Buffalo Law Review

Volume 13 | Number 3 Article 9

4-1-1964

The Evolution of the Durham Rule in the District of Columbia (1954-1963)

Joseph S. Forma

With the new statute condonation could not be found from the single fact of continued residence in the same abode. As suggested before, other facts must be present. Some of the circumstances which a court will look to in deciding whether condonation has occurred are the frequency, if any, of sexual intercourse (without fear or force), the presence of other expressions of conjugal kindness, love and affection, the amount of social intercourse and the observance of other marital amenities, *i.e.*, eating together, shopping together, etc. Factors that weigh against such a finding are continuing acts of physical aggression, sex by fear, continued expressions of a desire to leave regardless of social intercourse and the purpose of staying or cohabitating but without sexual intercourse *i.e.*, not to seek reconciliation but to see to welfare of children or repair of house[95] or to avoid social embarrassment,[96] all of which indicate a high degree of segregated life.

The object of this decisional process should be to conclude from all the facts, including the plaintiff's presence in court and the realities of married life, that such a reconciliation of the parties has occurred or that there have been sufficient manifestations of conjugal affection to warrant a conclusion that the plaintiff has forgiven the other spouse, making any judicial action unnecessary and undesirable. If a state of mind judicially labelled as forgiveness is to be found, then all of the plaintiff's conduct must be considered if an accurate finding of condonation is to be made. Such caution would be helpful to insure that the laudable policy of preserving relatively stable family life will not be used to force parties to remain in a "meaningless and hateful bond."[97]

LESLIE G. FOSCHIO

THE EVOLUTION OF THE DURHAM RULE IN THE DISTRICT OF COLUMBIA (1954-1963)

When a convicted defendant appeals the denial of a *pro se* motion seeking mental examination, and the appellate court affirms the denial in a per curiam decision,[1] one does not generally expect two of the three judges to write concurring opinions. When these concurring opinions deal not at all with the issue on appeal, but rather treat and interpret a case which one of the judges admits "is not here involved,"[2] one begins to wonder. But, when the Judges involved are Chief Judge Bazelon and Judge Burger of the U.S. Court of Appeals, Dis-

Cf. Stahl v. Stahl, 221 N.Y.S.2d 931, 945, *modified on other grounds*, 16 A.D.2d 467, 228 N.Y.S.2d 724 (1st Dep't 1962) (restoration of marital rights no consideration for separation agreement); Tolstoy, *op. cit. supra* note 91, at 73-74.

95. Kahnovsky v. Kahnovsky, 67 R.I. 63, 20 A.2d 679 (1941).

96. McCallum v. McCallum, 153 Wash. 1, 279 Pac. 88 (1929) (avoid "scene" at parent's home).

97. List v. List, 189 Misc. 261, 264, 61 N.Y.S.2d 809, 812 (Sup. Ct. 1946).

1. Gray v. United States, 319 F.2d 725 (D.C. Cir. 1963).

2. *Id.* at 726.

trict of Columbia Circuit, and the opinions deal with the test of criminal responsibility in the "land of *Durham*," the District of Columbia, the anomaly is explicable.

In the decade since *Durham v. United States*[3] there has been continuous flux and uncertainty about the test of criminal responsibility in the District of Columbia. No issue has been the subject of such extended litigation[4] or the subject of such demand for change.[5] While the instant case is of no importance on its own facts to the evolution of *Durham*, it does serve as an excellent focal point to illustrate the position and status of the two opposing judicial elements in the conflict over the Durham Rule. In order to appreciate the dichotomy of the two judges and their opinions in *Gray v. United States*, 319 F.2d 725 (D.C. Cir. 1963), an historical background is presented.

