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## Reds, Whites, and Sulfites: Examining Different Organic Wine Regulation Practices in the United States and the European Union

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# Reds, Whites, and Sulfites: Examining Different Organic Wine Regulation Practices in the United States and the European Union

*Ryan Puszka\**

*Abstract:*

*This note examines the history of regulation within the organic wine industry in the U.S. and the E.U. and explores the motivations behind the production of organic wine in these two regions. The variance in the historical significance of wine between these two regions is reflected in the contemporary differences between the two regions' rules for organic wine certification. In 2012, the U.S. and the E.U. entered into a comprehensive organic equivalency agreement that covered nearly all organic agricultural products but due to significant differences in the two regions' regulatory schemes concerning the inclusion of added sulfites in wine, the equivalency agreement did not extend to wine. This lack of organic equivalency between two of the world's largest producers and consumers of wine has resulted in a number of labeling difficulties in the international wine market and consequentially, has resulted in economic inequities, which disincentivize organic viticulture. These difficulties have trickled down to the consumer and resulted in both confusion and a general distrust for organically certified wines, further harming the reputation of organic wines. This article proposes the creation of a private international agency for certifying organic wine, mirroring the Demeter Standard for biodynamic products. This private certifying agency would provide greater transparency to consumers and a more economically attractive and streamlined regulatory process for wine producers who are considering organic viticulture.*

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\* Ryan Puszka J.D., Northwestern Pritzker School of Law, 2020. The author would like to thank the Northwestern Journal of International Law and Business editorial staff for their help in refining this Note.

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## I. INTRODUCTION

In an age where consumers are ready and able to analyze food products according to their nutritional information down to the gram, the wine bottle remains an elusive and often indecipherable format for conveying information. With labeling conventions varying greatly from region to region and bottle to bottle, following any number of regulatory criteria, wine is often ignominiously associated with a level of inaccessibility and pretention. In light of wine's often-unapproachable nature, it's only reasonable to hope that the increasingly familiar and consumer-friendly "USDA Organic" label might help the average consumer clarify what he or she is actually drinking and where it came from. Unfortunately, however, the different regulatory systems in place for the labeling of organic wine in both Europe and the United States add an additional level of indecipherability to the equation for the information-hungry consumer. As the organic movement continues to gain momentum and the "USDA Organic" label becomes ever more ubiquitous, this system poses an unnecessary and serious consumer-transparency problem to an industry whose historical ethos is founded on clarity and sincerity.

Beginning in the 1970s in the United States and Western Europe, the wine industry was re-inventing itself. Numerous winemakers were attempting to revert to pre-industrial winemaking methods: the organic wine movement was underway. This movement paralleled the broader trend across all food products; producers sought to meet the demand for more healthful, natural, and ecologically friendly food options. The progressive mentality surrounding food continues to extend beyond the sphere of "food" and includes a vast number of cultural and lifestyle movements that are more broadly oriented on the philosophy of returning to basics.<sup>1</sup> In the sphere of wine, these two genres of movements have collided. Producers and consumers alike are seeking to return to the most natural, original, and unadulterated version of wine: crushed grapes, fermentation via naturally occurring yeast on the grapes' skin, and nothing else.<sup>2</sup> Culturally-concerned, wealthy, and eco-conscious wine lovers have started to demand and create wines that are verifiably organic in an effort to explicitly reject commonplace, conventional wines, which have become mechanized, standardized, and predictable. This natural wine movement seeks to renounce wines that are passed through gelatin filters, moved through electric fields, and injected with various additives all to improve the wine's consistency and better prepare for aging.<sup>3</sup>

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<sup>1</sup> Kate Ashford, *The joy of living with less*, BBC (Nov. 3, 2014), <http://www.bbc.com/capital/story/20140224-the-joy-of-minimalist-living>.

<sup>2</sup> Stephen Buranyi, *Has wine gone bad?*, THE GUARDIAN (May 15, 2018), <https://www.theguardian.com/news/2018/may/15/has-wine-gone-bad-organic-biodynamic-natural-wine> (discussing original wine production methods that are reemerging in the realm of natural wine).

<sup>3</sup> *Id.* (noting that some of the complicated methods adopted by conventional wine

In the information era, the verification of genuine organic practices is crucial for building the consumer transparency that is necessary for the organic industry to build a reputation of legitimacy. Numerous organic standards have been created throughout the years to aid in this verification process. These systematized standards took a while to be universally adopted; despite notable organic wine production in France and Germany in the 1950s, it wasn't until 1991 that uniform European standards for organic agriculture were adopted, regulating fertilizer and pest-control measures for organic products.<sup>4</sup> In the United States it took until 2000 for the USDA to create the National Organics Program (NOP), which established the regulatory framework for organics, and the National Organic Standards Board (NOSB), which enforced the organic framework and certified organic products.<sup>5</sup> The introduction of semi-universal organic certification standards resulted in a new series of complications in the world of wine. For producers, the organic certification process became an initially costly and time-consuming undertaking.<sup>6</sup> For consumers, however, it is a powerful mechanism that increases product transparency, leading to elevated awareness regarding the origins of a food product and allowing for more precise and efficient consumption—so long as consumers understand what the labels mean.<sup>7</sup> As time would tell, the increased production costs for organic certification could be equitably sustained by the market, as observed during the organics surge in the 1990s when consumers consistently demonstrated their willingness to pay a premium for organic food products.<sup>8</sup> This trend has continued, as consumers continue to desire more choices with their food products and demand more information, and accordingly, the NOP's budget has consistently grown since its inception.<sup>9</sup>

The net results of the shift towards institutionalized and nationalized organic standards through the adoption of uniform certification schemes are an increase in product diversity, organic legitimacy, more sustainable agricultural practices,<sup>10</sup> and a greater breadth of comestible cultural

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producers to ensure stability and consistency in their products have resulted in a uniform and uninspired selection).

<sup>4</sup> Council Regulation 2092/91, 1991 O.J. (L 198) (EEC) [hereinafter *E.U. Rules for Organic Wine Production*].

<sup>5</sup> 7 C.F.R. § 205 (2000).

<sup>6</sup> Renée L. Robin, *Defining Organic Practices for Wine and Grapes*, WINE BUS. MONTHLY 64, 66 (Apr. 2006).

<sup>7</sup> Andrew Kasso, *No Sustainability Without Transparency!*, FORBES (June 18, 2010), <https://www.forbes.com/sites/csr/2010/06/18/no-sustainability-without-transparency/#39e3ac4d36f6> (noting that genuine transparency and full information allows consumers to better spend their dollars in accordance with their desires).

<sup>8</sup> Robin, *supra* note 6.

<sup>9</sup> USDA NATIONAL ORGANIC PROGRAM (Apr. 2017), <https://www.ams.usda.gov/sites/default/files/media/NOPMcEvoySpring2017.pdf>.

<sup>10</sup> Tamar Haspel, *Is organic agriculture really better for the environment?*, WASH. POST (May 4, 2016), <https://www.washingtonpost.com/lifestyle/food/is-organic-agriculture-really->

representation.<sup>11</sup> Issues surrounding the legitimacy of organic products, however, do not confine themselves within national borders. In 2012, the United States and the European Union agreed to an Organic Equivalency Agreement, which cross-recognized each others' organic certification<sup>12</sup> for organic products originating in the European Union or United States. The Equivalency Agreement was comprehensive and did a lot to reduce the administrative burden on producers, as they were no longer required to independently attain organic certification in each jurisdiction in order to recognize the benefits of their organic production. The agreement also helped to open markets between two of the largest agricultural economies.<sup>13</sup> This agreement broadly includes nearly all certifiable products, yet it curiously excludes wine.<sup>14</sup>

While this exclusion seems somewhat arbitrary, it reflects longstanding regulatory difficulties associated with classifying wine—an agricultural product that conventionally involves non-agricultural inputs to preserve wine's character during shipping and aging. More fundamentally, wine—unlike other, more conventional food products—is a luxury food product largely consumed as an indulgence, fully equipped with its own cultural and pre-biblical historical significance.<sup>15</sup> Despite all of these unique characteristics influencing the regulation of wine, wine's international organic certification controversy centers on what appears to be a simple question of preference: whether or not to permit the use of sulfites as an additive in certified organic wine.<sup>16</sup>

Sulfites are chemical compounds that preserve wine and increase its

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[better-for-the-environment/2016/05/14/e9996dce-17be-11e6-924d-838753295f9a\\_story.html?utm\\_term=.dd7839aec635](https://www.better-for-the-environment.com/2016/05/14/e9996dce-17be-11e6-924d-838753295f9a_story.html?utm_term=.dd7839aec635).

