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Chapter 184 and Salvia Divinorum: Electric Kool-Aid Salvia Tests?¹

Corin Saxton

Code Section Affected

Penal Code § 379 (new).

AB 259 (Adams); 2008 STAT. Ch. 184.

I was seeing what Adam had seen on the morning of his creation—the miracle, moment by moment, of naked existence.

—Aldous Huxley²

“Order some golf shoes,” I whispered. “Otherwise we’ll never get out of this place alive.”

—Hunter S. Thompson³

I. INTRODUCTION

When Daniel Siebert peered from his friend’s deck toward the hills before him, he pictured, ensconced in the hillside, what appeared to be a group of hobbit houses, occupied by “fairylike beings, childlike, with enormous eyelashes.”⁴ Siebert was not dreaming; he was experiencing the effects of salvia divinorum, a hallucinogenic drug indigenous to Oaxaca, Mexico, which the Mazatec Indians traditionally used for divinatory rituals and healing ceremonies.⁵ While this was Siebert’s first experience with salvia divinorum,⁶ as an ethnobotanist he would eventually become an expert on the subject.⁷ Like Siebert, other salvia divinorum users have reported similarly surreal visions,⁸ a testament to the plant’s potency.⁹

1. See generally TOM WOLFE, *THE ELECTRIC KOOL-AID ACID TEST* (1968). Wolfe’s seminal work of New Journalism chronicled the exploits and LSD use of Ken Kesey, Neal Cassady, and the Merry Pranksters. At the time, LSD, like salvia divinorum, was legal, and used by some to facilitate personal and spiritual exploration. *Id.*

2. ALDOUS HUXLEY, *THE DOORS OF PERCEPTION* 17 (Harper & Row 1990) (1954).

3. HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS* 24 (1971).

4. Christopher Ketcham, *Under the Spell of the Magic Mint*, *GENTLEMEN’S Q.*, June 2007, at 208, 211.

5. Phil Dalgarno, *Subjective Effects of Salvia Divinorum*, 39 *J. PSYCHOACTIVE DRUGS* 143, 144 (2007).

6. Ketcham, *supra* note 4, at 211.

7. See *id.* at 210 (noting that Siebert is now an ethnobotanist and has been called the Timothy Leary of salvia divinorum).

8. See Daniel Ucko, *Students See Logic in Lawmakers’ Attempts to Ban ‘Next Marijuana.’* *POLY POST*, Apr. 8, 2008, available at <http://media.www.thepolypost.com/media/storage/paper1127/news/2008/04/08/News/Students.See.Logic.In.Lawmakers.Attempts.To.Ban.next.Marijuana-3308276.shtml> (on file with the *McGeorge Law Review*) (quoting a student who imagined himself “riding on the leg of a giant Muppet”); Jim Sanders, *Lawmakers, Police Take Aim at Legal Drug*, *SAN LUIS OBISPO TRIB.*, Mar. 2, 2008 (on file with the *McGeorge Law Review*) (referring to one woman’s claims that her burrito grew legs and attacked her when she used salvia divinorum).

Today, smoke shops across California sell *salvia divinorum*, and it is also widely available on the internet.¹⁰ In response to the uncertainty of the drug's long-term effects and the potential for users to injure themselves while under the drug's influence,¹¹ the Legislature enacted Chapter 184, which prohibits the sale or distribution of *salvia divinorum* to minors,¹² thus making it harder for those with less mature judgment¹³ to obtain and use the plant.¹⁴

II. HISTORICAL AND LEGAL BACKGROUND

A. *Salvia Divinorum's* Historical Background and Current Use

1. Oaxaca, Mexico, and the United States

A member of the mint family, *salvia divinorum* is related to a number of species of *salvia* that can be grown as common garden plants.¹⁵ Native to Oaxaca, Mexico,¹⁶ it is the only type of *salvia* that possesses hallucinogenic properties.¹⁷ Consequently, it has developed a number of common names: "Sally D," "the magic mint,"¹⁸ "the lady," "legal acid,"¹⁹ "la pasotora,"²⁰ "diviner's sage,"²¹ or just "salvia."²² Though *salvia divinorum's* discovery date is unknown,²³ it has been in

9. Ketcham, *supra* note 4, at 209 ("The active ingredient of *S. divinorum* is salvinorin A, perhaps the most powerful naturally occurring hallucinogen known to man . . .").

10. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at F (Apr. 29, 2008).

11. See Erin Allday, *Legal, Intense Hallucinogen Raises Alarms: Salvia Divinorum Produces Short, Dreamlike Experience*, S.F. CHRON., June 27, 2007, at A-1, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/27/MNGDPQMLU31.DTL> (on file with the *McGeorge Law Review*) ("Nearly all medical researchers say there isn't enough evidence to determine whether *salvia* is safe or not."); Shari Roan, *Salvia Divinorum, An Old Psychedelic Drug with New Appeal*, L.A. TIMES, Apr. 28, 2008, <http://www.latimes.com/features/health/la-he-salvia28-2008apr28,0,190936.story> (on file with the *McGeorge Law Review*) (noting the fear that *salvia divinorum* causes a loss of bodily control that may lead to injuries).

12. See CAL. PENAL CODE § 379 (enacted by Chapter 184) (prohibiting sale to anyone under eighteen as well as prohibiting offers to sell, dispense, distribute, furnish, administer or give *salvia divinorum* or substances containing salvinorin A to anyone under eighteen).