The standard of criminal responsibility that had prevailed in the District of Columbia prior to the *Durham* case was the common law "right-wrong test," as set out in the *M'Naghten* case[6] used in conjunction with and supplemented by the "irresistible impulse test."[7] The right-wrong element of the test had been approved for use in the District of Columbia as early as 1882,[8] and is at present, the exclusive test of criminal responsibility in most common law jurisdictions within the United States.[9] Under this test, the accused is not responsible for his criminal act, if he either does not know the nature and quality of the act, or does not know that the act is wrong; but note, both elements are not conjunctively necessary.[10]

While the court had reaffirmed the validity of the "right-wrong test" subsequent to its adoption,[11] there had arisen by 1929 sufficient dissatisfaction with the rule that the court felt obligated to modify it by the addition of the "irresistible impulse test" as a supplementary test.[12] Under this formulation, the court in the *Smith* case held:

> The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason

3. 214 F.2d 862 (D.C. Cir. 1954).
4. Blocker v. United States, 288 F.2d 853, 864 (D.C. Cir. 1961).
5. Reid, *Criminal Insanity and Psychiatric Evidence: The Challenge of Blocker*, 8 How. L.J. 1 (1962).
6. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (H.L. 1843).
7. Durham v. United States, 214 F.2d 862, 869 (D.C. Cir. 1954).
8. *Ibid., citing* United States v. Guiteau, 12 D.C. (1 Mackey) 498, 550 (1882). *Guiteau* was reaffirmed in United States v. Lee, 15 D.C. (4 Mackey) 489, 496 (1886).
9. Annot., 45 A.L.R.2d 1447, especially 1452 n.6 (1956). The *M'Naghten* rule is followed in, among other jurisdictions, Arizona, California, Florida, Hawaii, Idaho, Kansas, Kentucky, Nebraska, Nevada, New Jersey, New York, Pennsylvania, Wyoming, and England. Several states have included the "right-wrong" test in statutes as in Louisiana, Minnesota, New York, North Dakota, Oklahoma, Colorado, and South Dakota. *M'Naghten* is not followed in New Hampshire, Maine or in the District of Columbia.
10. People v. Horton, 308 N.Y. 1, 123 N.Y.2d 609 (1954).
11. Snell v. United States, 16 App. D.C. 501, 524 (D.C. Cir. 1900); Taylor v. United States, 7 App. D.C. 27, 41-44 (D.C. Cir. 1895).
12. Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929).

> and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong.[13]

Even with this modification, however, discontent with the District of Columbia's test of criminal responsibility continued and increased,[14] until finally in 1954 the United States Court of Appeals (District of Columbia Circuit), per Judge Bazelon, found that the existing rule was so inadequate[15] that it would be propitious for the court to invoke its inherent power to make a change and adopt as law a new and broader test:[16] The Durham Rule was born.

The new test adopted by the court was neither novel nor unprecedented, for a similar test had been used in New Hampshire since 1870.[17] The standard of criminal responsibility under this test is capable of simple statement: "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."[18] Judge Bazelon believed that this test would leave the determination of criminal responsibility as an ultimate question of fact for the jury, and would preserve legal traditions of imposing no liability in the absence of moral blame.[19]

Reaction to the new test in the District of Columbia was immediate, widespread and generally unfavorable. Within the District, dissatisfaction was voiced by the press, by the Congress, by the Bar Association and most important, by the very court which had produced the rule.[20] Outside the jurisdiction, not a single court has adopted the rule, and every court asked to do so has refused.[21] Criticism of *Durham* focuses largely on the vagueness and am-

---

13. *Id.* at 549.

14. For a listing of arguments and authorities criticizing the *M'Naghten* rule, see Durham v. United States, 214 F.2d 862, 870-72 (D.C. Cir. 1954). See also Annot., 45 A.L.R.2d 1447, 1455-58 § 4 & n.10 (1956). An article defending M'Naghten is Hall, *Mental Disease and Criminal Responsibility*, 45 Colum. L. Rev. 677 (1945).

15. Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).

16. *Ibid.*

17. State v. Pike, 49 N.H. 399 (1870).

18. Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954). See also State v. Jones, 50 N.H. 369, 398 (1871). For an explanation of the rule by the court in the District of Columbia, see Douglas v. United States, 239 F.2d 58 (D.C. Cir. 1956); Carter v. United Staes, 352 F.2d 608, 617 (D.C. Cir. 1957). The *Durham* court did not define the terms disease and defect but merely differentiated between them. See Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954). The court finally attempted definition of the terms in the case of McDonald v. United States, 312 F.2d 847, 851 (D.C Cir. 1962).

