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Recommended Citation

Dickerson, Reed, "Group Interests in the Field of Food Law" (1959). Articles by Maurer Faculty. 1497.

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GROUP INTERESTS IN THE FIELD OF FOOD LAW

Reed Dickerson *

Professor Cowan's article raises some provocative issues that the lawyers will do well to consider carefully. I am not sure that I see all the implications of the questions raised, but there are some general considerations that I would like to explore before I comment briefly on the field of food law. Exploration of these considerations does not imply criticism of Professor Cowan's thesis, because they are extensions of ideas that I find hinted at in the article but, because of its general, exploratory, and preliminary character, are not developed there.

In his first paragraph, Professor Cowan mentions groups such as associations, unions, societies, boards, and so forth, together with "amorphous collectivities" of a group character such as taxpayers and consumers. Although much of the rest of the discussion deals with groups of the former kind, the reader could easily get the impression that both kinds may be lumped together as "groups" and that each group may be treated, with respect to its "groupness," as being substantially like every other group. I do not think that the author intended that result but, if he did, he may be inviting confusion. Clean results in this area depend on careful definition and a constant awareness of the kinds of groups involved in the particular controversy.

Professor Cowan, with some justification, finds the attempt to solve social and legal problems on the basis of two fundamental concepts, the "individual" and "society," inadequate. He concludes that a third concept—that of the "group," which is more than the individual but less than society as a whole—needs to be taken account of. But the establishment of a significant and working trinity of Individual, Group, and Society is more difficult than it may sound.

Whereas "individual" (the social building block) and "society" (the social totality) are single, undifferentiated concepts, the concept of "group" is highly differentiated and heterogeneous. In its endless permutations and combinations of people, it represents an infinite series of gradations between the "individual" at the one extreme and "society" at the other. In fact, it is so highly differentiated and heterogeneous that the number of significant statements that can be made in the law about "group" in its most general, abstract sense must be very limited. Some of these are made in Professor Cowan's article with respect to the law's traditional approach to procedural problems.

Outside of instances such as these, nothing significant, in my opinion,

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can come of a "group" approach to a concrete problem unless the characteristics of the particular kind of group involved are thoroughly understood and taken account of.

It is beyond my capacity and the limits of this article to attempt any exhaustive or systematic account of the myriad kinds of groups that appear in present-day society. I will therefore limit my comments to making what seem to me to be some elementary and important distinctions.

In recognizing that all groups are not alike, the law must first recognize that some groups are organic, while others are non-organic. Thus, a labor union is an organic group; taxpayers as a group are not. The United States Chamber of Commerce is an organic group; consumers as a group are not. The distinction is vital particularly in matters of group protection because only an organic group can act as a group in its own behalf. A non-organic group, on the other hand, can be protected only by some entity other than the group, such as an individual or an organic group. Even where a non-organic group is aided from within its own membership, that aid can come only from individuals or organic groups that differ from the non-organic group and act independently of it.

The differences between specific organic groups and specific non-organic groups are undoubtedly differences of degree and it would be hard to locate the place where the one kind ends and the other begins. This is unimportant. The important thing is that the fewer the conditions to organic existence the group enjoys, the more it must rely for its protection and advancement on individuals and other (organic) groups. The converse would also seem to be true.

The fully organic group has a strong centripetal force to hold it together. The fully non-organic group has nothing to hold it together. It is simply a conceptualization imposed, usually from the outside, on an aggregate of individuals who, though they may have a common interest, have little or no awareness of their "groupness." This is not to say, of course, that the non-organic group has no significance for the law. It may have great significance, because the law is constantly classifying people according to their interests (e.g., unsecured creditors, purchasers in the ordinary course of trade, and infants). The point is that the law will very likely want to treat a non-organic group differently from an organic group, at least with respect to the degree to which it may wish to intercede affirmatively on the group's behalf.¹

So much for sweeping over-generalizations. What does "groupness" (current cliché tempts me to say "togetherness") consist of in the food

¹. The basic distinction between organic groups and non-organic groups suggests the possible advisability of adopting the sociologists' practice of referring to the latter under some other designation than "group."
field? The answer is the same as for any consumer product: very little, so far as the consumer is concerned.

