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Review of "Vigilante: The Backlash Against Crime in America" by William Tucker

Steven H. Goldberg
Elisabeth Haub School of Law at Pace University

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tween games played for small stakes by Columbia students and the competition among nations for influence and power.

In sum: in reading these reports of often very elegantly designed social science research on some of the most fundamental political issues, one cannot help but wish that the authors would extend the care they take designing their questionnaires and experiments to the logical interpretation of the results. It is only through such interpretation that the studies become available to and usable by nonexpert readers. Unfortunately, social scientists seem to concern themselves primarily with rigorous methods of collecting data, not so much with methodical argumentation on the basis of that data.

VIGILANTE: THE BACKLASH AGAINST CRIME IN AMERICA. By William Tucker.[1] New York: Stein and Day. 1985. Pp. 371. $14.95.

Steven H. Goldberg[2]

Vigilante excuses subway gunman, Bernhard Goetz, as an inevitable product of a permissive society in which punishment may be delayed or avoided by process. Mr. Tucker sees the subway encounter between Goetz and three black youths as a microcosm of all that is wrong with America. The country has gone to hell in a hand basket, it happened during the 1960's, and "intellectuals," lawyers, and judges did the carrying. The decade of degeneration, driven by intellectual drivel and represented quintessentially by the Warren Court, spawned an unprecedented crime wave that, in turn, provoked "good people" to replace their faith in the criminal justice system with blazing six-guns.

These arguments deserve serious consideration, but this book contributes nothing to the debate. The author's anger with those he views as the handmaidens of the 1960's warps not only his perspective, but his interest in research and analysis. Conclusions and anger are all there is to this book. *Vigilante* is divided into three sections. The first, "What Went Wrong," focuses on what is wrong with the legal system: the exclusionary rule, lawyers, and judges. The middle, "How the System Should Work," deplores most sociology, psychology, and criminology. The last forty-six pages contain

1. Author of PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM and contributor to various periodicals.

2. Associate Dean, University of Minnesota Law School.

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Tucker's solution to "The Root Causes of Crime": get the black community to get its act together. He presents his case with a fine writing style, a series of poignant anecdotes, a large measure of amateur sociology cum psychology, and an impressionistic world view uninhibited by evidence. His conclusions run against the fashion in most quarters; and his simplistic, often demeaning, presentation will do nothing to gain the attention of those with whom he disagrees.

Tucker's brief for Bernhard Goetz as the symbol of American vigilantism has five major points:

1. All criminals are morally deficient.
2. The only way to deal with morally deficient people is to punish them.
3. If the justice system will not punish criminals, "good people" will.
4. The Warren Court's invention of the exclusionary rule created a crime wave and a vigilante reaction, because calculating criminals and good people both knew that criminals would never be punished.
5. At the same time as the Warren Court was undermining the criminal justice system, black mothers were dominating their male children, thereby creating a society overflowing with "criminal personalities."

Tucker's argument for the proposition that the Warren Court and black mothers, as joint venturers, produced the crime wave is typical of the entire book. The following passage gives the flavor of the argument:

> In a remarkable case of historical amnesia, justice officials awoke at one point in the 1960's and said, "Who are all these unfortunate criminal defendants society keeps bringing before us? Can't anything be done besides punishing them? How can we expect these unfortunate individuals to defend themselves against the overwhelming powers of the state?"
>
> Thus, in a series of crucial reforms over the past twenty-five years, the criminal justice system has been completely transformed. . . . All this has been instituted to give an accused criminal a "sporting chance" to defend himself against the "overwhelming powers of the state."

There is much to be said for the suggestion that the Warren Court's attempt to validate the guarantees of the Bill of Rights through the criminal justice system was a mistake that damaged the image of the incarceration system more than it increased governmental respect for the rights of citizens. Many have said it persuasively, and many compelling arguments have been made in criticism of the Warren Court's criminal law revolution.[3] The reader will

3. The most recent example captures both the feel and the history of the criticism.

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find none of these in *Vigilante*. Serious questions about the role of the Court, the efficacy of the exclusionary rule, and the effectiveness of the system are lost in the author's need to label the Warren Court and the legal profession as soft headed criminal-lovers with a cheerleader's interest in criminal defendants, an antipathy for the citizen's legitimate interest in safety, and a nefarious motive for enforcing the Bill of Rights through the criminal justice system.

