THE UNTRUE HISTORY OF UNSWORN STATEMENTS: FROM BAD HISTORY TO BAD LAW AND THE WAY BACK TO REASON

MAJOR DANIEL F. RENDLEMAN*

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 12th Combat Aviation Brigade and Officer-in-Charge, Ansbach Law Center. J.D., 2017, Yale Law School; B.A., 2009, Georgetown University. Previous assignments include Platoon Leader, 101st Combat Aviation Brigade, Fort Campbell, Kentucky, 2011–2014; Administrative Law Attorney, I Corps, Joint Base Lewis-McChord, Washington, 2017-2018; Trial Counsel, I Corps, Joint Base Lewis-McChord, Washington, 2018-2020. Member of the bar of Illinois. This paper was submitted in partial completion of the Master of Laws requirements of the 69th Judge Advocate Officer Graduate Course.

> *The first to state his case seems right until another comes and cross-examines him.*[1]

INTRODUCTION

Socrates, who claimed to know nothing, was nevertheless in constant pursuit of the truth.[2] His preferred method was to ask the important men of Athens (who were much more confident in their knowledge) to explain the truth so that Socrates might understand. As each leading light of the city gave his explanation, the answer seemed right to those gathered around. Once Socrates started asking questions, though, things began to fall apart. What had sounded like wisdom proved not to be sound after all. Instead, the previously-convincing account was always an over-simplification, full of absurdities or contradictions. It could not be trusted. Thus, Socrates modeled a basic and essential tool for every trial lawyer: cross-examination.[3]

Cross-examination has been called "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[4] Our highest court calls cross-examination the Constitution's "crucible" and promotes it as the favored method for determining the reliability of evidence.[5] But cross-examination is not the only guarantor of truth. Our courts also require an oath.[6] Each witness who gives testimony is required to swear or affirm that she will do so truthfully, holding a knife to her own conscience and exposing her to the threat of a perjury charge.[7] Together, the oath and cross-examination are fundamental pillars of the court's truth-seeking function. The justice system relies on them in every kind of court and for most any kind of proceeding.

And yet, the military justice system carved out an exception for an accused servicemember: the unsworn statement. This statement comes free of charge: no oath, no cross-examination, and, thanks to the development of case law, very few restrictions. The result is that the factfinder is confronted with information that is less likely to be true and more likely to be irrelevant.[8] The president should remedy this situation with a change to the Rules for Court-Martial ("R.C.M.") that limits the content of an accused's unsworn statement.

---

1. *Proverbs* 18:17 (Berean Study Bible).
2. PLATO, PROTAGORAS 56-69 (Benjamin Jowett trans., Bobbs-Merrill 1956) (dialogue between Socrates and Protagoras in which Socrates employs questioning tactics to poke holes in Protagoras' conclusion).
3. *See* William T. Braithwaite, *An Introduction for Judges and Lawyers to Plato's Apology of Socrates*, 25 LOY. U. CHI. L.J. 507, 508 (1994).
4. 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (2d ed. 1923).
5. Crawford v. Washington, 541 U.S. 36, 61 (2004).
6. *Id.*
7. *See id.*
8. *See* discussion *infra* Part III.

The unsworn statement has its origins in the findings portion of criminal procedure in pre-twentieth-century courts.[9] In 1951, long after most jurisdictions eliminated the unsworn statement, President Truman removed it from the military.[10] At the same time, Truman created an analogous unsworn statement for use during the presentencing phase of a court-martial.[11] Nonetheless, courts continue to look to the original iteration of the unsworn statement as a source for precedent and a guide to understanding the modern statement's proper purpose and scope.[12] Understanding both the original, findings-based iteration and the modern, presentencing-focused version of unsworn statements will aid in understanding the sworn statement's role in any modern court-martial.

Though the survival of this procedure has gone relatively unnoticed in legal scholarship, recent work mistakenly assumed that the unsworn statement originated in the ancient right of allocution.[13] Allocution was the common law practice of allowing a convicted man to request a lighter sentence from the court.[14] This article charts a different path, showing in Part I that the historical origins of the unsworn statement instead lie in an entirely different area of the law. Specifically, the unsworn statement was born out of strict evidentiary limitations and restrictions on the role of counsel that together severely hindered the defendant's ability to put on a case. The unsworn statement acted like a pressure valve, allowing the accused to defend himself as to his guilt or innocence, not to plead for leniency.[15]

Part II examines the evolution of military unsworn statements leading up to the adoption of the Uniform Code of Military Justice ("U.C.M.J.") in 1950. Developments in the law, in both civilian and military criminal jurisdictions, abrogated former restrictions on the accused and largely removed the need for unsworn statements at all.[16] Part III shows how the procedural changes that accompanied the U.C.M.J. created a new unsworn statement, divorced from its historical function. Nonetheless, courts continued to interpret the unsworn statement through the lens of historical practice, leading to confusion in the law and an unintended windfall for the accused.[17] Part IV recommends that the President narrow the content of

---

9. *Id.*

10. *Id.*

11. *Id.*

12. John S. Reid, *Undoing the Unsworn: The Unsworn Statement's History and A Way Forward*, 79 A.F. L. REV. 121, 137–46 (2018).

13. *See id.* at 123.

14. Celine Chan, *The Right to Allocution: A Defendant's Word on Its Face or Under Oath*, 75 BROOK. L. REV. 579, 579–80 (2009).

15. *See* William Cassara, What is an Unsworn Statement, (August 16, 2013), https://courtmartial.com/what-is-an-unsworn-statement/#:~:text=An%20unsworn%20statement%20is%20something,that%20will%20decide%20his%20sentence [https://perma.cc/Q62J-ACSP].

16. *See* U.S. WAR DEP'T, REGULATIONS FOR THE ARMY OF THE UNITED STATES 1895, 129, para. 926 (1900); George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 662 (1997).

17. *See* discussion *infra* Part III.

unsworn statements in a way that upholds the rights of the accused and promotes the truth-seeking function of the court-martial.

I. COURT-MARTIAL PROCEDURE IN THE NINETEENTH CENTURY

Nineteenth century military and civilian criminal procedure featured two especially harsh restraints on the accused: strict limitations on defense counsel and prohibitions on the accused serving as a witness. Although none of these limitations remain in force today, nineteenth-century criminal precedent cannot properly be interpreted without first understanding the gap between the present and the past.[18]

This section addresses five different legal concepts: (1) historical limitations on defense counsel in the courtroom, (2) historical limitations on the accused in the courtroom, (3) the unsworn statement in criminal procedure generally, (4) the unsworn statement in military court-martial procedure, and (5) the historical right of allocution. Each concept has a unique historical development. In order to avoid jumping from one legal concept to another in a vain attempt to tell a chronological tale, this section will address each concept sequentially.

A. Historic Limitations on Defense Counsel

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to "the Assistance of Counsel for his defence."[19] In modern law, this right guarantees that all criminal defendants will have an attorney speaking for them in court, regardless of personal income.[20] Historically, though, this right was limited.[21] Not everyone automatically received counsel and, especially in criminal cases, that counsel could often provide only limited assistance.

18. Just as British common law had a large and lasting influence on American common law, British military law is the immediate ancestor of American military law. The Second Continental Congress, a year before the Declaration of Independence, passed the Articles of War. AMERICAN ARTICLES OF WAR OF 1775, art. XLI, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 956 (2d ed. 1920). This code laid out the procedures and rules of American military justice and drew heavily from the British Articles of War, enacted just ten years earlier. BRITISH ARTICLES OF WAR OF 1775, art. XVII, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 944 (2d ed. 1920). From that point, the two began to slowly diverge. Nonetheless, American treatise writers continued to cite to British thinkers, writers, and precedents for well over a hundred years. Where differences emerged between the systems, writers often noted them explicitly. This paper will, therefore, look to British, as well as American, sources in determining the historical practice of nineteenth century American military justice.

19. U.S. CONST. amend. VI.

20. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

21. *Id.* at 340.

In some instances and particularly in federal cases, the right to have an attorney only existed for those who could afford representation.[22] The Supreme Court firmly rejected that understanding of the Sixth Amendment in 1938.[23] State defendants had no federal constitutional right to counsel until the passage of the Fourteenth Amendment in 1868,[24] and federal courts did not recognize that right until 1961.[25]

Courts were hesitant to extend the right to counsel to soldiers tried by court-martial.[26] In the early nineteenth century, an accused servicemember was usually on his own for his defense.[27] However, as time progressed, though military courts were not "bound by the letter" of the Sixth Amendment, they were considered "within [its] spirit" by most practitioners.[28] The military eventually began to take the "spirit" of the amendment seriously.[29] Even then, though, a counselor was considered merely a privilege.[30] No court overturned cases for want of an attorney alone.[31] Still, it was a privilege that was usually granted.[32]

---

22. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (holding that the Constitution guarantees the appointment of an attorney for criminal defendants in federal court who cannot afford one).

