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NOTES

Prohibiting Nonaccess Testimony by Spouses: Does Lord Mansfield's Rule Protect Illegitimates?

Lord Mansfield's Rule is a common-law rule of evidence that disqualifies a husband and wife from testifying as to nonaccess—lack of sexual relations—between them where the legitimacy of a child born or conceived during their marriage is at issue. There are three archetypical situations in which the rule commonly operates in civil actions. First, in a divorce suit or a proceeding to modify a divorce decree regarding child-support payments, the husband may wish to offer testimony of his sexual nonaccess to his wife in an attempt to disclaim paternity and avoid child-support payments. Second, a mother, presently or formerly married, may wish to offer her testimony or that of her present or former husband regarding their nonaccess to demonstrate that a third party is the natural father and is thus obligated to support the child. Finally, testimony of nonaccess by the spouses might be offered to support or prevent 1.


3. The rule has also been applied in criminal cases. See Egbert v. Greenwalt, 44 Mich. 245, 4 N.W. 654 (1880) (criminal conversation); Hicks v. State, 97 Tex. Crim. 629, 626 S.W. 291 (1924) (criminal desertion of child). But see Dustin v. Coiner, 367 F. Supp. 396 (N.D.W. Va. 1973), in which the court rejected a habeas corpus petitioner's contention that the rule should have been applied in a state prosecution for incest. The state court had refused to exclude the nonaccess testimony of the prosecutrix' mother that rebutted the presumption that the prosecutrix was the child of the mother's first husband and not the petitioner. 367 F. Supp. at 396. In civil cases, West Virginia had followed Lord Mansfield's Rule. See note 43 infra.


5. The right of a married woman to bring a paternity suit has been questioned in some jurisdictions. See note 91 infra.


recovery by the child in an action involving heirship\(^\text{11}\) or statutory benefits.\(^\text{12}\) In each instance the invocation of Lord Mansfield’s Rule excludes such testimony of nonaccess.

Although the rule is of consequence in relatively few cases in which the legitimacy of a child is at issue,\(^\text{13}\) invocation of the rule often will prevent the plaintiff from meeting the burden of proof for the cause of action.\(^\text{14}\) In every jurisdiction where it is accepted, the rule operates in conjunction with a legal presumption that a child born or conceived during the marriage is legitimate.\(^\text{16}\) Unlike presumptions that merely shift the burden of production of evidence, the presumption of legitimacy shifts the burden of persuasion to the party asserting illegitimacy.\(^\text{16}\) Furthermore, this burden is often measured by the requirement for “clear, convincing, and satisfactory proof,” or even for proof beyond a reasonable doubt, rather than by the usual civil standard of the preponderance of the evidence.\(^\text{17}\) Thus, the evidentiary scenario of a typical case involving legitimacy would include both the application of the rule to prevent the

\(^{11}\) See, e.g., In re Estate of Thomas, 228 Ark. 658, 310 S.W.2d 248 (1958); Craven v. Selway, 216 Iowa 505, 246 N.W. 821 (1933).


\(^{13}\) 112 U. Pa. L. Rev. 613, 615 (1964). To the extent that they positively exclude the spouse as a possible parent of the child, modern scientific procedures such as blood-testing make use of the rule unnecessary in many cases. See 1 S. Schatkin, Disputed Paternity Proceedings § 3.14 (4th rev. ed. 1975). The results of blood tests potentially can determine parental exclusion in 75-99% of all cases. See Krause, Scientific Evidence and the Ascertainment of Paternity, 5 Fam. L.Q. 252, 258-59 & n.30 (1971); Lee, Current Status of Paternity Testing, 9 Fam. L.Q. 615 (1975). Also, polygraph tests have been suggested as an alternative means of proof. See 1 S. Schatkin, supra, §§ 18.01-18.17; Note, Evidence—The Admissibility of Polygraph Test Results in Paternity Cases, 76 W. Va. L. Rev. 45 (1973).

\(^{14}\) Invocation of the rule is likely to preclude recovery wherever spousal nonaccess testimony is crucial to a party’s case. Such testimony is most necessary where the party wishing to establish illegitimacy has no independent evidence or third-party testimony of nonaccess to offer and therefore must rely on personal nonaccess testimony clearly incompetent under the rule. See Serafin v. Serafin, 67 Mich. App. 517, 524-25, 241 N.W.2d 272, 275-76 (1976), aff’d on other grounds, No. 5821 (Mich., filed Oct. 24, 1977); note 179 infra. Even if additional evidence is available, the exclusion of spousal nonaccess testimony still may be fatal to the party’s cause of action. For example, without such personal testimony the litigant might be unable to rebut the presumption of legitimacy. See, e.g., In re Estate of Thomas, 228 Ark. 658, 310 S.W.2d 248 (1958); Lewis v. Powell, 178 So. 2d 769 (La. Ct. App. 1965). For discussion of the nature of the presumption of legitimacy and the burden of proof, see text at notes 154-60 infra.

\(^{15}\) See In re Findlay, 253 N.Y. 1, 170 N.E. 471 (1930); McCormick, supra note 2, § 343, at 810-11; 9 J. Wigmore, supra note 2, § 2527; Annot., 46 A.L.R.3d 158 (1972).

\(^{16}\) McCormick, supra note 2, § 343, at 810.

\(^{17}\) Id. For discussion of the requirements of the burden of proof in various jurisdictions, see notes 154-57 infra and accompanying text.
spouses from establishing illegitimacy by their own testimony of nonaccess and the requirement that they present a greater quantum of evidence to sustain the burden of proof than in a normal civil case. Obviously, because of the combination of the rule with the presumption of legitimacy, litigants in these cases often cannot meet the burden of persuasion if their evidence consists principally of spousal nonaccess testimony.

Not surprisingly, there has been widespread disagreement concerning the validity of the policies advanced in support of Lord Mansfield's Rule and the efficacy of the rule to promote those policies. This Note assesses the validity of this rule of evidence in order to determine whether it is the most appropriate method of safeguarding the interests affected by the litigation of legitimacy. First, the historical development and justifications for Lord Mansfield's Rule are identified, and, in section II, the extent of the current acceptance of the rule in the United States is delineated. Section III analyzes traditional arguments advanced in support of the rule, including the rule's impact on society's marital and parent-child role models, the financial obligations of the states, and the legal status and social welfare of the child whose legitimacy is at issue. Various criticisms of the rule are assessed in section IV, and in the final section a proposal for the modification of the evidentiary structure of legitimacy litigation is submitted.

I. THE DEVELOPMENT OF LORD MANSFIELD'S RULE

The fledgling common law generally utilized a conclusive presumption that a child born during a marriage was legitimate—often with logically indefensible results. A more lenient accommodation permitted the presumption to be rebutted if the husband had not been "within the four seas" or, more precisely, within the king's jurisdiction. By the early eighteenth century, however, the presumption was clearly rebuttable, and testimony of nonaccess by the


19. In Alein de Wartone v. Simon, Y.B. 32 & 33 Edw. 1, 60 (C.P. 1304), the court discussed an earlier case in which a husband had gone overseas for three years and returned to find that his wife had borne a daughter only a month before. The child was permitted to recover as an heir upon the husband's death "because the private affairs of a man and his wife cannot be known, —for he may have come into the country by night before and begotten this woman [the child] . . . ." J. THAYER, SELECTED CASES ON EVIDENCE AT THE COMMON LAW 84 (1892).


spouses was admitted as substantive evidence. An exception perhaps existed in filiation cases, in which the uncorroborated testimony of a mother concerning nonaccess was deemed insufficient to support a finding of illegitimacy. This exception rested on the common-law disqualification of parties for interest.

