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Bevan, Miranda; Ormerod, David and Magor, Samantha. 2020. Time to dispense with the mute of malice procedure. *Criminal Law Review*, 2020(10), pp. 912-930. ISSN 0111-135X [Article]

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# Time to dispense with the mute of malice procedure<sup>1</sup>

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## ABSTRACT

*This article reviews the procedure for determining whether a defendant is “mute of malice”. It concludes that the procedure is unnecessary and anachronistic, and has been rendered effectively obsolete by statutory reform and modern trial processes under the Criminal Procedure Rules. It is time for this vestigial procedure to be formally repealed.*

## INTRODUCTION

This article examines whether it is possible to dispense with the mute of malice procedure in Crown Court trials. That procedure is engaged when a defendant fails to answer to the indictment on arraignment. It involves a jury being empanelled to determine the discrete issue of whether the accused is “mute of malice” or “mute by visitation of God.” The distinction is usefully summarised in *Halsbury’s Laws of England*:

“A defendant is mute of malice where they are deliberately silent, and mute by visitation of God where they are silent for reasons beyond their control.”<sup>2</sup>

The article begins with an illustration of how the mute of malice procedure was bypassed in a recent trial. It then briefly describes the procedure’s historical evolution, contrasted with the development of the procedure for assessing unfitness to plead – a determination with which it is closely allied. We then turn to consider the status of the procedure in the context of the modern criminal trial (governed by the Criminal Procedure Rules (Crim PR) and the Criminal Practice Directions (Crim PD)). Our conclusion is that the criminal trial process has effectively dispensed with this historical anachronism. In the modern Crown Court trial, which by necessity is becoming ever more efficient,<sup>3</sup> there is no place for the time-consuming and

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<sup>1</sup> We are grateful to HH Judge Donne RD QC, Professor Ronnie Mackay, Dr Penelope Brown and Professor Peter Hungerford-Welch for comments on an earlier draft and to Chloe Reddock for additional research assistance. The errors remaining are ours.

<sup>2</sup> *Criminal Procedure* (Volume 27 (2015) para 356).

<sup>3</sup> *Review of Efficiency in Criminal Proceedings* by The Rt Hon Sir Brian Leveson President of the Queen’s Bench Division, January 2015. Accessible at <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

costly process of empanelling a jury to determine whether a defendant is “mute of malice” or “mute by visitation of God”. The verdict which results has no bearing on the conduct of the trial, or the adjustment of the proceedings to accommodate the defendant’s needs. The procedure serves no useful purpose and should be formally abolished.

Nonetheless, we recognise fully the challenges the silent defendant presents for the court and that these should not be underestimated. Our examination of the mute of malice procedure highlights the difficulty of ensuring that a silent defendant is afforded the means to participate effectively in the process so that a fair trial can take place, whilst as far as possible respecting the defendant’s legal agency.<sup>4</sup> Ultimately, the focus should not be on the reasons for silence, but on obtaining a medical and/or other professional assessment of the defendant’s ability to participate effectively in the trial process. The article thus concludes with a call for reform of the test for unfitness to plead and its application in all criminal trials.

### **MUTE OF MALICE AND MODERN TRIAL PRACTICE**

In *R v Saif* in 2019, at Inner London Crown Court, HHJ Donne QC was faced with a defendant (D) who was on remand and appeared by video link at the Plea and Trial Preparation Hearing (PTPH).<sup>5</sup> He was unrepresented, had not applied for legal aid and appeared “flopped over the desk and not responding.” The judge noted that it was unclear whether D was being uncooperative or was unwell. The PTPH was adjourned for D to obtain legal aid and for consideration of his mental state. A direction was made for D to be produced at court for the adjourned hearing. The judge ordered a psychiatric report to determine whether D was suffering from a mental illness which might render him unfit to plead. The psychiatrist reported that D refused to see her. Her report was based on other information available to her. It recorded that D communicated with staff only in writing in Arabic, but that he engaged with the prison Imam and reported to him that “his refusal to speak is linked to immigration issues.” The psychiatric report concluded that D “does not exhibit any behaviour which might be consistent with mental illness”, although it was acknowledged that he had a history of self-harm and refusing food. D subsequently did not apply for legal aid, remained unrepresented and refused to leave his cell for future hearings

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<sup>4</sup> Including the right of persons with disabilities to enjoy legal capacity on an equal basis with others, and to be supported to do so (Articles 12 and 13 of the United Nations Convention on the Rights of Person with Disabilities (opened for signature 30 March 2007) (UNCPRD).

<sup>5</sup> We are grateful to HHJ Donne RD QC for making available his written ruling as delivered in open court.

The judge concluded that there was no issue of unfitness to plead. The Crown then invited the judge to empanel a jury to consider whether D was mute of malice. The judge rejected that suggestion, ruling that the mute of malice procedure had been rendered obsolete by modern statutory trial processes and rule 3.24 of the Crim PR, which provides “(a) if the defendant declines to enter a plea, the court *must* treat that as a not guilty plea unless rule 25.10 applies (Defendant unfit to plead)[emphasis added]”. HHJ Donne QC ruled that:

“having no evidence that the defendant is unfit to be tried and applying s.6 of the Criminal Law Act 1967 and rule 3.24 of the Criminal Procedure Rules, I enter a plea of not guilty on the defendant’s behalf and a jury will be empanelled to try him on the single count he faces.”

The case prompts numerous questions. What are the ramifications of bypassing the mute of malice procedure? Has it been rendered obsolete by the statutory changes to the fitness to plead regime or by the Criminal Law Act 1967? Was rule 3.24 of the Crim PR intended to abolish the procedure and does the Crim PR Committee have vires to achieve that outcome? What implications are there for necessary explanations to the accused and to the jury empanelled to try him?

## **THE DEVELOPMENT OF THE MUTE OF MALICE PROCEDURE**

### **An ancient pedigree – the ‘mute of malice’ procedure before 1827**

The procedure for dealing with defendants who remain silent on arraignment has an ancient pedigree, driven by imperatives of the early trial process. From the late medieval period a prisoner was required to plead to the indictment and accept trial by jury. The defendant who pleaded not guilty was asked ‘Culprit, how will you be tried?’ to which the defendant had to reply ‘By God and my country’.<sup>6</sup> Jury trial was thus conceived as a ‘consensual proceeding’ which the defendant had a right to decline, although this conception itself was a relic of the period prior to 1215 when the defendant could choose jury trial as an alternative to trial by ordeal.<sup>7</sup> A defendant who refused to enter a plea and/or to accept jury trial, whether staying silent or otherwise, was considered to ‘stand mute’.<sup>8</sup>

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<sup>6</sup> I. J. F. Stephen, *A History of Criminal Law in England* (1883) at 297-298.

<sup>7</sup> J. H. Langbein *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 1977) 75

<sup>8</sup> M. Hale, *The History of the Pleas of the Crown Vol II* (1736) (reprinted by Professional Books Ltd, London), p.316.