19. Annot., 45 A.L.R.2d 1447, 1462 (1956); Durham v. United States, *supra* note 18. For range of authority of jury under *Durham*, see Misenheimer v. United States, 271 F.2d 486, 487 (D.C. Cir. 1959).

20. Reid, *supra* note 5, at 2. For views of the United States Attorney for the District of Columbia on the Durham Rule, see Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 Geo. L.J. 580 (1963).

21. For a list of such authorities, see Blocker v. United States, 288 F.2d 853, 866 n.22 (D.C. Cir. 1961). For examples of courts refusing to follow Durham Rule, see State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960); Downs v. State, 330 S.W.2d 282 (Ark. 1959); People v. Nash, 52 Cal. 2d 36, 338 P.2d 416 (1959); People v. Carpenter, 11 Ill. 2d 60, 142 N.E.2d 11 (1957); Flowers v. State, 236 Ind. 151, 139 N.E.2d 185 (1957); Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958); Commonwealth v. Woodhouse,

biguity of terms found within the rule and the difficulty of exact definition of those terms,[22] on the product or causation aspect of the rule,[23] and on the fact that the Durham Rule operates as a rule of law rather than as a rule of evidence.[24] Further criticism is found in the fact that medical experts are testifying as to ultimate issues in terms conclusive of the question presented for the jury's determination.[25]

Within three years of the *Durham* decision, judicial disfavor with the rule and a desire to return to the old tests were expressed,[26] but Judge Miller's solo attack on *Durham* went unheeded until in 1961 another important milestone in the past decade of discord and dissension over *Durham* in the District of Columbia was reached. In *Blocker v. United States*,[27] a new leader in the anti-*Durham* crusade took advantage of an appeal from an allegedly erroneous burden of proof on insanity instruction to begin in earnest an attack on the "disease-defect test." Judge Burger, in his concurring opinion in *Blocker*, shouldered past the issue discussed by the majority and called the Durham Rule a wrong step in the right direction, and sought its modification.[28] Judge Burger's attack on *Durham* was twofold and on two different levels. In a psychological-philosophical approach he argued that *Durham* was erroneous as it ignored will and/or choice in man.[29] Pragmatically, he attacked *Durham* on the ground that it placed too much weight on medical terminology, thus giving rise to such abuses as the "week-end switch" by medical experts in classifying certain behavior as not being disease or defect on Friday but as being defect or disease on Monday.[30] The only solution, according to Judge Burger, is a test of criminal responsibility which incorporates ability to control one's behavior as a basis of responsibility.[31]

Proof that Judge Burger's ideas were readily received was not long in coming. In *Campbell v. United States*,[32] a trial court judge of the United

401 Pa. 242, 164 A.2d 98 (1960). But note that Maine has adopted a similar test by statutory fiat, Maine Rev. Stat., ch. 149, § 38-A (Supp. IV 1961).

22. Blocker v. United States, *supra* note 21, at 859.

23. *Id.* at 862.

24. *Id.* at 857 n.3; Reid, *supra* note 5, at 13.

25. See Acheson, *supra* note 20, at 587.

26. See Judge Miller's dissent in Catlin v. United States, 251 F.2d 368 (D.C. Cir. 1957).

27. 288 F.2d 853 (D.C. Cir. 1961).

28. Blocker v. United States, 288 F.2d 853, 858 (D.C. Cir. 1961).

29. *Id.* at 867.

30. *Id.* at 860. Judge Burger refers to the case of *In re* Rosenfield, 157 F. Supp. 18 (D.C.D.C. 1957), wherein a testifying psychiatrist informed the District Court that between court sessions on Friday and Monday St. Elizabeth's Hospital and its staff (of which the psychiatrist was a member) had changed its "official view" that sociopathic or psychopathic personality disorder was not a mental disease, and that commencing Monday morning such conditions would be termed mental disease or disorder. For other criticism of *Durham*, see Wertham, *Psychoauthoritarianism and the Law*, 22 U. Chi. L. Rev. 336 (1954); Acheson, *supra* note 20. See also 54 Colum. L. Rev. 1153 (1954); 27 Rocky Mt. L. Rev. 222 (1955). For comment favorable to *Durham*, see Zilboorg, *A Step Toward Enlightened Justice*, 22 U. Chi. L. Rev. 331 (1954); Guttmacher & Weihofen, *Psychiatry and the Law* (1952); 40 Cornell L.Q. 135 (1954); 43 Geo. L.J. 58 (1954); 68 Harv. L. Rev. 363 (1955).