23. *Id.*

24. U.S. CONST. amend. XIV, § 1.

25. *See* Gideon, 372 U.S. at 344 (holding that states had to provide a defense attorney to criminal defendants who could otherwise not afford one).

26. *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* 72 HARV. L. REV. 1, 49 (1958) ("On the basis of contemporary materials, only one conclusion is possible: The right "to have the Assistance of Counsel for his defence," though in terms applicable to "all criminal prosecutions" like the companion right of trial "by an impartial jury of the State and district wherein the crime shall have been committed," was never thought or intended or considered, by those who drafted the sixth amendment or by those who lived contemporaneously with its adoption, to apply to prosecutions before courts-martial.").

27. *Id.* at 22 (*"*In the 1806 Articles of War, there is not only no provision for any counsel for the accused, but article 69–taken verbatim from article 6 of 1789 –indicates that Congress considered that an accused soldier was on his own while standing trial.").

28. WINTHROP, *supra* note 18, at 165 n.38.

29. An 1890 general order required that commanders detail a "suitable officer" for defense "if practicable." *Id.* at 165. There was no requirement that such officers be attorneys. *Id.*

30. *Id.*

31. *See* William M. Beaney The Right to Counsel in American Courts 32 (1955) (stating "there was no feeling prior to 1938 that defendants who pleaded guilty, or those who failed to request counsel, had a constitutional right to be advised and offered counsel, or that a conviction without counsel was void"). *Contra* DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 318 (1869) ("It is a positive right of the prisoner to have counsel" in the military context).

32. ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW, AND COURT MARTIAL; AS PRACTISED IN THE UNITED STATES OF AMERICA 95 (1809) ("[I]t is at the same time not unusual for a prisoner to request the court to allow him the aid of counsel to assist him in his defence . . . This benefit the court will never refuse a prisoner").

Those attorneys that did serve as defense counsel, however, were tightly regulated relative to the modern criminal defense attorney.[33] For example, a criminal defense attorney was not allowed to speak during court-martial.[34] Counsel could not address the court-martial "by argument or pleading of any kind."[35] Instead, counsel were expected to assist the accused in making his own defense by "suggesting fit questions" or offering "observations on the general import of the evidence."[36] The responsibility fell to the accused to ask those questions or report those observations to the court.[37] Only the accused maintained the right to address the court and most importantly for this paper, the responsibility of delivering the closing argument, or "final defense."[38]

By the 1890s, the strict rules silencing defense counsel began to wither away.[39] Attorneys in Britain gained the same right to address the court that their clients had enjoyed.[40] There was a similar softening on the American side, where, though the formal rule was as strict as ever, it was "mainly held in reserve, to be enforced by the court in exceptional cases."[41] This was a period of transition.[42] Courts-martial granted defense counsel more liberty at trial, but not in a systematic way.[43] At the same time, the military solidified the right to counsel.[44] In 1895, Army regulations mandated that an accused receive access to defense counsel.[45] These new regulations required commanding officers to appoint a "suitable officer" as defense counsel for all general courts-martial.[46] Just as the rights of defense counsel

33. *See* ALEX TYTLER, AN ESSAY ON MILITARY LAW, AND THE PRACTICE OF COURTS MARTIAL 250 (1806).

34. *Id.*

35. *Id.*

36. *Id.* at 251.

37. Defense counsel were silenced in both the British and the American military justice systems. *See, e.g.,* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 242 (1st ed. 1896). William Winthrop, an influential scholar, military lawyer, and treatise writer in the late nineteenth and early twentieth centuries, called the prohibition on counsel speaking in a court-martial a "strict rule" that was "especially enforced as against professional counsel was such as to render their position embarrassing if not humiliating." *Id.* Writing in the British context, one scholar notes that, though defense counsel were appearing more often in courts-martial as the century wore on, there had been no corresponding "relaxation of the well established rule of courts martial as to the silence of professional advisers, and their taking no part in the proceedings." THOMAS SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL 203 (7th ed.1875). The rule prohibited all oral communication from counsel, including the examination of witnesses, at least as late as 1875 in America. *See* WINTHROP, *supra*.

38. TYTLER, *supra* note 33, at 251–54.

39. WINTHROP, *supra* note 37, at 242.

40. *Id.*

41. *Id.*

42. *See id.*

43. *Id.* at 243.

44. U.S. WAR DEP'T, REGULATIONS FOR THE ARMY OF THE UNITED STATES 1895, 129, para. 926 (1900).

45. *Id.*

46. *Id.*

had progressed from the early nineteenth century to the early twentieth century, the rights of the accused himself also advanced during the same time period.

B. The Accused Barred from the Witness Stand

At the beginning of the nineteenth century, an accused servicemember could not testify as a witness in his own court-martial.[47] That restriction came from a more general rule: no interested party was allowed to testify in any case, civil or criminal, military or civilian.[48] Although modern litigators would address a party's interest as an issue of bias that might affect the weight of their testimony, earlier courts considered this a question of competence that brought into question whether the witness should be allowed to speak at all.[49] This disqualification dated back to the sixteenth century, when an interested witness was assumed to be at greater risk of perjury.[50] Perjury, committed on an oath before God, was a danger to one's soul.[51] By denying the accused a right to testify, the court removed a temptation to provide false testimony.[52]

In the middle of the nineteenth century, this prohibition slowly started to erode.[53] States began permitting civil parties to testify at trial.[54] State legislatures, starting with Maine, began to remove the prohibition for criminal defendants by the 1860s.[55] In 1878, Congress declared all federal criminal defendants competent trial witnesses by statute.[56]

As defense counsel took on a greater role in proceedings, the accused became just another witness in the eyes of the court.[57] Witnesses were no longer responsible for the lawyerly work of drawing out facts, raising objections, or interacting with witnesses.[58] Though these twin developments—the rise of defense counsel and the defendant's right to take

47. AKHIL AMAR, AMERICA'S UNWRITTEN CONSTITUTION 104 (2012).

48. *Id.* This prohibition extended to both parties in a civil suit, to the accused in a criminal case, and to any individual who might stand to gain or lose by the outcome of a court case. *Id.*

49. Fisher, *supra* note 16, at 659–61.

50. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW 247 (2009).

51. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH 522 (2d ed. 1992).

52. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2645 (1996); *see also* AMAR, *supra* note 47, at 104. Additionally, this restriction was the reverse side of the right to remain silent. *Id.* If one had the right to give sworn testimony but chose not to, it invited the question, "Well, why didn't he?" *Id.* This specter, of the court or the jury drawing a negative inference against a silent party, is still with us.

53. Fisher, *supra* note 16, at 659–61.

54. *Id.* at 659.

55. *Id.* at 662.

56. 20 Stat. 30, *now codified as* 18 U.S.C. § 3481. The prohibition against testimony from the accused lasted longer in England, undone by a statute in 1898.

57. *See* J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 361 (1986).

58. *Id.*

the stand—did not expand in all the same places at all the same times, they both progressed (unevenly) over the same critical decades in the latter half of the nineteenth century.[59]

Taken together, these two advances were dramatic enough to shift the entire conception of the criminal trial.[60] Professor John Langbein, an expert in the history of the common law, notes that these developments marked a pivotal moment of legal development separating what came before from what was to come later.[61] While most lawyers are familiar with the modern form of the trial,[62] attorneys must also strive to understand the antecedent version to fully grasp the importance of the unsworn statement.

Langbein believed that the earlier form of trial served primarily as an opportunity for the accused to explain away their charges.[63] The accused would respond to each hostile witness in turn.[64] And, throughout the proceeding, the accused would answer questions from the judge.[65] As John Beattie, a British legal historian, put it:

> [T]he prisoner had to cross-examine prosecution witnesses himself and to speak in his own defense. If he did not, no one would. And the assumption was clear that if the case against him was false the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence.[66]

---

59. *See* Fisher, *supra* note 16, at 681; U.S. WAR DEP'T, REGULATIONS FOR THE ARMY OF THE UNITED STATES 1895, 129, para. 926 (1900).

60. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048 (1994).

61. *Id.* Trials from before the rise of defense counsel, he labels the "accused speaks" trial. *Id.* Those after, he calls the "testing the prosecution" trial. *Id.*

62. *See id.*

63. *Id.* at 1049.

