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# Wine in America

LAW AND POLICY

 RICHARD MENDELSON



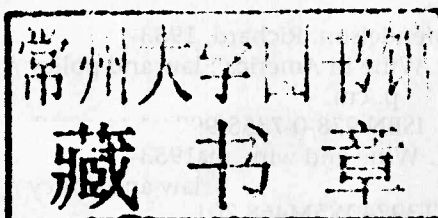
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# **WINE IN AMERICA: LAW AND POLICY**

**Richard Mendelson**

*Director, Program on Wine Law and Policy  
University of California at Berkeley*



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## AUTHORS

**Jacques Audier** is Professor Emeritus at the University of Paul Cezanne/Aix-Marseille III. He specializes in rural law and in vineyard and wine law and was the former director of the Master's degree program in vineyard and wine law. He presently is the legal advisor to the Director General of the International Organization of Vine and Wine (OIV) and is a member, and President since 2002, of the Scientific Committee on Designations of Origin, Geographical Indications and Traditional Specialties at the European Commission. He also serves as a consultant to the European Commission and the World Intellectual Property Organization. He is the author of several books on rural law and over 60 articles, of which 21 have been published in the *OIV Bulletin*. Université Paul Cezanne-Aix en Provence-Marseille, Diplôme d'Etudes 1964; Maîtrise en Droit Privé 1965; Diplôme d'Etudes Supérieures de Droit Prive 1966, de Sciences Criminelles 1967 et d'Histoire du Droit et des Faits Sociaux 1967; Docteur en Droit 1975.

**Carrie Bonnington** is a Senior Associate at Pillsbury Winthrop Shaw Pittman LLP, where she has been practicing since 2003. After concentrating in general civil litigation early in her practice, she began specializing in alcoholic beverage control law, focusing on litigation and advice relating to trade practices, responsible beverage service, and special events. She has presented at seminars and conferences throughout the nation. She is an adjunct professor at the University of the Pacific, McGeorge School of Law, where she coaches a mock trial team and lectures in trial advocacy. University of California Davis, BA, 2000; University of the Pacific, McGeorge School of Law, J.D., 2003.

**Lynne Carmichael**, a partner for 20 years at Hinman & Carmichael LLP in San Francisco, was previously a partner in the Corporate and Financial Services Group at Brobeck, Phleger & Harrison. Her current practice focuses on alcoholic beverage licensing for all business ventures, licensed business acquisitions, and trade practice counseling. She is a past president of Women for WineSense and a member of the International Wine Law Association.

She wrote the CEB treatise on transferring retail liquor licenses in California (2000) and was included in *Northern California Super Lawyers 2006*. Occidental College, B.A., 1965; University of California Berkeley Law, J.D., 1978.

**William Casey** is the managing partner of the San Francisco office of Clyde & Co US LLP. Bill's practice is in the area of business litigation, insurance coverage and counseling, and the defense of lawyers in legal malpractice actions. Bill is a civil litigation trial lawyer, who has tried cases to verdict, and regularly is involved in mediation practice. Bill also regularly counsels clients on the topic of risk management and loss prevention. He has also lectured at University of California Berkeley Law regarding authenticity issues surrounding rare and fine wines. Bill is a 1984 graduate of Santa Clara University School of Law, J.D., where he was editor-in-chief of the Santa Clara Law Review, and a graduate of Stanford University, A.B., 1980.

**Scott Gerien** is a Director of Dickenson, Peatman & Fogarty in Napa, California, where he heads the firm's Intellectual Property Department. Since his first case in 1996, *Kendall Jackson v. Gallo*, Scott has represented hundreds of wineries in intellectual property matters. Scott is very active with the International Trademark Association (INTA) and helped author the INTA Proposal for a Multilateral Register for Geographical Indications for Wines and Spirits. He is also a board member of the International Wine Law Association. In 2006, 2007, and 2009, Scott was identified by *Trademark Insider* as one of the top 50 trademark attorneys in the United States, and in 2009 *Wine Industry Business Journal* named him one of the top wine lawyers in Northern California and described him as "one of the most knowledgeable wine trademark-protection attorneys in the nation and the world." Trinity College, B.A., 1990; University of California Berkeley Law, J.D., 1996.

**Erik Lawrence** is an Associate at Dickenson, Peatman & Fogarty, where he has practiced since 2008. His practice focuses on business and real estate transactional law, specializing in servicing clients in all areas of the beverage alcohol industry. Prior to his legal career, he was an Associate Vice President in Wells Fargo's Commercial Banking Group. He received a Bachelor of Science degree in Managerial Economics from the University of California Davis in 1997 and a Juris Doctor degree from the University of California Davis School of Law in 2007, where he was Managing Editor of the *UC Davis Law Review* and a member of the Order of the Coif.