There was benefit in refusing to plead since a man executed on conviction (the standard sentence for a felony) forfeited all his property. For an accused who wilfully refused to plead or put himself on his country, the penalty was 'peine forte et dure', a practice which developed to involve starvation and being pressed by heavy stones, whilst stretched spread-eagled on the ground, until the prisoner submitted to trial, was crushed to death or starved.<sup>9</sup> But the deceased's property rights were secured for his heir.<sup>10</sup> Given the extreme nature of the penalty, it is unsurprising that a jury would be empanelled to decide the issue of whether the defendant was wilfully silent ('mute of malice') or in the alternative 'mute by visitation of God'<sup>11</sup> It is unsurprising too that the gruesome nature of the penalty broke the resolve of some. John Stevens, indicted for a highway robbery in 1741, refused to enter a plea, having taken objection to the seizure from him on arrest of a 'considerable Sum of Money'. Found 'mute of malice' by a jury, the judge read to him the terrible process which would follow. The proceedings record that although the executioner had been 'sent for to perform the usual Office of tying the Prisoner's Thumbs' Stevens pleaded not guilty 'before the Execution of the Sentence'.<sup>12</sup>

The barbarity of 'peine forte et dure', and the advantage of silence, were ended by the Felony and Piracy Act 1772<sup>13</sup> under which those determined by the jury to stand "mute of malice" were instead treated as if they had pleaded guilty and were sentenced to execution. However, the importance of distinguishing between the wilfully silent and those who were unable to enter a plea remained. A finding of "mute by visitation" was not an absolute bar to the accused being tried. However, as Hale describes, there was a 'presumption of ideotism' in such cases, on the basis that such a person would lack an understanding of 'what is forbidden by law to be done, or under what penalties' and so should not be tried.<sup>14</sup> The

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<sup>9</sup> D. Grubin, "What constitutes fitness to plead?" [1993] Crim. L.R. 1993, 748; Andrea McKenzie "This Death Some Strong and Stout Hearted Man Doth Choose: The Practice of Peine Forte et Dure in Seventeenth- and Eighteenth-Century England" (2005), *Law and History Review* 23(2), 279. The case of John Stevens (1841)

<sup>10</sup> Hale *ibid*, Vol II, p.319. For discussion of alternative motivations for undergoing peine forte et dure, particularly the preservation of reputation and the express rejection of the tribunal, see A. McKenzie (*ibid*).

<sup>11</sup> W. Hawkins, *A Treatise of the Pleas of the Crown*, 8th Ed., John Curwood ed. London, (1824) Book II, Ch 30 section 5.

<sup>12</sup> Old Bailey Proceedings Online ([www.oldbaileyonline.org](http://www.oldbaileyonline.org), version 8.0, 03 July 2020), Ordinary of Newgate's Account, September 1741 (OA17410916).

<sup>13</sup> 12 Geo.3c.20.

<sup>14</sup> M. Hale, *The History of the Pleas of the Crown*, Vol I (reprinted by Professional Books Ltd, London), p.34. See Grubin *ibid* fn 9 for discussion.]

presumption could be rebutted, as occurred in the case of *Elizabeth Steel*,<sup>15</sup> a defendant who had been deaf and without speech since birth. In that case the judges assembled to consider the proper approach to be taken to an accused found “mute by visitation”. They concluded that the presumption could be ‘repelled by evidence of that capacity to understand by signs and tokens.’ In such cases a not guilty plea would be entered but particular care would be taken to protect the interests of the silent defendant during trial. As Hawkins explains:

“the judges of the court (who are always to be of counsel with the prisoner, to see that he have law and justice) shall not only cause the felony to be enquired of, but also, whether the prisoner be the same person and all the other matters which he might have pleaded in his defence.”<sup>16</sup>

The emphasis on the court being ‘of counsel with the prisoner’ was particularly significant given that at this time defendants were frequently unrepresented.<sup>17</sup>

During this period, there was a distinction between ‘ideotism’ and ‘insanity on arraignment’. In the latter case, Hale explains, the defendant could not be arraigned or tried because their ‘phrenzy’ prevented them from pleading ‘advisedly’ to the indictment. Where a jury determined that the defendant’s ‘phrenzy’ was genuine, they would be ‘remitted to prison until that incapacity be removed’.<sup>18</sup> This was subsequently recognised in statute – section 2 of the Criminal Lunatics Act 1800 required an accused found by a jury to be ‘insane’ on arraignment such that he ‘cannot be tried’ to be detained ‘in strict custody until His Majesty’s Pleasure shall be known’.<sup>19</sup>

### **Declining significance of the “mute of malice” determination**

In 1827 the Criminal Law Act (CLA 1827) fundamentally changed the significance of a ‘mute of malice’ determination, by reversing the procedural effect of such a verdict. Section 2 of that Act provided that, where an accused was found ‘mute of malice’, ‘in every such case it

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<sup>15</sup> 168 E.R. 328 (1787). Trial following a determination of ‘mute by visitation’ also occurred in *Thomas Jones* 1773 1 Lea CC 452(n), *George Halton* (1824) Ryan & Moody 78, and *William Thompson’s Case*, 168 E.R. 1106 (1827), the latter two cases resulting in acquittals.

<sup>16</sup> Hawkins *above* n11 Book II, Ch 30 Section 7.

<sup>17</sup> Representation was allowed for misdemeanour (summary) trials, but there was no formal right of representation for felony trials (on indictment) until the 1836 Prisoners’ Counsel Act.

<sup>18</sup> M. Hale, *The History of the Pleas of the Crown*, Vol I (reprinted by Professional Books Ltd, London), p.34-35.

<sup>19</sup> 39 & 40 Geo.3, c.94 set out in *R v Emery* [1909] 2 KB 81.

shall be lawful for the Court, if it shall so think fit, to order the proper officer to enter a plea of 'Not guilty'.<sup>20</sup> The Bill as first introduced proposed a continuation of the approach taken in the 1772 Act,<sup>21</sup> but was amended subsequently. Whilst it is not possible to trace the evolution of the Bill in its entirety in Hansard, the contribution of Mr Scarlett MP objecting to the status quo provides some indication that the practice of the courts prompted the change. He noted:

'Judges are uniformly unwilling to enter guilty pleas when a defendant did not explicitly plead guilty. Where defendants refuse to plead, judges enter 'not guilty' pleas for them and a trial commences.'<sup>22</sup>

There were significant developments in caselaw as well during this period. In 1836 Alderson B's judgment in *Pritchard*<sup>23</sup> (drawing on *Dyson*)<sup>24</sup> confirmed the requirement for a jury to determine whether a defendant was "mute of malice" or "mute by visitation";<sup>25</sup> and crystallised the order in which the mute of malice procedure and the determination of unfitness to plead should be addressed. The oft-quoted passage reads:

There are three points to be enquired into:- 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 the proceedings in the trial so as to make a proper defence - to know that he might challenge any of you [the jury] to whom

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<sup>20</sup> 7 & 8 Geo. IV. c. 28, s. 2, "That if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the Court, if it shall so think fit, to order the proper officer to enter a plea of 'Not guilty,' on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same." (See *Thursby's Case*, 168 E.R. 1035 (1832)).

<sup>21</sup> Debate on the Consolidation of the Criminal Laws, House of Commons, 9 March 1826, vol 14, Mr Secretary Peel: "[This bill] will extend to subsequent and to future acts the principle of an act of king William, which places the felon, in the same situation as to the consequences of his guilt, whether that guilt be proved by evidence—or confessed by himself—or admitted by his standing wilfully mute—Or by his suffering outlawry. At present, there are several offences, constituted such by acts of the legislature which have passed subsequently to the act of king William, in the case of which, the same consequences do not follow to the offender, should he confess his guilt, or Stand wilfully mute, as would follow in the case of his conviction by verdict upon evidence."

<sup>22</sup> Criminal Justice Bill, House of Commons, 17 April 1826, vol 15.

<sup>23</sup> (1836) 7 C & P 303, 173 ER 135.

<sup>24</sup> (1831) 7 C & P 305.

