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A Wigmorian Defense of Feminist Methods

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by
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I have been asked to comment on Aviva Orenstein's paper. This is a particularly pleasant task because I agree with almost everything she said. Federal Rule of Evidence 412[1] is good. The recently enacted Federal Rule of Evidence 413[2] is bad. Social science evidence should be used to help eradicate the effects of cultural stereotypes[3] and the use of syndrome evidence is promising but dangerous.

I want to focus not on whether these conclusions are right, but on how feminist method, most particularly narrative,[4] necessarily leads us to these conclusions. I will argue that Wigmore and the original proponents of bans on character evidence understood precisely what the feminist use of narrative has tried to establish: good stories have their own truth and working to understand the particularities of that truth is the only fair way to adjudicate facts.

Every trial is its own story.[5] Bans on character evidence try to

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1. Federal Rule of Evidence 412 excludes evidence of a victim's past sexual behavior or her sexual predisposition.

2. Federal Rule of Evidence 413 permits admission of evidence that the accused has previously committed sexual assault.

3. *See* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials,* 49 HASTINGS L. J. 663, 706-15 (1998).

4. Feminists are not the only scholars to use narrative: see DERRICK BELL, AND WE ARE NOT SAVED (1987) (use of narrative to debate civil rights); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990) (using narrative in moral philosophy); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative,* 87 MICH. L. REV. 2411 (1989). However, feminists have used narrative extensively. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law,* 13 NOVA L. REV. 355 (1989); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1 (1991); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenonednological Critique of Feminist Legal Theory,* 3 WIS. WOMEN'S L. J. 81 (1987). As Patricia Cain has written, "[l]istening to women and believing their stories is central to feminist method." Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories,* 4 BERK. WOMEN'S L. J. 191, 195 (1989). Indeed, if one views consciousness-raising as a form of narrative then "the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement" is narrative. *See* Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory,* 7 SIGNS 515, 519-20 (1982). *See also* Katharine Bartlett, *Feminist Legal Methods,* 103 HARV. L. REV. 829 (1990).

5. The literary analogy for trials is not new. *See* Kim Lane Scheppele, Foreword:

ensure that the trial's story will be a good novel, with real characters, not a Harlequin romance. Harlequin romances are boring and fake and *false* at some level because the characters are not real; they are unidimensional types. They are the rugged masculine man and the feminine heroine and they are motivated by ubiquitous, unidimensional emotions, like greed or passion. There is no complexity, no nuance, no real life, no truth. Good trials, fair trials, and arguably the very principles of due process incorporated in the notion of a hearing, attempt to give the participants an opportunity to tell a real story with real people in it, not an off-the-rack tale with stock characters.

The title of this conference is *Truth and Its Rivals*. In evaluating the merits of truth, it is important to recognize that there are different kinds of truths. Literary truth and scientific truth are different concepts. Truth in the physical sciences tends to focus on the universal, absolute, and objective. Physical scientists find facts that are always true, given certain parameters. Social science focuses on accurate models, ideal types that explain psychological, sociological, and economic behavior in the aggregate. Social scientific models are true if they reflect typical behavior accurately. Literary truth is different. Literature suggests truth when the characters are real. Characters are real when they are unique, full, unpredictable, unable to be encapsulated by the universal norms of either physical or social science, and instead must be described to and experienced by the reader through the author.

One does not know or understand a literary figure after the first few pages of description. If one did, it would be a boring read. Character profiles can be accurate in the physical or social science sense, but never in the literary sense. We know good literature because, in the words of Kathryn Abrams, there is a "concreteness, particularity, and internal consistency [to] the account,"[6] not because the account can be documented as accurate by reference to external evidence.

Juries are supposed to evaluate facts as we evaluate literature. They are supposed to determine truth based on the complexities of the characters in front of them, not on a set of universal truths or types that might be true on average. Character evidence is harmful to this process because it types people just as the hard and social sciences do and just as bad novels do. The feminist call to listen to narrative is an attempt to force the law to tell stories that ring true in the

Telling Stories, 7 MICH. L. REV. 2073, 2080 (1989) ("The resolution of any individual case in the law relies heavily on a court's adoption of a particular story, one that makes sense, is true to what the listeners know about the world, and hangs together.") *See also* W. LANCE BENNETT AND MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981); Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. OF WOMEN AND THE L. 277, 288-289 (1993).

6. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1023 (1991).

literary sense.

Thus, a feminist analysis of the problem of character evidence is not significantly different than the analysis that Wigmore or McCormick might have given us, except that it expands the class of people entitled to be judged free of character type. The problem with the original rules is that they were not sensitive enough to the ways in which typing, particularly typing of non-mainstream groups, is inevitable. Wigmore understood that prior act evidence might lead us to type the defendant as a unidimensionally "bad" guy,[7] but he did not adequately understand, or perhaps was not sufficiently concerned with, how jurors use the types and categories through which they have come to understand the world to evaluate all of the parties in front of them.

I should make clear here that the prejudice and error with which I am concerned primarily is what Professor Park calls "inferential error":[8] inferring too much from one piece of prior act evidence. More specifically, with typing, the problem is letting one piece of prior act evidence, such as a past sexual encounter or prior commission of rape, confirm a social stereotype and thereby magnify the potential prejudicial damage. The main prejudice stems not from inferring too much from the prior act itself, but from inferring too much from the stereotype into which the prior act fits. When a rape victim says that, after trial, she felt like her enemy was more the defense lawyer than the defendant himself,[9] she is recognizing that her enemy—the most powerful obstacle to a successful prosecution—was the stereotype of the "loose female" on which the defense counsel relied in telling the story that got his client acquitted.[10]

We cannot get rid of types. Typing is inevitable because categorizing and classifying is an epistemological necessity. It is how we come to understand and make sense of the world. For the world of physical sciences, as E.O. Wilson illustrates, taxonomic classification

7. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 at 1212 (Peter Tillers, rev. 1983). *See also* MCCORMICK ON EVIDENCE § 190 at 345-47 (John William Strong ed., 4th ed. 1992); RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 218-19 (2d ed. 1983). As these scholars indicate, if the jury views the defendant as generally "bad," it will readily assume that the defendant did the alleged act.

8. *See generally* Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—Or, Rationales of the Character Evidence Ban, with Illustration from the Simpson Case*, 67 U. COL. L. REV. 747, 767-70 (1996).

9. *See* AUDREY SAVAGE, TWICE RAPED 31 (1990). This book is an account of the author's own rape and the subsequent trial.

10. For more on how different stereotypical stories affect rape prosecutions, see Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. AND WOMEN'S STUD. 387 (1996)

makes science possible.[11] Typing is the essence of what social scientists do. More universally, as Martha Minow succinctly explains, "cognitively, we need simplifying categories . . . unifying categories . . . [to] . . . help organize experience, even at the cost of denying it."[12] The law is particularly vulnerable to this means of giving structure. One cannot reach a legal result until one determines the category or type of precedent that controls. "[C]ourts make decisions using analogies and distinctions . . . tying 'like things' together."[13] Thus, typing is necessary for practicing law. But it is a dangerous way to adjudicate facts.[14]

Typing is especially dangerous in situations in which we are trying to evaluate experiences had by people who are clearly different than ourselves.[15] The more heterogeneous our society becomes, the more jurors evaluate people different than themselves. Their natural tendency is to assume that if person A is different from them in way X, and person B is also different from them in way X, then person A and person B are similar in many ways. The technical name for this propensity is "the representative heuristic,"[16] but the best way of illustrating both the ubiquity and potential harm of this propensity is to tell a story involving my three year old niece.

We were at a playground. At that age, my niece had several African-American women in her life, but only one African-American man, a young man named Greg who worked in her daycare center. While we were at the playground, a young African-American man walked across the field and my niece yelled out after him, "Greg,

11. *See* EDWARD O. WILSON, THE DIVERSITY OF LIFE 49 (1992).

12. Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 53 (1988).

13. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 18 (1995). "Since [legal] classification involves line drawing and assessments of similarity and difference, it is mired in stereotypes." *Id.* at 19.

14. As Professor Sheppele has argued previously, the fact determination process is integrally related to the categorization process because courts usually determine the relevant categories of precedent before determining which facts are relevant. *See* KIM LANE SHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 97 (1988) ("The description of the facts of the case is constrained by the lawyer's view of the available courses of legal action.").

