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MAGIC MUSHROOMS:

*from sacred
entheogen to
Class A drug.*

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ABSTRACT

On July 18th, section 21 of the Drugs Act 2005 came into force: as a result, magic mushrooms are now classified as a Class A drug under the Misuse of Drugs Act 1971. Following a brief look at magic mushrooms and their effects, this paper charts their usage throughout history, from

Saharan tribes in ancient times, through the psychedelic revolution of the 1960s, to the boom in (recently halted) internet sales of them in the United Kingdom. This serves as background to detailed consideration of magic mushrooms' recent change in legal status in this country, from non-controlled fungi to Class A drug. The desirability (or otherwise) of this development is analysed, situated within a comparative and international context, with reference to potential unwanted side-effects.

KEYWORDS

Magic Mushrooms - Drugs Act 2005 - Section 21.

MAGIC MUSHROOMS

There are more than 180 species of mushroom that contain psilocin, several of which grow wild in the UK; most notably. When ingested, normally through either being eaten fresh or brewed into a tea, such mushrooms can have psychedelic effects, hence they are known as 'magic mushrooms'.

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psychoactive substances, the exact effects will vary, being dependent upon both set and setting, but they are likely following pattern:

In the beginning stages of onset, mushrooms are a sort of undefineable feeling, similar to anticipation. There may be a feeling of energy in the body, and things are different than usual. As the effects intensify, a variety of perceptual changes may occur; pupil dilation, mental stimulation, new perspectives, feelings of changing emotions (lots of laughter), possible paranoia and confusion. More advanced users may seek spiritual or a sense of universal understanding through their mushrooms (<http://www.erowid.org/plants/mushrooms/mushrooms.html>).

MAGIC MUSHROOMS THROUGHOUT HISTORY: FROM PSYCHONAUTS

Magic mushrooms have been used by numerous different cultures throughout the ages. For many people they have served an entheogenic purpose, literally meaning that they have been used to 'generate within' (<http://www.dictionary.com>); thus they have formed an important aspect of shamanistic rituals, where they are taken to be a transformative experience. The most ancient example of a culture where magic mushrooms seemed to hold significance comes from rock paintings found in the Sahara that date back to 7000 BC. Magic mushrooms have a long and sacred history in native Central American cultures that extends into the millennium (see further: http://en.wikipedia.org/wiki/Magic_mushrooms).

Indeed, it was the mid-20th century discovery of ritualistic uses of magic mushrooms in Mexico by two amateur Western mycologists, R. Gordon Wasson - a vice president of J. P. Morgan - and his wife, Ottobona, that led to the subsequent publications (for example, Wasson RG, 1986) and the spread of their usage to the United States and other parts of the Western world. This has been largely attributed to the feature article in the hugely influential *Life* magazine ran a 17-page spread on Wasson, detailing - with great enthusiasm - his experiences with magic mushrooms: 'For the first time the word ecstasy took on a new meaning, the first time it did not mean someone else's state of mind' (Wasson, 1957).

As a result of this journalistic piece, a mass audience learned about the existence and effects of magic mushrooms: amongst them was the Harvard professor named Timothy Leary (see further, Leary, 2001, pp. 72-73). By 1961 Leary was working on a project of Clinical Reactions to Psilocybin Administered in Support of the Humanistic Movement, which involved Leary handing out doses of psilocybin to a wide range of people, including writers and philosophers such as Aldous Huxley, prison inmates and students. The overwhelming response was most people reporting that the experience had given them a profound insight, generally considering it to have been life-changing. Leary, that in magic mushrooms - and, later, LSD - he had found a new way to help people, went on to become one of the most influential people in the humanistic movement (see further, Miles B, 2003). The use of magic mushrooms, whilst some used them purely recreationally, for others, had a far greater, philosophical significance:

Like the culture by which it is conditioned, normal

consciousness is at once our best friend and a mortal enemy ... To become fully human, man must learn his own way ... The universe in which a human being is transfigured into a new creation. We have only to look at the fence and look around us with what the philosopher Plotinus, describes as 'that other kind of seeing, which has but few make use of' ... Through these new perceptions the subject's normal waking consciousness may be experienced in many different ways ... At the extreme is achieving a state of pure consciousness. The world is now seen as an infinite unity that is yet a unity, and the beholder experiences himself as being at one with the infinite Oneness (Huxley A, 1957).

