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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 psilocybin and psilocin, several of which grow wild in the UK; most notably, the Liberty Cap. When ingested, normally through either being eaten fresh, cooked, or brewed into a tea, such mushrooms can have psychedelic - 'mind manifesting' - effects, hence they are known as 'magic mushrooms'. As is usual with psychoactive substances, the exact effects will vary, being strongly dependent upon both set and setting, but they are likely to follow the following pattern:

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

MAGIC MUSHROOMS THROUGHOUT HISTORY: FROM SHAMANS TO 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 the divine within' (<<http://www.dictionary.com>>); thus they have formed a central aspect of shamanistic rituals, where they are taken to bring on a spiritual experience. The most ancient example of a culture where magic mushrooms seemed to hold significance comes from rock paintings of mushroom effigies found in the Sahara that date back to 7000 BC. Magic mushrooms also have a long and sacred history in native Central American cultures, which continues in to the millennium (see further: <http://en.wikipedia.org/wiki/Magic_mushrooms>).

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

As a result of this journalistic piece, a mass audience learned about the existence and effects of magic mushrooms: amongst them was a young Harvard professor named Timothy Leary (see further, Lee M and Shlain B, 2001, pp. 72-73). By 1961 Leary was working on a project entitled, 'A Study of Clinical Reactions to Psilocybin Administered in Supportive Environments': this involved Leary handing out doses of psilocybin to a broad range of people, including writers and philosophers such as Aldous Huxley, alongside prison inmates and students. The overwhelming response was positive, with most people reporting that the experience had given them some kind of insight, generally considering it to have been life-changing. Leary, believing that in magic mushrooms - and, later, LSD - he had found the cure to society's ills, went on to become one of the most influential people in the psychedelic movement (see further, Miles B, 2003). The use of magic mushrooms spread. Whilst some used them purely recreationally, for others, such as Huxley, they had a far greater, philosophical significance: 4

Like the culture by which it is conditioned, normal waking consciousness is at once our best friend and a most dangerous enemy ... To become fully human, man must learn to get out of his own way ... The universe in which a human being lives can be transfigured into a new creation. We have only to cut a hole in the fence and look around us with what the philosopher, Plotinus, describes as 'that other kind of seeing, which everyone has but few make use of' ... Through these new psychedelics, the subject's normal waking consciousness may be modified in many different ways ... At the extreme is achieving mystical consciousness. The world is now seen as an infinite diversity that is yet a unity, and the beholder experiences himself as being at one with the infinite Oneness (Huxley A, 1963).

In their book, *Psychedelic Drugs Reconsidered*, Grinspoon and Bakalar assert that the modern history of magic mushrooms is bound up with the hippie movement, and, thus, when the importance of that movement subsided, so did the cultural significance of magic mushrooms: 'as the hippie movement became assimilated, losing its distinctiveness but leaving many residues in our culture, psychedelic drugs moved to the periphery of public consciousness, but they continue to exert a similar subtle influence' (Grinspoon L and Bakalar JB, 1979). They contend that, whilst current levels of experimentation with psychedelic drugs do not actually differ markedly from those in the 1960s, fewer people now see them as providing an ethos for a way of life: 'the novelty is gone, their limitations and dangers are better understood and their virtues easier to put into perspective'. They posit that this change is epitomised by the difference in tone of the journal, the *Psychedelic Review*, edited by Leary between 1963 and 1971, and its current equivalent, *High Times*: 'Despite some half-hearted counterculture rhetoric, its casual tone is very different from the rage and exaltation of the drug-culture press of the 1960s, and its readers no more constitute a subculture than do readers of *Gourmet* or whiskey drinkers'. However, this is not to deny the existence of modern 'psychonauts', those who use magic mushrooms as an entheogenic tool with which to explore the inner realms of their minds. 5

MAGIC MUSHROOMS IN THE UNITED KINGDOM: FROM GREEN PARK 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 hookah whilst sat on a mushroom: 6

