

# ILLINOIS BUSINESS LAW JOURNAL

## A HORSE WALKS INTO A BAR: COMPARING EASTERBOOK'S CRITICIZED CYBERLAW ANALOGY TO THE STUDY OF ALCOHOLIC BEVERAGE LAW & REGULATION

### ❖ ARTICLE ❖

*Mark Edward Blankenship Jr. \**

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\* Juris Doctor, The University of Kentucky J. David Rosenberg College of Law (2019); B.A., *magna cum laude*, Georgia Southern University (2015).

*Acknowledgements: I began writing this article while social distancing and I first want to express my sincere thoughts and prayers to those affected by the Covid-19 pandemic. May we as a Nation be able to seek hope during these tumultuous times. I want to thank Professors Allison Connelly, Melynda Price, and Brian L. Frye for inspiring me in my legal writing, Professor James Donovan for his instruction on cyberlaw during my 3L year, and my friends and family for their love and support. Lastly, I dedicate this article to the Tourette Association of America.*

## I. INTRODUCTION

Bar and nightclub consultant Jon Taffer described alcohol establishments as “part of America’s fiber”, which is arguably true to this day and age.<sup>1</sup> Between 2008 to 2018, the number of breweries in the United States rose from 1,574 to 7,450. Additionally, in 2018, 8,391 wineries were established in North America, 7,762 of which were in the U.S.<sup>2</sup> As a result, the concept of alcoholic beverage law has become a niche area of practice.<sup>3</sup> Continued Legal Education panels<sup>4</sup> and boutique firms<sup>5</sup> have recently appeared across the country specializing in alcoholic beverage law. With this apparent need for beer and wine attorneys and legislative advancement, one may think that more law schools would make developments to help facilitate this need.<sup>6</sup>

So far, some institutions have. In 2019, the University of Kentucky J. David Rosenberg College of Law founded a student organization called the Bourbon Legal Society.<sup>7</sup> The first casebook on “craft beer law” will be published this year.<sup>8</sup> And some universities in

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1. *Nightclub King Jon Taffer Sets A High Bar*, NPR (Dec. 1, 2013 5:34 PM ET), <https://www.npr.org/2013/12/01/247515926/reimagining-the-american-nightclub>; CPA Speakers Bureau, *Jon Taffer - CBA Speakers Bureau*, YouTube (Nov. 7, 2013), <https://www.youtube.com/watch?v=O0utYUr31AU>.

2. Jan Conway, *Total number of breweries in the United States 2012-2018*, STATISTA (Apr. 17, 2019), <https://www.statista.com/statistics/224157/total-number-of-breweries-in-the-united-states-since-1990/>. According to the report, there were approximately 7,450 breweries in the U.S. in 2018. Breweries are categorized as craft, large craft, and other non-craft breweries. Craft breweries include microbreweries and brewpubs. *Id.* *National Beer Sales & Production Data*, BREWERS ASSOC., <https://www.brewersassociation.org/statistics-and-data/national-beer-stats/> (last visited April 10, 2020); *How Many Wineries Are There in the United States?*, USA WINE RATINGS (Mar. 9, 2018), <https://usawineratings.com/en/blog/insights-1/how-many-wineries-are-there-in-the-united-states-37.htm>.

3. *See Wine, Beer & Spirits Law*, PILLSBURY WINTHROP SHAW PITTMAN LLP, <https://www.pillsburylaw.com/en/services/sectors/wine-beer-and-spirits-law.html> (last visited April 10, 2020); Lindsey A Zahn, *Navigating the Challenges of a Regulated Industry*, in *WINE AND BEER LAW: LEADING LAWYERS ON NAVIGATING THE THREE-TIER SYSTEM AND OTHER REGULATIONS ON ALCOHOLIC BEVERAGES* 33, 47–48 (Thompson Reuters/Aspatore 2016); Daniel Croxall, *Helping Craft Beer Maintain and Grow Market Shares With Private Enforcement of Tied-House and False Advertising Laws*, 55 GONZ. L. REV. 167 (2019).

4. *See e.g.* LexVid, *CLE: Brewery & Distillery Law Series Part 1*, YouTube (Jan. 13, 2015), <https://www.youtube.com/watch?v=9kT9uBlvbyA&t=3680s>; *Alcohol 101: Alcohol Beverage and Distribution Law*, LAWLINE (May 5, 2015), <https://www.lawline.com/course/food-beverage-agriculture-part-7-alcohol-101>; *Homebrewing & Craft Beer Laws*, LAWLINE (May 7, 2019), <https://www.lawline.com/course/homebrewing-craft-beer-laws>; *Shaping American Alcohol Law: Cowboy Saloons, Al Capone and the Rise of Craft Beer*, LAWLINE (May 18, 2016), <https://www.lawline.com/course/shaping-american-alcohol-law-cowboy-saloons-al-capone-and-the-rise-of-craft-beer>.

5. *See e.g.* THE CRAFT BEER ATTORNEY, <https://craftbeerattorney.com/> (last visited April 10, 2020); BRISTOW BEVERAGE LAW, <https://www.bristowbeveragelaw.com/> (last visited April 10, 2020).

6. *See* LexVid, *supra* note 4; Zahn, *supra* note 3, at 34, 40–48; *see also* Clare Abel, *Staying in Compliance with the Wine, Beer, and Liquor Industry’s Three-Tier System*, in *WINE AND BEER LAW: LEADING LAWYERS ON NAVIGATING THE THREE-TIER SYSTEM AND OTHER REGULATIONS ON ALCOHOLIC BEVERAGES* 7, 11–15 (Thompson Reuters/Aspatore 2016); James M. Seff & Carrie L. Bonnington, *A General Introduction to Alcohol Beverage Laws and Regulations*, in *WINE AND BEER LAW: LEADING LAWYERS ON NAVIGATING THE THREE-TIER SYSTEM AND OTHER REGULATIONS ON ALCOHOLIC BEVERAGES* 81, 89–94 (Thompson Reuters/Aspatore 2016).

7. It should be noted that despite its name, the student organization does however represent all interests among the beer, wine, and spirits law industry in the Commonwealth. *See Bourbon Legal Society*, BBNVOLVED, <https://uky.campuslabs.com/engage/organization/bourbonlegalsociety> (last visited April 17, 2020). Interestingly, the state of Kentucky is also recognized for its peculiar beverage crossover of “bourbon-barrel aged beer.” *See e.g.* Bailey Loosemore, *The 5 Best Places to Try Some of Kentucky’s Bourbon Barrel-Aged Beer*, COURIER J., <https://www.courier-journal.com/story/life/food/spirits/beer/2018/06/12/best-kentucky-bourbon-barrel-aged-craft-beer-beweries/693547002/> (last updated July 26, 2018, 12:49 PM ET).

8. *See* Daniel Croxall, MCGEORGE SCHOOL OF L., <https://www.mcgeorge.edu/profiles/faculty/daniel-croxall> (last visited April 10, 2020); DANIEL CROXALL, *CRAFT BEER LAW AND PRACTICE* (Carolina Acad. Press 2020). Another book specifically on

California have even taught “wine law” within the past few years.<sup>9</sup> While all of these efforts are indeed commendable, it begs the question: Do any of these efforts illuminate the entire alcoholic beverage law and regulation framework?

First off, why should this matter? Well, legal scholars may have a “long face” about the idea of teaching a course on craft beer law or the like, for fear that the subject would be too shallow to where it misses any unifying principles, and be ultimately doomed to fail. This concern derives from a curriculum debate that began almost twenty five years ago by Judge Frank H. Easterbrook when he criticized the idea of cyberlaw by comparing it to teaching the Law of the Horse.<sup>10</sup> Despite its opposition to teaching specialized fields of law, Easterbrook’s analogy has been relied upon in support of teaching other fields of legal study, such as equine law, cryptolaw, health law, and more.<sup>11</sup> While much legal scholarship has been written particularly aimed toward craft beer law<sup>12</sup> or wine law<sup>13</sup>, this article will take a different approach by analyzing the evolution of the Law of the Horse analogy and applying it to advocate for the study of alcoholic beverage law and regulation as a whole, rather than craft beer law or wine law specifically.

## II. WHAT IS THE LAW OF THE HORSE?

The Law of the Horse was introduced in 1996 by Frank H. Easterbrook at a conference on the Law of Cyberspace as an intentionally narrow nonfield of law and witty analogy to describe cyberlaw.<sup>14</sup> Various scholars over time have analyzed the Law of the Horse in explaining their opposing stance on why studying cyberlaw is critical.

