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In evaluating Malcolm Wilkey's contributions in the area of criminal law, his work on the subject of the exclusionary rule first occupies one's mind and crowds out other thoughts. The intensity and persistence of his writing on this subject have been remarkable. Beginning in 1977, he has gone to print no fewer than eight times to offer thorough analysis and legal support for the view that the exclusionary rule is unsound, and can and should be abolished.[1] For a sitting federal judge, perhaps the most striking feature of this sustained advocacy has been the fact that most of it has been carried on outside of judicial decisions, in works addressed to the legal community and even the public at large.

Though the techniques of argument he has employed were plainly not learned in his days in Patton's army, his one-man assault on the exclusionary rule has had the characteristics of a seige. After launching his initial attack,[2] he awaited and evalu-

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1. United States v. Ross, 655 F.2d 1159, 1180 (D.C. Cir. 1981), *rev'd*, 456 U.S. 798 (1982); United States v. Montgomery, 561 F.2d 875, 888 (D.C. Cir. 1977); Wilkey, *A call for alternatives to the exclusionary rule: let Congress and the trial courts speak*, 62 JUDICATURE 351 (1979) [hereinafter cited as Wilkey, *A Call For Alternatives*]; Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 531 (1982) [hereinafter cited as Wilkey, *Constitutional Alternatives*]; M. Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule (National Legal Center for the Public Interest Mar. 1982), *reprinted in* 95 F.R.D. 211 (1982) [hereinafter citad as Wilkey, Enforcing the Fourth Amendment]; Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives*, 1 CRIM. JUST. ETHICS ____ (1982); Wilkey, *The exclusionary rule: why suppress valid evidence?*, 62 JUDICATURE 214 (1978) [hereinafter cited as Wilkey, *Valid Evidence*]; Wilkey, *Why Suppress Valid Evidence?*, Wall St. J., Oct. 7, 1977, at 12, col. 4.

2. Judge Wilkey's first major contributions to the exclusionary rule debate were his dissent in United States v. Montgomery, 561 F.2d 875, 888 (D.C. Cir. 1977), and his editorial page piece entitled *Why Suppress Valid Evidence?*, Wall St. J., Oct. 7, 1977, at 12, col. 4.

Prior to these efforts, he wrote several times in support of the view that the rule did not apply to a particular set of facts. *See, e.g.*, United States v. Robinson, 471 F.2d 1082,

ated carefully the pro-exclusion response.[3] In the several writings which have followed, he has consolidated his position and refined and expanded his analysis. That analysis reached its fullest fruition in two articles published in 1982 which, when read together, state perhaps as thoroughly as is possible the practical and legal justifications for abolishing the rule.[4]

Knowing no more than has been said thus far, and especially under the influence of the mythology that has long benefitted the exclusionary rule,[5] one might wonder if we con-

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1112 (D.C. Cir. 1972) (Wilkey, J., dissenting), *rev'd*, 414 U.S. 218 (1973).

3. Judge Wilkey's primary adversary in the debate was Professor Yale Kamisar, whose 1978 article, Kamisar, *Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978), was explicitly offered as a refutation of Judge Wilkey's *Wall Street Journal* article.

There followed a series of three more articles in *Judicature*, first a rebuttal by Judge Wilkey, then surrebuttals by each. Wilkey, *Valid Evidence*, *supra* note 1; Kamisar, *The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than 'an empty blessing,'* 62 JUDICATURE 336 (1979); Wilkey, *A Call For Alternatives*, *supra* note 1.

4. The first of these articles, Wilkey, Enforcing the Fourth Amendment, *supra* note 1, discusses at length twelve specific adverse effects that result from the exclusionary rule. These costs of the rule were later summarized elsewhere as follows:

