has been to consider the role of
open-minded listening in law and conflict resolution, but open-
minded listening also plays a critical role in social development gen-
erally. There is not space here to explore in detail the linkage be-
tween open-minded listening and social development, but let me
briefly suggest four areas for future consideration.

1. Listening as Social Connection

Open-minded listening is not only a functional activity but also a
constitutive activity. As mentioned at the outset, at a deep level,
whether we listen to one another with open minds helps to define
who we are. Listening connects people with one another. Listening
bonds people to one another. It is a key process within successful

48. Socino Babylonian Talmud, Seder Mo'ed, Eiruvin 13b (ad loc) (Rabbi Dr. I. Epstein,
10, 2014).
49. Id.
marriages, friendships, and organizations. Listening helps to make us us. Conversely, if over time we stop listening to one another, we may cease to exist. You and I may exist, but an important part of what helps to make us us are the bonds we share. Listening is one such core bond.

2. Listening to Address New Problems

In part due to rapid technological advances, our world is constantly changing, and with change comes new problems. Listening to others with open minds may help us address those challenges more effectively. There is an old saying that one need not "reinvent the wheel." When someone else discovers a new wheel—a new solution to a new problem—we can learn from their insights if we are willing to listen to what they say. Listening with an open mind, in other words, is a key element in problem solving, and in a world where new problems are continually arising, it is an essential skill.

3. Listening and Group Conflict

Many conflicts in our world exist between different groups, including centuries-old divisions along national, ethnic, and religious lines. Often an important piece of what helps to perpetuate these conflicts is the absence of open-minded listening: neither group grapples seriously with the content of what the other group says; for such grappling might, among other things, force it into the uncomfortable process of critically examining its own past. My sense is that, in many cases, increased open-minded listening could be very helpful toward mending those conflicts. I do not mean to suggest that listening alone would make such conflicts disappear; however, in many cases, I believe it could be quite helpful, and in some, possibly even transformative.

4. Educating for Open-Minded Listening

If we accept the premise that open-minded listening is a crucial process of social development, then we ought to think seriously about how to promote this skill, both within our formal educational systems and beyond.50 As we teach students information, are we also teaching them discernment? Do our leaders and other public figures model for us open-minded inquiry, or are they trapped within argumentative forms of dialogue in which the purpose of the

50. For such efforts, see Foundation for Critical Thinking, www.criticalthinking.org (last visited May 2, 2013).
conversation is not to learn or to problem solve but to win?\textsuperscript{51} As with many things, often the most significant lessons are the ones we teach by example. I suspect that few people would argue that, theoretically speaking, open-minded listening is a bad idea. "Walking the walk," however, is different from "talking the talk." Lauding the virtues of open-minded listening is much easier than actually doing it in practice.

Within legal education, it is especially important that we teach students good listening skills. As described above, lawyers often need to help their clients listen to what the other party is saying, mediators often need to assist both parties in listening to each other, and judges need to exercise open-minded listening in their own work. While I will not attempt to explore the issue here in depth, from my many years as a legal educator, my general sense is that while our law schools do a fine job in teaching advocacy skills, they do not currently do an adequate job in teaching skills such as listening and empathy. There are, of course, exceptions to this,\textsuperscript{52} and such efforts are certainly consistent with recent legal education reform movements emphasizing teaching students the range of skills they will need in practice.\textsuperscript{53}

\section*{Conclusion}

I began this article with an exchange between Supreme Court Justices Breyer and Scalia and will end it with two pieces of advice from another distinguished Justice from that Court, Clarence Thomas. Justice Thomas recently visited the University of Florida and, among other things, had a public conversation in which he fielded questions from law students about making a career in the law.

One student asked what, in retrospect, Justice Thomas would have done differently as a student in law school. Justice Thomas responded:

\footnotesize{\textsuperscript{51} For a critique of argumentative discourse in America see generally Deborah Tannen, \textit{The Argument Culture: Stopping America's War of Words} (1999).}


\footnotesize{\textsuperscript{53} See generally William M. Sullivan et al., \textit{Educating Lawyers: Preparation for the Profession of Law} (2007); Roy Stuckey et al., \textit{Best Practices for Legal Education} (2007).}
[When I was in law school,] I was pretty closed-minded. I was hard on the left ideologically. I was very, very radical in my thinking, and I discounted a lot of people that in retrospect would have been enormously helpful in the learning process. I think school is a time to really sit and honestly talk about things. I thought I had a lot of answers at twenty-four, twenty-five years of age, and I wish I had been more humble and less adamant and listened to more people. The seminar that I teach now [at Georgetown has twenty students], and listening to them is just fabulous. [I'm not] trying to not tell them what to think but just to give them the tools to think even with more clarity. It is just wonderful to listen.\textsuperscript{54}

Later, a student asked Justice Thomas who were his heroes and mentors when growing up? He began by mentioning the two great historical figures (Fredrick Douglas and John Marshall Harlan) as well as a distinguished jurist (Judge Phyllis Kravitch from the 11th Circuit) whom he had known personally for years. Yet soon he returned to the importance of listening:

[There are] all sorts of people that you can learn from. . . . There are cab drivers I've met, there are laborers I've met—probably the person who gave me some of the best advice was an almost toothless janitor when I worked in the Senate. Everybody has a story. Everybody who has lived has something they can tell you about life and about living that would be helpful. [There] are models all over the place if we will listen, and if we open our ears and our eyes and our hearts, they will tell you these things.\textsuperscript{55}

Listening with an open mind is not easy, but, as Justice Thomas's words reflect, open-minded listening is an invaluable means of learning. This is particularly true when parties are in conflict, for parties in conflict often do not listen well to one another. A number of factors inhibit open-minded listening, including fear of change, ego, distrust of the other party, and, perhaps most basically, distrust of one's own judgment. Fortunately, there are steps parties in conflict can take to promote greater open-minded listening. These include, taking the time to hear what the other party says, trying to hear what is true in it (rather than what one can refute), and working to incorporate such truths into one's own understanding. Lawyers and mediators can often do their clients great service.

\textsuperscript{54} Justice Clarence Thomas, \textit{Marshall M. Criser Distinguished Lecture in Law}, \textit{University of Florida Levin College of Law} (Sept. 21, 2012), http://mediasite.video.ufl.edu/Mediasite/Play/2b954b6b758447ac855a7b19730c5dad1d.

\textsuperscript{55} Id. (emphasis added).
by helping their clients hear what the other party says, and judges, too, can benefit from exercising open-minded listening in their own work. Further, as open-minded listening is so important for social development, we as a society need to think seriously about how to teach this skill.