64. *Id.*

65. *Id.*

66. BEATTIE, *supra* note 57, at 348–49. This concept, that the accused needs to explain himself, seems to be in contradiction to the long-held right for an accused to remain silent. However, as we have already seen in the development of the right to counsel, the modern conception of the right to silence may differ greatly from earlier iterations of it. The development of this right is beyond the scope of this paper, but consider Professor Langbein's response to this question: "The better way . . . is not to say that there was no privilege [to remain silent], but rather to recognize that the structure of criminal procedure in the early modern epoch made it impossible to implement the privilege. The 'accused speaks' criminal trial stood in perpetual tension with any notion of a right to remain silent. The privilege against self-incrimination became functional only as a consequence of the revolutionary reconstruction of the criminal trial worked by the advent of defense counsel and adversary criminal procedure. The privilege as we understand it is an artifact of the adversary system of criminal procedure. The error has been to expect to find the privilege in operation before the adversary system was in place." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1084 (1994); *see also* Alschuler, *supra* note 52, at 2632 (arguing that the right to remain silent was originally

But if the accused's own words were so important in his defense, how could he tell his own side of the story? If a witness could not take the stand, and his counsel could not speak for him, the answer was the unsworn statement.

C. The Unsworn Statement as a Mainstay of Criminal Procedure

Earlier criminal courts were hesitant to question a defendant under oath. They showed no such reluctance when questioning an accused who was not under oath.[67] In addition to regular questioning throughout the trial, the common practice was for the judge, prior to sending the case to the jury for deliberation, to ask the accused if he had anything additional to say in his defense.[68] By not placing the defendant under oath, the threat to the defendant's soul was greatly reduced. This final statement to the court was the unsworn statement,[69] and it was pervasive throughout common law.[70]

Though these statements were "not evidence" they did present the accused an opportunity to present his case directly to the jury.[71] An unsworn statement was usually a form of argument, but, in some jurisdictions, would also include factual claims.[72] So what does it mean to say that these statements are "not evidence?"[73] The only consistent interpretation of this phrase is that such statements were given less weight than sworn evidence.[74]

Though the unsworn statement existed as a feature in trials throughout the common law world, the practical application of this right varied from place to place. Some jurisdictions treated unsworn statements

---

conceived of as extending only to sworn witnesses and not to pre-trial investigations or other situations).

67. In the American context, Justices of the Peace would regularly interrogate defendants, unsworn, prior to trial. Alschuler, *supra* note 52, at 2655. They would then offer a report of the interrogation to the court. *Id.* Eventually, courts wanted to hear these accounts from the defendant himself and they did. *Id.*

68. *See, e.g.*, Commonwealth v. Stewart, 151 N.E. 74, 76 (Mass. 1926) ("In other cases the statement has been made to the prisoner, by justices of this court eminent for accuracy and learning, that he had the privilege 'to address the jury' in his own behalf.").

69. *Id.*

70. *See id.*

71. *Id.* at 76 ("It is significant that in no trial in this commonwealth, so far as we know, has any expression been used indicating that the statement of a defendant has been treated as evidence. It has commonly been referred to as an address or statement. These recurrent forms of statement of the privilege in actual trials from judges of great reputation reaching back almost a century are of great significance in fixing the nature of such statement or address as being simply what those words indicate, and as not being evidence.").

72. *See generally* Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 117 n. 113 (1981–82) (noting that most jurisdictions used the unsworn statement to "mitigate against the harshness" of excluding sworn testimony).

73. *See, e.g.*, WINTHROP, *supra* note 18, at 300.

74. *See, e.g., id.* (noting that though "not evidence" these statements should be given "due consideration").

harshly and excluded any added facts entirely.[75] An early English trial exchange showcases this point of view:

> Accused: I came home . . . the last day of August.
>
> Judge: Have you any witness to prove that?
>
> Accused: I cannot say I have a witness.
>
> Judge: Then you say nothing.[76]

Not all courts agreed with that judge. If the unsworn statement presented the only opportunity to tell the accused's side of the story, some courts felt they needed to be able to make those factual claims. An Australian court determined that facts could be introduced, but not as "ordinary evidence in the case, or evidence at all."[77] Instead of "evidence," factual statements made by the accused were treated as "suggestions."[78] The contents of unsworn statements received varied treatment, with some courts calling them "something more than argument, something less than evidence."[79] Juries seemed to give little weight to an unsworn statement in their own deliberations.[80]

Before defense counsel could make closing arguments and before defendants could testify at trial, the unsworn statement, though not a perfect fit by modern standards, fulfilled the functions of both the closing argument and the defendant's testimony.[81] But the accused finally gained the right to testify at trial in the latter half of the nineteenth century.[82] This new right

---

75. *See, e.g.*, Regina v. Rider (1838) 173 Eng. Rep.; 8 Car. & P. 539, 540 ("If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds.").

76. Coleman's Case (1678) 7. St. Tr. 1, 65 (Eng.).

77. Regina v. Morrison (1889) 10 N.S.W.R. 197, 208–9 (Austl.).

78. Such a "suggestion" from an unsworn statement could be considered by the jury but could not, on its own, justify instructing the jury on a particular defense. *Id.* at 210. In one New Zealand case, a defendant, accused of an indecent assault on an underage girl, presented no evidence but raised in his unsworn statement the affirmative defense that he had no reason to suspect her of being underage. *See* Rex v. Perry and Pledger [1920] NZLR 21, 25 (N.Z.). The court ultimately determined that the accused's unsworn statement did not rise to the standard of "some reasonable evidence" that would justify the defense. *Id.* In this case, however, the court also determined that such a defense could be raised from the victim's personal appearance and as an inference from the state's evidence. *Id.* at 26.

79. ZELMAN COWEN & P.B. CARTER, ESSAYS ON THE LAW OF EVIDENCE 217 (1956). *See generally id.* at 205–18 for a general discussion of the unsworn statement throughout common law jurisdictions.

80. *See* Fisher, *supra* note 16, at 640 (showing that defendants who offered an unsworn statement at the Old Bailey from 1715 to 1780 either did not seem to benefit or had a substantially higher rate of conviction).

81. *See generally id.*

82. *See* Act of Mar. 16, 1878, Ch. 37, 20 Stat. 30 (codified at 18 U.S.C. § 3481 (2018)).

signaled, in most jurisdictions, the death of the unsworn statement, sometimes automatically as a matter of law.[83] The places where the unsworn statement survived were holdover jurisdictions where the accused could still not testify.[84]

In the American military, both sworn and unsworn testimony existed simultaneously. This article will pay special attention to military practices in the late nineteenth century because that time period best showcases when these various legal concepts came together. This is particularly important because military courts, even today, continue to look back to late nineteenth-century practice to determine the proper scope of the unsworn statement.

D. The Military Unsworn Statement in the Nineteenth Century

The 1890 *Instructions for Courts-Martial* served as a kind of precursor to the modern *Manual for Courts-Martial*.[85] These books provided a military unit in the field with all the basic procedures and regulations for conducting a court-martial.[86] The 1890 *Instructions* outlined the accused's choices for addressing the court.[87] By this time, the accused could be sworn in to testify in their defense.[88] If the accused so chose, the judge advocate, the Army's prosecutor, would ask him, "What do you have to say in your defense?"[89] In this case, the accused would have "no exceptional status or privileges" and would be subject to cross-examination.[90] Whether or not he took the stand, he could make "a verbal statement in his defense" or a written statement to be read aloud by the judge advocate.[91] This was his unsworn statement.[92] After the accused submitted this "final defense," the judge

83. *See* Ferguson v. Georgia., 365 U.S. 570, 586 (1961) ("The abolition of the incompetency rule was therefore held in many jurisdictions also to abolish the unsworn-statement practice."); State v. Louviere, 124 So. 188, 192 (La. 1929) ("But the rule ceases when the reason on which it is founded ceases, which is the case in those jurisdictions wherein the competency of an accused is expressly declared by statute. In such cases the unsworn statement of an accused becomes secondary to his right of testifying under oath and cannot be received."); *see also* Rex v. Krafchenko (1914) 17 D.L.R. 244, 250 (Can.) (finding that, but for a specific statutory bar, it is "extremely probable" that the right to make an unsworn statement would have been nullified by the right to take the stand).

84. Thus, Georgia, which did not allow an accused to take the stand until 1962, continued to allow an unsworn statement. *See Ferguson*, 365 U.S. at 586.

85. *See* P. HENRY RAY, U.S. ARMY, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES (1890); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1893) [hereinafter 1893 MCM].

86. *See* RAY, *supra* note 85; 1893 MCM, *supra* note 85.

87. *See* RAY, *supra* note 85.

88. *Id.* at 31.

89. *Id.* at 10.

90. *Id.* at 31.

91. *Id.* at 10.

