

Malingered Mutism: The Case of Mary Doherty

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Abstract

This article examines the historical case of Mary Doherty; a young girl arrested for the murder of her father in 1806. During her trial, she remained mute and did not enter a plea. The jury found that she was mute through the visitation of God and found her not guilty. The next day, she was seen sitting on the courthouse steps acting normally. Her deception fooled everyone, including several hundred people who examined her. This article explores the historical aspects of mutism in the legal system and the detection of malingered mutism.

Keywords: Mutism, malingering, conversion disorder

1. Introduction (State v. Doherty, 1806)

When the body of Michael Doherty was finally found in April 1806, he had been dead for several days. There was a deep laceration on the right side of his head and his skull broken on the left, both of which produced significant blood flow. Evidence and clues were abundant. Blood was found on an ax, on the victim's bed, the wall of the house, and on a wheelbarrow. Someone tried to wash the ax, bed, and floor, but there were stains between Doherty's bed and where his body was discovered. In addition, there was dried blood on his shirt and head. Several days later, Mary Doherty, aged between 12 and 13 years, was indicted for the murder of her father, Michael Doherty of Hawkins County, Tennessee.

Michael Doherty lived with Mary (his oldest child), a younger brother who was later offered as a witness, and two younger children. He had lost his wife. Except on one occasion, no one had seen Mary off the plantation, and the family had never been seen visiting a house of worship. Mary did not attend school or have employment. The family kept to themselves.

There was a witness, an acquaintance named Mr. Beaty. According to court records, Beaty testified that he had been informed that Michael Doherty was missing four days and nights. Beaty knew from experience that Mr. Doherty enjoyed alcohol, so with this new bit of information, Beaty assumed the worst. With the aid of a friend, John Sheflet, the pair set out to find Doherty. While looking around the house, Beaty noticed something peculiar. They found the body of Michael Doherty underneath the floorboard of the family's home. When he suggested that Mary knew the body was there, she accused him of lying. The other children were also present and appeared unalarmed. According to the coroner's inquest, the date was a few days before the 13th or 14th of April.

Mary said that she had last seen her father four days prior, about 150 yards from the house. She appeared unconcerned and self-assured when her father was found. She spent the night at the house, and Mary did not attempt to leave, although she could easily have done so. Based on the evidence, Mary Doherty was tied up and restrained that morning and remained so until the official inquest. After reportedly being pushed, insulted, and tormented by a group of older women from the community, Beaty untied her and allowed her to wash. When he addressed her, she began to cry. At that point, Beaty instructed Mary not to run away, and he would do his best to protect her.

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He asked her if she was responsible for her father's murder, and she said nothing. Counsel later pointed out at trial that any confession could not be considered admissible since whatever Mary shared might have been said with the goal of possibly receiving better treatment.

Mary continued to remain silent at the inquest. It was presumed that her silence indicated that she understood the atrocity of the crime, and she constantly denied knowing anything about her father's death. Mary spent about four months in jail. Although she had spoken in monosyllables on her arrival, several witnesses gave evidence that she had not responded when spoken to since then and showed no sign of understanding or reaction when spoken to. She had not been heard to talk for six to eight weeks despite efforts to persuade her to do so. She had shown no reaction to her brother's visit, and her eyes were almost always closed. Mary also refused to eat in the presence of others for several days, although she ate food when it was left with her. When asked to change her clothes and sweep the jail, she did so and had once or twice swept the jail without being asked. She lay on a bed of straw covered with a blanket even in the sweltering heat.

When the attorney general offered to produce evidence to show that Mary was guilty and therefore had a motive for remaining mute, the court ruled against the motion. During the trial, Mary stood for several hours, showing no awareness or understanding of what was happening, and remained silent. The jury found that she was mute through the visitation of God, and the court ordered the plea of not guilty to be entered on her behalf. She was remanded and returned for trial the next day. The jury found her not guilty.

The next day, two judges saw Mary Doherty sitting near an older adult on the courthouse steps. Her eyes were open, and she appeared animated and amiable. She smiled at the judges as they passed. Court records reported that it is unknown how she became aware of the danger in which she had been placed, although having been arraigned for murdering her father, she would understandably be alarmed. How she was able to withdraw in such a manner is beyond ordinary calculation. Her deception fooled everyone into believing that she had lost her understanding (if not her speech), although several hundred people had examined her.