> Cost 1: "The criminal is to go free because the constable has blundered."
>
> Cost 2: Only the undeniably guilty benefit from the exclusionary rule, while innocent victims of illegal searches have neither protection nor remedy.
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> Cost 3: The exclusionary rule in any form vitiates all internal disciplinary efforts by law enforcement agencies.
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> Cost 4: The disposition of exclusionary rule issues constitutes an unnecessary and intolerable burden on the court system.
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> Cost 5: The exclusionary rule forces the Judiciary to perform the Executive's job of disciplining its employees.
>
> Cost 6: The misplaced burden on the Judiciary deprives innocent defendants of due process.
>
> Cost 7: The exclusionary rule encourages perjury by the police.
>
> Cost 8: The exclusionary remedy makes hypocrites out of judges.
>
> Cost 9: The high cost of applying the exclusionary rule causes the courts to expand the scope of search and seizure for all citizens.
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> Cost 10: The exclusionary rule is applied with no sense of proportion to the crime of the accused.
>
> Cost 11: The exclusionary remedy is applied with no sense of proportion to the misconduct of the officer.
>
> Cost 12: All of the above costs result inevitably in greatly diminished respect for the judicial process among lawyers and laymen alike.

Wilkey, *Constitutional Alternatives*, *supra* note 1, at 532-33 (footnote omitted). The first article then reviews and evaluates possible alternatives to the rule.

The second article, Wilkey, *Constitutional Alternatives*, *supra* note 1, reviews briefly the costs of the rule and the possible alternatives to it. It then devotes primary attention to establishing the constitutionality of such alternative means of remedying and deterring fourth amendment violations.

5. As Judge Wilkey has noted:

front here a person with fire in his eyes, obsessed to vanquish the rule at any cost to individual rights and the sanctity of the Constitution. Judge Wilkey has been a willing point man in a debate that stirs the deepest emotions. He voluntarily placed himself far outfront of the current state of the law, and has staunchly remained there, even as the Supreme Court has taken giant steps in the general direction which he has advocated.[6] His willingness to play such a role would seem to say much about him, though the conclusions are somewhat less obvious.

Consideration of his argument quickly makes clear that neither a lack of concern for fourth amendment rights, nor a view that they are here outweighed by more pressing considerations, explains any part of what he is up to. For a good part of what he is concerned about is the self-defeating character of the rule. In the course of his argument, he demonstrates effectively the ways in which the exclusion of evidence actually works to impede the protection of fourth amendment interests. Further, he proposes alternative remedies for the violation of fourth amendment rights, which appear capable of protecting those rights more fully than the exclusionary rule ever has. Taken as a whole, his argument can only be understood as a serious effort to

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> The greatest obstacle to replacing the exclusionary rule with a rational process, which will both protect the citizenry by controlling the police and avoid rewarding the criminal, is the powerful, unthinking emotional attachment to the rule. The mystique and misunderstanding of the rule causes not only many ordinary citizens but also judges and lawyers to feel (not think) that the exclusionary rule was enshrined in the Constitution by the Founding Fathers, and that to abolish it would do violence to the whole sacred Bill of Rights. They appear totally unaware that the rule was not employed in U.S. courts during the first 125 years of the Fourth Amendment, that it was devised by the judiciary in the assumed absence of any other method of controlling the police, and that no other country in the civilized world has adopted such a rule.

Wilkey, *Valid Evidence*, *supra* note 1, at 217. *See* Wilkey, Enforcing the Fourth Amendment, *supra* note 1, 95 F.R.D. at 240.

6. Judge Wilkey's opposition to the good faith exception to the exclusionary rule, which the Supreme Court has now partially adopted, United States v. Leon, 104 S. Ct. 3430 (1984), is an interesting case in point:

> Like most other products of a committee, the Attorney General's Task Force recommendation on the good faith exception smacks of a compromise between the admittedly intolerable situation we have and the remedy truly necessary to correct it. Unlike many compromises, this one is the kind of compromise which may be as disastrous as trying to make the Grand Canyon in two jumps. The jumper is rarely able to summon the effort to make the second hop.

Wilkey, Enforcing the Fourth Amendment, *supra* note 1, 95 F.R.D. at 237.

more effectively secure fourth amendment rights, while alleviating serious drawbacks of the rule.