92. *Id.*

advocate could respond.[93] This basic structure would continue through the different editions of the Manual for Courts-Martial until the 1920s.[94]

A treatise from the time by Colonel William Winthrop addresses this practice with more detail.[95] Winthrop referred to the unsworn statement as "the concluding statement."[96] The accused made the first "concluding statement" followed by the judge advocate's answer.[97] Winthrop's description of the statement sounds similar to a modern closing argument:

> The statement may consist of a brief summary or version of the evidence, with such explanation, or allegation of motive, excuse, matter of extenuation, &c., as the party may desire to offer, or it may embrace, with the facts, a presentation also of the law of the case and an argument both upon the facts and the law.[98]

The statement is "not evidence" but a "personal declaration or defence."[99] Further, it cannot be "a vehicle of evidence, or properly embrace documents or other writings, or even averments of material facts, which, if duly introduced, would be evidence."[100] For Winthrop, though the unsworn statement could include arguments about admitted facts, it could not include new ones.[101] Especially since the defendant could now testify, Winthrop saw no reason to expand the unsworn statement beyond the confines of legal arguments.[102]

Other writers were softer on this point than Winthrop.[103] General George Davis wrote in 1915 that the statement was "usually in the form of an argument."[104] However, he mentioned that the term "statement" in the rules implied "that it contains, in addition to matter of argument, allegations of fact, some of which may not have been presented to the court in the form of evidence during the course of the trial."[105] He cites no authority for this

93. *Id.* at 11.
94. *See, e.g.*, 1893 MCM, *supra* note 85, at 146.
95. *See* W. WINTHROP, MILITARY LAW (1886).
96. *Id.* at 420.
97. *Id.* at 421.
98. *Id.* at 423.
99. *Id. See also* S. V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 133 (5th ed. 1866) ("He has a right to construe the evidence adduced in any way, to draw any deductions from it, and to explain all that may seem to bear against him by argument from facts established, but he has no right to testify for himself by statements not supported by the testimony before the court or to introduce documents or other evidence which he has neglected to present at the proper time").
100. *Id.*
101. *Id.*
102. *See generally id.*
103. *See, e.g.*, GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (3d ed. 1915).
104. *Id.* at 132.
105. *Id.* at 132–33.

claim other than "the custom of the service."[106] Nonetheless, Davis further explained that, since by 1915 the accused could give sworn testimony, facts made in an unsworn statement "will properly require something more in the way of corroboration than was formerly the case."[107] Davis continuously used the word "statement" to refer to the prosecutor's own closing argument, and yet he would not have allowed the prosecutor to introduce new allegations of fact.[108]

Whether the accused's unsworn statement could include factual assertions or was limited to argument, in at least one sense, the court was expected to grant a wide "freedom" to the accused in making his statement.[109] Soldiers did not normally have the liberty to speak ill of certain individuals who were likely to serve as witnesses at a court-martial.[110] During unsworn statements, however, the court granted an allowance that relaxed this otherwise strict prohibition.[111] After all, an accused might face hostile testimony given by his own commanding officer. Taken too far, the defendant's duty to respect and obey superior officers could nullify his entire ability to defend himself against them. Thus, "an accused may be permitted to reflect within reasonable limits upon the apparent animus of his accuser or prosecutor."[112] The accused servicemember needed to be allowed to criticize other soldiers for lying or exaggerating, even if, outside of a trial, such an accusation would be improper. Otherwise, he would be helpless when posed against a high-ranking witness.

By the time that Winthrop and Davis published their treatises, a court-martial defendant had the right to defense counsel and the right to give sworn testimony.[113] These two writers demonstrate that the late nineteenth century unsworn statement functioned, in essence, as an additional

106. *Id.* at 132.

107. *Id.* at 133.

108. *Id.* There was, however, an exception to the rule against unsworn evidence. *See* William Winthrop, A Digest of Opinions of the Judge-Advocates General of the Army 664 (1901). If the accused admitted, during his unsworn statement, to facts "material to the prosecution," then the government was relieved of the burden of independently proving such facts. *Id; see also* DAVIS, *supra* note 103, at 133 n.1 ("[W]here the accused, in his statement, fully admits that certain facts existed substantially as proved, he may be regarded as waiving objection to any irregularity in the form of the proof of the same."). However, a conviction could not be wholly sustained on such an admission. WINTHROP, *supra*.

109. WINTHROP, *supra* note 95, at 421.

110. "No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, imprisoned, and of asking pardon of the party offended, in the presence of his commanding officer." AMERICAN ARTICLES OF WAR OF 1776, § VII, art. I, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 956 (2d ed. 1920).

111. *Id.*

112. WINTHROP, *supra* note 95. This right was guaranteed by military order, not by case law.

113. *See* 18 U.S.C. § 838 (regarding the right to defense counsel); Act of March 16, 1878, Ch. 37, 20 Stat. 30 (codified at 18 U.S.C. § 3481 (2018)) (regarding the right to give sworn testimony).

argument.[114] The statement was made prior to findings, and it was structurally opposite to the prosecution's closing argument.[115] Though there is some discrepancy concerning whether these statements could include factual allegations, the statement was not a vehicle for "evidence."[116] It was not even a vehicle for facts that would otherwise be evidence without corroboration from another source, nor was it a plea for mercy.

E. The Unsworn Statement Contrasted with the Right of Allocution

As examined above, the unsworn statement, in civil and military criminal law, allowed the accused to defend his innocence on findings.[117] This right, though, was not the same as the right to allocution. Allocution represented a separate right, with a distinct historical evolution, divorced from the developments that gave rise to the unsworn statement.[118] The right of allocution presented convicts with the opportunity to plead for a lighter sentence.[119] This practice originated in the late twelfth century as the "benefit of clergy."[120] At the time, felonies were uniformly punishable by death.[121] However, if the defendant showed that he was a member of the clergy, then he would escape the court's jurisdiction[122] or, after conviction, have his sentence set aside by the court.[123] This procedure had its own fascinating progression, and eventually became available to all criminal defendants for most, but not all, felonies.[124] Since the rule amounted to a "get out of jail free" card, legislatures limited its application by statute to one offense per offender.[125] Those convicts who successfully invoked the privilege were branded on the thumb to ensure that they did not escape justice a second time.[126]

---

114. *See* WINTHROP, *supra* note 95, at 421; DAVIS, *supra* note 103, at 132.

115. *See* WINTHROP, *supra* note 95, at 420.

116. *See id.* at 423; DAVIS, *supra* note 103, at 132–33.

117. *See generally* WINTHROP, *supra* note 95; DAVIS, *supra* note 103.

118. *See* Paul W. Barrett, *Allocution*, 9 MO. L. REV. 115 (1944).

119. *Id.*

120. LANGBEIN ET AL., *supra* note 50, at 618.

121. *See* L. C. GABEL, BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES (1929).

122. The original purpose of such a rule was to secure the prerogative of ecclesiastical courts. *See* LANGBEIN ET AL., *supra* note 50, at 619. The prisoner would be turned over to the church to be tried under their jurisdiction. *Id.*

123. *Id.*

124. The judicial test for membership in the clergy was simply a test of literacy. *Id.* at 618. All males who could read were therefore able to avail themselves of the privilege. *Id.* After this, all males who could pretend to read, by memorizing a particular passage of scripture, gained the privilege. *Id.* at 619.

125. *Id.*

126. *Id.* For a notable example of this in American legal history, *see John F. Tobin, The Boston Massacre Trials*, 85 N.Y. St. B.J., 17 (2013). Though all of the soldiers were tried for murder, they were all acquitted of that charge. Two were convicted of manslaughter, a "clergyable" offense, and subsequently branded on the thumb.

Over time, convicts other than clergymen were given an opportunity to escape punishment. A defendant might hope for a reprieve if they could show pregnancy, pardon, or insanity.[127] These changes gradually developed into a comprehensive system, and courts began asking convicts, directly before sentencing, whether any circumstances existed that should mitigate their sentences.[128] Over time, the system shifted from requiring convicts to make a specific plea to simply asking convicts to make a general call for mitigation.[129] In 1944, the defendant's right to allocution entered the Federal Rules of Criminal Procedure.[130] That said, allocution is quite limited in modern practice.[131] Courts now give the convicted individual a chance to show remorse for his actions but have little patience for defendants who seek "to reargue their case . . . or to protest their innocence."[132]

Francis Wharton detailed the differences between allocution and unsworn statements in his seminal *Treatise on Criminal Pleading and Practice*.[133] In the 1899 edition of his work, Wharton describes the unsworn statement in Chapter 10 as dealing with the merits trial itself.[134] He writes, "[A] defendant has a right to make a statement to the jury."[135] The statement occurs before the jury deliberates on findings.[136] Further, Wharton notes that "[in] jurisdictions . . . in which the defendant is entitled to be examined under oath, such unsworn statements . . . cannot be received."[137] Wharton does not address the right of allocution until Chapter 20, which deals with sentencing procedures.[138] Here, he writes that the point of this address is:

> to give the defendant the opportunity to [make] statements which, by the strict rules of law, could not have been admitted when urged by his counsel in the due course of legal procedure; but which, when thus informally offered

127. *See* Barrett, *supra* note 118, at 121.

128. FRANCIS WHARTON, A TREATISE OF CRIMINAL PLEADING AND PRACTICE § 906 (9th ed. 1889).

129. Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 460 (2008).

