

**SALVIA DIVINORUM AND SALVINORIN A: THE
DANGEROUS SUBSTANCES AMERICA DOES NOT KNOW
ABOUT**

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I. INTRODUCTION

Go to YouTube.com, search for “salvia divinorum,” and click on one of the thousands of videos to watch. The videos depict people, even young children, acting in mind-blowing ways after consuming salvia divinorum, a hallucinogenic herb.¹ In one such depiction, a twenty-seven year-old man imagined “he was in a boat with little green men” soon after taking a hit of salvia divinorum.² Next, he immediately fell to the floor in convulsive laughter.³ The videos, which can be disturbing, are just one way communities across the nation are learning of this substance.

Although this man’s experience did not create harm to himself or others at the time he consumed salvia divinorum, other stories about users of the substance are much more alarming. In Delaware in 2006, Brett Chidester, a seventeen year-old “model student with no history of mental illness,” seemed to have it all going for him.⁴ Then, he began to smoke salvia divinorum several times per week.⁵ At the same time he began smoking the substance, according to a journal he kept, he started to feel that life was pointless.⁶ Shortly after, Brett committed suicide, and the medical examiner listed salvia divinorum on his death certificate as a contributing factor to his death.⁷ Consequently, Delaware passed a

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* Capital University Law School, J.D. candidate, May 2010. I would like to thank my parents, sister, and family for providing me with support and inspiration. Additionally, I would like to give a special thanks to the Law Review Editors, Dr. Martha Shockey-Eckles, and all of my former professors and teachers for demanding the best of me and making this article possible.

¹ Kevin Sack & Brent McDonald, *Popularity of a Hallucinogen May Thwart Its Medical Uses*, N.Y. TIMES, Sept. 9, 2008, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

legislative bill, known as Brett's Law, which banned *salvia divinorum*.⁸ Although the bill came too late to protect Brett, it is not too late to protect others.

More legislation is necessary to prevent incidents like Brett's death from occurring in the future. Traditional drugs, such as lysergic acid diethylamide (LSD) and marijuana, among others, have a negative impact on society, which led to their prohibition in the United States.⁹

Over the past decade, *salvia divinorum*, a plant, and its active constituent part, salvinorin A, have spread across the United States.¹⁰ As they have spread across the country, the drug's use has increased among citizens, nearly unnoticed, and because *salvia divinorum* is a powerful hallucinogen, it is endangering society.¹¹ The stories and videos depicting *salvia divinorum*'s harmful effects are widely available, but still the federal government and most states have not made *salvia divinorum* nor salvinorin A illegal.¹²

The federal government and all fifty states need to take steps to protect society from *salvia divinorum* and salvinorin A. Specifically, because they are increasingly dangerous substances to communities throughout the United States, and they contain similar ingredients and produce effects similar to illegal drugs, the federal and state governments should prohibit them.

This article begins by examining *salvia divinorum* and its active constituent part, salvinorin A. Additionally, it states the substance's origins, effects, and use, followed by a discussion of recent legislative trends and current drug laws. Next, this article examines similar drugs' effects (i.e., marijuana and LSD)¹³ and compares the effects of those drugs

⁸ *Id.*

⁹ 21 U.S.C. §§ 801(2), 812(c) (2006).

¹⁰ Sack, *supra* note 1, at A1.

¹¹ Chris Martell, *Salvia: The Unregulated Drug Salvia Divinorum is Creating Enough of a Hallucinogenic High That State Lawmakers Are Moving to Ban It*, WIS. ST. J., June 18, 2007, at A1.

¹² See OFFICE OF DIVERSION CONTROL, DRUG ENFORCEMENT ADMIN., DRUGS & CHEMS. OF CONCERN: SALVIA DIVINORUM & SALVINORIN A (Nov. 2008), http://www.deadiversion.usdoj.gov/drugs_concern/salvia_d/salvia_d.htm [hereinafter SALVIA DIVINORUM & SALVINORIN A].

¹³ *Salvia divinorum* is characterized as a hallucinogen. SALVIA DIVINORUM & SALVINORIN A, *supra* note 12. Because LSD is a typical hallucinogen, the most commonly used hallucinogen, and its effects "apply to other hallucinogens," this article will examine LSD in representation of all hallucinogens when comparing it with *salvia divinorum*.

(continued)

to salvia divinorum. This article also provides an in-depth analysis of public policy reasons for and against drug laws and an analysis of why federal and state governments should prohibit salvia divinorum. Lastly, the article suggests and predicts future legislation for salvia divinorum.

II. SALVIA DIVINORUM

A. *Salvia Divinorum's Origin and Contents*

Salvia divinorum is an herb plant native to Oaxaca, Mexico, but it can also be grown domestically in the United States.¹⁴ It can grow more than three feet high, and it produces “large green leaves, hollow square stems and white flowers with purple calyces.”¹⁵ The leaves are primarily where the substance’s active ingredient, salvinorin A, is found.¹⁶ “[S]alvinorin A is a potent and selective kappa opioid receptor agonist,” meaning it activates the kappa opioid receptor to produce hallucinogenic effects.¹⁷ Other hallucinogens, which are already prohibited, are kappa opioid receptor agonists as well, but they also activate a person’s serotonin 2A receptor, which mediates hallucinogenic effects.¹⁸ Neither salvinorin A nor any other constituent of salvia divinorum activate the serotonin 2A receptor,¹⁹ thereby maximizing their hallucinogenic effects. Thus, salvinorin A is the component that makes salvia divinorum so dangerous.²⁰

B. *Salvia Divinorum's Effects*

Users consume salvia divinorum in three ways.²¹ It can be smoked, chewed, or drunk as an intoxicating tea when its leaves are boiled.²² After consuming it, users can feel several effects within thirty seconds,²³ and

NAT’L INST. ON DRUG ABUSE, RES. REP. SERIES, PUBL’N NO. 01-4209, HALLUCINOGENS & DISSOCIATIVE DRUGS 1, 2 (March 2001), available at <http://www.drugabuse.gov/PDF/RRHalluc.pdf> [hereinafter HALLUCINOGENS AND DISSOCIATIVE DRUGS].

¹⁴ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See id.* This article only briefly mentions salvinorin A; salvinorin A is implicitly included in discussions of salvia divinorum.

²¹ *See* Richard Lezin Jones, *New Cautions Over a Plant with a Buzz*, N.Y. TIMES, July 9, 2001, at B1.

²² *Id.*

²³ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

they can last up to an hour.²⁴ Because of its debilitating effects, salvia divinorum is “regarded as the world’s most potent hallucinogenic herb.”²⁵ The hallucinations are so intense that they can cause out-of-body experiences, where “[u]sers have . . . reported sensations of traveling through time and space, assuming the identities of other people and even merging with inanimate objects.”²⁶ Further, it has caused unconsciousness and short-term memory loss when taken in higher doses.²⁷ Other effects “include perceptions of bright lights, vivid colors and shapes, . . . body or object distortions[,] . . . dysphoria, uncontrolled laughter, a sense of loss of body, overlapping realities, . . . incoordination, dizziness, and slurred speech.”²⁸

Still, there are other potential effects. Because society is still learning of salvia divinorum’s existence, it knows little about salvia divinorum’s “long-term physical and mental effects.”²⁹ Additionally, although there has not been any proof showing that it is toxic or addictive, Dr. Michael Miller, a rehab program medical director, stated that he does not think salvia divinorum causes a harmless high.³⁰ He stated, ““It has got to be addictive because it works directly on the chemical pathway to the opiate system of the brain.””³¹

C. *Salvia Divinorum’s Use*

Salvia divinorum’s primary user population is young.³² According to *The National Survey on Drug Use and Health Report*, more than 1.8 million persons age twelve and older tried salvia divinorum in their life, and approximately 750,000 persons used it in 2006.³³ The study detailed salvia divinorum’s users in 2006, finding it was used by approximately 0.6% of kids age twelve to seventeen, 1.7% of young adults age eighteen to

²⁴ Jones, *supra* note 21, at B1.

²⁵ Sack, *supra* note 1, at A1.

²⁶ Jones, *supra* note 21, at B1.

²⁷ *Id.*

²⁸ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁹ Martell, *supra* note 11, at A1.

³⁰ *Id.*

³¹ *Id.*

³² U.S. DEP’T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., OFFICE OF APPLIED STUDIES, PUB. NO. SMA 07-4293, USE OF SPECIFIC HALLUCINOGENS: 2006, 1 (Feb. 14, 2008), *available at* <http://www.oas.samhsa.gov/2k8/hallucinogens/hallucinogens.pdf> [hereinafter USE OF SPECIFIC HALLUCINOGENS: 2006].

³³ *Id.*

twenty-five, and less than 0.1% of adults over twenty-six years old.³⁴ Thus, nearly all of its users are age twelve to twenty-five, with a substantial majority of its users age eighteen to twenty-five.³⁵

One of the factors that may contribute to the use of salvia divinorum is the manner it is used, which constitutes a problem itself. The Drug Enforcement Administration (DEA) stated that people are abusing it, rather than using it, for its “ability to evoke hallucinogenic effects.”³⁶ Furthering this claim, Daniel J. Siebert, who studied salvia divinorum for more than twenty years³⁷ and initiated salvia extract production, stated that people are “just taking it to get messed up.”³⁸ He also stated that users “see it as a legal alternative to illegal drugs.”³⁹ Thus, for people who want to abuse drugs, they can abuse salvia divinorum legally, free of any worries about getting into trouble with law enforcement.

Availability and cost are two other factors contributing to its use. Buyers can purchase it online or in local shops, such as head shops and tobacco shops, throughout the United States.⁴⁰ This widespread availability makes it relatively easy for users to acquire. Additionally, it is relatively cheap; costs vary according to the level of potency.⁴¹ Some mild extracts sell for as little as five dollars a gram, and some of the most potent leaves sell for approximately fifty dollars.⁴² Although fifty dollars may be out of some users’ price ranges, it is still reasonable to foresee other users paying that amount, and it is even more reasonable to foresee users paying five dollars. Its main users are people between eighteen and twenty-five years-old,⁴³ an age group known for drinking alcohol to get drunk⁴⁴ and willing to spend between seven dollars and fifteen dollars on a twelve-pack

³⁴ *Id.*

³⁵ *Id.*

³⁶ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

³⁷ Jones, *supra* note 21, at B1.

³⁸ Sack, *supra* note 1, at A1.

³⁹ Jones, *supra* note 21, at B1.

