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REGINA v. KUNDEUS

THE SAGA OF TWO SHIPS PASSING IN THE NIGHT

By JOSEPH M. WEILER

A. INTRODUCTION

There is a general principle of our morality and our criminal law that individuals should be judged on the facts as they believed them to be. That principle has never secured the wholehearted support of our judges. Yet the controversy that arose in the development of the common law after the Victorian judgment in Regina v. Prince\(^1\) is still brewing. Indeed, the reluctance of our judiciary to adhere to the general principle is easily discernible in the recent decisions of the House of Lords in D.P.P. v. Morgan\(^2\) and the Supreme Court of Canada in Regina v. Kundeus.\(^3\)

It is hardly necessary to remind a legal audience of the facts of Prince's case. Suffice it to say that William Prince abducted Annie Phillips, the girl of 13 who looked 18. When Prince was arrested, he said that he would not have taken Annie away with him had he not believed her when she told him she was 18. The jury found on the evidence that his belief that she was 18 was reasonable. The trial judge referred to the Court for Crown Cases Reserved, the question of whether Prince's belief constituted a defence to the charge. The Court decided by a majority of 15 to 1 that the defence of mistake of fact was not available. Prince was convicted and sentenced to three months imprisonment with hard labour.

\(^1\) (1875), L.R. 2 C.C.R. 154.
\(^2\) [1975] 2 W.L.R. 913.
\(^3\) [1976] 32 C.R.N.S. 129.
A century after *Prince's* case, this debate over the status of the so-called "defence of mistake of fact" has yet to subside. Initially the courts in the United Kingdom and Canada seemed to retreat in unison from the restricted view of this defence taken by the 15 majority judges in *Prince's* case. However, the recent decisions in *Morgan* and *Kundeus* would appear to suggest a divergence in the manner in which the highest tribunals of these two countries will treat instances of mistake of fact.

In *Morgan*, the House of Lords decided that on a rape charge the Crown must prove that the accused intended to have intercourse without the consent of the victim. In that enquiry, an honest belief that the victim was giving consent, whether based on reasonable grounds or not, would negate the requisite *mens rea* for that offence.

In *Kundeus*, one reading of the majority's decision is that an honest belief on the part of the accused that he was selling mescaline was irrelevant to the charge of trafficking in L.S.D. The question of the reasonableness of the accused's belief was not an issue in *Kundeus*. The approach taken and the result reached by the majority is similar to that which our courts had been avoiding in the centenary marking the aftermath of *Prince*. For these reasons, *Kundeus* deserves a detailed analysis, since on its face it suggests that a new direction is being adopted by our highest judicial body on the subject of *mens rea* and mistake of fact. In particular, the *Kundeus* decision illustrates that the Supreme Court is sanctioning the withdrawal from the position which it adopted in *Regina v. Beaver*, a retreat which had been augured in decisions of the British Columbia and Ontario Courts of Appeal. Regretfully, while *Kundeus* suggests a new direction in the Supreme Court's treatment of *mens rea*, the majority decision fails to support its conclusion with any reason which might explain why such a change in policy is warranted. We are left to speculate in this regard and to offer our own explanation.

The *Kundeus* case thus is one of the more significant of the Supreme Court's recent decisions for two reasons: first, the manner in which the majority decision dealt with the case is illustrative of its perception of its role as our court of last resort; and second, the dissenting opinion is interesting.

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4 A more detailed analysis of *Prince's* case is found in Cross, "Centenary Reflections" in *Prince's* Case, 91 Law Quarterly Review 540.


both as an example of a different style of decision-making than that displayed by the majority and also for its analysis of the meaning of *mens rea* in the area of mistake of fact.

**B. HOW DID KUNDEUS GET TO THE SUPREME COURT OF CANADA?**

Richard Kundeus was charged with unlawfully trafficking in L.S.D. The only evidence presented at trial was through the Crown's witnesses. A police constable testified that he and Kundeus were sitting at a local pub and that Kundeus was calling out 'speed, acid, M.D.A. or hash' to passersby. The police constable, who was at that time acting undercover, asked for hash or acid but the accused replied that he was all sold out. The accused then offered to sell the police constable some mescaline at two dollars. The latter asked for two hits and gave the accused four dollars. Kundeus then left the room and returned five minutes later and handed the policeman two capsules. These capsules, when analysed, proved to contain L.S.D. not mescaline.

Kundeus elected not to adduce any evidence in defence. After having stated that the only issue was *mens rea*, the trial judge concluded that "the prosecution has proved beyond a reasonable doubt, the guilt of the accused." Kundeus then appealed the conviction on the ground that the trial judge had misdirected himself in law in convicting Kundeus of trafficking in L.S.D., if he was satisfied that the accused did not know that the substance was in fact L.S.D. The Court of Appeal disagreed with the conclusion reached by the trial judge, refused to follow the reasoning of the Ontario Court of Appeal in *Regina v. Custeau* and set aside the conviction.

Mr. Justice McFarlane, J.A., writing for the Court interpreted the reasons for judgment of the trial judge as finding that although Kundeus did in fact sell L.S.D., he thought he was selling and intended to sell mescaline. Moreover, the evidence disclosed that the undercover police officer also thought that he was purchasing mescaline. The issue on appeal then, was whether on these facts the necessary *mens rea* had been proved. In a brief decision, with no discussion as to the meaning or role of *mens rea*, the Court of Appeal allowed Kundeus' appeal and directed an acquittal. The reason offered for this conclusion was that "there is an essential difference between trafficking in a restricted or controlled drug (L.S.D.) and selling a drug (mescaline)." Why? Because:

> [t]rafficking in a restricted or controlled drugs is prohibited by statute as conduct harmful in itself, whereas selling mescaline is an offence only in the absence of a written or verbal prescription. This essential difference is emphasized by the dif-

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8 *Supra*, note 3 at 132.
ferent penalties which are applicable and the special definition of 'trafficking' in ss. 33 and 40 of the Act as opposed to the use of the word 'sell' in the regulation.\textsuperscript{10}

Since the decision of the Court of Appeal was unanimous, it was necessary for the Crown to obtain leave to appeal to the Supreme Court. Significantly, neither the grounds upon which leave was requested, nor granted are mentioned in the majority's decision. We must look deep into the dissenting opinion of Chief Justice Laskin to find any indication as to the basis upon which this case came before the Supreme Court. Yet it is clear from the appeal factums that the only issue upon which leave to appeal was granted, and to which the factums were directed, concerned the relevance of the accused's mistake of fact to the charge of trafficking in L.S.D. In short, the Court was asked to decide a substantive question as to the meaning and role of mens rea. But the only indication from the Court that this was the sole question to be decided was an oblique reference on the dissenting opinion to the arguments presented to the Court by the Appellate Crown.

Chief Justice Laskin, analysing the Crown's arguments, describes the Crown's position as contending that while proof of the \textit{actus reus} involved would not be enough to support a conviction, if the Crown could also prove the accused had a general intention to traffic in drugs, its case against the accused for trafficking in L.S.D. would have been made out. To be more specific, in order for Kundeus to meet the case against him, he could only rely on a mistake of fact based on reasonable grounds that had the situation been as he supposed, he would not have attracted culpability for any drug offence.\textsuperscript{11}

It is important to note the grounds of appeal and the arguments presented by counsel to the Supreme Court, because the majority judgment offers two distinct \textit{ratio decidenda} for its disposition of the appeal. One reading of Mr. Justice de Grandpré's decision would suggest that this judgment is based solely on grounds of evidence or proof. An alternative analysis of the majority decision is that it is based on a matter of substantive law, \textit{i.e.}, the legal

\textsuperscript{10} Supra, note 3 at 134.