In a minute or two the Caterpillar took the hookah out of its mouth and yawned once or twice, and shook itself. Then it got down off the mushroom, and crawled away in the grass, merely remarking as it went, 'One side will make you grow taller, and the other side will make you grow shorter'. 'One side of *what?* The other side of *what?*' thought Alice to herself. 'Of the mushroom,' said the Caterpillar, just as if she had asked it aloud; and in another moment it was out of sight' (Carroll L, 1982, 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 depiction of the mushroom as having magical properties is by no means novel, continuing a long-standing association between mushrooms and magic in traditional British fairy-tales and folklore: 'Flying witches, powerful fairy rings and elves' predilection for sitting on red and white toadstools have all been ascribed to experiences with magic mushrooms' (Jeavans C, 2005). The first explicit documented use of magic mushrooms was in a *Medical and Physical Journal* of 1799: a man out gathering mushrooms for breakfast in London's Green Park accidentally picked some magic mushrooms, and subsequently fed them to his family. The doctor who treated them later described how the youngest child 'was attacked with fits of immoderate laughter, nor could the threats of his father or mother refrain him' (see further: < http://en.wikipedia.org/wiki/Magic_mushrooms>). 7

Yet, it is only in the past few decades, following the psychedelic influences of the 1960s and 1970s, that the trend of using magic mushrooms has developed in Britain. This recent history initially involved small numbers of people picking and eating magic mushrooms in the Autumn months when they spring up in fields and woodlands. However, in the past few years, numerous lucrative commercial businesses were established, based around the selling and distribution of magic mushrooms. These included stalls (both on markets and at festivals), shops, and Internet websites that provided home delivery; by 2005 the 8

Government estimated that more than 400 establishments in the United Kingdom were involved in selling these drugs (House of Commons Standing Committee F, 2005, col. 184). The majority of their stock was imported, largely from Holland, with HM Revenue and Customs estimating the imports for 2004 to be between 8 - 16,000 kilograms (House of Commons, Hansard Written Statement for 23 June 2005, col. 50WS). These developments have, unsurprisingly, led to an increase in use of magic mushrooms, with 337,000 estimated to have taken them in 2005/05 (Roe S, 2005, p. 13), compared with 179,000 in 2002/03 (Condon J and Smith N, 2003, p. 3): 'when the NME described 2004 as 'the third summer of love', it 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 governed by the Misuse of Drugs Act 1971 and was, until recently, unclear. In order to avoid being seen to be promoting their use as psychedelic drugs, sellers often displayed signs stating that their wares were being sold purely for 'ornamental' or 'research' purposes (Honigsbaum M, 2003). Similarly, websites carried provisos such as the following: 'Mushrooms are sold only as specimen samples for botanical studies only. You may not dry or prepare these mushrooms' (< www.everybodydoesit.com >). That this was a façade was rendered transparent when immediately followed by statements such as: 'This hallucinogen will give you a stoned, psychedelic, philosophical, happy and visual trip'. 9

The situation was further complicated by the conflicting interpretations of the law that emanated from Government. Many of those who sold magic mushrooms used to display in their windows a photocopy of a letter, written by Home Office official Ian Breadmore in 2003, that clearly stated: 'It is not illegal to sell or give away a freshly picked mushroom provided that it has not 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 *might* fall within the ambit of the Misuse of Drugs Act 1971 if they had been 'cultivated, transported to the marketplace, packaged, weighed and labelled' (as quoted in House of Commons, 2004, p. 39). The legality of this trade was further obfuscated by Customs and Excise ruling in the same year that a 17.5 per cent VAT be levied on magic mushrooms, this high rate of tax being due to the fact that they are classified as a drug rather than as a food as they are eaten for their 'stimulant' rather than for their 'nutritional' effect (Verkaik R, 2004). 10

One might assume that the imposition of VAT assured magic mushrooms' legal status; however, 2004 also saw a number of raids on businesses selling magic mushrooms (Verkaik R, 2004). One such raid led to a court case that looked set to clarify the law in this area but which, in the event, collapsed: *R v Mardle and Evans*, Tuesday 14th December, Gloucester Crown Court, unreported (transcript available via: < <http://www.mjreedsolicitors.co.uk> >). The collapse of this case led to a clause being inserted into the Drugs Bill 2005 that aimed to amend the Misuse of Drugs Act 1971. This paper now offers a detailed consideration of this grey area of the law as it stood under the original Misuse of Drugs Act 1971 provisions, including a critical analysis of the cases that were central to that Act's interpretation; this is followed by a discussion of the relevant amendment contained within the Drugs Act 2005 and its potential impact. 11