13. See Drug Law Blog, http://druglaw.typepad.com/drug_law_blog/2008/03/ab-259-the-dail.html (Mar. 11, 2008) [hereinafter Drug Law Blog, Mar. 11] (on file with the *McGeorge Law Review*) (noting that, despite his opposition to Chapter 184, steps should be taken to protect kids with immature judgment regarding drugs and safety).

14. Will Bigham, *Under Fire: Bill Would Limit Sales of Salvia Plant*, SAN BERNARDINO COUNTY SUN, May 4, 2008 (on file with the *McGeorge Law Review*) (noting that AB 259 would make it harder for minors to come by *salvia divinorum*).

15. E.g., Roan, *supra* note 11.

16. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at G (Apr. 29, 2008).

17. Allday, *supra* note 11.

18. *Id.*

19. Ketcham, *supra* note 4, at 211.

20. Erowid, *Salvia Divinorum Vault: Basics*, http://www.erowid.org/plants/salvia/salvia_basics.shtml (last visited June 6, 2008) [hereinafter *Salvia Basics*] (on file with the *McGeorge Law Review*).

21. *Id.*

22. Aaron Bruner, *Potential State and Federal Regulation of Drug Salvia*, CAL. AGGIE, Feb. 27, 2008.

use for centuries.²⁴ It was first documented in Western literature in 1939,²⁵ and its hallucinogenic effects were confirmed in 1961.²⁶

The Mazatec shamans of Oaxaca have used salvia divinorum for decades in religious ceremonies.²⁷ However, its use is governed by a number of rules and conventions.²⁸ Mazatec shamans caution that the plant is powerful as well as delicate.²⁹ Thus, the shamans demand that the plant be treated respectfully, and they warn that disobeying the traditional rules governing its use could lead to madness.³⁰ In fact, some Mazatec shamans will not use the plant for fear of its potency.³¹

While also grown in the United States, salvia divinorum is primarily imported from Mexico and Central and South America.³² It became widely available in the United States in the mid 1990s,³³ and has grown in popularity over recent years.³⁴ In fact, a 2008 national survey found that 1.8 million people ages twelve or older have tried it.³⁵

Salvia divinorum varies in strength³⁶ and sells for approximately twenty-five dollars a gram,³⁷ which is enough for about ten to fifteen uses.³⁸ Sellers advertise the plant as a tool for self-exploration,³⁹ yet it has become increasingly popular as a recreational drug among high school and college students.⁴⁰ A search for

23. See Dalgarno, *supra* note 5, at 144 (“Historically the date of the first human[] interaction is unknown.”).

24. See Salvia Basics, *supra* note 20 (“The use of Salvia Divinorum likely dates back far into early Central American History, but documentation is so far very slim.”).

25. *Id.*

26. *Id.*

27. Allday, *supra* note 11.

28. Dalgarno, *supra* note 5, at 144; see also Ketcham *supra* note 4, at 241 (noting that salvia should be taken at night, in silence, and after 53 days of abstinence).

29. See Ketcham, *supra* note 4, at 241 (interviewing a Mazatec shaman who notes that salvia is delicate and suggests that salvia may induce a madness that chases those who do not follow its customs).

30. *Id.*

31. See *id.* (interviewing a shaman who is fearful of salvia and suggests that without a certain understanding of the plant, it cannot be administered without the risk of inducing madness).

32. Allday, *supra* note 11.

33. Erowid, Salvia Divinorum, <http://www.erowid.org/plants/salvia/> (last visited June 6, 2008) (on file with the *McGeorge Law Review*).

34. See Bruner, *supra* note 22 (“[T]he plant Salvia divinorum . . . appears to have grown in popularity over the past decade.”).

35. U.S. Drug Enforcement Agency, Drugs and Chemicals of Concern, Nov. 2008, http://www.deadiversion.usdoj.gov/drugs_concern/salvia_d/salvia_d.htm (on file with the *McGeorge Law Review*).

36. Jessica Gresko, *Officials Ponder Regulation of Salvia, Say Plant Could Be the ‘New Marijuana’*, Mar. 11, 2008, http://health.mytelus.com/channel_health_news_details.asp?news_id=14692&news_channel_id=1053&channel_id=1053&relation_id=0 (on file with the *McGeorge Law Review*) (“[S]alvinorin A[] is also sold in various strengths labeled ‘5x’ through ‘60x.’”).

37. *E.g.*, Roan, *supra* note 11.

38. See Ketcham, *supra* note 4, at 211 (noting that a gram is “sufficient for ten or fifteen serious trips”).

39. See Sanders, *supra* note 8 (quoting Daniel Siebert, an herbalist who sells salvia online and whose user’s guide indicates that salvia can be used for philosophical insights and spiritual experiences).

40. See Ucko, *supra* note 8 (“[S]alvia is an inexpensive and easily obtained herb that is becoming more

“salvia” on YouTube⁴¹ reveals over 7,000 results.⁴² Many of the clips depict teens smoking salvia divinorum and laughing uncontrollably or looking confused.⁴³

2. *Effects of Salvia Divinorum*

Although researchers have yet to discover any short-term detrimental effects on a user’s mental or physical health, the long-term effects remain unknown.⁴⁴ Salvia divinorum’s short-term effects vary based on the dosage and the means used to ingest the plant.⁴⁵ “Depending on the dosage, the Salvia experience can vary from a subtle, just-off-baseline state to a full-blown psychedelic experience.”⁴⁶

Salvia divinorum “can be smoked, chewed, or brewed into tea.”⁴⁷ While Mazatec shamans typically chew the plant, most users prefer to smoke it.⁴⁸ When salvia divinorum is smoked, the effects last for approximately ten minutes;⁴⁹ when the plant is chewed, its effects last for approximately an hour.⁵⁰ The range of effects include uncontrollable laughter,⁵¹ distorted senses,⁵² an out-of-body feeling,⁵³ and intense hallucinations.⁵⁴ In addition, salvia divinorum users

prevalent among college students who are smoking it to get high.”); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at G (Apr. 29, 2008) (“This substance is being used by individuals of all ages, but becoming more popular among high school students.”); Allday, *supra* note 11 (“[S]alvia seems to be appealing to a growing group of young people . . .”).