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“beer law” has also been written, but was mainly intended as an instruction guide for brewers. *See generally* JOHN SZYMANKIEWICZ, BEER LAW: WHAT BREWERS NEED TO KNOW (First Printing 2017).

9. *See Richard Mendelson*, U.C. BERKELEY SCH. L., <https://www.law.berkeley.edu/our-faculty/faculty-profiles/richard-mendelson/> (last visited Apr. 17, 2020) (“He is a Lecturer in Wine Law at UC Berkeley, School of Law, where he directs the Program on Wine Law and Policy. He also lectures on a variety of vineyard and wine law topics at UC Davis Graduate School of Management and as part of the University of Aix-Marseille and the University of Bordeaux.”); *Beverage Law*, BRIAN F. SIMAS L. OFF., <https://www.simaslawfirm.com/> (last visited Apr. 17, 2020).

10. *See generally* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1996); Renato Mariotti, *Cyberspace in Three Dimensions*, 55 SYRACUSE L. REV. 251 (2005); BELLIA ET AL., *CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE* (West Acad. Pub., 5th ed. 2018).

11. *See generally* Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473 (2004); J.B. Ruhl & James Salzman, *Climate Change Meets the Law of the Horse*, 62 DUKE L.J. 975 (2013); Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71 (2008); Jerrold Tannenbaum, *What Is Animal Law?*, 61 CLEV. ST. L. REV. 891 (2013); Carla L. Reyes, *Conceptualizing Cryptolaw*, 96 NEB. L. REV. 384 (2017); M. Gregg Bloche, *The Emergent Logic of Health Law*, 82 S. CAL. L. REV. 389 (2009).

12. *See e.g.* Croxall, *supra* note 3; Shivani Patel, *The IP of IPAs: A Look into Trademark Infringement in the Craft Beer Industry*, 26 J. INTELL. PROP. L. 249 (2019); Brian D. Anhalt, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162 (2016).

13. *See e.g.* Kevin J. Fandl, *Regulatory Policy and Innovation in the Wine Industry: A Comparative Analysis of Old and New World Wine Regulations*, 34 AM. U. INT'L L. REV. 279 (2018); Alana Lenore Joyce, *Wine Online: Fermenting the Role of Third Party Providers from California to New York*, 48 U.C. DAVIS L. REV. 2035 (2015); Laura Zanzig, *The Perfect Pairing: Protecting U.S. Geographical Indications with a Sino-American Wine Registry*, 88 WASH. L. REV. 723 (2013).

14. *See* Easterbrook, *supra* note 10, at 207–08; Ruhl & Salzman, *supra* note 11, at 985–86; Ibrahim & Smith, *supra* note 11, at 71–74.

*A. Easterbrook's View: Cyberlaw as Multidisciplinary Dilettantism*

The Law of the Horse was not necessarily intended to discourage converting lawyers into one-trick ponies per se. Rather, the analogy stemmed from Gerhard Casper's belief that law schools should teach courses limited to subjects that illuminate the entire law for two reasons. The first reason was that Casper rejected multidisciplinary dilettantism because it was viewed as a cross-sterilization of ideas which prompted one to "[combine] two fields about which [one may] know little and get the worst of both worlds."<sup>15</sup> The second reason was that Casper believed the best way to learn the law applicable to specialized endeavors is to study general rules.<sup>16</sup> As Easterbrook emphasized:

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on "The Law of the Horse" is doomed to be shallow and to miss unifying principles.<sup>17</sup>

Thus, Easterbrook viewed cyberlaw as another form of multidisciplinary dilettantism that simply required combining intellectual property law with computer networks. His rationale was based upon: a) the uncertain duration of cyberspace; b) the falling behind in matching law to well-understood technology already in existence; and c) the ability to easily classify behavior under current legal principles.<sup>18</sup>

*B. Lessig's View: What Cyberlaw Can Teach*

Three years later, the *Harvard Law Review* published an article by Professor Lawrence Lessig regarding his stance on the Law of the Horse as applied to the study of cyberlaw. In it, Lessig agreed with Easterbrook that courses in law school should illuminate the entire law. However, unlike Easterbrook, he believed that "there [was] an important general point that comes from thinking particularly about how law and cyberspace connect." In doing so, Lessig raised the question of what cyberspace was.<sup>19</sup> Interestingly, Lessig rejected the idea that cyberspace was "unregulable" territory. Instead, he theorized that cyberspace is unique due to its code, its own software and hardware, and thus by understanding its interactions with law and behavior, one can understand how cyberspace can be regulated.<sup>20</sup>

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15. See Easterbrook, *supra* note 10, at 207–08; Ruhl & Salzman, *supra* note 11, at 985–86.

16. Easterbrook, *supra* note 10, at 207.

17. *Id.*

18. *Id.* "Error in legislation is common, and never more so than when the technology is galloping forward. Let us not struggle to match an imperfect legal system to an evolving world that we understand poorly."

19. Lessig, *supra* note 10, at 502, 505–06; see also Mariotti, *supra* note 10, at 252.

20. Lessig, *supra* note 10, at 503, 505–06. As Lessig stated: "Many believe that cyberspace simply cannot be regulated. Behavior in cyberspace, this meme insists, is beyond government's reach. The anonymity and multijurisdictionality of cyberspace makes control by government in cyberspace impossible. The nature of the space makes behavior there *unregulable*. This belief about cyberspace is wrong, but wrong in an interesting way. It assumes either that the nature of cyberspace is fixed — that its architecture, and the control it enables, cannot be changed — or that government cannot take steps to change this architecture. Neither assumption is correct. Cyberspace has no nature; it has no particular architecture that cannot be changed. Its architecture is a function of its design . . ." *Id.* at 505; see also Ibrahim & Smith, *supra* note 11, at 79.

### 1. The Four Modalities of Constraint

Lessig believed that there are four modalities of constraint within the behavior of regulation that are shared by both cyberspace and real space. Law is the first modality of constraint that orders people to behave in certain ways and threatens punishment if they do not. Thus, law regulates—it “tells [people] not to buy certain drugs, not to sell [certain goods] without a license,” etc.<sup>21</sup> The second modality are social norms, which also regulate. Unlike the law, social norms are enforced by the community instead of the government.<sup>22</sup> Thirdly, the modality of markets regulates by price, which can also affect individual and collective behavior.<sup>23</sup> Finally, there is the modality of architecture, the physical world as one finds it, even if it was already in existence when discovered.<sup>24</sup> Lessig emphasized that one can best understand the study of cyberlaw by studying cyberspace’s own four modalities of constraint, how they collaborate in regulation, and their cumulative effects.<sup>25</sup>

### 2. The Interrelationships Between Law, Social Norms, Architecture, and Markets

To emphasize the synergy between cyberspace and its four modalities of constraint, Professor Brett Frischmann highlighted three lessons drawn from the Easterbrook-Lessig debate on why one should study cyberlaw. First, he noted that cyberlaw requires the study of complex relationships between various legal sub-disciplines.<sup>26</sup> Second, Frischmann noted that cyberlaw is interdisciplinary in that it requires the study of various disciplines outside of the law. He illustrated that Lessig not only emphasized how cyberlaw requires critical legal study of different modes of regulation, such as law, social norms, markets, and architecture, but he implicated that cyberlaw additionally requires to some degree, the study of social sciences, economics, and technology.<sup>27</sup> Finally, Frischmann emphasized how cyberlaw “forces critical (re)examination of balances struck by existing social arrangements, often involving competition and at times incommensurable values.”<sup>28</sup>

### *C. Mariotti’s Three-Dimensional View of Cyberspace*

Attorney Renato Mariotti, like many scholars who have advocated for various course subjects, took a somewhat rejectionist stance on the Law of the Horse.<sup>29</sup> First, he argued that just because a particular field fails to illuminate the entire law, does not mean it lacks any value.<sup>30</sup> Second, while he agreed with Easterbrook that “focusing exclusively on a particular

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21. Lessig, *supra* note 10, at 506–07.

22. *Id.* at 507.

23. *Id.*

24. *Id.*

25. *Id.*

26. BELLIA ET AL., *supra* note 10, at 13.

27. *Id.* at 14.

28. *Id.*

29. Compare Mariotti, *supra* note 10, at 298–99 with Ruhl & Salzman, *supra* note 11, at 1013–14, Bloche, *supra* note 11, at 395, Ibrahim & Smith, *supra* note 11, at 84, and Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1, 15–16 (2011).