2. Mutism

Mutism is typically defined as the "inability or unwillingness to speak, resulting in an absence or marked paucity of verbal output" (Altshuler et al., 1986, p. 1409), despite maintaining an adequate level of consciousness (Lishman, 2001). The comprehension of speech is usually normal, and some degree of verbal expression is generally present (Benson, 1975). In children, *selective mutism* (SM) "is characterized by a consistent failure to speak in social situations in which there is an expectation to speak (e.g., school) even though the individual speaks in other situations" (American Psychiatric Association [APA], 2013, p. 189; Gensthaler et al., 2016). SM is believed to be a variant of an anxiety disorder (Mac, 2015).

According to the APA (2013, p. 195), a person is diagnosed with SM if the following conditions are present:

- A. Consistent failure to speak in specific social situations where there is an expectation for speaking (e.g., at school) despite speaking in other situations.
- B. The disturbance interferes with educational or occupational achievement or with social communication.
- C. The duration of the disturbance is at least one month (not limited to the first month of school).
- D. The failure to speak is not due to a lack of knowledge of, or comfort with, the spoken language required in the social situation.
- E. The disturbance is not better accounted for by a communication disorder (e.g., childhood-onset fluency disorder) and does not occur exclusively during autism spectrum disorder, schizophrenia, or another psychotic disorder.

SM is a rare disorder affecting between 0.7% – 2% of the population (Kopp & Gillberg, 1997; Kumpulainen et al., 1998; Viana et al., 2009) and less than 1% of children (APA, 2013; Viana et al., 2009). It is more common in girls than in boys (Kristensen, 2000; Krysanski, 2003) and is resistant to treatment (Standart & Le Couteur, 2003). Elizur and Perednik (2003) have observed a higher prevalence of SM in immigrant populations. The onset is usually between the ages of three and eight years and is associated with extreme shyness, a fear of social embarrassment, social isolation, and social withdrawal (Mac, 2015). Its hallmark characteristic is the lack of meaningful speech in most social situations unassociated with another psychological or psychiatric condition (Krysanski, 2003).

Earlier definitions of SM emphasized a manipulative withholding of speech; however, the current definition is expanded to include the loss of speech due to anxiety produced by a threatening environment (Viana et al., 2009; Wong, 2010).

Anxiety disorders are highly correlated with SM (Mac, 2015). A recent meta-analysis by Driesson et al. (2020) found that in children with SM, 80% had an additional anxiety disorder, including social phobia (69%), specific phobia (19%), and separation anxiety disorder (18%). Communication disorders and language deficits are common among children with SM (Muris & Ollendick, 2021). Aggressive behaviors, including oppositional defiant disorder symptoms, have also been reported (Capozzi et al., 2018; Diliberto & Kearney, 2016; Kehle et al., 2012). In addition to their lack of speech, children with SM may appear to be frozen, restrained, or unable to react in certain situations (Johnson & Wintgens, 2016). Known as selective inactivity, this development may manifest itself when the child becomes the focus of someone's attention (Hill & Scull, 1985).

While known to persist into adulthood, the literature addressing SM in adolescents or adults is rare. As far back as Adolf Kussmaul's identification of *Aphasia Voluntaria* in 1877, SM has been generally identified as a childhood disorder. Elective Mutism was first included in the DSM III (APA, 1980). Years later, the DSM IV-TR (APA, 2000) listed SM as a disorder usually first diagnosed in infancy, childhood, or adolescence. Walker and Tobbell (2015) suggested that since most of the literature focuses on diagnostic categorization, early research set the standard for the age of onset for SM at approximately five years old, essentially establishing the disorder as a childhood phenomenon contributing to the aforementioned paucity.

A handful of cases are described in the literature describing SM in adults. For example, Kehle et al. (2012) describe the case of a 44-year-old American woman who had not spoken to anyone other than her mother for almost 40 years. Bankier et al. (1999) discuss comorbid SM in a 25-year-old man with Asperger's syndrome. Jainer et al. (2002) refer to a 22-year-old woman diagnosed with SM who only communicated with her mother. Pavlek (2001) described a 50-year-old "mildly retarded" man who was silent for 28 years.

Unfortunately, when adult SM appears in the media, it is often associated with tragedy. Seung-Hui Cho was a young man with a diagnosis of SM responsible for 33 deaths (including his own) on April 16, 2007, at Virginia Polytechnic Institute and State University, in Blacksburg, Virginia (Virginia Tech Review Panel, 2007). Adam Lanza, also an adult thought to have SM, killed 28 people on December 14, 2012, in Newtown, Connecticut (O'Connell & Moldan, 2013). However, these are extreme examples and not an indication of the norm.