Tucker's legal, factual, and analytic miscues would probably not be remarkable were he not so adamant about the rectitude of his own constitutional analysis, so deliberate in his desire to hang the crumbling of society around the neck of the Warren Court, and so persistent in pandering to the public's worst perception about the criminal justice system.

Despite its centrality to his argument, discussion of constitutional law makes up only a small part of the text. Tucker's main constitutional argument is that the Bill of Rights is not anti-majoritarian. The Court, he contends, has no business interpreting those provisions as preserving individual values against challenge by the state as representative of the majority. As a general technique for arguing that the constitutional decisions of the last quarter century are wrong, he invents Constitutional "rights" for victims, witnesses, and the government as surrogate for the majority.

> The right to be relatively safe and secure in your home and on the street is just as much a 'civil liberty' as the right to a grand jury indictment or a fair trial.
>
> Mrs. Coolidge's "Constitutional right" to *cooperate* with the police counted for nothing, of course, when compared to her husband's Constitutional right to try to get away with murder.
>
> Distortions like the exclusionary rule, on the other hand, which bestows rights only on *guilty* people, are clear violations of the "equal protection" clause of the Fourteenth Amendment.
>
> The right to "trial by jury" can be read as a right of the accused, but it can also be read as the right of a jury.
>
> All this [appellate consideration of constitutional issues] is in flagrant violation of the Seventh Amendment of the Constitution, which says:
>
> > . . . no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.
>
> The Ninth Amendment speaks to the rights of crime victims. It doesn't say so in so many words, but the intent is clear.

There is precious little analysis accompanying any of the above. Given the quality of Tucker's history and analysis when he makes the attempt, this is probably just as well.

His search and seizure discussion is his longest and "best" at-

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Frase, *Criminal Procedure in a Conservative Age: A Time to Rediscover the Criminal Nonconstitutional Issues*, 36 J. LEGAL EDUC. 79 (1986).

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tempt. The factual mistakes, though trivial, suggest a sloppiness that may explain the lack of serious consideration for the issues. He ought to know that it was not *Mapp v. Ohio*,[4] but *Wolf v. Colorado*[5] that held the Fourth Amendment enforceable against the states. He ought to know that whatever lead the Warren Court to the decision in *Mapp*, it was not "watching the federal exclusionary rule circumvented through the silver platter syndrome"—*Elkins v. United States*,[6] having put that issue to rest the previous year. The heart of his search and seizure "analysis" involves "fundamental fairness' and "mere evidence." He exhibits just enough knowledge of each to be dangerous.

He asserts that the pre-*Mapp* standard for the constitutionality of searches and seizures was "fundamental fairness." His understanding of that concept and its place in constitutional law is apparent in his definition: "The fundamental fairness doctrine was a rule of thumb, similar to Justice John Paul Stevens's famous definition of pornography: 'I may not be able to define it, but I know it when I see it.' " (Everybody knows that he really said: "I have not yet begun to fight.") The key ingredient implicit in the standard, according to Tucker, is "the *public* has an interest in a fair trial." Whether he understands but decides not to discuss the incorporation issues, or believes that all of the pre-*Mapp* federal search and seizures cases were actually decided under a "fundamental fairness" standard is not clear. His subsequent discussion of *Rochin v. California*[7] and its "shocks the conscience" test for state cases, in the same paragraph with the Holmes observation that the federal government "played an ignoble part" in *Silverthorne Lumber Co. v. United States*[8] suggests the latter. Referring specifically to the "fundamental fairness' approach to illegally seized evidence, Tucker observes: "All this changed with the introduction of the exclusionary rule. *The guilt or innocence of the defendant is now no longer the overriding consideration.*" That the exclusionary rule predated both *Silverthorne* and *Rochin*, neither of which, in any event, turned on the guilt or the innocence of the defendants, apparently escaped the author.

He considers the "mere evidence" rule to be court's most bizarre interpretation of the fourth amendment. In his haste to pillory the Warren Court, he fails to tell the reader that it was the Warren Court that abolished the rule. From his incorrect observa-

4. 367 U.S. 643 (1961).
5. 338 U.S. 25 (1949).
6. 364 U.S. 206 (1960).
7. 342 U.S. 165 (1952).
8. 251 U.S. 385 (1920).