130. *Id.* at 463 n.146. *See* FED. R. CRIM. P. 32(i)(4)(A)(ii).

131. *See generally* Giannini, *supra* note 129, at 462–66 (discussing the narrow circumstances in which courts allow allocution, typically only for a mitigating effect upon the calculation of sentencing).

132. *Id.* at 463–64.

133. WHARTON, *supra* note 128.

134. *Id.* at § 579.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at § 906.

> man to man, may be used to extenuate guilt and to mitigate punishment.[139]

Not only is the allocution address presented at a different stage than the unsworn statement, but it also includes facts specifically deemed irrelevant during the merits portion of the trial, e.g., post-crime regret.[140] While the unsworn statement and the allocution statement are outwardly similar, they have separate origins, purposes, developments, and timing.[141] In the military, unsworn statements existed without allocution rights until 1951 when the historical unsworn statement is eliminated and, with the same stroke of a pen, the allocution statement was introduced.[142]

II. THE METAMORPHOSIS OF THE MILITARY UNSWORN STATEMENT

However, prior to 1951, the form of the unsworn statement had already begun to change.[143] The expanded role of defense counsel meant that the accused's chance to make an unsworn personal argument was no longer a pivotal trial opportunity.[144] He had counsel now who could do that for him.[145] Nonetheless, the change that did take place was surprising. Many commentators expected the unsworn statement to take on a diminished role, believing that since that the accused could testify, "what [he] says in his statement, as to facts . . . lacks the weight it might otherwise have."[146] But rather than taking on a diminished role as expected, the unsworn statement morphed into a stand-in for the testimony of the accused.[147]

A. Changes in Procedure

In 1917, the *Manual for Courts-Martial* featured a subtle change. Previous editions list only a single closing defense to be "submitted by the accused."[148] The 1917 edition adds a second step. That edition reads that,

---

139. *Id.*

140. *Id.*

141. *See id.*

142. MANUAL FOR COURTS-MARTIAL, UNITED STATES. ix (1951) [hereinafter 1951 MCM].

143. *See* discussion *infra* Part II.A., III.A.

144. *See* discussion *supra* Part I.A.

145. *Id.*

146. EDGAR DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 137 (1907).

147. *See* discussion *infra* notes 174–79 and accompanying text.

148. MANUAL FOR COURTS-MARTIAL, UNITED STATES 155 (1917) (stating "The statement of the accused, or argument in his defense . . . should be signed by the accused, referred to in proceedings as having been submitted by him, and appended to the record, whether he is defended by counsel or not."). *But see* MANUAL FOR COURTS-MARTIAL, UNITED STATES xxvi (1921) (beginning with the 1921 revision to the Manual, the document was issued as an executive order from the President).

"[a]fter the accused has made a statement . . . arguments may be presented to the court, by the judge advocate, the accused, and his counsel."[149] For the first time, the 1917 *Manual for Courts-Martial* depicted a formal separation between the modern closing argument and the unsworn "statement."[150]

A second change came a decade later.[151] The 1917 *Manual* still called the unsworn statement a "personal defense or argument."[152] At that time, the statement consisted of a "brief summary or version of the evidence."[153] By 1928, however, the unsworn statement definition changed.[154] While the statement was still "not evidence," in 1928 the *Manual* provided that the statement "should not include what is properly argument."[155] The statement simply became a "denial, explanation, or extenuation of the offenses charged."[156] With these two brief changes, the unsworn statement, which for years had mostly consisted of an argument, was suddenly not argument at all, but a form of testimony.[157]

B. Changes in Practice

Records from the Judge Advocate General's office contain examples of this new form of testimonial unsworn statement.[158] They reveal that the accused used the new unsworn statement as a means of avoiding cross-examination in court.[159]

For example, Private Simmons used his unsworn statement in 1929 to explain that he never intended to keep the unit's money that he lost downtown.[160] In 1930, Captain Brady used his unsworn statement to explain that he never intended to defraud anyone with his bad checks.[161] Second

149. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1917) [hereinafter 1917 MCM], *supra* note 148, at 141.

150. *Id.*

151. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1928) [hereinafter 1928 MCM].

152. 1917 MCM, *supra* note 148, at 140.

153. *Id.*

154. *See* 1928 MCM, *supra* note 151, at 61.

155. *Id.*

156. *Id.*

157. *Id. See also* DAVIS, *supra* note 103, at 810 (listing the unsworn statement as "Statement (See Arguments)" in the index to his treatise).

158. Vol. 1–81 B.R. (publishing the reports of the Judge Advocate General of the United States Army Board of Review from 1929 to 1951). Established in 1918, the Board of Review acted as a reviewing body that heard appeals from courts-martial in the field and issued rulings on the legal sufficiency of the trial below. *Id.* Many of these reports include summaries or verbatim transcripts of unsworn statements made during the course of a courts-martial. *See id.* Though there are relatively few examples (a handful each year), these reports represent the best examples of what soldiers actually said in unsworn statements in the twentieth century, after the guarantee of active defense counsel and the opportunity to take the stand. *See id.*

159. *Id.*

160. *Id.* at 137.

161. Vol. 1 B.R. at 326 (1929–30).

Lieutenant Chadwick, accused of cheating on an exam, explained that he did not realize his actions were against the rules—he did not intend to cheat.[162] Since intent exists entirely within the accused's own mind, an unsworn statement became the ideal place for a defendant, maximizing his own interests, to introduce an intent defense.[163] The judge advocate was precluded from engaging in a cross-examination that would effectively illuminate the differences between the accused's claimed intent and his external actions.[164]

Still, not all unsworn statements focused on the accused's intent.[165] Private Carr, accused of selling military-issued equipment, used his unsworn statement to explain that he left the clothes in a locker.[166] When he returned, they were gone.[167] First Lieutenant Deligero was convicted of withholding promised child support.[168] Before he was found guilty, however, he used his unsworn statement to explain that the child probably was not his in the first place, that he had no evidence the child was benefitting from his payments, and that he had a good service record in combat.[169] First Lieutenant Shore, accused of sharing the bed of another officer's wife, used his unsworn statement to flatly deny the accusations.[170] Second Lieutenant Barrett denied embezzling funds from his unit.[171] He did so in an unsworn statement, "not because it isn't the truth or I'm afraid to be questioned on it" but just to get the trial over quickly.[172] Barrett's comments showcase the tension in these statements.[173] Barrett had to defend his use of an unsworn statement because the statement did not have the traditional guarantees of trustworthiness: the oath and cross-examination.[174]

Whether these unsworn statements address intent or the criminal act itself, none resemble a closing argument.[175] These statements do not comment on other evidence.[176] They do not draw connections or inferences for the listener.[177] With better tools at his disposal, the defendant no longer needed to use the unsworn statement for argument at all and, instead, used it tactically to make factual claims. During one trial, the defense even used the unsworn statement to admit other documentary evidence from expert

162. *Id.* at 351.
163. *Id.*
164. *See* 1928 MCM, *supra* note 151, at 61.
165. *See* sources cited *infra* notes 189–194.
166. Vol. 1 B.R. at 359 (1929–30).
167. *Id.*
168. Vol. 78 B.R. at 45 (1948).
169. *Id.* at 46.
170. Vol. 81 B.R. at 346–47 (1949).
171. *Id.* at 68.
172. *Id.*
173. *See id.*
174. *See id.*
175. *See* 1928 MCM, *supra* note 151, at 61–62.
176. *Id.*
177. *Id.*

witnesses.[178] In the nineteenth century, the unsworn statement primarily functioned as a closing argument.[179] In the first half of the twentieth century, that unsworn statement served as a means of avoiding hard questions and was ripe for reform.[180]

III. THE MODERN UNSWORN STATEMENT

After World War II, Congress reviewed and reformed much of the military justice system, which ultimately resulted in the adoption of a single code that governed all military branches: the U.C.M.J.[181] The military unsworn statement had never been a creature of statute, and Congress refrained from mentioning it now.[182] As a part of the reform process, however, the Judge Advocate General of the Navy recommended the elimination of the unsworn statement.[183] He thought that the accused should instead be allowed to make a sworn statement in extenuation or mitigation after findings and before sentencing.[184] Both of his suggestions came to pass—the accused did get a chance to make a sworn statement and the traditional unsworn statement was eliminated. However, the latter reform was undercut by the introduction of the newer form of the unsworn statement.[185]

A. The Death of the Unsworn Statement and the Birth of Presentencing

President Truman implemented the U.C.M.J. in Executive Order 10214, the 1951 *Manual for Courts-Martial*.[186] This *Manual* removed all language about the unsworn statement.[187] Instead, *the Manual* allowed for "arguments to be made to the court by the trial counsel, the accused, and his counsel."[188] New language explained that "[i]t is improper to state in an argument any matter of fact as to which there has been no evidence."[189] The President decided that final statements to the court should be argument, and

178. 57 U.S. ARMY JUDGE ADV. GEN.'S DEP'T, BOARD OF REVIEW 194 (1946) (wherein defense counsel "attached" two psychiatric reports to the accused's written unsworn statement).