<sup>11</sup> See *infra* Section II (discussing the cultural origins of organic viticulture and the significance of it in Europe and the United States).

<sup>12</sup> 7 U.S.C.A. §§ 6501-24 (2018); 7 C.F.R. § 205; Council Regulation 834/2007, 2007 O.J. (L 189) (EC); Commission Regulations 889/2008, 2008 O.J. (L 250) (EC); Commission Regulations 1235/2008, 2008 O.J. (L 334) (EC); Commission Implementing Regulation 126/2012, 2012 O.J. (L 41) (EU).

<sup>13</sup> USDA FOREIGN AGRICULTURE SERVICE, WORLD AGRICULTURAL PRODUCTION, Table 01 World Crop Production Summary (Nov. 2018).

<sup>14</sup> The Equivalency Agreement does not contain any provisions for personal care products or aquaculture. *EU-US Equivalency Agreement*, ORGANIC TRADE ASSOCIATION (2012), <https://ota.com/resources/global-market-opportunities/trade-agreements/eu-us-equivalency-agreement> [hereinafter *EU-US Equivalency Agreement*]; Ignacio Carreño, *E.U. and U.S. Mutually Recognise their Respective Organic Standards and Control Systems as Equivalent*, 3 EUR. J. RISK REG. 225, 227 (2012).

<sup>15</sup> Geoffrey Jones & Emily Grandjean, *Creating the Market for Organic Wine: Sulfites, Certification, and Green Values* 20 (Harv. Bus. Sch. Working Paper 18-048, 2017); see John 2:10 (noting how there were different customary ways in which to serve wine at a party).

<sup>16</sup> Howard Hewitt, *Much Ado About Sulfites, French Wines, and Organic Regulations*, PALATEPRESS (Feb. 29, 2012), <http://palatepress.com/2012/02/wine/much-ado-about-sulfites-french-wines-and-organic-regulations/>.

stability by preventing wine from growing bacteria or turning to vinegar.<sup>17</sup> Sulfites naturally occur in all wine and are a natural biological result of fermentation,<sup>18</sup> but in modern times, sulfites have become a staple additive in commercial wine. The addition of sulfites beyond those that are naturally occurring stabilizes the wine and can elongate a wine's shelf life, providing winemakers greater flexibility in production due to a higher level of confidence that the elevated sulfite level will prevent the wine from oxidizing during transport.<sup>19</sup> Although there are legitimate consumer concerns about the health effects adding sulfites in wine—particularly concerning wine induced headaches—the medical literature shows that sulfites' only observed medical effect is inducing asthmatic responses in a small number of highly sensitive asthma sufferers.<sup>20</sup> In contrast to the limited medical effects of sulfites, there is a substantial difference in the character and presentation of wines produced with and without added sulfites.<sup>21</sup> As compared to predictably classic but rigid wines that use added sulfites, no-sulfite-added wines—those produced by certified organic U.S. winemakers—are notoriously variable from year-to-year as well as from barrel—to—barrel and moreover, are difficult to produce in a consistent manner.<sup>22</sup> Therefore, absent forthcoming contradictory medical evidence, the choice surrounding the addition of sulfites in wine is primarily a matter of aesthetics and part of the art and philosophy of winemaking.

While commercial producers consider added sulfites essential to the stability and quality of wine, organic producers generally hold one of two opposed perspectives concerning the inclusion of sulfites in certified organic wine: one group seeks to allow the addition of sulfites up to a low threshold while the other hopes to disallow any added sulfites. This disagreement has been implied in the differing approaches to the organic certification of wine in the United States and European Union. These different approaches can be understood more deeply by analyzing wine's varying historical and cultural significance in the two regions and moreover, through examining the relative significance of the wine economy in both regions.

While national and international organic certification schemes offer the perception of transparency and thus improve consumer confidence,

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<sup>17</sup> Jones & Grandjean, *supra* note 15, at 8 (discussing that the first organic wine pioneers found great difficulty producing wine that was independently stable without the addition of sulfites).

<sup>18</sup> Andrew L. Waterhouse, *Sulfites*, WATERHOUSE LAB (Dec. 2015), <https://waterhouse.ucdavis.edu/whats-in-wine/sulfites>.

<sup>19</sup> Jones & Grandjean, *supra* note 15, at 8.

<sup>20</sup> Waterhouse, *supra* note 18.

<sup>21</sup> See Simon Woolf, *Sulfites in wine: friend or foe?*, DECANTER (Mar. 18, 2016), <https://www.decanter.com/learn/wine-terminology/sulfites-in-wine-friend-or-foe-295931/> (exploring the varying expressions of organic, no-added-sulfite wine compared to conventional wine).

<sup>22</sup> *Id.*

fraudulently labelled wines still slip through the cracks—often due to the breadth, scale, and uniqueness of the wine industry. In fact, in 2014 an Australian vineyard was caught fraudulently labelling its wine as organic.<sup>23</sup> Surprisingly, this discovery was made by organic wine wholesalers and not by the Australian certification agency, demonstrating the systematic flaws in the organic certification process.<sup>24</sup> Although fraudulent labelling and food label auditing issues are not problems isolated to the wine industry,<sup>25</sup> the wine industry is uniquely susceptible to these issues<sup>26</sup> due to wine's often cryptic labeling and unique production process. If sufficient changes to the organic certification institution are not made to protect against such crimes, the organic label might lose much of its significance, and not only will consumers be exposed to a heightened risk of not getting what they bargained for, but consumers may become unaware of the cultural, historical, and ethical ends of the organic wine movement. Therefore, whatever certification scheme is ultimately adopted must be judicious in its granting of certification and its label auditing so as to protect the significance of the organic label, thus protecting compliant organic producers from unfair competition as well as protecting underinformed consumers from deceit.

Nonetheless, countries and wine regions have developed their own distinct ways of addressing the issues involved in organic wine certification, which range from the inclusion of sulfites to label policing. There is significant documentation of the contentious history of internal, region-specific regulation and lobbying. Yet, even within regions and among winemakers with similar approaches to organic viticulture, there is significant disagreement over which approach to added sulfites in organic wine is best.<sup>27</sup> The remainder of this note will discuss the historical settings

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<sup>23</sup> Danielle Bowling, *Vineyard busted for falsely claiming organic status*, FOOD MAGAZINE (July 31, 2014), <https://www.foodmag.com.au/vineyard-busted-for-falsely-claiming-organic-status/>; Lauren Eads, *Vineyard Caught Over False Organic Claims*, THE DRINKS BUSINESS (July 31, 2014), <http://www.thedrinksbusiness.com/2014/07/ausie-vineyard-claims-false-organic-status/>.

<sup>24</sup> Bowling, *supra* note 23; Eads, *supra* note 23. *But see*, Lindsey A. Zahn, *How Are Organic Wine Labels Regulated in the U.S.?*, ON RESERVE (Aug. 6, 2014), <https://www.winelawonreserve.com/2014/08/06/how-are-organic-wine-labels-regulated-us/> (noting that the NSAA, the Australian organic regulatory agency, responded swiftly and severely to this fraudulent labeling behavior).

<sup>25</sup> See John Vogel, *Organic labeling fraud is booming*, AMERICAN AGRICULTURIST (May 30, 2017), <https://www.farmprogress.com/marketing/organic-labeling-fraud-booming> (discussing how the growth of the organic sector outpaces the regulators and auditors).

<sup>26</sup> Steve Dollar, *How Rudy Kurniawan Fooled the Wine World*, WINE ENTHUSIAST (Aug. 14, 2017), <https://www.winemag.com/2017/08/14/how-rudy-kurniawan-fooled-the-wine-world/> (examining the massive and highly publicized wine labeling fraud perpetrated by Rudy Kurniawan).