41. YouTube is a website that allows users to upload and share video clips across the internet. YouTube Company Profile, <http://www.crunchbase.com/company/youtube> (last visited Jan. 15, 2009) (on file with the *McGeorge Law Review*).

42. See Johanna Cornblatt, *More States Ban Salvia*, U.S. NEWS & WORLD REP., July 18, 2008, <http://www.usnews.com/articles/news/national/2008/07/18/more-states-ban-salvia.html> (on file with the *McGeorge Law Review*).

43. See Roan, *supra* note 11 (“Numerous users have placed clips on YouTube of themselves or others laughing hysterically or staggering around while high on salvia, such as one YouTube clip that has logged more than 240,000 views.”).

44. See Allday, *supra* note 11 (“Not a lot is known about salvia and its long-term effects, but most medical researchers agree that there don’t seem to be any immediate negative side effects of the drug, and they say it is highly unlikely that it is addictive.”); Roan, *supra* note 11, (“[L]ittle is known about the effect of the drug on health and safety . . .”); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at G (Apr. 29, 2008) (“Salvia divinorum is not generally understood to be toxic or addictive . . . medical experts and accident and emergency rooms have not reported any particular health concerns . . .”).

45. Sanders, *supra* note 8.

46. Salvia Basics, *supra* note 20.

47. Mike Burkholder, *State to Outlaw Herb Plant*, WAPAKONETA DAILY NEWS, May 17, 2008.

48. See Ketcham, *supra* note 4, at 211 (noting that the Mazatecs traditionally prescribe chewing the leaf, but that a study of salvia users conducted by Erowid.com revealed that 93% of the participants stated that they smoked the leaf).

49. See, e.g., *id.* (relaying one salvia expert’s story of chewing salvia during which the effects lasted for about an hour, and noting that this period is telescoped to about ten minutes when the plant is smoked).

50. *Id.*

51. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at G (Apr. 29, 2008).

52. Roan, *supra* note 11.

53. Sanders, *supra* note 8.

54. See, e.g., Salvia Basics, *supra* note 20 (“At higher doses users report dramatic time distortion, vivid

generally become immobile, though some will try to move around.⁵⁵ After the hallucinogenic effects wear off, some users note a stupor that persists for approximately one to two hours.⁵⁶

3. *Salvinorin A's Medicinal Potential*

Salvinorin A is the naturally occurring hallucinogenic chemical in *salvia divinorum*.⁵⁷ The way Salvinorin A affects the brain distinguishes *salvia divinorum* from all other hallucinogens⁵⁸ and opens up a realm of medicinal possibilities.⁵⁹ Most hallucinogens affect serotonin receptors,⁶⁰ which is significant because serotonin is a neurotransmitter that affects a wide range of bodily functions.⁶¹ But Salvinorin A does not trigger serotonin receptors.⁶² Instead, Salvinorin A only stimulates kappa-opioid receptors,⁶³ which are signal-sending proteins⁶⁴ that control mood and regulate appetite, pain, and even addictive behaviors.⁶⁵ It is thus possible for medical professionals to use Salvinorin A to treat drug dependence and depression,⁶⁶ and, possibly, to

imagery, encounters with beings, travel to other places, planets or times, living years as the paint on a wall or experiencing the full life of another individual.”).

55. See, e.g., *id.* (“While most people remain unmoving during the experience, some individuals will attempt to get up and walk around while in a completely dissociated state.”).

56. See Ucko, *supra* note 8 (“[Y]ou still have this weird high; it’s like this haze for a couple of hours.”); Ketcham, *supra* note 4, at 241 (“[The author felt] dumb, fogged up, like [he] was wearing a layer of old gray chopped meat over my eyes.”). But see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at 3 (Jan. 15, 2008) (“The most commonly reported after-effects include an increased feeling of insight, improved mood, a sense of calmness, and increased sense of connection with nature.”).

57. See Ketcham, *supra* note 4, at 209 (“The active ingredient of *S. divinorum* is salvinorin A, perhaps the most powerful naturally occurring hallucinogen known to man . . .”).

58. See Roan, *supra* note 11 (“The drug is unique in that it acts on kappa-opioid receptors, cell proteins that bind to specific molecules, which are widely distributed throughout the body . . .” (quoting a senior scientist on addiction pharmacology)).

59. See Letter from Marion D. Miller, Bd. of Governors, Cal. Att’y’s for Criminal Justice, to Anthony Adams, Assembly Member, Cal. State Assembly (Apr. 25, 2008) [hereinafter Miller Letter] (on file with the *McGeorge Law Review*) (“In this case, we are dealing with a plant which is currently being widely studied and evaluated for its [sic] medicinal and potential health benefits by medical scientists here in California and elsewhere.”); Ketcham, *supra* note 4, at 240 (“Thus, salvinorin A suggested a universe of medicinal opportunity.”).

60. See Allday, *supra* note 11 (“[U]nlike most psychotropic drugs, salvinorin A does not react to serotonin receptors.”).

