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Reasoning in Dispute Resolution Practices: The Hidden Dimensions

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ABSTRACT: We know how people *could* reason well to resolve disputes. We don't yet know why they don't. Which theories we have applied to bridge that gap have had a profound influence on which practices we employ to resolve disputes. Dispute resolution ideally aims to promote good reasoning and good relationships. Is it possible to align theory more closely with practice to achieve both goals?

KEY WORDS: deep disagreement, dispute resolution, mediation, reasoning

If all that stands between a person's thinking and a good decision is a mistake in reasoning, then pointing out the mistake should be enough to fix the problem. And in turn, if all that stands between disputants and a resolution to their dispute is a mistake in reasoning, then it should suffice for a mediator to help the disputants reason accurately.

In what follows, I focus on disputes between two or more individuals, or between groups, who must make a decision and who cannot agree on their decision. For my purposes, the key difference between dispute resolution and public (or private) debate is that the parties cannot simply agree to disagree. There must be a resolution, and typically that resolution must be within a limited time frame. For example, a new labour contract must be negotiated before the old one ends, a custody dispute settled before the children are taken out of the country, or a property line redrawn before a new fence is built. Dispute resolution typically aims at least to produce good results – to construct a fair, well-reasoned decision. It also often aims to produce good relationships. Dispute resolution processes often include ways to protect existing good relationships, to improve poor relationships where possible, and, if relationships are irreparable, to leave the parties at least feeling sufficiently respected within the process.

A key component of most dispute resolution processes is reasoning. Participants are given the opportunity to reason so that they can decide whether a proposed solution does or does not meet their needs and values. And here is where much of dispute resolution theory and system design runs into difficulty. We can only promote good reasoning as the way to resolve disputes if we can also claim that good reasoning can be done when needed. However, it is only too obvious that good reasoning does not happen either as easily or as often as we need it to. Disputes remain intractable long past the point where outsiders think the disputants ought to “see reason” and find a solution to their problem. Why is this so? We do know how people could reason well. We don't know why they don't.

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It's not that we have no idea why they don't. We do have several common explanations, all of which suggest potential remedies. For example, some dispute resolution practices are designed precisely as remedies for these three common causes of error:

1. ignorance: not knowing how to recognize mistakes in reasoning
2. temporary inability: being impaired by stress, emotion, or ill health
3. psychological resistance: refusing to participate reasonably, since the relationship between the parties or the issue in dispute is problematic in some way.

We currently deal with ignorance by offering instruction, either in advance through the education system, or in the form of advice on the spot from someone who can see the mistake. We deal with temporary inability due to stress or other impairment by postponing the discussion to a better time, or by ameliorating the physical environment to make it more comfortable. We deal with psychological resistance by recommending counseling prior to the actual attempt to resolve a dispute, or by introducing a third party to the debate to facilitate or mediate the parties' interactions.

In addition, various dispute resolution structures are designed so that they incorporate ways to overcome these obstacles to reasoning. Mediation was designed to make it possible for disputants to move past reasoning problems caused by temporary impairment or psychological resistance. In mediation, a neutral third party with good communication skills is brought in to create a safe space in which each party can speak openly, be assured of being heard, and therefore have a fair chance to reach a resolution through reasoning. Arbitration and litigation make it possible for the disputants to transfer the responsibility for good reasoning to objective third parties, who are competent to uncover the relevant facts and make binding decisions.

Methods of ADR – alternate dispute resolution – such as mediation and arbitration continue to gain popularity as alternatives to litigation. Alternate dispute resolution is intended not only to free people to do their own best reasoning to resolve their disputes, but also to leave far more of the control over the outcome in their own hands. The participants then need to trust that their own good reasoning can resolve disputes – instead of, for example, trusting that their lawyers have done the best possible reasoning for them and that a judge has done the best possible reasoning in weighing their lawyers' competing arguments.

Mediation has evolved into a variety of forms, reflecting varying rationales for how disputes should be resolved. Two variations are particularly relevant here. One variant emphasizes reasoning and makes it possible to deal with reasoning breakdown due to ignorance. In this form of mediation, the mediator is expected, for example, to represent “an ideal model of critical discussion”, to be able to elicit reasoning from the parties, and assist them to “argue in ways that lead them to agree on the best case.” (Jacobs and Aakhus, 2002, p.29). This model is silent on whether good relationship between the parties is a desired outcome of the resolution.