<sup>27</sup> See Magali A. Delmas & Neil Lessem, *Eco-Premium or Eco-Penalty? Eco-Labels and Quality in the Organic Wine Market*, 56(2) BUS. & SOC'Y 318, 323 (2017) (noting that the low premium that eco-labeled wine procures disincentivizes producers from pursuing organic certification); Jones & Grandjean, *supra* note 15, at 12.

in which these varying regulatory schemes came into being. It will then proceed to examine the evolution of the present regulatory schemes in the United States and the European Union, and finally, it will propose a solution to the confusing contemporary framework: a private, independent, and international certification body, mirroring Demeter's biodynamic certification that operates on an opt-in basis for all who wish to abide by its stringent and uniform standards.<sup>28</sup>

## II. HISTORICAL AND CULTURAL BACKGROUND

The different organic wine certification schemes effective in the United States and the European Union both developed as a means to protect consumers' interest in transparency, and both schemes share similar paths of development. Yet the modern certification standards between the two regions contain several minor but hugely consequential differences. A discussion of the historical development of organic wine and organic wine certification in each region will help elucidate the ideological divergence underpinning these differences.

### A. *A Brief History of Organic Wine in the United States*

Wine in the United States was first introduced by the Spanish in 1769, and even today, U.S. wine remains a relatively young industry.<sup>29</sup> Since the middle of the nineteenth century, the U.S. wine economy has been centered on California.<sup>30</sup> While California's wine business has been substantial since the era of thirsty gold miners, California wines were virtually unknown on the international stage until the "Judgment of Paris" in 1976, which declared California wines relevant.<sup>31</sup> This international recognition put California wines on the map and accordingly amplified the adoption of organics in U.S. wine.

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<sup>28</sup> *Biodynamic Processing Standard*, DEMETER ASSOCIATION, INC. (July 2017), <https://www.demeter-usa.org/downloads/Demeter-Processing-Standards.pdf>; [hereinafter *Demeter Processing Standard*]; *Biodynamic Farm Standard*, DEMETER ASSOCIATION, INC. (Sept. 2017), <https://www.demeter-usa.org/downloads/Demeter-Farm-Standard.pdf> [hereinafter *Demeter Farm Standard*].

<sup>29</sup> See K. Kris Hurst, *The Origins and History of Winemaking*, THOUGHT CO. (Nov. 26, 2019), <https://www.thoughtco.com/wine-origins-archaeology-and-history-173240>; see also Axel Borg, *A short history on wine making in California*, UC DAVIS LIBRARIES (July 5, 2016), <https://www.library.ucdavis.edu/news/short-history-wine-making-california/>.

<sup>30</sup> DANIEL GEISSELER & WILLIAM R. HORWATH, CAL. DEP'T OF FOOD AND AGRIC. & UC DAVIS, *Grapevine Production in California* (2016), [http://apps1.cdfa.ca.gov/FertilizerResearch/docs/grapevine\\_Production\\_CA.pdf](http://apps1.cdfa.ca.gov/FertilizerResearch/docs/grapevine_Production_CA.pdf).

<sup>31</sup> Borg, *supra* note 29 (detailing the first time that American made wines outperformed European wines on the global level); Katy Steinmetz, *How America Kicked France in the Pants And Changed the World of Wine Forever*, TIME (May 24, 2016), <http://time.com/4342433/judgment-of-paris-time-magazine-anniversary/> (discussing the effects of the famous "Judgment of Paris" on the Californian wine industry).

Beginning alongside many philosophically-related counter-culture movements, organic agriculture took hold in California during the 1960's.<sup>32</sup> Following the successes of both Californian wine and the organics movement, several winemakers in the 1980's and 1990's saw an opportunity to turn on a profit on these related trends.<sup>33</sup> The first of these producers adopted a pragmatic and egalitarian approach to agriculture that was particularly concerned with authenticity.<sup>34</sup> In spite of their admirable motivations, many pioneering organic wine producers in California encountered recurring problems with the stability of their wines: without the addition of sulfites or close monitoring and oversight, much of the wine would quickly oxidize and turn into vinegar, rendering the drinkability of each bottle unpredictable.<sup>35</sup> The unfortunate consequence of this instability was the lingering reputation that organic California wines sacrificed quality for their organic and sustainable denomination, even despite the numerous, prestigious Decanter World Wine Awards these organic wines had earned.<sup>36</sup> The first organic producers also had to combat negative press flowing from the newly established and booming conventional wine industry in California, which actively condemned the organic wine movement as a branch of the hippy movement.<sup>37</sup>

In the modern era, as New World wine<sup>38</sup> production continued to grow and consolidate,<sup>39</sup> there was little to no support for organic wine production amongst the major wine producers in the United States.<sup>40</sup> The large producers saw that the organic wine pioneers were not commanding high enough premiums at sale to justify the input costs associated with organic conversion and certification—often as high as fifteen to thirty percent of revenue.<sup>41</sup>

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<sup>32</sup> Jones & Grandjean, *supra* note 15, at 11.

<sup>33</sup> Lawrence M. Fisher, *Organic Wines Enter the Mainstream*, N. Y. TIMES, (Nov. 19, 1991), <http://www.nytimes.com/1991/11/19/business/organic-wines-enter-themainstream.html>.

<sup>34</sup> *Id.*

<sup>35</sup> Jones & Grandjean, *supra* note 15, at 13.

<sup>36</sup> See Decanter Wine Awards 2009, DECANTER (July 23, 2009), <http://awards.decanter.com/DWWA/2009?WineCountry=&Award=&Colour=&Style=&Vintage=&Score=&GrapeVariety=&Organic=true&Advanced=true>.

<sup>37</sup> Fisher, *supra* note 33.

<sup>38</sup> Jones & Grandjean, *supra* note 15, at 14 (enumerating New World wine countries, including the United States, Australia, and South Africa, that lack the historical wine culture of Europe and have more recently developed their wine industries).

<sup>39</sup> Paul Franson, *Consolidation in changing the business of wine*, NAPA VALLEY REGISTER (Feb. 2, 2006), [www.napavalleyregister.com/business/consolidation-is-changing-thebusiness-of-wine/article\\_8cbf2ddf-56c8-52ef-97bf-a77ff69b0eb4.html](http://www.napavalleyregister.com/business/consolidation-is-changing-thebusiness-of-wine/article_8cbf2ddf-56c8-52ef-97bf-a77ff69b0eb4.html) (noting that the top 30 companies in the United States produce 90% of the volume of U.S. wine).

<sup>40</sup> *But see* Fisher, *supra* note 33 (discussing how E. & J. Gallo encouraged its farmers to minimize their use of chemicals and to participate in sustainable farming, even though the company doesn't plan on to pursue organic certification).

<sup>41</sup> Delmas & Lessem, *supra* note 27, at 320 (finding that consumers tend to prefer organic labeled wines at lower prices, but at higher prices, tend to prefer conventional wines).

Despite these high costs, smaller U.S. producers continued to carve out their niche.

Notwithstanding a lack of organic conversion amongst major American producers, wholesale support for sustainability within the wine industry was not lost on all large-volume U.S. producers. A contingent of these ‘sustainable’ producers who didn’t abide by strict organic practices, such as E. & J. Gallo, transitioned to implementing sustainable wine production methods without seeking organic certification.<sup>42</sup> Sustainable winemaking focuses on sustainable production in the most intuitive sense, focusing on environmental, social, and economic responsibility but falling short of banning man-made chemicals in farming.<sup>43</sup> Although this approach diverged from the purist mentality of the first U.S.-based organic winemakers, which involved head-to-toe organic production methods and forbidding the addition of any sulfites, it retained many of the beneficial externalities born from sustainable agriculture. Unfortunately, consumers of these sustainably-made but not organically certified wines had no audited or reliable assurances that these production methods were being implemented.