15. Lynne Henderson has noted the difficulties in trying to empathize with people who are different than ourselves. *See* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1584 (1987). In order to empathize, one must transcend the stereotype or category through which one initially understands the subject and relates to the subject as a real person in order to "(1) feel[] the emotion of another [and] (2) understand[] the experience or situation of another . . . often achieved by imagining oneself to be in the position of the other." *Id.* at 1579.

16. *See* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMING OF SOCIAL JUDGMENT 24-25 (1980).

Greg." The young man turned around, looked somewhat quizzical, and then walked on, wondering, I presume, why this three-year-old white kid was calling him Greg. What my niece was doing is what we all do; she was typing. Her three-year-old mind was trying to efficiently process the massive amount of new data that it was receiving and so she assumed that African-American men and Greg were one category. She didn't realize that there could be different African-American men.

As our experience expands, we are less and less likely to do as much typing as did my niece, but we are still dangerously prone to it. Indeed, the problems of typing have emerged within the feminist community itself in the debates about essentialism.[17] Typing is something that we all must fight. Attention to fairness and truth requires that, as adults, we remind ourselves constantly not to rely on questionable typing categories. This takes work because really trying to understand difference takes work. Again, think of a novel. A good novelist has to work hard to make us understand a character who is a different gender, different race, or different class than ourselves; a novelist has to work hard to describe an aura, a climate, an atmosphere, and a culture very different than our own. Likewise, every listener has to work hard to understand the individuality and nuance in stories about people who have lived lives different than the listener. It is far easier to ignore nuance and individuality, efficaciously place individuals in categories of other, and accept the generalized understanding[18] of what defines that other.

To bring this all back to evidence and rape, Rule 412 is necessary and Rule 413 is dangerous precisely because of jurors' tendencies to type those who are "other." Women who have previous sexual experience are other—they are women that defy the generalized understanding, or cultural script, of what a woman should be. We typify them all and say, if she has slept around once, she is not like other

17. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (in the "tendency toward gender essentialism . . . some voices are silenced in order to privilege others. ...To be fully subversive, the methodology of feminist legal theory should challenge not only law's content but its tendency to privilege the abstract and unitary voice."); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. L. FOR. 139,150 ("[F]eminist and civil rights thinkers . . . have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks.")

18. This generalized understanding is what others have called the "cultural script." Coombs, *supra* note 5, at 278. It is what Professor Orenstein details in Part II.B of her paper. *See* Orenstein, *supra* note 3, at 677-82. Its prevalence is what Andrew Taslitz explores in Taslitz, *supra* note 10.

women and therefore she probably said yes this time.[19]

Comparably, African-American men are other, particularly in the context of rape. Our culture has a deep and troubling history of portraying African-American men as naturally disposed to rape.[20] From the onset of Southern lynching campaigns,[21] through the prosecutions of the Scottsboro Boys,[22] to the 1992 Presidential campaign,[23] our cultural script has typed the African-American man as a rapist. The African-American man on trial for rape confirms this stereotype and the use of prior act evidence will only compound the problem.

Of course, Rule 413 allows in evidence of all prior incidents of rape, not just those perpetrated by African-American men, but it is highly likely that Rule 413 will be used disproportionately against African-American men.[24] Moreover, the very notion of typing "rapists" makes uniform an act that is far from uniform in its perpetration, thereby blurring the nuance and complexity of the stories surrounding individual rapes. Should a man who committed date rape as an

19. To the extent that jurors take evidence of previous sexual activity or provocative dress and use it to come to the conclusion that the woman is simply unworthy, the problem turns to one of nullification prejudice. *See* Park, *supra* note 8, at 770-71. ("Nullification prejudice occurs where the trier draws factually accurate inferences from the evidentiary facts, but uses them to make a decision on grounds not permitted by the substantive law."). As I have argued elsewhere, many rape prosecutions are thwarted not because the jurors disbelieve the woman, but because her defiance of the cultural script leaves the jury completely unsympathetic to her harm and unwilling to enforce the laws of rape on her behalf. *See* Katharine K. Baker, *Once A Rapist?: Motivational Evidence and Relevancy in Rape Law,* 110 HARV. L. REV. 563, 589 (1997) ("If a woman breaches th[e norms of appropriate sexual conduct], her credibility becomes largely irrelevant because the jury will not bother to vindicate her violation.").