A second model of mediation, proposed by Bush and Folger (1994), looks at the potential of mediation to transform relationships. In this model, mediation's “greatest value lies in its potential not only to find solutions to people's problems but to change people themselves for the better, in the very midst of conflict”(p.xv). In this second model, it is clear that good reasoning, while valued, is seen as a limiting force if used in

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isolation from the “personal strength and compassion for others” that they see as the crucial underpinning for good relationships.

In contrast, arbitration and litigation align more closely with the first model in which reasoning is dominant. Both clearly anticipate that relationship between the disputants could worsen or break down completely. Both procedures have enforcement mechanisms so that even an unhappy loser must comply with the judgment.

The contrast between these methods of dispute resolution illustrates the dilemma I want to consider in this paper. What are we to do if disputants are unable to see common ground despite their own best efforts at reasoning accurately and fairly, and despite the intervention of a mediator who can model an ideal of reasoning? Is it reasonable to resort to dispute resolution methods that abandon relationship-building and rely only on reason?

If we cannot facilitate reasoning good enough to resolve a dispute, the dispute seems intractable. The three explanations for inadequate reasons mentioned earlier – ignorance, temporary inability, or psychological resistance – are the only three we typically draw on to improve performance. Our repertoire of remedies is generally limited just to the solutions mentioned above: to reasoning instruction, waiting for a better time, or psychological counselling. If you don’t reason better once you are shown these models of good behaviour and have heard the explanations of why they make best sense, then we have no clear next step to take – at least none beyond saying *you* aren’t reasonable.

There are two other explanations for what may be happening in disputes that are not settled by reasoning. Unfortunately, both of them not only raise questions about whether better reasoning can be done, but also raise questions about the legitimacy of turning to arbitration or litigation as a way past stalemate.

The first of these explanations is still being actively explored within argumentation theory. This is Fogelin’s characterization of “deep disagreements”. (1985, reprinted 2005) These are disagreements which proceed “from a clash in underlying principles”, such that “the parties may be unbiased, free of prejudice, consistent, coherent, precise, and rigorous, yet still disagree.” (2005, p. 8) In these cases, each party has strong commitments to moral, metaphysical, or other fundamental principles, and those principles are either not open for discussion, or if discussed might not be resolvable within the lifetime of the disputants. Fogelin himself argues that deep disagreements “are not subject to rational resolution”. (2005, p. 11) If so, they might still be referred to Bush and Folger’s “transformative” type of mediation, but could not justifiably be referred to reasoned mediation, arbitration or negotiation. Feldman (2005) offers the counter-proposal that suspension of judgment might be the rational response in such situations. To the extent this allows the parties themselves to recognize the depth of their disagreement, dispute resolution can then continue to assist. Mediation of any type can end with the parties agreeing that it is not possible to resolve their differences at this time, and moving on to do whatever they can do that does not require the co-operation of the other. Arbitration or litigation could conceivably conclude that neither party has a superior case, and split any potential awards equally between them.

Woods (*date*) offers another model for the structure of disagreements in principle. In his model, there are degrees of disagreement, related not to the topic in dispute but to which dispute resolution mechanisms can be used. “Force One” disagreements are equivalent to those just discussed: there is no consensus between the parties on the issue or on a procedure to resolve the matter, and so the parties agree to disagree. “Force Two”

disagreements not only lack consensus on the issue and on procedure, but also on whether it is acceptable to continue to disagree: in these disputes, one or both parties will not let the matter drop. These would be disagreements that could not be settled in mediation but could go to arbitration or litigation. “Force Three” disagreements take the dispute one challenging step further: the parties cannot agree to send the dispute to any third party for resolution. Where litigation is not accepted as a reasonable way to resolve some type of dispute, the parties do have another option, and that is to turn to their government for suitable legislation which can be voted on. If even this alternative is not acceptable, and a person or group rejects the outcome of the vote and refuses to obey the legislation, the dispute has reached “Force Four”. There is one further step. The person or group might not only reject the legislation but also refuse even to entertain the possibility that opponents could be right. Such completely closed minds are at “Force Five”. It is, unfortunately, only too easy to think of examples of disputes that are this severely resistant to resolution: Woods cites abortion as a vivid and classic example; the rights of homosexuals, euthanasia, and Holocaust denial would be others.