61. Health Encyclopedia-Diseases and Conditions, Serotonin, <http://www.healthscout.com/ency/68/409/main.html> (last visited June 13, 2008) (on file with the *McGeorge Law Review*).

62. See Ketcham, *supra* note 4, at 240 (noting that salvinorin A would bind only against the kappa-opioid receptor).

63. *Id.*

64. Aaron Rowe, *How Hallucinogenic Sage Works*, WIRED, Aug. 27, 2007, <http://blog.wired.com/wiredscience/2007/08/how-hallucinogen.html> (on file with the *McGeorge Law Review*).

65. *Id.*

66. See Roan, *supra* note 11 (noting that substances which activate the kappa-opioid receptor may be used to treat certain types of drug dependence and “appear to have some antidepressant effects”).

modulate pain response, tissue healing, and appetite.⁶⁷ Doctors might even be able to use the drug to treat Alzheimer's disease and schizophrenia.⁶⁸

B. Legal Background

1. Federal Law Concerning *Salvia Divinorum*

Federal law does not prohibit the use or distribution of *salvia divinorum*.⁶⁹ In October 2002, Congressman Joe Baca introduced federal legislation to outlaw *salvia divinorum*'s use and sale.⁷⁰ Baca sought to add Salvinorin A to Schedule I of the Controlled Substances Act (CSA),⁷¹ which, among other things, regulates the manufacture, importation, possession, and distribution of certain drugs.⁷²

Schedule I controlled substances are subject to the greatest restrictions and penalties of any other drug scheduled under the CSA.⁷³ For the substance to be classified as a Schedule I drug, it must have a high potential for abuse, there must be no accepted medical use of the drug in the United States, and there must be "a lack of accepted safety for use of the drug or other substance under medical supervision."⁷⁴

Baca's Hallucinogen Control Act would have criminalized *salvia divinorum*'s use and sale, but it ultimately died in committee.⁷⁵ However, in 2002, the Drug Enforcement Agency (DEA) placed *salvia divinorum* on its list of "Drugs and Chemicals of Concern,"⁷⁶ and the DEA is currently determining whether to classify *salvia divinorum* as a Schedule I drug.⁷⁷

2. Other States' Regulatory Mechanisms

In 2005, Louisiana "became the first state to criminalize the possession and sale of *salvia*."⁷⁸ Florida, Kansas, Virginia, Missouri, Delaware, North Dakota, and Illinois have since passed laws prohibiting the sale and possession of *salvia*

67. Ketcham, *supra* note 4, at 240.

68. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at J (Apr. 29, 2008).

69. See, e.g., Ketcham, *supra* note 4, at 240 ("*S. divinorum* fails to come under the purview of either the Controlled Substances Act of 1970 or the Federal Analogue Act of 1986 . . .").

70. See *id.* at 211 (noting that Baca's Hallucinogen Control Act "sought to outlaw *salvia* and criminalize its use").

71. H.R. 5607, 107th Cong. (2002).

72. See DEA History, <http://www.usdoj.gov/dea/pubs/history/1970-1975.pdf> (last visited Jan. 16, 2009) (on file with the *McGeorge Law Review*).

73. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at 4 (Mar. 27, 2008).

74. *Id.* at 5.

75. Ketcham, *supra* note 4, at 211.

76. *Id.*

77. See, e.g., *id.* ("[The list of concern is] the common precursor to prohibition.").

78. *Id.* at 242.

divinorum.⁷⁹ In addition, a number of other states have pending legislation that would ban or control salvia divinorum.⁸⁰

The suicide of a Delaware teen in 2006 propelled much of this legislation.⁸¹ Brett Chidester was a well-rounded, seventeen-year-old student at a private all-boys school in Wilmington, Delaware.⁸² When Brett's mom discovered his salvia use, she asked him to stop.⁸³ However, Brett—who may have been suffering from depression⁸⁴—continued using salvia divinorum.⁸⁵ Sadly, Brett later died after “asphyxiating himself with stove fumes in a tent in his father's garage.”⁸⁶ Brett left a suicide note, which a noted psychologist determined was written while under the influence of a drug.⁸⁷ Specifically, the state medical examiner named salvia divinorum as a contributing factor in Brett's death.⁸⁸ In response, “Delaware passed ‘Brett's Law,’ which labeled Salvia [as] a controlled substance.”⁸⁹

III. CHAPTER 184

Chapter 184 prohibits selling, distributing, dispensing, furnishing, administering, or supplying salvia divinorum or any substance containing Salvinorin A to minors.⁹⁰ Violation of Chapter 184 will result in a misdemeanor

79. Cornblatt, *supra* note 42.

80. *Id.*; see also Jack Shafer, *Salvia Divinorum Hysteria: The Press Help Fuel the Next “Drug Menace,”* SLATE, May 6, 2008, <http://www.slate.com/toolbar.aspx?action=print&id=2190781> (on file with the *McGeorge Law Review*) (“According to the AP, 16 states are considering bans on Salvia.”).

81. See Ketcham, *supra* note 4, at 242 (noting that many lawmakers in other states have been “[i]nspired by the efforts in Delaware”); Drug Law Blog, Mar. 11, *supra* note 13 (noting that Chidester's suicide provided the political catalyst for some states' legislation regarding salvia divinorum).

82. Letter from Kathleen Chidester, to Gloria Romero, Senator, Cal. State Senate (Apr. 14, 2008) [hereinafter Chidester Letter] (on file with the *McGeorge Law Review*) (stating that Brett was a straight A student, very popular and athletic, volunteered in a nursing home after school, and passed the drug tests required by his work).