Despite the apparently settled nature of the admissibility of spousal testimony concerning nonaccess, Lord Mansfield promulgated a new rule of evidence in *Goodright ex dim. Stevens v. Moss.* In that case the plaintiff brought an action in ejectment to secure possession of the premises for his lessor, who was the alleged heir of one who had died seised of the property. The trial judge excluded declarations of the lessor's mother that the birth had occurred before her marriage. On appeal, Lord Mansfield was of the opinion that evidence concerning the time of birth ought to have been received, but in dicta he stated: "[T]he law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage." His justification for such an exclusion of nonaccess testimony was based not on a disqualification for interest as in filiation cases, but on grounds of "decency,

22. Only much later were the ways to rebut the presumption of legitimacy clearly identified. In Hargrave v. Hargrave, 50 Eng. Rep. 457, 458 (Ch. 1846), early common-law cases were seen as identifying three means of rebutting the presumption: (1) proof that the husband was impotent, (2) proof that the husband was entirely absent or absent during the probable period of conception, or (3) "other proof" that sexual intercourse did not occur or could not have occurred during the probable period of conception.

23. A filiation proceeding, which is analogous to a modern paternity suit, was an action to obtain a judicial declaration that a particular individual was the parent of a child. It did not have the effect of legitimating the child. Black's Law Dictionary 756 (rev. 4th ed. 1968).

24. 95 Eng. Rep. at 49. It should be noted that this case is ambiguous in its support for the rule. Lord Hardwicke's opinion for the court emphasized the insufficiency of the mother's uncorroborated testimony to support the verdict; though insufficient, it does appear that the nonaccess testimony was technically admissible. See 7 J. Wigmore, supra note 2, § 2063, at 360. Of course, the distinction may be meaningless insofar as it matters little whether nonaccess testimony is excluded altogether or admitted with the proviso that it is insufficient to support a verdict. The decision is significant, however, to the extent that courts have misread the case and invoked the rule of insufficiency even where corroborative testimony was available.


27. The real issue was the time of birth, not the fact of access. Mansfield allowed the testimony concerning the date of birth and seemingly discussed the admissibility of nonaccess testimony for the purpose of contrast. 98 Eng. Rep. at 1257.


29. "[T]hey shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious . . . ." 98 Eng. Rep. at 1258.

30. See text at note 23 supra.
Although the common law in England was in fact the opposite of the rule set forth by Lord Mansfield in Moss, his rule had several notable effects. The rule came to be recognized both in England and in the United States not only in filiation and ejectment cases but in all actions in which the legitimacy of a child was at issue. The testimony of a husband or wife was precluded regardless of the existence of corroborating testimony.

Perhaps even more significant was the acceptance of Lord Mansfield’s rationale in support of the rule excluding nonaccess testimony. By the end of the nineteenth century, interest had been largely abrogated in many states as a basis in civil actions for the disqualification of testimony or witnesses. However, courts preserved the rule in legitimacy cases by utilizing Mansfield’s alternative rationale of “decency, morality, and policy.”

Though correctly criticized as obiter dictum, Mansfield’s justification for the rule in Moss prevailed even to the point that he became the eponym for the rule.

Because of the nature of Lord Mansfield’s explanation for the rule, its validity must be constantly reexamined. That is, decency, morality, and policy are defined by contemporary standards. Perhaps the most easily examined indicator of the degree of harmony between the rule and the current societal notions of policy that support it is the acceptance the rule enjoys in the United States today.

32. See text at notes 21-22 supra. But see note 24 supra.
33. 7 J. Wigmore, supra note 2, § 2063, at 363.
34. Evans v. State ex rel. Freeman, 165 Ind. 369, 373, 75 N.E. 651, 651 (1905); see, e.g., Commonwealth v. Strickler, 1 Browne (app.) 47, 49-50 (Pa. Dist. Ct. 1801). In Strickler the court stated:

To admit a married woman . . . to swear she has lived in adultery . . . and at the same time to say, that she will not give evidence that her husband had no access to her, because the evidence would be indecent, seems rather mysterious and incomprehensible. . . . The rule of law seems however settled. We only mean to say, that the reason assigned by Lord Hardwicke, appears the most satisfactory.

For a discussion of “the reason assigned by Lord Hardwicke,” see notes 24-25 supra and accompanying text.
35. See 2 J. Wigmore, supra note 2, § 575, at 674.
36. Not only was Mansfield’s alternative rationale widely utilized, but the rule—little more than a century old—was cited as an “ancient” common-law doctrine. See Egbert v. Greenwalt, 44 Mich. 245, 248, 6 N.W. 654, 655 (1880). For early cases using the Mansfield rationale for the rule, see People ex rel. Crandall v. The Overseers of the Poor of Ontario, 15 Barb. 286 (N.Y. 1853); Cross v. Cross, 3 Paige Ch. 139 (N.Y. 1832); Tioga County v. South Creek Township, 75 Pa. 433 (1874).
II. The Present Status of Lord Mansfield’s Rule

The degree of acceptance or rejection accorded a rule of evidence may itself be an important factor in the determination of the validity of the rule. For example, a trend toward the repudiation of a rule might suggest that it is not in harmony with contemporary policy. Such trends are particularly crucial to rules such as that of Lord Mansfield, the rationale for which rests not on some circumstantial reliability of the testimony but on external public policy.39

Courts have conflicted in their assessments of the validity of the rule. Recently it has been described as “the almost universal rule,”40 “largely repudiated,”41 and a rule for which “there is as yet no clear trend of decision.”42 An examination of state law reveals that the present status of the rule lies somewhere between the two latter characterizations.

Fifteen states43 apply the rule without regard to the kind of action in which legitimacy is at issue.44 However, the rule is suspect in three of those states, because of cases that either avoided the application of the rule or failed to consider it in circumstances where it would have been relevant.45 In eight jurisdictions statutes have mod-

44. But see note 53 infra concerning the widespread acceptance of the Uniform Reciprocal Enforcement of Support Act.
45. The states are Alabama, Alaska, and Oklahoma. Until recently, the rule was suspect in Michigan.

In Smith v. Smith, 268 Ala. 348, 106 So. 2d 260 (1958), and Donahey v. Donahey, 52 Ala. App. 596, 296 So. 2d 188 (1974), it appears that the nominal fathers were permitted to testify to nonaccess, but the Alabama courts held that there was
ified the rule so that the testimonial disability exists only in certain situations. The courts of fourteen states and the District of Columbia have either refused to adopt the rule or have repudiated their insufficient proof to rebut the presumption of legitimacy.

**Harkrader v. Reed,** 5 Alas. 668 (1917), *affd.* 264 F. 834 (9th Cir. 1920), is the only Alaska case to consider the rule. The discussion of the applicability of the rule might be characterized as dictum because the case turned on the existence of a valid marriage, not on the fact of access.

In *Serafin v. Serafin,* 67 Mich. App. 517, 24 Alas. 2d 272, *motion for leave to appeal granted,* 392 Mich. 889 (1976), the Michigan Court of Appeals found the assessment of child support, where the husband's nonaccess testimony had been excluded, to be an unconstitutional taking of property. 67 Mich. App. at 522, 241 N.W.2d at 275. The court found that the exclusion of such evidence denied the plaintiff a fair opportunity to rebut the presumption of legitimacy. 67 Mich. App. at 525, 241 N.W.2d at 275. Though the court stated that the justification for the rule was no longer compelling, it expressly declined to overturn the rule. 67 Mich. App. at 527, 241 N.W.2d at 276-77. The Michigan Supreme Court then rejected the rule and affirmed the opinion on other grounds. No. 58211 (Mich., filed Oct. 24, 1977).