30. Mariotti, *supra* note 10, at 298–99.

object is not a good principle for a field of study”, he believed Easterbrook was incorrect in characterizing cyberspace as an object like a horse.<sup>31</sup> Nevertheless, he believed that Lessig was only partially correct when he described cyberspace as a place.<sup>32</sup>

Instead, Mariotti theorized that in order to fully understand cyberlaw, the concept of cyberspace should be viewed three-dimensionally: as a place, a medium, and a good all at the same time, with its dimensions cutting across traditional subject matters and methods of analysis, as Frischmann noted.<sup>33</sup> For instance, he believed computer programmers, or “code writers” as Lessig described them, were like any other market actor in that their designs and business decisions are shaped by consumer demand in order to maximize profits.<sup>34</sup> Additionally, Mariotti illustrates one of Lessig’s works about an internet newsgroup to demonstrate that the internet functions not only as a space where people can gather, but also as a method of communication.<sup>35</sup> Finally, Mariotti emphasizes the multidimensional conceptualization of cyberspace by citing to the many alternative views on how cyberspace should be viewed.<sup>36</sup> Many cases involving cyberspace have adopted this three-dimensional view through the use of argumentative analogies.<sup>37</sup>

### III. ALCOHOL & OUTSIDE APPLICATIONS OF THE LAW OF THE HORSE

As previously mentioned, various scholars have analyzed the Law of the Horse in relation to various other areas of law.<sup>38</sup> However, there are three particular analyses that are worthy of discussion for their similarities to alcoholic beverage law that help reinforce such law as a distinct legal field.

#### *A. Environment and Climate Change Adaptation*

Scholars have argued that climate change adaptation is a distinct area of law, not substantively but procedurally.<sup>39</sup> To them, climate change is a process that intersects along many substantive fields. While discrete *substantive* climate change issues are likely to match up well with some existing field of law, none of such fields alone or in any combination are well equipped to *procedurally* manage climate change adaptation.<sup>40</sup> Additionally, the emergence of environmental justice and its separation from environmental law as two distinct

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31. *Id.*

32. *Id.* at 253.

33. *Compare id.* at 298–99 with BELLIA ET AL., *supra* note 10, at 13.

34. Mariotti, *supra* note 10, at 275.

35. *See id.* at 280–82.

36. *See generally id.* at 261–68.

37. *See e.g.* American Broadcasting Cos., Inc. v. Aereo, Inc., 573 U.S. 431 (2014) (comparing a video-on-demand service to “a copy shop that provides its patrons with a library card”); Mainstream Loudoun v. Board of Trustees of the Loudon County Public Library, 2 F. Supp. 783 (E.D. Va. 1998) (demonstrating that the Defendants likened the Internet to that of a “vast Interlibrary Loan system”, while Plaintiffs had argued the Internet acted more like “a set of encyclopedias, and the Library Board’s enactment of the Policy to a decision to “black out” selected articles considered inappropriate for adult and juvenile patrons”); *see also* Intel Corp. v. Hamidi, 71 P.3d 296, 309–10 n.7 (Cal. 2003).

38. *See supra* note 11 and accompanying text.

39. Ibrahim & Smith, *supra* note 11, at 1018–19.

40. *Id.*

legal fields have been relied upon to advocate for climate change adaptation as a distinct legal field.<sup>41</sup>

*B. Sports and Entertainment Law . . . and the Horse*

The Law of the Horse has been raised in the concept of Sports & Entertainment Law as well.<sup>42</sup> This might come as no surprise that the entertainment industries have had a strong presence within the area of cyberlaw, such as with peer-to-peer filesharing.<sup>43</sup> But if there is a sport that takes a peculiar stance on the Easterbrook analogy, it is the sport pertaining to the horse itself—equine law.<sup>44</sup> According to Professor Joan Howland, equine law and cyberlaw share many crucial similarities: (a) they are highly regulated by statutes, case law, and administrative restrictions and rulings; (b) they share critical issues, such as contracts, securities, tax, labor, gaming, licensing, and those involving search and seizure; and (c) they are regulated by the same modalities of constraint introduced by Lessig.<sup>45</sup> However, Howland notes an important characteristic of equine law and thoroughbred racing that makes them distinct from cyberlaw: its history.<sup>46</sup>

Throughout history, horse racing was a popular sport in Britain that at one point faced scrutiny amongst Christian church leaders and a period of decline.<sup>47</sup> By the mid-seventeenth century, horse racing eventually became both a sport and social gathering.<sup>48</sup> While horse racing became a popular sport when it was introduced to America, it did receive some of the same religious scrutiny.<sup>49</sup> Horse racing throughout the colonies became a sport for every social class, not just the elite, but faced somewhat of a reversion after the Revolutionary War<sup>50</sup> and again after the Civil War.<sup>51</sup> Between the Gilded Age and the Great Depression, horse racing was immersed in controversies of corruption, such as doping, illegal gambling, and fraudulent races, as well as a resurgence in conservative religious values, that altogether banned the sport in various parts of the country for quite some time.<sup>52</sup> However, systems were eventually put in place in order to preserve the integrity of the sport. These systems

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41. *Id.* at 980–82, 989, 996–1002, 1019, 1026.

42. See Amanda G. Ciccattelli, *Is There Such a Thing as "Entertainment Law"?*, IP WATCHDOG (June 21, 2017), <https://www.ipwatchdog.com/2017/06/21/is-there-such-a-thing-as-entertainment-law/id=84707/>; Mitchell N. Berman, *"Let 'em Play" A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1330 n.21 (2011); cf. Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1156–57 (2000). See generally Sherman J. Clark, *Why Sports Law?*, 28 STAN. L. & POL'Y REV 151 (2017).

43. Peer-to-peer file sharing, like the VCR, was a method of distribution that caused great concern within the entertainment industries. See BELLIA ET AL., *supra* note 10, at 406. See generally Sony Corp. of Am. V. Universal City Studios, Inc., 464 U.S. 417 (1984); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Metro-Goldwyn Meyer Studios, Inc. v. Gorkster, Ltd., 545 U.S. 913 (2005); Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010).

44. See generally Howland, *supra* note 11.

45. See *id.* at 475–76, 506–07.

46. *Id.*

47. *Id.* at 476, 479.

48. *Id.* at 482.

49. *Id.* at 483–85.

50. *Id.* at 485, 488–91.

51. *Id.* at 494–95.

52. *Id.* at 495–96.



included pari-mutuel betting, as well as the creation of state racing commissions, the Thoroughbred Racing Association, and the Thoroughbred Racing Protective Bureau.<sup>53</sup>

### *C. Law and Entrepreneurship*

Instead of analyzing the law's limits as a regulator, the study of law and entrepreneurship has been proposed for its legal relevancy and distinctiveness.<sup>54</sup> According to scholars, entrepreneurship is a distinct field because it reveals how the law deals with novelty as applied to opportunities.<sup>55</sup> It involves new products or services, new ways of organizing, and new geographic markets.<sup>56</sup> As the novelty of opportunities increase, so do the unique challenges presented to the legal system, which in turn can lead to the greater need for distinctive legal rules or legal practices to govern that opportunity.<sup>57</sup>

## IV. WHAT CAN ONE LEARN FROM ALCOHOLIC BEVERAGE LAW?

Alcohol and its establishments have made a significant impact in American history. Yet despite this, alcoholic beverage law has yet to stand out as a particular subject in law school curriculums. Meanwhile other legal specializations such as music law, equine law and sports law have caught on.<sup>58</sup> More politically involved specializations such as those pertaining to religion, race, slavery, and gender have been even more engrained in legal studies, U.S. laws, and the Constitution.<sup>59</sup> While studying alcoholic beverage law might not be as impactful as some of the other specializations mentioned above, alcohol will continue to be an important industry in the modern world, much longer than five years for sure.<sup>60</sup> Thus, there will be a need that can be addressed and a historical industry that can be catered to through a specialized legal lens.<sup>61</sup>

Granted some alcoholic beverages, such as bourbon have made much more of an impact in America than others.<sup>62</sup> And while “Law and the Craft Beer” might sound fun and intriguing, the methodologies employed in the course—particularly studying the regulation of

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53. *See id.* at 495–506.

54. Ibrahim & Smith, *supra* note 11, at 84, 89.

55. *Id.* at 84.

56. *Id.*

57. *Id.* *See generally* sources cited *supra* note 43.