**Wendell Lee** is General Counsel to Wine Institute, the public policy advocacy group consisting of more than 1,000 California wineries and affiliated businesses. Wine Institute represents 85 percent of U.S. wine production and 90 percent of U.S. wine exports. He has been with Wine Institute since 1980 and deals with all legal matters for the organization. Additionally, he oversees the Wine Institute website, computer database, and technical support. For four years prior to joining Wine Institute, Wendell was a criminal trial attorney serving in the Office of the District Attorney for the City and County of San Francisco. He is a graduate of Hastings College of the Law and the University of Hawaii and has been a member of the California Bar since 1977.

**Margot Mendelson** is a law clerk for the Honorable Diana Gribbon Motz on the U.S. Court of Appeals for the Fourth Circuit. She worked previously at the University of Arizona Rogers College of Law and the Migration Policy Institute. She has published works in the *Yale Law Journal*, the *Berkeley Women's Law Review*, and the *Harvard Review of Latin America*. She is a graduate of Harvard College (B.A., 2003), Yale Law School (J.D., 2009), a member of the California Bar, and an Arthur Liman Public Interest Law Fellow (2009-2010).

**Richard Mendelson** directs the Program on Wine Law and Policy at the University of California, Berkeley, School of Law, where he teaches classes on wine law and geographical indications. He is counsel to the law firm of Dickenson, Peatman & Fogarty in Napa, California, where he has practiced wine law since 1986. He is past president and current director of the International Wine Law Association, headquartered in Paris. He is the author of *From Demon to Darling: A Legal History of Wine in America* (University of California Press 2009), which was awarded the Law Prize in 2009 from the International Organization of Vine and Wine, and *Spirit in Metal* (Val de Grâce 2011), on his work as a metal sculptor. He owns Mendelson Wines and sells a Pinot Noir and two dessert wines under that label. Harvard College, B.A, 1975; Oxford University, Magdalen College, M.A., 1977; Stanford Law, J.D., 1982.

**James Seff** heads the Wine, Beer & Spirits Law practice at Pillsbury Winthrop Shaw Pittman in San Francisco and previously was Wine Institute's chief counsel. He is a professional member of the American Society for Enology and Viticulture, a former chair of the American Bar Association Alcoholic Beverage Practice Committee, and a founding member of the International Wine Law Association. His practice deals with all wine industry legal issues, including regulatory matters, trade practices, mergers and acquisitions, litigation, and internal investigations. *Chambers USA* rates him Tier 1 in Food and Beverages: Alcohol. His publications include chapters in the *UC/Sotheby Book of California Wine; Successful Wine Marketing*; and *Inside the Mind: Food, Beverage & Drug Law*. He was president of the San Francisco Bar Association, was a governor of the California State Bar, and is a retired U.S. Navy Captain. University of Michigan, A.B. with Honors in English, 1963; University of California Berkeley Law, J.D., 1966.

**James Terry** is a Director of Dickenson, Peatman & Fogarty, where he has practiced since 1995. Jim has represented buyers in numerous vineyard and winery acquisitions throughout California. His wine industry-related practice includes alcoholic beverage law, business entity selection and formation, business planning, sales and acquisitions, grape purchase agreements, and vineyard leasing. He has lectured extensively on wine law subjects in California. His publications include "Grapes to Wine: Business Models and the Regulation of Wine Production," published in the Organisation Internationale de La Vigne et Du Vin's *Le Bulletin de L'OIV* in 2006. Jim is past president of the Napa County Bar Association and a member of the Real Property and Business Law sections of the California Bar Association. He is the current Managing Director of Dickenson, Peatman & Fogarty. University of California Berkeley,

A.B., 1972; Santa Clara University School of Law, J.D., 1976; New York University School of Law, LL.M, 1978, where he was awarded the Donald L. Brown Fellowship in Trade Regulation.

**Andrew Wanger** is a partner with Clyde & Co US LLP. He is a trial lawyer practicing in the area of civil litigation. His practice regularly includes the representation of businesses in contract disputes and of other legal professionals in malpractice actions, and the defense of insurers in complex insurance coverage disputes. Andrew has extensive civil and criminal trial experience, having tried numerous cases to verdict. He previously served as a Deputy District Attorney for Fresno County from 1995 to 1996. Andrew is a 1993 graduate of Santa Clara University School of Law, J.D., and a graduate of Santa Clara University, B.S., 1990.



# FOREWORD

Mike Thompson

As the congressman from Northern California's premier wine growing region, I've been introduced to some of the world's top wine aficionados. They've talked extensively about how wine is more than just a beverage; it's a gateway to a better food experience, to a place's culture, to a vineyard's soil and climate, and to a winery's technique.

When they talk, I nod and smile. I'm truly appreciative of the passion they bring to wine. But when you were born and raised in the Napa Valley, when you are the third generation in the wine community, and when you have done every job in the industry from fixing tractors to washing out barrels to growing grapes, you *know* that wine is so much more.