In *Austin v. Austin,* 418 P.2d 347 (Okla. 1966), and *Greenwood v. Greenwood,* 387 P.2d 615 (Okla. 1963), Oklahoma courts received nonaccess testimony without comment.

46. The states are California, Illinois, Indiana, Maryland, Massachusetts, New York, Tennessee, and Vermont.

In California, if the husband and wife cohabited during the period of conception, and the husband was not impotent or sterile, there is a conclusive presumption of legitimacy. *Cal. Evid. Code* § 621 (West Supp. 1976). If the couple did not cohabit, evidence may be offered to rebut the presumption, *Cal. Civ. Code* § 7004 (West Supp. 1976), and the spouses may testify to nonaccess. *Estate of McNamara,* 181 Cal. 82, 100, 183 P. 552, 559 (1919).

In an Illinois paternity suit, the mother is competent to testify to nonaccess. *See People ex rel. Cullison v. Dile,* 347 Ill. 23, 179 N.E. 93 (1931) (holding that the husband may not so testify); *Ill. Rev. Stat. ch. 105/4, § 56 (1973).* Illinois courts have extended the rule to allow the husband to present nonaccess testimony. *People ex rel. Jones v. Schmitt,* 101 Ill. App. 2d 183, 185, 242 N.E.2d 275, 276 (1968).

Lord Mansfield's Rule, however, apparently has not been confronted by Illinois courts in the context of divorce.

In a Maryland paternity suit, both husband and wife are competent to testify to nonaccess once independent testimony establishes that they were not cohabiting at the probable time of conception. *Md. Ann. Code* art. 16, § 66F(b) (repl. vol. 1973). Maryland courts have extended this rule to divorce cases. *Staley v. Staley,* 25 Md. App. 99, 335 A.2d 114 (1975).

In a Virginia paternity suit, both husband and wife may testify to nonaccess once independent testimony establishes that they were not cohabiting at the probable time of conception. *Va. Ann. Code* art. 5, § 66F (1966). Virginia courts have extended this rule to divorce cases. *Sayles v. Sayles,* 522 Mass. 86, 88 N.E.2d 21 (1948).


Both the husband and wife may testify to all matters in a Vermont divorce case.
earlier adherence to it. Seven states—the birthplace of the rule—have abrogated it by statute. Six jurisdictions either have not confronted the rule or have expressly declined to consider its application. Finally, rule 601 of the Fed-


California has also rejected the rule in those cases in which the presumption is rebuttable. See note 46 supra.

48. These states are Delaware, Minnesota, Montana, North Dakota, South Dakota, Washington, and Wisconsin.

Delaware has enacted a statute expressly permitting spousal access testimony. See DEL. CODE tit. 13, § 508 (1974).

North Dakota, South Dakota, Wisconsin, and Montana permit such testimony based on judicial construction of statutes concerning legitimacy. In State v. Fury, 53 N.D. 333, 205 N.W. 877 (1925), a statute permitting proof of legitimacy, N.D. CENT. CODE § 14-09-03 (repl. vol. 1971), was construed to allow admission of spousal nonaccess testimony. Illegitimate status, however, has since been abrogated by legislative action. See N.D. CENT. CODE § 30.1-04-10(2) (Supp. 1975). S.D. COMPIL. LAWS ANN. § 25-5-4 (1976) was found to allow spousal nonaccess testimony in In re Kessler's Estate, 76 S.D. 158, 74 N.W.2d 599 (1956). WIS. STAT. ANN. § 61.21(2) (Wis. Supp. 1973) was given the same interpretation in Schmidt v. Schmidt, 21 Wis. 2d 433, 124 N.W.2d 569 (1963). A similar statute, MONT. REV. CODES ANN. § 5833 (1921), was found to abrogate Lord Mansfield's Rule in In re Wray's Estate, 93 Mont. 525, 19 P.2d 1051 (1933). Although the court retained a conclusive presumption of legitimacy "when the parents have been cohabiting during the period of conception," 93 Mont. at 536, 19 P.2d at 1054, Montana's recent adoption of the Uniform Parentage Act, replacing the aforementioned statute, cast doubt upon any holding of a conclusive presumption of legitimacy. See MONT. REV. CODES ANN. §§ 61-305, 61-313 (Supp. 1975).

Minnesota and Washington courts have held that Lord Mansfield's Rule has been abrogated by general competency statutes requiring only that witnesses be of sound mind and suitable age and discretion. See State v. Soyka, 188 Minn. 333, 233 N.W. 300 (1930) (construing predecessor statute of MINN. STAT. ANN. § 595.02 (Supp. 1976)); In re Adoption of a Minor, 29 Wash. 2d 759, 189 P.2d 458 (1958) (en banc) (interpreting predecessor statute of WASH. REV. CODE § 5.60.020 (1974)).

49. "Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period." Law Reform (Miscellaneous Provisions) Act, 1949, 12 & 13 Geo. 6, c. 100, § 7-(1).

50. The jurisdictions are Arizona, Hawaii, Nevada, Rhode Island, Virginia, and Wyoming.

The rule does not appear to have been considered by the Arizona courts. See State v. Meliz, 97 Ariz. 215, 399 P.2d 116 (1965) (en bane), a paternity action in which nonaccess testimony apparently was received without comment. Acceptance
eral Rules of Evidence apparently rejects Lord Mansfield's Rule, though application of rule 601 is subject to the law of the forum if state law supplies a substantive rule of decision. 51

Even those states embracing Lord Mansfield's Rule have provided statutory exceptions for certain classes of cases. Virtually every state has adopted section 22 of the Uniform Reciprocal Enforcement of Support Act, 52 which permits spouses to testify to non-access in multi-state support actions. 53 Similar provisions are found in the Uniform Civil Liability for Support Act 54 and the Uniform Par-

51. Fed. R. Evid. 601, as proposed by the Advisory Committee on Rules of Evidence and prescribed by the Supreme Court, simply provided that "[e]very person is competent to be a witness except as otherwise provided in these rules." RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183, 261 (1972). This apparent rejection of Lord Mansfield's Rule by omission is analogous to rule 601's rejection of the Dead Man's Acts. See Advisory Committee's Note to Proposed Rule 601, id. at 262. However, Congress amended rule 601 by adding: "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Pub. L. 93-595, § 1, 88 Stat. 1934 (1975). Yet, to the extent the Federal Rules of Evidence are adopted by the states, the notion that Lord Mansfield's Rule has been rejected by omission could allow a judicial interpretation that the rule has been abolished by rule 601.

52. 9 UNIFORM LAWS ANN. 383, 399 (Master ed. 1974-76).

53. The pertinent part of § 22 states that "[h]usband and wife are competent witnesses (and may be compelled) to testify to any relevant matter including marriage and parentage." 9 UNIFORM LAWS ANN. 862, 922 (Master ed. 1973). Of the states accepting Lord Mansfield's Rule, only Iowa omits this section. IOWA CODE ANN. §§ 252A.1-.12 (1969 & Supp. 1976). Though § 22 was apparently ignored in Neff v. Johnson, 391 S.W.2d 760 (Tex. Ct. App. 1965), it has been suggested that the language of the section abrogates the rule regardless of whether the action is of a multistate character. See State ex rel. Dooloff v. Sargent, 100 N.H. 29, 34, 118 A.2d 596, 599-600 (1955) (Kennison, C.J., dissenting in part). Otherwise, application of the act in a state adopting the rule might permit a nonresident defendant husband to give nonaccess testimony while a resident husband would be barred from doing so. See Commonwealth ex rel. Leider v. Leider, 210 Pa. Super. Ct. 433, 440, 233 A.2d 917, 920 (1967) (Hoffman, J., dissenting).