<sup>25</sup> Immediately following the CLA 1827, the 'mute of malice' determination remained an issue for the jury (*Thursby's Case*, (1832) 168 E.R. 1035), although even at this time not exclusively so. See *R. v William Bitton* 172 E.R. 1159 (1833) in which the defendant refused to plead to the indictment but on arraignment explained, "I will not plead. I have pleaded once before, and I have stood my trial." The Judge is recorded as having entered a plea of not guilty for him (under CLA 1827 s2) without empanelling a jury.

he may object - and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.<sup>26</sup>

The defendant Pritchard, described as 'deaf mute', was found by the jury to be 'mute by visitation of God' (limb 1), but able to plead to the indictment (limb 2). However, in what Grubin<sup>27</sup> has identified as a problematic conflation of Hale's statements on 'ideotism' and 'insanity', Alderson B directed the jury, as Parke J had in *Dyson*, that if they concluded that the defendant was unable to stand trial they should find him 'not of sane mind'. This was the jury's verdict in both cases, and the defendants Pritchard and Dyson were both detained indefinitely under section 2 of the Criminal Lunatics Act 1800. The judgment is a critical moment in the development of the law surrounding both muteness of malice and unfitness to plead. The second and third limbs of Alderson B's process have been repeatedly confirmed as setting out the test for unfitness to plead, now conceived as 'a single, indivisible test which must be met in its entirety'.<sup>28</sup> Although the test has been developed to apply to modern trial proceedings,<sup>29</sup> it has retained a narrow focus arising from its formulation with reference to an enquiry to establish the intellectual capacity of an individual who has communication difficulties, as in the cases of *Dyson* and *Pritchard*. It is therefore not well suited to encompass the issues that may restrict the ability to participate effectively of a defendant with a serious mental illness or mood disorder. These limitations of the unfitness to plead test, fixed at this early point in its development, continue to trouble the courts,<sup>30</sup> and invite the criticism of commentators<sup>31</sup> and reformers.<sup>32</sup>

The case of *Pritchard* also set firm the requirement for a jury to determine whether a silent defendant is "mute of malice" or "mute by visitation". Featuring as limb 1 in Alderson B's

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<sup>26</sup> *Pritchard* *ibid*, 304.

<sup>27</sup> Grubin *ibid*.

<sup>28</sup> *R v Marcantonio* [2016] EWCA Crim 14 at [8].

<sup>29</sup> See *R v John M* [2003] EWCA Crim 3452 for the most widely favoured formulation of the test for modern trial proceedings. The modern formulation includes the ability to instruct counsel - the right of representation post-dating (just) the case of *Pritchard*, see *fn 17*).

<sup>30</sup> See for example *R v Murray* [2008] EWCA Crim 1792; *R v Moyle* [2008] EWCA Crim 3059, [2009] Crim. L.R. 586; *R v Diamond* [2008] EWCA Crim 923.

<sup>31</sup> See for example A.Loughnan, "Between fairness and "dangerousness": reforming the law on unfitness to plead" [2016] Crim. L.R. 451; R.D. Mackay and W. Brookbanks, *Fitness to Plead: International and Comparative Perspectives*, (2018), (Oxford: OUP).

<sup>32</sup> See Law Commission, *Unfitness to Plead: A Consultation Paper*, CP197, paras 2.60-2.106 and *Unfitness to Plead, Volume 1*, Law Com No 364 paras 3.11ff.



formulation this mute of malice procedure has been repeatedly referenced in unfit to plead cases, even where such a determination did not occur and was not required. As a result, it has remained embedded in the common law arguably longer than the frequency of its occurrence or its significance can justify. Detention under the Criminal Lunatics Act 1800 for defendants found to be 'mute by visitation' and unfit to plead was confirmed in *R v The Governor of HM Prison at Stafford ex parte Emery* (1909), even though the defendant's unfit to plead arose purely 'by reason of his inability to communicate with and be communicated with by others'.<sup>33</sup> This outcome, in combination with the CLA 1827, effected a radical shift in the position of the silent defendant, and indeed in the significance of the 'mute of malice' determination itself. The defendant found 'mute of malice', previously condemned by their wilful silence to certain conviction and execution, was now to have a not guilty plea entered on their behalf and be tried in the usual way. The defendant found 'mute by visitation' was at the greater risk of indefinite detention (under s. 2 of the Criminal Lunatics Act 1800) should they also be found to be unfit to plead.<sup>34</sup> As a result the focus of concern in respect of an accused who would not, or could not, plead shifted from the mute of malice procedure to the determination of whether the accused was unfit to plead and has remained there.

The result is that we have been able to identify fewer than 20 cases considered by the appellate courts since *Pritchard*, in which a 'mute of malice' procedure has featured. The issue of contention in these cases tends to relate to the subsequent unfit to plead determination, rather than the mute of malice procedure itself.<sup>35</sup> As the West Indian Supreme Court concluded in *Reid v R*, the question of unfit to plead is, put simply, the 'more important issue'.<sup>36</sup>

### **Negligible common law development of the mute of malice procedure**

During the later 19<sup>th</sup> century and into the 20<sup>th</sup> century the mute of malice procedure has lingered on as something of a relic, much as the requirement to put oneself on one's country remained long after it was necessary to consent to trial by jury. The mute of malice procedure itself has barely been developed by the Courts. In the decades after *Pritchard*, the

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<sup>33</sup> *Emery* [1909] 2 KB 81 at [84]. See also *R v Berry* (1876) 1 QBD 447.

<sup>34</sup> See T. Ward, "Standing Mute" (2012) *Law & Lit.*, 24(1), 3, for discussion of the 'paradoxical' change of emphasis.

<sup>35</sup> See for example *Berry* (1876) 1 QBD 447; *Roberts* ([1953] 3 WLR 178; and *Reid* (1961) 3 WIR 404 which turned on the timing of the unfit to plead enquiry in relation to the trial of the general issue.

<sup>36</sup> (1961) 3 WIR 404, at [405].

requirement for the jury to determine the issue was confirmed,<sup>37</sup> and has never been overruled. However, in contrast to *Thursby's Case*,<sup>38</sup> in which an admission offered by counsel that the defendant was mute by visitation did not obviate the need for a jury determination, the Court of Appeal more recently appears to have condoned, albeit *obiter*, a relaxation in the requirement to empanel a jury where there is no dispute as to the basis of the defendant's silence.<sup>39</sup>

Inevitably, the number of occasions where a defendant's silence on arraignment is a source of contention is likely to have reduced with the increase in our understanding about disabilities, improvements in the treatment of those with disabilities, the advent of universal education for those who are deaf and blind<sup>40</sup> and the development of British Sign Language.<sup>41</sup> Thus in *McCarthy*<sup>42</sup> the defendant was deaf and unable to speak, but could nonetheless communicate effectively in writing and so engage in trial. The appeal turned on whether a jury should have been empanelled to consider the issue of unfitness to plead. However, no issue was taken with the fact that there was no jury determination of why the defendant was silent on arraignment, Lord Parker CJ commenting *obiter* that this would have been unnecessary "because it has always been assumed, and rightly assumed, that he was deaf by visitation of God." A similar approach was taken in the later case of *R v Holman*<sup>43</sup> in which the Court of Appeal concluded that although the defendant was technically silent on arraignment, she nonetheless unequivocally communicated pleas of not guilty and so "the issue of mute of malice or by visitation of God did not arise", it being "quite unnecessary for the true reason for her failure to speak to be pronounced upon by a jury."

In only two cases in this period was there any consideration of the mute of malice procedure itself. The first is the assizes case of *R v Sharp (George Myhill)*<sup>44</sup> in which the burden and

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<sup>37</sup> *R v Schleter* (1866) 10 Cox 409. See also in Old Bailey Proceedings unreported cases involving jury determinations of muteness: for example *Bazil de Mair*, August 1838, (t18380820-1884), *Charles Anderson*, April 1867, (t186704808-415) and *Stephen Titus*, November 1912, (t19121105-33) Old Bailey proceedings Online.

<sup>38</sup> *Thursby's Case* (1832) 168 E.R. 1035.

<sup>39</sup> *R v McCarthy* [1967] 1 QB 68.

<sup>40</sup> Mandated by the Elementary Education (Blind and Deaf Children) Act 1893.

<sup>41</sup> For a timeline of the development of British Sign Language see <https://www.ucl.ac.uk/british-sign-language-history/bsl-timeline>

<sup>42</sup> [1967] 1 QB 68, at pp.72-73.

<sup>43</sup> (1994) 32 BMLR 52, p .59. [1995] Crim. L.R. 79.