31. Blocker v. United States, 288 F.2d 853, 867 (D.C. Cir. 1961)

32. 307 F.2d 597 (D.C. Cir. 1962).

States District Court for the District of Columbia, George L. Hart, Jr., gave an instruction to the jury on the standard of criminal responsibility which followed Judge Burger's opinion in *Blocker*.[33] Judge Hart's charge "in effect made the 'right-wrong' test coupled with 'capacity to exercise his will so as to choose to do or not to do the act,' the controlling criteria for imposing responsibility."[34] On appeal Judges Bazelon and Washington (both of whom had been on the *Durham* Court) combined to outvote Judge Burger and to strike down the charge of the trial court as "patently erroneous."[35]

The Bazelon-*Durham* proponents did, however, yield to the pressure of the Burger "control-capacity" onslaught if only slightly. The majority in *Campbell* relented so as to allow the jury to use the "capacity to choose as one of several considerations in determining whether the act in question was the product of mental disease or defect,"[36] but lest anyone think that this was in any way a retreat from *Durham*, the majority continued and concluded that capacity to choose by itself "cannot be an affirmative test of criminal responsibility"[37] in the District of Columbia.

The *Campbell* case, therefore, is not of truly major importance. It left *Durham* enthroned quite solidly, and really deserves mention only as it was the first time that capacity to choose and control behavior found any recognition in a majority opinion. *Campbell* did, however, leave the door open for Judge Burger's control tests to gain importance in later decisions, and it also provides room for conjecture. What would have been the result if the *Campbell* court had been composed of one less "Durhamite" and in his place had been seated Judge Miller or Judge Bastian (both of whom had concurred in Judge Burger's *Blocker* opinion)? This case might well have been the Waterloo of the Durham Rule.

The door of recognition that *Campbell* had set ajar for Judge Burger's "capacity to choose and control tests" was opened wide less than six months later in *McDonald v. United States*.[38] In *McDonald*, the court *en banc*, in a per curiam decision, met the crucial criticism leveled at the Durham Rule, which had been the failure to adequately define the key terminology, disease and defect,[39] by holding that disease or defect "includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior *controls*."[40] (Emphasis added.) Once again the court stressed that the capacity to know right from wrong or inability to refrain from wrong are not to be independent tests,[41] but the court now recognized them as relevant factors (especially in determining the causal relation-

33. Gray v. United States, 319 F.2d 725, 726 (D.C. Cir. 1963).
34. Campbell v. United States, 307 F.2d 597, 600 (D.C. Cir. 1962).
35. *Id.* at 605.
36. *Id.* at 600.
37. *Id.* at 601.
38. 312 F.2d 847 (D.C. Cir. 1962).
39. Blocker v. United States, 288 F.2d 853, 858 (D.C. Cir. 1961).
40. McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962).
41. *Id.* at 851-52.

ship between disease and defect and the criminal act) under the Durham Rule.[42] While this was not a change in the form of *Durham*, it was a definite advance in its application toward the control test result Judge Burger sought in *Blocker*.[43]

McDonald is important in the line of development of the criminal responsibility test in the District of Columbia because it is, as Judge Burger claims, a turning point, as is especially evident in its acceptance of minority views expressed in earlier dissents.[44] It is also important as it marks the decline of a pure Durham Rule and the birth of a vigorous spirit of change, the extent of which is just now being decided.

The Bazelon-Burger dissension, however, was not in any way ended by the modifications achieved in *McDonald*. In the instant case these two judges[45] met head on in concurring opinions which did not in any way treat the issue on appeal, the denial of a *pro se* motion, but which dealt with each judge's view of the effect of *McDonald* on *Durham*, and also comment on the view of the other judge.

