

Victim or Complaining Witness: The Difference Between Guilty and Not Guilty

MICHAEL CONKLIN*

TABLE OF CONTENTS

I.	INTRODUCTION	423
II.	CASE LAW	424
III.	DEFINING VICTIM	428
IV.	METHODOLOGY	429
V.	RESULTS	429
VI.	DISCUSSION	430
VII.	PROPOSED SOLUTION	430
VIII.	CONCLUSION	431
IX.	APPENDIX: SURVEY LANGUAGE	432

I. INTRODUCTION

A trial court’s distinction between using the language “victim” and “complaining witness” may seem trivial, but it plays a significant role in the criminal justice system. Defense attorneys argue that using the term victim presupposes what the trial is meant to determine and therefore denies defendants’ constitutionally guaranteed presumption of innocence.¹ Some

* © 2020 Michael Conklin. Powell Endowed Professor of Business Law, Angelo State University.

1. Coffin v. United States, 156 U.S. 432, 453 (1895). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Id.*

defense attorneys have gone so far as to argue that “calling the deceased a victim is just as wrong as calling the defendant a criminal.”² Conversely, prosecutors point out that the term victim is frequently used in statutes³ and that it does not necessarily presuppose criminal activity by the defendant. Furthermore, the alternative term, complaining witness, may lead jurors to associate the accuser’s testimony with trivial, annoying complaints by children or coworkers.⁴ These seemingly slight intimations at trial can bias a jury toward a particular conclusion, undermining its autonomy.⁵

To further complicate the issue, the term victim is ambiguous in the U.S. legal system.⁶ It is defined differently between statutes, and sometimes it is not defined at all.⁷ Difficulties arise when determining who qualifies as a victim based on issues of adequacy of injury, causation, imaginary victims, and culpable or consenting victims.⁸ This Article reports the findings of a study on the effects of using victim or complaining witness on juror decision-making and concludes with a suggested best practice for addressing the legitimate complaints of both sides of the debate.

II. CASE LAW

There is little case law on the issue of whether victim or complaining witness is the appropriate term. The most relevant coverage of the issue is the 1860 California Supreme Court case of *People v. Williams*.⁹ In dicta in the case, the court cautioned against using the word victim in jury instructions:

2. *State v. Brightman*, No. 36150–7–II, 2009 WL 2233112, at *9 (Wash. Ct. App. July 28, 2009) (quoting Brief of Appellant at 27, *Brightman*, 2009 WL 2233112 (No. 36150–7–II), <https://www.courts.wa.gov/content/Briefs/A02/361507%20appellant.pdf> [<https://perma.cc/JM9B-2DFE>]). The court explicitly rejected this claim. *Id.*

3. Andrew Nash, Note, *Victims by Definition*, 85 WASH. U. L. REV. 1419, 1419–20 (2008).

4. See Terry Campos, *Use of the Term “Victim” in Criminal Proceedings*, 11 NAT’L CRIME VICTIM L. INST. NEWS 1, 1, 3–4 (2009), <https://www.lclark.edu/live/files/4359-ncvli-news-2009-11th-edition.pdf> [<https://perma.cc/8DZM-BSL9>].

5. *People v. Williams*, 17 Cal. 142, 147 (1860) (“The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the Court, and the great deference which they pay to the opinions and suggestions of the presiding Judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the Court.”).

6. See *United States v. Terry*, 142 F.3d 702, 711 (4th Cir. 1998) (“[T]he term ‘victim’ standing alone is ambiguous . . .”).

7. See Nash, *supra* note 3, at 1419–20.

8. See *infra* notes 38–45 and accompanying text.

9. *Williams*, 17 Cal. at 147.

The word *victim* . . . is an unguarded expression, calculated . . . to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. . . . When the deceased is referred to as “a victim,” the impression is naturally created that some unlawful power or dominion had been exerted over his person. . . . The Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression.¹⁰

However, discussions of this case rarely mention the exact context of the word *victim* used in the jury instructions at issue.¹¹ The jury instructions in question referenced “his victim,” where “his” refers to the defendant.¹² This was likely viewed by the California Supreme Court as more prejudicial than just the use of the word *victim* alone.

