

1986

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### Recommended Citation

E. A. Dauer and J. D. Nyhard, *Dispute Resolution and Preventive Law: A Reply to Professor Brown*, 1986 J. Disp. Resol. (1986)

Available at: <https://scholarship.law.missouri.edu/jdr/vol1986/iss/6>

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# DISPUTE RESOLUTION AND PREVENTIVE LAW: A REPLY TO PROFESSOR BROWN

E.A. DAUER\* AND J.D. NYHART\*\*

Within our discussion of scientific models and the processes of dispute resolution,<sup>1</sup> we suggested a single continuum along which the strategies of Preventive Law and of ADR (Alternative Dispute Resolution) could be arrayed. Beneath that synthesis lay a proposition which we may not have made entirely clear: That the two bodies of hitherto separate principles address problems which are not themselves distinct.

Professor Brown's response<sup>2</sup> would reassert the distinctiveness of the two fields, though he concludes by agreeing that "[ADR] resembles[s] the preventive law process."<sup>3</sup> The cogency of his analysis makes it necessary for us to be more explicit about what we had in mind.

The word "dispute" is a central figure. For Professor Brown, a dispute necessarily implies the assertion of a legal right arising out of some conduct (nonperformance, injury, whatever) which took place in the past. "The culmination of dispute is that its termination is ordered by the machinery of court process."<sup>4</sup> Unless, of course, it is "settled" out of court, through some procedure such as ADR.

The conventional uses of ADR are consistent with his view: ADR is most often spoken of as being useful to matters which would be ripe for adjudication had the ADR not been successful. In such cases we agree with his Hegelian analogy, the synthesis of which is that unlike litigation an ADR *may* consider aspects of the settlement that project performance obligations or relationships into the future, and that for those aspects of the ambition of ADR the learning of Preventive Law may be useful.

The point, however, is that we were addressing the potential of ADR in a broader way. ADR is not only useful to instances of current dispute,

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1. Nyhart and Dauer, *A Preliminary Analysis of the Uses of Scientific Models in Dispute Prevention, Management and Resolution*, 1986 MO. J. DISPUTE RESOLUTION 29.

2. Brown, *Thesis (Preventive Law), Antitheses (Adversarial Process), Synthesis (Settlement, ADR): A Comment on Nyhart and Dauer*, 1986 MO. J. DISPUTE RESOLUTION 55.

3. *Id.* at 58.

4. *Id.* at 56.

conventionally defined. As the deep sea mining problem and the proposed Bay of Fundy project exemplify,<sup>5</sup> ADR techniques are also available for instances of integrative rather than disputations activity—where the problem is not one of settling a “dispute” in terms of its potential for adjudicable claims of legal right, but rather one of entirely forward-looking transaction building. Consider first an ordinary simple contract. We own a large pizza and Professor Brown owns a case of beer. The pizza is too much for just us two, and Brown has more beer than he’ll probably drink in the near future. We make a contract: Two slices of pizza for four cans of beer. And we are all better off. There was, prior to that contract, no “dispute” in the ordinary sense. There was, however, a potential claim of legal right. Had we muscled him aside and tried to steal his beer, Brown could have asserted a legally protectable right to exclude us from its enjoyment and vice-versa, of course. The construction of that contract is a matter clearly within the realm of legal planning, hence within that of Preventive Law.

Consider next a case in which an oil company wishes to construct an offshore platform on leased sea bottom. Fishermen wish to extract fish from the same area, a tradition which has until this moment been unchallenged. The fishing nets, let us suppose, may foul the operations of the drill; and the platform may alter the behavior of the fish in a way deleterious to the fishermen. Each party could not simply do what it wished, unhindered by the claims of the other. The fishermen and the oilmen could trade a portion of their legal rights (ownership of the pizza; the right to fish in the open seas) for some return which would be of greater value—a different platform design; an agreement about the hours when the laying of nets would occur.

We see the two cases as strictly analogous. Neither one is a “dispute” except insofar as that word might be defined to include the assertion of a right of ownership which could be violated only by agreement of its owner. Thus the problem of oilmen and fishermen is not a dispute in the ordinary sense any more than the pizza-beer contract is.

ADR is relevant to the second case; preventive law is relevant to the first. Since the two cases are alike, so also are the ambitions of certain applications of ADR at one with those of Preventive Law. So too with the law itself: Bargains are possible where property rights exist; property rights are, at least in contemporary legal systems, rooted in the public protection of the choice to exclude a use of the property by others. Thus the formation of every contract implies the assertion of a legal right: “I will exclude you from the use of this pizza regardless of how much you may want or need it. Unless, of course, you buy me off with a couple of beers.”

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5. See, e.g., Baker & Knecht, *Fundy Tidal Power in Coastal Zone and Continental Shelf Conflict Resolution*, COASTAL ZONE AND CONTINENTAL SHELF CONFLICT RESOLUTION: IMPROVING OCEAN USE AND RESOURCE DISPUTE MANAGEMENT 121 (Nyhart ed. 1985).

If we move, therefore, beyond the confining connotations of the word “dispute,” there is a theoretical as well as a practical continuum which unites the legal contributions to bargaining with those of contending. This does not mean that Preventive Law and dispute processing do not have discrete attributes in practice, nor even in theory. They surely do. What it does mean is only that there is nothing in the deep structure of bargaining-in-the-shadow-of-the-law which requires that they not have an underlying unity, or be on a common continuum. In the range of problems we were addressing, *i.e.* those which deal not with problems ripe for litigation but rather with problems in which optimizing exchanges are possible, ADR techniques can be extremely valuable *simultaneously* with the principles of Preventive Law. We repeat, therefore, our original claim: All contracts, at least potentially, can define the measures of present exchange (the result of ADR) *and* establish the criteria by which future performances may be judged (a goal of Preventive Law). Hence, it seems quite reasonable as well as theoretically sound to erect a set of ADR criteria (or, as we called them, “desiderata”) which derive from a unified continuum of possibilities. Whether the unification will also prove useful, time will tell.