Section C. 01.041 of the regulations provides that no person shall sell a substance containing a drug listed or described in Sched. F. to the regulations without a written or verbal prescription. By virtue of s. 26 of the Act the penalty for violation of the regulations on conviction upon indictment is a fine not exceeding $5,000 or imprisonment not exceeding three years or both.

Section 42 of the Act provides that the penalty for trafficking in a restricted drug upon conviction or indictment is imprisonment for ten years. Section 34 provides the same penalty for trafficking in a controlled drug on similar conviction.

The Court of Appeal never directly stated the operative reasons for its eventual disposition of the appeal. However, MacFarlane, J.A., disagreed with the decision of the Ontario Court of Appeal in \textit{Custeau}, which he described as being decided "per incuriam" since the court seemed to base its decision on the premise that mescaline is a controlled drug and that the maximum penalty for trafficking in that substance is the same as that for selling L.S.D. By inference we can conclude that the learned judge also disagreed with the conclusion reached in \textit{Custeau}, \textit{i.e.}, that it was no defence to a charge of trafficking in L.S.D. that the accused believed he was selling mescaline. Stated in a positive sense, the British Columbia Court of Appeal must be interpreted as holding that the accused mistake of fact on the situation described in \textit{Custeau} and \textit{Kundeus} would have afforded him a defence to the charge.

\textsuperscript{11} Id. at 143.
relevance of Kundeus' mistake of fact. This latter issue was the sole focus of
the trial judge, the Court of Appeal and the dissenting opinion of Chief Justice
Laskin.

It is unfortunate that the Supreme Court of Canada's most important
statement in almost two decades on the issue of mistake of fact and criminal
guilt is couched in a decision that affords two separate interpretations. It is
even more disturbing that the first rendition of what the majority meant in its
decision, i.e., whether Kundeus did or did not in fact entertain a mistaken
belief as to the character of the drug he was purporting to sell to the under-
cover police officer, was not an issue in the lower courts nor a ground of appeal
to the Supreme Court. On the contrary, the statement of facts in the factum
filed by counsel in the Supreme Court of Canada, factums which had been
agreed to by both counsel, specifically referred to Kundeus as having an honest
belief that he was selling mescaline. The key issue addressed in the factums
was the relevance of such mistake of fact to the charge of trafficking in L.S.D.
Yet, de Grandpré, J.'s opinion brings into question the facts upon which the
appeal was based.

C. A LESSON IN OBFUSCATION — WHAT DID THEY DECIDE?

On its face the majority decision does concentrate on how the charge
should be proved rather than what legally must be proven in order to succeed
in a prosecution for the offence. Yet it is not so surprising that the majority
decision can be given these separate interpretations. Presumably, when counsel
for the appellant and respondent appeared to argue this case, they were pre-
pared to argue the substantive issue only. We can only surmise that counsel
could not have been prepared to argue the evidentiary issue, and the result
was an obscure opinion that gives rise to more problems than it solves, and
leaves the crucial substantive issue to be treated as an apparent afterthought.

The majority's decision begins with a reference to the facts in Beaver v.
The Queen,\(^1\) and then goes on to say that:

> [o]ur facts are different. They are very simple and uncontradicted. One reading of
them is that Kundeus was offering L.S.D. for sale, actually sold L.S.D. and re-
ceived payment therefor. On that reading it is obvious that the conviction should
have been affirmed.\(^2\)

It is unclear why de Grandpré, J. cited this version of the facts unless
he is accepting them as his own view. Later in his opinion,\(^3\) he mentions the
Supreme Court's decision in Regina v. King,\(^4\) in particular the obiter remarks
of Mr. Justice Ritchie concerning the charge of impaired driving:

> When it has been proved that a driver was driving a motor vehicle while his ability
to do so was impaired by alcohol or a drug, then a rebuttable presumption arises
that his condition was voluntarily induced and that he is guilty of the offence
created by s. 223 and must be convicted unless other evidence is adduced which

\(^{12}\) Beaver v. The Queen, supra, note 5.
\(^{13}\) Supra, note 3 at 137.
\(^{14}\) Id. at 138-39.
\(^{15}\) 38 C.R. 52; [1952] S.C.R. 746; 133 C.C.C. 1; 35 D.L.R. (2d) 386.
raises a reasonable doubt as to whether he was, through no fault of his own disabled when he undertook to drive and drove from being able to appreciate and know that he was or might become impaired.  

After citing (approvingly) this obiter dicta of Mr. Justice Ritchie as to the rebuttable presumption that an impaired state is voluntarily induced for purposes of s. 223 (now s. 234), de Grandpré, J. goes on to suggest that “in the case at bar, such a rebuttable presumption has arisen.” Unfortunately, he does not tell us whether he is referring to a rebuttable presumption that Kundeus was voluntarily selling L.S.D. or whether the rebuttable presumption in the case at bar refers to the knowledge of the character of the drug which Kundeus was selling. If the learned Justice is referring to the former, then his remarks are totally superfluous, since there was no suggestion that Kundeus through no fault of his own was impaired by a drug which rendered his conduct involuntary. If de Grandpré, J. is referring to a rebuttable presumption that Kundeus must be taken to have intended to sell L.S.D., then it hardly seems appropriate to cite King as authority for this proposition, for no such issue arose in that case.

Whatever the majority was referring to in its reference to “such a rebuttable presumption”, they were not satisfied that the accused had met the evidentiary burden which it placed upon him. On the contrary, de Grandpré, J. concludes that since no evidence was tendered by the accused, it “was not possible to find that he had an honest belief amounting to a non-existence of mens rea and the Court of Appeal was in error in its conclusion.”

What the majority seems to be saying in these passages is that the accused as a matter of law must be deemed to have knowledge of the character substance which he is selling. Moreover, if the accused does not call evidence, it is impossible to rebut the presumption of knowledge. Further, the lower courts were in error for having relied on the evidence of the undercover police officer to reach the conclusion that Kundeus was labouring under a mistaken belief as to the nature of the drug he was selling.

The surprising feature of this portion of the majority’s decision is that it does not seem to have appreciated how substantial a change in the law concerning the burden of proof in drug offenses that it was making in this brief paragraph. No compelling reasons of logic or social policy are offered to justify the change which these statements will make in the trial process. For example there is no argument that overwhelming problems of proving or disproving the accused’s knowledge necessitates placing the burden on him to rebut by his own evidence the legal presumption, for this type of charge. Yet the practical effect of this decision will mean that the accused will in most cases be forced to take the stand and testify on his own behalf and, of course, be subject to cross-examination.

In view of the significant ramifications of this ruling by our highest court, we might have expected some weighty reasons for taking such a step. We look in vain for such reasons. We are offered only a side-handed analogy

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17 Supra, note 3 at 139.
reference to the rebuttable presumption which is said to have arisen in the facts of Regina v. King. Yet, as mentioned above, the statements in King are obiter, and were directed to the issue of voluntariness, not knowledge. Yet the majority blithely treats the bombshell which it has dropped in the paragraph as a self-evident conclusion, requiring no further explanation. We are left with a new presumption of law, qualitatively different both in focus and in effect from the common law presumption of fact that an accused must be taken to have intended the natural and probable consequences of his actions, as well as the presumption of voluntariness which the Court had recognized as coming out of King.