⁴⁰ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

⁴¹ *See* Sack, *supra* note 1, at A1.

⁴² *Id.*

⁴³ USE OF SPECIFIC HALLUCINOGENS: 2006, *supra* note 32, at 2–3.

⁴⁴ *See* U.S. DEP’T OF HEALTH & HUMAN SERVICES, THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT & REDUCE UNDERAGE DRINKING 1–2 (2007), *available at* <http://www.surgeongeneral.gov/topics/underagedrinking/calltoaction.pdf>.

of beer to do so.⁴⁵ If they are willing to spend between seven dollars and fifteen dollars to get drunk, or “messed up,” then they would seemingly spend five dollars.

Lastly, *salvia divinorum*’s classification contributes to its use. Stephanie Barchus, an alcohol and drug coordinator at a Wisconsin high school, told the *Wisconsin State Journal* that “kids don’t consider it a drug because it’s natural and it’s legal.”⁴⁶ If kids do not consider it a drug, they likely do not consider it bad,⁴⁷ which is possibly why legalization increases drug use.⁴⁸

On the other hand, although children and young adults abuse *salvia divinorum*, it may have positive uses in the proper context and under the supervision of medical professionals. For example, researchers think salvinorin A has potential to serve as pain or psychiatric medication.⁴⁹ Dr. Bryan L. Roth from the University of North Carolina told the *New York Times* that salvinorin A has potential to treat depression, schizophrenia, Alzheimer’s, or HIV.⁵⁰ However, Dr. Roth warned that salvinorin A and *salvia divinorum* produce debilitating effects, and for salvinorin A to be an effective form of treatment, *salvia divinorum*’s effects would have to be blocked.⁵¹ It is also important to note that neither substance has been approved for medical use, which this article discusses later.⁵²

⁴⁵ See NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUMBIA UNIV., THE ECONOMIC VALUE OF UNDERAGE & ADULT EXCESSIVE DRINKING TO THE ALCOHOL INDUS. 3–5 (2003) (presenting statistical analysis of the amount spent per year on alcohol by binge drinkers).

⁴⁶ Martell, *supra* note 11, at A1.

⁴⁷ See, e.g., GERALD F. UELMEN & VICTOR G. HADDOX, DRUG ABUSE & THE LAW SOURCEBOOK 1–3 (Penguin Books 1971) (1984) (stating that because the public does not consider alcohol a “drug,” the public treats alcohol differently than it does “street” drugs); see also DRUG ENFORCEMENT ADMIN., U.S. DEP’T OF JUSTICE, SPEAKING OUT AGAINST DRUG LEGALIZATION 15 (2003), available at http://www.usdoj.gov/dea/demand/speakout/speaking_out-may03.pdf [hereinafter SPEAKING OUT] (explaining that there are far more users of “legal drugs” such as tobacco and alcohol than there are users of “illegal drugs”).

⁴⁸ See SPEAKING OUT, *supra* note 47, at 15.

⁴⁹ Sack, *supra* note 1, at A1.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

D. Salvia Divinorum's Legislative Trend

As more people learned of salvia divinorum over the past decade, it became a growing concern, leading the DEA to place it on its Drugs and Chemicals of Concern list and leading to more domestic and foreign legislative activity to control the substance.⁵³ By November 2008, thirteen states, as well as other local governments, had banned or regulated salvia divinorum and/or salvinorin A.⁵⁴ Seven other states had legislation pending that would place regulatory controls on salvia divinorum and/or salvinorin A, and ten other states had legislative bills fail.⁵⁵ The DEA's report also stated Australia, Belgium, Denmark, Estonia, Finland, Italy, Japan, Spain, and Sweden placed regulatory controls on the substances.⁵⁶

The states and countries that regulate salvia divinorum and/or salvinorin A agree the substances should be regulated. However, the laws vary in regard to how they regulate the substances and how they punish violators. Some laws regulate possession and use, while others restrict distribution.⁵⁷ At one end of the spectrum, Florida made salvia divinorum and salvinorin A Schedule I drugs,⁵⁸ which made it "unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver" salvia divinorum,⁵⁹ punishable for up to five years in prison⁶⁰ and up to a \$5000 fine.⁶¹

At the other end of the spectrum, Maine imposed less stringent restrictions on salvia divinorum and salvinorin A. It prohibited distributing salvia divinorum or salvinorin A to minors, making the offense punishable by a fine between \$50 and \$1500.⁶² In addition, it prohibited the purchase, possession, or sale by minors, allowing punishment by a fine between \$100 and \$300.⁶³ Clearly, Maine has taken a less punitive approach because the maximum fine is less than one-third of the maximum fine Florida can

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ FLA. STAT. ANN. § 893.03(1)(c) (West 2008).

⁵⁹ *Id.* § 893.13(1)(a).

⁶⁰ *Id.* § 775.082(3)(d).

⁶¹ *Id.* § 775.083(1)(c).

⁶² ME. REV. STAT. ANN. tit. 17, § 2012 (2008).

⁶³ *Id.* § 2013.

impose, and Maine's laws do not even authorize imprisonment of violators.⁶⁴

III. CURRENT DRUG LAWS IN THE UNITED STATES

The next step is examining the drug laws of the United States. This article focuses on the federal drugs laws, rather than laws of individual states. It would be inefficient to address all fifty states' drug laws, and analyzing the federal drug laws provides a general approach to the issue of whether salvia divinorum should be banned, which in turn can be applied to each state. Additionally, some states have already implemented laws regulating salvia divinorum, thereby satisfying the efforts of this article.⁶⁵

Although the Controlled Substances Act (CSA) is extremely complex, its main function is to prohibit a person from knowingly or intentionally possessing,⁶⁶ or manufacturing, distributing, dispensing, or possessing with the "intent to manufacture, distribute, or dispense, a controlled substance."⁶⁷ A "controlled substance" is "a drug or other substance . . . included in schedule I, II, III, IV, or V" of the CSA,⁶⁸ and the five schedules are categories where each drug or substance is listed, based on each schedule's requirements.⁶⁹ Thus, if the government places a drug or substance in one of the five schedules, it becomes a controlled substance, making it illegal under federal law.⁷⁰

Before the government can place a drug or substance on one of the five schedules, it must satisfy two prongs. First, the substance must have potential for abuse.⁷¹ To determine this, the Attorney General must weigh factors including:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.

⁶⁴ Compare FLA. STAT. ANN. § 775.083(1)(c) (West 2008), with ME. REV. STAT. ANN. tit. 17, §§ 2012–13 (2008).

⁶⁵ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

⁶⁶ 21 U.S.C. § 844(a) (2006).

⁶⁷ *Id.* § 841(a)(1).

⁶⁸ *Id.* § 802(6).

⁶⁹ See *id.* § 812(a)–(b). The CSA provides the United States Attorney General with the sole authority to schedule drugs or substances. *Id.* § 811(a).

⁷⁰ *Id.* § 841(a). States have structured their drug laws similarly, implementing the "schedules" structure. See, e.g., FLA. STAT. ANN. § 893.03 (West 2008); MASS. GEN. LAWS ANN. ch. 94C, § 3 (West 2005); MO. ANN. STAT. § 195.017 (West 2009).

⁷¹ 21 U.S.C. § 811(a)(1)(A) (2006).

- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.⁷²

Second, the drug or substance must meet the requirements of the particular schedule where the Attorney General will list it.⁷³ To determine the appropriate schedule for a substance, the Attorney General must apply the requirements of each schedule to the drug or substance.⁷⁴ This article focuses on schedule I. To qualify as a schedule I drug, the drug must have “a high potential for abuse,” no “currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use . . . under medical supervision.”⁷⁵

Furthermore, the Attorney General must weigh five additional factors to determine whether a drug has a “currently accepted medical use.”⁷⁶ The factors include: “(1) The drug’s chemistry must be known and reproducible; (2) there must be adequate safety studies; (3) there must be adequate and well-controlled studies proving efficacy; (4) the drug must be accepted by qualified experts; and (5) the scientific evidence must be widely available.”⁷⁷

Regardless, substances not listed in one of the five schedules may still be prohibited. A substance not classified as a controlled substance under the CSA can be classified as a schedule I controlled substance if it is a controlled substance analogue.⁷⁸ The Attorney General can classify a substance (i.e., one that is not already a schedule I controlled substance) as a controlled substance analogue if the substance’s chemical structure “is substantially similar to the chemical structure of a controlled substance in schedule I or II” and/or the substance “has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially

⁷² *Id.* § 811(c). Two of the factors are omitted because they are not pertinent to this discussion.

⁷³ *Id.* § 812(b).

⁷⁴ *Id.* § 811(a)(1)(B).

⁷⁵ *Id.* § 812(b)(1)(A)–(C).

⁷⁶ Marijuana Scheduling Petition, 57 Fed. Reg. 10,504–06 (Mar. 26, 1992).

⁷⁷ *Id.*

⁷⁸ 21 U.S.C. § 813 (1988). This was an amendment to the CSA in 1986, known as the Controlled Substance Analogue Enforcement Act of 1986. Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99–570, § 1202, 100 Stat. 3207–13 (1986) (codified as amended at 21 U.S.C. § 802(32)(A) (1988)).

similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.”⁷⁹

The “and/or” signifies a split between the circuit courts. The statute contains an “or” between the second and third clauses,⁸⁰ suggesting any one of the three scenarios would be sufficient. However, several circuit courts have ruled the “or” only pertains to the second and third clauses, and thus, they require a substance to meet the first clause *and* either the second or third clause to prosecute an individual for a controlled substance analogue.⁸¹ Other circuit courts have different views. The Second and Eleventh Circuits declined to rule on the issue,⁸² and the Fifth Circuit chose to treat the clauses with the “or” applying to all three clauses; thus, only requiring the government to meet one of the clauses.⁸³ The Seventh Circuit held that if the government meets the second clause (i.e., it produces substantially similar effects), then a jury may infer the substance was chemically similar.⁸⁴ The Supreme Court has not granted certiorari on the issue.

Additionally, it is important to note that “substantially similar” does not equate to “exactly the same,” but rather, it allows for some difference between a potential controlled substance analogue and a controlled substance.⁸⁵ In *United States v. Orchard*,⁸⁶ the Eighth Circuit based its determination of whether two substances produced substantially similar effects on the substances’ intensities, as well as their effects on the central

⁷⁹ 21 U.S.C. § 802(32)(A)(i)–(ii) (2006). The statute actually has three clauses, but the third is not mentioned because it is irrelevant for this article’s purpose.