Modern case law on this issue varies. The general principle is that it is acceptable to use *victim* in cases where there is an undisputed injured party.¹³ This is because someone can be the victim of behavior from someone other than the defendant or even a victim of a noncriminal, accidental act.¹⁴ Examples are as follows:

In *Bradham v. State*, an appeal of a voluntary manslaughter conviction held that “[n]o criminal connotation appears under any definition [of *victim*] in Webster’s and [the court] decline[d] to impute such a meaning to the use of the term ‘victim.’”¹⁵

In *Barger v. State*, an appeal of a murder conviction held that “[w]ith respect to the repetitious use of the word ‘victim’ in the instructions to describe the deceased, [the court was] of the opinion that it was not prejudicial.”¹⁶

In *State v. Plain*, an appeal of a harassment conviction led to the court stating that “[a]lthough we conclude the prosecutor erred during closing

10. *Id.*

11. For example, Nash provided an in depth analysis of *Williams*. See Nash, *supra* note 3, at 1422. However, Nash never mentioned that the jury instructions in question referred to “his victim,” where “his” refers to the defendant. *Id.* It is also a common practice in defense attorney motions to preclude the term “victim” from trial by citing *Williams*. See STEPHEN JONES & APRIL MCCURDY DAVIS, 2B VERNON’S OKLAHOMA FORMS 2D: CRIMINAL LAW PRACTICE & PROCEDURE § 23.42 (Supp. 2019) (referencing *Williams* without notice that *Williams* is responding to the reference of “his victim”).

12. *Williams*, 17 Cal. at 146.

13. See *infra* notes 15–18 and accompanying text.

14. See, e.g., *State v. Brightman*, No. 36150–7–II, 2009 WL 2233112, at *9 (Wash. Ct. App. July 28, 2009).

15. 250 S.E.2d 801, 806 (Ga. Ct. App. 1978).

16. 202 A.2d 344, 348 (Md. 1964).

argument in persistently [over thirty times] using the term ‘victim’ . . . we do not find that the prosecutor intentionally violated her duty.”¹⁷

State v. Brightman, an appeal of a murder conviction in which it was undisputed that someone was shot and killed, held that:

Using the term ‘victim’ may imply that a crime has taken place; however, it does not imply that a defendant is the victimizer; thus, it does not constitute an opinion that he was guilty of the charged crime. The term ‘victim’ ‘applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally.’¹⁸

State v. Albino is an exception to the general rule.¹⁹ Here, in an appeal of a murder conviction, the court held the prosecutor’s thirty-one references to victim improper specifically “in a case such as this, where the defendant ha[d] asserted a self-defense claim,” and “where there [was] a challenge as to whether a crime occurred, the repeated use of the words victim, murder and murder weapon is improper.”²⁰

In cases where the determination of whether the accuser was harmed at all is to be adjudicated, the use of the term victim has sometimes been held to be improper.²¹ This most frequently occurs in sexual assault cases.²² The determination is also frequently contingent on whether the term was used by the prosecutor or by the court and in what context.²³ Examples are as follows:

State v. Cortes was an appeal of assault charges where the trial court referred to the complainant as victim seventy-six times in its jury charge.²⁴ The appellate court found that:

In the context of the present case, the jury could have drawn only one inference from [the] repeated use [of the word ‘victim’], namely, that the defendant had committed a crime against the complainant. For this reason, we agree with those courts that have deemed references to the complainant as the ‘victim’ inappropriate where the very commission of a crime is at issue.²⁵

In *State v. Warholic*, an appeal of a sexual assault conviction, the court found that because it was the prosecution and not the court that made the references to victim, “the jury was likely to understand that the state’s identification of the complainant as the victim reflected the state’s contention

17. 898 N.W.2d 801, 817, 820 (Iowa 2017).

18. *Brightman*, 2009 WL 2233112, at *9 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2550 (Philip Babcock Gove et al. eds., 2002)).

19. 24 A.3d 602 (Conn. App. Ct. 2011).

20. *Id.* at 613, 615.

21. *See infra* notes 25–34 and accompanying text.

22. *See infra* notes 25–34 and accompanying text.

23. *See, e.g., State v. Warholic*, 897 A.2d 569, 583–84 (Conn. 2006); *State v. Wright*, No. 02CA008179, 2003 WL 21509033, at *2 (Ohio Ct. App. July 2, 2003).

24. 885 A.2d 153, 158 n.4 (Conn. 2005).