54. UNIFORM CIVIL LIABILITY FOR SUPPORT ACT § 10, reported in 9 UNIFORM LAWS ANN. 142 (Master ed. 1973). Though Utah has adopted this provision, it continues to recognize Lord Mansfield's Rule. Compare UTAH CODE ANN. § 78-
entage Act. The ambit of testimony within the rule's prohibition has also been narrowly confined in most states. Though spousal testimony of nonaccess is consistently excluded, the spouses are permitted to testify to facts from which nonaccess can be inferred. Also, the testimony of nonaccess is admitted if its effect will not be to bastardize the child, except in three states that embrace a broader version of the rule that excludes all spousal testimony tending to bastardize the child, whether it concerns nonaccess or other facts.

The foregoing information is significant in several respects. Clearly the rule can no longer be said to have the support of a majority of jurisdictions. Even where it is accepted, it is limited to certain types of cases, and the testimony to which it applies is narrowly defined. Furthermore, there is a distinct trend toward the complete abrogation of the rule. In conjunction with this trend, it should be noted that, although the leading commentators of the nineteenth century accepted the rule without much discussion, "no modern text on the law of evidence supports [the rule]." Consequently,

55. UNIFORM PARENTAGE ACT § 12, reported in 9 UNIFORM LAWS ANN. 369 (Master ed. Supp. 1977).
57. In Commonwealth ex rel. Leider v. Leider, 434 Pa. 293, 254 A.2d 306 (1969), nonaccess testimony was permitted because the subsequent marriage of the parents had the effect of legitimating the child. This was allowed despite the mother's marriage to another man at the time of the child's birth and Pennsylvania's acceptance of Lord Mansfield's Rule. For similar cases, see Shatford v. Shatford, 214 Ark. 612, 217 S.W.2d 917 (1949); Dudley's Admr. v. Fidelity & Deposit Co., 240 S.W.2d 76 (Ky. 1951); In re Wright's Estate, 237 Mich. 375, 211 N.W. 746 (1927).
59. Compare Annot., 49 A.L.R.3d 212 (1973) with Annot., 60 A.L.R. 380 (1929). Of the fifteen jurisdictions that have abrogated the rule by judicial opinion, eight have done so in the last decade. See note 47 supra.
60. See 2 W. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE 996 (1st Am. ed. 1875); 1 J. BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION § 1179 (1891); 2 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 151, at 134 (16th rev. ann. ed. 1899); J. LAWSON, THE LAW OF PRESUMPTIVE EVIDENCE 118 (1886); F. WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES § 518, at 424 (8th ed. 1880).
61. State ex rel. Dolloff v. Sargent, 100 N.Y. 29, 34, 118 A.2d 596, 600 (1955) (Kenison, C.J., dissenting in part). A review of leading authorities on evidence and domestic relations confirms opposition to the rule. See 2 F. CHAMBERLAIN, A TREATISE ON THE MODERN LAW OF EVIDENCE § 1089, at 1341-42 (1911); H.
courts can no longer resort to a "weight of authority" argument to justify adherence to the rule.

More important, the fact that jurisdictions are moving away from Lord Mansfield's Rule indicates that the assumptions underlying the continued application of the rule are dubious. A rule of evidence that is justified solely on considerations of social policy retains its validity only so long as the relevant societal characteristics that legitimate the rule remain unchanged. To the extent that societal norms have changed since the promulgation of the rule in 1777, and to the degree that these new norms do not require this evidentiary rule to achieve present policy objectives, the judicial system is burdened with an obsolete rule. Therefore, the policy considerations supporting the rule must be reexamined in light of contemporary standards.

III. AN ASSESSMENT OF THE POLICIES SUPPORTING LORD MANSFIELD'S RULE

Lord Mansfield himself failed to articulate specifically the public policy upon which his rule of evidence rested. A survey of decisions, however, reveals recurring definitions of public policy that assertedly support the rule. First, the rule is thought to protect against the breakdown of the marital and parent-child role models in our society. Second, it is believed necessary to minimize the burdens imposed on society by wards of the state. Third, it is contended that the rule operates to protect the best interests of the child.

CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 13.7, at 398 (1968); J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 91 (1947); McCORMICK, supra note 2, § 67, at 146; 7 J. WIGMORE, supra note 2, § 2064, at 369.

62. See note 38 supra and accompanying text; note 63 infra.

63. "Public policy" is used here as a generic term incorporating all reasons given by the courts for following Lord Mansfield's Rule. The term conveys the central fact that the rule is based on societal considerations that override the public interest in allowing litigants to secure reliable evidence. See § 7 J. WIGMORE, supra note 2, § 2175, at 1. Most American jurisdictions accepting the rule do so on the basis of Mansfield's grounds of decency, morality, and policy. See Annot., 49 A.L.R.3d 212, 231 (1973). Although attempts have been made to analyze those components separately, see, e.g., 7 J. WIGMORE, supra, note 2, § 2064, a judicial determination of decency and morality is really nothing more than a determination of societal policy. Also, one may cite cogent reasons for the rule outside of the traditional Mansfield rationale. Thus, in order to accommodate all considerations behind the rule and to emphasize its societal policy nature, the term "public policy" will be used to denote all justifications for the rule.

It should be noted that the cases presented in the remainder of this discussion are not necessarily indicative of the status of the rule in the various jurisdictions. The cases are used to demonstrate the arguments advanced for and against the rule.

64. See text at notes 68-86 infra.

65. See text at notes 87-100 infra.

66. See text at notes 101-48 infra.
Finally, it may be claimed that the rule prevents unreliable testimony. It is shown in this section that each of these rationales is deficient in the context of modern societal values.

A. The Protection of Familial Role Models

Lord Mansfield's Rule is often justified by the assertion that the public admission of nonaccess testimony would tend to encourage deviation from the socially accepted norms concerning husband-wife and parent-child relationships. Courts regard this argument as having more than merely passing sociological importance. It may be inferred from the language of many opinions that many judges possess a highly idealistic view of family institutions that can emotionally influence them to support the rule.

Somewhat like the spousal privilege against revealing confidential marital communications, one purpose of excluding nonaccess testimony under the rule is to preserve society's trust in the marital institution. It is considered unseemly that the details of marital sex lives should be publicly disclosed and that the institution of marriage be impugned by the implication that the child is the result of a partner's moral delinquency. Thus, the moral fiber of the entire community is supposedly protected by concealing marital behavior contrary to the socially preferred prototype.

A second aspect of the social-norm argument concerns the deleterious effect nonaccess testimony may have on the parent-child

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67. See text at notes 149-51 infra.

68. The courts' use of the "social norm" argument has focused on the impact of nonaccess testimony on society's ideal image of marital and parent-child relationships. See text at notes 69-75 infra. The same rationale might be advanced with the emphasis on the impact of the evidence on the child, particularly since the parents are the source of this bastardizing testimony. The analysis of the "social norm" argument here deals with its effectiveness and consistency in supporting the application of the rule to avoid a detrimental effect on the institution of marriage and on the parent-child relationship.

69. For example, emotional reaction appears to outweigh legal reasoning in Justice Henriod's concurring opinion affirming application of the rule in Lopes v. Lopes, 30 Utah 2d 393, 396, 518 P.2d 687, 690 (1974): "[In concurring.] I am constrained to say that in cases like this the children are not the bastards, but you know who." One court seemed divorced from reality when it observed that under the rule, "[n]o one . . . can malign the virtue of the mother, and no one . . . can interrupt the harmony of the family relationship and undermine the sanctity of the home." Craven v. Selway, 216 Iowa 505, 508, 246 N.W. 821, 823 (1933).