Perhaps Mr. Justice de Grandpré’s decision should be read not as a radical departure from the current law on the burden of proof in drug cases, but merely as a disagreement with the trial judge and/or Court of Appeal about what the record indicated to be Kundeus’ belief. In other words, we can interpret the majority’s decision simply as reaching a different conclusion about the facts than the lower courts. The problem with this view is that it does not appear to adhere to the record which was available to the Supreme Court and agreed to by Counsel. One can question the priority of our final Court of Appeal acting in this manner. As one learned commentator notes in this regard:

Too frequently, the Supreme Court and other appellate courts in Canada seem more interested in re-arguing or reinterpreting facts rather than laying down for the guidance of the lower courts, fundamental principles of substantive criminal law.¹⁸

It is significant that Chief Justice Laskin in his dissent felt compelled by the record to accept the view of the facts which had been adopted by the British Columbia Court of Appeal and had been agreed to by counsel when the factums to the Supreme Court were filed. The Chief Justice vigorously objected to hearing the submissions of counsel for the appellant Crown when it raised this issue. The basic problem, of course, is that there has not been developed in Canada a sufficient body of jurisprudence on appellate law and procedure.¹⁹ But perhaps the more plausible explanation for this dispute at the hearing was that the majority was more concerned with the guilt or innocence of the accused than the role it should play as our highest judicial body in developing the criminal law. Yet, depending on how one feels about the other interpretations of this decision, this seeming reversal of the lower courts’ interpretation of the facts may be seen as a most palatable or, at least, a more plausible construction of the majority’s manner of disposition of the appeal.

The reason why one may interpret the majority’s decision in Kundeus in these two distinct ways, is that Mr. Justice de Grandpré refers to various “readings” of the facts. As we discussed above, he says that “one reading” of the facts is that “the accused offered L.S.D. for sale, and in fact, sold

L.S.D.’. On that reading there seems little doubt that the charge had been proved and the conviction should have been affirmed in full. However, de Grandpré, J. goes on to set out “another reading” by the Court of Appeal (that the accused thought he was selling mescaline), and then states:

Assuming that this reading of the trial judge is the proper one, was the Court of Appeal right in holding that the necessary mens rea had not been proved? I do not believe so.

The difficulty with this alternate interpretation of the ratio decidendi of Kundeus is the failure of the majority to provide any reasoned argument which would illustrate how it reaches this conclusion. The only explanation offered is a short reference to one segment of Regina v. Blondin holding that to support a charge of importing narcotics into Canada, the Crown need not prove that the accused knew that the substance he is importing is cannabis resin, but only must be aware that the substance is a narcotic made illegal by the Narcotics Control Act. In the words of Mr. Justice Robertson, in that case “it would be sufficient to find in relation to a narcotic, mens rea in its widest sense.” De Grandpré, J. then states that Blondin must be read with King and concludes that:

[In my view, the result in Regina v. Custeau was the proper one and this notwithstanding the error committed by the Court of Appeal of Ontario and underlined by the Court of Appeal of British Columbia in the case at bar, mescaline having been described as a controlled drug when it is a drug mentioned in the regulations under the Act which cannot be sold without a prescription.]

The references to two “readings” of the facts, together with this failure to spell out the reasons for its conclusion, whereby it approved the result in Custeau and reversed the British Columbia Court of Appeal’s decision in the instant case, inevitably caused confusion in lower courts seeking guidance from the majority’s decision in Kundeus. Predictably, in one of the first decisions after Kundeus in the lower courts, Regina v. Williams, where the fact pattern was similar to that in Kundeus, the learned judge voiced the dilemma in which the enigmatic decision of the majority had placed him. Faced with the two distinct versions of the ratio decidendi of Kundeus, he refused to hold that Kundeus had settled the major substantive issue in the area of mens rea. In view of the fact that any conclusions concerning the redefinition of that doctrine of mens rea would have to be based solely upon vague interpolation, he decided that “it would be rash to attempt such a task when another more plausible reading of the judgment is apparent.” Instead, the learned provincial court judge read de Grandpré, J.’s decision as based on the manner of proving mens rea:

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20 Supra, note 3 at 137.
21 Id. at 138.
23 Id. at 13-14.
24 Supra, note 3 at 140.
25 Supra, [1976] 3 W.W.R. 120, Provincial Court of B.C.
26 Id. at 127.
An attempt to re-define the concept of *mens rea* on the basis of the implications of the majority judgment in the *Kundeus* case would raise many uncertainties since there is no discussion in the judgment as to the extent of the modifications that should be made. Would *mens rea* exist if the intended act violated any of the sections of the Food and Drug Act including those dealing with the sale of rotten food (section 4 (c))? Would the doctrine extend to intended violations of the Criminal Code or other statutes? For example, if Kundeus had thought the substance was a packet of sugar stolen from a nearby restaurant, could he have been convicted? Would an intended violation of a provincial offence suffice? The judgment of de Grandpré J. in the *Kundeus* case does not answer these questions, and I do not think it should be assumed that this omission is an oversight. It seems more sensible to conclude that the *ratio decidendi* of the case concerns the unrebutted evidentiary presumption. So interpreted, the judgment is inapplicable to the case at bar since the accused took the stand here and rebutted any presumption of *mens rea* that existed.\(^\text{27}\)

While it must be admitted that the majority’s decision in *Kundeus* may leave more questions about *mens rea* unanswered than it purports to settle, we must also recognize that to limit its application as in *Williams* may not be a fair interpretation. Does it seem plausible that the express approval of the result in *Custeau* in the penultimate paragraph of de Grandpré, J.’s opinion was meant to be a mere afterthought? While the majority’s references to the doctrine of *mens rea* might be confusing, are they merely *obiter dicta* in view of the express approval of the interpretation of the facts taken by the Court of Appeal for purposes of this segment of their opinion, and particularly in view of the strong dissent of Laskin and Spence, JJ. which is directed primarily at this very issue? To be more specific, if *Williams* is right on the meaning of the majority’s decision in *Kundeus*, does this mean that the dissenting opinion of Laskin and Spence, JJ. must be the accepted view? Yet how would this jibe with the result in *Custeau* with which the majority was in accord? Does this inconsistency present an insurmountable roadblock to accepting the interpretation of *Kundeus* taken in *Williams*?

The majority’s opinion leaves us with a myriad of questions but little material on which to base our answers. Is this the style of decision-making that should characterize the final Court of Appeal? Why should lower courts (as in *Williams*), be forced to engage in a form of psycho-analysis in order to determine the *ratio decidendi* of a Supreme Court decision? In *Kundeus*, the Supreme Court was confronted squarely with a case which required them to decide an issue involving a major policy decision as to the meaning and function of *mens rea*. Yet, as noted above, the court seems to have avoided this issue and to be more concerned with the disposition of this individual case. As a result, the majority got sidetracked and discussed issues that were not the basis for the appeal and which counsel may not have been prepared to argue. Thus, rather than addressing themselves to the substantive issue, the majority can be interpreted as having decided only that Kundeus was guilty as charged. Surely this is not the proper role that the highest appellate court should play but is rather the primary responsibility of the trial courts. Unfortunately, *Kundeus* is not an isolated example of this *ad hoc* approach that the Supreme Court has taken when confronted with cases that present

\(^{27}\) *Id.* at 130.
major questions in the development of Canadian law. What is most surprising is that the majority's decision seems to completely ignore the dissenting decisions of Laskin and Spence, JJ. Almost as if the two opinions arose from two different appeals and were argued in separate courts on different days, neither opinion comes to grips with the issues that concern the other. While the majority concentrates on the issue of the manner of proof of the offence, the dissent was exclusively concerned with the substantive question as to what proof was required. The decisions taken together seem like two ships passing in the night.