In my congressional district, which includes the Napa Valley and Sonoma, Lake, Mendocino, and Yolo Counties, wine is life. It's an economic backbone, spreading jobs beyond wineries and vineyards to restaurants, retail, and tourism. It's the taxes that pay for our schools and roads. It's the business name on the back of the little league uniforms and the patron of the new hospital wing. It's the farmer who religiously monitors the rain and temperature. It's the winery owner who grew an internationally recognized brand out of a few barrels in her cellar.

For us, great wines are more than just tasting notes. They are a testament to the hard-working people and incredible natural resources that make up our home. But they are also a product of the policies, laws, and regulations that govern how wine is made and sold.

When Richard Mendelson asked me to write the foreword to his comprehensive book on the policy and law behind wine, I saw it as an amazing opportunity to help tell the story of what I taste when I drink a wine from my congressional district—the people, the agriculture, as well as the tax policy, trade laws, and labeling regulations. A book like this goes beyond the wine in the bottle and back through the story of the economic, political, and legal factors that brought the wine into existence. And I believe that once you learn how these factors can be as complex and engaging as a 98 point Napa Valley cabernet, the wine on your palate will taste even better.

That is exactly what drove me to form the Congressional Wine Caucus when I first came to Congress in 1998. Most Members of Congress had no idea of the impact their policy decisions have on wine, but I soon found out they were eager to learn—and taste—more. The Wine Caucus, which today is one of the largest bipartisan and bicameral groups on Capitol Hill, meets regularly to discuss policies pertaining to wine, such as efforts to control agricultural pests, barriers to increasing American wine's presence in the global market, and wine's impact on public health. But with those discussions, I also like to introduce my fellow representatives to the people behind the wine, whether it's the independent winemaker, the fifth-generation grape grower, or even the sommelier at a hip new restaurant. These are the people who bring the policies to life.

Over the years, I've seen congressional interest in wine grow as vineyards have taken root across our country. Now that wine is made in all 50 states, every representative and senator has reason to be invested in the success of American wine. And, like me, they are quickly learning that wine is more than a beverage or even an experience; it's an economic driver and community builder.

As a result, these Members of Congress have joined the people from my district, who know wine is not just a matter of what tastes good and what doesn't. They've seen how laws, policies, and court decisions such as the ones discussed in this book make a big difference in whether the wines from their congressional districts succeed or not. A recent issue they grappled with was a proposal in Congress to increase the federal excise tax on wine by a massive amount. Most people know intrinsically that an increase in the excise tax means higher prices on the wine shelves. But what members of the Congressional Wine Caucus discussed were the thousands of winery and vineyard jobs that would be lost as a result of the increase. We also talked about the vineyards that would be eaten up by development when the price of the excise tax eclipsed the value of the grapes. Fortunately, we were able to point out the consequences of the legislation for jobs and our agricultural lands, and the proposal was defeated.

But this example is exactly why the stories behind wine—the jobs, the land, and the communities—are so important to understand. Since Prohibition, an arcane and idiosyncratic maze of policies and laws has been erected around wine, to the point that most people who consider themselves oenophiles know very little about, and have been given few opportunities to understand, such critical elements of the wines they love to drink. The complex subject matters involved, such as constitutional law, intellectual property, taxation, and international trade, are often addressed by people far removed from the wineries and vineyards. Yet to someone like me or my neighbors at home, these subject matters are at the very center of American wine. And we know that the disconnect between people's understanding of wine and the policies and laws that govern it is a real threat to our way of life.

That is what makes this book—the first of its kind in America—such a critical read. Written by experienced wine law attorneys Richard Mendelson and colleagues, it provides valuable information and insights into the laws and policies that make American wine what it is. This book should be studied by

any American student, scholar, government regulator, or policymaker who wants to truly understand wine.

Examples of why this book is so important abound. As this book goes to press, the wine community is embroiled in another important policy battle. Legislation was introduced in Congress again this year that would strip the federal government of its power over interstate commerce in alcoholic beverages and put it entirely in the hands of states, in essence allowing the Twenty-first Amendment to trump the Commerce Clause. Although this is a subject traditionally more familiar to Congress watchers than wine drinkers, it is central to the ability of wine lovers everywhere to buy and receive wines directly from wineries in interstate commerce. Since its introduction, the legislation has been amended to limit its scope, but its future direction is unpredictable. Wineries, legislators, and consumers must remain vigilant and oppose attempts to limit consumer wine choices or to unreasonably restrict the rights of wineries to access these consumers.

A topic this complex, yet incredibly important to the future of American wine, requires a deep understanding of wine policy and law, one that few have. Yet this policy proposal is just one example of many that are being brought before policymakers and regulators on the federal, state, and local levels. Richard Mendelson's book is exactly the place to begin for those who want to quickly gain this understanding without having to immerse themselves in tens of thousands of pages of legal text.