20. *See* Jennifer Wriggins, *Rape, Racism and the Law,* 6 HARV. WOMEN'S L. J. 103, 114-16 (1983); ANGELA DAVIS, WOMEN, RACE AND CLASS 184-185 (1981); Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law,* 9 HARV. BLACKLETTER L. J. 43, 44-5 (1992).

21. *See* IDA B. WELLS, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 69-71 (Alreda M. Duster ed. 1970); DAVIS, *supra* note 20, at 172-201.

22. In 1931, nine black men were arrested and prosecuted for raping two white women on a freight train in Alabama. Eight of the nine were sentenced to die. The white women on whose testimony the prosecution relied were held in jail with threat of prosecution on prostitution and vagrancy grounds if they did not testify against the men. Two years after the trial, one of the women recanted. All of the Scottsboro boys were eventually acquitted, but the last man did not go free until 1951. *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 230-35 (1975).

23. One of the most effective advertisements used against presidential candidate Michael Dukakis employed the image and story of a black male rapist, Willie Horton, to heighten voters' fear of violence and crime. *See* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA 11-12, 181-182 (1995).

24. *See* Baker, *supra* note 19, at 596 ("Because black men are disproportionately involved with the criminal justice system and because police are going to be more likely to arrest those people whom they know to have some history of sexual offense, the police are going to be even more likely to arrest black men disproportionately.").

18-year-old college student[25] be typed in the same category with a man who beat, robbed, and raped a woman at knife point? Should we encourage juries to think of some men as "rapists" when all the evidence suggests that there is no accurate character profile of "a" rapist?[26] By doing so, the law endorses the use of stereotypes and is complicit in allowing juries to ignore their duty to evaluate the unique facts and complexities of the case in front of them. Rule 413 presents the legal equivalent to a novelist writing, "then she was raped" and expecting the reader to understand what happened.[27] Thus, Rule 412 and the denouncements of Rule 413 reflect feminist concerns and feminist method because they combat stereotypes and force the jury to listen to the actual stories of individuals.

Professor Orenstein's endorsement of social science evidence is a further means of combating stereotype. She calls the use of experts to dispel cultural stereotypes "group" character evidence,[28] but I would call it "anti"-character evidence. The experts come in to help purge the jurors of their tendency to think in character types. Although presented by qualified social scientists,[29] this kind of evidence can also be seen as a kind of "anti-expert" evidence. Rule 702, as traditionally understood, allows expert testimony if the expert's expertise leads her to be able to infer more from the underlying facts than can the jury.[30] In rape cases, we want this expert testimony, not because the expert can infer more from the facts, but precisely because everyone should infer less from the facts. Again, the inferential error is in letting the prior facts amplify a pre-existing stereotype. The goals for these experts is not so much to educate as to de-educate the jurors, to help the jurors unlearn the ways in which they have come to categorize the world.[31] This does not mean that we defer to

25. Various studies indicate that approximately 25% of college males report having engaged in coercive sex. *See* Karen R. Rapaport & C. Dale Pusey, *Sexually Coercive College Males, in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 217, 219-20 (1991).

26. *See* Baker, *supra* note 19, at 597-612.

27. Literature is notably bereft of rape scenes, possibly because authors simply do not know how to describe it in a manner that will ring true. For one particularly compelling description of rape, see GLORIA NAYLOR, THE WOMEN OF BREWSTER PLACE 170-71 (1982).

28. *See* Orenstein, *supra* note 3, at 707.

29. The experts must be qualified to interpret the data that they present. *See* FED. R. EVID. 702.

30. *See* LEMPERT & SALTZBURG, *supra* note 7, at 859 (Experts "are able to aid the jury in its task of fact-finding, not because they have fortuitously observed events which are relevant to the jury's inquiry, but because they have specialized skill or training which enables them to perceive and interpret events in ways that ordinary lay people cannot.").