The dissenting opinion written by Chief Justice Laskin was premised on the assumption that the record forced the Supreme Court to adopt the interpretation of the facts taken by the Court of Appeal. As such there is no reference in his decision to any rebuttable presumptions of knowledge and no analogies to King as we saw in the majority opinion. Unlike the majority decision, Laskin, C.J.C. right at the outset sorts out the gist of the case as a question of law about the substance, not the proof of mens rea. Then the Chief Justice launches into a lucid, easily discernible line of argument towards his conclusions. The argument which he presents is well organized, and utilizes a wide variety of material in its development. For example, he refers to judicial authority not only from Canadian courts, but also English, and Australian decisions. Moreover, Laskin, C.J.C. canvasses various legal texts, digests, law journal articles, and the American Law Institute Model Penal Code in support of his conclusions. The result of these efforts is a well-balanced exercise in judicial craftsmanship which attempts to lay out the issues in their full dimensions and to answer them in a definitive fashion. It is the style of decision-making which we should expect from our highest tribunal but is so lacking in the majority's decision. Yet while we may applaud the Chief Justice for the manner in which he writes his opinions, we may still criticize the substance of his reasoning. On the other hand, while the majority's decision may be unsatisfactory in offering no cogent reasons for its conclusions on the substantive issue, we may still agree with the result and supply our own reasons. It is to this substantive issue to which we now direct our attention.

D. MENS REA AND MISTAKE OF FACT

When we analyse the substance as opposed to the style of Laskin, C.J.C.'s opinion, it becomes clear that however talented the legal craftsman who wrote this argument, his fundamental approach to the issue of mens rea has placed a severe limitation on the meaning which he accords to that concept. The Chief Justice, in analyzing the doctrine of mens rea, starts with a premise which shapes his whole approach to the subject. For him, mens rea constitutes the mental element of the crime. Once having accepted this definition, the Chief Justice proceeds to a tight analytical dissection of the instant case to determine what element must be shown to obtain a conviction. It is with this premise and this approach that we take issue with Chief Justice Laskin. For it is submitted that these two factors prevent the Chief Justice from seeing clearly the underlying values and policies that should shape his decision.

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Having at the outset stated our basic critique of the dissenting opinion in *Kundeus*, let us proceed to analyse it in detail and then to suggest an alternative approach to the issues presented. The dissenting judgment characterizes the appeal as presenting the three essential questions: 29

1) Whether mistake of fact arises at all as a separate defence for the accused in the face of the burden on the Crown to prove mens rea as an element of the offence charged.

2) Whether mistake of fact must be objectively reasonable or whether it is enough that it be based upon an honest belief.

3) (Which is tied to #1), whether mistake of fact is shown by proof that, on the facts as the accused honestly believed them to be, he was innocent of the offence charged, albeit guilty of another offence, or whether he must show that he was innocent of any offence.

Laskin, C.J.C. summarily answers the second issue in the negative by referring to *D.P.P. v. Morgan* and in particular to *Regina v. Beaver* as having conclusively settled this issue. He quotes with approval 30 the statement of Cartwright, J. in the *Beaver* case, as authority for the proposition that where serious criminal charges are involved:

... the essential question is whether the belief entertained by the accused is an honest one and ... the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining that essential question. 31

The first and third issues Laskin, C.J.C., quite properly considers to be related. Concerning the alleged mistake of fact in this case, he indicates that it does not arise as an affirmative defence for the crime for which Kundeus was charged. In short, in Laskin, C.J.C.’s opinion, trafficking in L.S.D. includes the element of mens rea as an ingredient of the offence, to be proved by the Crown. Mistake of fact in this context presumably would prevent the Crown from fulfilling this part of its obligation. Thus if “mistake is put forward on behalf of the accused, it is only by way of meeting an evidentiary burden and raising a reasonable doubt that the Crown has met the persuasive burden of proof resting upon it.” 31 In other words, Laskin, C.J.C. assumes that the offence of trafficking in L.S.D. includes as part of the Crown’s case, proof of knowledge by the accused of the nature of the impugned substance. While the Chief Justice seems to approve of the reasoning in *Blondin*, i.e., that proof of knowledge by the accused that he was trafficking in a restricted drug, even if it not be L.S.D., would be enough to fulfill the Crown’s burden, it is clear that he is not dealing with that situation in this instant case, where the drug is on a lower scale of prohibition and regulation. 33

Thus the first two questions posed by the dissent are answered in the negative. The key issue in this appeal becomes whether Kundeus would be

29 *Supra*, note 3 at 144-45.
30 Id. at 145.
32 *Supra*, note 3 at 144.
33 Id.
innocent of the offence charged, if had the facts been as he supposed, he would have been guilty of another, lesser offence. The Chief Justice answers this question in the affirmative.

In deciding that an acquittal is required in these circumstances, Laskin, C.J.C. explicitly disapproves of the judgment of Brett, J., in Regina v. Prince, to the contrary. He says that the view in Prince is "no longer sustainable", and favours the approach of Glanville Williams who treats this situation as an instance of the rule of transferred intent formulated as follows:

The accused can be convicted where he both has the *mens rea* and commits the *actus reus* specified in the rule of law creating the crime, although they exist in respect of different objects. He cannot be convicted if his *mens rea* relates to one crime and his *actus reus* to a different crime, because that would be to disregard the requirement of an appropriate *mens rea*.3

Since Laskin, C.J.C. had already concluded that selling mescaline and trafficking in L.S.D. were not the "same crime", he would not transfer the intent (*mens rea*) of one crime to the *actus reus* of the other. He goes on to analyze several Provincial appellate court decisions in this area, approving of the cases which support his view and disapproving or distinguishing those which are contrary to the position he has taken. He concludes this review of the Canadian case law with the observation that:

Is any general principle deducible from the foregoing catalogue of instances? Certainly, it cannot be said that, in general where *mens rea* is an ingredient of an offence and the *actus reus* is proved it is enough if an intent is shown that would support a conviction of another crime, whether more or less serious than the offence actually committed. The matter in terms of principle, depends on how strict an observance there should be of the requirement of *mens rea*. If there is to be a relaxation of the requirement, should it not come from Parliament, which could provide for the substitution of a conviction of the lesser offence in the same way as provision now exists in our criminal law for entering a conviction on an included offence?

But according to Laskin, C.J.C., this "sensible" solution is not open to the Supreme Court, presumably since it would constitute a radical departure from settled principle on this subject in Canadian law. In the opinion of the learned Chief Justice, what the Crown should have done in this case, was to charge Kundeus with attempted sale of mescaline.