THE OLD LAW ON MAGIC MUSHROOMS: FROM 'PREPARATION' TO 'PRODUCT'

The Misuse of Drugs Act 1971, s. 2(1)(a), states that 'the expression 'controlled drugs' means any substance or product ... specified in Part I, II, or III of Schedule 2 to this Act'. Psilocin is listed in Schedule II, part I, paragraph 1, rendering it a Class A drug. Paragraph 3 of part I of the second schedule to the Act extends the application of the Act to: 'any ester or ether of a substance for the time being specified in paragraph 1 or 2 above'. Psilocybin, the psychedelic constituent found in magic mushrooms, is an ester of psilocin 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 is an offence for a person to have a controlled drug in his possession in contravention of subsection (1)'. 12

However, the issue of the legality of magic mushrooms used to be even more complicated than it at first appeared: in order to be considered to have psilocybin in one's possession, more was required than simply to be in possession of magic mushrooms. The explanation for this dated back to a House of Lords case concerning possession of cannabis: *DPP v Goodchild* [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 more potent derivative, cannabinal, contained within cannabis, was classified as a Class A drug. Mr Goodchild, having been found to be in possession of cannabis, was indicted 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 cannabinal within it. In quashing the appellant's conviction for the higher offence, Lord Diplock noted that: 13

[T]here are some listed drugs which, although they can be synthesised, also occur in the natural state in plants, fungi or animals, and these include some of the most used narcotic drugs. It would not in my view

be a natural use of language to say, for instance, that a person was in possession of morphine when what he really had was opium poppy-straw from which whatever morphine content there might be in it had not yet been separated.

There was a clear analogy here with magic mushrooms, and, indeed, Lord Diplock used them as an example: 'psilocin and psilocybin are to be found in a toadstool sometimes called the Mexican magic mushroom'. As a result of this decision, it was clear for a long time that the offence of unlawful possession of the Class A drug psilocybin was not established by mere proof of possession of magic mushrooms. To secure a conviction, the prosecution needed to prove that the activity fell within the scope of Schedule II, Part I, paragraph 5 of the Misuse of Drugs Act 1971: '**any preparation or other product** containing a substance or product for the time being specified in any of the paragraphs 1 to 4 above' (emphasis added). 14

The majority of cases involving magic mushrooms focused on interpretation of the meaning of the word 'preparation' in paragraph 5, with the leading authority in interpreting this being *R v Stevens* 15 April 1981, unreported. Stevens was caught by the police with a bag of dried, powdered magic mushrooms. The Court of Appeal addressed the question of whether or not the powdered substance found in the appellant's possession could be described as a 'preparation'. In reference to the word 'preparation' in the 1971 Act, Drake J said the following: 15

... it was intended that its ordinary and natural meaning should be given to it. What was needed in order that these mushrooms should be prepared is that they ceased to be in their natural growing state and had in some way been altered by the hand of man to make them into a condition in which they could be used.

It is submitted that the court were here answering the wrong question, and, as a result, misinterpreted paragraph 5. Paragraph 5 refers to 'any preparation': the word 'preparation' is clearly being used as a noun, relating to the substance in question, as opposed to as a verb, describing the activities of the individual concerned. Whilst it may seem a minor point, it is far easier to prove that mushrooms were 'prepared' for ingestion than to prove that, as a result, they became 'a preparation': namely, 'a specially made up substance, especially a medicine or food' (<[http: www.dictionary.com](http://www.dictionary.com)>). 16

The Court of Appeal case of *Cunliffe* [1986] Crim LR 547 illustrated that, applying *Stevens*, even the most minimal human intervention could be viewed as bringing the activity within the ambit of paragraph 5. In this instance, the police found a wooden casket containing some dried mushrooms in the appellant's bedroom. Cunliffe told the police that he had placed the mushrooms in a paper bag to dry out naturally; unlike in *Stevens*, the mushrooms had not been powdered. Cunliffe was convicted after the jury were given the following summing-up: 17

It is only if you can say to yourselves, 'We feel sure that what this man did was to arrange for the mushrooms to be dried out in his house to be available for use for drug taking'; only if you are satisfied that he did that act of preparation rather than it being just a natural ordinary occurrence on its own, only then can you 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 finished product. The conviction was upheld. 18