Judge Burger took this opportunity to recapitulate the *McDonald* holding[46] and to advocate that "in the spirit of *McDonald*" the defendant's capacity to control his behavior and his capacity to exercise will and choice should be important considerations in the District of Columbia's test of criminal responsibility.[47] Judge Burger thus continues his ever more successful campaign to achieve the demise of *Durham* and its replacement with the capacity and control tests that he called for in *Blocker*.

Judge Bazelon, on the other hand, while realizing that the days of a pure Durham Rule are gone forever in the District of Columbia, nevertheless strives to limit the expansion and importance of the elements interjected by *Campbell* and *McDonald* to precisely what is allowed by those cases. Judge Bazelon rejects Judge Burger's expansions, made in "the spirit of the McDonald holding," arguing that this is expressly what the court rejected in *Campbell*.[48]

In decisions subsequent to the *Gray* case, the rule remains largely as *McDonald* has left it. In *Hawkins v. United States*,[49] the Court approved a charge taken directly from *McDonald* and this case neither expands nor restricts the rule of *McDonald*.[50] In *Simpson v. United States*,[51] the court once

42. *Ibid.* But note that the court holds that there must be testimony on the point in evidence to get instruction on capacity to know and to control.
43. See the dissenting opinion lauding the majority for this "advance" in McDonald v. United States, 312 F.2d 847, 861 (D.C. Cir. 1962). (Miller, C.J., dissenting in part and concurring in part).
44. Gray v. United States, 319 F.2d 725, 728 (D.C. Cir. 1963).
45. The other member of the court sitting on this case was Judge Wright.
46. Gray v. United States, 319 F.2d 725, 727-28 (D.C. Cir. 1963).
47. *Id.* at 728.
48. *Id.* at 726.
49. 310 F.2d 849 (D.C. Cir. 1962). The court was composed of Judges Bazelon, Miller and Wright.
50. See Gray v. United States, 319 F.2d 725, 726 (D.C. Cir. 1963).
51. 320 F.2d 803 (D.C. Cir. 1963).

again adhered closely to the *McDonald* result, though it reiterated that the use of the "right-wrong" and "control" tests is now a factor under the Durham Rule. The court held, on the facts of the case (*i.e.*, in light of the evidence presented and in the absence of objections), that the use of "right-wrong elements" in the instructions, even if there were no testimony directly bearing on that subject as required by *McDonald*,[52] is not "plain error."[53] While this may appear to be an easing of limitations on the use of "right-wrong" and "control" elements, this result seems to be limited to this particular factual posture as the stricter rule was soon restated.[54]

The latest case of consequence in the area of criminal responsibility in the District of Columbia is *Blocker v. United States*[55] (opinion by Chief Judge Bazelon). After treating the issue on appeal, Judge Bazelon continued with a restatement of the test of criminal responsibility for that jurisdiction. He gives the accepted *McDonald* definition of disease and defect[56] and points out that the ability to distinguish right from wrong may be considered, if there is testimony on the point, to determine a causal relation between the disease and the act.[57] Once again he points out that right-wrong shall not be considered an ultimate or independent test, but he concludes that if a defendant cannot distinguish right from wrong he cannot be held criminally responsible.[58] Judge Bazelon justifies this last statement on the ground that if such were the case (*i.e.*, inability to distinguish right from wrong) it could not be found beyond a reasonable doubt that the act was not a *product* of this impairment.[59]

The latest *Blocker* case[60] is an accurate statement of the present test of criminal responsibility in the District of Columbia. Clearly, the product of disease or defect formulation of *Durham* still stands as the ultimate rule, although ability to know right from wrong and capacity to control behavior may now be used under that rule, if there is evidence presented relevant to these factors, to show whether or not an act was the product of the disase or defect. This is, of course, the interpretation of Chief Judge Bazelon, and it is un-