The consumer concept has given the sociologists and the economists, as well as the lawyers, a lot of trouble. The fact that everyone is a consumer of many things has led some persons to confuse the consumer interest with the balanced aggregate of all human interests, the "public interest," a patent absurdity, even though precisely the same people (the "public") are involved. Because everyone eats, the same confusion could well arise with respect to the "food consumer," which is manifestly a narrower interest than that of "consumer." Similarly, on the next level of particularity, with respect to the "consumer of salt.” The difference between the consumer interest and the public interest is more obvious when you turn to groups such as the “consumers of Peter Pan Peanut Butter,” which obviously excludes large numbers of at least the adult public and many persons of more tender years who prefer Skippy Peanut Butter or another brand. Some of this confusion can be avoided if you talk, as Professor Cowan does, not in terms of people, but in terms of interests.

Now notice this: Every significant organic group has a common interest that is (1) strong, (2) constant or frequently recurrent, and (3) inter-connected.

The trouble with the consumers of products in general and the consumers of food products in particular is that the more specific the interest is (such as the interest in buying a jar of mayonnaise), the more fleeting it is; whereas the more permanent it is (such as the interest in buying canned goods in general), the more diffuse and heterogeneous it is.

Because of its apparent aptness, perhaps I may be forgiven for repeating here what I stated on another occasion:

... it is helpful to remember that the word "consumer" means variously (1) an individual buyer, as related to a particular product he wants, (2) an individual buyer, as related to the total of his purchasable wants, (3) all buyers who want a particular product, as they are related to that product, or (4) all buyers (i.e., everybody), as related to the total of their purchasable wants.

In sense (1) the word “consumer” denotes not a whole man, nor even a constant aspect of a man, but a fleeting relationship. True, the individual buyer may not consciously work in this transaction against his interests in this transaction, but he may unconsciously work in this transaction against his interests in other transactions. And conversely. This is just as true for the less concrete and less significant sense (2), where his interest is, in the abstract, more pervasive, but remains in individual situations an aggregate of separate interests no better or differently coordinated.

In most economic situations of general significance, sense (3) is the most important, because concrete problems normally involve particular products or groups of products and all those who are interested as
users in those products. Here the relevant consumer group not only is limited in number but is comprised of constantly changing individuals with only a momentary allegiance. The important fact here is that the common interest in a common product provides no such adhesive, necessary to group self-assertion, as it gives, through intimate and continued personal association, to organic entities such as the "laborer" and the "producer." Add to this fact an increased disparity in sophistication between seller and buyer and you can see why the consumer frequently needs special help.

When we say that "everyone is a consumer" (sense (4)), we mean that everyone wants at least something that is purchasable, though not necessarily the same thing or things. Here, the word "consumer" relates to an undifferentiated group with no peculiarities whatsoever. As this everybody-capable-of-buying-anything, the consumer has even less group self-consciousness than under sense (3). The capacity for group self-protection is correspondingly less.

Few specific food demands are both strong and constant. Two examples appear to be milk and bread. Do these common demands furnish sufficient matrices around which to construct organic groups of "consumers of milk" and "consumers of bread"? Working against any such notion are several factors. One is that, important though they may be, these demands do not, in the hierarchy of interests that compete for the attention of an individual during a busy day, command more than a minute part of that attention. Another is the lack of simultaneity. While one housewife may be fretting over a quart of sour milk, another recipient of sour milk may be wondering how to fix a leaky faucet. A third factor is the wide dispersion of even simultaneous common interests. While at eight o'clock on a given morning seventy-five housewives may be fretting over seventy-five quarts of sour milk, the chances are that they are so widely dispersed that they are for the most part unknown to each other, even where they are customers of the same milk company.

As a result, such scattered and fleeting interests are unlikely to lead to the coming together of individuals that is necessary to group action. The three factors just noted are more than enough to subvert any fragile common interest that might otherwise form the basis of organized group action.