58. *See e.g.* OUTLINE DEPOT, <https://www.outlinedepot.com/Home/Classes> (last visited Apr. 16, 2020). Vanderbilt University Law School does offer a course though on Marijuana Law and Policy. Like alcohol, marijuana has also been described as highly regulated and “virtually synonymous with prohibition.” Other law schools have followed a similar approach. *See also Course Information: Marijuana Law and Policy*, VAND. L. SCH., <https://law.vanderbilt.edu/courses/341> (last visited Apr. 16, 2020); *Law Courses Catalog: Cannabis Law & Policy*, LEWIS & CLARK L. SCH., [https://law.lclark.edu/courses/catalog/law\\_413.php](https://law.lclark.edu/courses/catalog/law_413.php) (last visited Apr. 16, 2020); *Cannabis Law & Policy Project*, U.WASH. SCH. L., <https://www.law.uw.edu/academics/programs/cannabis-law-policy-project> (last visited Apr. 16, 2020). *Cf.* Danielle Cortez, *Craft Beer and Marijuana Cohesiveness Is Possible: How One Can Learn from the Other's Regulatory Madness*, 12 OHIO ST. BUS. L.J. 159 (2018).

59. *See generally* U.S. CONST. amends. I, XIII, XIV, XIX.

60. *See discussion infra* Sections III.A & III.B.

61. *See supra* note 6 and accompanying text; *see also* Ruhl & Salzman, *supra* note 11, at 981 (“Law of implies something more, that there is a need for the legal system to respond to change from outside by changing inside at a more fundamental level.”); Ibrahim & Smith, *supra* note 11, at 76 (“In our view, a new field of legal study is justified when a discrete factual setting generates the need for distinctive legal solutions.”).

62. *See* BRIAN F. HAARA, *BOURBON JUSTICE: HOW WHISKEY LAW SHAPED AMERICA* 1–7, 147–48 (Potomac Books 2018).

a specific alcoholic beverage regarding how “American” it is—still appears too shallow of an approach. It does not illuminate the entire subject of alcohol regulation nor does it navigate the three-tier system, which will be discussed later. Such a narrow subject can leave practitioners with only an understanding of their jurisdiction’s beer laws, which may be different from their wine laws, with no explanation as to why that is.<sup>63</sup> An equivalent to this study would be that of *sculpture law*: the licensing, tax, right of publicity, insurance, and tort issues pertaining to sculptures instead of copyright protectable artworks as a whole.<sup>64</sup> Thus, specifically studying craft beer law or wine law loses credibility as an individualized subject of law, and echoes more of the concerns outlined in the Law of the Horse analogy. Therefore, studying the regulation of wine, beer, and spirits as a whole can give a better sense of a more unified legal specialization.<sup>65</sup>

Yet there are two issues with taking Lessig’s argument against the Law of the Horse in relation to cyberlaw and applying it to why one should study alcoholic beverage law. First, Lessig has equated cyberspace, not only as a place, but also as a jurisdiction. In Lessig’s own words, cyberspace was “the most significant new jurisdiction since the Louisiana Purchase.”<sup>66</sup> By contrast, a tavern cannot be viewed as its own jurisdiction, though one may quip that during the Colonial times it probably could have been.<sup>67</sup> Second, Mariotti is correct in that a “Law of X” should not be viewed one-dimensionally in terms of its place. There is no “Law of the Holy Ground”, but there is Law and Religion, Church and State, and also Canon Law. There is no “Law of the Plantation”, but there is Agricultural Law and Environmental Law. And there is no “Law of the Polling Place”, but there is nevertheless Election Law. In a sense, the course subject is the thing that is being preserved or offered to the public (not in a contractual sense) along with its implied places and mediums.<sup>68</sup>

This paper proposes that teaching alcoholic beverage law requires a hybrid approach of Mariotti’s Three-Dimensional View and Lessig’s four modalities of constraint. In other words, effectively teaching alcoholic beverage law would require studying the regulation of alcohol in terms of it being a good, its mediums, and its places, in relation to the laws, social norms, markets, and architecture that affect it. In addition, alcohol regulation requires studying historical context in encouraging the development of novel and creative beverage products while navigating through a sort of archaic procedural framework, that affects not only licensing and unfair competition practices, but also franchise, intellectual property, zoning, landlord-tenant, and First Amendment laws.<sup>69</sup>

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63. See LexVid, *supra* note 4; Seff & Bonnington, *supra* note 6, at 82, 84.

64. Compare SZYMANKIEWICZ, *supra* note 8 with LEONARD D. DUBOFF ET AL., ART LAW IN A NUTSHELL (West Acad. Pub., 5th ed. 2017), MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW (LexisNexis, 5th ed. 2010) and 17 U.S.C. § 102(a).

65. See Ruhl & Salzman, *supra* note 11, at 986. Cf. Stacy Hostetter, *The Privilege of Obscenity: The Slant on Bad Frogs and Flying Dogs*, 12 BUFF. INTELL. PROP. L.J. 99, 100 (2018).

66. Mariotti, *supra* note 10, at 252; LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 217 (1999).

67. Compare discussion *infra* Section III.A with Mariotti, *supra* note 10, at 256–57.

68. See generally Mariotti, *supra* note 10, at 275–76, 280–82, 297–300; OUTLINE DEPOT, *supra* note 57.

69. See N. Davey Neal, *Current and Future Issues Facing Local Brewers and Vinters*, in WINE AND BEER LAW: LEADING LAWYERS ON NAVIGATING THE THREE-TIER SYSTEM AND OTHER REGULATIONS ON ALCOHOLIC BEVERAGES 51, 52 (Thompson Reuters/Aspatore 2016); Eric Anderson, *Hogtied by Regulation: Alcohol Brands Beware This Super Bowl*, ADAGE (Jan. 26, 2018), <https://adage.com/article/special-report-super-bowl/hog-tied-regulation-alcohol-brands-beware-super-bowl/312090>; LexVid, *supra* note 4; Zahn, *supra* note 3, at 34, 42.



Tun Tavern; Philadelphia, PA (Est. 1686–1781)

#### A. Alcohol and its Places

According to Taffer, the second public building ever built in America was a bar (the first was a church), the Declaration of Independence and the U.S. Constitution were both conceived in a public house, Thomas Jefferson was America's first vintner, and in the 1800s Congress made whiskey the official spirit of America.<sup>70</sup>



John Greenwood, *Sea Captains Carousing in Surina* (1755)

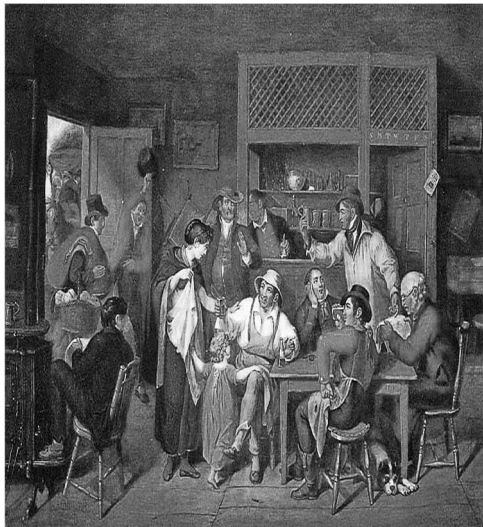
Public houses and taverns were not just places to drink. They served as clearinghouses, testbeds for revolutionary ideas, social hubs for like-minded individuals and travelers, eateries, entertainment venues, as well as meeting places for assemblies and courts. Sometimes, they served as scenes for the depictions of social life and historical events.<sup>71</sup>

70. CPA Speakers Bureau, *supra* note 1; see also Steve Hendrix, *The Bender That Began America: Bar Tab Shows Framers Celebrated a Newly Finished U.S. Constitution and a Future President*, CHI. TRIBUNE (Feb. 22, 2018, 7:44 AM), <https://www.chicagotribune.com/nation-world/ct-george-washington-bar-tab-20180222-story.html>; Eric Milzarski, *How Washington Spent Thousands on Alcohol in a Single (Crazy) Night*, WE ARE THE MIGHTY (Sept. 04, 2018, 03:09 PM EST), <https://www.wearethemighty.com/history/george-washington-bar-tab>; Salvatore Colleluori, *The Colonial Tavern, Crucible of the American Revolution*, WAR ON THE ROCKS (Apr. 17, 2015), <https://warontherocks.com/2015/04/the-colonial-tavern-crucible-of-the-american-revolution/>.