70. See Mccormick, supra note 2, § 86, at 172. Though the spousal confidential-communications privilege was used as an alternative justification for Lord Mansfield's Rule in Ray v. Ray, 219 N.C. 217, 218, 13 S.E.2d 224, 225 (1941), it is difficult to see how the lack of sexual relations could be regarded as confidential communication.


role model. This argument concentrates on the harm to the public rather than the effect such testimony might have upon a particular parent and child. Society, so the argument goes, should not witness such challenges to its norms as allegations by parents that their children are illegitimate. The attempted dissolution of the parent-child bond is viewed as a betrayal that adversely affects the public concept of the family.

However, Lord Mansfield's Rule fails to insure the achievement of either end advocated by the social-norm argument. First, the rule is ineffective because other evidence is admissible that is at least as destructive of these norms. Lord Mansfield's Rule prohibits only direct spousal testimony of nonaccess; spousal testimony from which nonaccess can be inferred has been widely permitted. For example, where relevant, the law of evidence in virtually all jurisdictions permits testimony of adultery—even where nonaccess testimony is prohibited:

Testimony by the husband that his wife has had sexual relations with every man in town can be given . . . but he is not permitted to say that he was in the jungles of New Guinea during the two years prior to the birth of his wife's child and that he never saw her during that period of time. That would be scandalous!

Consequently, the invocation of Lord Mansfield's Rule fails to prevent the disparagement of the marital institutional model because it does not exclude testimony that may be even more deleterious than that which is excluded.
When it is remembered that the rule is only infrequently of con­sequence in an action,80 the inconsistency between the desired end of preserving societal norms by excluding nonaccess testimony and the practical result of permitting "indecent" testimony in all but a very few instances becomes manifest.81 Of course, it could be contended that the rule is valuable as a partial safeguard of societal norms, i.e., some restraint on indecent testimony is better than none. However, such a limited benefit seems hardly a sufficient justification for a rule that excludes probative testimony possibly determinative of the cause of action.82

Similar criticisms may be directed at the argument that Lord Mansfield's Rule prevents the disparagement of society's image of the parent-child relationship. There are many other ways for spouses to bastardize their children and to impugn the parent-child role model than by offering nonaccess testimony.83 Certainly the admission of facts from which nonaccess can be inferred may accomplish the same end.84 Furthermore, many courts admit nonaccess testimony in cases in which there will be no res judicata effect on the legitimacy of the child.85 However, the absence of a conclusive finding of illegitimacy does not lessen whatever impact testimony of adultery or of nonaccess might have on the public. Once again, the use of the rule in legitimacy cases may be seen as a fruitless attempt to achieve a policy that would be totally ignored if the evidence were of a different form or came from a different source.86 The rule thus fails effectively to conceal socially undesirable paradigms of the marital and parent-child relationships.

80. See note 13 supra; note 56 supra and accompanying text.

81. Like Lord Mansfield's Rule, the evidentiary privilege regarding confidential spousal communications, see note 70 supra, has the purpose of maintaining respect for the institution of marriage. That end is uniformly achieved by the spousal privilege that excludes all confidential communications. Under Lord Mansfield's Rule, however, only direct spousal testimony of nonaccess is excluded while testimony about equally "indecent" matters such as adultery is allowed. See text at notes 76-78 supra.

82. See Davis v. Davis, 521 S.W.2d 603, 607 (Tex. 1975).

83. See In re L—, 499 S.W.2d 490, 493 (Mo. 1973) (en banc).

84. See notes 77-79 supra and accompanying text.

85. See Monahan v. Monahan, 142 Me. 72, 46 A.2d 706 (1946); note 57 supra and accompanying text. For a discussion of the circumstances necessary to give res judicata effect to a determination of a child's legal status, see Comment, Res Judicata and Paternity, 37 Colo. L. Rev. 479 (1965). Two states have addressed this problem by enacting laws declaring that a divorce decree cannot be a conclusive adjudication of the child's status. See Mass. Ann. Laws ch. 208, § 25 (Michie/Law. Co-op 1969); N.C. Gen. Stat. § 50-11 (1976). In both states, however, the statutes apparently have not affected the imposition of Lord Mansfield's Rule, even though the potential for a decree of illegitimacy is eliminated.

86. For an application of these criticisms to the rationale that the rule should be invoked because a child is peculiarly affected because his parent is the source of such bastardizing testimony, see note 68 supra.
B. Minimization of Public Support of Illegitimate Children

Another rationale advanced in favor of Lord Mansfield's Rule is the public policy against the judicial creation of wards to be supported by the state. Excluding the nonaccess testimony of spouses purportedly lessens the number of children declared illegitimate, and this in turn supposedly reduces the number of public charges because the husband or nominal father is not relieved of his support obligation. Such an analysis may have been reasonable in Lord Mansfield's time, when the legal burden of supporting an illegitimate child initially fell not upon the natural father but rather upon the parish, which could seek but rarely would receive any indemnification from the true father. It may also have been reasonable in the United States in the early nineteenth century, when a similar common-law structure was used to provide public support.

Modern statutory paternity procedures stand in sharp contrast to the old English parish-indemnification process. First, statutes in most states permit the mother to bring an action directly against the putative father for support of the child. Furthermore, where the child is otherwise likely to become a public charge, many states permit public-welfare authorities to initiate the action. Thus, today's system is oriented toward placing the initial responsibility for support

88. 1 S. Schachtin, supra note 13, §1.08, at 1-27.
89. See R. Pashley, Pauperism and Poor Laws 199 (1852). The responsibility for support often became a contest between two unwilling parishes. See Parish of St. Andrews v. Parish of St. Brides, 93 Eng. Rep. 35 (K.B. 1717). The support of illegitimate children was a financial hardship on the residents of a parish because support payments did not come from general revenue funds but rather were paid from special levies called Poor Rates. S. Webb & B. Webb, English Local Government: English Poor Law History: Part I. The Old Poor Law 309 (1927).
90. A parish officer, the Overseer of the Poor, might persuade the child's mother to identify the natural father, who would then be assessed an amount for the indemnification of the parish. But unless the putative father were one of a few wealthy men, there was little likelihood of enforcing the obligation. Id. Though little could be done to increase the effectiveness of this procedure when the mother was unmarried, the problem probably was avoided for married mothers by interposing a rule preventing a declaration of illegitimacy and placing the obligation to support a child born in wedlock on the nominal father, the husband.
on the natural father rather than on the local government, which would then seek indemnification.

Under the present statutory scheme, Lord Mansfield's Rule may actually increase the possibility that an illegitimate child will become a public charge. For example, the natural father can use the rule as a shield to prevent the mother from introducing nonaccess testimony necessary to overcome the presumption of legitimacy. If her husband—the nominal father—is unavailable to pay support, the public will be required to provide for the child.

Another practical consideration is the ability of the putative father to pay support. In the rigidly stratified society of Lord Mansfield's time, few putative fathers could afford to indemnify the parish. 93 Today, the United States' relatively affluent standard of living makes such a situation less likely. 94 Although the increased mobility in modern society might permit the natural father to flee in an attempt to avoid the obligation of support, 95 the Uniform Reciprocal Enforcement of Support Act permits multistate actions to enforce such indebtedness. 96 Thus, there appears to be little if any factual basis to support a rule, such as Lord Mansfield's Rule, that discriminates on the basis of the presence of a marital obligation rather than a biological relation. 97

Even if the putative father is unable or unwilling to pay support, it must also be recognized that social attitudes toward providing public welfare have altered substantially. 98 Our current legislative policy provides public support for children on the basis of need even though a nominal father is chargeable with that obligation. 99 Fur-

93. See note 89 supra.
94. This conclusion might be disputed insofar as a disproportionate number of illegitimate births occur among the poor. See H. Krause, ILLEGITIMACY: LAW AND SOCIAL POLICY 112 (1971).
95. See Child Support and the Work Bonus: Hearings on S. 1842, S. 2081 Before the Senate Comm. on Finance, 93d Cong., 1st Sess. 64-68 (1973). The two bills attempted to meet the problem by establishing paternity testing and prosecution on a nationwide basis.