The analytic approach to *mens rea* to which Laskin, C.J.C. adheres may

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36 Id. at 129.
37 Viz. McLeod, supra, note 5; Burgess, Blondin, Custeau, Ladue, supra, note 7.
38 Viz. McLeod, Blondin, Burgess, Custeau, supra, note 7.
40 Supra, note 3 at 148-49. This is the approach adopted by the American Law Institute Model Penal Code (1962) Article 204(2). "although ignorance or mistake would otherwise afford a defense to the offence charged, the defense is not available if the defendant would be guilty of another offence had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offence which he may be convicted to those of the offence of which he would be guilty had the situation been as he supposed."
40 Id. at 150.
be termed the ‘positive’ approach. This approach has dominated most judicial and academic comment on the subject in this century. Notable examples of its exposition include the works of Glanville Williams, Professors Smith and Hogan, and the American Law Institute’s Model Penal Code, all of which were referred to by the Chief Justice during the course of his opinion. The Supreme Court of Canada has also treated *mens rea* in this manner in its leading cases of the past two decades, *viz.* Beaver, Rees and Pierce Fisheries.*

This approach to *mens rea* attempts to identify particular states of mind and “to attribute them to each of the material elements constituting the disposition of particular criminal offences.” In short, the concept of *mens rea* is analyzed in terms of the “mental element of the crime”. This “mental element is not one particular state of mind for each offence, but rather a complex combination of states of mind, each bearing on a different element of the offence, including the so-called defences.*

The other conception of *mens rea* may be called the ‘negative approach’, or better still, the ‘functional’ approach to this concept. On this view of criminal offenses, certain defined forms of conduct are considered *prima facie* criminal, unless they occur in circumstances which should excuse the actor from criminal liability. Central to this view of the criminal law is the concept of ‘defeasibility’. Under this analysis, a person is guilty of a criminal offence if he performed certain defined acts unless he was unconscious at the time of his acts, or unless he was mistaken about the physical consequences of his bodily movements, or unless he was subjected to threats or other gross forms of coercion, and so forth.*

Proponents of this defeasible, functional approach to *mens rea*, argue that the positive approach is both too narrow and too rigid. The positive approach is criticized as too “narrow” since its definition of *mens rea* as “the mental element necessary for the particular crime” turns out to be a misunderstanding of the source and functions of the *mens rea* concept.* The maxim *actus non facit reum nisi mens sit rea* first appeared in Coke’s Institutes. Glanville Williams, Francis Sayre, Jerome Hall and other leading commentators have interpreted Coke as saying that although there are exceptions to this maxim, *mens rea* is the subjective state that makes an act punishable under the law. On this theory, an absence of *mens rea* is simply an absence of the state of mind prescribed by the statute. Recent scholarship in this subject has rejected this view of *mens rea*, both as misreading of Coke, and as a failure to

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43 Id. at 106 and 105. For example, on a charge of theft under Section 283 (1)(a), “the mental element” of the offence would include an absence, colour of right as well as the presence of one of the so-called “specific intents” i.e. “to deprive, temporarily or absolutely the owner of it or a person who has a special property or interest in it of the thing or of his property or interest in it.”

see that *mens rea* is a notion which encompasses the issue of responsibility.\textsuperscript{46} On this alternative view, *mens rea* is not divorced from its normative connotations but rather is viewed simply as encompassing the culpability of the act in question. As Professor Fletcher concludes:

> We require *mens rea* as an essential condition for criminal liability, not because we realize intuitively that the condemnationary sanctions should apply only to those who are justly condemned for their conduct, and men are not justly condemned and deprived of their liberty unless they are personally culpable in violating the law. That is the point of Coke’s saying . . . the act is not culpable under the law (*actus non facit reum*) unless the actor is culpable for acting as he did (*nisi mens sit rea*).\textsuperscript{47}

In short, *mens rea* translated literally as ‘guilty mind’ refers not to the specific subjective state of an accused but to his moral culpability in acting as he does.

Yet this narrow scope of the positive approach to *mens rea* is not the only problem from which the Williams-Sayre-Laskin school of thought on that subject suffers. Critics of their understanding of the concept of *mens rea* reject the notion that the doctrine of *mens rea* should stand for a positive requirement of an appropriate form of blameworthiness in every case. They do not admit that the principle of *mens rea* has been developed to the stage where it has changed from a collection of excuses to a “dissection of imputability”. The dimensions of this debate as to the role of *mens rea* have been succinctly stated by Peter Brett in his seminal work, *An Inquiry Into Criminal Guilt*:

> If one regards the principle of *mens rea* as no more than a phrase for collecting together a number of excuses, the problem in each case raising the matter, will be that of determining whether there is any reason for holding the accused to be free from blame. On the other hand, if one regards the principle as involving the enumeration of the conditions of imputability, one is forced to ask in each case whether those conditions are present. This, in its turn, presupposes that we are capable of enumerating in advance the conditions of imputability. And I doubt whether this can be effectively done . . . \textsuperscript{48}

Brett, like Hart and Fletcher, speaks of *mens rea* from a negative perspective. He asks whether there is any reason for holding the accused free from blame, rather than whether the prosecution has proved the mental element of the crime. He rejects the latter approach since he does not believe that it is possible to identify in advance all of the possible excuses that might serve to absolve the accused from blame. In his judgment, the search for the conditions of imputability which requires a precise *a priori* analysis of *mens rea* is never successful. Something is always left out. We cannot anticipate and enumerate all of the conditions of blameworthiness in advance: better not to try. Instead we can recognize blame when we see it, and should have no need for an *a priori* definition.

There are two key reasons why this functional analysis of *mens rea*, which treats it as a series of excusing conditions, is so compelling. First, it is

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\textsuperscript{47} *Supra*, note 44 at 414.

\textsuperscript{48} *Supra*, note 45 at 41.
clear that the doctrine or principle of *mens rea* was derived entirely from case law. The principle is a creation of the judiciary, dispensing justice in individual cases. In many instances, *mens rea* excuses were crafted as implied exceptions to express or precise legislative commands.\(^{49}\) Second, the principle of *mens rea* has always been understood in a very loose sense. It has been translated in a variety of ways including a "blameworthy state of mind", a "guilty mind", an "evil intent", a "vicious will", and so forth. Yet, as Brett points out, while the principle is usually stated in the form of a positive requirement, the illustrations used to show its mode of operation are all negative in form:

The full exposition thus becomes an exhibition of a series of situations in which a man will be held by the criminal law to be without guilt, unified by a very broad and vague statement of principle. In short, what Hale, Hawkins and Blackstone are really presenting to us is, to use the convenient phrase of Stroud, a collection of excuses. The thread which connects together the various members of this family of excuses is that in every instance the defendant is free from moral fault or blameworthiness.\(^{50}\)

The criminal law is thus conceived as a combination of two types of moral choices. The legislature performs the task of considering conduct at large and makes a broad statement along the lines of, for example, "no one shall print counterfeit money." The legislature does not spell out in advance all the qualifications to this directive. The exceptions to these legislative commands are left to the courts to formulate in individual cases, referring to the second type of moral judgment embodied in the principle of *mens rea*. Of course, the legislature may deem it advisable to determine in advance, in the definition of the offence, many of the features that would be embodied in the concept of *mens rea* and which distinguish one offence from another. For example, the offence of theft can be distinguished from fraud or murder from manslaughter, on the basis of a different "specific intent". Yet legislatures do not feel bound to identify all the prerequisites to criminal liability in advance. Our system of democratic government has allotted this function to the courts, and they have reacted accordingly, using the particular resources available to them. The flexibility of this approach allows the basic values of the criminal law to be applied to the unusual concrete situations which no legislature could be expected to anticipate. For this reason:

\[\text{[w]hen a novel defence is raised, we cannot refuse to apply a new rule until the legislature gets around to adopting it. In the interim the innocent individual who should be excused because he was blameless will suffer the harsh injustice of criminal punishment. It is precisely because a court can and does make law retrospectively that the defendant should be able to appeal to it for a new rule to be applied to the old facts of his case.}\]

\(^{51}\)

The structure of our *Criminal Code* reflects the strategy of combining the institutional strengths of legislatures and courts to develop our criminal law. The legislative effort at codifying most criminal law offences,\(^{52}\) yet retaining the common law rules of justification and excuse\(^{53}\) maintains the basic

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\(^{49}\) Id. at 40.