Nevertheless, when the large volume producers failed to adopt the aggressive pro forma organic certification, the ideological line in the sand was drawn. Two distinct groups within the world of sustainable wine emerged: the utilitarian-minded, who wanted to protect food products and the preserve land, keeping both clear of the harmful chemicals that threatened the environment and human health, and the organic purists, who shared in the environmental concerns but were additionally focused on a cultural revolution within the U.S. wine world, seeking to create pure, unadulterated wine that had a complete and genuine expression of *terroir*.<sup>44</sup> Accordingly, from the early days of the U.S. wine boom, there was a distinct ideological division amongst the environmentally conscious wine producers. Inevitably, this ideological division has resulted in differing approaches to organic certification. The larger, more utilitarian and ecologically focused winemakers, who were open to the inclusion of added sulfites in organic wine, and the organic wine purists, who vehemently opposed the notion.<sup>45</sup>

### *B. A Brief History of Organic Wine in Europe*

The ancient Greeks and Romans made Europe the first place where

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<sup>42</sup> Jones & Grandjean, *supra* note 15, at 15 (noting that the adoption and promotion of sustainable farming practices in accordance with the California Sustainable Winegrowing Alliance (CWSA) were being adopted by some large-scale producers).

<sup>43</sup> Katie Kelly Bell, *Is Sustainable Winemaking The Wave Of The Future?*, FORBES (May 2, 2014, 12:28 PM), <https://www.forbes.com/sites/katiebell/2014/05/02/is-sustainable-winemaking-the-wave-of-the-future/>.

<sup>44</sup> Jones & Grandjean, *supra* note 15, at 16–17 (explaining the development of American organic wine ideologies).

<sup>45</sup> *Id.*

producing and consuming wine was an activity for the masses.<sup>46</sup> Moreover, *vitis vinifera*, the botanical grape variety that is grown to produce nearly all modern wine, is indigenous to nearly all parts of Europe.<sup>47</sup> As a result, Europe has been consistently named the cultural center of the wine world.<sup>48</sup> Italian, Spanish, and—most of all—French wines have been found in the cellars of royalty for centuries.<sup>49</sup> The natural result of this storied cultural relationship with wine has made Europe the economic hub of the global wine industry. Even today, Europe produces more wine than the rest of the world combined, despite its relatively small geographic area.<sup>50</sup>

Europe was also the first place where regulations on wine emerged. Dating back to Roman times, wine was authenticated with various labeling techniques to prevent fraudulent advertising and misrepresentation.<sup>51</sup> As wine culture evolved, the regulation compounded, eventually resulting in geographical demarcation regulations that, even today, are uniquely associated with Old World wines and separate them from New World wines.<sup>52</sup> The rise of European branding and protectionism in the wine world has helped transform wine from a drink prized for its utility to make water potable into a luxury good.<sup>53</sup> Today, any given bottle of wine falls into a complicated but comprehensive price and quality hierarchy, and a large segment of all wine produced is consumed as an indulgence.<sup>54</sup> Now more than ever, regulations and protections designed to verify the identity, origin, and quality of wine are of supreme importance in maintaining stable, open markets. For European winemakers who have inherited this system, the ability to label wine with any number of lucrative denominations and certifications—becoming a member of the elite few winemakers—is

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<sup>46</sup> Jeffrey A. Munsie, A Brief History of the International Regulation of Wine Production, 6 (March 2002) (unpublished Third Year Paper, Harv. L. School) (on file with Digital Access to Scholarship at Harvard).

<sup>47</sup> TIM UNWIN, WINE AND THE VINE: AN HISTORICAL GEOGRAPHY OF VITICULTURE AND THE WINE TRADE 29 (1991) (establishing that *Vitis vinifera* appears to have originated in Eurasia).

<sup>48</sup> Munsie, *supra* note 46, at 10.

<sup>49</sup> Eleanor Ducard, A Complete History of Bordeaux Wine, TANGLEWOOD WINE (Aug. 21, 2018), <https://tanglewoodwine.co.uk/blogs/news/complete-history-bordeaux-wine>.

<sup>50</sup> WORLD WINE PRODUCTION BY COUNTRY 2015, WINE INSTITUTE (2017), [https://www.wineinstitute.org/files/World\\_Wine\\_Production\\_by\\_Country\\_2015.pdf](https://www.wineinstitute.org/files/World_Wine_Production_by_Country_2015.pdf); Giulia Meloni & Johan Swinnen, *The Political Economy of European Wine Regulations*, 1 (LICOS Centre for Institutions and Econ. Performance, Discussion Paper 320/2012), <https://feb.kuleuven.be/drc/licos/publications/dp/dp320.pdf>.

<sup>51</sup> Munsie, *supra* note 46, at 7.

<sup>52</sup> Old World wines refers to wines produced in Europe, while New World wines refers to wines produced elsewhere. *Id.* at 8-9 (discussing the evolution of increasingly specific regulations in the European wine economy as a means to preserve value, consumer perceptions, and prevent fraud).

<sup>53</sup> *Id.*

<sup>54</sup> STEVE CHARTERS, WINE AND SOCIETY: THE SOCIAL AND CULTURAL CONTEXT OF A DRINK 51-62 (2006).

tremendously important for a winery's profitability.<sup>55</sup>

Following declines in production and profitability resulting from World Wars I and II along with other natural disasters, many European countries adopted less restrictive regulations; more winemakers were certified and, accordingly, were able to fetch higher prices for their wines.<sup>56</sup> This democratization of the regulations, however, was not a wholesale abandonment of the system; as members of the historical epicenter of wine production, European winemakers have demonstrated a willingness to preserve their privileged position on the international stage. In one particularly notable case, a coalition of champagne producers brought an injunctive action against a British wine importer who was labeling various sparkling wines as champagne.<sup>57</sup> The Chancery Division of the High Court took note of the value of the Champagne's AOC denomination and granted an injunction against selling non-champagne certified products as champagne.<sup>58</sup> Eventually, many European countries<sup>59</sup> got together to form the European Economic Community (EEC) in 1957 to stabilize the continent's agriculture industry.<sup>60</sup> Numerous regulations under this treaty were specifically aimed at insuring the quality of and protecting the prices of European wine.<sup>61</sup> This extensive history of cultural significance, regulations, protectionism, and litigation highlight European winemakers' strong desire to preserve both the cultural and economic staples of European life that the wine industry embodies.

For nearly all of its storied history, wine production in Europe utilized solely organic agricultural practices.<sup>62</sup> Today Europe remains the global hub for organic wine and produces more organic wine than any other region worldwide. European organic viticulture constitutes 89% of the total worldwide area under organic grape cultivation.<sup>63</sup> It is worth noting that, as

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<sup>55</sup> *Id.* at 13-15 (describing that the French wine laws, Appellation d'Origine Contrôlées (AOC), from the nineteenth and twentieth centuries—that remain largely unmodified today—explicitly classified certain producers as superior).

<sup>56</sup> PIERRE SPAHNI, THE COMMON WINE POLICY AND PRICE STABILIZATION 32 (1988); *see* Munsie, *supra* note 46, at 16-17 (noting that the AOC France was greatly expanded while new, less strict classifications were introduced and noting that Italy began implementing regulations to increase nationwide production).

<sup>57</sup> *Bollinger v. Costa Brava Wine Co. Ltd.*, (1961) 1 WLR 277, 292 (UK).

<sup>58</sup> *Id.*; UNWIN, *supra* note 47, at 320.

<sup>59</sup> The initial countries to participate in the EEC were Belgium, France, Germany, Italy, Luxembourg, and the Netherlands, notably excluding Spain. UNWIN, *supra* note 47, at 321.

<sup>60</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

<sup>61</sup> *See* Council Regulation 816/70, 1970 O.J. (L 99) (EC); Council Regulation 817/70, 1970 O.J. (L 99) (EC).

<sup>62</sup> Shawn McKenzie, *A Brief History of Agriculture and Food Production: The Rise of "Industrial Agriculture"*, JOHNS HOPKINS CENTER FOR A LIVABLE FUTURE 18 (2007) (noting that chemical fertilizers were first introduced in the early nineteenth century).