Among the costs of the rule he discusses at length are the following:

> B. *While Only the Undeniably Guilty Benefit From the Exclusionary Rule, it Offers Innocent Victims neither Protection nor Remedy* (Cost 2)
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> We normally evaluate public policies by their announced purpose and visible result. I submit that the whole purpose of criminal law is to protect innocent people, *i.e.*, society as a whole. Whom does the exclusionary remedy protect? Only the unquestionably guilty. If there is an unreasonable (illegal) search, a gun is found, the guilty man goes free. If there is an unreasonable (illegal) search, no gun is found, the innocent person has no right of redress. The exclusionary remedy flunks the basic test of protecting society.
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> . . . .
>
> C. *All Internal Disciplinary Efforts of Federal Agencies and State Police are Sabotaged by the Exclusionary Rule in any Form* (Cost 3)
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> No law enforcement agency will go all out to discipline an erring officer, if the result will be to sabotage the prosecution later by demonstrating that the evidence should be excluded because of an illegal search. In a converse time situation, no law enforcement agency will discipline its officer if a federal trial judge has already found that the search was legal, *i.e.*, that the officer acted properly by that judge's appraisal of the facts known to him in the particular case. . . .
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> . . . .
>
> E. *The Rule Warps and Distorts the Administration of Justice*
>
> **1. Producing Perjury by the Police (Cost 7)**
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> With the knowledge of the result of the exclusionary rule, the necessity of determining whether the search was legal or illegal is an outright encouragement to perjury by the police. Policemen are human; they know that in most instances . . . the criminal will go free if the search is declared illegal. . . . Even the most honest and objective officer is likely to yield to the temptation, based on his belief that the good of society demands that this criminal be put behind bars, to shade, alter, or even fabricate testimony to be sure that the search and seizure are pictured as legal.
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> . . . .
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> **2. Making Hypocrites Out of Judges (Cost 8)**
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> The necessity of deciding the exclusionary issue makes hy-

> pocrites out of judges. With a conflict in evidence, the judge will be inclined to "believe" the officer, even if he well knows from all the surrounding circumstances the officer is lying. The judge, too, is human, and is conscious of the "higher good," that the unquestionably culpable should be found guilty and punished. . . . "True" justice will be done, *i.e.*, the guilty *will* be punished, even if the verdict is based on falsehood.
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> **3. Expanding the Scope of Search and Seizure for All Citizens (Cost 9)**
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> . . . [I]n a very real sense [the existence of the exclusionary remedy] also diminishes the protection of the Fourth Amendment for honest citizens. . . . [J]udges are likely to move toward dangerously expanded notions of what is legal search and seizure in order to avoid suppressing evidence. Standards of what is a permissible or "reasonable" search and seizure apply equally to the just and the unjust, so expanded areas of reasonableness permit and encourage police actions against *all* citizens which otherwise might not occur.[7]

In order to alleviate these and other costs of the rule, Judge Wilkey makes the keystone of his analysis the formulation of alternative means for securing fourth amendment rights. Only in the mythology of the exclusionary rule do these remedies work any sort of a reduction in real-life protection of personal privacy interests:

> The first and most logical alternative would be to adopt a system under which the Executive Branch disciplines its own people. While the judiciary may ultimately have the responsibility for implementing all constitutional protections, this does not mean that the judiciary must intervene in every single instance of an alleged violation, as happens with the exclusionary rule as the sole method of enforcing the fourth amendment. While individual law enforcement agencies may be too close to their own people always to discipline them effectively, yet this does not preclude the setting up of an overall disciplinary board or agency in the Executive Branch, where the alleged misdeeds of enforcement officials can be investigated, tried, and punished appropriately—without any impact on the trial of the original accused for *his* crime.
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> Second, surely a civil tort remedy can be created, under the Federal Tort Claims Act or elsewhere, to give victims of searches and seizures a claim against the government for the

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7. Wilkey, Enforcing the Fourth Amendment, *supra* note 1, 95 F.R.D. at 218, 222-23 (footnote omitted).

> misconduct of erring police officers. The exclusionary rule compensates only the defendant who is actually guilty of possessing incriminating material objects and is successful in having them suppressed. If the search turns up nothing incriminating, no matter how outrageous the violation, the victim of the search has no remedy whatsoever against the government.[8]

To understand the intensity and persistence of Judge Wilkey's exclusionary rule work, one must therefore look elsewhere than to any facile hostility to fourth amendment values. But one need not look far. For in reviewing his other writings—especially in the field of criminal law—one finds deep commitments to fundamental principles which, taken together, fully account for his comprehensive treatment of the subject.