<sup>44</sup> [1960] 1 Q.B. 357.

standard of proof in mute of malice procedures were considered. Salmon J, as he then was, concluded that the burden to establish muteness of malice lay on the prosecution to the criminal standard. If the jury retained any doubt then they should return a verdict of mute by visitation of God. The reasoning is unclear and, where identifiable, unconvincing. The prosecution's submission was that a finding of mute of malice was an "allegation of fraud upon the court and an endeavour to pervert the course of justice"<sup>45</sup> and Salmon J appears to agree, observing that it would be "manifestly most unfair" for a defendant to be wrongfully found mute of malice.<sup>46</sup> However, as defence counsel at trial noted, being found mute of malice bears no criminal liability nor any penalty. At the same time, feigned muteness was considered by Salmon J to be a potential mechanism for inconveniencing prosecution witnesses "for the purpose of avoiding or postponing the trial" - something which the defendant equally 'should not get away with'. In the second case, *R v Paling*,<sup>47</sup> the Court of Appeal concluded that there is no right of challenge to a juror empanelled to try the issue of muteness of malice, on the basis that section 12 of the Juries Act 1974 applies only to proceedings following arraignment and plea.

### Legislative neglect

During this period, Parliament also paid scant attention to the mute of malice procedure. By contrast, the unfitness to plead procedure has been the subject of repeated reforms and legislative change, even though the test itself remains one of common law. In 1964 the Criminal Procedure (Insanity) Act (CP(I)A 1964) set out for the first time the procedure to be followed where the question of unfitness to plead arises (s. 4). The Act introduced the requirement for medical evidence for a finding of unfitness to plead (s.4(6) and 8(2)) and confirmed the role of the jury in that determination.<sup>48</sup> The statute is silent in relation to the mute of malice procedure, nor was any mention made of it in the passage of the Bill through both Houses. In terms of procedure at least, the CP(I)A 1964 uncoupled mute of malice and unfitness to plead determinations.

Little attention was also paid to the mute of malice procedure during the passing of the Criminal Law Act 1967. The CLA 1967 repealed in its entirety the CLA 1827, but reproduced

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<sup>45</sup> [1960] 1 Q.B. 357, p.357.

<sup>46</sup> [1960] 1 Q.B. 357, p.358.

<sup>47</sup> (1978) 67 Cr App R 299.

<sup>48</sup> Following the clear view of the Criminal Law Revision Committee Third Report: *Criminal Procedure (Insanity)* (1963) Cmnd 2149, paras 14 to 15.

section 2 of the 1827 Act without substantive changes in section 6(1)(c), which sets out that where a defendant:

“stands mute of malice or will not answer directly to the indictment, the court may order a plea of not guilty to be entered on his behalf, and he shall then be treated as having pleaded not guilty.’

Again, there appears to have been no debate in Parliament in respect of the mute of malice determination itself – the section of the Bill in which the relevant clause appeared being described as representing a ‘clarification and restatement of the existing law’.<sup>49</sup> In contrast to the statutory development of the unfitness to plead procedure, the CLA 1967 provides no guidance as to whether the determination should be by jury or judge alone, what evidence is required for a finding that the defendant stands mute of malice or how the court’s apparent discretion to enter a not guilty plea might be exercised.

Is it possible that the 1967 Act impliedly rendered obsolete the procedure of empanelling a jury to determine the issue? The 1827 Act did not prescribe empanelling a jury to determine whether a defendant was mute of malice, but it was unquestionably the procedure adopted under that Act.<sup>50</sup> The continuation of the requirement for a jury to determine whether a defendant stood mute of malice following the CLA 1967 finds some support in a rare parliamentary reference to the procedure in debates during the passage of the Criminal Justice Act 1988. Lord Wigoder tabled an amendment to remove the requirement for a jury to try the issue of muteness of malice.<sup>51</sup> However, the amendment was withdrawn, in large part it seems because of a misunderstanding of the ramifications of a mute by visitation finding. Lord Wigoder prefaced his argument with the observation ‘I understand that if the defendant is found mute by visitation of God, he is found unfit to plead and is carried off to some institution for the rest of his life’. Little wonder that, because juries were empanelled to determine the question of unfitness to plead at that time, objection was taken to the proposed amendment, which was withdrawn. As late as 1998 the Barbados Court of Appeal in *Hope and Davis*<sup>52</sup> overturned a conviction which followed a mute of malice determination

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<sup>49</sup> Hansard, HL 1 Nov 1966 vol 277, Col 513 (Lord Stonham).

<sup>50</sup> See *Pritchard ibid*; and *Schleler ibid*.

<sup>51</sup> Hansard (HL) 2 November 1987, vol 489: Lord Wigoder’s suggested amendment read: “Power of judge to try preliminary issue without jury. In any trial on indictment on which either of the following issues is raised— (a) whether the defendant is mute of malice or by visitation of God, or (b) whether the defendant is fit to plead, it shall be for the judge, without presence of a jury, to decide the issue.”.

<sup>52</sup> *Hope and Davis* (1998) 56 WIR 62, Barbados Court of Appeal decision.

conducted by the judge without empanelling a jury – the only occasion we have been able to identify when an irregularity in the mute of malice procedure resulted in a conviction being quashed.

In 1991 the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 again fundamentally changed the unfitness to plead landscape, with the introduction of the trial of the facts<sup>53</sup> and flexibility of disposal for those found to have ‘done the act or made the omission’.<sup>54</sup> The jury’s role in the unfitness determination was retained, contrary to the recommendations of the *Report of the Committee on Mentally Abnormal Offenders* (“the Butler Report”) published in 1975. Again, the mute of malice procedure was not mentioned during the passage of the Bill. However, it did feature in the Butler Report, as a relic from a bygone era. The Report characterised the retention of the jury for unfitness determinations as a ‘historical survival’ from the era when a jury was required to determine whether the defendant was mute of malice or by visitation of God, before subjection to ‘peine forte et dure’.<sup>55</sup>

### **Caselaw in the late 20<sup>th</sup> Century – problems arising from the two procedures**

Cases involving mute of malice procedures continued to be vanishingly rare following the statutory development of the unfitness to plead procedure. The three reported cases from the 1990s which involved a mute of malice determination<sup>56</sup> are particularly instructive because they reveal how the requirement to conduct a mute of malice procedure can obscure, and potentially undermine, the unfitness to plead procedure. All three cases involved defendants whose mental condition, combined with non-compliance or lack of representation, meant that applying the unfitness to plead test would be challenging in any event. However, the existence of the additional mute of malice determination, addressing similar subject matter, but without clarification in caselaw or statute, appears to have complicated the process.

One problem revealed by the caselaw is the lack of clarity about what further enquiry is triggered, or excluded, by a mute of malice finding. *Pritchard* has been read as mandating an

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<sup>53</sup> Introducing CP(IA) 1964 s4A.

<sup>54</sup> CP(IA) 1964 s5(2).

<sup>55</sup> *Report of the Committee on Mentally Abnormal Offenders* (1975) Cmnd 6244, para 10.22.

<sup>56</sup> *Hope and Davies*, (1998) 56 WIR 62; *Ricketts* 1997 WL 1102965 (1997) and *Mohammed Sharif* [2010] EWCA Crim 1709.

unfitness to plead determination following a finding of 'mute by visitation'<sup>57</sup>, but does that, by implication, mean that a 'mute of malice' determination obviates the need to consider unfitness? Alderson B's judgment does not explicitly say as much, indeed one might argue for the contrary contention,<sup>58</sup> but this appears to have been the approach taken in *Hope and Davis*.<sup>59</sup> In that case the appeal was allowed on the basis that the judge had determined of his own accord that the defendant stood mute of malice and entered a not guilty plea on his behalf. However what appears to have troubled the Court of Appeal in particular was the unresolved issue of whether the defendant was in fact unfit to plead; defence counsel having informed the court that the defendant had been evaluated by a psychologist as "being mentally defective and intellectually disadvantaged" but no formal enquiry had been embarked upon. Had the jury determined the basis of the defendant's muteness and found him "mute by visitation", the court observed, "the issue of fitness to plead would then have fallen to be decided by a jury". The defendant had, in effect, in the court's reasoning, been denied the chance of the jury triggering an unfitness determination. And, in any event, the judge was wrong in principle to make the determination of his own accord.