In their book, *Psychedelic Drugs Reconsidered*, Grinspoon and Bakalar discuss that the modern history of magic mushrooms is bound up with the counterculture movement, and, thus, when the importance of that movement faded, did the cultural significance of magic mushrooms: 'as the counterculture became assimilated, losing its distinctiveness but leaving behind a legacy in our culture, psychedelic drugs moved to the periphery of the mainstream of consciousness, but they continue to exert a similar subtle influence' (Grinspoon L and Bakalar JB, 1979). They contrast the concurrent levels of experimentation with psychedelic drugs in the 1960s, fewer people now see them as an ethos for a way of life: 'the novelty is gone, their limitations are better understood and their virtues easier to put into perspective' that this change is epitomised by the difference in the *Psychedelic Review*, edited by Leary between 1963 and its current equivalent, *High Times*: 'Despite some half-hearted rhetoric, its casual tone is very different from the rage and fanaticism of the drug-culture press of the 1960s, and its readers no more of a subculture than do readers of *Gourmet* or whiskey drinkers. They do not deny the existence of modern 'psychonauts', though they see mushrooms as an entheogenic tool with which to explore the depths of their minds.

MAGIC MUSHROOMS IN THE UNITED KINGDOM: FROM LONDON TO GLASTONBURY

In Lewis Carroll's *Alice's Adventures in Wonderland*, first published in 1865, Alice has an encounter with a caterpillar, who is smoking a pipe on a mushroom:

In a minute or two the Caterpillar took the hookah pipe out of its mouth and yawned once or twice, and shook itself down off the mushroom, and crawled away in the grass, remarking as it went, 'One side will make you grow taller and the other side will make you grow shorter'. 'One side of what?' thought Alice to herself. 'The other side of what?' 'The other side of the mushroom,' said the Caterpillar, just as if she had asked a question, and in another moment it was out of sight' (Carroll, 1865, p. 53).

The story continues in this surreal vein: Alice's nibbling on the mushroom leads to her growing to giant proportions, with the result that she is mistaken for an egg-stealing serpent by a pigeon. Carroll's association of mushrooms as having magical properties is by no means unique, but the long-standing association between mushrooms and magic is reflected in British fairy-tales and folklore: 'Flying witches, powerful magicians, and a predilection for sitting on red and white toadstools have been common experiences with magic mushrooms' (Jeavons C, 2005).

documented use of magic mushrooms was in a *Medical & Natural History Magazine* (1799: a man out gathering mushrooms for breakfast in a forest and accidentally picked some magic mushrooms, and subsequently died, and his family. The doctor who treated them later described how the man 'was attacked with fits of immoderate laughter, nor could his father or mother refrain him' (see further: < http://en.wikipedia.org/wiki/Magic_mushrooms>).

Yet, it is only in the past few decades, following the psychedelic revolution of the 1960s and 1970s, that the trend of using magic mushrooms has developed in Britain. This recent history initially involved people picking and eating magic mushrooms in the forests and fields where they spring up in fields and woodlands. However, in the 1990s, numerous lucrative commercial businesses were established in the selling and distribution of magic mushrooms. These businesses (on markets and at festivals), shops, and Internet websites offering home delivery; by 2005 the Government estimated that there were 1,000 establishments in the United Kingdom were involved in the trade (House of Commons Standing Committee F, 2005, col. 1). The mushrooms, which their stock was imported, largely from Holland, with HM Customs estimating the imports for 2004 to be between 150,000 and 200,000 (House of Commons, Hansard Written Statement for 23 February 2005 (50WS)). These developments have, unsurprisingly, led to a boom in the sale of magic mushrooms, with 337,000 estimated to have taken place in 2004 (Roe S, 2005, p. 13), compared with 179,000 in 2002/03 (Roe S, 2005, p. 3): 'when the NME described 2004 as 'the third year since we put the benign mood down to one thing - the return of magic mushrooms' (Moss S, 2004).

MAGIC MUSHROOMS AND THE LAW

The legal position of those who sell magic mushrooms is unclear under the Misuse of Drugs Act 1971 and was, until recently, unclear. Many of those who were being seen to be promoting their use as psychedelic drugs were displaying signs stating that their wares were being sold for 'ornamental' or 'research' purposes (Honigsbaum M, 2004). Many websites carried provisos such as the following: 'Mushrooms for sale as specimen samples for botanical studies only. You may not use these mushrooms' (< www.everybodydoesit.com>). The legal position was rendered transparent when immediately followed by a sign that said: 'This hallucinogen will give you a stoned, psychedelic and visual trip'.

The situation was further complicated by the conflicting legal position that emanated from Government. Many of those who were selling magic mushrooms used to display in their windows a photocopy of a letter from Home Office official Ian Breadmore in 2003, that clearly stated it was illegal to sell or give away a freshly picked mushroom product unless it had been prepared in any way'. (available via, for example: < <http://www.salviaonline.co.uk/legal.htm>>). However, in 2004, the Home Office wrote to mushroom importers saying that magic mushrooms were not within the ambit of the Misuse of Drugs Act 1971 if they were sold in their natural state, transported to the marketplace, packaged, weighed and sealed in airtight containers (House of Commons, 2004, p. 39). The legality of this was further obfuscated by Customs and Excise ruling in the same year that a 20% VAT be levied on magic mushrooms, this high rate of tax being a result of the fact that they are classified as a drug rather than as a food item (Moss S, 2004).