<sup>63</sup> CBI MINISTRY OF FOREIGN AFFAIRS, CBI PRODUCT FACTSHEET: ORGANIC WINE IN

of 2013, this represented only 5.6% of European vineyards and 3.7% of worldwide vineyards; the rebirth of the organic wine industry is still in its nascent stage.<sup>64</sup> Nevertheless, in an attempt to return to the fundamental cultural principles that underlie European viticulture, organic winemaking in Europe is growing rapidly. From 2007 to 2013 the organic grape cultivation area increased by 23% annually.<sup>65</sup> Organic wine consumption in Europe has increased as well, and Germany imports more organic wine than any other country.<sup>66</sup> These developments illustrate that the support for the European organic wine movement is growing. There has been a lot of progress regarding the uniformity of organic wine labeling across E.U. wine, reducing consumer confusion—most notably with the adoption of uniform European labeling scheme.<sup>67</sup>

Several major roadblocks lie in the way of further organic growth and progression of in Europe, however. There remain convoluted labeling conventions in the international sphere, essentially disallowing European organic wine producers from marketing their wines as organic in the United States despite otherwise complying with European organic standards. Moreover, in contrast with other organic products, many consumers continue to associate organic certified wine with unpredictable quality symptomatic of earlier organic wines.<sup>68</sup> Even in European countries where wine is consumed at the greatest volume and with the greatest frequency, wine is an indulgence. Thus, given organic wine producers' history of quality-control difficulties, most consumers are unwilling to pay a premium for organic wine,<sup>69</sup> which does not incentivize new producers from entering the organic market. Instead, consumers overwhelmingly prefer the perceived quality and consistency of conventional wine. These barriers have arisen in spite of Europe's historical success in developing Union-wide protective regulations. It is vital to the growing organic wine industry, as well as the broader system of organic and sustainable agriculture, that uniform, transparent, and comprehensible labelling standards are adopted on a global scale.

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EUROPE (2013), [https://www.cbi.eu/sites/default/files/market\\_information/researches/product-factsheet-organic-wine-europe-wine-2013.pdf](https://www.cbi.eu/sites/default/files/market_information/researches/product-factsheet-organic-wine-europe-wine-2013.pdf) [hereinafter *Organic Wine in Europe Factsheet*].

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *Id.* Germany imports an annual volume of around 30 million bottles of organic wine.

<sup>67</sup> Commission Implementing Regulation 203/2012, 2012 O.J. (L 71) (EU) (establishing that, from the 2012 harvest, all organic wine growers in the E.U. that meet regulatory standards may use the term “organic wine” on their labels; the labels must be further standardized with EU-organic-logo).

<sup>68</sup> While growers were experimenting with organic wines, the wines did not meet the quality or consistency of similarly priced conventional wines, and today, organic wine in Europe occupies the lower priced portions of the wine market. *See Organic Wine in Europe Factsheet, supra* note 63.

<sup>69</sup> *Organic Wine in Europe Factsheet, supra* note 63 (highlighting that organic wines are sold at a price premium as compared to conventional wines in only Germany and Austria).

### III. MODERN REGULATORY STRUCTURES

#### A. *Examining the International Equivalency Agreement*

Understandably, the varying historical, economic, and cultural appreciations for wine have greatly influenced the varied approaches to organic winemaking within and between the United States and Europe, and these distinct approaches have naturally resulted in different organic national standards for wine. But the same could be said of nearly all agricultural products, and in this sense, wine is not unique. Nonetheless, on February 15, 2012, the United States and the European Union overcame these differences—at least with regard to nearly all non-wine organic products—and reached an agreement allowing domestically certified and labeled organic products to move freely across borders while retaining their original organic label and organic status.<sup>70</sup> This agreement established equivalency between the USDA's NOP and the E.U. Organic Program; it allowed USDA NOP certified organic products to be marketed as organic in the E.U.<sup>71</sup> Conversely, the United States allowed European products certified according to the E.U. Organic Program to be marketed as organic in the United States.<sup>72</sup> This agreement succeeded in supporting organic agriculture by reducing the administrative burdens for organic producers who, prior to the agreement, had to obtain both sets of certification if they wanted to market their products as organic in both regional markets.<sup>73</sup>

The historic Equivalency Agreement was able to overcome minor variations in organic certification standards by acknowledging that the European Union Organics Program and the USDA NOP were overwhelmingly similar,<sup>74</sup> and thereby greatly improved transatlantic organic agricultural trade. After the agreement, organic producers were able to export

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<sup>70</sup> Letter from Kathleen Merrigan, Deputy Sec'y, USDA, and Islam Siddiqui, Chief Agricultural Negotiator, Office of the U.S. Trade Representative, to Dacian Ciolos, Member, Eur. Comm'n (Feb. 15, 2012) (on file with USDA); Letter from Dacian Ciolos, Member, Eur. Comm'n, to Kathleen Merrigan, Deputy Sec'y, USDA and Islam Siddiqui, Chief Agricultural Negotiator, Office of the U.S. Trade Representative (Feb. 15, 2012) (on file with USDA); *EU-US Equivalency Agreement*, *supra* note 14 (discussing the extent of the EU-U.S. Organic Equivalency Agreement detailed in the letters).

<sup>71</sup> *EU-US Equivalency Agreement*, *supra* note 14.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> There were a few minor carveouts in the agreement upon which the deal is contingent, each of which require slight variations in domestic organic certification standards, specifically exclusions of antibiotic use, in order for the counter-certifying-party to ratify the other's equivalent organic status. These carveouts are very minor—particularly relative to wine's wholesale exclusion from the agreement, however, and they, more than anything reflect the USDA NOP's and the European Organics Program's willingness to compromise both with constituents and trading partners. *EU-US Equivalency Agreement*, *supra* note 14; Letter from Kathleen Merrigan to Dacian Ciolos, *supra* note 68; Letter from Dacian Ciolos to Kathleen Merrigan.

their goods and market them as organic simply by complying with domestic organic certification regulations, as opposed to having to seek separate and distinct certification.<sup>75</sup> Accordingly, the Equivalency Agreement undeniably improved consumer transparency and product comprehensibility: “organic” meant the same thing, regardless of whether the product was produced in Europe or the U.S.

While the Equivalency Agreement is a boon for the exploding organic agriculture market,<sup>76</sup> wine is the one product where organic equivalency was not agreed.<sup>77</sup> Instead of mutually sharing in the benefit of universal standards on both sides of the Atlantic, the Equivalency Agreement gives a distinct advantage to U.S. produced wines. The Agreement allows U.S. wines that are certified as either “made with organic grapes” or “organic” to be sold in Europe labelled “organic,” while only some European certified organic wines may be marketed merely as “made with organic grapes” in the U.S.<sup>78</sup> This exclusion is entirely based upon what have proven to be incommensurable regional ideologies concerning the addition of sulfites to wine. Therefore, while the Agreement ratifies and recognizes the organic equivalency of the viticulture, it refuses to grant like-kind status to the ultimate wine product, solely based on levels of added sulfites, and thereby denies organic wine the benefits that are enjoyed by all other organic products. Even more problematically, the Agreement contributes to consumer confusion regarding what is actually in a bottle of wine. To further understand this issue, the existing domestic regulations and their supporting logic must be examined.

## *B. National Standards for Certifying Organic Wine*

Certification schemes were originally introduced to reduce consumer confusion and increase transparency; however, given differing standards across regions and countries regarding what constituted an “organic” product, they have often had the opposite effect. Nonetheless, there have been numerous attempts at the mass-standardization of organic agricultural practices, and most of these efforts began with private agencies.<sup>79</sup>

### 1. European Organic Standards

In Europe, arriving at a system for organic wine certification was a slow process. Although the European Union passed rules for the organic certification of agricultural products in 1991, the rules lacked standards for organic alcohol; winemakers with certified organic grape cultivation could

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<sup>75</sup> *EU-US Equivalency Agreement*, *supra* note 14.

<sup>76</sup> See Press Release, USDA, USDA Reports Record Growth In U.S. Organic Producers (Apr. 4, 2016), <https://www.usda.gov/media/press-releases/2016/04/04/usda-reports-record-growth-us-organic-producers>.

<sup>77</sup> *EU-US Equivalency Agreement*, *supra* note 14.