For most wine drinkers, taste is all that matters. And for those of us who are involved in making wine, that's fine by us. But anyone who wants to know the story behind the wine needs to look at the people, the land, the history, and the laws and policies that brought the wine to your table. This book is where to start.

Mike Thompson  
Member of Congress and  
Co-chair, Congressional Wine Caucus  
March 2011

# INTRODUCTION AND ACKNOWLEDGMENTS

What is wine law? Technically, it is a branch of administrative law concerning the regulation of wine, as a subset of alcoholic beverages. But this definition is altogether too narrow. In my wine law practice, spanning more than 25 years, I have handled a wide variety of legal matters of vital interest to the wine industry in areas such as land use, intellectual property, international trade, torts, specialized contracts (distributor agreements, grape purchase and sale agreements, vineyard leases), environmental law, tax law, constitutional law, and administrative law.

This being what I learned, this also is what I have taught. My Wine Law class at the University of California, Berkeley, School of Law ("Berkeley Law") is essentially a survey class covering diverse legal fields, all focused on wine. We also address important wine policy issues such as promoting public health, preserving agriculture, preventing wine counterfeiting, and eliminating international trade barriers. For embracing such a wide vision of wine law and allowing me to teach at their universities, I thank Berkeley Law and Pam Samuelson in particular, the University of Aix-Marseille Law Faculty (Jacques Audier), the University of Bordeaux Law Faculty (Dominique Denis, Antoine Vialard, and Jean-Marc Bahans), the University of Reims Law Faculty (Theodore Georgopoulos), and the University of California, Davis, School of Management (Bob Smiley).

Wine law is arcane and often counter-intuitive. Without an understanding of the history of temperance and Prohibition in our country, one cannot begin to comprehend the spirit or the letter of wine law. This is why I wrote my first book, *From Demon to Darling: A Legal History of Wine in America* (University of California Press 2009). As that book shows, our laws are deeply rooted in our history, and a firm grasp of that history is essential. For example, were it not for the saloons of the pre-Prohibition and Prohibition eras—those dens of iniquity that infuriated women temperance crusaders—we might not have special laws that prohibit trade practices such as tied-houses, free goods, and consignment sales, practices that are commonplace in other industries. And if we had not begun in the 1830s to devolve control over alcoholic beverages to



local communities, we might not have local option elections on the sale and service of alcoholic beverages across the United States today.

Despite these deep historical roots, wine law is evolving rapidly as the wine industry expands at home and abroad. Nowhere is this more evident than in the area of Twenty-first Amendment jurisprudence, particularly in relation to direct-to-consumer interstate shipments of wine, and intellectual property, where wine brands and appellations of origin are important focal points in the ongoing discussion at the World Trade Organization about geographical indications.

Wine law is idiosyncratic, as anyone who has dealt with the subject quickly realizes. It is a world unto itself, with its own constitutional provisions (intoxicating liquors are the subject of not just one, but two, constitutional amendments—the Eighteenth and the Twenty-first), its own language (tied-house, primary source, semi-generics, to name a few), and its own regulators at the state, federal, and sometimes local levels.

Finally, wine law is fun, in large part because wine itself is fun. My Berkeley Law students always look forward to our class wine tasting, which focuses on appellations of origin. Are appellations meaningful to consumers? Can consumers tell the difference between wines made from grapes grown in distinct appellations? The only way to know is to taste the product.

This book follows the general outline of my Wine Law class at Berkeley Law. We begin with an overview of the subject, followed by individual chapters on wine industry trade practices (Jim Seff and Carrie Bonnington), wine labeling and advertising (Wendell Lee), business models for grape growing and winemaking (Jim Terry and Erik Lawrence), Twenty-first Amendment jurisprudence (Margot Mendelson), intellectual property involving wine brands and wine appellations (Scott Gerien and me), land use in the context of rural wineries and urban bars (Lynne Carmichael and me), wine counterfeiting (Bill Casey and Andrew Wanger), public health and social responsibility (myself), and international institutions and accords that deal with wine (Jacques Audier). My co-authors are my colleagues and friends and, in the area of constitutional law, my daughter. I have the utmost confidence in their abilities and their experience. Most of them have lectured to my students, so their presentations have been classroom tested. I thank them all for their valuable contributions.

Finally, I thank my students, past and present, for their questions, opinions, and feedback; Alexis Burgess, Negin Iraninejadian, and Kim Lehmkuhl for their research and editorial assistance; my secretary, Jaymie Kilgore, who coordinated the manuscript preparation; the very capable staff of Berkeley Law Library; and my wife, Marilyn, for her patience and support, for reviewing every chapter, and for sharing with me a love of wine and culture.

Richard Mendelson  
Napa, California  
March 2011

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