One might assume that the imposition of VAT assured m

legal status; however, 2004 also saw a number of raids on magic mushrooms (Verkaik R, 2004). One such raid led to a case that looked set to clarify the law in this area but which, in the case of *Mardle and Evans*, Tuesday 14th December, Gloucester, was unreported (transcript available via: <<http://www.mjree.com>>). The collapse of this case led to a clause being inserted in the Misuse of Drugs Act 2005 that aimed to amend the Misuse of Drugs Act 1971. This clause offers a detailed consideration of this grey area of the law and the original Misuse of Drugs Act 1971 provisions, including a discussion of the cases that were central to that Act's interpretation; a discussion of the relevant amendment contained within the 2005 Act and its potential impact.

THE OLD LAW ON MAGIC MUSHROOMS: FROM 'PREPARATI

The Misuse of Drugs Act 1971, s. 2(1)(a), states that 'the expression "controlled drugs" means any substance or product ... specified in Part III of Schedule 2 to this Act'. Psilocin is listed in Schedule 2, Part III, rendering it a Class A drug. Paragraph 3 of part I of the Schedule to the Act extends the application of the Act to: 'any ester or salt of a substance for the time being specified in paragraph 1 or the psychedelic constituent found in magic mushrooms, and thus qualifies as a Class A drug under the Act. Section 5(1) of the Misuse of Drugs Act 1971 provides that 'it shall not be lawful for a person to have a controlled drug in his possession'; section 5(2) states that 'it shall not be lawful for a person to have a controlled drug in his possession in contravention of subsection (1)'. Section 5(3) provides that 'it shall not be lawful for a person to have a controlled drug in his possession in contravention of subsection (1)'.

However, the issue of the legality of magic mushrooms was more complicated than it at first appeared: in order to be convicted of having psilocybin in one's possession, more was required than simply the possession of magic mushrooms. The explanation for this was given in the House of Lords case concerning possession of cannabis in *Hyphantos* [1978] 2 All ER 161. At the time the case was decided cannabis was classified as a Class B drug under the 1971 Act; however, the monoamine oxidase inhibitor, cannabidiol, contained within cannabis, was classified as a Class A drug. *Hyphantos* was found to be in possession of cannabis, but not only for possession of a Class B drug, but also for possession of a Class A drug, given that the cannabis that he was found with contained cannabidiol within it. In quashing the appellant's conviction for the possession of a Class A drug, Diplock noted that:

[T]here are some listed drugs which, although they are synthesised, also occur in the natural state in plants and animals, and these include some of the most useful drugs. It would not in my view be a natural use of the word "drug" to say, for instance, that a person was in possession of a controlled drug when what he really had was opium poppy-straw, whatever morphine content there might be in it had been separated.

There was a clear analogy here with magic mushrooms, and Diplock used them as an example: 'psilocin and psilocybin are found in the toadstool sometimes called the Mexican magic mushroom'. In the *Hyphantos* decision, it was clear for a long time that the offence of possession of a Class A drug psilocybin was not established by mere possession of magic mushrooms. To secure a conviction for possession of a Class A drug, it needed to be proved that the activity fell within the scope of paragraph 5 of the Misuse of Drugs Act 1971: 'any preparation or product containing a substance or product for the time being specified in paragraphs 1 to 4 above' (emphasis added).

The majority of cases involving magic mushrooms focus on the meaning of the word 'preparation' in paragraph 5, with authority in interpreting this being *R v Stevens* 15 April 1971. Stevens was caught by the police with a bag of dried, powdered mushrooms. The Court of Appeal addressed the question of whether the powdered substance found in the appellant's possession was described as a 'preparation'. In reference to the word 'preparation' in paragraph 5 of the 1971 Act, Drake J said the following:

... it was intended that its ordinary and natural meaning should be given to it. What was needed in order that the substance should be prepared is that they ceased to be in their natural growing state and had in some way been altered by human intervention to make them into a condition in which they

It is submitted that the court were here answering the question of whether the substance was a 'preparation' as a result, misinterpreted paragraph 5. Paragraph 5 refers to 'preparation': the word 'preparation' is clearly being used as a noun, referring to the substance in question, as opposed to as a verb, referring to the activities of the individual concerned. Whilst it may seem far easier to prove that mushrooms were 'prepared' for use as a drug, it is not so easy to prove that, as a result, they became 'a preparation': namely, a powdered or dried substance, especially a medicine or food' (<<http://www.dictionary.com>>).