25. *Id.*

that, based on the state's evidence, the complainant was the victim of the alleged crimes."²⁶

Talkington v. State, an appeal of a rape conviction, held that the trial court's use of the term victim rather than "complainant" in jury instructions constituted reversible error in a case where the sole issue was whether the complainant consented to sexual intercourse.²⁷

In *Mason v. State*, an appeal of an unlawful sexual intercourse conviction, the prosecutor, state's witness, and even the defense attorney referred to the complainant as the victim.²⁸ The court found that "[r]eference to a complainant as a 'victim' is not objectionable in all cases where the commission of a crime is disputed; it is only objectionable in those cases where consent is the sole defense."²⁹

In *Walden v. State*, an appeal of a rape conviction, the court held that it is not reversible error for the trial judge to use "the word 'victim' in context with the general definition of the crime of rape and [the trial judge] was not instructing the jury that the female was in fact raped."³⁰

State v. Wright, an appeal of a rape conviction, held that:

In this case, Defendant has failed to demonstrate that his substantial rights have been affected by the use of the term "victim" by the court, prosecutor, and defense counsel. Therefore, we cannot find that this was error. Nevertheless, we are compelled to note that the trial court should refrain from using the term "victim," as it suggests a bias against the defendant before the State has proven a "victim" truly exists.³¹

Jackson v. State, an appeal of an unlawful sexual intercourse conviction, held that, "the word 'victim' should not be used in a case where the commission of a crime is in dispute."³² However, because the defense did not object to the use of the word victim during trial, the defendant must establish plain error.³³ Plain error was not present in this case because:

[T]he term "victim," to law enforcement officers, is a term of art synonymous with "complaining witness." Moreover, the term "victim" is also used in the indictment in this case as it is routinely in criminal charges which are read to the jury.

26. *Warholc*, 897 A.2d at 583–84.

27. 682 S.W.2d 674, 674–75 (Tex. App. 1984).

28. *Mason v. State*, No. 203, 1996, 1997 WL 90780, at *2 (Del. Feb. 25, 1997).

29. *Id.*

30. 542 S.W.2d 635, 637–38 (Tenn. Crim. App. 1976).

31. *State v. Wright*, No. 02CA008179, 2003 WL 21509033, at *2 (Ohio Ct. App. July 2, 2003).

32. 600 A.2d 21, 24 (Del. 1991).

33. *See id.*

Although the term should be avoided in the questioning of witnesses in situations where consent is an issue, its use in this case, without objection, does not constitute plain error.³⁴

III. DEFINING VICTIM

Defining the term victim has become more relevant since the modern victim's rights movement began with the passing of the Victim and Witness Protection Act of 1982.³⁵ Now, the federal government and all fifty states have victims' rights statutes.³⁶ Unfortunately, as noted previously, the term victim is ambiguous in the U.S. legal system.³⁷ There are four major categories of difficulty in clearly defining who qualifies as a victim.

First, adequacy of injury: The Sixth Circuit held that a fully reimbursed financial loss did not create victim status.³⁸ However, the Eleventh Circuit concluded that it did.³⁹ The Eighth Circuit held that "an individual need not be harmed, or even knowledgeable of the crime, to be a victim."⁴⁰

Second, causation: The District Court of Maine held that someone wrongfully convicted of someone else's crime is a victim of that person.⁴¹ The defendant's claim that the chain of causation between the original criminal act and the wrongful convictions was broken due to the independent cause of improper police investigations and prosecutions was rejected by the court.⁴² However, the Fourth Circuit held that victim status could not be obtained by the family members of a motorist killed in a road rage incident because the family members had no "relationship to the offense beyond their relationship to the direct victims."⁴³

Third, imaginary victims: The Tenth Circuit held that when an FBI agent poses as a minor to catch a defendant who solicited sex to the minor, the fictitious minor can be counted as a victim.⁴⁴

Fourth, culpable or consenting victims: The Fifth Circuit held that an illegal immigrant, who consented to be smuggled across the border and was injured in the process, can be considered a victim of the smuggler's crime of smuggling.⁴⁵

34. *Id.* at 24–25.

35. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C.).

36. Nash, *supra* note 3, at 1425.

37. *See, e.g.*, *United States v. Terry*, 142 F.3d 702, 708, 711 (4th Cir. 1998).