Shades of the same reasoning can be detected in the 1997 Privy Council case of *Ricketts*.<sup>60</sup> Defence counsel informed the court that in his view the defendant, who was silent on arraignment for murder, had a 'mental problem' and should be seen by a psychiatrist. However, the Government's psychiatrist was unavailable and there were no funds to instruct a doctor privately. The jury proceeded to find the defendant mute of malice, at which point counsel withdrew, having no instructions for the conduct of the trial. Unrepresented, the defendant interrupted throughout the trial making 'incoherent' comments and 'noisy outbursts so that a piece of cloth was tied around his mouth'.<sup>61</sup> The Privy Council declined to overturn his conviction for murder, but acknowledged that the judge was 'in a difficult position' 'yet he had to proceed on the verdict of the jury that the defendant was mute of malice'.<sup>62</sup> In *Mohammed Sharif*<sup>63</sup> the defendant, charged with conspiracy to defraud, had

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<sup>57</sup> *Hope and Davies*, (1998) 56 WIR 62.

<sup>58</sup> Presumably the possibility of a defendant who stands mute of malice being also unfit to plead explains why the CLA 1967 section 6 leaves the entry of a not guilty plea at the discretion of the court.

<sup>59</sup> (1998) 56 WIR 62.

<sup>60</sup> 1997 WL 1102965 (1997).

<sup>61</sup> 1997 WL 1102965 (1997), [8].

<sup>62</sup> 1997 WL 1102965 (1997), [14]. See N Roberts, "The Law Lords and human rights: the experience of the Privy Council in interpreting Bills of Rights" (2000) *European Human Rights Law Review* 147-180.

been found to be mute of malice at trial in 1998. Trying that issue the jury had considered evidence from a number of medical experts, but the determination was hampered by the defendant's failure to attend medical appointments and tests and made the more complex by the allegation of malingering. The defence at the subsequent trial had contended that the defendant was unfit to plead, but a new jury determined that he was in fact fit to plead. However, the focus on malingering in the reports prepared for the mute of malice procedure appears to have clouded the assessment of the subsequent more complex question of unfitness to plead. That latter determination was subsequently called into question and provided the basis for overturning the conviction following a Criminal Cases Review Commission referral in 2010.

### **Post 2000 – an anachronistic and vestigial procedure**

The refinement of the unfitness to plead procedure has continued with the removal, in the Domestic Violence, Crime and Victims Act 2004 (DVCVA 2004), of the jury's role in determining unfitness to plead. That is now the province of the judge alone. The change in the law followed a recommendation made by Lord Justice Auld in his 2001 *Review of the Criminal Courts of England and Wales*, who observed "it is difficult to see what a jury can bring to the determination of the issue that a judge cannot."<sup>64</sup> As with previous reforms, the mute of malice procedure was not raised during the passage of the Bill, and the Act does not appear to have expressly, or by necessary implication, removed the requirement to empanel a jury to determine the basis of a defendant's silence. Indeed, following the passing of the DVCVA 2004, practitioner texts continue to reference the necessity of a jury determining whether the defendant is mute of malice<sup>65</sup> and caselaw suggests that some 'mute of malice' challenges do arise and determinations by the jury still occur.<sup>66</sup> However, removal of the jury process for unfitness to plead has rendered the mute of malice procedure wholly anachronistic.

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<sup>63</sup> *R v Sharif* [2010] EWCA Crim 1709. See P Catley "The use of neuroscientific evidence in the courtroom by those accused of criminal offenses in England and Wales" (2015) *Journal of Law and Biosciences* 510

<sup>64</sup> Lord Justice Auld (2001) *Review of the Criminal Courts of England and Wales* paras 212-213.

<sup>65</sup> *Blackstone's Criminal Practice* D12.19, *Archbold Criminal Pleading, Evidence and Practice* 4-228.

<sup>66</sup> Two reported cases, one an unduly lenient reference (*Attorney-General's Reference No 196 of 2006* [2006] EWCA Crim 3273) and the other an application for review of the minimum term of a life sentence (*Re Maczka* (application under para 3 of Sch 22 to the *Criminal Justice Act 2003*) [2008] EWHC 1675 (QB), reveal that mute of malice determinations are, on occasion, still being conducted by juries. In neither case did the determination appear to have had any bearing on the progress of the trial - a plea of not guilty having been entered in both cases, both defendants gave evidence and were convicted. See also Fn 101 below.

What justification can there be for the jury to be retained for mute of malice procedures when it has been removed for assessments of unfitness? Certainly not the seriousness of the ramifications for the defendant. The unfitness determination severely curtails the rights of the unfit defendant, with regard to their engagement in the proceedings and opportunity to test the prosecution case. Nothing turns on a mute of malice determination; trial simply proceeds with a not guilty plea entered (CJA 1967, s.6). Indeed, arguably, affording a defendant who is wilfully silent on arraignment the performance of a jury procedure is only liable to publicise his position and frustrate the process.<sup>67</sup>

It might be argued that a jury is better placed than a judge to determine whether a defendant is being unco-operative, 'mute of malice'. However, the muteness determination will often engage, in a substantive way, with the alternative position, that the defendant is instead 'mute by visitation'. In such cases, even if not formally required, the jury is likely to be presented with expert evidence, potentially conflicting or complex medical evidence, and will be engaged in an assessment of the defendant's capacity to enter a plea (albeit described in arcane terms). Parliament concluded in the DVCVA that such an enquiry is more properly the province of a judge, and it is plainly incoherent to have a jury empanelled to address that question when, since 2004, the DVCVA has mandated that the jury should have no involvement in the wider, but overlapping, issue of unfitness to plead.<sup>68</sup>

The mute of malice procedure is so under-developed at common law (and in statute) that it remains unclear *how* it is to be applied in practice. There is no right to challenge jurors,<sup>69</sup> but the procedure for their empanelling is unclear. It appears to be governed by section 11 of the Juries Act 1974 although, unlike fitness to plead procedures which were, until the DVCVA, specifically referred to in the statute (s.11(5)(b)), there is no specific reference to mute of malice determinations. Early caselaw supports the suggestion that the same jury can try the mute of malice issue and the general issue,<sup>70</sup> although in *R v Ricketts*,<sup>71</sup> the only recent

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<sup>67</sup> See for example *The Attorney General of the Irish Free State v Sean T O'Kelly, Editor of the Nation Newspaper* High Court, (1928), an Irish contempt case. The facts of the case reveal that the Nation Newspaper had reported on three republican defendants who had refused to plead and offered no evidence at the muteness determination. Two juries empanelled to determine the issue, some members apparently sympathising with the defendants' position, failed to agree, forcing the judge to discharge them.

<sup>68</sup> Indeed if the *Pritchard* procedure is still to be observed in 'muteness' cases, the judge's examination of the issue of unfitness to plead must mandatorily follow a jury finding of 'mute by visitation'.

<sup>69</sup> *Paling* (ibid).

<sup>70</sup> *Steel* (ibid).

<sup>71</sup> 1997 WL 1102965 at [6].



case in which there is a clear indication, a fresh jury was sworn for trial. The process of having a jury sworn to determine the mute of malice issue is inefficient, expensive and liable to create delays, with consequent disruption to other trials and inconvenience to witnesses and defendants. The inefficiency would be further compounded if a second jury is required and would be liable to exploitation by defendants as a delaying tactic to frustrate the trial process generally.

How is the jury to be directed? Caselaw provides no guidance for judges on the form of words to be used. There is no mention in the Crown Court Compendium, nor in the Crown Court Bench Book nor, looking more historically, to the JSB Specimen Directions.<sup>72</sup> The lack of any guidance may be a reflection of the rarity of such cases arising in practice, but arguably it is in those scenarios that are less familiar to judges sitting in the Crown Court that the guidance is needed most. There has also been no development of a legal test for 'malice' or 'visitation of God'. It is suggested that the Crown must prove malice to the criminal standard,<sup>73</sup> but is the jury compelled to find the defendant mute by visitation of God if they have a reasonable doubt? Need the jury even engage with the question of "visitation of God" if not specifically raised? Is there any evidential requirement? Caselaw suggests that both sides are free to call relevant witnesses,<sup>74</sup> including expert evidence,<sup>75</sup> but the issue has never to our knowledge been considered specifically since the advent of expert witnesses.