The Court of Appeal case of *Cunliffe* [1986] Crim LR 547 applied the principle in *Stevens*, even the most minimal human intervention as bringing the activity within the ambit of paragraph 5. In *Cunliffe*, the police found a wooden casket containing some dried mushrooms in the appellant's bedroom. Cunliffe told the police that he had dried the mushrooms in a paper bag to dry out naturally; unlike in *Stevens*, the mushrooms had not been powdered. Cunliffe was convicted of possession of a controlled substance. The court were given the following summing-up:

It is only if you can say to yourselves, 'We feel sure that this man did was to arrange for the mushrooms to be available in his house to be available for use for drug taking' that you are satisfied that he did that act of preparation rather than that it was just a natural ordinary occurrence on its own. If you can say that, you can find this man guilty.

In line with *Stevens*, the word preparation was (mis?)construed as referring to the actions of Cunliffe, as opposed to referring to the substance which was the subject of the conviction which was upheld.

However, the most significant precursor to recent questions about the interpretation of paragraph 5 in relation to magic mushrooms was the case of *Hodder & another v Chief Constable of Avon & Somerset* [1988] Crim LR 261. Hodder was brought to trial following the discovery of 100 small, sealed, labelled bags, each containing one hundred magic mushrooms in a separate compartment. Whilst Hodder and his co-appellant knew that they had to prepare the mushrooms for use as psychedelics, they thought that it was wrong to boil or dry them. Their lawyers argued that the bagging and labelling of the mushrooms did not constitute preparation, as preparation must refer to the mushroom itself, not its packaging: further, they argued that *preservation* of the mushrooms by freezing was not akin to preparation. It was submitted that a distinction needed to be drawn between 'preparatory acts' and 'preparations'. What was in their clients' possession was 'a preparation

clients' activities did not fall within Schedule II Part I paragraph 5 of the Misuse of Drugs Act. Roch J summarised the arguments of Hodder's lawyers in the following manner:

For example, mere picking, submitted Mr Bromilow, would not make the mushrooms a preparation, nor would putting them into packets and labelling them make them a preparation. The mushrooms would still be mushrooms. The man in the street, submitted Mr Bromilow, would not refer to the mushrooms in the frozen compartment of the refrigerator as a preparation. He would simply call them frozen mushrooms.

However, at trial, the magistrates had been of the opinion that the mushrooms were counted out into packages each containing a certain weight, then labelled and subsequently frozen, that, using the correct meaning of the word 'preparation', the actions of the appellants were a preparation for future use'.

The Court of Appeal upheld the appellants' conviction but not the magistrates' logic. Roch J did not believe that freezing mushrooms was a preparation, and distinguished this case from both *Stevenson* where the mushrooms had been dried out, for the following reason: there was no evidence that freezing the mushrooms brought them to a state to be consumed. Indeed, the evidence was that they were consumed until they had been defrosted'. However, it will be remembered that Schedule II Part I paragraph 5 is not restricted to preparations, but extends to 'preparation or other product' (emphasis added). The Court applied the second limb of paragraph 5 to uphold the convictions:

[I]n my judgment these mushrooms picked, packed and frozen do come within the meaning of the word 'product' in the phrase 'or other product' in those words' ordinary meanings. The evidence indicates clearly that the appellants were producing packages of frozen mushrooms for themselves and others in much the same way that a supermarket produces packaged and frozen vegetables. The calling of such packages of frozen vegetables 'products' is an ordinary and natural use of language. Consequently on that ground I must refuse this appeal.

This shift away from the question of whether or not packaged mushrooms are 'a preparation' to whether or not they are 'a product' is of crucial importance. Further, the use of the supermarket analogy was highly pertinent when considering the thriving business of selling mushrooms that have recently been brought to the attention of the court. It should also be noted that there was no suggestion of concealment in *Hodder*: whilst the labels on the bags seemed to indicate that the mushrooms were destined for a number of people other than the appellants, the question of whether or not any money would change hands was not relied upon by the court. *Hodder* was also notable for the appellants questioning the validity of applying the logic of *Goodman* to mushrooms:

It may be that a distinction should be drawn between those instances in which a controlled drug occurs in the form of a plant or fungus and cannot be used to produce a controlled drug without being separated from the substance of which it is a constituent, and those cases in which a controlled drug is a natural plant or fungus and can be used to produce a controlled drug.