<sup>78</sup> *Id.*

<sup>79</sup> Jones & Grandjean, *supra* note 15, at 23.

either elect to label their products “made with organic grapes” or obtain private certification of their wines. The private organic wine certification movement began in Germany and Switzerland in the 1970s and 1980s, when the organic wine production interest group ECOVIN was developed in an attempt to consolidate organic practices in viticulture and certify participating members.<sup>80</sup> From its founding through today, all members of ECOVIN have agreed to comply, subject to examination, not only with governing national and European Union standards for organic winemaking, but also to ECOVIN’s own, more stringent standards for organic wine.<sup>81</sup> Participation in ECOVIN—along with several other similar NGO groups offering organic certification—allows members to display an ECOVIN certification logo on their labels, which is widely recognized and considered as a super-premium organic label.<sup>82</sup>

Organic winemakers eventually sought greater exposure and consumer transparency beyond what the recognizable but regionally limited ECOVIN logo could offer and decided to consolidate their efforts with the primary mover in organic agriculture: the International Federation of Organic Agriculture Movements (IFOAM).<sup>83</sup> IFOAM is an influential organic agriculture NGO focused on standardizing and grouping organic standards in order to realize the environmental benefits of organic agriculture.<sup>84</sup> With the ECOVIN members’ assistance, IFOAM exercised its influence through a series of conversations with the European Commission to develop European-wide certification standards for organic alcohol.<sup>85</sup> Through IFOAM’s and other organic winemaker group’s lobbying efforts, the European Commission established the ORWINE project.<sup>86</sup> ORWINE was funded by the Commission to collect data and information on the impact of organic viticulture in order to provide recommendations for eventual Europe-wide organic certification standards.<sup>87</sup> All of ORWINE’s research and recommendations came to a head in 2012 when the European Commission expanded upon its existing regulations,<sup>88</sup> adopting comprehensive

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<sup>80</sup> Helga Willer, *Organic Viticulture in Europe: Development and current statistics*, (16th IFOAM Organic World Congress, June 16-20, 2008).

<sup>81</sup> Jones & Grandjean, *supra* note 15, at 23.

<sup>82</sup> *E.U. Rules for Organic Wine Production*, *supra* note 4, at 8-9.

<sup>83</sup> *Id.* at 5 (noting IFOAM’s role in influencing the European Commission to pass standards for organic wine certification).

<sup>84</sup> Willer, *supra* note 80.

<sup>85</sup> CRISTINA MICHELONI, ITALIAN ASSOCIATION OF ORGANIC AGRICULTURE, ORWINE PUBLISHABLE FINAL ACTIVITY REPORT (2009), [https://cordis.europa.eu/docs/publications/1238/123869711-6\\_en.pdf](https://cordis.europa.eu/docs/publications/1238/123869711-6_en.pdf).

<sup>86</sup> ORWINE’s full title is: Organic viticulture and wine-making: development of environment and consumer friendly technologies for organic wine quality improvement and scientifically based legislative framework.

<sup>87</sup> Micheloni, *supra* note 85.

<sup>88</sup> Council Regulation 834/2007, 2007 O.J. (L 189) (EC).

certification standards for all organic wine produced in the EU.<sup>89</sup> The new regulations stated that a wine could be labeled as “E.U. Certified Organic” if it was made entirely from certified organic grapes and contained sulfites below 100 parts per million for red wines and 150 part per million for white wines<sup>90</sup> with an additional allotment of thirty parts per million for any wines with significant residual sugars.<sup>91</sup> This represented a relatively flexible threshold for organic producers, as it was notably lower than the added-sulfites allowance for conventional wines<sup>92</sup>—appealing to the organic wine purists—but still allowed the addition of sulfites to stabilize and preserve the classic character of European wines that the consumer had come to recognize as fundamental.

## 2. U.S. Organic Standards

Organic certification in the United States also started with private organizations. The process began with the non-profit California Certified Organic Farmers (CCOF) in 1973, which offered organic certification to participating and cooperating members.<sup>93</sup> The CCOF’s certification standards were eventually adopted as state-wide organic standards in California.<sup>94</sup> Eventually in 1990, the United States introduced a federal regulatory framework and enforcement agency to the organic industry through the Organic Foods Production Act of 1990 (OFPA).<sup>95</sup> These regulations were implemented and the NOP and the NOSB were formally created.

Diverging from the European model, the NOP designated that wine could be certified organic if it was made from organic grapes and contained no added sulfites.<sup>96</sup> Alternatively, if the wine was produced with organic grapes but made with added sulfites below the threshold of 100 parts per

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<sup>89</sup> Commission Implementing Regulation 203/2012, 2012 O.J. (L 71) (EU); *EU Rules for Organic Wine Production*, *supra* note 4.

<sup>90</sup> IFOAM EU Group, *EU Rules for Organic Wine Production: Background, Evaluation, and Further Sector Development*, 19-25, [https://www.ecovin.de/sites/default/files/downloads/ifoam\\_winedossier2013.pdf](https://www.ecovin.de/sites/default/files/downloads/ifoam_winedossier2013.pdf) [hereinafter *E.U. Organic Rules: Background*].

<sup>91</sup> Jones & Grandjean, *supra* note 15, at 29; CCOF, *Our History*, <https://www.ccof.org/ccof/history> (last visited Nov. 15, 2019) [hereinafter CCOF].

<sup>92</sup> *EU Organic Rules: Background*, *supra* note 90, at 19.

<sup>93</sup> Jones & Grandjean, *supra* note 15, at 23; CCOF, *supra* note 91.

<sup>94</sup> CCOF, *supra* note 91.

<sup>95</sup> 7 C.F.R. § 205 (2000); *History of Organic Farming in the US*, SUSTAINABLE AGRICULTURE RESEARCH & EDUCATION, <https://www.sare.org/Learning-Center/Bulletins/Transitioning-to-Organic-Production/Text-Version/History-of-Organic-Farming-in-the-United-States>.

<sup>96</sup> There is an allowance of up to ten parts per million of sulfites in certified organic wine, which is designed to allow for the naturally occurring sulfites that arise out of fermentation. See *Organic Wine: Oversight, Labeling + Trade*, U.S. DEP’T OF AGRIC. (2012), <https://www.ams.usda.gov/sites/default/files/media/Organic%20Wine%20-%20Oversight-Labeling-Trade.pdf>.

million, the wine could be sold as “made with organic grapes.”<sup>97</sup> Only the wines designated as “made with organic grapes” were also required to bear on the label the denominator “contains sulfites,” despite the fact that *all* wine unavoidably contains some level of naturally occurring sulfites.<sup>98</sup>

This strict standard on added sulfites garnered a lot of attention and created great controversy within the already-established American organic wine community. Many organic grower groups petitioned the NOP and the NOSB to allow the use of added sulfites in certified organic wine.<sup>99</sup> These groups cited concerns that the prohibition of all added sulfites in organic wine was a departure from prior, independent regulations regarding organic certification—such as the standards of the CCOF.<sup>100</sup> They further argued that this new obstacle requiring producers, who had been already been independently certified as organic, to reduce their already minimal levels of added sulfites would greatly diminish the number of winemakers electing to certify as organic.<sup>101</sup> They additionally argued that extremely strict standards disallowing any added sulfites would encourage winemakers on the verge of converting to organics to revert to more conventional viticultural methods—the opposite of the desired effect.<sup>102</sup> In response to these petitions, the NOSB committee in charge of approving the governing certification standards tentatively approved the petition to eliminate the no-added sulfite requirement. But after another influential coalition of winemakers petitioned for the standards to remain extremely strict,<sup>103</sup> the full NOSB board

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<sup>97</sup> *Id.*

<sup>98</sup> The USDA requires food products with added sulfites to bear this statement in order to warn consumers who may have a sulfites allergy—approximately one-half of one percent of the U.S. population. *Id.*; see also Mitchell R. Lester, *Sulfite Sensitivity: Significance in Human Health*, 14 J. AM. COLLEGE OF NUTRITION 229, 229-32 (1995).

<sup>99</sup> Dana Nigro, *U.S. and Europe Have Different Definitions of Organic Wine*, WINE SPECTATOR (Feb. 24, 2012), <https://www.winespectator.com/articles/us-and-europe-have-different-definitions-of-organic-wine-46432> (noting that several concerned producers in the organic wine community are worried that the new standards set too high of a bar for certification).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting Paolo Bonetti, president of a Colorado based Organic Wine importer, who notes that the strict no-added sulfites rule excluded 800 producers from organic certification, greatly reducing the volume of certified organic wine for sale in the United States and making it more difficult for certified organic wine producers to get shelf space).