179. *See supra* text accompanying notes 115, 126.

180. *See supra* text accompanying notes 168–84.

181. Charles M. Schiesser & Daniel H. Benson, *Modern Military Justice*, 19 CATH. U. L. REV. 489, 491 (1970).

182. *See, e.g.*, 10 U.S.C. § 801 (1964) (showing no mention of unsworn statements).

183. Off. OF THE JUDGE ADVOC. GEN. NAVY DEP'T, SYNOPSIS OF RECOMMENDATIONS FOR THE IMPROVEMENT OF NAVAL JUSTICE 37 (1947).

184. *Id.*

185. *See* discussion *infra* Part III.A.

186. 1951 MCM, *supra* note 142, at ix.

187. *Id.* at 111.

188. *Id.*

189. *Id.*

not fact, after all.[190] Nonetheless, the unsworn statement did not entirely disappear.[191] It was granted new life in a new trial procedure: the presentencing hearing.[192]

Prior to these reforms, there was no significant presentencing procedure.[193] Evidence mitigating or extenuating the defendant's guilt could only be introduced if it was relevant to the merits of the charges and specifications.[194] The statutory U.C.M.J. did not create a separate presentencing procedure, but President Truman did. [195] The new *Manual* detailed a full presentencing hearing.[196] After findings, but before a sentence was announced, the prosecution could present additional aggravation evidence and the defense could introduce mitigation and extenuation evidence.[197] The defense could even relax the rules of evidence in order to introduce "affidavits, certificates . . . and other writings" that would otherwise not be permitted due to authentication or hearsay problems.[198] This evidence did not need to be directly tied to the merits of the case and would hopefully help the factfinder craft a sentence based, not solely on the crime, but on the individual defendant as well.[199] The accused could take the stand and testify to present evidence himself.[200]

Nonetheless, it was unlikely that an accused servicemember would ever give sworn testimony during this new hearing because of the creation of the new, more attractive unsworn statement.[201] The *Manual* carried over much of the old regulatory language.[202] This statement was, again, considered "not evidence" but also "should not include what is properly argument."[203] The *Manual* thereby transplanted the errors of the pre-World War II era into the new unsworn statement.[204] Notably, the new

190. *Id.* at ix, 111.
191. 1951 MCM, *supra* note 142, at 119.
192. *Id.*
193. Major James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994).
194. *See* 1917 MCM, *supra* note 148, at 144 (creating a brief section of the trial where, after, conviction, parties could introduce two limited types of evidence: personnel data and previous convictions, including any relevant discharges from the service. Personnel data consisted solely of information on the charge sheet itself (age, pay, and time of service)); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES 79 (1949) (showing that the accused was also able, as a form of mitigation, to introduce evidence of previous punishment suffered for the same misconduct at issue in trial).
195. Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107, 108 (establishing the statutory Uniform Code of Military Justice); 1951 MCM, *supra* note 142, at ix.
196. 1951 MCM, *supra* note 142, at 119.
197. *Id.* at 119–121.
198. *Id.* at 120.
199. *Id.*
200. *Id.* at 120–21.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*

presentencing proceeding did not originally include a separate argument by either counsel.[205] After the presentation of presentencing evidence, the court would recess and deliberate on a sentence.[206] The unsworn statement acted as a sort of stand-in for the presentencing "argument," though only for one party.[207] When later iterations of the *Manual for Courts-Martial* added presentencing arguments by both counsel, the unsworn statement lingered on as a chance for the accused to address the court himself.[208]

B. Jurisprudence Adrift: Putting Together a Puzzle with the Wrong Pieces

For the first time, military courts had a tool—the presentencing unsworn statement—that was roughly equivalent to allocution. However, this new form of military allocution came with the baggage of the history of the unsworn statement. The MCM even used much of the old language to describe the new unsworn statement.[209] The result was that courts somewhat clumsily tried to find a place for the procedure with language and history that did not fit. When courts did peek into the nineteenth century to find the original meaning of the unsworn statement, they ignored the changes and often got the history wrong. This led to a flawed paradigm of deference to the unsworn statement. Specifically, because courts misread Colonel Winthrop's account of the nineteenth-century procedure, courts believed that the unsworn statement was specifically a military tradition that was "generally considered unrestricted."[210]

In *United States v. Rosato*, the United States Court of Military Appeals examined a trial judge's decision to prevent the accused from introducing, in his unsworn statement, information that was deemed irrelevant and that would normally be considered hearsay.[211] The appeals court made several historical errors when discussing the right to make unsworn statements.[212] It claimed that the right was recognized "by military custom."[213] Yet, the older form of the unsworn statement was not a particular feature of the military and instead had a long-standing basis in civilian courts.[214] The court then cited Colonel Winthrop to support the proposition that the unsworn statement right "has generally been considered

205. *Id.*
206. *Id.* at 123.
207. *Id.* at 120–21.
208. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(h) (2019) [hereinafter 2019 MCM].
209. *Id.*
210. United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991).
211. *Id.* at 95.
212. *Id.* at 95–96.
213. *Id.* at 96.
214. 28 U.S.C. § 1746 (1976).

unrestricted."[215] But Winthrop did not use the word "unrestricted."[216] Winthrop wrote that unsworn statements are instead to be given "considerable freedom . . . within certain limits."[217] The "freedom" he described was specifically addressing the accused's right to make accusations about the animus of his accusers regardless of the usual respect and obedience required of subordinate soldiers and officers.[218] Winthrop himself listed a variety of rules that would restrict the unsworn statement and would justify the court "refus[ing] to allow him to proceed."[219] Winthrop believed the statement was not to be, "a vehicle of evidence . . . or even averments of material facts, which, if duly introduced, would be evidence."[220] It is hard to reconcile that language with the court's idea of allowing for an "unrestricted" unsworn statement filled with irrelevant hearsay.[221] But Winthrop's treatise is the source that the *Rosato* court relied on in drawing that conclusion.[222]

Subsequent courts, rather than returning to the source material, simply cited *Rosato*'s characterization.[223] Time and again, military courts declared that the unsworn statement was "generally considered unrestricted."[224] Sometimes, courts used even starker language.[225] This deferential approach led to the unsworn statement's use as a vehicle for statements that would not otherwise be allowed in the already permissive presentencing hearings.[226] Even if a statement "might contain matter that would be inadmissible if offered as sworn testimony," it can come out in an unsworn statement."[227]

The accused is, for example, allowed to compare his sentence to civilian co-conspirators, even though such comparisons are normally not allowed and could not be argued by counsel.[228] In *United States v. Talkington*, the accused used part of his unsworn statement to discuss

---

215. *Rosato*, 32 M.J. at 96.

216. *Id.*

217. WINTHROP, *supra* note 37, at 299.

218. *Id.*; *see* discussion *supra* Part I.D.

219. Winthrop specifically listed defamation, gratuitously disrespectful language, and "any form of . . . defiance of authority." WINTHROP, *supra* note 37, at 299–300; *see generally* discussion *supra* Part I.D.

220. WINTHROP, *supra* note 37, at 300.

221. *Rosato*, 32 M.J. at 96.

222. *Id.*

223. United States v. Talkington, 73 M.J. 212, 215 (C.A.A.F. 2014); United States v. Kloch, No. ARMY20080788, 2009 WL 6929459, at *2 (A. Ct. Crim. App. Nov. 10, 2009); United States v. Satterley, 55 M.J. 168, 172 (C.A.A.F. 2001); United States v. Grill, 48 M.J. 131, 132 (C.A.A.F. 1998).

224. *Talkington*, 73 M.J. at 215.

225. United States v. Friedmann, 53 M.J. 800, 803 (A.F. Ct. Crim. App. 2000) (calling the unsworn statement "virtually unrestricted").

226. *Grill*, 48 M.J. at 133.

227. *Id.*

228. *Id.*

collateral consequences to his conviction.[229] The Court of Appeals for the Armed Forces found that even though the information was irrelevant and even though it was inappropriate to consider that information at the sentencing stage, the accused still had the right to talk about that information in his unsworn statement.[230] The court allowed the military judge to issue a "contextual instruction," but, again citing *Rosato* as support, re-affirmed the historically erroneous principle that the unsworn statement was "generally considered unrestricted."[231] Though exceptions exist,[232] the message from the courts is clear: the unsworn statement has a long-standing historical tradition of being generally unfettered and, further, the government has only limited freedom to respond.[233] That message is at odds with the actual historical tradition.