⁸⁰ *Id.* § 802(32)(A).

⁸¹ See *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005); *United States v. Hodge*, 321 F.3d 429, 436 (3d Cir. 2003); *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003); *United States v. Washam*, 312 F.3d 926, 930 n.2 (8th Cir. 2002).

⁸² *United States v. Roberts*, 363 F.3d 118, 121 (2d Cir. 2004); *United States v. Brown*, 415 F.3d 1257, 1261 (11th Cir. 2005).

⁸³ *United States v. Granberry*, 916 F.2d 1008, 1010 (5th Cir. 1990).

⁸⁴ *Turcotte*, 405 F.3d at 527.

⁸⁵ *Washam*, 312 F.3d at 930–31. See also *Klecker*, 348 F.3d at 73 (holding two substances were substantially similar, despite not being identical); *Brown*, 415 F.3d at 1271 (holding two substances were substantially similar, despite not being identical).

⁸⁶ 332 F.3d 1133 (8th Cir. 2003).

nervous system.⁸⁷ Alternatively, the Eighth Circuit has also looked at the overall effects on the human body.⁸⁸

Although the Attorney General has the ability to classify substances as controlled substance analogues, the CSA limits when this can be done. The Attorney General cannot classify a substance as a controlled substance analogue if the substance has a newly approved drug application or newly approved medical use.⁸⁹

Lastly, the penalties for violating the CSA vary. Simple possession of a controlled substance has separate penalties from manufacturing, distributing, dispensing, or possessing with the “intent to manufacture, distribute, or dispense, a controlled substance.”⁹⁰ If a “person knowingly or intentionally” possesses any amount of a controlled substance, unless it was otherwise authorized or prescribed, that person “may be sentenced to a term of imprisonment of not more than 1 year,” and can be fined at least \$1000.⁹¹ However, if the person has one prior drug conviction, that person must be imprisoned for fifteen days to two years, and the minimum fine increases to \$2500, and if the person has more than one prior drug conviction, that person must be imprisoned for ninety days to three years, and the minimum fine doubles to \$5000.⁹²

On the other hand, penalties for manufacturing, distributing, dispensing, or possessing with the “intent to manufacture, distribute, or dispense, a controlled substance” are higher than simple possession.⁹³ The penalties also vary based on the substance(s) at issue and the amount of each substance in question.⁹⁴ For example, both marijuana and LSD are schedule I drugs,⁹⁵ and “10 grams or more of a mixture or substance containing a detectable amount of [LSD]” or “1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana” yield the maximum penalties allowed by the CSA.⁹⁶ The maximum penalties

⁸⁷ *Id.*

⁸⁸ *Washam*, 312 F.3d at 932–33.

⁸⁹ 21 U.S.C. § 802(32)(C)(ii) (2006).

⁹⁰ *Id.* §§ 841(a)–(b), 844(a).

⁹¹ *Id.* § 844(a). Substances with a cocaine base and flunitrazepam are exceptions to the general rule because the penalties are stricter for them. *Id.*

⁹² *Id.*

⁹³ Compare *id.* § 844(a)–(b), with *id.* § 841(a).

⁹⁴ See *id.* § 841(b).

⁹⁵ *Id.* § 812(c).

⁹⁶ *Id.* § 841(b)(1)(A).

include imprisonment and a fine.⁹⁷ The prison term is a minimum of ten years, but no more than life in prison, unless “death or serious bodily injury results from the use of” a substance or the person has previously had one felony drug conviction.⁹⁸ In that case, the minimum penalty increases to twenty years.⁹⁹ The CSA continues, stating that for a third felony drug conviction, “such person shall be sentenced to a mandatory term of life imprisonment without release.”¹⁰⁰ Additionally, fines can exceed \$4 million for a first offense, while maximum fine amounts double for subsequent offenses.¹⁰¹

Further, there are lesser penalties for manufacturing, distributing, dispensing, or possessing with the “intent to manufacture, distribute, or dispense, a controlled substance.”¹⁰² The second tier penalizes those with “1 gram or more of a mixture or substance containing a detectable amount of [LSD]” or “100 kilograms or more of a mixture or substance containing a detectable amount of marihuana” in the same manner.¹⁰³ A violation of the second tier requires a prison term of five to forty years, except it increases to twenty years to life in prison “if death or serious bodily injury results from the use of such substance” and increases to ten years to life in prison if the person has a previous felony drug conviction.¹⁰⁴ Additionally, the fine can be as high as \$2 million for a first offense and double for subsequent felony drug offenses.¹⁰⁵

For the next tier, the CSA prescribes penalties for less than fifty kilograms of marijuana.¹⁰⁶ It states that any amount under fifty kilograms can be penalized by a prison term up to five years and a fine that can be as high as \$250,000.¹⁰⁷ If the person has a prior felony drug conviction, then the prison sentence has a maximum of ten years, and the maximum fine doubles.¹⁰⁸

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* § 841(a)(1).

¹⁰³ *Id.* § 841(b)(1)(B).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 841(b)(1)(D).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Finally, § 841(b)(1)(C) of the CSA is a catchall category for schedule I and schedule II substances and provides penalties for any amount of a substance that is not otherwise specified in the CSA.¹⁰⁹ Thus, the penalty for any amount of marijuana or LSD that is not otherwise specified is up to twenty years in prison, unless use of the substance results in death or serious bodily injury.¹¹⁰ In that case, the prison term is at least twenty years and up to life in prison.¹¹¹ If the person has a previous felony drug conviction, the prison term must be thirty years or less.¹¹² Additionally, the fine amount can be as high as \$1 million for a first time offender and can increase under other circumstances.¹¹³

To summarize, for simple possession, the government can sentence a person up to one year in prison for a first offense,¹¹⁴ and for manufacturing, distributing, dispensing, or possessing with the “intent to manufacture, distribute, or dispense, a controlled substance,” the sentences vary.¹¹⁵ For ten grams or more of LSD or one thousand kilograms or more of marijuana for a first offense, the government can sentence a person from ten years to life in prison.¹¹⁶ For one gram or more of LSD, so long as it is less than ten grams, and one hundred kilograms or more of marijuana, so long as it is less than one thousand kilograms, the government can sentence a person from five years to forty years in prison.¹¹⁷ For less than fifty kilograms of marijuana, the government can sentence a person to a prison term up to five years.¹¹⁸ The catchall section of the CSA prescribes sentences for those with marijuana between fifty kilograms and one hundred kilograms or those with less than one gram of LSD up to twenty years in prison.¹¹⁹ Lastly, other circumstances, such as prior drug convictions and death or serious bodily injury resulting from use of the substance, will increase the penalty amounts.¹²⁰ This illustrates how penalties vary for different substances, even though they are in the same schedule.

¹⁰⁹ *See id.* § 841(b)(1)(C).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* § 844(a).

¹¹⁵ *Id.* § 841(a)–(b).

¹¹⁶ *Id.* § 841(b)(1)(A).

¹¹⁷ *See id.* § 841(b)(1)(A)–(B).

¹¹⁸ *Id.* § 841(b)(1)(D).

¹¹⁹ *See id.* § 841(b)(1)(A)–(D).

¹²⁰ *See id.*

Further, if it is determined a person in possession of a controlled substance does not have a specific intent to manufacture, distribute, or dispense the controlled substance, that person is not limited to only a simple possession criminal charge.¹²¹ For example, if a person has ten grams of LSD or one thousand kilograms of marijuana, that person may not only be charged with simple possession, and thus, face a one-year prison sentence.¹²² Although the United States Supreme Court has never granted certiorari to the issue, several circuits have held that the more of a controlled substance a person possesses, the more likely a court is going to find intent to manufacture, distribute, or dispense the substance.¹²³ Thus, possessing greater amounts of a substance increases the likelihood of a court imposing greater penalties.

IV. SALVIA DIVINORUM'S SIMILARITIES TO PROHIBITED DRUGS LIKE MARIJUANA AND LSD

Comparing salvia divinorum to previously prohibited drugs is the first step to show that federal and state governments should ban it as they have banned other drugs. A comparison of salvia divinorum, marijuana, and LSD shows that salvia divinorum's effects are quite similar to the effects produced by the other two drugs.¹²⁴

¹²¹ See *infra* note 123 and accompanying text.

¹²² *Id.*

¹²³ See *United States v. Coleman*, 145 Fed. App'x 859, 860–61 (5th Cir. 2005); *United States v. Lamarr*, 75 F.3d 964, 973 (4th Cir. 1996); *United States v. Lopez*, 42 F.3d 463, 467 (8th Cir. 1994); *United States v. Billops*, 43 F.3d 281, 285–86 (7th Cir. 1994).

¹²⁴ Additionally, this article's focus is on the effects caused by the substances, rather than their look, smell, components, manner of consumption, etc., because the important aspects of drugs and potential drugs (i.e., dangerous substances) are the results of consumption. In other words, when judging substances like salvia divinorum, it is more important to focus on the effects it produces, rather than its look, smell, components, manner of consumption, etc. Government rationale for banning drugs is protecting individuals and society. See Doug Bandow, *War on Drugs or War on America?*, 3 STAN. L. & POL'Y REV. 242, 244 (1991). Following that premise, individuals and society will need protection from a substance's effects much more than its look or components. Therefore, comparing these substance's effects is the proper manner to make the comparison.

A. Physical and Mental Effects of Marijuana and LSD

Common effects of marijuana include sleepiness, depression,¹²⁵ euphoria, talkativeness, short-term memory loss, learning deficits, panic, anxiety, and hallucinations.¹²⁶ The addictiveness of marijuana is debated; Mary Townsend stated that marijuana use has led to dependence and addiction,¹²⁷ while *The Merck Manual* stated that withdrawal symptoms might occur after the cessation of frequent marijuana use.¹²⁸ Like salvia divinorum, marijuana produces a wide range of effects.

Not only does LSD produce some of the same effects as marijuana, but also it produces some unique effects. LSD is a powerful hallucinogen that causes more mental effects than physical effects,¹²⁹ and its effect is so massive that it deeply alters consciousness for hours.¹³⁰ In particular, the DEA warned that hallucinogens, such as LSD, impair “judgment that often leads to rash decisions and accidents.”¹³¹ The DEA added that hallucinogens “produce changes in perception, thought, and mood,” and alter perceptions of time and space.¹³² Lastly, like most hallucinogens, LSD rarely leads to dependence, and thus, addiction is not a concern for LSD.¹³³

¹²⁵ See NAT’L INST. ON DRUG ABUSE, RES. REP. SERIES, PUB. NO. 05-3859, MARIJUANA ABUSE 3 (July 2005), available at <http://www.drugabuse.gov/PDF/RRMarijuana.pdf> [hereinafter MARIJUANA ABUSE].