Given that *Hodder* was decided in 1990, it is perhaps surprising that mushroom retailers' businesses flourished (seemingly with approval) in spite of it. Whilst such enterprises were generally profitable, *Hodder* and, as a result, did not freeze their produce, it is clear that J's decision by no means centred around the fact that the produce was frozen: if packages of *frozen* mushrooms, whether produced or by individuals, are to be viewed as products, there is no reason why packages of *unfrozen* mushrooms would not be viewed in exactly the same way. Thus, on its broadest reading, *Hodder* brings within paragraph 5 anybody who packages up magic mushrooms.

In summary, the net result of the case law on magic mushrooms brought within paragraph 5 of the Misuse of Drugs Act 1971 - 'any preparation or other product' - had been to expand the scope of the Act increasingly broadly. However, the marked shift in policy towards an increasing focus on the 'product' aspect of paragraph 5, which brought individuals to go from running a legitimate, taxed business to being liable to a prison sentence, without any legislative change having occurred, could be seen to be in direct contradiction of a number of fundamental principles of criminal law, such as the non-retroactivity principle. The non-retroactivity principle is that a person should not be punished except in accordance with a previously declared law. The principle of maximum certainty was also at risk of being undermined.

[Maximum] certainty in defining offences embodied in the principle of legality, termed the 'fair warning' and 'void for vagueness' principles in United States law. All these principles may be seen as constituents of the principle of legality, and there is a close relationship between the principle of maximum certainty and the non-retroactivity principle. A vague law may in practice be applied retroactively, since no-one is quite sure whether it is within or outside the rule' (Ashworth A, 2003, p. 70).

Concerns such as these led to the collapse of the 2004 case of *Evans*. The defendants, who sold fresh magic mushrooms in Gloucester, were subjected to a police raid and prosecuted on the grounds that they had done nothing wrong: before starting to sell magic mushrooms they had contacted the Home Office to enquire about the law and, as a result of that communication, were of the opinion that magic mushrooms constituted neither a 'preparation' nor a 'product' and were beyond the reach of the Misuse of Drugs Act 1971. However, they were being brought on the grounds that the refrigerator in their shop, by the defendants may bring them within this legislation.

The defence applied to stay the indictment as an abuse of process. In hearing this application, Miss Recorder Miskin, J, considered the evidence from a number of witnesses running similar operations who had 'gone to considerable lengths to make sure that their operations were lawful before setting up their respective businesses selling magic mushrooms'. Following consideration of the relevant provisions of the Misuse of Drugs Act 1971 and the important case of *Goodchild*, J went on to consider the court's power in respect of abuse of process. She cited out in *DPP v Connolly* [1964] AC 1254, namely, that 'the court has an inherent power to protect its process from abuse ... which may include a power to safeguard an accused person from oppression and prejudice'. This is further defined in *Hui Chiming* [1992] 1 WLR 1014, where it was held that 'so unfair and wrong that the court should not allow a prosecution to proceed'.

with what, in all other respects, is a regular proceeding' establishing an abuse rests on the defendant and the scale of the balance of probabilities.

The defence's case for abuse of process rested on a number of points: firstly, the apparent acceptance of the executive in allowing the distribution of fresh mushrooms, particularly with regard to the fact that Customs had frequently inspected cartons of incoming mushrooms and allowed them through; secondly, the Home Office circular which dealt with the legality of selling fresh mushrooms. With reference to this circular, Miss Recorder Miskin noted that the later Circular did express reservation that refrigerating mushrooms constituted either a 'preparatory offence' or a criminal offence. However, on this point, she commented: 'I take the view that the circular which deals with the cooling and chilling point, is too fine a point on it. They are being ultra cautious and the language is very happy, because everybody is entitled to know what is and what is not a criminal offence'. Thirdly, Miss Recorder Miskin referred to the fact that VAT is a European tax, and the relevant case law - *Witzemann Hauptzollamt Munschen-Mitte* [1998] STC 708 - there is a powerful argument for saying that if a country imposes VAT on an activity then they can be taken by the citizen concerned to not be illegal. Reference was also made to Article 7 of the Convention on Human Rights, which includes the requirement that any offence should be clearly described by law.

In summation, Miss Recorder Miskin's concern was that the Home Office had been sending out conflicting messages to traders in magic mushrooms. She concluded: 'It seems to me, that following what Lord Diplock said in *Director of Public Prosecutions v. Morgan* that somebody should not be jailed on an ambiguity ... I now with this prosecution in this way is an abuse of the process of the law. Accordingly, I am going to order that this indictment be dismissed.'

THE NEW LAW ON MAGIC MUSHROOMS: FROM FALSE LOG

Two days after the collapse of this trial - notably without having been referred to the Advisory Council on the Misuse of Drugs - a clause was added to the Drugs Bill 2005, then before Parliament. This clause was passed through the House of Lords in the week referred to as the 'magic mushroom week', namely, the week following the announcement of the Government's intention that which all outstanding Bills must either be enacted or fail. There were a number of complaints that scrutiny of the measures concerning magic mushrooms was inadequate; however, the clause concerning magic mushrooms was passed by a majority vote, whereby the proposal to withdraw it was roundly defeated. For further information see: <<http://www.tdpf.org.uk>>).