Recently, another flaw in historical interpretation has arisen in court opinions concerning unsworn statements. Courts have begun divorcing the term "not evidence" from its original meanings of being either "something to be given less weight than actual evidence" or "a prohibition against introducing facts."[234] The United States Air Force Court of Appeals recently held that the unsworn statement being considered "not evidence" means that it is "not subject to the rules of evidence."[235] The statement could not therefore be limited by rules that would otherwise prevent unfair prejudice, confusion of the issues, or a misleading of the members.[236] Such a misinterpretation inverts the significance of the phrase.[237] Rather than being given less weight or more restriction, the Air Force court gave the unsworn statement more freedom.[238] This mistake has appeared in cases about victim unsworn statements as well as cases concerning an accused's unsworn statements.[239]

---

229. *Talkington*, 73 M.J. at 216.

230. *Id.* at 217.

231. *Id.* at 215.

232. *See, e.g.*, United States v. Ezell, 24 M.J. 690, 693 (A.C.M.R. 1987) (holding that an accused cannot discuss a victim's sexual history during an unsworn statement).

233. *See* United States v. Cleveland, 29 M.J. 361, 362–363 (C.M.A. 1990) (holding that the government could not rebut the defendant's opinion that he had "served well" with evidence that the defendant's service record was poor as such evidence did not rebut the defendant's own opinion of his service).

234. *See* United States v. Hamilton, 77 M.J. 579, 586 (A.F. Ct. Crim. App. 2017) ("However, those rules [of evidence] do not apply to victim unsworn statements, which are not evidence."; United States v. Provost, 32 M.J. 98, 99 (C.M.A. 1991) ("It must be remembered that, if an accused elects to make an unsworn statement, he is not offering evidence.") .

235. *Hamilton*, 77 M.J. at 586.

236. *See* 2019 MCM, *supra* note 208, M.R.E. 403.

237. The 1927 MCM only uses the phrase "not evidence" to refer to two types of statements: unsworn statements and hearsay. MANUAL FOR COURTS-MARTIAL, UNITED STATES 113 (1927).

238. *See Hamilton*, 78 M.J. at 342; *Provost*, 32 M.J. at 99; *Rosato*, 32 M.J. at 96.

239. *See, e.g., Provost*, 32 M.J. at 99 (holding that the accused "is not offering evidence" in the context of granting him wide freedom in the content of his statement).

C. The Modern Unsworn Statement is Fundamentally Flawed

Even if future courts correctly understand that historical misconceptions have led the unsworn statement so far adrift and correct course, it would remain a flawed tool. Allowing a person to address the court without an oath and without cross-examination is necessarily a risky proposition. Case law often emphasizes the importance of cross-examination as a safeguard for the rights of criminal defendants.[240] After all, the Constitution enshrines that right in the Confrontation Clause.[241] Though courts take special care to protect this important right for the accused in a criminal trial, cross-examination is a right afforded to all parties in almost any type of proceeding as a basic tenet of due process.[242] The state, for example, has a right to cross-examine a defendant who takes the stand.[243] It flows from "[a] recognition that to deny a litigant the ability to cross-examine an adverse witness on statements made on direct examination 'subverts an essential safeguard of the accuracy and completeness of testimony.'"[244] Similarly, the right to cross examine extends to both parties in a civil trial as a right and not merely a privilege.[245]

If the oath and cross-examination, which are both bedrock tenets of criminal and civil procedure, remain important safeguards of truth, then courts should only dispense with them for a compelling reason.[246] Nineteenth-century courts-martial had such a compelling reason because there was no other way to hear from the accused.[247] Twenty-first-century courts-martial find themselves in a very different position.[248]

The modern defendant has four opportunities to address the court that his predecessor lacked: sworn testimony on merits, sworn testimony on sentencing, and, usually through a representative, argument on merits and argument on sentencing.[249] Even if the unsworn statement were entirely

240. *See, e.g.,* Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) (holding that cross-examination is "the main and essential purpose" of the right to confrontation guaranteed in the Sixth Amendment).

241. *Id.; see also* Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1027 (2003) ("Cross-examination provides the defense attorney with an arsenal of weapons to probe the credibility of the witness and the believability of the testimony provided by the witness.").

242. Chase, *supra* note 241, at 1027.

243. State v. Lea, 934 P.2d 460, 465 (Or. 1997) (quoting John William Strong, ed., 1 *McCormick on Evidence* § 19 at 78 (4th ed 1995)); *see also* Trawick v. State, 431 So. 2d 574, 576 (Ala. Crim. App. 1983) ("The privilege of cross-examination inures to the benefit of the State, in a criminal prosecution, just as to any other party.").

244. *Id.*

245. *See* Gordon v. Indusco Mgmt. Corp., 320 A.2d. 811, 818 (Conn. 1973) ("The right of cross-examination is not a privilege but is an absolute right.").

246. *See generally Trawick*, 431 So. 2d, at 567; *Lea*, 934 P.2d at 465; *Indusco Mgmt. Corp*., 230 A.2d at 818.

247. *See* discussion *supra* Part I.B.

248. *See* 2019 MCM, *supra* note 208, at II-135, II-143.

249. *See* discussion *supra* Part III.A.

eliminated, the defendant could still present his own words and a plea for mercy.[250] The rules of presentencing allow the accused to submit a wide range of evidence, including testimony about "any . . . trait that is desirable in a servicemember."[251] An accused can present a thorough demonstration of childhood hardships, positive character traits, and the warm opinions of his family and friends.[252] This permissive atmosphere gives the accused an opportunity to present themselves as an individual worthy of an individualized sentence—as more than just his crimes. With such a lenient framework, there is no compelling reason to jettison the safeguards of oath and cross-examination.

The deleterious effects of the unsworn statement are less harmful during sentencing than at other stages of trial. That said, a flaw is not worth keeping simply because it could be worse. The system puts a premium on thorough presentencing proceedings because arriving at a just sentence is crucial to any effective criminal justice.[253] Adversarial systems only come to right conclusions when both parties are equally situated in the courtroom. Justice is not served by favoring one party over the other. The public has a right to "fair trials designed to end in just judgments."[254]

Of course, criminal trials can be full of incongruities.[255] After all, if the government loses at trial, the prosecutor does not go to jail. As a result of this imbalance, certain safeguards protect particular values that society holds dear.[256] In criminal trials, the government must overcome a high burden of proof because society has chosen to prevent jailing innocent people at the cost of freeing some guilty ones.[257] The exclusionary rule protects individual privacy,[258] just like how spousal immunity protects the marital relationship.[259] Some of these incongruities go the other way.[260] The government gets to speak last, for example, because the government carries the burden of proof.[261]

But in each of these cases, there is a good reason to put the parties on a slightly different footing.[262] For every situation where the parties are placed on uneven footing, the system is protecting some societal value.[263]

---

250. *See* 2019 MCM, *supra* note 208, at II-143.
251. *Id.*
252. *Id.*
253. *See* Illinois v. Somerville, 410 U.S. 458, 463 (1973).
254. *Id.*
255. *See generally* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 60 YALE L. REV. 1149, 1149-1150 (1960) (discussing the incongruity of power in a criminal trial).
256. *Id.* at 1153.
257. *Id.*
258. United States v. Calandra, 414 U.S. 338, 347 (1974).
259. Johnson v. State, 848 A.2d 660, 668 (Md. Ct. Spec. App. 2004).
260. *See* Goldstein, *supra* note 255, at 1153.
261. *Id.*
262. *Id.* at 1149.
263. *Id.*

True, the unsworn statement once served such a function.[264] The system wanted to allow the accused to give his side of the story.[265] But that compelling reason no longer exists, and a poor apprehension of history has further worsened the incongruity.[266] Inertia and misunderstanding in the current system tips the scales of justice without an important societal rationale for doing so. A procedure that used to level the playing field now irrationally elevates one party over another.[267]

D. The Victim Unsworn

However, the military justice system also gives a special benefit to crime victims.[268] Congress introduced victim impact statements[269] into the military justice system at the end of 2013, guaranteeing victims a right "to be reasonably heard" at criminal proceedings.[270] A change in the Rules for Courts-Martial implemented the requirement.[271] Now, victims in a court-martial can be heard at presentencing hearings, unsworn and without cross-

264. *See* discussion *supra* Part I.B.

265. *See* discussion *supra* Part I.C.

266. *See* discussion *supra* Part I.B.

267. *See* discussion *infra* Part III.D. A similar complaint has been made about the more limited form of allocution in civilian courts. *See, e.g.*, Celine Chan, *A Defendant's Word on Its Face or Under Oath?*, 75 BROOK. L. REV. 579, 624 (2009) (arguing that allocution as currently practiced in civilian courts offers "no assurance of credibility and trustworthiness" and therefore does not "achieve its fundamental goals of promoting sentencing accuracy and enhancing perceived equity.").