83. See Sanders, *supra* note 8 (“Chidester said her son . . . balked at her appeals to stop smoking salvia.”).

84. See, e.g., Jon Tevlin, *Plant Packing a Psychedelic Kick Would Be Banned by Bill*, STAR TRIB. (Minn.), Mar. 11, 2008, available at http://www.startribune.com/templates/Print_This_Story?sid=16583991 (on file with the *McGeorge Law Review*) (“Chidester already suffered from depression, according to reports . . .”).

85. See Sanders, *supra* note 8 (noting that Brett reasoned that because it was legal it could not be overly harmful).

86. Ketcham, *supra* note 4, at 242.

87. Chidester Letter, *supra* note 82.

88. *Id.* (noting that no drugs were detected in Brett's posthumous drug test but that there is no current drug test for salvia divinorum); see also Roan, *supra* note 11 (“No standardized lab test exists to assess the presence of salvia in the bloodstream or measure the degree of intoxication.”).

89. Bruner, *supra* note 22.

90. See CAL. PENAL CODE § 379 (enacted by Chapter 184) (prohibiting sale to anyone under eighteen as well as prohibiting offers to sell, dispense, distribute, furnish, administer or give salvia divinorum or substances containing salvinorin A to anyone under eighteen).

“punishable by imprisonment in a county jail” for up to six months, by a fine of up to \$1,000, or both.⁹¹

IV. ANALYSIS

A. Support for Chapter 184

Chapter 184’s supporters note that there are costs associated with the new law,⁹² but argue that these costs are necessary to protect California’s minors.⁹³ Supporters worry that underage salvia divinorum users might harm themselves while hallucinating;⁹⁴ even salvia divinorum purveyors recognize that the loss of coordination salvia divinorum causes could lead to accidents.⁹⁵ Some supporters are also concerned that teens might use salvia divinorum when driving.⁹⁶ For this reason, most salvia divinorum sellers advise purchasers to take the drug while in the presence of someone sober.⁹⁷

Additionally, Chapter 184’s supporters are concerned that the plant might have unknown effects that could damage a user’s mental health.⁹⁸ Supporters suggest that these unknown and potentially damaging effects provide further

91. *Id.*

92. See Interview with Elizabeth Watson, Legislative Dir. for Anthony Adams, in Sacramento, Cal. (May 30, 2008) (notes on file with the *McGeorge Law Review*) (“This is such a minor bill, like any other law on the books there will be some costs . . . the same expenses with prohibiting alcohol or cigarettes to minors.”); ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 259, at 1 (Jan. 23, 2008) (noting that there is no direct state cost and that local incarceration costs are likely minor and will be offset by fines).

93. See Interview with Elizabeth Watson, *supra* note 92 (noting that the costs are “worth it to protect the minors”).

94. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at 2 (Mar. 27, 2007) (“The effects can range from subtle to extremely strong, causing an individual to have out-of-body experiences and create a real potential for physical danger to oneself and others.”).

95. See Roan, *supra* note 11 (“Some websites promoting salvia warn users to take the drug in the presence of a sober person who can help if a user loses body control or behaves erratically.”); Allday, *supra* note 11 (noting that Daniel Siebert will not sell salvia divinorum to minors, fearing that they could endanger themselves by using it without taking basic precautions).

96. Sanders, *supra* note 8 (noting that Assembly Member Adams is concerned teens might use salvia divinorum when behind the wheel).

97. See, e.g., Roan, *supra* note 11 (“Some websites promoting salvia warn users to take the drug in the presence of a sober person who can help if a user loses body control or behaves erratically.”).

98. See *id.* (noting that DEA spokesperson Rogene Waite emphasizes that a substance could still be dangerous even if it is not a controlled substance); “Homemade” Chocolates Containing Psilocybin Mushrooms Appearing Across the United States, DEA MICROGRAM BULL., June, 2003, <http://www.usdoj.gov/dea/programs/forensicsci/microgram/mg0603/mg0603.html> (on file with the *McGeorge Law Review*) (noting that while long-term effects of salvia divinorum use are unknown, there is the possibility that its long-term effects may be similar to those of other hallucinogens—perhaps leading to depression, schizophrenia, or flashbacks); Roan, *supra* note 11 (noting that one addiction counselor believes salvia divinorum can “contribute to preexisting emotional problems”); Salvia Basics, *supra* note 20 (noting that, like other psychoactives, salvia could augment a user’s emotional or psychological problems or could “trigger latent psychological and mental problems”).

justification for the boundaries Chapter 184 places on underage use of *salvia divinorum*.⁹⁹

Chapter 184's supporters acknowledge that the legislation, through the attention it creates, will likely increase *salvia divinorum*'s popularity.¹⁰⁰ However, they contend that any harm created by the drug's increased popularity is offset by the fact that Chapter 184 alerts parents to the existence and availability of *salvia divinorum*.¹⁰¹ Furthermore, supporters believe that *salvia divinorum*'s popularity will likely increase regardless of legislation concerning its sale and distribution.¹⁰²

Supporters concede that Chapter 184 will not have a substantial impact on underage *salvia divinorum* use, but they assert that any impact on such use is preferable to no impact at all.¹⁰³ Some supporters, well aware of Chapter 184's limitations,¹⁰⁴ hope it will be a stepping-stone for further *salvia divinorum* regulation.¹⁰⁵

B. Opposition to Chapter 184

Chapter 184's opponents are concerned that its ultimate goal is to ban all *salvia divinorum* use.¹⁰⁶ After all, AB 259, the bill that was eventually enacted as Chapter 184, would have classified *salvia divinorum* and Salvinorin A as Schedule I controlled substances, "criminalizing the unlawful possession, possession for sale, and sale of the substances."¹⁰⁷ Furthermore, Assembly Member Adams has stated his intent to pursue additional prohibitions on *salvia divinorum*.¹⁰⁸

99. See Drug Law Blog, Mar. 11, *supra* note 13 ("Some might answer that it's a law based on common sense—that it can't possibly be a mistake to criminalize the sale of a hallucinogen to minors because there can't possibly be any doubt that using such a drug has the potential to harm a young mind.").