However, the most significant precursor to recent questions concerning the interpretation of paragraph 5 in relation to magic mushrooms was the case of *Hodder & another v Chief Constable of Avon & Somerset Constabulary* [1990] Crim LR 261. Hodder was brought to trial following the discovery of forty-four labelled bags, each containing one hundred magic mushrooms, in his freezer compartment. Whilst Hodder and his co-appellant knew that it was illegal to prepare the mushrooms for use as psychedelics, they thought that this meant that it was wrong to boil or dry them. Their lawyers argued that the bagging and labelling of the mushrooms did not constitute an act of preparation, as preparation must refer to the mushrooms and not mere 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 the question of whether what was in their clients' possession was 'a preparation', and that their clients' activities did not fall within Schedule II Part I paragraph 5 of the 1971 Act. Roch J summarised the arguments of Hodder's lawyer, Mr Bromilow, in the following manner: 19

For example, mere picking, submitted Mr Bromilow, would not make the mushrooms a preparation, nor would putting them in packets and labelling them make them a preparation. They would still be mushrooms. The man in the street, said Mr Bromilow, would not refer to the frozen mushrooms in the freezing 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 'because the mushrooms were counted out 20

into packages each containing one hundred, then labelled and subsequently frozen, that, using the ordinary and natural meaning of the word 'preparation', the actions of the appellants amounted to preparation for future use'.

The Court of Appeal upheld the appellants' conviction but, crucially, disagreed with the magistrates' logic. 21
Roch J did not believe that freezing amounted to preparation, and distinguished this case from both *Stevens* and *Cunliffe*, where the mushrooms had been dried out, for the following reason: 'There was no evidence that freezing the mushrooms brought them into a suitable state to be consumed. Indeed, the evidence was that they could not be used until they had been defrosted'. However, it will be remembered that Schedule II Part I paragraph 5 is not restricted to preparations, referring to both: 'any preparation **or other product**' (emphasis added). The Court relied on this *second* limb of paragraph 5 to uphold the convictions:

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

This shift away from the question of whether or not packages of magic mushrooms are 'a preparation' to 22
whether or not they are 'a product' was of crucial importance. Further, the use of the supermarket analogy in *Hodder* was highly pertinent when considering the thriving businesses in magic mushrooms that have recently been brought to the attention of the courts. It should also be noted that there was no suggestion of commercial dealing 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 themselves, the question of whether or not any money would change hands was not relied upon by the court. *Hodder* was also notable for the fact that it saw Roch J questioning the validity of applying the logic of *Goodman* to magic mushrooms:

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

Given that *Hodder* was decided in 1990, it is perhaps surprising that magic mushroom retailers' 23
businesses flourished (seemingly with Home Office approval) in spite of it. Whilst such enterprises were generally aware of *Hodder* and, as a result, did not freeze their produce, it is submitted that Roch J's decision by no means centred around the fact that the mushrooms were frozen: if packages of *frozen* mushrooms, whether produced by supermarkets or by individuals, are to be viewed as products, there is no rational reason why packages of *unfrozen* mushrooms would not be viewed by the courts in exactly the same way. Thus, on its broadest reading, *Hodder* would seem to bring within paragraph 5 anybody who packages up magic mushrooms.

In summary, the net result of the case law on magic mushrooms was that the phrase contained within the 24
Misuse of Drugs Act 1971 Schedule II Part I paragraph 5 - 'any preparation or other product' - had been construed increasingly broadly. However, the marked shift in policy occasioned by this increasing focus on the 'product' aspect of paragraph 5 was problematic: for individuals to go from running a legitimate, taxed business to risking a jail sentence, without any legislative change having occurred, was unacceptable. It could be seen to be in direct contradiction of a number of fundamental principles of criminal law, such as the non-retroactivity principle: 'the essence of the non-retroactivity principle is that a person should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question' (Ashworth A, 2003, p. 70). Further, the related principle of maximum certainty was also at risk of being violated:

[Maximum] certainty in defining offences embodies what are 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 operate retroactively, since no-one is quite sure whether conduct is within or outside the rule' (Ashworth A, 2003, p. 75).