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tion that the "Warren majority never assembled itself for another major decision" after the 1966 decision in *Miranda v. Arizona*,[9] it is fair to conclude that his failure to mention the 1967 decision in *Warden, Maryland Penitentiary v. Hayden*,[10] is a matter of ignorance rather than an intent to deceive. He uses the "mere evidence" rule in conjunction with the exclusionary rule to lament the Warren Court's sympathy for the difficulty of police investigation: "Criminal investigation is now a guessing game in which the police get one guess." He continues with this statement: "In order to conform with the courts' bizarre interpretations of the Fourth Amendment, the police have to be either prescient or psychic (p. 104). If the observation is correct, it is not because of the "mere evidence" rule and the Warren Court majority that put the forty-six-year old precedent of *Gouled v. United States*[11] to rest.

The black mothers' part in Tucker's American immorality play is as poorly conceived and argued as is the part of the Warren Court. If anything, the psuedo-social science is less satisfactory than the constitutional analysis. It is, however, exemplary of the author's "answer first, questions later" approach to analysis, be it constitutional law or sociology. Tucker's "answer" is that the "real criminals" are black: "We might as well face it. When we talk about crime in America, we are talking largely about black crime" (p. 302). Asserting that it is only violent crime that is relevant, he sweeps aside white collar crime—and a lot of white criminals. In pursuing this uniquely colored definition of "crime" and "real criminals," the author ignores revenge murder and occasional drug use—the former because the author liked the reason for the killing and the latter because the author liked the criminal.

The cause of the crime wave is as important to the author's previously conceived view of the world as is the color. Rejecting poverty ("it doesn't make sense to say that 'poverty causes crime,' *Crime causes poverty.*") and drugs (" 'drugs cause crime'—is probably an inversion. . . . 'criminals often do drugs' "), Tucker places the blame on black women:

> As the perverse incentives of AFDC have taken hold of black culture, the average black family has turned into a woman, her assorted children, and a welfare check.
>
> . . . . Unfortunately, it seems very clear that a great deal of what we call the "criminal personality" is the result of men being raised exclusively, or under the predominating influence, of women.

When ideology requires a different answer, Tucker employs a

9. 384 U.S. 436 (1966).
10. 387 U.S. 294 (1967).
11. 255 U.S. 298 (1921).

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different analysis. In his discussion of the death penalty, being unable to demonstrate deterrence statistically, Tucker turns to the "recent emergence of the 'serial murderer.'" "These are the murderers," he explains, "who were *previously* deterred by the death penalty." In this context, he prefers to have the blame fall elsewhere, and so delivers a blistering attack on those who assert family background plays a role in causing serial murders: "Once again the experts have tried to psychologize and sociologize the whole thing into oblivion. Searching for an explanation of the 'serial murderers,' *The New York Times* quoted one expert as saying: 'All of them had real difficulties with their mothers early on.'"

When writing about black mothers, he must have forgotten his rapier-like response to the "experts" at *The New York Times*:

> Has there ever been a time when a certain portion of the population didn't have difficulties with their mothers early on? And even if motherhood were the problem, how is it that this whole new breed of killers, ranging in age from their early twenties to their late fifties, should suddenly start expressing their hostilities right about 1972?

The causes of crime and the role of the criminal justice system in our society are both overripe for review. The appropriate method for vindication of the guarantees in the Bill of Rights is still in doubt. The probable gulf between the public perception and the reality of the criminal justice system needs consideration and attention. *Vigilante*, unfortunately offers nothing of value for any of the above.

JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT. Henry Abraham.[1] New York: Oxford University Press. 2d ed. 1985. Pp. xi, 430. Cloth, $24.95; paper, $9.95.

Kermit L. Hall[2]

"In every case," writes Gerald Nachman of the *San Francisco Examiner & Chronicle*, "Judge Wapner rules quickly, firmly, and fairly. Nothing escapes his flinty gaze. I can't imagine how he's been overlooked for appointment to the Supreme Court, for clearly here is a man you would trust to rule wisely on abortion and classroom prayer."[3] Familiar, benign, sensible, Joseph A. Wapner, the

1. James Hart Professor of Government, University of Virginia.
2. Professor of History and Law, University of Florida.
3. San Francisco Exam. & Chron., June 16, 1985, Sunday Datebook, at 17.

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