100. See Interview with Elizabeth Watson, *supra* note 92 (stating that it was known that Chapter 184 would "open Pandora's box" and that some head shops have even indicated that *salvia* sales increased after AB 259 was introduced, but that Chapter 184 "is a tool to help parents who have no idea it's out there").

101. *Id.*

102. See Allday, *supra* note 11 (quoting Assembly Member Adams who notes that use will only get worse and that "[t]here is no way this drug is going to get less popular").

103. See Interview with Elizabeth Watson, *supra* note 92 ("[While Chapter 184 may] only have a minor impact on accessibility, any impact is better than what we have now.").

104. See Bigham, *supra* note 14 (quoting Lt. Barbara Ferguson, the San Bernardino County Sheriff's legislative liaison, who indicates her unhappiness with the amended version of AB 259).

105. See *id.* (noting that Lt. Barbara Ferguson hopes *salvia divinorum* will be completely outlawed in California).

106. See Drug Law Blog, http://druglaw.typepad.com/drug_law_blog/salvia_index.html (May 5, 2008) (on file with the *McGeorge Law Review*) ("To be clear, then, no matter how much AB 259 might seem like a 'moderate' step that is intended just to 'protect the kids,' the ultimate goal of its proponents is to impose criminal sanctions on all *salvia* users, no matter their age.").

107. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at 1 (Mar. 27, 2007).

108. Bigham, *supra* note 14.

Yet further regulation completely banning the use of the drug in California is unlikely for several reasons:¹⁰⁹ first, California's prison system is suffering from an overcrowding crisis;¹¹⁰ second, there are fears that a ban on salvia divinorum could hinder medical research efforts;¹¹¹ and, lastly, there is no precedent in California for scheduling a drug that the DEA has not yet scheduled.¹¹²

Opponents also note that salvia divinorum does not appear to be addictive or physically harmful.¹¹³ Hospitals and police departments have not reported any salvia divinorum-related injuries or disturbances,¹¹⁴ and it seems unlikely that these types of injuries will become commonplace.¹¹⁵ Opponents further contend that it is unlikely that minors would use salvia divinorum while driving.¹¹⁶ "Salvia users tend to recline or go catatonic immediately after inhaling, so unless they've decided to commit suicide with their car, the rest of the motoring public is probably safe."¹¹⁷

Though opponents do not deny the possibility that salvia divinorum could have unknown, harmful effects, one opponent has argued that there are a number of *legal* activities and substances that could also be harmful.¹¹⁸ Therefore, criminalizing a substance about which so little is known would be an excessive measure.¹¹⁹

109. See Interview with Elizabeth Watson, *supra* note 92 ("Unless the Feds schedule it, there probably won't be any further regulation in California.").

110. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at C-F (Apr. 29, 2008).

111. See, e.g., Roan, *supra* note 11 ("Some researchers worry that attempts to make salvia illegal or designate it as a controlled substance may thwart studies into the drug's healing properties.").

112. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at 5 (Mar. 26, 2007).

113. Miller Letter, *supra* note 59.

114. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at 3 (Jan. 15, 2008) ("Even as Savlia [divinorum] has become [available] in modern culture, medical experts and accident and emergency rooms have not reported any particular health concerns, and the police have not reported a significant issue with public order offenses.").

115. See Allday, *supra* note 11 (quoting an addiction specialist who notes that salvia divinorum use will never be "more than low-level use" which is not going to "bombard emergency rooms"); Drug Law Blog, http://druglaw.typepad.com/drug_law_blog/salvia_index.html (Oct. 6, 2007) [hereinafter Drug Law Blog, Oct. 6] (on file with the *McGeorge Law Review*) (noting that the drug is not very harmful for most people, that all that really happens when people use salvia is they sit around their living rooms acting strange for a few minutes before the drug wears off).

116. See Drug Law Blog, Oct. 6, *supra* note 115 ("We also don't hear stories about people driving on salvia.").

117. Shafer, *supra* note 80; see also YouTube.com, Driving on Salvia, <http://www.youtube.com/watch?v=Sp2V6NXCKEO> (last visited Aug. 13, 2008) (on file with the *McGeorge Law Review*) (satirizing the notion of driving while on salvia divinorum).

118. See Drug Law Blog, Mar. 11, *supra* note 13 ("[T]aking a couple aspirin or riding a skateboard all could conceivably harm a young person . . . a number of ordinary household substances—from cough syrup to Benadryl to plants like Acacia and Morning Glory—can also be used as legal recreational drugs by any young person who is curious and reckless enough to try them.").