Concerns such as these led to the collapse of the 2004 case *R v Mardle and Evans*. The defendants, who 25
sold fresh magic mushrooms from a shop in Gloucester, were subjected to a police raid and prosecuted. They maintained that they had done nothing wrong: before starting to sell magic mushrooms they had

contacted the Home Office to enquire about their legal status, and, as a result of that communication, were of the opinion that fresh magic mushrooms constituted neither a 'preparation' nor a 'product' and were thus beyond the reach of the Misuse of Drugs Act 1971. However, the prosecution was being brought on the grounds that the refrigeration of the mushrooms by the defendants may bring them within this legislation.

The defence applied to stay the indictment as an abuse of the process of the court. In hearing this application, Miss Recorder Miskin, presiding, considered evidence from a number of witnesses running similar operations, all of whom had 'gone to considerable lengths to make sure that they were not acting unlawfully before setting up their respective businesses concerning magic mushrooms'. Following consideration of the relevant provisions of the Misuse of Drugs Act 1971 and the important case of *Goodchild*, Miss Recorder Miskin went on to consider the court's power in respect of abuse of process, as set out in *DPP v Connolly* [1964] AC 1254, namely, that 'the court has a general and inherent power to protect its process from abuse ... this power must include a power to safeguard an accused person from oppression or prejudice'. This is further defined in *Hui Chiming* [1992] AC 34 as 'something so unfair and wrong that the court should not allow a prosecutor to proceed with what, in all other respects, is a regular proceeding'. The burden of establishing an abuse rests on the defendant and the standard of proof is the balance of probabilities. 26

The defence's case for abuse of process rested on a number of criteria: firstly, the apparent acceptance of the executive in allowing the importation and distribution of fresh mushrooms, particularly with regard to the fact that Customs had frequently inspected cartons of incoming imported mushrooms and allowed them through; secondly, the Home Office circular, that stated the legality of selling fresh mushrooms. With reference to this, Miss Recorder Miskin noted that the later Circular did express reservations about whether refrigerating mushrooms constituted either a 'preparation' or a 'product'. However, on this point, she commented: 'I take the view, the Home Office circular which deals with the cooling and chilling point, is a fudge, to put not too fine a point on it. They are being ultra cautious maybe, but I do not think the language is very happy, because everybody is entitled to know exactly what is and what is not a criminal offence'. Thirdly, Miss Recorder Miskin made reference to the fact that VAT is a European tax, and that, following European case law - *Witzemann Hauptzollampt Munschen-Mitte* [1990] European Court Reports 1/1477; *Fischer* [1998] STC 708 - there is a powerful and persuasive argument for saying that if a country imposes VAT on an imported product then they can be taken by the citizen concerned to not consider that product to be illegal. Reference was also made to Article 7 of the European Convention on Human Rights, which includes the requirement that an offence should be clearly described by law. 27

In summation, Miss Recorder Miskin's concern was that the executive had been sending out conflicting messages to traders in magic mushrooms. She concluded: 'It seems to me, that following what Lord Diplock said in *Goodchild* that somebody should not be jailed on an ambiguity ... I think that proceeding now with this prosecution in this way is an abuse of the process of this court. Accordingly, I am going to order that this indictment be stayed'. 28

THE NEW LAW ON MAGIC MUSHROOMS: FROM FALSE LOGIC TO SIDE EFFECTS

Two days after the collapse of this trial - notably without the matter having been referred to the Advisory Council on the Misuse of Drugs - clause 21 was added to the Drugs Bill 2005, then before Parliament. The Drugs Bill passed through the House of Lords in the week referred to as the 'Wash Up'; namely, the week following the announcement of the General Election in which all outstanding Bills must either be enacted or fail. As a result, there have been complaints that scrutiny of the measures contained within it was inadequate; however, the clause concerning magic mushrooms was put to a vote, whereby the proposal to withdraw it was roundly defeated (see further: <<http://www.tdpf.org.uk>>). 29