Perhaps most obvious is his opposition to judicial activism and the usurpation of the functions of other branches of government, a subject which he has addressed separately and at length.[9] Among his most important arguments concerning the exclusionary rule is a structural one. He argues that the exclusion of evidence is a judicial invention, necessitated by and formulated in the absence of legislation offering a remedy for violations of the fourth amendment. It having been created as a remedial measure, it can and should likewise be abolished by legislation creating appropriate remedies for fourth amendment violations:

> [I]t is usually only when the legislative branch is seen to have failed in implementing a constitutional provision that the judiciary feels compelled to take action. And where the Supreme Court or a lower federal court has supplied a remedy in a case where no statutory remedy for enforcement has been provided by Congress, that remedy can prevail only until Congress, by appropriate legislation, provides another remedy and thus occupies the field.[10]

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8. Wilkey, *Constitutional Alternatives, supra* note 1, at 537-38 (footnote omitted). Judge Wilkey has proposed a third approach, to be implemented in the absence of legislation enacting his primary alternatives. This approach envisions a mini-trial of the alleged offending officer following the primary criminal case. Upon finding a fourth amendment violation, the court would uphold the use of the evidence only if appropriate discipline were imposed and reported to the court within a fixed time. In the absence of such discipline, the evidence would be suppressed and, in the usual case, the conviction reversed. *Id.* at 538-39; United Stetes v. Ross, 655 F.2d 1159, 1208-09 (D.C. Cir. 1981), *rev'd*, 456 U.S. 798 (1982).

9. *See* M. Wilkey, Activism By the Branch of Last Resort: Of the Seizure of Abandoned Swords and Purses (Jan. 1984 National Legal Center for the Public Interest).

10. Wilkey, *Constitutional Alternatives, supra* note 1, at 550.

His assessment of the costs of the exclusionary rule likewise reflects a concern that it calls forth an intimate involvement of the judiciary in the affairs of the executive, thus impairing the performance of both.[11]

Second, Judge Wilkey's other work reveals a profound concern with the practical consequences of legal rules on the real-life situations in which they operate. He is well aware that, however noble in theory, legal rules must be justified by their impacts on the conduct of imperfect human beings. He is a master at reasoning through the ways in which a particular rule is likely to impact on the range of affected human behavior. His careful analysis of the effects of the exclusionary rule[12] demonstrates that he opposes the rule in large measure because of its disastrous practical consequences. The same general theme appears throughout his criminal law opinions.

Where the issue has been the creation of new restrictions on the conduct of law enforcement officials, Judge Wilkey has been quick to point out when, from a pragmatic point of view, these restrictions are likely to malfunction. In his dissenting opinion in *United States v. Robinson*,[13] for example, he criticized the majority's conclusion that officers conducting a search incident to arrest must make *ad hoc* judgments about what is necessary to protect safety and secure evidence:

> The training of a police officer, like the training of a soldier, must be designed to maximize simplicity, clarity of instructions, and standardization of procedures. For his own protection the soldier is taught to do things instinctively; he is drilled repeatedly in certain procedures until even in times of great stress he reacts automatically by doing the correct thing. In part, the same is true of the police officer; he is taught certain standardized procedures for his own protection, so that in time of stress he will instinctively take the correct action.
>
> For a police officer, the "correct action" is designed not only to protect the officer, and other persons, but to prevent unjustifiable intrusions into citizens' private affairs. While search and seizure cases are frequently viewed as the classical confrontation of the rights of the individual versus the rights of society, I cannot stress this too strongly. The uninstructed in-

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11. *See supra* note 4 (especially costs 3, 4, 5, and 6).

12. *See* Wilkey, Enforcing the Fourth Amendment, *supra* note 1, 95 F.R.D. at 217-25.

13. 471 F.2d 1082, 1112 (D.C. Cir. 1972) (Wilkey, J., dissenting).