¹²⁶ MARY C. TOWNSEND, PSYCHIATRIC MENTAL HEALTH NURSING: CONCEPTS OF CARE IN EVIDENCE-BASED PRACTICE 430–31 (Tom Ciavarella ed., F.A. Davis Company, 5th ed. 2006) (1993).

¹²⁷ *Id.* at 429.

¹²⁸ THE MERCK MANUAL OF DIAGNOSIS & THERAPY 1695 (Mark H. Beers et al. eds., Merck Research Labs., 18th ed. 2006).

¹²⁹ U.S. Dep’t of Justice Drug Enforcement Admin., *Hallucinogens*, DRUGS OF ABUSE, 2005, at 51, available at <http://www.usdoj.gov/dea/pubs/abuse/doa-p.pdf> [hereinafter DRUGS OF ABUSE].

¹³⁰ See EDWARD M. BRECHER & EDITORS OF CONSUMER REPORTS, LICIT & ILLICIT DRUGS: THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, & MARIJUANA—INCLUDING CAFFEINE, NICOTINE, & ALCOHOL 346–47 (1972).

¹³¹ DRUGS OF ABUSE, *supra* note 129, at 52.

¹³² *Id.* at 51.

¹³³ TOWNSEND, *supra* note 126, at 427.

B. Comparison of *Salvia Divinorum* to Marijuana and LSD

An examination of *salvia divinorum*'s effects shows it produces effects similar to both banned drugs.

1. *Salvia Divinorum* and Marijuana

Salvia divinorum shares many effects with marijuana. Both substances evoke an enhanced state of happiness, as marijuana produces talkativeness and euphoria,¹³⁴ and *salvia divinorum* produces a type of euphoria, but with the extreme effect of uncontrollable laughter.¹³⁵ Both can also generate a sense of unhappiness, as marijuana can produce depression,¹³⁶ anxiety, and panic,¹³⁷ and *salvia divinorum* can produce dysphoria, a form of depression, and anxiety.¹³⁸ They also both generate short-term memory loss and hallucinations,¹³⁹ and *salvia divinorum*'s effects seem more severe because it produces "out-of-body experiences,"¹⁴⁰ "perceptions of bright lights, vivid colors and shapes, . . . body or object distortions . . . [and] overlapping realities."¹⁴¹ Lastly, neither marijuana nor *salvia divinorum* have conclusive evidence regarding their addictiveness.¹⁴²

2. *Salvia Divinorum* and LSD

LSD has even more similarities to *salvia divinorum* than marijuana. The DEA stated that *salvia divinorum* and salvinorin A produce hallucinogenic effects that are similar to the effects produced by other prohibited hallucinogens.¹⁴³ More specifically, *salvia divinorum* and LSD are powerful hallucinogens and produce many of the same effects on those who use them.¹⁴⁴ LSD has the capability to alter a person's consciousness for hours,¹⁴⁵ while *salvia divinorum*'s effects can go a step further by

¹³⁴ *Id.* at 431.

¹³⁵ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

¹³⁶ MARIJUANA ABUSE, *supra* note 125, at 3.

¹³⁷ TOWNSEND, *supra* note 126, at 430, 432.

¹³⁸ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

¹³⁹ TOWNSEND, *supra* note 126, at 429, 430; Jones, *supra* note 21, at B1.

¹⁴⁰ Jones, *supra* note 21, at B1.

¹⁴¹ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

¹⁴² See *supra* notes 30, 127–28 and accompanying text.

¹⁴³ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

¹⁴⁴ Martel, *supra* note 11, at A1; SALVIA DIVINORUM & SALVINORIN A, *supra* note 12; DRUGS OF ABUSE, *supra* note 129, at 51–52.

¹⁴⁵ See BRECHER, *supra* note 130, at 346–47.

causing unconsciousness if taken in higher doses.¹⁴⁶ LSD and salvia divinorum also both alter perceptions of time and space.¹⁴⁷ Based on these analogous effects, salvia divinorum and LSD are extremely similar.

There is also reason to believe salvia divinorum is more powerful than common hallucinogens like LSD. The DEA stated that although most prohibited hallucinogens “activate the serotonin 2A receptor, which mediates the effects” of the drug, salvinorin A prevents salvia divinorum from activating the receptor, thereby strengthening its effects.¹⁴⁸ Further, as stated previously, Dr. Miller thinks that salvia divinorum is addictive, whereas other hallucinogens like LSD are not.¹⁴⁹ Therefore, not only is it potentially more powerful than LSD, but also it may be more addictive than LSD and other hallucinogens.

After comparing the effects produced by salvia divinorum, marijuana, and common hallucinogens like LSD, salvia divinorum produces effects that are substantially similar to already prohibited drugs.

V. DRUG LAW ANALYSIS: REASONS SUPPORTING DRUG LAWS

The United States legislature has established its policy for drug laws in the country. The CSA states, “The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”¹⁵⁰ This reasoning is the backbone of the CSA and drug law policy.

A. Policy Reasons for Prohibiting Drugs

Public policy support for drug prohibition centers around “[t]he two major justifications for the drug laws . . . : protecting individuals and protecting society”¹⁵¹ because drugs negatively affect both individuals and society. Drug prohibition and the resulting penalties decrease drug use,¹⁵²

¹⁴⁶ Jones, *supra* note 21, at B1.

¹⁴⁷ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12; DRUGS OF ABUSE, *supra* note 129, at 51.

¹⁴⁸ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

¹⁴⁹ Martell, *supra* note 11, at A1.

¹⁵⁰ 21 U.S.C. § 801(2) (2006).

¹⁵¹ Bandow, *supra* note 124, at 244.

¹⁵² See SPEAKING OUT, *supra* note 47, at 7; Stephen D. Easton, *Everybody Knows It, but Is It True? A Challenge to the Conventional Wisdom That the War on Drugs Is Ineffective*, 14 FED. SENT’G REP. 132, 138–40 (2002) (applying a statistical analysis to show that increased resources dedicated to the war on drugs decreases the rate of illegal drug use).

as research has indicated higher fines for marijuana possession and an increased likelihood of arrest decrease marijuana use.¹⁵³ Specifically, drug purchases entail too many risks, and more barriers to acquire drugs means the less likely people will use them.¹⁵⁴ Because threats of fines and arrests deter and decrease drug use, drug prohibition limits drugs' negative effects, thereby protecting individuals and society.

1. Protecting the Individual

First, the physical and mental effects have an immediate impact on the individual users. Marijuana makes people sleepy and sometimes even depressed,¹⁵⁵ and depression and sleepiness coincide with sadness, loss of interest in activities, and loss of energy.¹⁵⁶ Additionally, marijuana causes short-term memory loss and learning deficits.¹⁵⁷ Collectively, these symptoms cause people to be unmotivated and unproductive at activities,¹⁵⁸ such as work and school. Without any motivation or production at those activities, it is difficult to succeed in various aspects of life. For example, the inability and lack of motivation to obtain or maintain a job increases the likelihood of going bankrupt and/or becoming homeless.¹⁵⁹ Additionally, effects such as hallucinations generate anxiety and panic in an individual, leaving the user with a sense of discomfort.¹⁶⁰

LSD also has adverse effects on individual users. It "produce[s] changes in perception, thought, and mood," and alters perceptions of time and space.¹⁶¹ These thought and mood changes could be negative, and the altered perceptions of time and space could create a sense of discomfort in the individual.¹⁶²

¹⁵³ Matthew C. Farrelly et al., *The Joint Demand for Cigarettes and Marijuana: Evidence from National Household Surveys on Drug Abuse*, 20 J. HEALTH ECON. 51, 65 (2001).

¹⁵⁴ Charles Van Deventer, *I'm Proof: The War on Drugs Is Working*, NEWSWEEK, July 2, 2001, at 14.

¹⁵⁵ MARIJUANA ABUSE, *supra* note 125, at 3.

¹⁵⁶ TOWNSEND, *supra* note 126, at 484.

¹⁵⁷ *Id.* at 430.

¹⁵⁸ See NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH, MARIJUANA: FACTS PARENTS NEED TO KNOW 10 (2007); see also SPEAKING OUT, *supra* note 47, at 9.

¹⁵⁹ See Norbert Gilmore, *Drug Use & Human Rights: Privacy, Vulnerability, Disability, & Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 378-79 (1996).

¹⁶⁰ See TOWNSEND, *supra* note 126, at 430; Gilmore, *supra* note 159, at 373.

¹⁶¹ DRUGS OF ABUSE, *supra* note 129, at 51.

¹⁶² See Gilmore, *supra* note 159, at 373

The physical and mental effects also lead to greater concerns. By altering a person's consciousness for hours,¹⁶³ LSD impairs "judgment that often leads to rash decisions and accidents."¹⁶⁴ Dr. "Bertha K. Madras, a deputy director of the Office of National Drug Control Policy," told the *New York Times* that "[t]he risk of any drug that is intoxicating is high . . . [because y]ou're one car ride away from an event that could be life-altering,"¹⁶⁵ or life-ending. Both marijuana and LSD present these dangers because they both can cause hallucinations.¹⁶⁶ Imagine an individual trying to drive while hallucinating. He or she may see the actual road or highway where they are driving their vehicle, but they may also see a completely different image with objects that are not real, but very animate. A person cannot drive responsibly or skillfully while seeing two different images of the road ahead.

Further, "drugs have been shown to affect reaction times, concentration, and attentiveness."¹⁶⁷ Not only do drugs adversely affect drivers' concentration on the road, but also drugs affect how quickly drivers can react to potential accidents. Even in situations where an impaired driver is able to concentrate enough to foresee an accident, he or she may not be able to react in time to prevent the accident and resulting injuries or death. Therefore, users can harm themselves by driving while impaired by drugs.

When drugs impair motor skills, such as reaction time and concentration, they affect other aspects of life beyond the ability to drive. Because drugs impair motor skills, they impact factory workers, carpenters, dangerous machine operators, etc., in the same way drugs impact driving.¹⁶⁸ Individuals who use drugs before work are incapable of performing their work tasks at their normal level of skill and diligence, which generates additional dangers due to the risks associated with their occupations.¹⁶⁹ For example, dangerous machine operators may not have the concentration and attentiveness to operate the machinery properly, nor have the reaction time to promptly react to a problem, such as a child

¹⁶³ See BRECHER, *supra* note 130, at 346–48.

