

Gardner: The Unlawful Concert

Michael I. Spak

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Michael I. Spak, *Gardner: The Unlawful Concert*, 19 DePaul L. Rev. 640 (1970)
Available at: <https://via.library.depaul.edu/law-review/vol19/iss3/16>

This Book Reviews is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

The Unlawful Concert. BY FRED GARDNER. New York: Viking Press, 1970. Pp. 239. \$1.25.

The Unlawful Concert seemed poorly composed and was, generally, quite discordant. There are many possible descriptions of this work; however, objectivity is not one of them. The author has an axe to grind, and he does so—deeply into the scalp of the United States Army. Sometimes the blows land fairly, but most often there is an indiscriminate hacking accompanied by jabs of pettiness.

The case-in-chief concerns the Presidio "mutiny." The author expounds on the theme of twenty-seven "runaway" servicemen who "wouldn't adjust to military life and the war in Viet Nam,"¹ and were being deprived of their liberty in a California stockade (the Presidio). The *heroes* in the cast of characters are the Presidio twenty-seven.

One soldier was a "runaway" merely "to help the peace movement." After receiving thirty days leave, he was ordered to report to the Oakland Army Terminal, but balked at the prospect because "soldiers were being shanghaied at gunpoint or forced bodily to board planes for Viet Nam."² Our first hero is described as "a really beautiful person, man, kind of what I imagine a primitive Christian to be like."³ Another of the protagonists in the script merely made the decision to "turn on every straight person you can reach, if not to drugs, then to beauty, love, honesty and fun."⁴ He is described as "not only concerned about himself, [but] passionately concerned about the welfare of his fellow prisoners."⁵ Still another "runaway" is described as spending his evenings reading the Bible. Almost a page of his story is devoted to the portion of Saint Matthew that begins "Blessed are the peacemakers: for they shall be called the children of God."⁶ As a blanket description, "the Presidio twenty-seven came from that part of the white working class that has not profited from America's wealth: the transient, the insecure, the badly educated, the emotionally hurt, the poor."⁷ Their average age was nineteen; their median level of education was tenth grade; and fourteen of them came from disrupted families.

Having painted verbal pictures of the participants in the "concert," the author proceeds to unfold the various movements and crescendos leading to the climax of the work. In essence, the lyrics tell the following tale. One day a prisoner, while "allegedly" trying to escape, was shot and killed by a guard. The other prisoners stated that there was no command of "Halt!" given by the guard. Further, the witnesses stated that the guard could have caught the prisoner who was only "jogging" away. After

-
1. GARDNER, *THE UNLAWFUL CONCERT* 9 (1970).
 2. *Id.* at 10.
 3. *Id.* at 15.
 4. *Id.* at 25.
 5. *Id.* at 25-26.
 6. *Id.* at 67.
 7. *Id.* at 46.

suffering what are described as numerous intolerable conditions in the stockade, the twenty-seven decided to "resist" in order to protest the killing and call attention to their plight as inmates of the prison. Breaking ranks after a morning formation, they shouted "Freedom!" and walked some sixty feet to a sunny patch in the compound, where they sat down in a circle, linked arms and sang the anthem of the civil rights movement.

Very briefly, we read the following sequence of events. The Commanding Officer of the stockade was called to the scene and began reading the mutiny article.⁸ He was drowned out by a refrain of "We Shall Overcome," until he availed himself of a loudspeaker. After repeating the mutiny article, he ended with a direct order for the men to return to their cell-blocks. The twenty-seven then yelled and chanted for their lawyer. They were forcibly taken back to the stockade, some having to be carried.

An Army investigation of the event ensued, with the Investigating Officer recommending a charge of "willful disobedience," under Article 90 of the Uniform Code of Military Justice,⁹ a lesser included offense of mutiny. Notwithstanding this recommendation, a trial for mutiny was initiated.

Not only were the "runaways" tried for mutiny, but Army harassment was turned on full force. The prisoners were physically and emotionally harassed while awaiting trial. Rumors circulated that the Army was only interested in "getting" those of the twenty-seven who had retained civilian lawyers. However, the military lawyers also were subject to harassment. One of these was "bawled out" for having his hands in his pockets. During the course of the trial, the defense attorneys were treated with "sarcasm" by the court and were thwarted in many attempts

8. UNIFORM CODE OF MILITARY JUSTICE § 894, art. 94. *Mutiny or Sedition.*

"(a) Any person subject to this chapter who—

(1) with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition;

(3) fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition. (b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct."