38. *United States v. Yagar*, 404 F.3d 967, 971 (6th Cir. 2005).

39. *United States v. Lee*, 427 F.3d 881, 895 (11th Cir. 2005).

40. *United States v. Drapeau*, 188 F.3d 987, 991 (8th Cir. 1999).

41. *United States v. Morehouse*, 345 F. Supp. 2d 3, 7 (D. Me. 2004).

42. *Id.* at 8–9.

43. *United States v. Terry*, 142 F.3d 702, 712 (4th Cir. 1998).

44. *United States v. Sims*, 428 F.3d 945, 961–63 (10th Cir. 2005).

45. *United States v. Angeles-Mendoza*, 407 F.3d 742, 747 (5th Cir. 2005).

IV. METHODOLOGY

This survey consisted of background questions regarding age, gender, and political affiliation. Subjects were then provided one of four different case summaries, all involving an alleged assault. Finally, participants were asked to state how likely they believe the defendant was to have committed the assault on a 0–100 Likert Scale.⁴⁶ The two variables in the case summaries were the gender of the accuser and whether they were referred to as victim or complaining witness. Therefore, the four versions were (1) female victim, (2) female complaining witness, (3) male victim, and (4) male complaining witness. The gender of the defendant was male in all four scenarios. See the Appendix for the complete case summary language used. The survey was conducted in the summer of 2019 and completed by 158 participants.

V. RESULTS

It was originally hypothesized that using the word victim would only result in a negligible, if any, increase in predictions of guilt over the use of the word complaining witness. However, the results showed a significant effect, depending on the gender of the victim.

Looking only at the two case summaries with the female victim and complaining witness, the results were as hypothesized. A female complaining witness resulted in an average likelihood of guilt of only 61.9%, while the female victim averaged 68.2%. However, the male victim and complaining witness distinction was in the opposite direction and more disparate. A male complaining witness resulted in an average likelihood of guilt of 63.7%, while the male victim averaged only 54.6%. Also surprising was that the variables of survey respondent age, gender, and political affiliation showed no statistically significant effect on outcomes.⁴⁷

46. For an explanation of the Likert Scale, see Saul McCleod, *Likert Scale Definition, Examples and Analysis*, SIMPLYPSYCHOLOGY (2019), <https://www.simplypsychology.org/likert-scale.html> [<https://perma.cc/4T3H-LS2B>].

47. Using an R-squared regression analysis. For a description of R-squared analysis, see Jim Frost, *How To Interpret R-squared in Regression Analysis*, STATISTICS BY JIM, <https://statisticsbyjim.com/regression/interpret-r-squared-regression/> [<https://perma.cc/H6LR-EFQF>].

VI. DISCUSSION

The disparate results based on the gender of accuser, the severity of the results, and the uniformity of the results across all demographic variables measured were all unexpected outcomes. Positing a feasible explanation for the gender of accuser disparity is challenging. If the expected result in the female accuser case summaries are explained by the word victim implying guilt and complaining witness being associated with triviality, then why was this not the same for the male accuser? One possible explanation is that survey respondents—consciously or otherwise—viewed female complaints as more legitimate than male complaints.

Averaging the guilt levels of the case involving the two male accusers results in 59.2% probability of guilt while the average for the two cases involving the female accusers is 65.1%. This gender difference is not surprising because a female allegedly punched by a man is likely viewed more sympathetically than a man allegedly punched by a man. Furthermore, females and males have been found to exhibit different tendencies toward lying,⁴⁸ which may in turn affect how others view their respective truth claims. But this expected gender result also serves to make the other gender result that much more unexpected—why a female complaining witness is viewed less favorably than a female victim while the inverse is true for the male counterpart.

The findings of this study will hopefully cause future research to be conducted involving different scenarios. These additional findings will likely help illuminate the gender-of-victim findings reported here. Future studies could implement gender-neutral language to see what effect, if any, is involved there. Future studies could also include nonviolent cases, such as fraud, to examine case-type differences. Perhaps results would differ if a rape case were used. There, the term alleged victim could be assessed to see if it conjures memories of high-profile false allegations of rape, such as the Duke Lacrosse case.⁴⁹

VII. PROPOSED SOLUTION

Both options of victim and complaining witness have downsides. The term victim, in certain situations such as rape allegations, may assume a fact that needs to be adjudicated.⁵⁰ In this way it is in danger of violating

48. See generally SeEun Jung & Radu Vranceanu, *Experimental Evidence on Gender Differences in Lying Behaviour*, 68 *REVUE ÉCONOMIQUE* 859 (2017).