<sup>103</sup> Katrina Frey, *Katrina Frey talks about sulfites and the battle to keep them out of organic wine on the Organic Conversation Radio Show*, FREY VINEYARDS (Apr. 28, 2011), <https://www.freywine.com/index.cfm?method=blog.blogDrilldown&blogEntryID=7BC86355-ACA4-95F5-9831-9905F97A6070&originalMarketingURL=blog/Katrina-Frey-talks-about-sulfites-and-the-battle-to-keep-them-out-of-organic-wine-on-the-Organic-Conversation-Radio-Show> (arguing that sulfites are unnecessary in wine, and making wine without sulfites is a matter of detail and attention rather than expense); Nigro, *supra* note 99 (noting that influential organic winemakers and distributors, including Frey and LaRocca Vineyards, along with an Organic Consumer Lobby, sought to maintain the highest possible standards and exclude all synthetic materials).

reconvened and upheld the provision.<sup>104</sup> The outcome of this disagreement reinforced the underlying philosophical differences between the two major sects within the U.S. organic wine arena, and ultimately, the power and influence of those in favor of the stricter standards won and got the stringent standard they desired.<sup>105</sup>

### 3. Issues Under the Current Regulatory Scheme

There remains a lot of discontent within the global organic wine community regarding the incredibly strict, bifurcated system of organic certification in the United States. On a domestic level, the wine community is concerned both about the economic effects that the artificially narrowed market will have on organic viticulture, disincentivizing organic viticulture and about underinformed consumers, who are unlikely to grasp the difference between a wine “made with organic grapes” and a wine labeled “organic.” The distinction between different levels of organic certification is confusing and can be unclear for consumers and experts alike. According to NOP standards, products “made with organic. . .” certification must contain at least seventy percent certified organic ingredients.<sup>106</sup> However, grapes are the only significant input in wine and NOP standards dictate that wine cannot be labelled as “made with organic grapes” unless all of its grapes are organic.<sup>107</sup> Ultimately, this amounts to punishing wines that include sulfites even though they otherwise exceed the default organic certification standards for other agricultural products.<sup>108</sup> Moreover, because conventional wine standards dictate a sulfite limit of 350 parts per million,<sup>109</sup> there is no incentive for organic grape cultivators marketing their wines as “made with organic grapes” to reduce their sulfite count below this high threshold. This confusing system has the potential to render even sophisticated consumers uncertain about the quality of the wine they purchase, as the NOP certification of

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<sup>104</sup> United States Department of Agriculture, Meeting of the National Organic Standards Board (NOSB) (Nov. 29, 2011), 52-68, 127-139, [www.ams.usda.gov/sites/default/files/media/transcript1ga.pdf](http://www.ams.usda.gov/sites/default/files/media/transcript1ga.pdf); Frey Vineyards, *The NOSB Voted: No Added Sulfites in Organic Wines* (Dec. 13, 2011), [www.freywine.com/?method=blog.blogDrilldown&blogEntryID=72CDBE33-0EA3-.8A6B-BB53-F7E537C4F8B5&originalMarketingURL=blog/The-NOSB-voted--noadded-sulfites-in-Organic-Wines](http://www.freywine.com/?method=blog.blogDrilldown&blogEntryID=72CDBE33-0EA3-.8A6B-BB53-F7E537C4F8B5&originalMarketingURL=blog/The-NOSB-voted--noadded-sulfites-in-Organic-Wines).

<sup>105</sup> See Jones & Grandjean, *supra* note 15, at 26; *supra* Section II.a (discussing the ideological divide between producers of organic wine in the United States).

<sup>106</sup> *USDA Labeling Organic Products*, UNITED STATES DEPARTMENT OF AGRICULTURE (2012), <https://www.ams.usda.gov/sites/default/files/media/Labeling%20Organic%20Products%20Fact%20Sheet.pdf>; Certified organic products must contain up to ninety-five percent organic ingredients, with the remaining five percent allotted to allow for processing ingredients for which there is no organic alternative. See UNITED STATES DEPARTMENT OF AGRICULTURE, *USDA Organic Labeling Standards*, <https://www.ams.usda.gov/grades-standards/organic-labeling-standards>

<sup>107</sup> *Id.*

<sup>108</sup> See *id.*

<sup>109</sup> Hewitt, *supra* note 16.

“made with organic . . .” can signify different things for different products.<sup>110</sup>

For European organic winemakers, the U.S. certification system and the lack of a true equivalency agreement for organic wine lead to an even worse outcome. The Equivalency Agreement upholds the NOP’s strict no-added sulfites provision and expands it even further with respect to European wines. Because the EU’s standards allow for added sulfites in certified organic wine up to 150 parts per million,<sup>111</sup> all certified organic European origin wine that does not individually attain NOP certification<sup>112</sup> can only be labelled “made with organic grapes”.<sup>113</sup> This means that unless a producer individually obtains NOP certification, their European certified organic wine falls into the ambiguous “made with organic grapes” category even if it contains no added sulfites. When considered in concert with the inequivalent status for organic wine born out of the Organic Equivalency Agreement, the current NOP standards for organic wine certification have resulted in the disenfranchisement and discrimination of U.S. and European winemakers practicing organic viticulture through the implementation and enforcement of unnecessarily strict and confusing organic certification standards.

#### IV. A PROPOSAL FOR A PRIVATIZED SOLUTION

The current certification system in the United States is industry-defeating. The strict no-added sulfite requirement—one that was achieved through the extensive lobbying of a clear but vocal minority of winemakers<sup>114</sup>—penalizes a substantial portion of the U.S. organic viticulture market. For all ecologically and nearly all health concerned purposes, the penalized winemakers produce an identical product to certified wine producers from completely organic grapes. The logical foundation of the current NOP scheme and resulting disenfranchisement, then, is substantiated by flimsy health claims about extremely marginal cases that thinly veil an economic desire to narrow competition in the market. Moreover, the lack of genuine organic equivalency for wine between the United States and Europe has functionally created a unilateral trade barrier between two of the world’s largest wine producing and consuming regions.<sup>115</sup> Many European winemakers are producing wine that more than satisfies

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<sup>110</sup> The label, “Made with Organic . . .” conveys further restrictions for certain products beyond requiring seventy percent of the product’s ingredients to be certified organic, such as restrictions on the inclusion of sulfites in wine produced from fruit other than grapes. *USDA Labeling Organic Products*, *supra* note 106.

<sup>111</sup> Nigro, *supra* note 99.

<sup>112</sup> NATIONAL SCIENCE FOUNDATION, *U.S. Requirements for Imported Organic Products*, <http://www.nsf.org/consumer-resources/cooking-cleaning-food-safety/food-safety/organic/us-requirements-imported-organic-products>.

<sup>113</sup> *EU–US Equivalency Agreement*, *supra* note 14.

<sup>114</sup> Jones & Grandjean, *supra* note 15, at 16–17.

<sup>115</sup> See ORGANISATION INTERNATIONALE DE LA VIGNE ET DU VIN, *OIV VINE AND WINE OUTLOOK 2012* (2012) at 22, 25.

European organic certification specifications. But unfortunately, due to the United States' practically inconsequential philosophical debate concerning the addition of sulfites—a naturally occurring bi-product of fermentation<sup>116</sup>—even a high-quality European wine made from organic grapes does not qualify for organic certification in the United States. Instead, certified organic European wines—irrespective of their actual sulfite content<sup>117</sup>—are limited to the less well understood and less desirable “made with organic grapes” designation, unless the producers of these wines are willing to spend for additional NOP certification. This labelling demotion for European wines sold in the United States further confounds the definition of “organic” used by the universally recognized USDA organic logo, which organic European winemakers will argue they have already paid for when they obtained European organic certification.

In light of the otherwise comprehensive organic equivalency granted to nearly all other products between the United States and Europe, the exclusion of wine from the Agreement effectively results in an implicit—and perhaps intentional—protectionist, unilateral tariff on European organic wine.<sup>118</sup> On one side of the agreement, certified U.S. organic wines can be marketed in the European Union with the “USDA Organic” seal, and additionally, U.S. wines that domestically obtained the “made with organic grapes” designation can be sold as fully “organic” in European markets.<sup>119</sup> Yet, there is no reciprocity for European producers on the other side. This convoluted and discriminatory system places European winemakers at a disadvantage, rendering them unable to reap the benefits that should reasonably accompany the expensive sunk costs of attaining organic certification. Furthermore, the no-added sulfite NOP standards disincentivizes U.S. and European winemakers from attaining organic certification,<sup>120</sup> as they may not deem the “made with organic grape” certification worthwhile in light of the high costs associated with certification.<sup>121</sup> Moreover, this confusing system renders wine labels even more indecipherable than they already are, requiring

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<sup>116</sup> See Waterhouse, *supra* note 18.; see also Buranyi, *supra* note 2 allowance of up to ten parts per million of sulfites in certified organic wine, which is designed to allow for the naturally occurring sulfites that arise out of fermentation (acknowledging the apparently unavoidable presence of sulfites in all wine, even in natural wine).