¹⁶⁴ DRUGS OF ABUSE, *supra* note 129, at 52.

¹⁶⁵ Sack, *supra* note 1, at A1.

¹⁶⁶ TOWNSEND, *supra* note 126, at 429; DRUGS OF ABUSE, *supra* note 129, at 52.

¹⁶⁷ Aaron Marcus, *Are the Roads a Safer Place Because Drug Offenders Aren't on Them?: An Analysis of Punishing Drug Offenders with License Suspensions*, 13 KAN. J.L. & PUB. POL'Y 557, 574 (2004).

¹⁶⁸ *Id.*; SPEAKING OUT, *supra* note 47, at 11–12.

¹⁶⁹ See Gilmore, *supra* note 159, at 378–79.

running in front of a machine. Likewise, carpenters work with power tools, and their inability to concentrate and properly perform their jobs may compromise their abilities to avoid injuries (e.g., a carpenter misfiring a nail gun and striking himself, herself, or another).¹⁷⁰

Drug use is also an economic burden on individual users and their families. Drug users in the United States spend a large amount of money on drugs each year.¹⁷¹ *What America's Users Spend on Illegal Drugs*, a biennial report by the Office of National Drug Control Policy, found that in 2000, United States drug users spent \$64 billion on drugs.¹⁷² Spending, or for a better word, wasting, money on drugs has an adverse economic effect on purchasers and their families. Middle-class and upper-class citizens who use drugs may have enough income to pay for ordinary and necessary living expenses,¹⁷³ such as clothing, food, and shelter. However, any money spent on drugs diverts money away from the normal expenses and savings of purchasers, or worse, the purchasers' families. This may be an acceptable way to spend money to some drug purchasers, but if drug purchasers are addicted, they may not want to waste money on drugs and only do so to feed their addiction.¹⁷⁴ This creates a greater economic burden on individuals and their families because if they cannot stop using, they cannot stop wasting money, which in turn may cause them to go bankrupt.

It is reasonable to assume that wasting money on drugs has a greater effect on low-income citizens because they are already poor and live on limited funds. They likely only have enough money to spend on ordinary and necessary living expenses, such as clothing, food, and shelter, and do not have any excess to spend on drugs.¹⁷⁵ Thus, when low-income citizens buy drugs, they are likely wasting money they do not have, and they drive themselves and their families deeper into poverty.¹⁷⁶ Even if they have just enough money for the drugs and the ordinary and necessary living

¹⁷⁰ Statistics also support these theories. See SPEAKING OUT, *supra* note 47, at 11–12.

¹⁷¹ See OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFFICE OF THE PRESIDENT, WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS 2–3 (Dec. 2001), available at http://www.whitehousedrugpolicy.gov/publications/pdf/american_users_spend_2002.pdf (estimating that in 2000 users spent \$10 billion on marijuana and \$2.4 billion on “other substances”) [hereinafter WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS].

¹⁷² *Id.*

¹⁷³ See Gilmore, *supra* note 159, at 378.

¹⁷⁴ See *id.* at 378–79.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

expenses, they are keeping themselves from saving money to spend elsewhere. Either way, users likely prevent themselves from buying a family car, moving their families to a better neighborhood with better educational facilities, or taking a family vacation. In essence, wasting money on drugs prevents users and their families from obtaining more prosperous ways of life.

Because drug prohibition decreases drug use, and thus, the effects of drugs, drug prohibitions protect individual users and their families from the physical and mental effects produced by the drugs, as well as the economic problems and dangers of driving or working with dangerous equipment that result from drug use.¹⁷⁷

2. *Protecting Society*

Some of the same policy reasons that apply to protecting individuals also apply to protecting society. Persons driving vehicles or operating dangerous machinery while hallucinating are not only dangerous to themselves, but also they are dangerous to society. For people who drive a vehicle or operate machinery, the concern is that they are going to injure themselves by improperly operating the vehicle or machinery. Likewise, there is concern that they might cause injury to another by crashing into another vehicle or person.

Individual drug use also negatively affects society because drug use takes large amounts of money out of the country's economy.¹⁷⁸ According to the Office of National Drug Control Policy, the total cost of drug abuse for 2002 was \$180.9 billion.¹⁷⁹ This cost can be broken down into three major pieces: health care costs, productivity losses and other costs.¹⁸⁰ The price society must pay in health care accounts for 8.7% of that cost, which is roughly \$15 billion.¹⁸¹ That cost includes providing health care for abusers, treatment for diseases contracted due to drug abuse, treatment and care for babies whose mothers abused while pregnant, and treatment for

¹⁷⁷ Easton, *supra* note 152, at 138; SPEAKING OUT, *supra* note 47, at 11–12.

¹⁷⁸ See OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFFICE OF THE PRESIDENT, THE ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES 1992–2002 vii (Dec. 2004), available at http://www.ncjrs.gov/ondcppubs/publications/pdf/economic_costs.pdf [hereinafter ECONOMIC COSTS OF DRUG ABUSE]; see also Gilmore, *supra* note 159, at 375; SPEAKING OUT, *supra* note 47, at 11.

¹⁷⁹ ECONOMIC COSTS OF DRUG ABUSE, *supra* note 178, at vii–viii.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at III-1.

the victims of crimes perpetrated by drug abusers.¹⁸² In terms of productivity loss, the estimates put that figure at 71.2% of the overall cost to society.¹⁸³ In other words, society suffered a \$128.8 billion loss in productivity because individuals were abusing drugs rather than working, in the hospital because of drug abuse, incarcerated for drug-related offenses, or hospitalized because they were the victims of crimes perpetrated by drug abusers.¹⁸⁴

Further, those who use drugs before work burden the economy in another way. Because drugs affect “concentration and attentiveness,”¹⁸⁵ users who work while impaired may not be able to concentrate on their work. Thus, they lack the level of productivity they would be capable of without impairment, which slows business production.¹⁸⁶ In light of the United States’ current poor economy, this effect is an even greater concern because businesses cannot tolerate a slowdown in production.¹⁸⁷

In addition to the economic burden that drugs generate, they also increase crime. Low-income citizens are much more likely than middle-class or upper-class citizens to commit crimes for drugs because they do not have the money to pay for them; thus, they steal, rob, or do anything within their means and resources to obtain money or things of value to exchange for the drugs.¹⁸⁸

Another issue regarding drugs is their availability to youths. American society has a long-standing policy to protect youths from harm, including drugs,¹⁸⁹ and drugs are readily available to youths.¹⁹⁰

Because drug prohibition decreases drug use,¹⁹¹ it minimizes their harmful effects and lessens their availability to youths. Crime also

¹⁸² *Id.* at III-1–III-12.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at III-12–III-20.

¹⁸⁵ Marcus, *supra* note 167, at 574.

¹⁸⁶ SPEAKING OUT, *supra* note 47, at 7; *see also* Gilmore, *supra* note 159, at 379.

¹⁸⁷ Ben Rooney, *Obama: 200 Days in Office*, CNNMoney.com, Aug. 5, 2009, http://money.cnn.com/galleries/2009/news/0907/gallery.Obama_200_days/index.html.

¹⁸⁸ *See* ECONOMIC COSTS OF DRUG ABUSE, *supra* note 178, at III-20–III-25.

¹⁸⁹ *See, e.g.*, Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1332 (2008) (stating that the criminal justice system is structured to protect youths from harm).

¹⁹⁰ NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUMBIA UNIV., NAT’L SURVEY OF AM. ATTITUDES ON SUBSTANCE ABUSE XII: TEENS & PARENTS 1–3 (2007).

¹⁹¹ *See* sources cited *supra* note 152.

decreases because when less people use drugs, less people need to commit crimes to obtain money or something of value to exchange for drugs.¹⁹²

3. *General Reasons for Prohibiting Drugs*

The spread of drug use is another concern. Several environmental and cultural factors, such as an acceptance of drug use, high crime rates, drug availability, and peer involvement in drugs, contribute to the spread of drug use.¹⁹³ Drug prohibition, on its own, stands for the proposition that drug use is unacceptable, and the proposition that drugs are not acceptable decreases use, availability, and proliferation.¹⁹⁴ Additionally, drug prohibition decreases crime,¹⁹⁵ and less crime decreases the likelihood of drug use, availability, and proliferation.¹⁹⁶ This dynamic limits the spread of drugs because as drug use decreases and fewer people use drugs, they are less prevalent in society, which in turn implies there are less drug users on the streets to pressure their peers into using drugs. Therefore, drug prohibition decreases drug use and also decreases the spread of drug use.

B. *Policy Reasons Against Prohibiting Drugs*

Opponents to drug prohibition present several arguments. The main argument is that drug prohibition does not reduce crime, but in fact, makes drug use more dangerous.¹⁹⁷ Specifically, drug prohibition “causes those who are determined to use illicit substances to do so in an illegal and dangerous market where . . . disputes cannot be resolved peacefully.”¹⁹⁸ For example, because drugs are illegal, if two people get into a dispute regarding a drug sale, they cannot go to the justice system to resolve the dispute like two parties in a contract dispute because they will incriminate themselves. As a result, drug disputes escalate to violence.¹⁹⁹ Although this may be true, this argument supporting legalization is not sufficient. Because drug prohibition decreases drug use, legalization would increase

¹⁹² See Easton, *supra* note 152, at 138; see also SPEAKING OUT, *supra* note 47, at 16 (stating crime and violence are interconnected with drug use).

¹⁹³ Patricia Cohen et al., *Common and Uncommon Pathways to Adolescent Psychopathology and Problem Behavior*, in STRAIGHT AND DEVIUS PATHWAYS FROM CHILDHOOD TO ADULTHOOD 242, 242, 250 (Lee N. Robins & Michael Rutter eds., 1990).

¹⁹⁴ See SPEAKING OUT, *supra* note 47, at 14–15; Gilmore, *supra* note 159, at 375–76.

¹⁹⁵ See sources cited *supra* note 152.

¹⁹⁶ See Cohen, *supra* note 193, at 250, 254.

¹⁹⁷ Bandow, *supra* note 124, at 244.

¹⁹⁸ *Id.* at 246.