In Wood’s sequence of increasing resistance to resolution, the additional source of disagreement appears to be power. Who should have the power to resolve disputes, and why?

In Canada, the justice system itself has been transformed over the last twenty years by aboriginal people’s challenges to both the legitimacy and the procedural structure of Canadian courts. This dispute could probably best be characterised as “Force Four” – the aboriginal people rejected the idea that this system did or could provide “justice” for all. Ross (1992) experienced the challenges as a lawyer working with communities in northern Ontario. He describes how the backward-looking perspective of a trial – who did what to whom and why – and its focus on blame and punishment – who is guilty and what is the proper sentence – is incomprehensible to many aboriginal people. Correspondingly, their traditional dispute resolution mechanisms, which emphasise relationships, rely on consensus, and reason only indirectly through narrative, are equally incomprehensible to judges and lawyers like himself.

Yet in spite of the stark incompatibility of the two belief systems, hybrid structures have evolved. Trials may be carried out with the judge and lawyers sitting in a circle with the offender, victim, and community members. There may be healing circles and sentencing circles, with native and non-native participants.

This development of co-existing or hybrid dispute resolution procedures pushes us to re-examine questions about reasoning and culture. A willingness to construct new procedural options to deal with a perceived incompatibility between cultures is not enough to ensure the new procedures are well-conceived. As the on-going treaty process in B.C. shows, dispute resolution options must often be carefully negotiated.

The extent of the differences between cultural practices in reasoning itself have been known since the 1970s. Cultural difficulties in accepting a reasoning-based dispute resolution system have been studied by Michelle LeBaron (See, for example, LeBaron, 2003). The difficulties include the unwillingness of some immigrants even to consider mediation, because it is incompatible with their usual practices. The incompatibility is not necessarily due to a belief that disputes cannot be solved with reason. It could also be due to a belief that it is not acceptable to do the reasoning openly in the presence of the other party or strangers, such as a mediator. It could be due to a belief that it is not acceptable

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for the parties themselves to resolve their dispute: only the appropriate spokespeople or arbitrators may take part.

These are “deep disagreements” in Fogelin’s sense, and they are also disputes that can range all the way up to Force Five on Woods’ scale. (Think, for example, of any dispute in which one party appeals to religion as a power more legitimate than government.)

In such cases, a normative approach to using reason to resolve disputes becomes much harder to justify. One difficulty is pragmatic: it’s hard to justify requiring everyone to reason in a way that some significant minority of people cannot do, and cannot understand when it is done for them. The other difficulty is political. It’s hard to justify expecting people from all cultural backgrounds to use the same system of reasoning if that reasoning seems to be a Western cultural artifact. The speed with which non-westerners can acquire an understanding of logic is unfortunately not enough to protect westerners from accusations of cultural imperialism. (Evidence that even brief exposure to Western schooling does alter patterns of reasoning is apparent in studies by Luria (1932) and Lancy (1983).)

Resolving disputes by reason is not something we typically want to limit only to disputes between members of a single social or cultural group. Yet the differences that have been observed across cultures remain puzzling, and surprisingly resistant to any explanation that would establish whether reason can or cannot appropriately be used to resolve disputes. Between 1931 and 1990 studies were carried out in among isolated groups in Africa, China, and Papua New Guinea to see whether people who had never been exposed to the English language or to Western schooling could reason logically. The results of the studies were at best inconclusive. I’ll quote three examples to illustrate. The first is from the 1975 study in Liberia:

Question: All people who own houses pay house tax.

Boima does not pay a house tax.

Does he own a house?

Answer: Yes. Boima has a house but he is exempted from paying house tax. The government appointed Boima to collect house tax so they exempted him from paying house tax. (Scribner, 1977)

The respondent rejects the initial premise in favour of a more complex version: All home-owners except the tax collectors pay house tax. (It is not clear from the reports of the study whether this replacement rule was just invented by the respondent, or whether it reflected actual Liberian tax rules.) The response pattern is strikingly reminiscent of how seventh-graders respond to potential “trick questions”, and of many traditional “brain-teaser” puzzles: don’t assume the parameters of the right answer are set just by the wording of the question.