It is not clear that Lord Mansfield's Rule successfully avoids placing the burden of support on the state through its tendency to place the burden on the nominal father (husband), because such a person, much like a natural father, is prone to flee from support obligations. See id. at 223 (statement of Jule M. Sugarman, Administrator, Human Resources Admin., Commissioner, Dept. of Social Services, City of New York), 227 (response of Caspar W. Weinberger, Secretary of Health, Education, and Welfare).
96. See note 53 supra and accompanying text.
97. See note 95 supra.
99. AFDC (Aid to Families with Dependent Children) payments are generally not conditioned on the marital status of the head of the family. See H. Krause, supra note 94, at 269. In 1973 over 80% of the families receiving benefits under
thermore, unlike the situation in England where the costs of support were borne by the local parish, the American welfare burden today is spread across the nation. Because of the economic, legal, and social realities of today's welfare state, the "public charge" argument in support of Lord Mansfield's Rule has been vitiates.

C. Minimization of the Disabilities of Illegitimacy

Perhaps the most cogent rationale for applying Lord Mansfield's Rule is the public policy to minimize the number of children stigmatized by the disabilities that accompany a declaration of illegitimacy. The stigma is acknowledged to be twofold: (1) disabilities that are legally imposed, and (2) social and economic disabilities. Courts have maintained that the stigma of illegitimacy is so great that it is in the "best interests of the child" to provide the protection afforded even by a limited rule that restricts the evidence that may be offered to rebut the presumption of legitimacy.

However, the "best interests of the child" rationale does not justify the imposition of the rule in all cases in which legitimacy is at issue. First, courts have failed to distinguish those situations where it is to the child's advantage to secure a decree of illegitimacy and thereby establish a blood relationship with the true father. By
proving a blood tie—albeit illegitimate—to a decedent, the child might be entitled to statutory death benefits, proceeds from an estate, or, most commonly, benefits in a paternity suit. In each of these situations, the child may need the nonaccess testimony of his nominal parents in order to rebut the presumption of legitimacy and to prevail in establishing a legal relationship.

These circumstances reveal that the "best interests of the child" justification, at the very least, does not support a universal application of Lord Mansfield's Rule. Some states recognize this problem and refuse to apply the rule in paternity cases, and the Uniform Reciprocal Enforcement of Support Act allows nonaccess testimony because the child will ultimately benefit from the assessment of support payments. Even commentators generally favoring the rule have suggested that it be relaxed in cases in which it fails to benefit the child. Thus, if the rationale for the rule is to promote the best interests of the child, it should be selectively applied so as not to deny benefits to the individual whose legitimacy is at issue.

Even a selective application of the rule, however, can be criticized in light of modern legal and social attitudes toward illegitimacy. Incapacities related to illegitimacy have largely been removed since Lord Mansfield's time. In 1968 the Supreme Court held that a


109. See, e.g., In re Kessler's Estate, 76 S.D. 158, 74 N.W.2d 599 (1956) (child established as heir; bastardizing testimony allowed); Craven v. Selway, 216 Iowa 505, 246 N.W. 821 (1933) (child denied proceeds of estate; nonaccess testimony not allowed).


111. The states are Illinois, Indiana, Massachusetts, New York, and Tennessee. See note 46 supra.

112. See notes 52-53 supra.

113. See Bell, Competency of a Husband and Wife To Testify as to Non-Access, 21 TEMP. L.Q. 217, 222 (1947).

114. Under this theory, the rule would usually not be applied in death benefit, heirship, or paternity cases in which the nonaccess testimony would be of assistance in granting the child financial support. Generally, the rule would prevent nonaccess testimony in divorce cases where the child might lose support rights. Id. at 220-22.


At common law the bastard child was filius nullius—the child of no one. The principal discrimination was in the area of property rights. The child was accorded no right of support from either parent. 1 S. SCHATZEN, supra note 13, § 1.08, at 1-27. While the child could inherit from the mother, property could not pass to...
Louisiana statute barring an acknowledged\textsuperscript{116} illegitimate child from recovering for the wrongful death of a natural parent was invalid as a denial of equal protection.\textsuperscript{117} In subsequent cases the Court established that illegitimates were entitled to workers' compensation benefits,\textsuperscript{118} public assistance,\textsuperscript{119} social security benefits,\textsuperscript{120} an opportunity in some circumstances to demonstrate both paternity and their right as an heir to inherit from a deceased putative father,\textsuperscript{121} and the right of their mothers to bring an action for the illegitimate child's wrongful death.\textsuperscript{122} With only one significant exception, illegitimate children are accorded almost the same rights as legitimate children.\textsuperscript{123}

\textsuperscript{116} "Acknowledgement" consists of an admission of paternity by the natural father or acts constituting an admission, such as giving support. \textit{H. Clark}, supra note 61, § 5.4, at 179. There was no right to inheritance from the father at all. \textit{Id.} Furthermore, illegitimates were often precluded from maintaining actions for the wrongful death of a parent, see Board of Commrs. v. City of New Orleans, 223 La. 199, 65 So. 2d 313 (1953), or for statutory benefits such as workers' compensation survival benefits. See \textit{Wieczoreck v. Folsom}, 142 F. Supp. 507 (D.N.J. 1956).

Statutory exceptions later reduced the legal deficiency in the area of support. See note 91 supra and accompanying text. Also, many states now permit the child to inherit through the mother from her relatives. See Uniform Probate Code § 2-101 (West 4th ed. 1975); Annot., 97 A.L.R.2d 1101 (1964).

\textsuperscript{117} Levy v. Louisiana, 391 U.S. 68 (1968). Although the Court did not designate illegitimacy as a suspect classification, it found no rational basis for the state's action in statutorily discriminating against acknowledged bastard children.


\textsuperscript{121} Trimble v. Gordon, 97 S. Ct. 1459 (1977). This case involved the ability of the decedent-father's illegitimate daughter to share in the estate under an Illinois statute that permitted illegitimates to inherit only from the mother. The decedent had been adjudged the father in a paternity suit prior to his death, and he had been supporting the child. The Supreme Court overturned the statute because the statutory classification extended beyond the legitimate state interest in protecting the intestate distribution process from spurious paternity claims: "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." 97 S. Ct. at 1466. The Court distinguished \textit{Labine v. Vincent}, 401 U.S. 532 (1971), in which it had upheld a prohibition against illegitimates inheriting from their fathers, on the ground that the Louisiana statute in that case permitted inheritance where the father had "acknowledged" the child. 97 S. Ct. at 1464 n.13. See note 116 supra. Despite its refusal to overrule \textit{Labine}, the court took a significant step in that direction by its suggestion that the interest of the state in encouraging the institution of the family is insufficient to justify the complete disinheritance of illegitimate offspring: "The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status." 97 S. Ct. at 1465.