¹⁹⁹ See *id.*

use or keep it constant.²⁰⁰ With more people using drugs, and because drugs prompt violent and irrational behavior that exacerbates criminal activity, drug legalization is actually more likely to cause just as much crime, if not more, than drug prohibition.²⁰¹ Additionally, the DEA stated that most violent crime results from drug use, not from disputes in a drug sale.²⁰²

Further, prohibition “reduces the number of suppliers and increases the costs of doing business” for drug dealers.²⁰³ As a result, dealers have to charge more money to cover their additional costs of doing business.²⁰⁴ With the inflated drug prices, street crime increases because drug habits force those who do not have the money or resources to pay for the drugs to steal, rob, etc., to support their drug habit.²⁰⁵ This argument is plausible, but it only applies to poor addicts because those who have money for drugs do not have to commit crimes to obtain valuables to support their drug habit. Despite drug prohibitions, drugs will always be present in the United States.²⁰⁶ Thus, the idea is to minimize their harm, and limiting their existence accomplishes that because it decreases crime.

Another argument is drugs remain readily available despite federal and state regulations.²⁰⁷ Although drugs will always be present,²⁰⁸ the goal is to limit their existence. Currently, drug existence is limited because drugs are not “readily” available, as evident from statistics showing drug use has decreased since 1979.²⁰⁹

Drug prohibition opponents also argue drug laws overwhelm the criminal justice system by overcrowding jails and monopolizing court

²⁰⁰ See sources cited *supra* note 152.

²⁰¹ SPEAKING OUT, *supra* note 47, at 16.

²⁰² *Id.*

²⁰³ Bandow, *supra* note 124, at 250.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ OFF. OF NAT'L DRUG CONTROL POL'Y, U.S. DEP'T OF JUSTICE, NAT'L DRUG CONTROL STRATEGY 4 (1999), available at <http://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/99ndcs.pdf>; see also, SPEAKING OUT, *supra* note 47, at 5 (showing that despite efforts for more than 120 years to eliminate drugs, they are still present in the United States).

²⁰⁷ SPEAKING OUT, *supra* note 47, at 4.

²⁰⁸ See sources cited *supra* note 206.

²⁰⁹ SPEAKING OUT, *supra* note 47, at 4; Easton, *supra* note 152, at 138.

dockets.²¹⁰ Even if this is true, drug use contributes to violence and criminal acts,²¹¹ and drug prohibition decreases drug use,²¹² thereby reducing violence and criminal acts. As a result, although courts will hear more cases prosecuting people for drugs, courts will hear less cases based on violence because of drugs. Additionally, even if the cases prosecuting people for drugs exceeds the amount of cases that are not heard because of violence caused by drugs, public safety concern overrides the concern that the criminal justice system is too busy.

Another argument worth mentioning is dealing drugs offers a better life than other options available.²¹³ In poor neighborhoods, drug dealers “tend to have more money than many of their customers.”²¹⁴ “How are you going to convince the kids to get back to school so they can be a factory worker, or get a low paying job in a fast food place, or be unemployed, when they can sell drugs for big money[?]” asked a Chicago police officer.²¹⁵ A teacher and coach from a Washington, D.C., high school told the *Washington Post*, “[D]rugs rival athletics as the way to get out [of urban ghettos]. The thinking is, “If you can’t be an athlete be a drug dealer.”²¹⁶ Drugs will always be present in societies in the United States,²¹⁷ so the goal is to limit their use and spread, and because drug prohibition is effective as a deterrent,²¹⁸ it helps achieve the goal of limiting the number of dealers and users on the streets. Additionally, the costs of operating a system to distribute legalized drugs may be more expensive.²¹⁹ If true, there would still be a need for dealers to import and sell them illegally and cheaper.²²⁰ Therefore, legalizing drugs would not provide a better alternative because selling drugs would still be a better way of life than taking a low paying job elsewhere.

²¹⁰ Tracy Thompson, *Drug-Case Avalanche Buries Federal Courts*, WASH. POST, Dec. 24, 1990, at A4.

²¹¹ SPEAKING OUT, *supra* note 47, at 16.

²¹² See sources cited *supra* note 152.

²¹³ Mike Royko, *A Battlefield View of War on Drugs*, CHI. TRIB., Sept. 15, 1989, at 3.

²¹⁴ William J. Stuntz. *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1812–13 (1998).

²¹⁵ Royko, *supra* note 213, at 3.

²¹⁶ Michael Wilbon, *Worst of It at Cardozo Is That It’s No Surprise*, WASH. POST, June 8, 1989, at D1.

²¹⁷ See sources cited *supra* note 206.

²¹⁸ See sources cited *supra* note 152.

²¹⁹ See SPEAKING OUT, *supra* note 152, at 16.

²²⁰ See *id.* at 12.

Finally, the argument has been made that drug legalization would keep money in the U.S. economy because commercial outlets could openly sell the drugs, rather than dealers selling them in the streets illegally.²²¹ However, because drug prohibition decreases use,²²² those who forego drug use will spend the money they would typically spend on drugs elsewhere in commerce, thereby positively affecting the economy.²²³ Although drug prohibition would still take money out of the economy because those who insist on using drugs will still use them, the other negatives effects of drugs still outweigh the positive effects of legalization.

Although there is no way to absolve society from drugs' harm, after weighing the policy reasons for and against drug prohibition, drug prohibition is better than drug legalization.

VI. APPLICATION OF DRUG LAW ANALYSIS TO SALVIA DIVINORUM

The federal and state governments should ban salvia divinorum and salvinorin A based on the existing drug laws and on the policy reasons for which the federal and state governments previously banned other drugs, such as marijuana and LSD.

A. Drug Laws

1. Prohibition as a Controlled Substance Analogue

A substance is a controlled substance analogue if it has a substantially similar or greater hallucinogenic effect than a controlled substance in schedule I or II and/or it has a chemical structure that is substantially similar to a controlled substance in schedule I or II.²²⁴ Because salvia divinorum produces effects that are substantially similar to prohibited drugs like marijuana and LSD,²²⁵ that alone may be enough for the federal government to ban salvia divinorum under the CSA as a controlled substance analogue—depending on how it construes the “or” in the statute.

Here, applying the considerations the Eighth Circuit made to evaluate “substantially similar,”²²⁶ salvia divinorum is substantially similar to marijuana and LSD. Marijuana and LSD are schedule I controlled

²²¹ *See id.*

²²² *See sources cited supra* note 152.

²²³ Easton, *supra* note 152, at 138; *see, e.g.,* SPEAKING OUT, *supra* note 47, at 11.

²²⁴ 21 U.S.C. § 802(32)(A)(i)–(ii) (2006).

²²⁵ *See infra* text accompanying notes 227–35.

²²⁶ *See supra* text accompanying notes 86–89.

substances,²²⁷ and both produce hallucinogenic effects,²²⁸ although LSD's hallucinogenic effects are stronger because it is a powerful hallucinogen.²²⁹ Like marijuana and LSD, salvia divinorum affects the body and central nervous system by producing hallucinogenic effects,²³⁰ and it is more similar to LSD because it is also a powerful hallucinogen.²³¹ However, salvia divinorum has the potential to produce greater hallucinogenic effects than LSD because its main component is salvinorin A, and salvinorin A's effects are not mitigated, which causes salvia divinorum to have a more intense and direct impact on the body.²³² Its hallucinogenic effects are at least similar to, and most likely greater than, those of marijuana and LSD, and because substances' effects do not have to be the exact same,²³³ the effects are substantially similar. Therefore, depending on the federal circuit, by comparing salvia divinorum's effects with marijuana's and LSD's, it could qualify as a controlled substance analogue.

Based on precedent in the Fifth Circuit,²³⁴ salvia divinorum would qualify as a controlled substance analogue, and thus, be illegal because it meets one of the three clauses in § 802(32)(A) of the United States Code.²³⁵ This also may be enough for the Seventh Circuit to classify it as a controlled substance analogue because that court permits juries to infer that the chemical structure of the potential controlled substance analogue is substantially similar to the chemical structure of a controlled substance if the jury finds the substances' effects are similar.²³⁶ Here, the jury is likely to find salvia divinorum's effects are similar to marijuana and LSD, and they would then be able to infer that salvia divinorum shares a substantially similar chemical structure with marijuana or LSD. This would satisfy the first clause of § 802(32)(A) and meet the Seventh Circuit's two-prong test to make it a controlled substance analogue.

On the other hand, the circuits that require the government to satisfy both prongs to classify a substance as a controlled substance analogue are not likely to classify salvia divinorum as a controlled substance analogue.

²²⁷ 21 U.S.C. § 812(c) (2006).

²²⁸ DRUGS OF ABUSE, *supra* note 129, at 528.

²²⁹ *Id.*

²³⁰ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²³¹ Martell, *supra* note 11, at A1.

²³² See *supra* text accompanying notes 17–20.

²³³ See text accompanying cases cited *supra* note 85.

²³⁴ See *supra* text accompanying note 83.

²³⁵ See 21 U.S.C. § 802(32)(A) (2006).

²³⁶ See *supra* text accompanying note 84.

The main component of salvia divinorum, salvinorin A, “has a unique and complex chemical structure unlike that of any currently controlled substance.”²³⁷ A neurologist in Missoula, Montana, Dr. Ethan Russo, studied salvia divinorum and affirmed this belief, stating that it is in its own class.²³⁸ Although proposed controlled substance analogues do not have to share the exact chemical structure as controlled substances,²³⁹ salvia divinorum is not substantially similar in chemical structure to other controlled substances, and these circuits would not classify salvia divinorum as a controlled substance analogue.

The Fifth Circuit is the only circuit that has correctly interpreted the statute. The statute lists three clauses, and an “or” is placed immediately after the second clause.²⁴⁰ The statute does not contain an “and” after the first clause²⁴¹ to support other circuits’ holdings that a substance must satisfy the first prong *and* either the second *or* third prong.²⁴² They have unnecessarily implied the “and” into the statute on their own initiative.

Salvia divinorum also dodges the CSA’s limitations that would preclude classification as a controlled substance analogue. “Neither Salvia divinorum nor . . . salvinorin A has an approved medical use,”²⁴³ so neither substance falls into the newly approved drug exception in the CSA.²⁴⁴

Because some circuits would not classify salvia divinorum as a controlled substance analogue, though it still produces the same detrimental effects as other prohibited drugs, the federal and state governments need to classify it, and its constituent part, salvinorin A, as controlled substances to prohibit them.