2.1. The History of Mutism in Legal Contexts

Mutism has a long history in legal proceedings (Casella, 1937; Daniel & Resnick, 1987; East, 1927; Jones & Llewellyn, 1917; Ray, 1838; Ward, 2012). The defendant's age or witness can range from child to adult (Haw & Cordess, 1988). Many early cases involving competency to stand trial involved defendants who were deaf and/or mute (e.g., *Jackson v. Indiana*, 1972). In *U.S. v. Bowling* (2020), the court found that the defendant faked mutism, causing a one-year delay in the proceedings, and received a sentencing enhancement for obstruction of justice.

According to Langbein (2003) the silencing of defendants is a product of the modern, lawyer dominated adversarial system. During the 18th century and earlier, trials were much faster by comparison. Defendants were known to present their own cases unaided by counsel until roughly the 1730s. Testimony also focused on the character of the defendant rather than the facts. During these times, should a defendant not enter a plea, it was up to the court to decide if this was malicious or caused by God (Morris et al., 2006; Ward, 2012).

The old English courts considered individuals who did not plead but remained silent to be either "mute of malice" (i.e., malingering) or "mute by visitation of God" (Grubin, 1993). Unless communication was established, individuals the court found to be mute through divine intervention could not be tried and could be held as the monarch saw fit. The same was not true of those judged mute of malice (Grubin, 1993; Langbein, 2003). Should the accused choose to remain silent, they would be subjected to *Peine forte et dure* (French for forceful and hard punishment) after being warned three times and given several hours to think it over (Parry, 1927). This method of torture saw the defendant having increasingly heavier stones placed upon their chest until either a plea was entered or fatal suffocation occurred (Brown, 2019; Langbein, 2003). The process is described in detail by Parry, 1927, p. 366):

That you be taken back to the prison whence you came, to a low dungeon into which no light can enter: that you be laid on your back on the bare floor, with a cloth round your loins, but elsewhere naked: that there be set upon your body a weight of iron as great as you can bear and greater: that you have no sustenance save on the first day three morsels of the coarsest bread,

on the second day three draughts of stagnant water from the pool nearest to the prison door, on the third day again three morsels of bread as before and such water alternately from day to day till you die.

This method was also used on defendants during the early American Colonial period (Daniel & Resnick, 1987). Only one recorded execution by *peine forte et dure* in U.S. history occurred when 80-year-old Giles Corey was pressed to death on September 19, 1692, during the Salem witch trials, after refusing to enter a plea (Roach, 2004).

The notable referenced case addressing the matter is *Rex v. Pritchard* (1836). The defendant, who was deaf, was able to enter a plea using sign language. It was at this point the Judge instructed the jury to determine whether the defendant was “sane or not,” creating the foundation for the criteria still used today by psychiatrists, psychologists, and lawyers when assessing clients’ ability to plead:

First, whether the prisoner is mute of malice or not; secondly whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defense—to know that he might challenge any of you to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.

Despite their appreciation for Visitations of God, courts dating back as far as 1300 acknowledged it was critical to determine whether the defendant’s silence was indeed willful and not malicious (Brown, 2019; Grubin, 1993). Being naturally mute was under the auspices of God’s will, and those found to be so were able to enjoy full legal protection. These individuals could be tried as if they had entered a plea of not guilty as long as they appeared to understand their circumstances (Grubin, 1993). Some Courts were not willing to take the defendant at face value; according to Ward (2012) referenced seventeenth century judge Sir Matthew Hale (1716) “tho’ great caution is to be used therein.”

The concept of “mute by malice” perseveres albeit with a more pragmatic approach. On February 14, 2018, 19-year-old Nikolas Cruz opened fire with a rifle at Marjory Stoneman Douglas High School in Parkland, Florida, killing 17 people and injuring 17 others. After a brief attempt to escape, Cruz was quickly apprehended without incident about an hour later. At his arraignment the next day, Cruz was charged with 17 counts of premeditated murder and held without bond. The defendant pled not guilty. On March 7, 2018, a grand jury indicted Cruz on 34 charges: 17 counts of first-degree murder and 17 counts of attempted first-degree murder. After the indictment, Cruz’s attorney, Melisa McNeill, filed documents with the Court withdrawing Cruz’s not guilty plea. Acknowledging that a plea of not guilty might be seen as offensive to the community considering it was already established Cruz was indeed the perpetrator, the change was not unexpected. “Having now been Indicted by the Grand Jury, the Defendant Nikolas Cruz withdraws that filing and Stands Mute to the Charges,” it read (Mark, 2018).