Now enacted, section 21 of the Drugs Act 2005 amends Part 1 of Schedule II to the Misuse of Drugs Act 1971 to include 'fungus (of any kind) that contains the drug psilocin or an ester of psilocin': the effect is that magic mushrooms themselves become a Class A drug. At the time of its enactment, the reach of section 21 raised concerns. For example, would those landowners who knew that magic mushrooms materialised every Autumn on their property yet failed to destroy them be guilty of Class A drug possession? The aforesaid scenario satisfies the two elements of possession under section 5(2) of the 1971 Act: namely, knowledge and control. Imposing a duty to destroy these naturally occurring crops would create an onerous obligation, especially given that the nature of fungi is that they spring up over night and can be spread sparsely over vast areas. In order to avoid such a situation, on the same day that section 21 of the 2005 Act was brought into force by the Drugs Act 2005 (Commencement No. 1) Order 2005 - July 18th - so were the Misuse of Drugs (Amendment) (No 2) Regulations 2005. 30

By inserting new provisions into the Misuse of Drugs Regulations 2001, these Regulations provide exceptions from prosecution for the offence of possession of magic mushrooms: for example, a person will not be committing an offence of possession of magic mushrooms if the mushrooms are growing naturally 31

and uncultivated on their premises. The Regulations also exempt from prosecution those who are caught in the possession of psilocybin mushrooms that they have picked with the purpose of delivering into the custody of a person lawfully entitled to take custody of them, such as the police, or with the purpose of destroying the fungus as soon as is reasonably practicable. That these exceptions will generate the next swathe of defences to prosecutions for magic mushroom possession seems highly predictable.

However, the new legislation still leaves mushroom foragers at risk of a Class A drug prosecution: there are many mycologists in the United Kingdom who go hunting for (non-psychedelic) wild mushrooms to use in cooking (see, 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 mitigates, to a certain extent, against the conviction of 'innocent' fungi gatherers. Section 28(3)(b)(i) provides that the accused shall be acquitted: 'if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug'. Case law has confirmed that in order to take advantage of this provision a defendant need only prove on the balance of probabilities that they lacked the relevant knowledge: it is an evidential rather than a legal burden that needs to be discharged (*R v Lambert* [2001] UKHL 37). 32

At the time of the enactment of section 21, Home Office Minister Paul Goggins stated that: 'By clarifying the law we are making it clear that we will not allow the sale and supply of magic mushrooms whether fresh or dried. This will benefit people likely to be at risk from the dangerous effects of magic mushrooms and will bring to an end profiteering in magic mushrooms by growing numbers of vendors (Home Office, 2005)'. Leaving aside the fact that one of those profiteers has been the Government themselves, through taxation on magic mushroom sales, the portrayal of this development as nothing more than a clarification of the existing law is inaccurate. The scope of section 21 is actually much broader than this: under its ambit, recreational users of fresh magic mushrooms, previously exempt from any liability whatsoever, become guilty of Class A drug possession. 33

Governmental allusion to the dangerous effects of magic mushrooms in justifying the new provision is also questionable: that consumption of magic mushrooms can be described as low risk in comparison with other drugs, both legal and non-legal, is evident. In answer to a written question in parliament, the National Statistician, Len Cook, provided information on the number of deaths from drug-related poisoning in England and Wales: in the past decade, there has been one death recorded as stemming from ingestion of magic mushrooms, compared to 5,737 from heroin/morphine and 582 from cocaine, including crack cocaine (House of Commons, Hansard Written Answers for 31 Jan 2005 (pt 9), col. 953W). In addition, this single death would either have been as a result of behaviour following from magic mushroom ingestion or from eating the wrong kind of mushroom, as there are no documented cases of anyone dying from the toxic effects of magic mushrooms themselves. This is not surprising given that it is estimated that an individual would have to consume their own body weight in fresh 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/>>). 34

To describe magic mushrooms as dangerous also conflicts with the findings of the Co-ordination Point and Monitoring New Drugs (CAM). CAM is part of the European Union's early warning system on drugs, making risk assessments in order to advise the best way of dealing with them: theirs is the only in-depth study that has been made of magic mushrooms world-wide (CAM, 2000). It was recently presented to the Dutch Government, in the prelude to their deciding whether or not to license the sale of magic mushrooms in Holland. In the study, risk was assessed under four categories, with the following results: 'health of the individual' received a 1.8 score, defined as no risk; 'risk to public health & society in general', a 2.9 score, low risk; 'risk to public order and security of the general public' was given a score of 2.5, again, low risk; and 'criminal involvement' earned a score of 1.8, namely, no risk. Magic mushrooms were only thought to pose a risk to those already suffering from mental health problems. As Steve Rolles of the independent drug policy foundation, Transform, commented, with reference to this: 'But what about the majority of people who do not have mental health problems? It's like banning peanut butter because a tiny minority of people are allergic to it' (as quoted in Honigsbaum M, 2005). 35