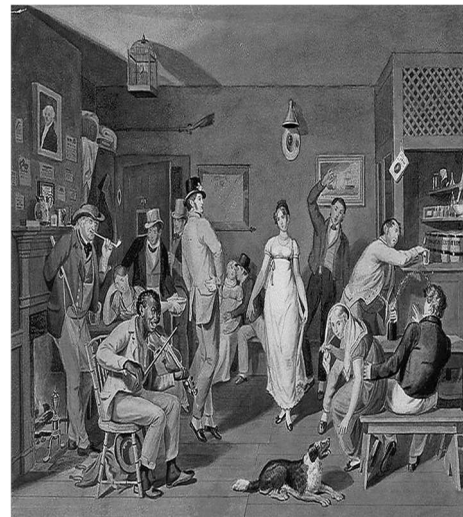
71. Colleluori, *supra* note 70. See also Steven Struzinski, *The Tavern in Colonial America*, 1 GETTYSBURG HIST. J. 29, 29–38 (2002); NANCY MAVEETY, GLASS & GAVEL: THE U.S. SUPREME COURT AND ALCOHOL 13 (Roman & Littlefield Pub. Group, Inc. 2019).



Washington Taking Leave of his Officers, Francis's Tavern; Broad St., NY (Dec. 4, 1783).



John Lewis Krimmel, *In an American Inn* (1814)



*Barroom Dancing* (1820)

Thus, unlike cyberspace, alcohol and its establishments have been apparent for centuries. But as will be explained further, alcohol faced religious scrutiny, corruption, and a short period of prohibition (a failed one at best) before its regulation became revamped, similar to that of thoroughbred racing.<sup>72</sup>

72. See discussion *supra* Section II.B.

### 1. Tied-Houses

Although some of its earlier functions were eliminated, the American tavern continued to thrive as a social gathering place for creative and like-minded individuals, and still does today. The White Horse Tavern, for example, which became later known for its famous literary and artistic patrons, continues to remain the second oldest pub in New York City.<sup>73</sup> However, one of alcohol's biggest breaking points, began near the 1890s.



White Horse Tavern in 1961, New York, NY (Est. 1880)

With the improvement of refrigeration and the help of improved transportation, tied-houses began appearing.<sup>74</sup> These were bars that, although were ostensibly run by an independent retailer, were required to buy some or all of its beer from a particular brewery/manufacturer. In exchange the brewery would provide the retailer equipment, materials, and help with business and financial planning.<sup>75</sup> As the brewing industry became more industrialized and breweries focused more heavily on maximizing profits, widespread drunkenness and alcohol's other negative effects on the family unit, marriage, and spiritual salvation began to rise, especially during World War One.<sup>76</sup> Additionally, tied-houses affected the markets due to their intense competition with one another, to the point where saloons were driven out of business.<sup>77</sup> As a result, the U.S. enacted the Eighteenth Amendment, which led to the Prohibition era.<sup>78</sup>

73. See THE WHITE HORSE TAVERN, <http://www.whitehorsetavern1880.com/> (last visited April 19, 2020).

74. SZYMANKIEWICZ, *supra* note 8, at 183–84.

75. *Id.*; Neal, *supra* note 69, at 52–53; Seff & Bonnington, *supra* note 6, at 84–85.

76. SZYMANKIEWICZ, *supra* note 8, at 186–88; LexVid, *supra* note 4.

77. SZYMANKIEWICZ, *supra* note 8, at 186–88; Neal, *supra* note 69, at 53; Seff & Bonnington, *supra* note 6, at 84–85.

78. U.S. CONST. amend. XVIII; SZYMANKIEWICZ, *supra* note 8, at 186–88.





Prohibition agents destroying a bar



Women's Temperance Movement

## 2. Prohibition, Speakeasies, and Bootlegging

Arguably, Prohibition can be described as a failure.<sup>79</sup> When Prohibition took effect, bootlegging and private distilling operations started occurring. Private, unlicensed barrooms—nicknamed “speakeasies” for how low you had to speak the password to gain entry so as not to be overheard by law enforcement—also became venues for alcohol consumers. While they did cater to female patrons, jazz musicians, and ballroom dancing, they also became the subjects of organized crime from syndicate figures like Al Capone.<sup>80</sup>



Pictured in middle: Al Capone (1899–1947)

79. Seff & Bonnington, *supra* note 6, at 88; Andrew D'Aversa, *Brewing Better Law: Two Proposals to Encourage Innovation in America's Craft Beer Industry*, 165 U. PENN. L. REV. 1465, 1473 (2017).

80. *The Speakeasies of the 1920s*, PROHIBITION: AN INTERACTIVE HIST., <http://prohibition.themobmuseum.org/the-history/the-prohibition-underworld/the-speakeasies-of-the-1920s/> (last visited Apr. 16, 2020); Ian Harvey, *Prohibition and Speakeasies in the US*, VINTAGE NEWS (Jan. 30, 2017), <https://www.thevintagenews.com/2017/01/30/prohibition-and-speakeasies-in-the-us/>; LexVid, *supra* note 4.

Furthermore, when the U.S. fell in the Great Depression, one of the strategies of rectification was to once again allow for the sale of beer, wine, and liquor and tax such products. And on February 20, 1933, President Herbert Hoover passed the Twenty First Amendment which repealed the Eighteenth Amendment and granted the states broad authority to regulate alcohol within their borders. Legal saloons and bars opened almost immediately, pre-existing illegal bars operated legally, and speakeasies vanished almost as fast.<sup>81</sup>

In 1935, Congress adopted the Federal Alcohol Administration Act (FAAA), which became the principal federal authority in governing the alcohol beverage industry.<sup>82</sup> Section 205 of the FAAA grants the Alcohol and Tobacco Tax and Trade Bureau (TTB)—formerly the Bureau of Alcohol, Tobacco, and Firearms (ATF)—the authority to adopt and enforce regulations regarding unfair competition and unlawful practices, such as exclusive outlets, tied houses, commercial bribery, and consignment sales.<sup>83</sup>

### 3. The Three-Tier System and State Regulation

Most importantly, the U.S. government proposed to the states a general architectural framework of regulation known as the three-tier system. It essentially regulates the *places* of the alcoholic beverage industry, listing them in three categories: (1) manufacturers, (2) wholesalers, and (3) retailers. Manufacturers cannot sell their products to individuals for purchase and sale. Instead they must sell their product to the wholesaler, who will then sell it to the retailer, i.e. a tavern, restaurant, liquor store, etc., or depending on their respective state laws, they may self-distribute under certain circumstances.<sup>84</sup> Wholesalers deal not only with distribution, but also marketing and the retailer's order fulfillment.<sup>85</sup>

It is important to note that the TTB takes on the role of licensing manufacturers and wholesalers, collecting revenue and ensuring that only licensed manufacturers are producing alcohol.<sup>86</sup> However, because of the vested broad powers states have in regulating alcohol within their borders, states have predominantly split into two regulatory systems: (1) control states, where the state government itself maintains some amount of control over the production, distribution, or retail sales of alcohol; and (2) license states, where license systems are implemented to allow private companies to distribute and sell alcohol to

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81. Abel, *supra* note 6, at 9; LexVid, *supra* note 4; Harvey, *supra* note 80; Luke Basha, *It's Still 1970 Somewhere: How North Carolina's Small Craft Breweries Hope to "Craft Freedom" From Antiquated Statutes Friendly to Distributors and National Macrobreweries*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 340, 350–52 (2018); David R. Scott, *Brewing Up A New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should Be Changed*, 3 WAKE FOREST J. L. & POLICY 417, 418–19 (2013).

82. See 27 U.S.C.A. §§ 201 *et seq.*; Seff & Bonnington, *supra* note 6, at 82.

83. See 27 U.S.C.A. § 205. The TTB resides within the Department of the Treasury. 27 C.F.R.; Seff & Bonnington, *supra* note 6, at 82.

84. LexVid, *supra* note 4; SZYMANKIEWICZ, *supra* note 8, at 192–94; Basha, *supra* note 81, at 352–53; Seff & Bonnington, *supra* note 6, at 83. In a sense, the three-tier system follows a similar framework as that of a corporation, which has three organs: shareholders, directors, and officers. See also MELVIN ARON EISENBERG & JAMES D. COX, BUSINESS ORGANIZATIONS: CASES & MATERIALS 269–70, 300 (West Acad., 11th ed. 2014).