Now enacted, section 21 of the Drugs Act 2005 amends section 21 of the Misuse of Drugs Act 1971 to include 'fungus (of any kind) containing the drug psilocin or an ester of psilocin': the effect is that the possession of such mushrooms themselves become a Class A drug. At the time of its enactment, section 21 raised concerns. For example, would those landowners who had magic mushrooms materialised every Autumn on their land be liable to destroy them be guilty of Class A drug possession? This would not satisfy the two elements of possession under section 21, namely, knowledge and control. Imposing a duty to destroy magic mushrooms occurring crops would create an onerous obligation, especially as the nature of fungi is that they spring up overnight and can cover vast areas. In order to avoid such a situation, on 18th July 2005 section 21 of the 2005 Act was brought into force by the (Commencement No. 1) Order 2005 - July 18th - so were the (Amendment) (No 2) Regulations 2005.

By inserting new provisions into the Misuse of Drugs Regulations provide exceptions from prosecution for the possession of magic mushrooms: for example, a person is not guilty of an offence of possession of magic mushrooms if the mushrooms are found naturally and uncultivated on their premises. The Regulations also provide from prosecution those who are caught in the possession of magic mushrooms that they have picked with the purpose of depositing them in the custody of a person lawfully entitled to take custody of them, or with the purpose of destroying the fungus as soon as practicable. That these exceptions will generate the need for prosecutions for magic mushroom possession seems unlikely.

However, the new legislation still leaves mushroom foraging a Class A drug prosecution: there are many mycologists in the UK who go hunting for (non-psychedelic) wild mushrooms to use as food. For example, *The Tasty Mushroom Partnership* (<http://www.tastymushroompartnership.co.uk>). It should be noted that the existence of section 28 of the Misuse of Drugs Act 1971, to that extent, against the conviction of 'innocent' fungi gatherers, provides that the accused shall be acquitted: 'if he proves that he was not believed nor suspected nor had reason to suspect that the product in question was a controlled drug'. Case law has developed in order to take advantage of this provision a defendant must show a balance of probabilities that they lacked the relevant knowledge or evidence rather than a legal burden that needs to be discharged. *Lambert* [2001] UKHL 37).

At the time of the enactment of section 21, Home Office stated that: 'By clarifying the law we are making it clear that the sale and supply of magic mushrooms whether fresh or dried benefit people likely to be at risk from the dangerous effects of magic mushrooms and will bring to an end profiteering in magic mushrooms as the growing numbers of vendors (Home Office, 2005)'. Leaving one of those profiteers has been the Government through the introduction of taxation on magic mushroom sales, the portrayal of this as a health hazard, nothing more than a clarification of the existing law is in fact what section 21 is actually much broader than this: under it users of fresh magic mushrooms, previously exempt from prosecution, become guilty of Class A drug possession.

Governmental allusion to the dangerous effects of magic mushrooms in justifying the new provision is also questionable: that magic mushrooms can be described as low risk in comparison to other Class A drugs, legal and non-legal, is evident. In answer to a written question of the National Statistician, Len Cook, provided information on deaths from drug-related poisoning in England and Wales over the decade, there has been one death recorded as stemming from magic mushrooms, compared to 5,737 from heroin/morphine/cocaine, including crack cocaine (House of Commons, Hansard, Answers for 31 Jan 2005 (pt 9), col. 953W). In addition, there would either have been as a result of behaviour following magic mushroom ingestion or from eating the wrong kind of magic mushroom, no documented cases of anyone dying from the toxic effects of magic mushrooms themselves. This is not surprising given that for an individual would have to consume their own body weight of magic mushrooms in order to risk a fatality: as long as magic mushrooms are properly identified, poisoning is not a problem (see further <http://www.erowid.org/plants/mushrooms/>).

To describe magic mushrooms as dangerous also conflicts with the Co-ordination Point and Monitoring New Drugs (CAMND) approach.

European Union's early warning system on drugs, making order to advise the best way of dealing with them: their study that has been made of magic mushrooms world-wide was recently presented to the Dutch Government, in the deciding whether or not to license the sale of magic mushrooms. The study, risk was assessed under four categories, with results: 'health of the individual' received a 1.8 score, 'deleterious to public health & society in general', a 2.9 score, 'low risk and security of the general public' was given a score of 1.8, and 'criminal involvement' earned a score of 1.8, namely magic mushrooms were only thought to pose a risk to those already suffering from mental health problems. As Steve Rolles of the independent foundation, Transform, commented, with reference to the fact that the majority of people who do not have mental health problems are banning peanut butter because a tiny minority of people are allergic (quoted in Honigsbaum M, 2005).