The mute of malice procedure is revealed as a process retained more through benign neglect than functionality. Rendered effectively obsolete by the Criminal Law Act 1827, and anachronistic by virtue of the DVCVA 2004, it has lingered as a vestigial procedure, recognised in statute but not developed by legislators or the courts, whose focus has rightly turned to the more important issue of fitness to plead. Surprisingly there has even been little academic attention paid to the 'mute of malice' procedure,<sup>76</sup> in contrast to unfitness to plead,<sup>77</sup> even by seasoned academics on the issue of capacity for trial.<sup>78</sup> Arguably it is only

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<sup>72</sup> We are grateful to HH Wait and HH Tonking for insights into the earlier JSB materials.

<sup>73</sup> [1960] 1 Q.B. 357.

<sup>74</sup> See for example *Steel* (ibid).

<sup>75</sup> *R v Sharif* [2010] EWCA Crim 1709.

<sup>76</sup> Ward *ibid*, A.R. Poole, *Standing Mute and fitness to plead* [1968] Crim LR 6.

<sup>77</sup> See for example P.Brown, *Unfitness to plead in England and Wales: historical development and contemporary dilemmas*, *Med. Sci. Law* (2019) 59(3), 187; R.D. Mackay and W.J. Brookbanks, *Fitness to Plead: International and Comparative Perspectives*, (2018), (Oxford: OUP); A. Arstein-Kerslake, P. Gooding, L. Andrews and B.

by virtue of its inclusion in the repeatedly cited *Pritchard* test that it has retained any purchase on legal memories. Certainly, the demeaning terminology of ‘muteness’, now considered offensive and no longer in acceptable usage,<sup>79</sup> and the arcane reference to ‘visitation of God’ to reflect a natural condition, are entirely unsuitable for a justice system which aims to be accessible and respectful of difference.

## MUTENESS DETERMINATIONS AND THE MODERN TRIAL PROCESS

Since 2005 we have seen a revolution in procedure in the criminal courts.<sup>80</sup> The Crim PR and Crim PD have changed the face of the criminal trial process, albeit not without some controversy.<sup>81</sup> Introduced to ensure that the trials are ‘accessible, fair and efficient’,<sup>82</sup> commentators have raised concerns that the requirement for ‘fairness’ has been ‘left trailing’ in a drive towards ‘efficiency’ recast narrowly as ‘cost-efficiency’.<sup>83</sup> However, in terms of ‘accessibility’ significant strides have certainly been made in the last 15 years in relation to the treatment of vulnerable people in the criminal justice system, through the Crim PR and more widely.

Whilst the pace and extent of change for vulnerable suspects and defendants has not matched that for vulnerable witnesses,<sup>84</sup> a defendant who is deaf, without speech, or with

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McSherry, *Human rights and unfitness to plead: the demands of the Convention on the Rights of Persons with Disabilities*, (2017) H.R.L. Rev. 17(3), 399; A. Loughnan, *Between fairness and "dangerousness": reforming the law on unfitness to plead*, (2016) Crim. L.R. 7, 451; R.D. Mackay and G. Kearns, *An upturn in unfitness to plead? Disability in relation to the trial under the 1991 Act* [2000] Crim LR 532.

<sup>78</sup> There is no examination of the mute of malice process in key publications on trial capacity: see for example R.D. Mackay, *Mental Condition Defences in the Criminal Law*, (1995) (Oxford: OUP).

<sup>79</sup> See The Advocate’s Gateway, *Planning to question someone who is deaf, Toolkit 11, 1*, January 2018 accessible at <https://www.theadvocatesgateway.org/images/toolkits/11-planning-to-question-someone-who-is-deaf-2016.pdf>;

<sup>80</sup> See Lord Thomas [2015] Crim LR 000.

<sup>81</sup> M McConville and L. Marsh “Adversarialism goes West: Case management in criminal courts” (2015) Int. Journal of Evidence & Proof Vol. 19(3) pp.172–18. See also the very many critical commentaries of James Richardson (then editor of Archbold) in *Criminal Law Week* to insert examples.

<sup>82</sup> Courts Act 2003, s.69(4)(a).

<sup>83</sup> M. McConville, L. Marsh “Adversarialism goes West: Case management in criminal courts” (2015) The International Journal of Evidence & Proof Vol. 19(3) pp.172–18.

<sup>84</sup> See J. Jacobson, G. Hunter and A. Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (2015); P. Cooper and D. Wurtzel, “A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales” [2013] Crim. L.R. 4; S. Fairclough, “It doesn’t happen ... and I’ve never thought it was necessary for it to happen’: Barriers to vulnerable defendants giving evidence by live link in Crown Court trials” (2016) Int. Journal of Evidence and Proof Vol 21(3), 209.

particular communication needs, should be identified at a very early stage and is able to be assisted by a range of interpretation and communication supports. The progressive, and now almost complete, roll-out of Liaison and Diversion services<sup>85</sup> across police stations and courts means that a defendant with substantial trial participation needs should be offered assessment, and their needs identified, at an early stage and, it is hoped, long before they appear in the Crown Court for arraignment.

Once at court, under the Criminal Procedure Rules (Rule 3.9) and the Criminal Practice Direction (1 General Matters 3D) the identification and monitoring of trial participation needs is shared by the parties and the judge. The court is required to ‘take every reasonable step’ to ‘facilitate the participation of any person, including the defendant’. This includes ‘finding out whether the defendant needs interpretation because he or she does not ‘speak or understand English’ or has a ‘hearing or speech impediment’, and carries a corresponding duty to arrange for appropriate interpretation and give directions.<sup>86</sup> The handling and questioning of vulnerable defendants is now recognised as a specialist skill.<sup>87</sup> It generates challenges which require courts and advocates to adapt to the defendant’s needs, rather than the other way around.<sup>88</sup> The proper approach to enable defendants with communication needs to participate effectively in the process, including on arraignment, is now set out in ‘toolkits’ produced since 2012 by the Advocate’s Gateway.<sup>89</sup> In addition, although there is no statutory entitlement in force for defendants,<sup>90</sup> intermediaries to support defendants with profound communication needs are available at common law.<sup>91</sup> Thus the defendant who might in the 19<sup>th</sup> and early 20<sup>th</sup> centuries have been found ‘mute by visitation’ on the basis of a communication difficulty, ought today to be identified long before arraignment and

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<sup>85</sup> Funded by NHS England or in Wales the Criminal Justice Liaison Services funded by NHS Wales’ Criminal Justice Liaison Services. These services enable a defendant to be screened for mental health, learning disability and other communication difficulties by a mental health practitioner in police stations and at courts.

<sup>86</sup> Criminal Procedure Rules 3.9 (3)-(6).

<sup>87</sup> *R v Grant Murray & Anor* [2017] EWCA Crim 1228, para 226.

<sup>88</sup> *R v Lubemba; R v JP* [2014] EWCA Crim 2064, para 45;

<sup>89</sup> See for example, Planning to question someone who is deaf, Toolkit 11, 1 (ibid).

<sup>90</sup> Youth Justice and Criminal Evidence Act 1999, ss 33BA and 33BB, introducing a statutory entitlement for a defendant to be supported by an intermediary for the giving of evidence, is not yet in force.