85. Basha, *supra* note 81, at 352.

86. Seff & Bonnington, *supra* note 6, at 83; SZYMANKIEWICZ, *supra* note 8, at 191.

consumers.<sup>87</sup> Furthermore, local county, parish, and city ordinances can also affect the architecture of alcohol regulation, sometimes to the extent that they conflict with state regulation.<sup>88</sup>

There have been recent means of circumvention that have left the alcohol industry in a bind. In *Granholm v. Healm*,<sup>89</sup> the Supreme Court did allow wineries to break through the three-tier systems and sell directly to consumers. However, the Court still held that the three-tier system was still intact.<sup>90</sup> This change in architecture and the law may have not only impacted wine's perception to the public, but it arguably affects the market by giving wineries unfair advantages over craft breweries and distilleries.<sup>91</sup> One thing is paramount regarding state regulation: if it is not rooted in what the people of each state sincerely desire at this moment, it will not succeed regardless of how logical and complete it appears as a statute.<sup>92</sup>

### B. Alcohol as a Good

It is a given that alcohol is a good—but it is not just any good. Firstly, alcohol is the only currently regulated and commercially traded commodity specifically mentioned in the Constitution. In fact, it is mentioned twice.<sup>93</sup> Secondly, alcohol is one of three commodities where franchising laws are treated differently.<sup>94</sup> Thirdly, alcohol has been regarded as recession-proof. These three distinctions show that alcohol is a unique good that will continue to exist.<sup>95</sup> According to a 2010 poll from the Gallup organization, alcohol consumption had generally remained consistent within the course of time regardless of economic conditions, though consumption did rise following the 2008 financial crisis.<sup>96</sup> At the same time, the rise in consumption can be a drawback, since excessive alcohol use can have devastating effects to the public, just like the kind that occurred during Prohibition.<sup>97</sup>

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87. See e.g. John G. Mackie, *Local Regulation of Wine and Beer Producers in California*, in WINE AND BEER LAW: LEADING LAWYERS ON NAVIGATING THE THREE-TIER SYSTEM AND OTHER REGULATIONS ON ALCOHOLIC BEVERAGES 19 (Thompson Reuters/Aspatore 2016); Neal, *supra* note 69, at 53–57; Zahn, *supra* note 3, at 35–42, 46–47.

88. SZYMANKIEWICZ, *supra* note 8, at 242–47; Abel, *supra* note 6, at 12, 14–15; Seff & Bonnington, *supra* note 6, at 83–84, 88; Zahn, *supra* note 3, at 40–42.

89. 544 U.S. 460 (2005).

90. *Id.*

91. See Justin P. Weinberg & O. Joseph Balthazor Jr., *Stop Letting Wine Crash the Wedding: Craft Beer Consumers Are Sophisticated Buyer*, 8 CYBARIS 61 (2017); Seff & Bonnington, *supra* note 6, at 87–88; Neal, *supra* note 69, at 55–57.

92. See RAYMOND B. FOSDICK & ALBERY L. SCOTT, TOWARD LIQUOR CONTROL ix (Ctr. Alcohol Pol'y 2011).

93. U.S. CONST. amends. XVIII, XXI; see Seff & Bonnington, *supra* note 6, at 88; D'Aversa, *supra* note 79, at 1472–73.

94. SZYMANKIEWICZ, *supra* note 8, at 184–86, 279–80; Barry Kurtz & Brian H. Clements, *Beer Distribution As Compared to Traditional Franchise Law*, 33 FRANCHISE L. REV. 397 (2014).

95. Compare Easterbrook, *supra* note 10, at 207 with Seff & Bonnington, *supra* note 6, at 92 (“Alcohol has been said to be a recession-proof product because people who drink will always do so.”) and Eric Rosenberg, *5 Recession Resistant Industries*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/100115/5-recession-resistant-industries.asp> (last updated Dec. 13 2019).

96. Neal, *supra* note 69, at 57; Frank Newport, *U.S. Drinking Rate Edges Up Slightly to 25-Year High*, GALLUP (July 30, 2010), <https://news.gallup.com/poll/141656/drinking-rate-edges-slightly-year-high.aspx>. But see Thomas Pellechia, *2019 U.S. Alcohol Consumption to Increase While Population Growth Stagnates*, FORBES (Jan. 2, 2019, 10:28 AM EST), <https://www.forbes.com/sites/thomaspellechia/2019/01/02/2019-u-s-alcohol-consumption-to-increase-while-population-growth-stagnates/#4d9f9d0166bc>.

97. See Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COMM. L.J. 209, 218–20 (2015).



Furthermore, the social uses of alcohol, like the Internet, can even affect court interpretation.<sup>98</sup>

### 1. Distinction from Food and Drug

One might be quick to make an Easterbrook-like argument about alcohol law being analogous to the Law of the Horse. Alcohol has sometimes been characterized as a food, so it would seem reasonable to simply apply food and drug law to alcohol. While some products, such as gluten free beers, can be additionally regulated by the Food and Drug Administration (FDA), the main regulating authority for alcoholic beverages is the TTB. The TTB is heavily procedural, regulating alcohol acquisition, label approval, advertising, licensing, formula approval, excise tax payments, and more.<sup>99</sup> By contrast, the FDA primarily affects alcohol regulation only in terms of *food safety*. While the FDA arguably does have an interest in regulating, supervising, and inspecting alcohol production facilities, the notion that the FDA would take over the TTB's role seems to have dissipated. For instance, both the TTB and FDA have agreed that merely adding coffee to beer, did not make it food for FDA purposes.<sup>100</sup>

### 2. Peculiarities of Wine, Beer, and Spirits

As mentioned earlier, a state's beer laws for instance can differ slightly from their wine laws. Each beverage can be governed and categorized by multiple factors such as their alcohol content by volume (ABV), other ingredient composition, place of manufacture, and more.<sup>101</sup> Thus, each of these beverages can receive different treatment, making careful study necessary, especially as new beverage creations are introduced.<sup>102</sup> Yet it is permissible to study one type of subindustry with more emphasis than another, depending on each state's particular laws and markets. Since such specialized characterizations can be done in entertainment law, why should alcohol regulation be viewed any differently?<sup>103</sup>

Nonlegal practices pertaining to alcohol production, distribution, and/or retail are important as well. Similar to how a cyberlaw practitioner would learn nonlegal practices, such as economics and computer technology, or how a music entertainment lawyer would learn music theory and music history, alcoholic beverage law also encourages one to study

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98. Compare MAVEETY, *supra* note 71, at 1–4, 297–98 with cases cited *supra* note 37.

99. Compare Easterbrook, *supra* note 10, at 208 with Abel, *supra* note 6, at 13, Zahn, *supra* note 3, at 44, Seff & Bonnington, *supra* note 6, at 91, SZYMANKIEWICZ, *supra* note 8, at 191–228, and Robert Cattnach & Gabrielle Wirth, *Top Ten Pitfalls in Brewery and Winery Acquisitions*, in WINE AND BEER LAW: LEADING LAWYERS ON NAVIGATING THE THREE-TIER SYSTEM AND OTHER REGULATIONS ON ALCOHOLIC BEVERAGES 69, 71 (Thompson Reuters/Aspatore 2016)

100. SZYMANKIEWICZ, *supra* note 8, at 199–200; LexVid, *supra* note 4.

101. See Zahn, *supra* note 3, at 34–38, 42–45; SZYMANKIEWICZ, *supra* note 8, at 191–94, 198–202; Tammy Lam, *Brew Free or Die? A Comparative Analysis of U.S. and E.U. Craft Beer Regulations*, 23 CARDOZO J. INT'L & COMP. L. 197, 203–204 (2014).

102. See generally Weinberg & Balthazor Jr., *supra* note 91; Tracy Jong & Luis Ormaechea, *Trends to Note in Alcoholic Beverage Trademark Law That Can Impact the Decision Making Process for Businesses at Critical Points in the Alcoholic Beverage Product Life Cycle*, 12 BUFF. INTELL. PROP. L.J. 19, 35 (2018); Neal, *supra* note 69, at 56–57.