268. Victim impact statements began in California in the 1980's when Doris Tate campaigned for the state legislature to pass the Victim's Rights Bill. *See* Theresa Vargas, Brutally killed by Charles Manson's followers, Sharon Tate became the face of victims' rights, Washington Post, Nov. 20, 2017; *see also* Nat'l Crime Victim L. Inst., National Survey of Victim Impact Statements (July 7, 2010), https://law.lclark.edu/live/files/12746-national-survey-of-state-victim-impact-statement [https://perma.cc/8CV6-VH74]. Doris Tate was motivated by the murder of her daughter Sharon at the hands of the Manson family. Vargas, *supra*. The statement is an opportunity for the victim to explain to the court the impact that the crime had. Nat'l Crime Victime L. Inst., *supra*. Practices vary state by state but they are often given without an oath and, at least sometimes, without cross-examination by the accused. *Id.*

269. This paper makes a complaint about allowing accused unsworn statements without cross-examination or an oath, arguing that only compelling circumstances should cause a court to abandon its usual guarantees of trustworthiness. A similar complaint can be made against victim impact statements. In reply, one might point out that allowing the victim to make a statement is necessary because it allows the victim to be heard regardless of whether her statement is desired by either the government or the accused. Perhaps the unique position of a crime victim presents a compelling societal rationale for this right. A compromise solution would be preferable, one where the victim has the right to be heard but must then answer questions from counsel. Nonetheless, for purposes of this paper, in the military justice system, the victim has a right to make an unsworn statement. The accused's rights must be balanced accordingly.

270. National Defense Authorization Act of 2014, Pub. L. No. 113-66, § 1701 (2013).

271. *See* 2019 MCM, *supra* note 208, at II-143.

examination.[272] Any modifications to the accused's unsworn statement must keep the victim's new rights in mind. Removing an unfair advantage would not create a more just system if doing so creates a windfall elsewhere.

However, the victim's new right is unlike the accused's unsworn statement. Perhaps most importantly, the victim's right does not benefit from a major historical misunderstanding that declares it to be unrestricted.[273] In fact, it is greatly limited.[274] Victims are allowed to address "only . . . victim impact and matters in mitigation."[275] A written proffer of the statement must be given to the court and to defense counsel after the announcement of findings.[276] No unsworn statement can be made in capital cases.[277]

The victim must limit their statements to matters either helpful to the accused or related to the personal consequences suffered as a result of the crime. The former category is not as uncommon as might be supposed. Domestic violence victims, for example, sometimes use their unsworn statements to plead for leniency for their abusers.[278] The victim is not a member of the prosecution. The interests of the victim and the interests of the government do not always align.[279] If the prosecutors want to ask the victim particular questions or draw out any testimony outside the scope of her unsworn statement's limitations, they must call her to the stand, subject her to an oath, and have her brave cross-examination. Nonetheless, a presentencing hearing has the possibility of turning into a two-on-one punching match if the accused is not given the right tools to defend himself.

IV. A BALANCED SOLUTION

Optimal reform in this area must correct the case law's mistakes, preserve the rights that the historical unsworn statement sought to protect, and keep the accused from facing an unfair disadvantage. Fortunately, the second goal has already been accomplished. The historical unsworn

---

272. *Id.*

273. *Id.*

274. *Id.*

275. The Rules for Court-Martial define victim impact as "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." Mitigation is "any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency." *See* 2019 MCM, *supra* note 208, at II-142.

276. *Id.* at II-143.

277. *Id.* at II-142. In cases where the victim is deceased, a survivor is designated to assume the rights of the victim. 10 U.S.C. § 806b(c). It is worth reflecting on why, in the most serious cases, the victim is not permitted to give an unsworn statement. Our system, in capital cases, relies on the safeguards of an oath and cross-examination.

278. *See generally* 2019 MCM, *supra* note 208, at II-142 (discussing the use of unsworn statements for mitigation).

279. *See generally* Edward Meyers, *Right or Burden: Victim Impact Statements at Court-Martial*, 30 PUB. INT. L. J. 118, 123 (2021) (discussing how the victim's interests in the proceedings may differ from that of the government).

statement gave the accused a way to address the court when he had no right to testify.[280] It provided a chance to make a closing argument when he had no access to vocal counsel. The accused today enjoys the right to testify and the right to modern counsel. It would be anachronistic to say that the unsworn statement was designed as a workaround. However, from the modern vantage point, one can see that the unsworn statement was a sort of placeholder for the fuller and more robust rights that succeeded it and, in almost every jurisdiction, replaced it.[281]

The larger challenge is preserving the accused's status vis-à-vis the victim. The proper solution is to grant the accused the same rights as the victim. Specifically, the accused should be allowed to make an unsworn statement about the impact of the crime on the victim or on himself. Preserving for the accused this limited unsworn statement would give the now-convicted defendant an opportunity to show remorse, growth, or a changed heart. In effect, the accused will still be able to make an impassioned and emotional plea to the court in a free-flowing manner without having to expose himself to an oath and cross-examination. This limited statement would create a space for the accused to be and to feel heard, an important consideration for the accused as it is for the victim. The accused can apologize for the harm he has caused, show that he realizes the consequences of the crime, and exhibit a determination to begin charting a new path. The accused can also contradict the victim's account of the crime's impact.

Notably, this proposed restriction would not allow the accused to address issues of mitigation in the same manner as the victim. That is because there is no unfair advantage that the accused needs to counter. If the victim decides to address mitigation matters in her unsworn statement, the accused receives a boon. If a victim tells the court that she thinks the crime was not very serious or that the accused is unlikely to behave that way again, the accused is better off than he would be without such a statement. If the accused has other mitigation to put before the court, he can do so in other ways.

The current version of the accused's unsworn statement is defined by the Rules for Courts-Martial and case law interpreting those rules.[282] Accordingly, the clearest and easiest solution would be to modify those rules via executive order.[283] Limiting the unsworn statement to issues of crime impact would benefit the overall presentencing procedure. More

280. *Id.* at 131.

281. *See id.* at 129.

282. *See id.* at 164.

283. Specifically, R.C.M. 1001(d)(2)(C) should include language to parallel the scope limitations of the victim unsworn statement in R.C.M. 1001(c)(3). The full, revised R.C.M. 1001(d)(2)(C) would read: "The accused may make an unsworn statement and may not be cross-examined by trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statement of fact therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both. The content of such a statement may only include the impact of the crime on the victim, if applicable, and on the accused. The statement may not include a recommendation of a specific sentence."

servicemembers would take advantage of the opportunity to give sworn testimony. This may give the accused an advantage by emphasizing his trustworthiness to the court. Even better, sworn testimony may ultimately demonstrate the truth of his statement. An ineffective cross-examination is a powerful support for witness testimony. The factfinder also receives the benefit of sworn testimony and will therefore provide more accurate sentences.

Additionally, a narrower unsworn statement would head off much of the confusion that still exists in modern case law. Judges currently allow an accused to make irrelevant comments to the panel and then instruct the panel to ignore those comments.[284] If the servicemember is limited to testimony concerning crime impacts, he will obviously be precluded from attacking the verdict, disparaging the victim's character, opining on collateral consequences, or commenting on the sentences of a co-accused. The result will be a simpler hearing with a lower chance of confusing the issues.[285]

Military courts will cease relying on the misinterpretations of the unsworn statement's history. Courts will no longer invert the meaning of "considerable freedom . . . within certain limits" to mean "unrestricted" or "not evidence" to mean "not subject to the rules of evidence.[286] Instead of trying to persuade courts about the true history of the unsworn statement, an executive order can simply override the erroneous interpretations. After all, the ideal solution is not a return to the tools of a hundred and fifty years ago—those have been replaced by stronger instruments. A limited unsworn statement places focus onto newer tools: sworn testimony, active counsel, and argument.

CONCLUSION

Confusion about the origins of the unsworn statement has infected modern military court proceedings. The result is a precedent severed from common sense, fairness, and historical context. The unsworn statement has become a mechanism of distraction, allowing parties to introduce irrelevant information to the factfinder and creating an unbalanced playing field within our adversarial system. A simple solution exists: the scope of the unsworn statement should be narrowed by executive order, correcting modern mistakes and preserving the rights of the accused.

---

284. *See, e.g.*, United States v. Talkington, 73 M.J. 212, 215 (C.A.A.F. 2014).

285. *Id.* The Army also uses unsworn statements at Administrative Separation Boards and Officer Elimination Boards, two non-criminal processes required when eliminating enlisted soldiers and officers from the service under certain circumstances. U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations para. 2-10(d)(1)(B)(2) (Dec. 19, 2016); U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges para. 4-11(e)(4) (Feb. 8, 2020). There, however, the dangers of an unsworn statement are even greater as there is no segmented "sentencing" hearing. Findings and consequences are decided and announced together. A limited unsworn statement would be helpful in these proceedings.

286. WINTHROP, *supra* note 37, at 299.