In carrying out their assessment, the CAM researchers took into account the fact that magic mushroom use tends to be incidental, experimental and recreational, with long term use being very rare; indeed, the human body develops a fast occurring tolerance to magic mushrooms, which fact mitigates against frequent usage. Further, they commented upon the existence of other cultures where people have used psilocybin mushrooms fairly regularly throughout their lives, without any symptoms of chronic toxicity. They concluded: 36

Looking at the above, the CAM recommends quality restrictions on the product psilocybe mushrooms (i.e. standardisation, cleanliness, labelling) and the trade in psilocybe mushrooms (i.e. responsible information supply) and by doing this, creating 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' status as a Class A drug, and, indeed, 37
having reviewed CAM's evidence, the Dutch Government took the decision to license their sale. Due to the
lack of problems associated with use of magic mushrooms, the British Government could similarly have
taken this opportunity to experiment with legal licensing models. However, introducing such a system was
always unlikely to be accepted as the way forward in the context of our prohibitionist drug policy, and
was, indeed, dismissed as an option by the Government who believed such an approach would 'set an
undesirable precedent for other Class A drugs' (Home Office, 2004, s. 4.1.2). It is submitted that this was
an argument predicated upon false logic, given that fresh magic mushrooms were, at the time, an
unregulated substance, not a Class A Drug.

A more valid concern as regards licensing magic mushrooms would have been the question of whether or 38
not adopting such an approach would conflict with British obligations under international law, most
notably the United Nations 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 various UN Conventions on Drugs and, in
pursuance of this, to aid in their interpretation (<<http://www.incb.org>>). In correspondence with the
Dutch Government, at the time when they were making their decision as to whether or not it was
legitimate to license magic mushrooms, the Secretariat of the INCB made the following statement:

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

Further, there has been no indication that the INCB are at all concerned about the burgeoning trade in 39
magic mushrooms throughout Europe: the phenomenon did not gain a mention in their latest annual
report, further suggesting that magic mushroom selling does not conflict with Convention obligations
(INCB, 2004).

An alternative approach that the Government might have taken would have been for magic mushrooms to 40
be listed as a controlled drug, but classified either as a Class B or a Class C drug, to better - though it is
submitted, still disproportionately - reflect the dangers involved in their ingestion. Giving magic
mushrooms a lower classification would have been more 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 that drug presents to society (Misuse of Drugs Act 1971 (Modification) (No. 2) Order 2003). That
each drug is placed in the most appropriate category is of particular importance given that, in the case of
R v Martinez (1984) 6 Cr App R (S) 364, it was clarified that, when sentencing, no distinction should be
drawn by the courts between the different Class A drugs: applying this principle in *R v Thomas* [2004]
EWCA Crim 3092, the Court of Appeal confirmed that those prosecuted for magic mushroom offences and
heroin offences could expect to be sentenced in the same way.

There are other problems with the enactment of section 21. As is now stated on the website of Psychedeli, 41
previously one of the UK's largest suppliers of magic mushrooms: 'The only mushrooms you'll be able to
get from the 18th July are dried ones from your favourite Class A drugs dealer - and the Government
won't get any VAT on sales. If you're lucky, you might also be offered some smack or a Crack cookie to
go' (<<http://www.thepsychedeli.co.uk/>>). This points to the very real concern that any reduction in magic
mushroom use resulting from this legislative change may lead to an increase in ingestion of other,
potentially more harmful, controlled substances: the fact that magic mushrooms were widely available
during the Glastonbury Festival 2004 was thought to be a strong contributor to the fact that that year saw
lower numbers of Ecstasy users, dealers and drug-related medical emergencies (see further:
<<http://www.tdpf.org.uk/>>).