In carrying out their assessment, the CAM researchers took into account the fact that magic mushroom use tends to be incidental, exclusively recreational, with long term use being very rare; indeed, users quickly develop a fast occurring tolerance to magic mushrooms against frequent usage. Further, they commented upon their research of other cultures where people have used psilocybin mushrooms throughout their lives, without any symptoms of chronic illness. They concluded:

Looking at the above, the CAM recommends quality control measures on the product psilocybe mushrooms (i.e. standard cleanliness, labelling) and the trade in psilocybe mushrooms (responsible information supply) and by doing this will create a limited market for mushrooms. The result of the risk assessment gives no reason for a prohibition of psilocybe mushrooms (CAM, 2000).

Such an analysis would hardly seem to support magic mushrooms being a Class A drug, and, indeed, having reviewed CAM's evidence, the Government took the decision to license their sale. Due to the problems associated with use of magic mushrooms, the Government could similarly have taken this opportunity to experiment with other models. However, introducing such a system was always not accepted as the way forward in the context of our prohibition and was, indeed, dismissed as an option by the Government. Such an approach would 'set an undesirable precedent for other drugs' (Home Office, 2004, s. 4.1.2). It is submitted that the argument predicated upon false logic, given that fresh mushrooms were, at the time, an unregulated substance, not a Class A drug.

A more valid concern as regards licensing magic mushrooms is the question of whether or not adopting such an approach would breach British obligations under international law, most notably the Convention on Psychotropic Substances of 1971. This agreement places psilocin in Schedule I, the highest level of control; however, magic mushrooms themselves remain unclassified. At the time of formulating the Convention, it was felt that including wild organic materials would be problematic. The International Narcotics Control Board (INCB) is part of the United Nations (UN) and was established to ensure that countries abide by the Convention on Drugs and, in pursuance of this, to aid in the implementation of the Convention (<<http://www.incb.org>>). In correspondence with the Dutch Government at the time when they were making their decision as to whether it was legitimate to license magic mushrooms, the Secretariat of the

following statement:

As a matter of international law, no plants (nature containing psilocin and psilocybin) are at present controlled by the Convention on Psychotropic Substances of 1971. Consequently, preparations of these plants are not under international control and therefore, not subject to the provisions of Articles of the 1971 Convention (the letter quoting the correspondence can be found at: <<http://www.er>

Further, there has been no indication that the INCB are aware of the burgeoning trade in magic mushrooms through which this phenomenon did not gain a mention in their latest annual report suggesting that magic mushroom selling does not conflict with their obligations (INCB, 2004).

An alternative approach that the Government might have taken for magic mushrooms to be listed as a controlled drug, either as a Class B or a Class C drug, to better - though disproportionately - reflect the dangers involved in their use. Magic mushrooms a lower classification would have been consistent with the recent downgrading of cannabis from a Class B to a Class C drug, a move made out of recognition of the relatively low level of harm it presents to society (Misuse of Drugs Act 1971 (Modification) Order 2003). That each drug is placed in the most appropriate class is of particular importance given that, in the case of *R v Marti* (S) 364, it was clarified that, when sentencing, no distinction should be made by the courts between the different Class A drugs: apply *v Thomas* [2004] EWCA Crim 3092, the Court of Appeal (Criminal Appeal) held that those prosecuted for magic mushroom offences and heroin offences should be sentenced in the same way.

There are other problems with the enactment of section 5(1)(b) on the website of Psychedeli, previously one of the UK's leading magic mushroom suppliers: 'The only mushrooms you'll be able to buy in July are dried ones from your favourite Class A drugs dealer. The Government won't get any VAT on sales. If you're lucky, you might be offered some smack or a Crack cookie to go' (<<http://www.thepsychedeli.co.uk/>>). This points to the fact that any reduction in magic mushroom use resulting from a change in classification may lead to an increase in ingestion of other, perhaps more harmful, controlled substances: the fact that magic mushrooms were widely available during the Glastonbury Festival 2004 was thought to be a contributor to the fact that that year saw lower numbers of drug dealers and drug-related medical emergencies (see further <<http://www.tdpf.org.uk/>>).