49. See Justin Block, *10 Years Later, the Duke Lacrosse Rape Case Still Stings*, HUFFPOST, https://www.huffpost.com/entry/duke-lacrosse-rape-espn-30-for-30_n_56e07e33e4b065e2e3d486f7 [<https://perma.cc/86YR-WRN2>] (last updated Dec. 29, 2016).

50. See *supra* notes 21–34 and accompanying text.

the presumption of innocence. Additionally, the presence of a victim implies an imperative to act.⁵¹ Victims require rescue and their perpetrators must be punished.⁵² Conversely, the term complaining witness may be biased against the prosecution. “Complaining” generally has a negative connotation; it is frequently used to refer to trivial or even illegitimate concerns.

Other word choice options have problems as well. “Complainant” has the same problems as complaining witness. “Alleged victim” may come across as unduly skeptical of the accuser’s claims. Furthermore, in some cases the party is undoubtedly a victim and the issue is only whether the defendant is criminally responsible.⁵³ “Aggrieved party” suffers the same problems as victim, in that it presumes a grievance. “Accuser” may serve to diminish the plight of the party as anyone can make an accusation. Also, sometimes the party is not literally accusing the defendant of criminal activity. The term “witness” is perhaps the most neutral but has the downside of lacking specificity as there are frequently numerous witnesses in a trial.

Given these inherent problems with potential terms used to identify the party, and the significant effects it can have on juries, the best solution is to simply refer to the parties by their names. This has the added benefit of promoting an environment of respect and avoids confusion that may arise in cases with multiple accusers.

VIII. CONCLUSION

Courts generally allow accusers to be referred to as victims when it is clear they have incurred some harm.⁵⁴ Even in sexual assault cases where harm suffered by the accuser needs to be proved at trial, prosecutors and the court are sometimes allowed to refer to the accuser as the victim.⁵⁵ This research shows the significant role language choices can be at trial.

51. Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1493 (2017) (citing Adam J. McLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31, 31 (2008)).

52. *Id.*

53. For example, if Joe was stabbed in the back and a trial is brought against Matt for the assault, it would be inaccurate to refer to Joe as an alleged victim. Joe is clearly a victim; it is just a matter of determining if Matt is criminally liable for the harm Joe suffered.

54. See *supra* notes 13–18 and accompanying text.

55. See, e.g., *State v. Warholic*, 897 A.2d 569, 583–84 (Conn. 2006); *Mason v. State*, No. 203, 1996, 1997 WL 90780, at *2 (Del. Feb. 25, 1997); *State v. Wright*, No. 02CA008179, 2003 WL 21509033, at *2 (Ohio Ct. App. July 2, 2003); *Walden v. State*, 542 S.W.2d 635, 637–38 (Tenn. Crim. App. 1976).

While many other terms could potentially be substituted to avoid the problems of the word victim, each are fraught with their own problematic implications. Therefore, the decision should not be taken lightly by the courts, and simply using the party's name should be considered as a reasonable solution.

IX. APPENDIX: SURVEY LANGUAGE

Imagine you are serving on a jury for an assault case involving a man who allegedly punched [a woman/another man] in the ribs. At trial, the defendant claimed this never happened and that the [victim/complaining witness] completely fabricated the entire story to get back at him for a heated argument they had earlier that night. The [victim/complaining witness] says the defendant punched [her/him] as a result of the heated argument. Phone records show that the [victim/complaining witness] texted [her/his] friend that night stating, "Joe just punched me. I can barely breathe. What should I do?" The friend told [her/him] to call the police. Immediately after receiving this advice, the [victim/complaining witness] called the police who took [her/his] statement and photographed [her/his] ribs. A medical expert testified that while the [victim's/complaining witness's] ribs are consistent with a strike from a fist, it is also possible that it was the result of being struck by something else. There were no eyewitnesses or video evidence of the alleged assault.

Based solely on the information provided, give a number from 0–100 to describe if you believe the defendant hit the [victim/complaining witness] with 0 being absolutely not, 50 being too close to say, and 100 being absolutely yes.