\textsuperscript{123} The Court has refused to find legitimate-illegitimate classifications to be
The remaining legal disability of major consequence to illegitimates is the stricter requirement of proof of eligibility as offspring to which they may be held vis-à-vis their legitimate counterparts. While statutory classifications may not absolutely deny benefits to illegitimates, governmental units may require a different and stricter demonstration of eligibility of illegitimates than of legitimate children where such a showing is "carefully tuned" to a legitimate interest of that unit. Thus, in order to qualify for surviving children's insurance benefits under the Social Security Act, illegitimates can be required to prove affirmatively a dependency relationship with the decedent while such a relationship is presumed in the instance of a legitimate child. Likewise, a state may constitutionally provide that an illegitimate may not inherit from his father unless he had been acknowledged by the decedent.

Of course, not all illegitimate children are subjected to such problems of proof. For example, the stringent requirement of a prior adjudication of paternity as a prerequisite to inheritance from an intestate father can be alleviated if the father makes a will. Furthermore, all states provide procedures by which a child may be legitimated. These factors, coupled with the narrow scope of evi-

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124. Trimble v. Gordon, 97 S. Ct. 1459, 1466 (1977) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)). The "carefully tuned" criterion is aimed at limiting the breadth of classifications that treat illegitimates differently from legitimates. In Trimble, having conceded that the state had a legitimate interest in avoiding spurious claims of paternity that may interfere with the distribution of an estate and that can be refuted only by the deceased, the Court found that a statute that disinherited all illegitimates from taking from their intestate fathers was unconstitutional because it extended beyond the interest of the state, i.e., it failed to permit inheritance when paternity was already established and there was no possibility that the distribution process could be disrupted.

125. Mathews v. Lucas, 427 U.S. 495 (1976). The practical effect of Lucas might be to deny such benefits to illegitimates, since dependency can be established only by a showing that the child lived with the decedent or that the decedent provided for the child's support. In many states, the acts sufficient to establish dependency would be tantamount to acknowledging the child—a step that could result in a support obligation. See note 116 supra.


127. See Labine v. Vincent, 401 U.S. 532, 539 (1971). But see Trimble v. Gordon, 97 S. Ct. 1459, 1467 (1977), where the court stated that the fact that an intestate father could have made a will to provide for the illegitimate child did not mitigate the constitutional infirmity of a statute absolutely prohibiting such inheritance.

dence excluded by the rule, seem to indicate that the rule is of consequence in relatively few instances.

It might still be argued that, although infrequently applied, the rule ought to be invoked to prevent the imposition of any disability—a little protection is better than none at all. To that extent the legal-disabilities argument provides support for the rule. Whether the rule ultimately is supportable in conjunction with other considerations, however, remains to be considered below.

A second factor to be examined in the context of the "best interests of the child" is the social opprobrium that accompanies a declaration of illegitimacy. In this discussion, the social disabilities resulting from the parental dispute over his legitimacy assume two forms: the effect on the child's emotional self and the effect on the child's relationship to society. To the extent that the disability results from some internal psychological need of the child to know the natural parents, the harm is probably not mitigated by the rule. Also, the mere fact that legitimacy is being litigated, or that testimony is being presented from which nonaccess can be inferred, would seem to cause as much emotional damage to the child as the nonaccess testimony the rule attempts to exclude.

To the degree that the social stigma relates to the external reaction of society to the bastard child, it is evident that the rule is of decreasing utility because of the change in social attitudes in the United States. The increase in the incidence of illegitimate births in recent years suggests that more members of society have come in contact with illegitimates, which may reduce the incidence of stereotyped attitudes formed in isolation from such individuals. Moreover, a recent study concluded that most people do not favor burdening illegitimates with legal disabilities. To the extent that

129. See text at notes 83-86 supra.
130. See note 13 supra.
131. See text at notes 187-88 infra.
132. See Wyatt, supra note 92, at 452; note 104 supra. It is uncertain whether the elimination of illegitimacy as a legal concept would eradicate its social stigma. Compare Davis, supra note 102, at 229 with Wallach & Tenoso, supra note 102, at 29-31.
133. One would expect that a child has a natural yearning to know his true parentage. Every child has the need to feel rooted, to find himself, and to know his true origins. . . . The anxiety to learn what was in his past may be pathological, making it more difficult for the child to lead a useful life and to form meaningful relationships. In re Adoption by K, 92 N.J. Super. 204, 208, 222 A.2d 552, 554 (1966).
136. In a 1968 public survey conducted by the University of Illinois, 96% of
attitudes toward legal disabilities broadly reflect societal norms. This finding indicates a softening of the negative social attitudes toward illegitimates. Furthermore, since the relaxation of legal incapacities generally follows rather than leads the relaxation in social attitudes, the recent trend to eliminate the legal disabilities associated with illegitimacy suggests an antecedent reduction of the social stigma associated with that status. Thus, it appears that social rejection has ceased to be a substantial burden of illegitimacy: "The social position of the child has... vastly improved, for it is no longer regarded as an outcast, but is admitted to all of the activities of the community." Consequently, the cogency of this rationale for applying the Mansfield Rule has diminished.

A final variation of the best-interests rationale suggests that the rule should be invoked to decrease the risk of a declaration of illegitimacy and the consequent loss of support from the nominal father. This argument, however, is too broad: the unstated assumption is that the nominal father is always a better source of support than the natural father. It is true that the nominal father is known and thus provides the child with someone from whom support can be sought. But there is nothing to suggest that enforcement and collection problems are reduced by placing the duty of support on the nominal, rather than the natural, father.

This argument regarding the support from the nominal father seems especially attenuated in the context of a paternity suit. Although the reasons for bringing such a suit are varied and difficult to infer from case law, it is not unreasonable to assume that a common motivating factor is that the defendant might be a better source

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137. See Davis, supra note 102, at 223.
139. 1 S. Schatzkin, supra note 13, § 1.12, at 1-60. This change in attitude is reflected in periodical literature. In 1914, it was suggested that society should "[m]ake illegitimacy costly and burdensome, ... [so that] it will decline." Man
gold, Unlawful Motherhood, 53 FORUM 343 (1914). This attitude is in marked contrast to feelings recently expressed in a national magazine by Rod McKuen:

In the process of my hunt for my father, it would come out that I, too, had fathered an illegitimate son, although to me he is legitimate in every way. ... Once he said to me, "Being a love-child is the best thing in the world. It means you were really wanted."

McKuen, My Search for My Father, GOOD HOUSEKEEPING, May 1976, at 120, 220.
141. See H. Krause, supra note 94, at 85-86. But see R— v. R—, 431 S.W.2d 152 (Mo. 1968).
142. See note 95 supra.
than the nominal father for support, both in amount and reliability.\textsuperscript{143} Thus, in a paternity suit, the application of Lord Mansfield's Rule might well be contrary to the economic interests of the child and result only in protecting the interests of a culpable defendant.\textsuperscript{144}

This last situation highlights a further defect in relying upon the "best interests of the child" rationale to support the rule: this rationale tends to focus only on the economic interest of the child, ignoring the interests of the spouses who have placed their dispute before the court. The "best interests" rationale is not used to exclude the interests of other parties in other areas of the law,\textsuperscript{145} and it should not be so used in the support context. While it is not unreasonable to give special consideration to the financial well-being of the child whose legitimacy is disputed, evidentiary rules ought not disregard totally the interests of the parties who first placed a divorce or paternity proceeding before the court.

In some circumstances strict application of Lord Mansfield's Rule will not properly balance the interests of the litigants. For example, the use of the rule in a paternity suit would prohibit the prose­cutrix's nonaccess testimony, which may be necessary to rebut the presumption of legitimacy and to prove parentage. As pointed out above,\textsuperscript{146} it is unclear that the rule's usage here would benefit the child. The mother would not favor use of the rule because she initiated the suit to obtain support. Likewise, the nominal father probably would oppose use of the rule since he will be responsible for the child's support if the burden is not placed on the defendant. Only the defendant in the paternity suit would wish to invoke the rule in order to avoid the assessment of support. Thus, maximization of the parties' interests in this situation—particularly if extra weight is accorded the child's financial welfare—cannot justify the use of the rule.