The second example is the one most often quoted to illustrate how firmly entrenched an “illogical” reasoning pattern can be. The respondent is 37, an illiterate Muslim from a remote village in Uzbekistan:

Question: “In the Far North, where there is snow, all bears are white.

Novaya Zemlya is in the Far North and there is always snow there.

What color are the bears there?

Answer: “There are different sorts of bears.”

The questioner, following test protocol, repeats the syllogism. The respondent replies, “I don’t know, I’ve seen a black bear, I’ve never seen any others ...”. Three more times the questioner tries to elicit an answer, stressing each time that the point is to answer “on the basis of my words”, and “what do my words imply?” Clearly impatient, the respondent replies:

“If a man was sixty or eighty and had seen a white bear and had told about it, he could be believed, but I’ve never seen one and hence I can’t say. That’s my last word. Those who saw can tell, and those who didn’t can’t say anything!”

At this point a younger Uzbek volunteers, “From your words it means that bears there are white.”

The questioner takes advantage of this to have one last try, asking, “Well, which of you is right?” It doesn’t help.

The respondent’s final words are, “What the cock knows how to do, he does. What I know, I say, and nothing beyond that!” (Luria, 1931, pages 108-9)

This respondent clearly can reason. His justification for why he cannot answer the question is logical – if he had seen a white bear, he could speak of it, but he hasn’t, so he cannot say. The principle that he cannot speak about what he has never seen overrides any other principle that might permit him to answer the question. The dialogue indicates not only that the respondent will not make the same inference as the tester or his compatriot, it also indicates that in terms of dispute resolution processes, he is not ready to accept any other authority to settle the matter.

The third illustration, from the same study, tested the ability to categorize.. The respondent, a man aged 39, illiterate, is shown drawings of four familiar items: glass, saucepan, spectacles, and bottle, and asked “Which of these things could you call by one word?”

His response is, “These three go together, but why you’ve put the spectacles here, I don’t know. Then again, they also fit in. If a person doesn’t see too good, he has to put them on to eat dinner.”

The questioner follows protocol to elicit the expected answer: “But one fellow told me one of these things didn’t belong in this group.”

The respondent tolerantly says, “Probably that kind of thinking runs in his blood,” and continues, “But I say they all belong here. You can’t cook in the glass, you have to fill it. For cooking, you need the saucepan, and to see better, you need the spectacles. We need all four of these things, that’s why they were put here.” (Luria, 1931, p. 57)

What’s interesting in this example is that the test subject at first comes so near to deciding, as we’d expect, that the spectacles don’t belong with the other items. Yet he quickly decides there must be some reason the four items are together, and he constructs reasons to fit the situation. Further, just as the previous respondent rejected a different answer from the younger eavesdropper, this respondent also rejects any indication that someone else’s reasoning should guide him.

At the time the initial studies were done, there was little concern for what to do about such differences. From the perspective of reasoning studies, these examples were rare, and there would be no obvious reason not to treat them as mistakes that could be remedied by instruction. If Fogelin can suggest that deep disagreements might lie outside the scope of reasoned dispute resolution, these unusual examples would simply be another category of deep disagreement.

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Unfortunately, leaving these disagreements outside the scope of any of our dispute resolution procedures may cost us not just good reasoning but good relationships as well. As already indicated, the disagreements could range anywhere from Force One to Force Five on Woods' scale, and as a result impair not only the relationship between disputants but co-operation in society as well.

We could hope for a better explanation for the observed behaviour. So far, however, all the evidence from these studies is still equally compatible with three distinct hypotheses, each with significantly different consequences for theories of reasoning and for practices of dispute resolution.

Option 1: The problems did not, and perhaps could not, be translated accurately enough into the target language to make the tests a fair measure of reasoning. In this case, the answers could all be attributable to mistakes of understanding. The studies therefore provide no evidence either way of the person's logic or lack of it. Reasoning might still be universal, but translation problems may well prevent it being used to build common ground in a dispute.