2. Prohibition as a Controlled Substance

Although the federal and state governments should ban salvia divinorum based solely on the finding that it is substantially similar to other schedule I drugs (i.e., marijuana and LSD) in certain federal circuits, there is still even stronger support for its prohibition because it meets the requirements of a controlled substance: it has potential for abuse and it

²³⁷ Gregory Kau, *Flashback to the Federal Analog Act of 1986: Mixing Rules and Standards in the Cauldron*, 156 U. PA. L. REV. 1077, 1088 (2008).

²³⁸ See Jones, *supra* note 21, at B1.

²³⁹ See *supra* text accompanying note 84.

²⁴⁰ See 21 U.S.C. § 802(32)(A)(ii) (2006).

²⁴¹ See 21 U.S.C. § 802(32)(A)(i) (2006).

²⁴² See *supra* text accompanying note 81.

²⁴³ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁴⁴ See 21 U.S.C. § 802(32)(C)(ii) (2006); *supra* text accompanying note 89.

satisfies the three additional requirements of a schedule I controlled substance.

a. Potential for Abuse

Based on the factors used to determine whether a substance has a potential for abuse, salvia divinorum has potential for abuse. People use salvia divinorum because of its known pharmacological effects, particularly its “ability to evoke hallucinogenic effects.”²⁴⁵ In fact, abuse is one of the main reasons for its use because people are “just taking it to get messed up,”²⁴⁶ and the current pattern of consumption is that its abuse is increasing as it has become more widely known over the past decade.²⁴⁷ Regarding the current state of scientific knowledge, Dr. Roth believes salvia divinorum is capable of treating medical disorders but stated it could only be used to treat medical disorders “[i]f we can find a drug that blocks salvia’s effects.”²⁴⁸ At this time, and until science unveils a drug that blocks salvia divinorum’s effects, abuse is its sole purpose among its users. Because its sole purpose is abuse, its “scope, duration, and significance of abuse” also weigh in favor of adding it to the CSA.²⁴⁹ Lastly, because its effects last up to an hour and the hallucinations are so intense they cause out-of-body experiences and sometimes unconsciousness,²⁵⁰ it poses risks to peoples’ health. Under these conditions, a person who uses salvia divinorum before operating machinery or driving a vehicle becomes extremely dangerous.²⁵¹ Applying the factors to salvia divinorum, not only does it have a potential for abuse, but also it has a high potential for abuse and significant, harmful effects.

b. Schedule I Controlled Substance

Salvia divinorum qualifies as a schedule I controlled substance because it “has a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use . . . under medical supervision.”²⁵² Its main purpose is abuse, and it has become increasingly available over the last decade as discussed in the

²⁴⁵ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁴⁶ Sack, *supra* note 1, at A1, A24.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ 21 U.S.C. § 811(c)(5) (2006).

²⁵⁰ Jones, *supra* note 21, at B1.

²⁵¹ See discussion *supra* Part V.A.1.

²⁵² 21 U.S.C. § 812(b)(1) (2006).

preceding paragraphs.²⁵³ Additionally, even scientists who fear its criminalization would thwart researching its potential medicinal abilities think that salvia divinorum should be regulated.²⁵⁴ As Dr. Roth stated, despite its potential to treat medical disorders, its debilitating effects render it too dangerous.²⁵⁵

Lastly, neither salvia divinorum nor salvinorin A have been approved for medical use.²⁵⁶ The DEA does have an idea about its chemistry, but scientists have performed only limited studies on it, resulting in little data regarding the safety and efficacy of the substances.²⁵⁷ Expert scientists are still researching it, in hopes of finding medicinal value, but have not found enough existing scientific evidence to support it as a beneficial substance to society.²⁵⁸ Therefore, salvia divinorum does not have an approved medical use, and it meets all three elements of a schedule I drug.

Because salvia divinorum has a potential for abuse and meets the requirements of a schedule I controlled substance, it is a perfect candidate for designation as a schedule I controlled substance, and the Attorney General should add it to the schedule.

B. Policy Reasons for Prohibiting Salvia Divinorum

Not only do existing drug laws support salvia divinorum's prohibition, but also public policy supports its prohibition. Prohibiting it would protect individual users, their families, and society.

1. Protecting Individuals and Society from Salvia Divinorum's Effects

Salvia divinorum's effects have an immediate impact on the individual. Effects such as body and object distortions and overlapping realities²⁵⁹ generate confusion, which can be unsettling and potentially harmful.²⁶⁰ For example, in March 2008, a forty-two year-old man smoked salvia divinorum ten minutes before pointing a gun at himself, acting confused, breaking into laughter, and shooting himself in the face.²⁶¹ In addition to confusion, it generates feelings of depression, such as in the

²⁵³ Sack, *supra* note 1, at A1.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁵⁷ *Id.*

²⁵⁸ Sack, *supra* note 1, at A1.

²⁵⁹ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁶⁰ Sack, *supra* note 1, at A1.

²⁶¹ *Id.*

case with Brett, the seventeen year-old boy who killed himself after abusing the substance.²⁶² It also can produce conditions normally associated with body illnesses, such as dizziness and loss of coordination.²⁶³ Lastly, its potential addictiveness forces users who wish to quit to keep using it to feed their addiction.²⁶⁴ Therefore, its immediate effects on the user fit in line with the policy reasons for banning drugs.

Its effects also lead to other dangers to the individual user and society. If a person drives after using salvia divinorum, “the world’s most potent hallucinogenic herb,”²⁶⁵ then that person is a danger to themselves and society. The out-of-body experiences or unconsciousness that may result from using the drug would render a driver unable to exercise the proper care and diligence required to operate a motor vehicle.²⁶⁶ With most of its users age eighteen to twenty-five,²⁶⁷ the danger also is increased because those users are among the most inexperienced and unskilled drivers, which enhances the probability of a crash.²⁶⁸ Moreover, this age group is overrepresented in car-accident statistics involving alcohol.²⁶⁹ Just as they drink alcohol to get drunk,²⁷⁰ they consume salvia divinorum for its hallucinogenic effects,²⁷¹ or “to get messed up.”²⁷² If they have a tendency to drive while impaired by alcohol, there is no reason to believe they would not drive while impaired by salvia divinorum. Additionally, salvia divinorum is a cheaper way “to get messed up,”²⁷³ and as it stays legal, it increases the likelihood of people using it and driving impaired.

Similarly, it renders a person dangerous while operating other heavy machinery. If a man can point a gun at himself, begin laughing uncontrollably and accidentally shoot himself because he is laughing uncontrollably,²⁷⁴ individuals operating heavy-duty machinery cannot

²⁶² *Id.*

²⁶³ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁶⁴ *See* Martell, *supra* note 11, at A1.

²⁶⁵ Sack, *supra* note 1, at A1.

²⁶⁶ Jones, *supra* note 21, at B1.

²⁶⁷ USE OF SPECIFIC HALLUCINOGENS: 2006, *supra* note 32, at 2–3.

²⁶⁸ *See* Jennifer L. Tampoya, *What Works, What Doesn't: Revising DUI Laws in West Virginia to Reduce Recidivism and Save Lives*, 111 W. VA. L. REV. 283, 285 (2007).

²⁶⁹ *Id.*

²⁷⁰ U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 44, at 6–7.

²⁷¹ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁷² Sack, *supra* note 1, at A1.

²⁷³ *See* discussion *supra* Part II.C.

²⁷⁴ *See supra* text accompanying note 261.

possibly be trusted to work in the mental and physical state *salvia divinorum* produces. Again, if a child darts into the street in front of a tractor driven by a person laughing uncontrollably from *salvia divinorum* impairment, he or she is in serious danger. Picturing this scene makes it even more disturbing: a man driving a tractor, laughing hysterically as he or she runs over a helpless child.

The military also has expressed concerns because of “[t]he herb’s presence on military ships and bases.”²⁷⁵ A soldier operating a tank, aircraft, or guns while impaired from *salvia divinorum* is a huge concern for similar reasons as a person operating a tractor. Again referring to the example of the man who accidentally shot himself,²⁷⁶ a soldier operating a tank could do the same. Only this time, he would be firing tank ammunition at somebody or something.

A more basic concern is a person going swimming while impaired on *salvia divinorum*.²⁷⁷ It is conceivable that if a person begins laughing uncontrollably while they are in a pool, he or she might not be able to swim or tread water to keep themselves from drowning. Regardless of the nature in which *salvia divinorum* is used, it produces other physical dangers similar to the dangers the federal government wanted to prevent when it previously banned other substances.

2. *Protecting Individuals and Society from Salvia Divinorum’s Economic Burden*

Salvia divinorum has an economic burden on individual users, their families, and society that is similar to the burdens caused by other prohibited drugs. Similar to the large amount of money spent on other drugs,²⁷⁸ *salvia divinorum* users have to spend a large amount of money on it. Although the cost may seem negligible, with an average price range between five dollars and fifty dollars per leaf,²⁷⁹ regular usage can accumulate into an expensive habit. Thus, similar to money spent on other drugs, the cost of this habit diverts money away from savings or other necessary expenses, such as clothing, food, and shelter for users and their families. Money spent on *salvia divinorum* does not go toward the purchase of a car, a house in a good neighborhood with a good school

²⁷⁵ Sack, *supra* note 1, at A1.

²⁷⁶ *See id.*

²⁷⁷ *Id.*

²⁷⁸ WHAT AMERICA’S USERS SPEND ON ILLEGAL DRUGS, *supra* note 171, at 3.

²⁷⁹ Sack, *supra* note 1, at A1.

system, or a vacation. Middle and upper-class citizens keep themselves from saving money, while lower-income citizens keep or further ingrain themselves and their families into poverty.

Individual use of drugs that are currently banned also economically burdens society. Legalization of these drugs would economically burden society by causing a lack of work production from their users.²⁸⁰ Salvia divinorum currently burdens society the same way. Its debilitating effects, such as intense hallucinations, short-term memory loss,²⁸¹ and uncontrollable laughter²⁸² make it difficult for users to focus and function, which can cause a lack of work production by the user, thereby adversely affecting the economy. Therefore, prohibiting salvia divinorum, like other drugs, will decrease use, increasing work productivity and bettering the economy.

3. *General Reasons for Prohibiting Salvia Divinorum*

Salvia divinorum's current legal status, availability, and usage rates make it an extremely problematic substance. People likely use it so frequently because it is legal,²⁸³ which increases its use, availability, and spread. The federal and state governments can easily remedy this, however. Prohibiting the drug would decrease its use, availability, and spread because drug prohibition decreases use.²⁸⁴ As its use decreases, it would become less available, and as it becomes less used and less available, there will be fewer peers to pressure or influence their friends to try it.²⁸⁵ Thus, by prohibiting salvia divinorum, the federal and state governments could and should put a halt to its use and spread.