> dividual judgment of each policeman on every situation *ad hoc* is likely to result in more violations of individual rights than will obedience to carefully prescribed standard procedures.[14]

Likewise, in *United States v. Montgomery*,[15] where the majority decision suppressed evidence based on the lack of reasonable suspicion for a car stop, a dissenting Judge Wilkey put himself in the position of the officer and the citizen required to live under the court's holding:

> This is precisely the type decision which has given the exclusionary rule a bad name. The officers here did what their training had taught them to do; they did in fact what any citizen except the offender here would have had them do. Their conduct was reasonable under the circumstances; in my view they violated no one's constitutional rights. Yet two of my colleagues here hold that they crossed a constitutional line so fine that it has taken us more than a year of time to draw it.
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> . . . .
>
> The majority holds that police officers on normal patrol in a neighborhood with which they are intimately familiar cannot stop a driver (or inferentially a pedestrian) to identify him when suspicious circumstances have been personally observed by the officers. In practical effect, they must wait for a crime to be committed before taking effective action. For continuous, prolonged observation of the suspect, keeping "a sharp eye" as recommended by the majority, will result in causing the suspect's departure to wait for a more propitious time. And, according to the majority, the officers are forbidden even a simple stop to identify the suspect so that, if later a crime does occur with a description of the offender matching this suspect, the police will know for whom and where to look.
>
> . . . .
>
> This standard cannot give us the reasonably effective police . . . action which I believe the Supreme Court has sanctioned in its decisions for many years.[16]

Speaking more generally in his dissent to *United States v. Powe*,[17] Judge Wilkey addressed with characteristic directness the practical impact of extensive appellate judicial creativity on the criminal trial process:

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14. *Id.* at 1115 (footnote omitted).
15. 561 F.2d 875 (D.C. Cir. 1977).
16. *Id.* at 888-89 (Wilkey, J., dissenting) (footnote omitted).
17. 591 F.2d 833 (D.C. Cir. 1978).

> This is but one of many, many cases in which we could remand in an effort to produce "the perfect trial"—which probably has never occurred. The majority bave added a new red light to the kaleidoscope of warning signals previously sent down to the District Court and now prominently displayed in front of every trial judge. If the trial bench were a cockpit, and the trial judges pilots, the aircraft would already be unflyable.[18]

Third, and perhaps most important, among the principles underlying Judge Wilkey's exclusionary rule work, is a deeply felt conviction that civilized society depends on maintaining an accountability for individual actions. It is precisely the loss of such accountability which has long been the primary grievance against the rule, and which Judge Wilkey lists as Cost No. 1: "The criminal is to go free because the constable has blundered."[19]

Elsewhere in his work, this concern for the criminal justice system as a vehicle for enforcing an appropriate level of accountability for one's actions presents itself more directly and at greater length. Judge Wilkey served on a court that flirted as much as any with deterministic notions offered to justify or excuse criminal behavior. He wrote a significant amount, often in dissent, on the issues of insanity, intent, duress, voluntariness, and other concepts related to personal accountability.[20] That work stands as a monument to the imperative that people be held to answer for what they do.

Perhaps outstanding among these opinions directly confronting the issue of criminal responsibility is *United States v. Bailey*, where the reasoning of Judge Wilkey's dissent served as the basis for reversal by the Supreme Court.[21] The issue was the availability of duress or related defenses to persons charged with escape, who claimed they did so only to avoid inhumane conditions at the jail. The court of appeals majority ordered a new

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18. *Id.* at 849 (Wilkey, J., dissenting).

19. People v. Defore, 242 N.Y. 13, 21, 150 N.W. 585, 587 (1926), *quoted in* Wilkey, Enforcing the Fourth Amendment, *supra* note 1, 95 F.R.D. at 217.

20. *See* United States v. Bailey, 585 F.2d 1087, 1105 (D.C. Cir. 1978) (Wilkey, J., dissenting), *rev'd*, 444 U.S. 394 (1980); United States v. Robertson, 507 F.2d 1148, 1161 (D.C. Cir. 1974) (Wilkey, J., dissenting); United States v. Bernett, 495 F.2d 943, 965 (D.C. Cir. 1974) (Wilkey, J., concurring); *In re* Farquhar, 492 F.2d 561, 564 (D.C. Cir. 1973) (Wilkey, J., dissenting); United States v. Moore, 486 F.2d 1139, 1141 (D.C. Cir. 1973) (Wilkey, J., concurring).