103. Compare SHERRI BURR, ENTERTAINMENT LAW IN A NUTSHELL (West Acad. Pub., 4th ed. 2017) and COREY FIELD, ENTERTAINMENT LAW: FUNDAMENTALS AND PRACTICE (Cognella Acad. Pub. 1st ed. 2018) with Weinberg & Balthazor, *supra* note 91; Scott, *supra* note 81; Mackie, *supra* note 87; Neal, *supra* note 69, at 56–57, and Abel, *supra* note 6, at 38–40.

how beer, liquor, and wine is made. For instance, many brewery/brewpub startups begin with the practice of home brewing.<sup>104</sup> Potential clients in the beer and wine industry start out as hobbyists who overtime develop creative aesthetics in the same way a home studio music producer does.<sup>105</sup> Additionally, learning about brewing also brings about beneficial agricultural knowledge<sup>106</sup> as well as the fundamentals of marketing<sup>107</sup> and economics.<sup>108</sup>

### 3. Lawyer Competency

While this portion of analysis might seem a bit out of place, as members of the legal profession, it is crucial to understand the ramifications alcohol can have on one's legal practice. Under the Model Rules of Professional Conduct, a lawyer has a duty of competency.<sup>109</sup> While alcohol may be a fun niche of a legal practice, it is equally important that alcohol should be engaged with responsibly and ethically.<sup>110</sup> Alcohol has been theorized as being a gateway drug due the following factors: (a) alcoholics are more likely to try other substances due to their personality; (b) Alcohol alters the brain, leading to a higher chance of addiction to other drugs; and (c) there is a clear progression pathway leading from alcohol to other substances.<sup>111</sup> Furthermore, alcohol and drug abuse can lead to violent behavior and possible criminal activity, both of which are detrimental to the legal field as a whole.<sup>112</sup> In this regard, alcoholic beverage law acts similarly to cyberlaw in a legal ethics context. A lawyer's use of technology impacts their communication with a client or another attorney and how discoverable evidence, money, or other property is maintained or distributed. Likewise, a lawyer's mental capacity affected by alcohol can have identical impacts.<sup>113</sup> Regardless of

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104. See LexVid, *supra* note 4; *How to Brew*, AM. HOMEBREWERS ASSOC., <https://www.homebrewersassociation.org/how-to-brew/> (last visited Apr. 16, 2020); see also Christopher J. Fraga, *A Room with a Brew: A Comparative Look at Homebrewing Laws in Japan & the United States*, 72 U. MIAMI L. REV. 1239 (2018).

105. Compare LexVid, *supra* note 4 with Adam Dachis, *The Basics of Music Production, Lesson 1: Set Up Your Home Studio*, LIFEHACKER (May 13, 2013, 12:00 PM), <https://lifehacker.com/the-basics-of-music-production-lesson-1-set-up-your-h-499088482> and CHAPTER 1: *The 9 Home Recording Studio Essentials for Beginner*, E-HOME RECORDING STUDIO, <https://ehomerecordingstudio.com/home-recording-studio-essentials/> (last visited Apr. 16, 2020).

106. See Zahn, *supra* note 3, at 44–45. See generally Mackie, *supra* note 87.

107. Seff & Bonnington, *supra* note 6, at 89–94. See *The Menu to Success*, JON TAFFER, <https://jontaffer.com/the-menu-to-success/> (last visited April 20, 2020).

108. Elias, *supra* note 97, at 220–25.

109. See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Additionally, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. See also r. 1.16.

110. See Seff & Bonnington, *supra* note 6, at 94.

111. See Carol Galbicek, *Drinking and Drugs*, ALCOHOL REHAB GUIDE, <https://www.alcoholrehabguide.org/alcohol/drinking-drugs/> (last edited July 24, 2019); *Connection Between Alcohol and Drugs*, ALCOHOL REHAB, <https://alcoholrehab.com/drug-addiction/connection-between-alcohol-and-drugs/> (last visited Apr. 15, 2020).

112. Galbicek, *supra* note 111; ALCOHOL REHAB, *supra* note 111; see also Shelley Ross Saxer, "Down with Demon Drink!": *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 SANTA CLARA L. REV. 123, 124–25 (1995).

113. Compare *supra* notes 109–112 and accompanying text and Ken Armstrong, *What Can You Do With a Drunken Lawyer?*, MARSHALL PROJECT (Dec. 10, 2014, 10:50 AM), <https://www.themarshallproject.org/2014/12/10/what-can-you-do-with-a-drunken-lawyer> with RYAN GARCIA & THADDEUS HOFFMEISTER, *SOCIAL MEDIA LAW IN A NUTSHELL* 357–398 (West Acad. Pub. 2017) and CHRISTINE E. BROUCEK, *EDISCOVERY FOR THE LEGAL PROFESSIONAL* 147–57 (Wolters Kluwer 2020).

the shifting views on alcohol as a good and its use, alcohol's effect on the legal competencies of attorneys as well as judges is crucial to understand.<sup>114</sup>

Additionally, placing such an emphasis on the effects of alcohol on a lawyer's competent representation would potentially help law students avoid a substance abuse issue before it even starts and exacerbates beyond graduation. According to a study conducted by the American Bar Association and the Hazelden Betty Ford Clinic, one in three lawyers say they have a drinking problem, and twenty eight percent of them suffer from depression. Among those who reported problem drinking, twenty seven percent say their problems started in law school.<sup>115</sup>

Thus, alcohol as a good, and not just an area of abstract legal study, can have effects worthy of study on a lawyer's competency to practice, social life, work productivity in law firms and courts (the architecture of the law), and the legal market as a whole.<sup>116</sup>

### *C. Alcohol and Mediums*

Studying alcohol regulation in terms of its mediums is also crucial. According to Webster's Dictionary, the term *medium* can have two different meanings. The first definition is "something in a middle position." In a sense, wholesalers fit this definition. They act as an intermediary between large and powerful manufacturers and small independent retailers.<sup>117</sup> A retailer such as a tavern can perhaps be a medium too, since such establishments act as middlemen between the manufacturer and a consumer. This can be true when one thinks about the causal chain in strict products liability for example.<sup>118</sup> Thus, like cyberspace, manufacturers and retailers can be both the places and mediums of Alcoholic Beverage Law.<sup>119</sup>

But mediums can also be defined as means of transmission or conveyance.<sup>120</sup> The plural form of the word medium is *media*, which comprise of "channel[s] or system[s] of communication, information, or entertainment . . . publication[s] or broadcast[s] that carr[y] advertising, or . . . mode[s] of artistic expression or communication."<sup>121</sup> Here, the federal government can also be construed as media and plays a crucial role in the labeling and

114. MAVEETY, *supra* note 71, at 12.

115. Butler Center for Research, *Substance Use Disorders Among Legal Professionals*, HAZELDEN BETTY FORD FOUNDATION (March 16, 2017), <https://www.hazeldenbettyford.org/education/bcr/addiction-research/substance-abuse-legal-professionals-ru-317>; Nancy Rapp, *Problem Drinking Among Lawyers and Law Students*, ENJURIS, <https://www.enjuris.com/students/lawyers-and-alcoholism.html> (last visited Apr. 5, 2020); Staci Zaretsky, *The Struggle: Law Students Suffer From High Rates Of Depression And Binge Drinking*, ABOVE THE L. (May 12, 2016), <https://abovethelaw.com/2016/05/the-struggle-law-students-suffer-from-high-rates-of-depression-and-binge-drinking/?rf=1>.

116. Compare discussion *supra* Section III.C.3 and Elias, *supra* note 97, at 209–10, 218–20 with Lessig, *supra* note 10, at 506–07.

117. Compare *Medium*, MERRIAM-WEBSTER DICTIONARY [hereinafter MERRIAM WEBSTER], <https://www.merriam-webster.com/dictionary/medium> (last visited Apr. 20, 2020) with Paul Knettel, *Constitutional Mixologists: Muddling the Analysis of Protectionist Alcoholic Beverage Laws After Granholm v. Heald*, 93 WASH. U. L. REV. 1071, 1093 (2016), Basha, *supra* note 81, at 352, SZYMANKIEWICZ, *supra* note 8, at 262, and D'Aversa, *supra* note 79, at 1475.