3. Malingering

The DSM-5 defines malingering as “the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs” (APA, 2013, p. 726). The DSM-5 also states that malingering should be suspected in (a) a medicolegal context, (2) situations where there is a discrepancy between objective findings and the individual’s claimed stress and disability, (c) patients who fail to cooperate with treatment or diagnostic procedures, and (d) cases where there is a presence of antisocial personality disorder. However, the definition and criteria of malingering in the DSM have been criticized as too narrow and lacking empirical support (Berry & Nelson, 2010; Otto, 2008; Rogers, 1990) resulting in a high false positive rate of classification (Rogers, 1990; Rogers & Shuman, 2005).

Although most research on malingering has focused on adults (Kirkwood, 2015; Rogers & Bender, 2018), a substantial body of literature exists on malingering and deception in children and adolescents (Faust et al., 1988; McCann, 1998; Salekin et al., 2018). From early on, children use deception to avoid punishment or avoid negative emotional states such as guilt (Talwar et al., 2007). Heinrich and Liszkowski (2021) found that 54% of 3-year-olds misinformed a competitor at least once, and 38% withheld information from a competitor at least once. By the age of 12, children can intentionally deceive adults based on motivation and situational circumstances (Salekin et al., 2018).

According to McCaffrey and Lynch (2009, p. 377) "In addition to having the capability for deceptive behavior, children have been found to use this skill to fabricate symptoms during medical, psychological, and neuropsychological examinations."

Peebles et al. (2005) reported two cases of malingering in adolescent girls to avoid attendance at school. In the first case, a 14-year-old girl presented with fatigue, reduced appetite, nausea, and a facial rash. She later confessed to applying make-up to her skin and eyes. The second case involved a 13-year-old girl referred to an infectious diseases clinic with recurrent bleeding from previous surgeries. She later admitted to applying menstrual blood to her wounds. Oke et al. (2018) described the case of a 5-year-old boy with a history of recurrent abnormal body movement and shaking of his body in order to gain attention from his grandmother. Flaro and Boone (2009) reported two forensic cases of children malingering. In the first case, a 16-year-old boy with a long history of violent behavior feigned cognitive impairment to evade criminal responsibility. In the second case, a 9-year-old boy fabricated cognitive symptoms (he failed 5 of 5 effort measures) in the context of personal injury litigation.

Malingering may also represent adaptive behavior in some circumstances (APA, 2013). For example, Greenfeld (1986) described the case of a 14-year-old girl who feigned psychosis to be admitted to a hospital to escape sexual abuse at home. Overall, research suggests that children malingering at rates similar to those of adults (Salekin et al., 2018).

3.1. Malingered Mutism

Mutism rarely appears in isolation (David et al., 2009; Lishman, 2001). Actual mutism can present itself with a variety of other conditions, including catatonia, brain injury, stroke, psychotic disorders, affective disorders, personality disorders, epilepsy, endocrine disorders, encephalitis, dementia, and conversion disorder (Altshuler et al., 1986; David et al., 2009; Gordon, 2001; Lishman, 2001). However, it is rarely encountered in psycholegal evaluations (American Academy of Psychiatry and Law [AAPL], 2015).

Malingered mutism is challenging to maintain for extended periods and likewise difficult to detect (Davidson 1952, 1965; Jones & Llewellyn, 1917; Resnick & Knoll, 2018). Resnick and Knoll suggest the observation and evaluation of the potential malingeringer should take place in an inpatient setting and outline options for a comprehensive assessment, including (but not limited to): repeat interviews, neurological examination, observation at unsuspected times for communicative speech with peers, and corroborating nursing documentation. Malingered mutism may sometimes be discovered by suddenly waking the individual from a deep sleep immediately followed by asking some simple questions. The malingeringer may instinctively reply before remembering to continue their ruse (Davidson, 1952, 1965; Jones & Llewellyn, 1917). Additionally, individuals with genuine mutism will attempt to communicate by writing, gestures, or noises (Resnick & Harris, 2002).

According to Granacher and Berry (2008), a patient malingering mutism would exhibit physiological evidence, specifically the absence of laryngeal dysfunction. This can be observed via a routine laryngoscope exam. Furthermore, in faked mutism, normal palate movement is noted, as is normal breathing and swallowing. Words, if whispered, may be perfectly articulated. All these observations may indicate intact vocal cord innervation.