Option 2: The task itself was misinterpreted (for example, as a genuine request for information rather than as a word puzzle to be solved), in which case the person was not treating the logical inference as the key task. (For instance, the "Boima" example and perhaps the "spectacles" example given above might both be instances of misunderstanding the task.) If this is the case, the studies would provide evidence that "logic problems" are not a universal practice. But since several of the studies indicate that logic problems could be understood and done easily by members of the same culture who had had even as little as a few months' exposure to Western-style schooling. (Lancy, 1983) the studies may only show that logic is not universally acquired. They do not prove it could not be universally learned, and so logical reasoning is at least potential common ground.

Option 3. The words and the task were indeed understood by the participants in the studies, but they were applying additional axioms or principles which prevented them in at least some cases from reaching the "strictly logical", expected answer. (The "bear" example seems to be an instance of adding a principle that restricts discussion. The principle, "I cannot speak of what I have not personally experienced" appears also to be applied in some of the African cases as well.) If so, the studies do challenge the universality of reasoning principles and the possibility of using reasoning to resolve disputes – at least until those additional axioms can be identified and examined for their reasonableness.

As further testing was done to try to narrow the options, some particularly puzzling results appeared in a study by Hamill (1990). Testing Option 1, the impact of language and translation, he studied nine people who were bilingual in English and Navajo. The five women and four men ranged in age from twenty to sixty. Most were not only bilingual but biliterate, eight had completed high school and two had completed college degrees. As Hamill worked with his participants, he discovered that "and" had no simple translation into Navajo, and that "if...then" did not appear as a construction. The truth values of "and" statements varied in a complex way between the two languages, because, unlike English, Navajo is sensitive to the order in which the conjuncts are given. There was also a problem related to what is, in effect, a procedural issue. In Navajo there is such a strong prohibition against asserting anything directly of the person to whom you

are speaking that some sentences which were true in English could not even be asserted in Navajo. For example, “You are tall or you are short” can be said in English and is true in English. “You are tall or you are short” may not be asserted in Navajo so it cannot be counted as true. (Hamill, p.85) The underlying principle affecting these results is the Navajo belief in the importance of *hozho*, translated approximately as the maintenance of harmony, order and beauty. Clearly, belief in this principle will strongly influence not only which procedures may be used to deal with disputes, but will also affect the details of the process right down to the level of permissible and impermissible sentences to utter.

As Hamill notes, such test subjects do not represent “traditional” Navajo thinking, because they had such extensive exposure to Western-style schooling. However, that also means they do represent the mixed influences which are common in colonised and immigrant communities: schooling in the dominant culture, but with one or more additional influences from home, present community, or country of origin. Given the previous understanding of reasoning practices, we might have expected the Navajo to adopt one or the other of the options available to them – either their tradition, or the “standard” reasoning they were taught in school. We would not have expected them to adopt both, and to be perfectly comfortable with the conflict between the two systems. Further, there is a difficulty in counting these as instances of “deep disagreement”. The disagreement lies not between two individuals but within each bilingual individual.

And so we return to the issue of whether reasoning can be expected to play a central role in resolving disputes. Can what we in the “mainstream” cultures of the west know and teach as “reasoning” help disputants in multicultural societies to resolve disputes? As Asen (2005) notes in discussing exactly this issue, “Fundamental disagreement amid value pluralism characterizes public life in contemporary democratic societies.” (p.117) The debate on the impact of multiculturalism on reasoned discourse so far deals principally with public discourse. (See Asen, 2005, and Blair, 2005) Dispute resolution, in the sense I have been using it – procedures for reaching a decision between two or more parties – seem to be left to the discretion of the justice system. Implicitly, reasoning studies appear to treat cultural differences as disputes of “Force Three” on Woods’ scale: where they must be resolved within a time limit, they should be dealt with by the processes permitted under current legislation. The aboriginal challenges to the Canadian system illustrate where this breaks down, because, unlike recent immigrants and their descendents, aboriginal peoples have not given implicit consent to the use of Canadian norms.