\(^{50}\) Id. at 40-41.

\(^{51}\) Paul Weller: *In the Last Resort*, (Toronto: Carswell/Methuen, 1974) at 102.

\(^{52}\) *Criminal Code*, R.S.C. 1970, Ch. c-34, section 8.

\(^{53}\) Id., section 7(3).
roles of legislature and courts that characterized the earlier development of
criminal law. While some common law defences have been expressly included
in the Criminal Code, it is significant for our discussion that mistake of fact
has not been dealt with in this fashion. Presumably then, “mistake of fact”
should be approached along the same lines with which common law courts
have treated other so-called defences. In approaching this situation, a court
should refer to the concept of mens rea as stating the principle that a man
who is morally free from blame is not liable to punishment. In sum, the benefit
of interpreting the meaning and role of the principle of mens rea in this sense
is that it allows courts the flexibility to deal with novel instances of previously
recognized excuses, and to recognize new excuses should the situation require.
In my opinion, this is the most profitable way of analysis of mens rea, and
this view is consistent with the history of the development of that concept, is
supported by the wording and strategy of the Criminal Code, and is sustained
by the institutional characteristics of our courts and legislatures.

The functional approach to mens rea thus recognizes that the complex-
ities of the problem of excusing conditions cannot be captured in the
analytic approach that is used in the Williams-Sayre-Laskin school of thought.
The functional approach does not attempt to formulate in advance all the
rules that may excuse a person from criminal liability on account of his lack
of culpability. Rather the courts perform the task of unravelling the meaning
of mens rea on a case-by-case basis. Yet this function also requires the courts
to develop the family of excusing conditions in a manner that is in accord with
the institutional features that argue in favour of courts performing this role.
Translated into practical terms, this means that the courts in shaping the
meaning of mens rea on a case-by-case basis, must justify their conclusions by
referring to the policies and values which that doctrine should encompass.
If this style of decision making is not utilized, then we might expect that the
principle of mens rea will deteriorate into a hodge podge of ad hoc rules having
no real relation to each other. This prospect would dilute the effort to fashion
the excusing conditions upon the premise for the entire concept of mens rea,
i.e., the consensus of the community’s moral opinion that no one should be
punished unless he is culpable.

E. FROM THEORY TO PRACTICE: HOW SHOULD REGINA v.
KUNDEUS HAVE BEEN DECIDED?

If we accept the functional view as to the function of mens rea in criminal
law, what can we say about the manner in which a court should have ap-
proached the sale of L.S.D. by Richard Kundeus? Certainly the excuse of
mistake of fact had not been developed to a degree whereby the facts as
presented in Kundeus would have presented merely another familiar example
of a well-formulated rule. Canadian case law on the subject had not produced

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54 See, for example, ss. 16, 17, 19, 215.
55 C.f. A.L.I. Model Penal Code Article 2.04 which adopted the positive approach
of developing a detailed set of a priori prescriptions as to the method of handling this
situation.
a consistent rule applicable to all instances where an accused was operating under a mistake of fact.

The Supreme Court of Canada had decided some time earlier, that an honest but mistaken belief in a state of facts would absolve an accused from criminal guilt had the situation as supposed by the accused not involved any criminal offence.\textsuperscript{56} Moreover, this mistaken belief need not be reasonable in order to excuse the accused from criminal liability.\textsuperscript{67} Yet the courts had never developed a consistent rule about the effect of a mistake of fact in which if the situation had been as the accused supposed, he would also have been guilty of another criminal offence or other moral wrong. Instead, it was with a series of confusing statements that courts disposed of these cases, yet gave no real explanation for the value choices which they were making in reaching their "conclusions".

Rather than provide reasons or explanations the lower courts were content to decide cases on whether "specific intent" had been proved,\textsuperscript{58} or whether the offence only required proof of \textit{mens rea} "in its widest sense."\textsuperscript{59} In each case, the issue as to whether the particular mistake of fact was relevant on this issue of criminal liability, was treated as an easily discernible conclusion based on the construction of the particular statute creating the offence. Yet in no case did the court see fit to explain how their conclusions were consistent with the basic values and strategy of the criminal law. Thus, there were really no legal restraints arising out of the doctrine of \textit{stare decisis} that circumscribed the approach that the Supreme Court could take to the \textit{Kundeus} case.

Not only was the Supreme Court unfettered by \textit{stare decisis} as it approached \textit{Kundeus}, but it was also presented with a fact situation in this case which clearly illustrated an example of where the underlying values in the criminal law may conflict. As in the \textit{Beaver} case, the facts in \textit{Kundeus} provide a context where the two contrasting perspectives on the criminal justice system — which have been described as "crime control" and "due process" models — would have to be identified and accommodated. The confrontation between these two attitudes has shaped the evolution of the criminal law, especially in the area of \textit{mens rea}. The \textit{Kundeus} case presented the Supreme Court with a fact situation where these two attitudes would be graphically displayed. For \textit{Kundeus} asked the court to decide whether to give effect to an alleged excising condition based on a lack of culpability, (the concern of the due process model) in the face of the suggested insurmountable problem of proving the non-existence of this excusing condition (the concern of the crime control attitude).

The \textit{Kundeus} case thus afforded the Supreme Court with a golden opportunity to settle the question as to the relevance of mistake of fact in this type of fact situation, and to provide a clear statement of the operative reasons

\textsuperscript{56} R. v. Beaver, R. v. Rees, supra, note 5.
\textsuperscript{57} Id.
\textsuperscript{58} R. v. McLeod, supra, note 5 per Davey J.A.
\textsuperscript{59} R. v. Blondin, supra, note 7 per Robertson, J.A. R. v. Ladue, supra, note 7 per Davey J.A.
for reaching its conclusions. The response from the Court is an unhappy one in the sense that neither the majority nor dissenting opinion comes to grips with the policy arguments that can be offered either in favour of or against the conclusions which they reach.

The majority decision seems to concentrate solely on the policies which we can ascribe to the crime control model. The dissenting opinion seems concerned primarily with the prospect of punishing an individual contrary to the demands of the due process model. Yet our criminal law treats neither objective as an absolute value. The policy of our criminal law:

\[\text{assumes that without an effective sanction, we will not have a viable society preserving the due process objectives of freedom and equality, but that there is also no point in permitting the criminal law to offend against the principles of the very society it is trying to protect. A workable compromise is necessary. We must look at different situations pragmatically, assessing the weight of the claims of each in concrete situations.}\]

It was the obligation of the Supreme Court in Kundeus to work out the compromise between these two fundamental policies of the criminal law. But instead, the two opinions concentrated on the one value to the exclusion of the other.