118. See generally RESTATEMENT (SECOND) OF TORTS § 402A (1965).

119. See Mariotti, *supra* note 10, at 260–62.

120. MERRIAM WEBSTER, *supra* note 117 (emphasis added).

121. *Id.* (emphasis added). These mediums can also be considered channels of interstate commerce. See generally U.S. CONST. art. I, § 8, cl. 3; Gibbons v. Ogden, 22 U.S. 1 (1824).

advertising of alcoholic beverages.<sup>122</sup> Furthermore, after *Granholm* held that states may not use the Twenty First Amendment to create preferential treatment for in-state products to the detriment of interstate products in direct opposition to the Dormant Commerce Clause,<sup>123</sup> “states have been forced to get creative when exerting their police powers to still rightfully regulate [alcohol] in a commercial world that has stopped looking at state, national, and technological borders in the alcohol trade.” Below are examples of mediums where analyzing the dissimilarities in regulation between all types of alcoholic beverages, from sake to kombucha, and other modalities of constraint within regulation is critical.<sup>124</sup>

### 1. Labeling and Branding

Labeling and branding convey the identity, authenticity, and viability of manufacturers and their products to wholesalers, retailers, and consumers. They communicate whether a bottle of sparkling wine is truly Champagne, whether a particular hard cider is 5% ABV, and so forth. These media can run into various intersections at both the federal and state level.<sup>125</sup> A product’s label must be approved by the TTB before it can be sold or distributed. For that to happen, a Certificate of Label Approval (COLA) must be obtained containing descriptive information about the manufacturer and its product(s). Obtaining a COLA and TTB label approval can function similarly to how a corporation begins formation by filing articles of incorporation.<sup>126</sup> Labels can be rejected by the TTB at any time for their content, such as whether they include false or misleading statements, obscene or indecent material, or disparaging remarks of a competitor’s product.<sup>127</sup> The FDA also has guidelines pertaining to alcohol-product naming and packaging.<sup>128</sup> During the branding phase, manufacturers face four critical decisions: (1) selecting and adopting a mark to represent them; (2) deciding whether to register that mark with the USPTO or rely on common law trademark protection; and (3) deciding how to use the mark; and (4) deciding how to enforce the mark against competitors and infringers. If not careful, manufacturers, especially those that are stable and highly profitable, can run the risk of entering into hefty trademark disputes with disparate results. Trademark disputes can even occur between different types of alcoholic beverages, making dissimilarity absolutely essential in the start of an alcoholic beverage business.<sup>129</sup>

122. See 27 U.S.C.A. §§ 213 et seq.; Neal, *supra* note 69, at 55.

123. 544 U.S. 460 (2005); Seff & Bonnington, *supra* note 6, at 87–88.

124. Zahn, *supra* 3, at 34–48; Neal, *supra* note 69, at 54–55; Hostetter, *supra* note 65, at 100; LexVid, *supra* note 4; Paul Knettel, *supra* note 111, at 1072–73.

125. See generally, Jong & Ormaechea, *supra* note 102; Weinberg & Balthazor Jr. *supra* note 91; Hostetter, *supra* note 65; SZYMANKIEWICZ, *supra* note 8, at 240–41, 249–61; Zahn, *supra* note 3, at 34–48; Jeff Ikejiri, *The Grape Debate: Geographic Indicators vs. Trademarks*, 35 SW. U. L. REV. 603 (2007).

126. Compare Will Kenton, *Articles of Incorporation*, INVESTOPEDIA, <https://www.investopedia.com/terms/a/articlesofincorporation.asp> (last Feb. 21, 2020) with SZYMANKIEWICZ, *supra* note 8, at 250–55.

127. 27 C.F.R. § 4.39 (2016); SZYMANKIEWICZ, *supra* note 8, at 256; Jong & Ormaechea, *supra* note 102, at 23–24.

128. See Jong & Ormaechea, *supra* note 102, at 24–25; LexVid, *supra* note 4; SZYMANKIEWICZ, *supra* note 8, at 257–60.

129. See generally Jong & Ormaechea, *supra* note 102; Weinberg & Balthazor Jr., *supra* note 91; Seff & Bonnington, *supra* note 6, at 84.

## 2. Advertising

Advertising can be a medium for alcohol retailers, whether it be via radio, outdoor murals, or the Superbowl.<sup>130</sup> Beers like Corona or Landshark, through their advertising, convey feelings of paradise and escape.<sup>131</sup> Certain classes of alcohol, such as wine or bourbon, can convey feelings of sophistication and luxury. Such connotations are clear in magazines<sup>132</sup> and even television commercials, such as the one showcasing mixed-martial artist Conor McGregor's Proper No. Twelve Irish whiskey.<sup>133</sup> While a state cannot diminish a retailer's First Amendment right to free speech in its advertisements,<sup>134</sup> both the state and the TTB do have roles in confirming that advertisements include the required information that corroborates with the products package label and avoids prohibited statements.<sup>135</sup>

## 3. Technology and Social Media

Craft breweries, distilleries, and wineries have a goal of reaching the public. But the rise in technology and social media apps can put a damper on this. While online grocery shopping and food delivery apps like GrubHub and Postmates are novel ways technology has reached consumers, they can involve potential complexities for the alcoholic beverage industry.<sup>136</sup> Also, due to tied-house laws, commercial bribery from manufacturers is prohibited. In other words, a manufacturer may not provide something of value to a retailer in exchange for consideration or purchasing product. This includes sponsoring giveaways, offering promotional merchandise to retailers, and providing free taxi, Uber, or Lyft rides home from bars and restaurants during special events, even if the supplier's only motivation is to keep intoxicated drivers out of their vehicles and off the streets for purposes of public safety.<sup>137</sup>

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130. See Mariotti, *supra* note 10, at 262; Neal, *supra* note 69, at 54; Anderson, *supra* note 69; *Mural Advertising*, MATRIX MEDIA (Jan. 2, 2013), <https://www.matrixmediaservices.com/mural-advertising/>; Joshua M. Bernstein, *The 10 Coolest Murals You'll Find at Breweries*, BON APPÉTIT (June 10, 2015), <https://www.bonappetit.com/drinks/beer/slideshow/murals-breweries>.

131. Kim Banson MediaWorks, *CORONA Commercial Compilations*, YOUTUBE (Mar. 9, 2008), <https://www.youtube.com/watch?v=XT0Hkp3mVZ8>; Dan Evans, *Landshark Beer Commercial*, YOUTUBE (Sept. 17, 2015), <https://www.youtube.com/watch?v=687Snfg1cHg>.

132. See LUXURY ASIA MAG., <https://luxuryasiainsider.com/> (last visited Apr. 16, 2020); *Wine Bar Sophistication Comes Home*, LUXURY LIVING INT'L, <http://luxurylivingmag.com/1-must-have-wine-lovers/>.

133. Proper Whiskey, *Proper No. Twelve – Challenger*, YOUTUBE (Jan. 13, 2020), <https://www.youtube.com/watch?v=DGLu8Z-ksSI>; Boxing Extravaganza, *Proper 12 Twelve Whiskey Commercial Conor McGregor*, YOUTUBE (Sept. 30, 2018), [https://www.youtube.com/watch?v=XKA\\_\\_8B-W4](https://www.youtube.com/watch?v=XKA__8B-W4).

134. See Neal, *supra* note 69, at 54; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

135. SZYMANKIEWICZ, *supra* note 8, at 262–71; Cattanach & Wirth, *supra* note 99, at 74.

136. Seff & Bonnington, *supra* note 6, at 89–92. These apps are convenient for both consumers and businesses, especially during Covid-19. See e.g. Scott Broom, *Why Maryland is Keeping the Liquor Flowing as an 'Essential' Business During The Coronavirus Crisis*, WUSA9, <https://www.wusa9.com/article/news/health/coronavirus/maryland-allows-liquor-alcohol-sales-as-essential-business-during-coronavirus-shutdown/65-4755ad80-8e68-493a-8632-751d817628d3> (Mar. 24, 2020 8:27 PM EDT); Jackie Dove & Alina Bradford, *The Best Food-Delivery Apps for 2020*, DIGITAL TRENDS (Apr. 13, 2020), <https://www.digitaltrends.com/home/best-food-delivery-apps/>.

137. Seff, *supra* note 6, at 89–92; SZYMANKIEWICZ, *supra* note 8, at 262–66. See also Anderson, *supra* note 69.

## V. CONCLUSION

Alcohol is one of the biggest commodities in American history and will continue to be for many years to come. While “Craft Beer Law” may be way too specific and the “Law of the Brewery” would be as ineffective and too factually concrete as the “Law of the Horse” or “Law of the Coffeeshop,”<sup>138</sup> alcoholic beverage law can still be studied as a discrete legal topic through a three-dimensional view of the heavily regulated industry in terms of goods, places, and mediums. What makes alcoholic beverage law a peculiar subject is that 1) it shares similarities with entrepreneurship and thoroughbred racing, especially in terms of history, policy, and corruption; 2) it is more individualized procedurally than substantively; and 3) it departs from cyberlaw by recognizing Lessig’s four modalities of constraint in something already familiar.

Law, social norms, markets, and architecture relating to alcohol and its establishments have significantly changed since Colonial times, have become fields worthy of specialization, and can hopefully continue to change for the better. There is no doubt that error in legislation may be common, especially as technology gallops forward. Fortunately, scholars, practitioners, and other participants should possess plenty of historical context to help the alcoholic beverage industry evolve and enjoy its benefits responsibly.<sup>139</sup>

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138. Cf. Mariotti, *supra* note 10, at 256–57, 268–73, 297–300.

139. See Easterbrook, *supra* note 10, at 215–16; Zahn, *supra* note 3, at 34; Seff & Bonnington, *supra* note 6, at 94.