Such prohibition would prove invaluable to society. It is currently available to America's youth, as evidenced by the fact that children as young as twelve years-old are using it.²⁸⁶ Young adults age eighteen to twenty-five use it most frequently,²⁸⁷ and over the past decade, people of all ages have used it more frequently.²⁸⁸ Young children and young adults

²⁸⁰ See Gilmore, *supra* note 159, at 378–79.

²⁸¹ Jones, *supra* note 21, at B1.

²⁸² SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁸³ See *supra* text accompanying notes 46–47.

²⁸⁴ See sources cited *supra* note 152.

²⁸⁵ See discussion *supra* Part V.A.3.

²⁸⁶ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

²⁸⁷ USE OF SPECIFIC HALLUCINOGENS: 2006, *supra* note 32.

²⁸⁸ See Sack, *supra* note 1, at A1.

should not have access to this potent substance because of its devastating effects.

Addiction is also a concern. Although LSD is not addictive,²⁸⁹ and marijuana might be addictive,²⁹⁰ the Attorney General has placed them on the CSA.²⁹¹ Science shows that salvia divinorum is likely addictive,²⁹² and because it is legal, it is currently available for people to abuse and become addicted. Thus, the federal and state governments should prohibit salvia divinorum and salvinorin A because their addictive qualities make it more dangerous than other prohibited drugs.

Keeping salvia divinorum legalized also is likely to increase crime. If users become addicted,²⁹³ they will feel the need to have it consistently. If they do not have the money to pay for it, crime will increase because they will have to steal, rob, or commit other crimes to obtain valuables to pay for their salvia divinorum habit.²⁹⁴

Further, society should be cautious of salvia divinorum because its long-term effects are unknown.²⁹⁵ While it remains legal, it may be causing currently unknown, harmful consequences for its users that will remain unknown until the effects surface. Depending on the severity of these potential effects, the substance may alter lives, or even cut them short. Thus, not only should the federal and state governments ban salvia divinorum and salvinorin A for their immediate effects mentioned above, but legislation should prohibit them for their potential long-term effects. Although these effects are unknown,²⁹⁶ it is better to take a preventative approach because such a proactive approach is better than a reactive approach. Society cannot afford to wait until scientists document the long-term effects because, by that time, it may be too late to cure or remedy salvia divinorum's harms.

As its use continues to spread across the country, stories like Brett's, the forty-two year-old man's, or auto accidents will become more prevalent. Because drug prohibition deters people from using drugs,²⁹⁷ prohibiting salvia divinorum will deter people from using it. Taking it off

²⁸⁹ TOWNSEND *supra* note 126, at 427.

²⁹⁰ *Id.* at 430.

²⁹¹ See 21 U.S.C. § 812(c)(c)(9)–(10).

²⁹² See Martell, *supra* note 11, at A1.

²⁹³ *Id.*

²⁹⁴ See ECONOMIC COSTS OF DRUG ABUSE, *supra* note 178, at III-20 to III-25.

²⁹⁵ Martell, *supra* note 11, at A1.

²⁹⁶ *Id.*

²⁹⁷ See sources cited *supra* note 152.

the streets will make it less available and reduce the chances of addiction. Prohibiting salvia divinorum will stop its current use and spread by eliminating some of its current users and preventing others, young children and adults, from beginning it as a new habit.

VII. FUTURE LEGISLATION

Because public policy and the CSA support prohibiting salvia divinorum and salvinorin A, the federal and state governments should prohibit the substances. The federal government should add them to the CSA, states that do not have current legislation should enact similar legislation, and states, such as Maine, that currently have lenient legislation should amend their laws to take a stricter approach to the substances.

A. Suggested Legislation

The federal and state governments should enact legislation that prohibits a person from knowingly or intentionally possessing or manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute, or dispense, salvia divinorum. Such legislation would parallel the current language of the CSA.²⁹⁸

Additionally, the penalties should be similar to the CSA's penalties for LSD and marijuana. Salvia divinorum's effects are more similar to LSD's than marijuana's and more severe than marijuana's (and potentially LSD's). Both LSD and salvia divinorum are powerful hallucinogens that produce debilitating effects,²⁹⁹ whereas marijuana does not produce such effects.³⁰⁰ Thus, violations of salvia divinorum laws should be punished as strictly as LSD. However, salvia divinorum is a leafy plant,³⁰¹ like marijuana,³⁰² so the amount an individual uses to smoke salvia divinorum will be more similar to the amount an individual uses to smoke marijuana than LSD. Because it is an acid, a person needs much less LSD than marijuana or salvia divinorum to experience the drug's effects.³⁰³ Consequently, the penalties prescribed for salvia divinorum in the legislation proposed here originate from the CSA's penalties for marijuana, but are increased to be more representative of penalties for LSD.

²⁹⁸ See 21 U.S.C. §§ 841(a), 844(a) (2006).

²⁹⁹ See discussion *supra* Part IV.B.2.

³⁰⁰ See discussion *supra* Part IV.A.

³⁰¹ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

³⁰² TOWNSEND, *supra* note 126, at 428–29.

³⁰³ Office of Diversion Control, Drug Enforcement Admin., Drugs and Chemicals of Concern: LSD (Nov. 2008), <http://www.justice.gov/dea/concern/lsd.html>.

For a simple possession offense, courts should sentence a person with no prior felony drug convictions to a term of imprisonment up to one year and a fine. Courts should sentence a person with one prior felony drug conviction to a term of imprisonment for fifteen days to two years and a fine. Lastly, courts should sentence a person with more than one prior felony drug conviction to a term of imprisonment for ninety days to three years and a fine.

Courts should impose greater penalties for manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute, or dispense *salvia divinorum*, based on how much of each substance is at issue. For less than twenty-five kilograms of a mixture or substance containing a detectable amount of *salvia divinorum*, courts should sentence a person with no prior felony drug convictions to term of imprisonment for up to five years and a fine. If death or serious bodily injury results from its use, or if the person has previously had one felony drug conviction, the maximum term of imprisonment should increase to ten years. If it is a third felony drug conviction, courts should sentence the person to a mandatory term of fifteen years in prison without parole and a fine.

Additionally, for an amount between twenty-five kilograms and fifty kilograms of a mixture or substance containing a detectable amount of *salvia divinorum*, courts should sentence a person with no prior felony drug convictions to term of imprisonment for two to twenty years and a fine. If death or serious bodily injury results from its use or if the person has previously had one felony drug conviction, the maximum term of imprisonment should increase to forty years. If it is a third felony drug conviction, courts should sentence the person to a mandatory term of twenty years in prison without parole and a fine.

Further, for an amount between fifty kilograms and five hundred kilograms of a mixture or substance containing a detectable amount of *salvia divinorum*, courts should sentence a person with no prior felony drug convictions to term of imprisonment for five to forty years and a fine. If death or serious bodily injury results from its use, the term of imprisonment should increase to twenty years to life in prison, and if the person has previously had one felony drug conviction, the maximum term of imprisonment should increase to ten years. If it is a third felony drug conviction, courts should sentence the person to a mandatory term of twenty-five years in prison without parole and a fine.

Lastly, for 500 kilograms or more of a mixture or substance containing a detectable amount of *salvia divinorum*, courts should sentence a person with no prior felony drug convictions to term of imprisonment for ten years to life in prison and a fine. If death or serious bodily injury results from its

use or if the person has previously had one felony drug conviction, the minimum term of imprisonment should increase to twenty years. If it is a third felony drug conviction, courts should sentence the person to a mandatory term of life in prison without parole and a fine.

B. Predicted Legislation

Federal legislation making salvia divinorum a schedule I controlled substance does not appear to be imminent, but also it does not appear to be in the distant future. The same can be said for all fifty states. The evolution of the legislation will be fascinating. Salvia divinorum only has become more widely known in the past decade,³⁰⁴ and already thirteen states and several countries have enacted regulations, while other states have legislation pending.³⁰⁵ On the other hand, legislative bills have died in ten states, indicating a reluctance to regulate salvia divinorum.³⁰⁶ With states passing legislation, pending state legislative bills, and state legislative bills dying,³⁰⁷ the states have created a flurry of legislative activity regarding salvia divinorum in the past year. Clearly, it has become more widely known to legislators and a matter of importance, as well as a matter of debate, since it has become a growing social problem over the last decade. Within the next five years, the federal government will ultimately join the bandwagon of the states and countries that have already enacted legislation and place salvia divinorum on schedule I of the CSA. In turn, the remaining states will follow the federal government, but hopefully, it will not be too late for lives to be ruined, or lost.

VIII. CONCLUSION

Salvia divinorum, along with its constituent part, salvinorin A, are two of the most powerful substances available in the United States and other countries. They are as dangerous, if not more dangerous, than drugs already banned by the federal government and states across the country, sharing many similar debilitating effects. Further, not only are they available to men and women, but in many places, they are available to children as well, and their effects pose dangers that have the ability to ruin the lives of their users, as well as those who unknowingly and innocently associate or come into contact with their users. With several states and

³⁰⁴ Sack, *supra* note 1, at A1.

³⁰⁵ SALVIA DIVINORUM & SALVINORIN A, *supra* note 12.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

other major countries regulating salvia divinorum and salvinorin A, it seems clear the substances are drugs and/or chemicals of concern. Still, although several states have passed legislation regulating salvia divinorum and/or salvinorin A in some manner, other states have not taken steps to regulate them, and both substances have not been regulated by the federal government under the CSA.³⁰⁸

The federal government and the remaining states without regulations need to take initiative, follow the states and major countries that have adopted legislation, and issue long-needed laws to ban salvia divinorum and salvinorin A, which impose strict penalties to limit the use of these substances. In addition, states with lenient restrictions on the substances, such as Maine, need to strengthen their laws by completely banning the substances and imposing stricter penalties because public policy supports their prohibition.

Some federal circuits would classify salvia divinorum as a controlled substance analogue, thereby prohibiting it. However, most importantly, it meets the requirements for schedule I drugs of the CSA, allowing the federal government to prohibit it. Federal and state governments need to follow policy and the drug laws themselves, prohibit salvia divinorum and salvinorin A, and impose harsh sentences to prevent the substances from imposing their harsh consequences on society.

³⁰⁸ *Id.*