9. UNIFORM CODE OF MILITARY JUSTICE § 890, art. 90. *Assaulting or Willfully Disobeying Superior Commissioned Officer.* "Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

to present their cases. After the cases for prosecution and defense were completely presented, the court took thirty-five minutes to return with a finding of guilty for the first of the defendants to be tried, the others having been granted continuances. After less than an hour and a half, the six-officer court returned with a sentence—fifteen years. According to the author, the record of this trial was taken to Washington where, several hours after its arrival, Major General Kenneth H. Hodson, Judge Advocate General of the Army, slashed the sentence to two years.

The remainder of *The Unlawful Concert* concerns itself with the public outcry against the sentence, the ensuing trials of the rest of the twenty-seven, the personal feelings of various relatives of the defendants and proposed changes for the Uniform Code of Military Justice.

The author's theme is apparent and simplistic—simple, non-violent petitioning is not equal to mutiny. With this I agree. However, there can be no agreement on my part with the completely subjective reporting of the facts, including the very obvious fact that disobedience of orders does not equal non-violent petitioning. There can also be no agreement with the petty and indiscriminate axe wielded by the author at every opportunity. What purpose was served, for example, by describing the court law officer as a "fat, bald Mississippian"¹⁰ if the book was truly "an account of the Presidio Mutiny Case" as its subtitle reads?

Mr. Gardner depicts his characters in terms of good versus bad. The defendants, their attorneys and associates are the good guys, while the Army, its attorneys and associates are the bad guys. One of the good-guy-lawyers is described as "a graduate of the University of California at Los Angeles,"¹¹ whereas, one of the bad-guy-lawyers "attended an unaccredited law school."¹² Were the book really an objective account, the author's terms of black or white might be acceptable. Since the work is fraught with subjectivity, however, there seems to be no excuse for the author's obvious denial of the existence of shades of gray.

Putting aside Mr. Gardner's writing style (which is quite good), and his ever-swinging axe, and looking at his knowledge of military law and procedure, one of the kindest comments I can make is that he has reached a superlative—his work indicates absolute, abysmal ignorance. For example, I shall consider but two of his comments, taking one from the book's first page and one from the last. The author indicates that "after thirty days absence without leave, a man is marked as a deserter."¹³ What he does not indicate is that this is *solely* for some administrative matters (pay, allowances, who keeps his records, etc.). It has *absolutely no relation to the legal determination of absence without leave versus desertion*. In fact, the court is not even permitted to be shown this administrative entry. It would be reversible error for the court even to hear, let alone see the comment.¹⁴

10. *Supra* note 1, at 159.

11. *Supra* note 1, at 99.

12. *Supra* note 1, at 99.

13. *Supra* note 1, at 1.

14. *United States v. Leeder*, 33 C.M.R. 862 (1963).

The last page contains a comment (part of the author's "closing argument") that "[i]f soldiers . . . could talk about and read about the war, they might indeed refuse to fight it."¹⁵ This obviously leaves the reader with the impression that these rights are in some way prohibited. Nothing could be farther from the truth.¹⁶ Further, actually to believe that the Judge Advocate General of the Army would act on a record of trial a few hours after receiving it is absolutely incredible. In fact, General Hodson was opposed to the charge of mutiny *ab initio*. The Military Justice Branch of his office suggested to the Sixth Army Staff Judge Advocate that the disobedience charge be used. However, one of the weaknesses of the Army Military Justice System (some have called it a strength) is that the General's advice to his subordinate Staff Judge Advocates is just that—advice. The lower level advisor to the convening authority need not, and in this case did not, follow that advice.

Mr. Gardner does admit that the Uniform Code of Military Justice has some saving graces, so his proposed changes probably do not indicate a desire to do away with the entire system because it has some flaws. This reviewer does not apply that reasoning to the book in question, but rather as an extension of the oft-quoted remark generally attributed to Admiral Rickover,¹⁷ I think it quite appropriate to say of *The Unlawful Concert* that the price of the book (\$1.25) makes it one of the least expensive I have ever read—and worth every penny of it.

Michael I. Spak*

15. *Supra* note 1, at 226.

16. *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958); and *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

17. "The American schoolteacher is the most poorly paid professional person in the United States—and worth every penny of it."

* Assistant Professor at DePaul University College of Law. Member of the California and Illinois Bars. J.D., DePaul University College of Law.