21. United States v. Bailey, 585 F.2d 1087 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980).

trial, on a theory that the defendant should have been allowed to prove jail conditions in order to establish a lack of "voluntariness" or to negate the element of intent. The majority developed the theory that a purpose to avoid the objectionable "non-confinement" conditions, if proven, might evidence a lack of voluntariness and negate the intent requirement of the escape statute.[22]

In a powerful, painstaking analysis of the concepts of duress, voluntariness, and intent, Judge Wilkey undressed and left naked the majority's result-oriented reasoning. He showed first that the common law defense of duress was clearly unavailable to these defendants, because they had made no effort to return to custody following the escape,[23] and because they failed to demonstrate compulsion in the form of an immediate threat.[24]

He then demonstrated the court's use of the concept of "involuntariness" to be a mischievous confabulation of concepts designed to circumvent common law restrictions on the duress defense.[25] He summarized:

> The practical effect of the majority's decision is to abolish the strict standards governing claims of "involuntariness" that were formerly embodied in the affirmative defense of duress and to replace them with a nebulous and essentially deterministic view of "voluntariness," or free will. What really takes shape is a "totality of the circumstances" test similar to that used in Fourth and Fifth Amendment cases concerning voluntariness. Defendant would be able to adduce any and all evidence that may have some kind of bearing on his motivation. Evidence as to every conceivable unpleasantry that may exist in the prison may be thrown into the hodge-podge. Moreover, presumably evidence concerning motivation stemming from conditions external to the prison could be adduced by the defendant, i.e., that he was driven by a desire to see his dying mother. Confronted with this unstructured evidence the jury would then be expected to find whether from all the circumstances there is any reasonable doubt as to whether the defendant acted voluntarily. This deterministic approach is a prescription for chaos and has wisely been rejected in the criminal law for hundreds of years.[26]

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22. *Id.* at 1092 n.17.
23. *Id.* at 1111-17 (Wilkey, J., dissenting).
24. *Id.* at 1117-18.
25. *Id.* at 1118-21.
26. *Id.* at 1120-21 (footnote omitted).

Finally, addressing the majority's intent theory, he showed it to be in essence the requirement of specific intent where only a general intent to do the act was required by statute.[27] By careful explication of basic legal principles, Judge Wilkey conveyed an inevitability in the conclusion that he reached:

> A defendant "intends" what he knows to be the necessary consequences of his actions. Thus, even though a prisoner's primary or sole purpose is to avoid "non-confinement conditions," he can only do so—and he knows he can only do so—by avoiding legitimate confinement conditions as well. When and if he leaves prison, this prisoner "intends" to depart from "confinement conditions" even though his *motive* is to avoid non-confinement conditions. The majority unfortunately confounds "motive" with "intent."[28]

Judge Wilkey's exposition in *Bailey*, though dealing with completely distinct issues, has much in common with his writings on the exclusionary rule. Both reveal an intensity and determination to run the issues to the ground. It is apparent in both instances that the writer cares greatly about the outcome in issue, and has faith in the process of legal reasoning to redeem the errors of the past and present.[29]

In both instances, it is apparent that the heart of the problem, to Judge Wilkey, is the unsuitability of the majority's conclusion in the context of the real world. Whatever its flaws in reasoning—and they are substantial—the opposing view must fall primarily because, in a fundamental sense, it does not work. For Judge Wilkey, personal accountability is essential, and the criminal law is its principal tool of enforcement. Judicial tinkering which diminishes that accountability or renders less effectual the criminal machinery of its enforcement is to be attacked head on. At issue is whether our system will persist, or rather, will join other "civilizations which reached the carpet slipper stage, and slowly drowsed away beside the fading fires of genius."[30]

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27. *Id.* at 1121-29.

28. *Id.* at 1129 (emphasis in original).

29. That faith has been justified in four criminal cases, in which the Supreme Court majority reached the same conclusion that he reached in dissent: United States v. Ross, 655 F.2d 1159, 1180 (D.C. Cir. 1981), *rev'd*, 456 U.S. 798 (1982); United States v. Bailey, 585 F.2d 1087, 1105 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980); United States v. Robinson, 471 F.2d 1082, 1112 (D.C. Cir. 1972), *rev'd*, 414 U.S. 218 (1973); United States v. Ash, 461 F.2d 92, 106 (D.C. Cir. 1972), *rev'd*, 413 U.S. 300 (1973).

30. United States v. Moore, 486 F.2d 1139, 1158 (D.C. Cir. 1973) (Wilkey, J., concurring).