<sup>117</sup> *EU-US Equivalency Agreement*, *supra* note 14.

<sup>118</sup> *EU-US Equivalency Agreement*, *supra* note 14.

<sup>119</sup> *Id.*

<sup>120</sup> Nigro, *supra* note 99 (quoting Paolo Bonetti, president of a Colorado based Organic Wine importer, who notes that the strict no-added sulfites rule excluded 800 producers from organic certification, greatly reducing the volume of certified organic wine for sale in the United States, and making it more difficult for certified organic wine producers to get shelf space).

<sup>121</sup> Certification costs include paying to apply for certification, obtain the certifying affidavit, compile and submit annual submission of an organic system plan, and compensate NOP third parties for inspection of farm fields and processing facilities. See Robin, *supra* note 6.

customers to know the different international standards of “organic” and “made with organic . . . “. The net result is consumer confusion and economic inefficiency.<sup>122</sup> All of these issues undermine the legitimacy of national organics programs.

A nationally based organic certification is not the only available option when it comes to third-party organic certification or the effective marketing of products as sustainable. In fact, privatized organic certifiers, such as ECOVIN and the CCOF, preceded national standards.<sup>123</sup> As the persistence of ECOVIN certification demonstrates, even in the face of a Europe-wide standard, privatized certifiers still occupy a relevant place in the market by maintaining organic standards that are universally comprehensible and directly reflect the interests of their constituents, strict or otherwise.<sup>124</sup>

Similar to many of these privatized organic certifiers is the biodynamic certifying agency Demeter. While farming standards for organic foods did not emerge until the 1970s, Demeter’s biodynamic standards were created and implemented as early as 1928.<sup>125</sup> Demeter is a centralized, international NGO that has a universal standard for certifying a wide variety of biodynamic products including wine; the certification process spans production, processing, and labelling.<sup>126</sup> Demeter’s iconic logo can appear seamlessly on all Demeter certified products, regardless of a specific country’s certification standards or trade agreements.<sup>127</sup> Moreover, Demeter was able to centrally and definitively set a universal standard for sulfites, allowing up to 100 parts per million,<sup>128</sup> which is substantially higher than the United States’ requirement. Demeter’s centralized system for biodynamic certification is transparent, well-known, and most of all, efficient: there is only one level of certification and it signifies the same level of sustainable and non-interventionist quality regardless the country in which it appears. This creates an open market for biodynamic wine that shifts the agency costs of biodynamic certification to those who choose to bear them, and it does not require multiple certifications for those interested in certification.

The existing regulatory scheme employed between the European Union and the United States, which denies true organic equivalency in wine, stems

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<sup>122</sup> Jones & Grandjean, *supra* note 15, at 30; Erica York, *The Impact of Trade and Tariffs on the United States*, TAX FOUND. (June 27, 2018), <https://taxfoundation.org/impact-of-tariffs-free-trade/> (finding that trade barriers such as tariffs raise prices and reduce the generation of wealth).

<sup>123</sup> Willer, *supra* note 80; CCOF, *supra* note 91; *EU Organic Rules: Background*, *supra* note 90, at 8-9.

<sup>124</sup> Willer, *supra* note 80; CCOF, *supra* note 91; *EU Organic Rules: Background*, *supra* note 90, at 8-9.

<sup>125</sup> DEMETER ASSOCIATION, INC., *History*, [www.demeter-usa.org/about-demeter/demeter-history.asp](http://www.demeter-usa.org/about-demeter/demeter-history.asp).

<sup>126</sup> *Demeter Processing Standard*, *supra* note 28; *Demeter Farm Standard*, *supra* note 28.

<sup>127</sup> DEMETER, *This is Demeter*, <https://www.demeter.net/what-is-demeter/this-is-demeter> (last visited Nov. 23, 2019).

<sup>128</sup> *Demeter Processing Standard*, *supra* note 28, at 48.

from competing interests in the international wine community and has resulted in consumer confusion and artificial trade barriers to the growing organic wine community. The question regarding sulfites is one that incommensurably divides opinions within the organic wine community, and this philosophical division will continue to perpetuate varied international standards.<sup>129</sup> Yet, the fact that the overwhelming majority of vineyards practicing organic viticulture in Europe and the U.S. add sulfites to their wine and are therefore disqualified from obtaining NOP full organic certification in the U.S. is a problem that demands a better, more efficient solution.<sup>130</sup> In light of the rigidly-opposed policy interests despite this one-sided demand, the U.S.–E.U. organic wine community would benefit from a more prevalent private, independent, and international organic certification ‘brand’ that follows Demeter’s private model.

Given the ubiquity and universal recognition of the USDA Organic Seal and the European “bio” label, an international privatized organic certification body is likely impracticable for many organic products because its effectiveness would require outpacing the already established competition. Even disregarding the variable administrative hurdles that such a scheme would have to overcome, the return on investment in the form of price premiums would be negligible when compared to those earned off of established, nationally based certifications. Nonetheless, a privatized scheme is feasible for the organic wine industry because of wine’s unique product features.

The economic returns on the attainment of an organic label on wine have been poor, which has done little to incentivize winemakers in both Europe and the United States to certify as organic.<sup>131</sup> The organic label on wine has also become associated with a lower quality product, which is why consumers only tend to prefer organic wine to the conventional equivalents at lower prices.<sup>132</sup> This market structure, however, presents a unique opportunity for a privatized certification model. A rebranded organic scheme following the Demeter model could target specific interests, such as environmental, health, and safety, that motivate consumers to pay a premium for organic wine, following the model established in Germany and Austria.<sup>133</sup> Accordingly, this model could revitalize the sustainable viticulture movement and reinforce the foundational interests—environmental stewardship and a historical and cultural protection of wine—that motivated

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<sup>129</sup> Hewitt, *supra* note 16.

<sup>130</sup> *Organic Wine in Europe Factsheet*, *supra* note 63 (noting that 89% of all organic viticulture occurs in Europe).

<sup>131</sup> Delmas, *supra* note 27, at 22-23, 29 (finding that consumers tend to prefer organic labeled wines at lower prices, but at higher prices, tend to prefer conventional wines); *see also* Robin, *supra* note 6.

<sup>132</sup> *Organic Wine in Europe Factsheet*, *supra* note 63.

<sup>133</sup> *Id.* (noting that organic wines are sold at a premium only in Germany and Austria).

winemakers practice organic viticulture in the beginning.<sup>134</sup> Most importantly, a privatized model that certifies wine with a clear and universally consistent, one-tiered logo would allow for increased consumer transparency in the already archaically cryptic wine market, and as a result, it would foster the international growth of organic viticulture by eliminating artificial trade barriers.

## V. CONCLUSION

The current bifurcated system of organic certification for wine in the U.S.—which arose due to an incommensurable divide regarding the addition of sulfites in organic wine and ultimately stems from a protectionist desire—has resulted in economic inefficiency through a lack of consumer transparency and the creation of artificial trade barriers. Deciphering wine labels is difficult for all but the highly sophisticated wine drinker, and the inclusion of a recognizable organic certification on the label should aid consumer transparency, not stifle it. Unfortunately, it is unlikely that either side of the added-sulfite debate in the U.S. will yield their position, making it improbable that the NOP will remove its unnecessarily strict organic labeling requirements for wine. Therefore, in order to move towards a more efficient and transparent world of wine, it is time that producers and consumers alike start exploring a model they can have autonomy over: a privatized solution for organic wine certification that follows Demeter's model. A Demeter-like privatized organic certification agency would allow winemakers who are interested in an internationally uniform and globally recognized standard to get what they bargained for, and it would allow consumers all over the world to know what they are drinking.

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<sup>134</sup> Jones & Grandjean, *supra* note 15, at 13.