119. See *id.* ("AB 259, then, is an attempt to legislate in an empirical vacuum.").

Chapter 184 opponents stress that criminal law is a costly¹²⁰ and damaging¹²¹ form of regulation that should only be used to confront the most pressing dangers.¹²² Indeed, aside from the possibility that Brett Chidester committed suicide while using salvia divinorum, there are no documented deaths associated with its use.¹²³ Furthermore, the limited research of the plant¹²⁴ gives no indication that it is harmful in any way other than causing fleeting hallucinations.¹²⁵ Without empirical evidence that salvia divinorum is addictive or physically harmful, critics contend that legislation creating civil regulation or educational programs would be a more appropriate response to any actual or potential threat salvia divinorum poses.¹²⁶

Some also argue that Chapter 184 will only have a minimal impact on underage salvia divinorum use: minors can still buy it off the internet, and it is still legal for minors to possess and use the drug.¹²⁷ In addition, the possibility remains that Chapter 184 will only draw more attention to salvia divinorum,¹²⁸ perhaps further stimulating teens' interest in a drug that might have otherwise only been a passing fad.¹²⁹

C. California's Prison Overcrowding Crisis

Chapter 184 inevitably generates a discussion of California's prison overcrowding crisis,¹³⁰ a topic often debated in the context of marijuana laws.¹³¹

120. See Letter from Cal. Pub. Defenders Ass'n, to Members of the Senate Public Safety Committee, Cal. Senate (Apr. 24, 2008) (on file with the *McGeorge Law Review*) ("Finally, as long maintained by CPDA, county public defender offices are already hard-pressed to do their work given current fiscal constraints; yet each new criminal statute that illegalizes conduct not previously regulated requires an increased response by county public defender offices at a time when counties are hard pressed to maintain existing service levels.").

121. See Drug Law Blog, Mar. 11, *supra* note 13 ("Individuals who are prosecuted will be saddled with hundreds of dollars in fines and fees, the risk of jail time, and the prospect of a criminal record.").

122. See *id.* ("[Criminal law] ought to be used only as a last resort, when we are convinced we are confronting a serious problem that can't be solved by other means.").

123. See Shafer, *supra* note 80 ("[According to the AP], no known deaths on *Salvia* have been recorded.").

124. See Roan, *supra* note 11 (noting that research attempts to better understand salvia have been few).

125. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at G (Apr. 29, 2008) (noting that salvia divinorum is not toxic).

126. See Drug Law Blog, Mar. 11, *supra* note 13 ("[E]ducational programs for kids or civil regulation of merchants might work equally well to address our concerns."); Miller Letter, *supra* note 59 ("[I]t may be more appropriate to engage in public education about the dangers of the drug if abused . . .").

127. Bigham, *supra* note 14.

128. See David Hasemyer, *Legal Hallucinogenic Drug Moves Onto Officials' Radar*, San Diego UNION-TRIB., Mar. 12, 2008, at A-1 (on file with the *McGeorge Law Review*) ("If it is emerging, we don't want to bring attention to it so kids see it and say, 'Let me jump on board.'" (quoting a San Diego DEA spokesperson)).

129. See, e.g., *id.* (noting that some law enforcement officers and school administrators are not certain whether salvia will become a problem or whether "the drug's intensity and harsh effects will limit its popularity").

130. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at C-F (Apr. 29, 2008) (discussing the implications of Chapter 184 and California's prison crisis).

Though marijuana is a Schedule I controlled substance,¹³² in California it “is considered less dangerous than the other controlled substances and is treated separately.”¹³³ While California has decriminalized marijuana to some degree,¹³⁴ marijuana offenses “are the same as those applicable to other controlled substances and the elements of the crimes are the same.”¹³⁵ Despite the drug’s relative harmlessness,¹³⁶ over 1,000 California prisoners and over 2,000 California parolees are currently serving time for marijuana crimes.¹³⁷ Yet California suffers from a prison-overcrowding crisis that is staggering.¹³⁸ The State has 16,600 more prisoners than it does prison beds,¹³⁹ requiring thousands of inmates to stay in facilities designed for lower security levels.¹⁴⁰ Fortunately, Chapter 184 will not further aggravate California’s prison overcrowding crisis.¹⁴¹

D. Constitutional Challenges

Just as constitutional challenges to statutes penalizing marijuana use have failed,¹⁴² any similar challenges to Chapter 184 would also likely fail. The First Amendment’s Religion Clauses¹⁴³ have led to some judicial inconsistencies,¹⁴⁴ but “the basic purpose of these provisions . . . is to insure that no religion [is]

131. See Dennis M. Yates, *The Legalization of Marijuana: Part III*, <http://www.druglibrary.org/schaffer/hemp/mjleg1.htm> (last visited July 30, 2008) (on file with the *McGeorge Law Review*) (“Another problem with the current marijuana laws is prison overcrowding.”).

132. U.S. Drug Enforcement Administration, Drug Scheduling, usdoj.gov/dea/pubs/scheduling.html (last visited Aug. 13, 2008) (on file with the *McGeorge Law Review*).

133. 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes—Public* § 68 (3rd ed. 2000).

134. National Organization to Reform Marijuana Laws (NORML), California, http://www.norml.org/index.cfm?wtm_view=&Group_ID=4525 (last visited July 30, 2008) (on file with the *McGeorge Law Review*).

135. WITKIN & EPSTEIN, *supra* note 133.

136. See *Deglamorising Cannabis*, 346 LANCET 1241, 1241 (1995), available at http://norml.org/index.cfm?Group_ID=3476 (on file with the *McGeorge Law Review*) (“The smoking of cannabis, even long term, is not harmful to health.”); Yates, *supra* note 131 (“Currently, it is considered by many health officials to be one of the safest therapeutic substances known to man.”).

137. JAMES AUSTIN, NAT’L ORG. TO REFORM MARIJUANA LAWS (NORML), RETHINKING THE CONSEQUENCES OF DECRIMINALIZING MARIJUANA, norml.org/pdf_files/NORML_Rethinking_Decriminalizing_Marijuana.pdf (last visited July 30, 2008) (on file with the *McGeorge Law Review*).

138. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at C (Apr. 29, 2008).

139. *Id.*

140. *Id.* at D.

141. *Id.* at F. The Committee Analysis does not explain why Chapter 184 would not aggravate the current prison crisis, but perhaps the absence of any impact on the State’s prisons is linked to the fact—acknowledged by both supporters and opponents of Chapter 184—that the legislation will only have a minimal impact on teen use. See *supra* text accompanying notes 103 and 127, which possibly indicates that criminal prosecutions will be minimal, as well.

142. WITKIN & EPSTEIN, *supra* note 133.

143. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

144. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 668 (1970).

sponsored or favored, none commanded, and none inhibited.”¹⁴⁵ The Establishment Clause prevents government action that would promote or favor religion,¹⁴⁶ while the Free Exercise Clause is intended to protect religious belief and practice from persecution.¹⁴⁷ Any constitutional challenge against Chapter 184, like those raised against marijuana laws,¹⁴⁸ would likely be raised in the context of the Free Exercise Clause.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the United States Supreme Court held that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.”¹⁴⁹ In light of this precedent, it is “clear that a state may prohibit ‘religiously inspired’ drug use without running afoul of the Free Exercise clause of the First Amendment.”¹⁵⁰

V. CONCLUSION

Media coverage of *salvia divinorum* has arguably been poor,¹⁵¹ and the plant’s dangers have often been exaggerated.¹⁵² *Salvia divinorum* has been labeled the “the next marijuana”¹⁵³ and many consider it to be interchangeable with LSD and psilocybin mushrooms.¹⁵⁴ Despite these claims, *salvia divinorum* is not comparable to any of these drugs.¹⁵⁵ In fact, most users find its effects so

145. *Id.* at 669.

146. *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1224 (Miss. 2005) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)).

147. *Id.* at 1229, 1237.

148. *See generally* *People v. Trippet*, 56 Cal. App. 4th 1532, 1541, 66 Cal. Rptr. 2d 559, 564-65 (1st Dist. 1997) (holding that the defendant’s free exercise of religious rights was not infringed by religion-neutral general criminal drug laws); *State v. Sunderland*, 168 P.3d 526 (Haw. 2007) (holding that marijuana laws did not violate the defendant’s free exercise right).

149. 494 U.S. 872, 886 (1990).

150. *Trippet*, 56 Cal. App. 4th at 1541, 56 Cal. Rptr. 2d at 565 (quoting *Smith*, 494 U.S. at 874).

151. Drug Law Blog, http://druglaw.typepad.com/drug_law_blog/salvia_index.html (May 9, 2008) [hereinafter Drug Law Blog, May 9] (on file with the *McGeorge Law Review*).

152. *See* Shafer, *supra* note 80 (comparing the “current alarm over *Salvia*” to the panic over glue-sniffing seen in the 1970s); Hasemyer, *supra* note 128 (quoting Assembly Member Adams who refers to *salvia* as a “potentially explosive problem” that might reach “quasi-epidemic proportions”); Adams Link, Protecting Children From a Dangerous Drug, May 2008, <http://republican.assembly.ca.gov/enews/eLetter.aspx?Id=628> (on file with the *McGeorge Law Review*) (“[I]t is a dangerous thing to have in the hands of anybody . . .”); Letter from Howard C. Samuels, Executive Dir. of Wonderland Treatment Ctr., to Anthony Adams, Assembly Member, Cal. State Assembly (Jan. 10, 2008) (on file with the *McGeorge Law Review*) (“Young people are dying from this drug . . .”).

153. *See, e.g.*, Burkholder, *supra* note 47 (noting that *salvia* is “[o]ften touted as the ‘next marijuana’ in media reports”).

154. *See* Roan, *supra* note 11 (“The use of *salvia* is akin to the use of LSD.” (quoting Assembly Member Anthony Adams)).

155. *See* Shafer, *supra* note 80 (scoffing at the idea that *salvia* could be compared to marijuana); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at 2 (Mar. 27, 2007) (“The effects produced by *Salvia divinorum* are not comparable to any other effects produced by the other psychoactive substances.”).

unnerving that they are unwilling to try it a second time.¹⁵⁶ There is, however, overwhelming support for at least some moderate regulation.¹⁵⁷ Even Chapter 184's opponents concede that it is possible that repeated use could be detrimental to teens.¹⁵⁸ In fact, Daniel Siebert—one of *salvia divinorum*'s leading proponents—refuses to sell the plant to minors.¹⁵⁹ Though it is not yet possible to fully gauge the effects of *salvia divinorum*,¹⁶⁰ underage use of such a powerful hallucinogen poses dangers clear enough to justify the restrictions Chapter 184 places on the distribution of *salvia divinorum*.¹⁶¹

156. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 259, at J (Apr. 29, 2008) ("Those who try *salvia* often don't like it and won't try it again.").

157. *See id.* ("[F]ew people believe the drug should not be regulated at all.").

158. *See* Drug Law Blog, May 9, *supra* note 151 ("It doesn't seem crazy to me to suggest that doing a lot of *salvia*, or any hallucinogen, could eventually take a toll on a young kid's mental health. Maybe that's what happened to Bret Chidester.").

159. Allday, *supra* note 11.

160. *See* Shafer, *supra* note 80 (noting that its dangers are "conjecture").

161. *See* Interview with Elizabeth Watson, *supra* note 92 ("Why allow a thirteen-year-old to buy this when we know what could happen under it?").