A further possible consequence of focusing legal attention on magic mushrooms is that those consumers wary of breaching the law are more likely to turn to the alternative legal highs, such as salvia divinorum, commonly sold in the UK as 'magic mushrooms'. Indeed, this phenomenon - which has seen thousands of clubbers and festival-goers turning to the use of magic mushrooms in their former legal incarnation - is already being replicated by the introduction of a number of new products on the market as alternatives to their predecessors - because they actually appear to work better (INCB, 2004). These substances, and their effects, warrant close

Fly agaric mushrooms are the large red toadstools with

that are often depicted with elves sitting atop them in fact containing neither psilocybe nor psilocybin - and thus not a ban - they do contain a number of hallucinogenic constituents. Worryingly, the effect per volume consumed is highly variable and can react quite differently to the same dose; further, the chemical compounds per mushroom varies widely from region to region, from season to season, confusing the issue still more. Fly agaric mushrooms are extremely rare, fatal doses have been reported in America (see further: <http://en.wikipedia.org/wiki/Amanita_muscaria>).

Salvia divinorum is a member of the mint family and is a psychoactive plant. Grown by the Mazatec indigenous people in the mountains of southern Mexico, it has been used by them for entheogenic purposes for centuries. Its effects have been described as follows:

The salvia experience is quite different from that of other psychedelic drugs and may be overwhelming, even at a low dose and correct set and setting. Many salvia users, during out-of-body experiences, may suddenly 'merge' with their environment. Due to the significant time distortion typical of salvia, users may experience a lifetime as another person, or as an inanimate object, a wall or a piece of furniture. The experiences can be very pleasant, or very frightening and confusing (see further: <http://en.wikipedia.org/wiki/Salvia_divinorum>).

As of June 2002, Australia became the first country to ban psilocybin, followed by criminalisation in both Finland and Denmark.

The fact that these substances remain legal, and on sale through outlets that used to sell magic mushrooms, undermines the case for banning magic mushrooms. It is incongruous with broader British drug policy: indeed, the fact that magic mushrooms are legal ensures that our drug policy will never be anything other than an anomaly. Significantly, both fly agaric mushrooms and psilocybin mushrooms appear to be stronger and potentially more harmful than psilocybin mushrooms.

A final issue of note is that the newly imposed ban on psilocybin holds particular significance for those people who had been using psilocybin to self-medicate for the types of headaches associated with migraines. In the brain, such as cluster, episodic, chronic or migraine sufferers of these debilitating conditions believe that the psilocybin through taking magic mushrooms can not only prevent an attack, but can also terminate the headache cycle for a short time. The 'Clusterbusters' website, dedicated to disseminating information on this phenomenon, purports to be speaking up for 'those affected by the laws' and pleads with governmental and law enforcement agencies to consider the yearly loss of thousands of people through chronic pain' (see further: <<http://www.clusterbusters.com>>). Harvard Medical School are currently working towards obtaining FDA and Drug Administration approval to conduct a study into the use of magic mushrooms on headaches. Such research is supported by the International Association for Psychedelic Studies, an organisation based in the United States whose mission it is to sponsor scientific research into the use of psychedelics into approved prescription medicines (see further: <<http://www.maps.org>>).

The likelihood of similar such research being approved in the future has been lessened due to the fact that the activation of

accompanied by the Misuse of Drugs (Designation) (Amendment) Regulations 2004. This Order confirms legally that magic mushrooms, like psilocybin, are not designated as having no recognised medical use. Those who would beg to differ on this point must now make a choice between whether to carry on using magic mushrooms, thereby risking a maximum of seven years' imprisonment for Class A drug possession; or, if they prefer, to abstain, thus being denied what many of them have found to be an effective treatment they have come across. Those who prefer to abstain believe that they will suffer chronic pain as a consequence of their abstinence may be thrust upon many former users, regardless of whether they are willing to break the law: magic mushrooms are now harder to come by than prior to their prohibition. The market is now for individuals to go out foraging for them in the wild, exposing themselves not only to heightened risks of poisoning through their use of the wrong kind, but also to the full force of the criminal law.

CONCLUDING REMARKS

The recent backlash against magic mushrooms can be viewed as somewhat inevitable. The peculiarities of the law surrounding them developed largely as a result of their unique position of being found in the wild in this country: to expect the comparative leniency traditionally shown towards autumn mushroom pickers to be extended to those who were commercially dealing in magic mushrooms or psychedelic substances would have been naïve, given the current drug policies.

The question is how far the backlash will extend. Whilst magic mushrooms has attracted attention due to the highly visible enterprises that have flourished around them in recent years, the question of whether policing will be restricted to shutting down such enterprises, or whether a policy of zero tolerance will now be adopted, remains open. For users, including those who are using for spiritual enlightenment or the alleviation of chronic pain. If this latter scenario were to be adopted, the categorisation of magic mushrooms as a Class A drug is likely to have a significant impact. Whilst a lower classification would make little difference to the legal status of magic mushrooms - with their businesses becoming legally unregulated - it would have a significant impact upon users, though still leaving previously law-abiding commercial growers open to prosecution and potential imprisonment.

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