Daniel and Resnick (1987) reported a rare case of an adult defendant who remained mute for 10 months in an attempt to malingering incompetence to stand trial. Charged with the rape and murder of an 11-year-old girl, the 53-year-old male defendant was voluntarily admitted to a state hospital the day after committing the crime with the chief complaint of auditory hallucinations. When he was formally charged with murder, he immediately stopped speaking. He showed no signs of catatonia or depression. When he was unaware of being observed, he initiated and engaged other inmates in conversation. His neurological assessments and laboratory tests were negative. With the consent of the defendant and his attorney, a sodium amobarbital (occasionally referred to as "truth serum") interview was conducted. For 90 minutes the defendant spoke, describing his crimes in detail. He did not speak again after the interview was concluded. After a careful review of the available data, it was discovered the defendant had a history of voluntarily admitting himself to psychiatric institutions after offending, with the charges against him being ultimately dropped.

4. Conversion Disorder

Considering the particularly gruesome details involved in the Doherty case (*State v. Doherty*, 1806), the possibility of conversion disorder should be considered. The APA (2013, p. 318) lists these criteria for conversion disorder (functional neurological symptom disorder):

- A. One or more symptoms of altered voluntary motor or sensory function.
- B. Clinical findings that show evidence of incompatibility between the symptoms and recognized neurological or medical conditions.

C. Symptoms or deficit that are not better explained by another medical or mental disorder.

D. Symptoms or deficit that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning or warrants medical evaluation.

Historically, conversion disorder was viewed in the same vein as malingering (Kanaan, 2018). However, it is possible for extreme emotional responses from traumatic events to produce conversion symptoms. For example, during World War I conversion disorder, including mutism, was reported in approximately 10% of soldiers suffering from shell shock (Linden & Jones, 2014; Macleod, 2004). According to Resnick and Harris (2002, p. 127), “The exact details of the onset of mutism are important because a crime that involved ‘unspeakable horror’ may have been traumatic enough to induce a conversion disorder.”

Mutism is observed in approximately 4.5% of all conversion symptoms (Brodnitz, 1969; Thorpe et al., 1985). In a study of 194 children, Kozłowska et al. (2007) found 55% presented with multiple conversion symptoms. Hysterical or conversion mutism is diagnosed based on five criteria: 1) sudden onset; 2) recent stressful event; 3) absence of organic disease; 4) selective lack of concern (la belle indifférence); and 5) symbolic meaning (Akhtar & Buckman, 1977).

However, by all accounts, it is apparent that Mary Doherty was malingering mutism. Before the trial, she spoke normally and appeared to have a typical understanding (*State v. Doherty*, 1806). However, she also exhibited deceptive behavior before and during her arrest and made no attempt to communicate by writing or gesturing, which is more consistent with malingering rather than conversion disorder (East, 1927; Resnick & Harris, 2002). In conversion disorder, there is often a history of conversion symptoms (AAPL, 2015; Daniel & Resnick, 1987). Thus, this case illustrates the need for a comprehensive physical, psychological, and neurological examination (Daniel & Resnick, 1987; East, 1927; Lishman, 2001), especially in cases where there is a sudden onset of symptoms such as mutism (Resnick & Knoll, 2018). Of particular importance is the determination of the etiology of the mutism (AAPL, 2015), an assessment of premorbid language function, (East, 1927) and malingering assessment (AAPL, 2015; Resnick & Knoll, 2018).

5. Conclusion (*Rex v. Steel, 1787*)

Years before the Doherty case, in May 1787, the British Grand Jury found a Bill of Indictment against Elizabeth Steel for simple grand larceny. During her arraignment, she stood mute. The court directed a jury to determine whether she stood mute of malice or by the visitation of God. The jury returned a verdict, mute, by the visitation of God. Steel was remanded, and the judges assembled to consider whether she could be tried for the crime.

The judges believed that a verdict finding a prisoner mute by the visitation of God was not an absolute obstacle to her indictment. Although a person may be incapable of guilt, upon the presumption of “idiotism,” that presumption may be negated by evidence of defendant understanding by “signs and tokens” to the contrary. Thus, if the court determined that the defendant was incapable of participating in the proceedings, the clerk could enter a plea of not guilty on their behalf. It was then the responsibility of the court to navigate the proceedings with caution and ensure the defendant’s trial proceeded in a manner consistent with the rules of law.

Steel was arraigned again. When asked whether she was guilty or not guilty, she replied, “You know I cannot hear.” The court (assuming she could hear) repeatedly explained that this attempt to evade prosecution by faking deafness and mutism would be shortsighted as it would prevent the defendant from actively participating in her own defense and she would lose the advantage of questioning the witnesses.

The jury was tasked with determining whether Steel stood willingly mute or through the visitation of God. The jury again rendered a verdict mute by the visitation of God. The same jury was charged to try the indictment and found Steel guilty. She was sentenced to transportation, that is, being sent to the colony of Australia for her sentence instead of hanging, for seven years.

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