As you move from products such as milk and bread, which are bought by almost everyone almost daily, to products such as canned beans, pork chops, and frozen chicken pie, which represent less universal and more occasional appetites, you get even less of the strength, continuity, and inter-connectedness of specific common interests that are the prerequisites to organized group action. These examples are typical not only of food purchases but of purchases of consumer products generally. It is small wonder, then, that despite the occasional

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consumer cooperative there has rarely been a significant grass-roots consumer movement, either for particular consumer products or for consumer products generally.\(^3\)

You can solve the problem of strength and continuity of common interest by the simple expedient of defining your consumer group in terms, not of narrow food categories, but of broad food categories such as "canned foods," "fresh vegetables," "processed foods," or even "food generally." Ironically, by the same act you so diffuse the common interest that it could never serve as a sufficient bond for group solidarity.

In addition to differing between the organic and the non-organic, groups differ in other, sometimes related, respects. Some organic groups are large; some are small. Some are strong; some are weak. Some are complicated; some are simple. Some act constantly; some act sporadically. Some are tight; some are loose. Some consist of individuals; some consist of other groups. And so on.

From this it seems clear that in a concrete situation no "group" approach is likely to prove fruitful unless there is, at the outset, a careful definition and evaluation of the group, or kind of group, that is involved.

One difficulty I have with Professor Cowan's analysis is that of drawing the line between "group interest" and "social interest." By "social interest," does he mean (1) the aggregate of everyone's interests in everything (i.e., the "public interest"), (2) a particular interest, such as food, that is shared by everyone, or (3) a group interest, such as alcoholic beverages, that while not shared by everyone is of concern to everyone? Although he uses "social interest" synonymously with "public interest," a rereading of the article suggests that he is using the phrase primarily in sense (2). If so, he appears to have omitted the important concept of "public interest" as the useful ideal of balancing, at some point, all human interests. Such an omission would seem unfortunate.

My own preference would be to reserve the word "social" for the concept of public interest in its broadest sense and to treat all specific, shared interests as "group interests," even where they are shared by everyone. Thus, I would think it more useful to treat the interest in wholesome food as a "group" interest than to treat it as a "social" interest.

Under this kind of group analysis, the problem faced by the United States Food and Drug Administration (FDA) is that of mediating

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\(^3\) Occasionally an acute situation will provoke a spontaneous revolt of individual consumers. Assistant General Counsel William W. Goodrich of the Department of Health, Education and Welfare cites instances where strong, spontaneous consumer resistance neutralized forces tending to produce abrupt and exorbitant increases in coffee and beef prices.
between two sets of groups and groups of groups. On the side of the food producers, and of the food distributors in their capacity as sellers, the constituent groups (except for the shrinking unaffiliated grower) appear to be all organic: individual food companies, specific food industries made up of such companies, and organizations such as the American Farm Bureau Federation, the National Association of Frozen Food Packers, and the Millers' National Federation.

On the side of the food consumer, and of the food distributors in their capacity as buyers, the constituent groups vary. The consumer groups, and groups of groups, are almost entirely non-organic. The food distributors, on the other hand, are for the most part organic. Of all the organic groups that frequently act on behalf of the consumer, such as the Food Law Institute, the American Medical Association, the Better Business Bureaus, the occasional consumer cooperative, and magazine services such as Consumers' Research and Consumers Union, only the last two kinds intercede under any pretense that they act as and for consumers as such. The rest find their central reasons for existence in the exploitation of other interests.

In protecting buyers against impure food, FDA is not, of course, concerned solely with protecting consumer groups. At least incidentally, it also protects food distributors in their capacity as buyers. However, being organic and sometimes economically stronger than the food producers from whom they buy, these buyers normally offer less occasion for solicitude. When their economic position is dominant, they are often able to protect themselves by insisting on an adequate product, quite apart from whatever weight they may carry with FDA in instigating official action. Even so, whether or not they participate in the process, they benefit from many of the measures that FDA adopts on behalf of the amorphous collectivities that make up the "food consumer." Conversely, the food consumer benefits incidentally from whatever blows for pure food the food distributor may be able to strike against the producer.

Considerations such as those discussed in this article invite the makers of law to be highly cautious when confronted with sweeping generalizations about the term "group" or "group interest" in its most general and abstract sense.