A further possible consequence of focusing legal attention on the use of magic mushrooms is that those 42
consumers wary of breaking the law may be more likely to turn to the alternative legal highs, such as fly
agaric mushrooms and salvia divinorum, commonly sold in the outlets that previously sold magic
mushrooms. Indeed, this phenomenon - which encompassed magic mushrooms in their former legal
incarnation - is already underway: 'Tens of thousands of clubbers and festival-goers are turning their
backs on traditional narcotics and switching instead to so-called 'legal highs' following the introduction of
a number of new products on the market that outshine their predecessors - because they actually appear
to work' (Thompson T, 2004). These substances, and their effects, warrant closer examination.

Fly agaric mushrooms are the large red toadstools with white spots on them that are often depicted with elves sitting atop them in fairy-tales. Whilst containing neither psilocybe nor psilocybin - and thus not affected by the new ban - they do contain a number of hallucinogenic constituents. Somewhat worryingly, the effect per volume consumed is highly variable and individuals can react quite differently to the same dose; further, the amount and ratio of chemical compounds per mushroom varies widely from region to region, and from season to season, confusing the issue still more. Whilst deaths from fly agaric mushrooms are extremely rare, fatal doses have occurred in North America (see further: <http://en.wikipedia.org/wiki/Amanita_muscaria>). 43

Salvia divinorum is a member of the mint family and is another example of a psychoactive plant. Grown by the Mazatec indigenous people of the Oaxaca mountains of southern Mexico, it has been used by their shamans for entheogenic purposes for centuries. Its effects have been described as follows: 44

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

As of June 2002, Australia became the first country to ban salvia divinorum, followed by criminalisation in both Finland and Denmark. 45

The fact that these substances remain legal, and on sale from many of the outlets that used to sell magic mushrooms, undermines the argument that banning magic mushrooms was necessary due to their open sale being incongruous with broader British drug policy: indeed, the legal sale of alcohol ensures that our drug policy will never be anything other than riddled with anomalies. Significantly, both fly agaric mushrooms and salvia divinorum would appear to be stronger and potentially more harmful substances than psilocybin mushrooms. 46

A final issue of note is that the newly imposed ban on fresh magic mushrooms holds particular significance for those people who had been using them to self-medicate for the types of headaches associated with serotonin activities in the brain, such as cluster, episodic, chronic or migraine headaches. Some sufferers of these debilitating conditions believe that the ingestion of psilocybin through taking magic mushrooms can not only abort a single attack, but can also terminate the headache cycle for an extended period of time. The 'Clusterbusters' website, dedicated to disseminating information on this phenomenon, purports to be speaking up for 'those lost in broad based laws' and pleads with governmental and law enforcement agencies 'to consider the yearly loss of thousands of people through suicide, due to chronic pain' (see further: <<http://www.clusterbusters.org>>). Researchers at Harvard Medical School are currently working towards obtaining official Food and Drug Administration approval to conduct a study into the impact of magic mushrooms on headaches. Such research is supported by the Multidisciplinary Association for Psychedelic Studies, an organisation based in the United States whose mission it is to sponsor scientific research designed to develop psychedelics into approved prescription medicines (see further: <<http://www.maps.org>>). 47

The likelihood of similar such research being approved in the United Kingdom has been lessened due to the fact that the activation of section 21 was accompanied by the Misuse of Drugs (Designation) (Amendment Order) 2005. This Order confirms legally that magic mushrooms, like psilocin, are designated as having no recognised medical use. Those headache sufferers who would beg to differ on this point must now make an unenviable choice: whether to carry on using magic mushrooms, thereby risking up to a potential seven years' imprisonment for Class A drug possession; or to stop using them, thus being denied what many of them have found to be the most effective treatment they have come across. Those who make the latter choice believe that they will suffer chronic pain as a consequence. Further, abstinence may be thrust upon many former users, regardless of whether or not they are willing to break the law: magic mushrooms are now considerably harder to come by than prior to their prohibition. The most viable option is now for individuals to go out foraging for them in the wild, exposing themselves not only to heightened risks of poisoning through picking the wrong kind, but also to the full force of the criminal law. 48

CONCLUDING REMARKS

The recent backlash against magic mushrooms can be viewed as having been somewhat inevitable. The peculiarities of the law surrounding them developed largely as a result of their unique position of growing naturally in the wild in this country: to expect the comparative leniency that has traditionally been shown towards autumn mushroom pickers to continue to be extended to those who were commercially dealing in (largely imported) psychedelic substances would have been naïve, given the nation's broader drug 49

policies.

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

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