<sup>91</sup> *R. (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); [2010] 1 All E.R. 735. Although the circumstances in which they will be granted have been narrowed by the courts, see *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr App R 7), now reflected in CPD I General matters 3G: Vulnerable Defendants, and more recently *R v Thomas (Dean)* [2020] EWCA Crim 117, [2020] 4 WLR 66 and *TI v Bromley Youth Court* [2020] EWHC 1204 Admin, 2020 WL02497661

supported to enter their plea and participate in trial, without reaching the point of silence on arraignment. A mute of malice procedure would thus very rarely be triggered.<sup>92</sup>

Likewise, for defendants whose participation needs are more profound, and where there are concerns that they may be unfit to plead, again such issues should be identified at the earliest opportunity. Although continuing concerns about the suitability of the *Pritchard* test have not been addressed in legislation,<sup>93</sup> as charted above the process to be adopted has been developed in statute and is well-established, although cogently criticised.<sup>94</sup> Since 6<sup>th</sup> October 2014, the unfitness to plead process has been explicitly recognised in the Crim PR (25.10).<sup>95</sup> Although an issue of unfitness may arise at any point in the trial,<sup>96</sup> it would usually be raised for consideration before arraignment. Whilst findings of unfitness are very rare – around 100 per annum,<sup>97</sup> the number of cases in which an issue of fitness to plead is raised is much higher, and rising.<sup>98</sup> This may be attributable to numerous factors, including a greater alertness to mental health issues amongst legal representatives<sup>99</sup> and the increased use of mental health practitioners in screening suspects and defendants.<sup>100</sup> As a result, cases involving potential unfitness to plead are highly unlikely to reach the point of silence on arraignment.

We have reached a position under modern trial provisions where occasions in which a defendant ‘stands mute’ prompting a potential ‘mute of malice’ determination should be

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<sup>92</sup> As per *Holman and McCarthy*.

<sup>93</sup> *R v Murray* [2008] EWCA Crim 1792; *R v Moyle* [2008] EWCA Crim 3059; [2009] Crim.L.R. 586, *R v Diamond* [2008] EWCA Crim 923, [2008] MHLR 124. RD Mackay and G Kearns, “An upturn in unfitness to plead? Disability in relation to the trial under the 1991 Act” [2000] Crim. L.R. 532, 538.

<sup>94</sup> See *Unfitness to Plead, Volume 1*, Law Com No 364 and *R v Marcantonio (Robert)* [2016] EWCA Crim 14; *R v Orr* [2016] EWCA Crim 889; *R v Wells and others* [2015] EWCA Crim 2.

<sup>95</sup> The Crim PR also recognises the more problematic procedure to be followed in the magistrates’ courts where the court considers that ‘there may be grounds for making a hospital order without convicting the defendant’ under Mental Health Act 1983 s37(3). For discussion see Law Com No364 7.3ff.

<sup>96</sup> See *R v Orr* [2016] EWCA Crim 889.

<sup>97</sup> R. D. Mackay, *Unfitness to Plead – Data on Formal Findings from 2002 to 2014, Unfitness to Plead: Appendix A*, Law Com No 364.

<sup>98</sup> Law Commission *Unfitness to Plead Volume 1: Report*, Appendix B, Impact Assessment, at 21-22.

<sup>99</sup> See the expectations on counsel noted by Thomas LJ, as he then was, in *R v Norman* [2008] EWCA Crim 1810 para 34(iii).

<sup>100</sup> By Liaison and Diversion Services, see fn 84 above.

extraordinarily rare, although admittedly they will occasionally occur.<sup>101</sup> As *Blackstone's* acknowledges,<sup>102</sup> silence on arraignment will generally only occur where the defendant is able to plead but refuses to do so, for political or personal reasons. Alternatively, it may arise where a defendant has a participation difficulty, such as a mood disorder, which has previously not been identified. The latter would be unusual and is most likely to occur if the defendant is unrepresented or has refused (as (s)he is entitled) any previous offers of assessment, or more likely both. The two scenarios may be indistinguishable for the court at the moment of the defendant's silence on arraignment, particularly where the defendant is unrepresented, as occurred in *R v Saif*.

### **HAVE THE CRIM PR RENDERED THE MUTE OF MALICE PROCEDURE OBSOLETE?**

Neither the Crim PR nor the Crim PD makes explicit reference to the mute of malice procedure.<sup>103</sup> Rule 3.24 provides:

“In respect of each count in the indictment— (a) if the defendant declines to enter a plea, the court must treat that as a not guilty plea unless rule 25.10 applies (Defendant unfit to plead).”

Introduced alongside rule 25.10 to which it refers, rule 3.24 cites section 6 of the CLA 1967. However, in contrast to the statute it makes no reference to defendants who are “mute of malice”, nor any reference to the removal of the mute of malice procedure, and mandates the entry of a ‘not guilty’ plea where no plea is tendered (save where unfitness is raised).

In declining to embark on a mute of malice determination, in *R v Saif*, HHJ Donne QC declared rule 3.24 to be “a definitive statement of the law on this matter”. If that is right then the mute of malice procedure is effectively obsolete and the reference to a mute of malice finding in the CLA 1967 has, in a stroke, become redundant. Was this the intention of the Criminal Procedure Rules Committee? The answer would seem to be that it was. As HHJ Donne observed when the Criminal Procedure Rule Committee consulted on the proposed

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<sup>101</sup> See for example the cases of David Hampson, Swansea Crown Court, unreported 2018, recounted in <https://barristerblogger.com/2018/09/27/the-silent-man-of-swansea-and-st-margaret-of-york-muteness-malice-and-mercilessness/> (last accessed 03/07/20) and Adam Abakwe, Manchester Crown Court, unreported 2019, Manchester Evening News, 04/10/19, accessible at <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/practically-medieval-charge-brought-against-17033951#:~:text=Get%20the%20best%20stories%20straight,through%20our%20new%20personalised%20digest%E2%80%A6&text=A%20man%20who%20refused%20to,a%20'practically%20medieval'%20charge>

<sup>102</sup> D12.19.

<sup>103</sup> The Crim PR and Crim PD are accessible in their entirety at <http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015>.

new rules, at paragraph 91, it posed the following question: “(2) *Should the rules preserve the once practice of selecting a jury to decide whether a defendant who declines to plead is ‘mute of malice’ or ‘mute by visitation of God’?*” The secretariat of the Rule Committee has confirmed that not a single respondent favoured the preservation of the practice.

### **Does the Criminal Procedure Rules Committee have the vires to abolish a determination recognised in statute?**

The powers of the Crim PR Committee derive from section 69 of the Courts Act 2003. Commentators have raised concerns that the Committee has overstepped its remit by according unprecedented powers to trial judges which undermine the adversarial paradigm under the guise of ‘active case management’.<sup>104</sup> Such a criticism could not be levelled in respect of the mute of malice determination. Given the obsolete and anachronistic nature of the mute of malice procedure, we suggest that the removal of the reference in rule 3.24 to the mute of malice determination clearly meets the purpose of section 69(4) of the Courts Act 2003, because it contributes to the aim of securing an ‘accessible, fair and efficient’ trial process. Nor does its removal disadvantage the defendant. If HHJ Donne had empanelled a jury to determine the basis of the defendant’s silence on arraignment what would have been achieved? A ‘mute of malice’ finding would have had no impact on the trial, which would have proceeded with a not guilty plea entered (under s.6 CLA 1967). Nor could it be said to simplify the process by ruling out the need to consider unfitness to plead. On a proper reading of the obligations under caselaw<sup>105</sup> and the Crim PR and Crim PD<sup>106</sup> the judge’s duty to take reasonable steps to ensure a defendant can participate continues throughout the proceedings and could not therefore be displaced by a mute of malice determination. A ‘mute by visitation’ finding, following *R v Pritchard*,<sup>107</sup> would only have triggered a more focused enquiry by the judge into the same issue and on the same evidence that had been heard by the jury. What the judge needs to know is whether the defendant can participate effectively in trial, whether (s)he requires any adjustment to do so, and whether (s)he wants to avail him or herself of the opportunity to plead guilty. Any other examination of the defendant’s motivation, not touching on those issues, is no longer of any relevance to the court.

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<sup>104</sup> M. McConville, L. Marsh “Adversarialism goes West: Case management in criminal courts” *Int Journal of Evidence & Proof* Vol. 19(3), 172; L. Marsh, “Leveson’s Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process” (2016) *Common Law World Review* 45, 51.