In adopting the analytic approach to the problem, Laskin, C.J.C. reached the conclusion that Kundeus must be acquitted of the charge of trafficking L.S.D. since the \textit{mens rea} or “mental element” of the offence, had not been proved. As we discussed in the preceeding section of this paper, the problem with this approach to the issue in Kundeus is that the court was never called upon to clearly delineate the value choice involved in reaching this conclusion. The matter is treated as though it is the responsibility of the legislature to describe the offence, including the excusing conditions which would preclude successful prosecutions. The role of the judiciary on this theory of \textit{mens rea} is merely to interpret whether \textit{mens rea} is an ingredient of the offence and then to determine whether on the facts it had been proved. Laskin, C.J.C. deals with the issue as to whether he can apply the rule of “transferred intent”, but he never really outlines the values that this rule incorporates. His opinion thus reads more like a logical syllogism rather than what we might expect, where two potentially conflicting policies in the criminal law are presented in the same case.

\[\text{To be fair to Mr. Justice Laskin, he does indicate that while he would acquit Kundeus in the charge of trafficking in L.S.D. this would not mean that Kundeus was immune from the reaches of the criminal law. The Chief Justice suggests that Kundeus should have been charged with attempted sale of mescaline. In his opinion such a charge is “supportable under section 24 of the Code which makes it immaterial whether it was possible or not to commit the intended offence”. In support of this proposition Laskin C.J.C., cites 10 Hals (3d) 306; Regina v. Scott, 45 W.W.R. 479; [1964] 2 C.C.C. 252 (Alta. C.A.). It is submitted that this blanket pronouncement that “the defence of impossibility of attempt is not available,” is not as clear-cut as the learned Chief Justice would lead us to believe in this statement. For example, other common law courts have refused to convict where the impossibility of completing the offence was the result of the operation of the law or mixed fact and law (e.g., Booth v. State, 398 P. 2d 893 (Okla. Ct. Crim. App. 1964). See, generally, Enker, Impossibility in Criminal Attempts — Legality and the Legal Process, (1969) 53 Minn. L. Rev. 665.}\]

\[\text{Supra, note 51 at 97.}\]
What Chief Justice Laskin appears to be concerned about, (but never identifies) is the prospect of an accused who might subjectively be guilty of a minor offence being convicted of an offence which would result in a greater punishment. This result would seem grossly unfair and it runs afoul with the point of the doctrine of *mens rea*, which is that we should convict only those who have voluntarily chosen to commit an offence and so have deliberately exposed themselves to a risk of punishment.

While we can support the due process interest in treating the accused in such a way so as to maximize the individual freedom from the state, we must also pay attention to the demands of the crime control model. The advocates of this model argue against the expansion of excusing conditions on the basis that the recognition of a new excuse would create a situation where the doctrine of *mens rea* would be utilized to fabricate excuses by those who are not really entitled to it. In short, the more loopholes to criminal liability we recognize, the better the chance that persons will 'cook' their stories to come under these protective umbrellas.

This latter concern seems to lurk beneath the surface of the majority opinion in this case. The majority decision concentrates almost exclusively on the proof problems that the *Kundeus* fact situation presents. The thrust of the decision is to force the accused to take the stand and prove that he in fact was labouring under a mistake of fact. The apparent rationale is that it is not feasible for the Crown to be required to prove that a mistake of fact did not exist in the mind of the accused. This would be particularly difficult task where as in *Kundeus*, the accused did not adduce any evidence.

While these two policies seem to explain the operative reasons behind the two decisions in this case, neither opinion identified nor sought to justify its conclusions by referring to them. Instead we are left with the pronouncement of two alternative rules with no suggestion that the judges really appreciated the underlying reasons for their decisions. On the contrary, the opinions are written as if the answers are obvious — as if the conclusions are merely another articulation of a well recognized rule. And nowhere, do we get any discussion of the opposing arguments. The opinions read like two ships passing in the night.

If we apply the functional approach to *mens rea* to the facts in *Kundeus*, what would be the result? Obviously, the functional approach would not treat the issues presented as being merely an interpretation of a rule already anticipated and cruelly dealt with in the definition of the offence. The functional approach would require that the Supreme Court decide whether mistake of fact is an excuse in this case, but in reaching their decision they would have to recognize that the two underlying policies of the criminal law were potentially in conflict in this case, and then to reach a decision by weighing the claims of each policy. Utilizing the functional approach to *mens rea*, it is

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62 Nor does this latter view seem in accord with the actual definition of the offence which on its face does not speak to the issue of the relevance of a mistake of fact as to the nature of the drug sold. On the contrary, we are left with the bare definition of “traffic” as meaning manufacture, sell, export from or into Canada, transport or deliver.
possible to support the result of the majority’s decision in *Kundeus* and to supply the appropriate reasons for this conclusion which the Court reached.

There is no doubt that Kundeus sold L.S.D. to the undercover police officer. As such, he has *prima facie* presented himself as a candidate for criminal liability for the offence of trafficking in that substance. But does the doctrine of *mens rea* absolve him from a conviction for his offence? A court should approach this issue by asking itself “why should this accused be excused from criminal liability, when by his conduct he has clearly violated the prohibitions of the criminal law?” This question is answered by referring to the excusing conditions which are expressed in the notion of *mens rea*, that a man who is morally free from blame in terms of the community ethic is not liable to punishment. One such excuse had only been recognized by the Supreme Court when if the facts had been as he had supposed, the accused would not have been guilty of any offence. This is not the case in *Kundeus*. Richard Kundeus did have a *mens rea* in the sense that if the facts had been as he supposed, he would have been committing another offence, that of selling mescaline which is also prohibited by the *Food and Drug Act*. *Kundeus*, then, was culpable. Subjectively, he was not blameless. He can accurately be said to have *mens rea*. Accordingly, he does not qualify for the excusing condition that the doctrine of *mens rea* affords those who are morally innocent.

The claims of the due process model are satisfied since while an excuse would not be recognized in this case this is so only because the accused has voluntarily selected himself as a candidate for criminal punishment. To have recognized the accused’s mistake in this case as an excusing condition would have placed upon the Crown an extremely difficult problem of disproving the existence of a condition to which the accused has the only reliable informational access.

Of course, this problem of disproving the existence of a mistake of fact on the part of an accused was also a factor in *Beaver*. Max Beaver claimed that he thought he was carrying milk of sugar rather than heroin. Yet the Supreme Court recognized this mistaken belief as precluding a conviction for possession of heroin, despite the obvious proof problems their decision would create for the Crown. However, the situation in *Kundeus* seems qualitatively different than the facts in *Beaver*. First of all; the chances of a trier of fact believing an accused who claimed to be under a mistaken view similar to that of Max Beaver seem slim, especially in the absence of a strong corroborative evidence to the effect that the accused was a victim or perpetrator of a drug “rip-off”. But the facts in *Kundeus* would not appear to be so unique, for it is not unusual for the same entrepreneur to be engaged in the sale of a variety of drugs. When apprehended, we could expect that the vendor might claim that he was under a mistaken view as to the nature of the substance he was selling. In this case the Crown would have a difficult time disproving such belief, a task made even more burdensome due to the recent decision of the British Columbia Court of Appeal in *Regina v. Risby*.64

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64 *Regina v. Risby*, June 1976, B.C.C.A. per Branca, J.A.
In *Risby*, on a charge of possession of marijuana for the purpose of trafficking, the Court held that defence counsel should be allowed to cross-examine a Crown witness in order to elicit an exculpatory statement made by the accused at the time of his first being found in possession of the drug. In fashioning this exception to the rule excluding self-serving statements, the Court reasoned that a statement in the *Risby* context was part of the *res gesta* of the offence, and thus properly admissible. The result of this decision coupled with a recognition of the mistake in the *Kundeus* situation as an excusing condition, could place the Crown in the unenviable position of having to discredit part of its own evidence. If the accused declined to go into the box, there would be no opportunity for the Crown to cross-examine him on the reliability of his exculpatory statement. In view of these problems, it is not surprising that the Supreme Court would be impressed by the “flood gates” arguments against recognizing the mistake in *Kundeus* as a bar to conviction.