31. Experiments analyzed by Nesbitt and Ross suggest that the success of "de-educating" jurors in this way depends on experts providing jurors with the theoretical reasons for why people come to believe what they believe. *See* NESBITT & ROSS, *supra* note

the experts.[32] There is nothing to defer to them on because these experts should have nothing to say about the underlying facts. It is the jury's job to evaluate the facts.

I am significantly more wary than is Professor Orenstein about the use of syndrome evidence, however.[33] Although some prosecutors have used rape trauma syndrome evidence to help refute a defendant's claim that the victim's behavior was inconsistent with that of a rape victim,[34] and several commentators have endorsed the use of rape trauma syndrome evidence for this purpose,[35] using syndrome evidence in this manner runs the risk of replicating rather than eradicating the problems with stereotypes. Feminists have already taken and often regretted having taken this risk with Battered Women Syndrome evidence. As others have analyzed, the class of women abused by domestic violence is diverse and victim response to that abuse is varied.[36] In general, women may not respond to physical abuse by a partner in the way in which the cultural script would expect them to respond, but neither do they necessarily respond in any uniform manner.[37]

16, at 191. Thus, courts should be careful to make sure that social science testimony used for the purpose of debunking stereotypes of rapists and rape victims includes analysis of how and why juries come to believe the cultural scripts on rape.

32. Ronald Allen and Joseph Miller have argued that the "deep[] question lurking in the shadows" of contemporary debates about expert testimony "is whether fact finders are to be educated by or to defer to experts." Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1131 (1993). Like those authors, I would argue, and the use of social science evidence in the manner suggested argues, that expert testimony should be used as an educative tool, not a grounds for deference.

33. *See* Orenstein, *supra* note 3, at 41-44. Orenstein's endorsement of psychological syndrome evidence in this manner parallels Professor Taslitz's call to use expert psychological evidence to explain defendants' state of mind in criminal trials. *See* Andrew Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence,* 52 MD. L. REV. 1 (1993).

34. *See* State v. Robinson, 431 N.W.2d 165, 167 (Wis. 1988).

35. *See* Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 447-52 (1985); *see generally* David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome In Rape Prosecutions,* 26 B.C. L. REV. 1143 (1985).

36. *See* Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L. J. 297, 302 (1995) (arguing that African-American women must overcome cultural stereotypes of themselves before they can even use the stereotypes built into the Battered Women Syndrome); Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. W. L. J. 57, 92-93 (1994) (arguing that Asian women will not necessarily meet the model). *See also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 38-43 (1991) (arguing that the helpless image of Battered Women Syndrome may contribute to stereotyping).

37. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconcep-*

Syndrome evidence backfires because it allows the jurors to substitute one stereotype for another: the image with which they came into the trial is replaced with a new image, that of "the" battered women or "the" rape survivor. Syndrome evidence allows the jury to avoid confronting the particularities of the stories in front of them. Thus, when a victim fails to conform to the syndrome script, the jury dismisses her as readily as it would dismiss victims who did not conform to the cultural script. This result is understandable, for it is much easier to replace one oversimplification with another than it is to forsake one's original understanding,[38] and painstakingly, story by story, incorporate the particularity and uniqueness of the world around you.

Trials should be concerned about truth, but they should be concerned as much with literary truth as with probabilistic or scientific proof. Good novels teach us that the world is not as universal or typed a place as the sciences would have us believe. These novels take work to write and work to read because they force us to understand the complexity of truth. Attorneys and jurors should be forced to do comparable work in understanding the complexity of truth. Ridding the trial of character types helps forge a more complete truth.

tions in Current Reform Proposals, 140 U. PA. L. REV. 379, 397 (1991) (reporting that among cases in which previously battered defendants asserted self-defense, 75% involved confrontations, 4% were contract killings, 8% were sleeping-man cases, and 8% involved defendant as initial aggressor during a lull in violence). *See also* David L. Faigman and Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 112 (1997) (arguing that "[b]ecause . . . 'learned helplessness' theory places so much emphasis upon the woman's inability to rescue herself from the abusive situation, any proactive measures on the woman's part may thrust her outside of the protective realm of the syndrome theory"). *See also* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE, BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 179-81 (1989).

38. If narrative feminist methodology is radical it is radical because it attacks preexisting epistemological paradigms by requiring listeners to discard what they had come to know as truth and construct new truths based on the stories in front in them.