<sup>105</sup> See for example *R v Norman* [2008] EWCA Crim 1810.

<sup>106</sup> Rule 3.9 and the Criminal Practice Direction (1 General Matters 3D).

<sup>107</sup> And *Hope and Davies* (ibid).insert ref

Nonetheless, if this interpretation is right, rule 3.24 purports to remove entirely a determination which is explicitly recognised in statute, even if the procedure to be adopted is not spelt out. Does the Committee have the vires to do so, even if such a reform is within the spirit of the Courts Act 2003? It would appear that it does, acting in concert with the Lord Chancellor. Section 73 of the 2003 Act makes provision for the Lord Chancellor to ‘by order amend, repeal or revoke any enactment that he considers necessary or desirable’ in order to facilitate the making of the Crim PR or as a consequence of the making of the rules. As commentators have noted the Courts Act 2003 accords extraordinarily wide powers to the unelected Criminal Procedure Rule Committee,<sup>108</sup> prompting concerns about law-making by an undemocratic Committee.<sup>109</sup> But the effect of the legislation is clear, as the Crim PD itself makes plain at 1A.3:

**“The Criminal Procedure Rules and the Criminal Practice Directions are the law.**

Together they provide a code of current practice that is binding on the courts to which they are directed, and which promotes the consistent administration of justice.

Participants must comply with the Rules and Practice Direction, and directions made by the court, and so it is the responsibility of the courts and those who participate in cases to be familiar with, and to ensure that these provisions are complied with.”

(emphasis added)

The only issue that can be taken with rule 3.24 is that such a change in the law should be made explicit and the statute should have been amended to remove the reference to the mute of malice determination in terms by order of the Lord Chancellor under section 73 of the Court Act 2003.

### **The continuing need for reform**

Whilst we have argued that the removal of the mute of malice procedure is a necessary and appropriate modernisation of pre-trial processes, the challenges presented by the silent defendant have not been entirely removed or yet satisfactorily addressed. Ensuring that a

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<sup>108</sup> M. McConville, L. Marsh “Adversarialism goes West: Case management in criminal courts” (2015) Int Journal of Evidence & Proof, Vol. 19(3), 172.

<sup>109</sup> See for example J. Richardson, Commentary on Criminal Procedure (Amendment No. 2) Rules 2010 (S.I. 2010 No. 3026) CLW 10/01/2011, 15-18; F. Fitzgibbon QC, “Pile-em-high-sell-em-cheap” are the imperatives. Justice and humanity get squeezed out.’, The Justice Gap, 10/04/2018 accessible at <https://www.thejusticegap.com/pile-em-high-sell-em-cheap-are-the-imperatives-justice-and-humanity-get-squeezed-out/>

defendant who does not engage at all is assisted to secure their fair trial rights is challenging. A defendant who has wilfully chosen to surrender rights and refuses support offered cannot subsequently complain that (s)he has not enjoyed them.<sup>110</sup> However, ensuring that the defendant's silence is not the result of a reduced capacity to participate effectively, such that it may not be fair to try him or her, remains the responsibility of the court and the parties. This examination of the mute of malice procedure underlines the need for progress to be made in reforming the unfitness to plead test so that it focuses on capacity for effective participation in trial, ideally following the recommendations made by the Law Commission.<sup>111</sup> Such a test must have the flexibility to address the range of challenges which may inhibit participation, moving away from the emphasis on intellectual ability in *Pritchard*, to incorporate complex communication difficulties, as well as disorders of mood and other aspects of mental illness which may undermine a defendant's ability to engage rationally with the trial process. The analysis also reminds us of the importance of removing a defendant from the full trial process only where necessary, with full consideration of the measures available to support communication, and a fair process by which to test the allegation.

There remain practical issues in respect of defendants who are silent on arraignment and at trial that also need to be provided for, potentially as part of that wider reform process. The identity of a wholly silent defendant will need to be confirmed, if necessary, by a statement from an officer identifying the defendant or by fingerprint. If a defendant will not communicate at all the judge will have to take the initiative to seek information and, potentially, expert reports. A defendant is entitled to decline to undergo medical assessment, bringing their autonomy rights<sup>112</sup> into tension with their right to a fair trial.<sup>113</sup> In the first instance the judge, and any representation the defendant might have, should make efforts to explain the purpose of the enquiries and provide any assistance and reassurance required to enable the defendant to consider whether to co-operate. Ultimately, the judge may have no option but to

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<sup>110</sup> See for cases of silence *R v Ricketts* (1997 WL 1102965) or for absent defendants *R v Jones* [2002] UKHL 5, at [11].

<sup>111</sup> See Law Com no 364 *ibid*.

<sup>112</sup> Including under Articles 12 and 13 of the UNCRPD.

<sup>113</sup> Article 6 of the European Convention on Human Rights



remand a defendant into custody<sup>114</sup> or to hospital (where there is reason to suspect that the defendant has a mental disorder)<sup>115</sup> for reports to be prepared.

As the case of *Saif* identifies, silent defendants who are unrepresented pose additional challenges to the court in ensuring a fair trial, not just for the defendant but for victims, witnesses and the wider public. Where a defendant is found to be unfit to plead a representative is appointed by the court to put the case for the defendant at the trial of the facts (CP(I)A 1964 s4A(2)(b)). However, whatever the difficulties, we consider that there is no basis for mandating representation where the silent defendant is fit to plead. Not only would it be an undue restriction of the legal autonomy of the individual,<sup>116</sup> but an uncooperative defendant should not be put in a better position than a cooperative unrepresented defendant. Additionally, to impose representation would arguably be ineffective since counsel would be likely to have no instructions and would not, unlike the representative appointed under the CP(I)A, have a basis for acting, independent of instructions, in the defendant's best interests. Of course, this does not preclude the judge ensuring, insofar as that is possible, that the defendant understands the benefits of legal representation and its availability.

Thought will also need to be given to how the jury should be directed in respect of the defendant's silence during trial, especially where the defendant is unrepresented. The jury may need to be reminded that, although the defendant has said nothing, it is for the prosecution to prove guilt, that the defendant is entitled to remain silent, and that they should not speculate on the reasons for that, or infer that (s)he is guilty from the mere fact of his or her silence.<sup>117</sup> The scope for drawing adverse inferences under the Criminal Justice and Public Order Act 1994 will inevitably be limited where the silent defendant advances no positive case at trial.<sup>118</sup> However, where the defendant chooses not to give evidence, and

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<sup>114</sup> Bail Act 1976, Sch.1, Pt1, para 7.

<sup>115</sup> Mental Health Act 1983, s35. Such a remand would require evidence from a registered medical practitioner that there is a reason to suspect that the defendant has a mental disorder (s35(3)(a)).

<sup>116</sup> Including for those who are fit to plead but with disabilities, who enjoy equal rights under the UNCRPD (Article 12 and 13),

<sup>117</sup> See *Ricketts* for consideration of jury direction re a silent defendant (1997 WL 1102965) at para 37.

<sup>118</sup> Adverse inferences under s34 CJPOA 1994 and s11 Criminal Procedure and Investigations Act 1996 are unlikely to be appropriate, although failure to account for presence or objects/substances/marks (s36 and 37 CJPOA 1994) may still be relevant.

where no challenge has been made to the facts adduced by the prosecution, the jury will need to be directed that no adverse inference may be drawn.<sup>119</sup>

## CONCLUSION

We conclude that the mute of malice procedure is unnecessary and anachronistic. A vestigial process, it had been retained largely as a result of benign neglect, but has been rendered obsolete by Crim PR rule 3.24. It should now be formally removed from the statute book. However, our examination of the challenges presented by the silent defendant, and the limitations of the test for unfitness to plead borne out of early 'mute by visitation' caselaw, provides further support for statutory reform of the common law *Pritchard* test and the procedural framework to ensure the effective participation of all vulnerable defendants at trial.

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<sup>119</sup> *R v McManus* [2001] EWCA Crim 2455.