There is another reason why the Supreme Court was justified in recognizing Max Beaver's mistake, but not that of Richard Kundeus, as an excusing condition. In *Beaver*, as we noted above the crime control concerns in proving the charges are not as compelling as in *Kundeus*. But more important, the due process concerns are also much more prevalent in *Beaver*, since had the situation been as Max Beaver had supposed, he would not have been committing any offence. In these circumstances, and in view of the mandatory jail sentence for the offence charged, it would seem totally unfair not to recognize his mistake as an excuse. On the other hand in *Kundeus*, if the facts had been as the accused believed, he would still have been committing an offence, although it involved a lesser maximum penalty. Thus in *Kundeus*, the claims of the due process are not nearly as compelling as in *Beaver*. When seen in this light, the conclusion reached is sound in criminal law theory and recognizes the practical demands of the trial process. As such, Kundeus was properly condemned and should be punished under our criminal law.

Thus, according to the negative approach to *mens rea* which we have argued in favour of and then utilized, Kundeus would be guilty of trafficking in L.S.D. There is no need to acquit Kundeus and then wait until Parliament has relaxed the requirement of *mens rea* as suggested by the dissenting opinion of the Chief Justice. It is submitted that the latter's decision is based upon a misconception of the role and function of *mens rea*. The statute on its face did not require the conclusion which Laskin, C.J.C. reached, nor does the principle of *mens rea* at this stage of its development require legislative intervention to fashion it to achieve the aims of the criminal law. On the contrary, the courts are the appropriate organ to achieve these ends.

However, if we do not accept that the mistake of fact in *Kundeus* is an excusing condition, that is not the end of the matter. We may convict Kundeus of the offence charged, yet the nature of his mistake must certainly be relevant to fashioning the appropriate sentence. Unlike the *Model Penal Code*, our *Criminal Code* at this date does not speak in terms of the “grade” or “degree” of an offence. Thus, technically it is impossible to adopt willy-nilly, the solution to the problem of mistake of fact that the *Model Penal Code* suggests. Yet since the purpose of dividing crimes into degrees is to award the more severe
punishments for the higher degrees in which the offence may be committed, the Model Penal Code approach may be roughly transposed to the situation which is presented in Kundeus, in the sense that the court should sentence such the accused according to the degree of culpability which he has shown. Kundeus' punishment should be related to the degree of his blame or guilt. Or stated another way, he should receive the punishment which he would have received had the situation been as he supposed. In this way, he can be said to have chosen his punishment when he chose to perform the conduct in the circumstances that he mistakenly believed to exist.

This rule of sentencing an accused such as Kundeus according to the degree of culpability or blameworthiness he has shown is obviously in accord with the retributive justification for punishment. At the same time the utilitarian justification of punishment which aims at reducing crime by the deterrent and/or rehabilitative effect of criminal sentences is also well satisfied, for the deterrence theory is only workable if the accused has knowledge of the legal sanction and the relevant circumstances in which he is operating. By definition, to punish an accused for trafficking in L.S.D. when he thinks he is selling mescaline would be useless. He will not be deterred from selling mescaline by the stiffer sentence which trafficking in L.S.D. affords. Moreover, he has not shown himself to be in need of the reformative gains of the higher sentence since, subjectively, he did not think he was committing the greater offence. Thus, given the legislative framework of the Food and Drug Act, Kundeus should not receive more than the maximum penalty allowed for selling mescaline. Any stiffer sentence would serve no useful purpose and would violate the dictates of retributive justice.

In summary, it is submitted that the majority decision in Kundeus as it relates to the substantive issue of mistake of fact may be supported by the negative or functional approach to mens rea that was described above. But the major concern of this paper is not whether the result reached by the majority in this case was the correct one, but rather to sketch and argue in favour of a different approach to mens rea, than that which is now being used in our courts. The reasons which were suggested in support of the majority's conclusion are intended only to illustrate how the functional approach to mens rea would operate in a given case. The important points to note in this illustration is that the functional approach to mens rea requires the courts to recognize that the decisions it makes concerning the recognition of an excusing condition involves the weighing of claims of conflicting policies in the criminal law. In the Kundeus fact situation, it is possible to argue in support of the refusal to recognize the accused's mistake as an excusing condition because the interests of the crime control model outweigh the objections of the due process model of the criminal law.

Yet if we change the facts, we can see how in an analogous situation the claims of the due process model might prevail. For example, suppose Kundeus

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65 In many American states, murder is divided into two or three degrees. The death penalty is available for first degree murder, less severe penalties such as life imprisonment for second or third degree murder.

66 Although there is a suggestion in Regina v. McLeod, supra, note 5; Mr. Justice Davey used both the positive and negative approach to mens rea in rendering his decision.
had been charged with importing heroin, and it was proven that he thought he was smuggling a white facial powder into Canada, although on analysis the substance turned out to be heroin. There is no doubt that in these circumstances Kundeus can be said to be morally culpable, since he thinks he is committing a criminal offence. Prima facie he would not qualify for the excusing condition that the doctrine of mens rea affords. Yet to refuse to recognize his mistake of fact as an excuse would result in a conviction and necessarily a minimum sentence of seven years imprisonment.\(^6\) This result is radically different from the disposition I defended above, in which Kundeus while convicted of trafficking in L.S.D. was sentenced to a term not exceeding the maximum penalty for unlawful sale of mescaline. On the facts in Kundeus we could support the majority’s result because it is possible to effect an appropriate compromise at the sentencing stage between the demands of efficient law enforcement and due process. But where this compromise is not possible (i.e., where a minimum mandatory sentence is involved) then the demands of the due process model may outweigh the interests in efficient law enforcement. As such, the mistake of fact in our hypothetical case should be recognized by the court in its development of the family of excuses which we call the doctrine of mens rea.

The key feature of this approach to mens rea is that it places squarely on the shoulders of the judiciary, the responsibility for the evolution of the concept of mens rea. The negative or functional approach to mens rea recognizes the complexity of the issues involved which cannot be captured in the positivist, analytical approach to mens rea used by the dissenting opinion in Kundeus. When called upon to elaborate or modify an excuse which has been recognized in other situations, or when asked to recognize a new excuse, our courts need not feel that their hands are tied and that they must leave it to Parliament to react to these claims. On the contrary, it is submitted that the courts are the proper institution to develop the doctrine of mens rea to meet the challenge presented by novel circumstances.

In placing on the courts this responsibility to develop the concept of mens rea, we must also demand that their decisions are explicitly justified by reference to the underlying values of the criminal law. For if the courts do not provide reasoned demonstrations of how their legal handiwork fits with the strategy of the criminal law, the meaning and role of mens rea will be replete with inconsistencies, coloured by arbitrariness, and drained of its moral force.

F. CONCLUSION

The Kundeus case is a significant benchmark in the development of the criminal law in Canada since it illustrates disturbing characteristics of our Supreme Court. First, the legal craftsmanship exhibited by the majority is totally inappropriate for our highest tribunal. The obfuscation of the issues in Kundeus has created a situation where lower courts need resort to a form of psychoanalysis in order to determine the real basis for the Supreme Court’s decision. Second, the approach to mens rea which is carefully articulated in

\(^6\) Narcotics Control Act, R.S.C. 1970, c. N.-1, Section 5(2).
the dissenting opinion seems inadequate to meet the challenge of novel circumstances out of which the criminal law is forged. Finally, the *Kundeus* case is disturbing because it illustrates that the Supreme Court is not acting in a collegial fashion that should characterize the functioning of a final Court of Appeal. The opinion of the majority and dissent bear no relation to each other and if we didn't know better, would suggest that the authors heard different appeals on different days. The opinions read like two ships passing in the night. It is hoped that these pilots of our criminal law will soon get the ship back on course.