Imagine the bilingual individuals from Hamill’s study in mediation, and imagine their dispute turns on the truth of an “and” statement, or on the claim that “You are tall or you are short”. Without any solid justification to claim that Western logical reasoning is the best standard, a mediator cannot solve the dispute by trying to show that the statement must be seen as true. Equally, unless we support the risky claim that there are as many “logics” as there are languages, the unfortunate mediator cannot book out of the mediation just on the grounds that the dispute is irreconcilable as long as the statement is true in one language and false in the other. And a move to arbitration, litigation, or to healing circles simply begs the question of which form of reasoning is to prevail.

The chicken-and-egg relationship of reason to create common ground for dispute resolution is now apparent: can reason create common ground, or must we have common

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ground before we can reason together? Certainly we can have both, and certainly we can move forward once we do. But which way should we turn when we don't have both?

There is a strong parallel here to the issue of witness credibility addressed by Govier (1993). She considers examples in which a person offers testimony that is disregarded or considered incredible simply because of its source – situations where a person's claims are doubted because gender, age, culture, intelligence, or some other factor is counted as *prima facie* evidence that this person may not be sufficiently sincere, truthful, competent, or reliable. Strict adherence to “normal” standards of evidence can leave such people effectively silenced. On the other hand, giving extra credence to them – giving them the benefit of the doubt – is not justifiable either. Any imbalance of credibility simply perpetuates the problem. Moreover, there is seldom only one dimension to the imbalance: we will be hard pressed to decide how best to rebalance credibility if, for example, the people testifying are of different ages, the same gender, but different races.

As Govier notes, the claims we are most likely to reject are also “the most likely to generate new insights and make valuable additions to our understanding of the world”. (1993, p. 102) Similarly, then, we might hope that the most puzzling responses from otherwise rational people engaged in debate might be equally illuminating for our options in dispute resolution practices.

The chicken may have had too long a turn as the mascot for dispute resolution. It's time to re-examine the egg: procedural options for enhancing good relationships. Reason typically assumes equality between disputants, as there is meant to be in public discourse in a democratic society. Either that there already is a “level playing field”, or a level playing field can be created just by using the principles of reason: turning the matter of debate from the parties' feelings and preferences to the content of their arguments alone. Advocating the use of reason is typically based on the assumption that it is possible to enable reason by permitting parties to speak with equal freedom and to open any subject for discussion. Is this a fair assumption?

It is only recently – within the last decade – that issues of inequality, power, and trust have been considered within dispute resolution theory. The “win-win” or “Harvard model” of negotiation which has been such a powerful influence on models of mediation assumed that equality could be achieved if disputants had the right attitude, or at least were offered suitable facilitation by a third party. Only in the mid-1990s did one of the model's designers, Fisher (1996), acknowledge that power imbalances were hard to alter, and could have multiple dimensions that did not all lend themselves to mutually acceptable solutions.

Similarly, it was only in the mid-1990s that there was an extensive internet debate by members of SPIDR (Society of Professionals in Dispute Resolution) about whether or not mediators could ethically participate in mediation between an abused spouse and the abusive spouse. As recently as 1998, a student of mine who was a support worker in a transition home in B.C. did a project critically analysing why she and her co-workers were required to assist abused women to prepare for mediation on custody and support issues. Manifestly, no matter how “level” the “playing field” might appear while a mediator was in the room with the couple, there was a severe power imbalance between the two spouses that would prevent one or both from trusting the process or relying on reason to deal with their differences.

I don't want to find myself arguing for some form of relativism, where the dispute resolution procedure and the use of reason are specific to a culture or to the preferences of the parties to a particular dispute. Even the most puzzling results from studies of reasoning don't show that people find each other entirely incomprehensible. Reasoning works, but in patches and with unexpected areas of incompatibility. The aim here would be to find a way to make best use of the areas of overlap to decide how to deal with the problems caused by divergence. To do so, one of the issues that would also need to be explored is the relationships and the degree of equality and trust required. In other words, we want to be able to modify playing fields which are not yet level, and to acknowledge when logic alone cannot create a level playing field. Ideally, we also want processes in which disputes can be fairly resolved even on a bumpy playing field.

Consequently, the primary need for critical discussion in a dispute resolution process is likely to be at the stage of exploring what dispute resolution procedure will make best sense. When we examine why disputants are at odds with each other, we need to explore not just what we can do with reason, but also what that says about how we construct our relationships of trust and respect.

[link to commentary](#)

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