52. McDonald v. United States, 312 F.2d 847, 851-52 (D.C. Cir. 1962).
53. Simpson v. United States, 320 F.2d 803, 804 (D.C. Cir. 1963).
54. Blocker v. United States, 320 F.2d 800 (D.C. Cir. 1963).
55. *Ibid.* Appellant, Comer Blocker, was originally convicted of murder in the first degree on October 22, 1957. His defense was insanity. This conviction was reversed and remanded for a new trial by the Court of Appeals in a per curiam decision, Judge Miller dissenting. Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959). A second conviction on the same charge was reversed and remanded by the Court of Appeals sitting en banc, Judge Burger concurring in the result, and Judges Miller and Bastian dissenting. Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961). Blocker's subsequent conviction for second degree murder was affirmed by a unanimous Court of Appeals composed of Judges Bazelon, Fahy and Washington. Blocker v. United States, 320 F.2d 800 (D.C. Cir. 1963). Blocker was sentenced to life imprisonment, or a minimum sentence of ten years assuming good behavior. *Id.* at 801. Apparently at the time of his third appeal he had spent seven years in prison, and should have spent so much time on trial or in preparation for appeal that no time has remained for misbehavior to date.
56. McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).
57. Blocker v. United States, 320 F.2d 800, 802 (D.C. Cir. 1963).
58. *Ibid.*
59. *Ibid.* See also Wright v. United States, 250 F.2d 4, 12 (D.C. Cir. 1957).
60. Blocker v. United States, 320 F.2d 800, 802 (D.C. Cir. 1963).

doubtedly correct under principles of stare decisis and strict construction of precedent.

On the other hand, while this interpretation stands now, it would appear inevitable that further change will occur. Stoutly opposed to the strict interpretation of *Campbell* and *McDonald* are the views of Judge Burger and more than likely at least two other judges of the District of Columbia Court of Appeals, Judges Bastian and Miller. Just as Judge Burger's views in *Blocker* were influential in *McDonald* and wrought important modifications upon *Durham*, perhaps his expansive views in *Gray*, formed in the spirit of *McDonald*, will ultimately prevail and lead either to the reversal of *Durham* or the re-establishment of the right-wrong and control tests to independent and co-equal status with *Durham* in the District of Columbia.

JOSEPH S. FORMA

PHYSICAL AND MENTAL EXAMINATIONS OF DEFENDANTS UNDER RULE 35

I

Prior to the adoption of the Federal Rules of Civil Procedure in 1937[1] it was considered a gross breach of the sacred right of the privacy of the person to force any person to submit to a physical or mental examination against his will.[2] To protect this policy the Supreme Court impressively decided that there was no inherent power in a federal court to make or enforce an order to submit to such an examination[3]—despite the observation in the dissent that even at common law physical or mental examinations were often ordered when the ends of justice required.[4] The "inviolability of a person" policy prevailed until the promulgation of Rule 35(a) of the Federal Rules of Civil Procedure. Prior to Rule 35(a) a person could bring suit in a federal court seeking redress for alleged injuries, yet shield himself from examination of those alleged injuries by the other party by pleading the inviolability of his person. Rule 35(a), however, allows the court in its discretion to order a mental or physical examination of a party when that party's mental or physical condition are in controversy and good cause for such examination is shown.[5]

1. For an official text of the Federal Rules of Civil Procedure as they read when they become effective in 1938, see 308 U.S. 645. These Rules were drafted pursuant to the authority of the Rules Enabling Act of June 19, 1934, 48 Stat. 1064 (1934), 28 U.S.C. §§ 723b, 723c (1934). The present Enabling Act is found in 28 U.S.C. §§ 2071, 2072 (1952) and an up-to-date text of the rules is found at the end of title 28 U.S.C.A.

2. Union Pac. Ry. Co. v. Botsford, 141 U.S. 25 (1891).

3. Union Pac. Ry. Co. v. Botsford, *supra* note 2. *But cf.* Camden & Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900) and People *ex rel.* Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957) which recognize such inherent power to order physical or mental examinations in state courts.

4. Union Pac. Ry. Co. v. Botsford, 141 U.S. 25 (1891) (Brewer, J. dissenting). See also 8 Wigmore, Evidence § 2220 (McNaughton rev. 1961).

5. The text of Rule 35(a) is as follows:

(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order