Of course, a similar evaluation of the interests may support using the rule in a divorce case in which the mother has custody. The child clearly will benefit from a finding of legitimacy if the natural father is unknown or unavailable. The mother would similarly favor the use of the rule. Although there might be an element of unfair­ness toward the nominal father,\textsuperscript{147} the interests of the child and

\textsuperscript{143} It might be argued that the nominal father would always be a source of support available as an alternative to the paternity suit. As a practical matter, however, the paternity suit might not be brought if the nominal father were still available to provide support for the child.

\textsuperscript{144} See note 91 supra.

\textsuperscript{145} J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 109-10 (1973).

\textsuperscript{146} See text at notes 143-44 supra.

\textsuperscript{147} As a matter of social policy, there may be nothing wrong with placing support burdens on the nominal father even though there is no biological responsibility, particularly if the "best interests of the child" are considered of ultimate importance.
mother may be considered dominant. Thus, in this context, the rule draws some support from a “best interests” rationale.

D. Exclusion of Unreliable Testimony

The last major rationale advanced in support of Lord Mansfield’s Rule is that it excludes testimony that is easily fabricated and, by its peculiarly personal nature, difficult to corroborate. Although not explicitly articulated by the courts, this fear of fraud and unreliability appears to be based upon nothing more than a theory of disqualification for interest. This rationale, however, fails to provide a persuasive justification for the use of the rule because the modern law of evidence rejects disqualification for interest. It is generally believed that the self-serving nature of testimony should go to its weight and not its admissibility, and that the trier of fact should be allowed to assess the credibility of the witness.

E. Conclusions on the Justifications for Lord Mansfield’s Rule

Of all the affirmative reasons advanced for the application of Lord Mansfield’s Rule, only the “best interests” rationale offers any credible basis for excluding nonaccess testimony. But in only two circumstances are the best interests of the child clearly furthered: where a stringent requirement of proof must be met in order to prevent the loss of benefits or status as an heir, and in most divorce cases, however, the presumption of legitimacy ought to be conclusively declared rather than indirectly applied through an evidentiary restriction such as Lord Mansfield’s Rule.

148. But noneconomic factors must be considered as well. For example, the exclusion of nonaccess testimony may embitter the nominal father, totally destroying any possibility of a meaningful relationship between the child and him. See Wyatt, supra note 92, at 452.

In certain situations, a support decree against the nominal father may be undesirable to the extent that it may alienate his family, possibly a far more valuable economic and social resource than the husband. See Slack & Semmel, The Concept of Family in the Poor Black Community, in SUBCOMMITTEE ON FISCAL POLICY OF THE JOINT ECONOMIC COMMITTEE, 93D CONG., 1ST SESS., THE FAMILY, POVERTY, AND WELFARE PROGRAMS: HOUSEHOLD PATTERNS AND GOVERNMENT POLICIES 275, 287 (Studies In Public Welfare Paper No. 12, Part II, Comm. Print 1973).

In the majority of divorce cases, however, the application of the rule can probably be justified purely in terms of economic benefits to the child.

149. See text at note 34. While some opinions refrain from explicitly identifying this rationale for Lord Mansfield’s Rule, the reasoning is manifested in evidentiary rules requiring a more stringent standard of proof where the spouse’s testimony—though otherwise admissible—is uncorroborated. See, e.g., State v. E.A.H., 246 Minn. 299, 75 N.W.2d 195 (1956).

150. 2 J. WIGMORE, supra note 2, § 575.

151. MCCORMICK, supra note 2, § 65, at 144.

proceedings. In section IV criticisms promulgated independently of the rationales supporting the rule are analyzed and weighed against the benefits that may accrue from the rule in the limited contexts in which it seemingly is valid.

IV. INDEPENDENT CRITICISMS OF THE RULE

The jurisdictions that reject Lord Mansfield's Rule have not only generally refuted the policies put forward in its favor but have also advanced independent arguments supporting its abrogation. One of the most forceful rationales for overturning the rule concerns the object it is designed to safeguard—the presumption of legitimacy. While the presumption is rebuttable in all jurisdictions under at least some circumstances, most states have sought to bolster the presumption by requiring that proof of illegitimacy be clear and convincing or beyond a reasonable doubt. Chief Judge Cardozo for the New York Court of Appeals laid down an even more stringent requirement when he wrote that the presumption could not be rebutted "unless common sense and reason are outraged by the holding that [the presumption] abides."

This presumptive burden of persuasion renders negligible any benefits resulting from the application of Lord Mansfield's Rule: "While there is a policy which favors legitimation of children conceived or born in wedlock, that policy is adequately expressed in the presumption of legitimacy." Even if nonaccess testimony is admitted, it alone may be insufficient to overcome a presumption of legitimacy unless independent evidence is also presented.

153. See text at notes 147-48 supra.
156. See, e.g., Commonwealth v. Kitchen, 299 Mass. 7, 8-9, 11 N.E.2d 482, 484 (1937); Stone v. Stone, 210 So. 2d 672, 674 (Miss. 1968). But see Gibbons v. Maryland Cas. Co., 114 Ga. App. 166, 511 P.2d 82 (1973), in which only a preponderance of the evidence was needed to rebut the presumption.
157. In re Findlay, 253 N.Y. 1, 8, 170 N.E. 471, 473 (1930). A similarly strong presumption is found in Ripplinger v. Ripplinger, 9 Wash. App. 619, 624, 241 A.2d 682, 684 (1968), in which only a preponderance of the evidence was needed to rebut the presumption.
158. The presumption of legitimacy is an exception to the usual "bursting bubble" theory of presumptions, as both the burden of persuasion and the burden of producing evidence are shifted to the party claiming illegitimacy. McCORMICK, supra note 2, § 345, at 822.
160. "[T]he mere statements, admissions, allegations or agreements made by the parties to this divorce proceeding standing alone are not sufficient to rebut the strong presumption of legitimacy..." Buchanan v. Buchanan, 256 Ind. 119, 123, 267 N.E.2d 155, 157 (1971).
More important, protecting the interests of the child through a strong presumption of legitimacy removes many of the costs associated with the Mansfield Rule. First, the rule forces a court to render a judgment without regard to the whole truth.\textsuperscript{161} Application of the rule results in the exclusion of the most relevant and probative testimony available concerning the fact of nonaccess: by their very nature the sexual relations between husband and wife are generally not subject to proof by third-party testimony.\textsuperscript{162} Yet, third-party testimony is the only evidence of nonaccess allowed by the rule. Moreover, in some circumstances the exclusion of spousal testimony removes not only the best but the only evidence available of nonaccess.\textsuperscript{163}

When probative evidence is excluded from the factfinding process, serious social consequences may result. As a New Jersey court stated in regard to Lord Mansfield's Rule:

[I]t is a rather serious indictment against ... legal jurisprudence ... to compel one who, under our judicial branch of government, is vested with the powers and duties of interpreting and administering the law, to say, in limine, "I am compelled to decide this case against what seems to be the truth of it."\textsuperscript{164}

Not only may those within the judicial structure be dissatisfied with the intransigence of the rule,\textsuperscript{165} but the spouse who is denied an opportunity to present important evidence may lose respect for the judicial system.\textsuperscript{166} Likewise, the public is likely to be scornful of a system of justice that excludes important information.\textsuperscript{167} Unlike

\begin{itemize}
\item \textsuperscript{161} See Ventresco v. Bushey, 159 Me. 241, 245, 191 A.2d 104, 106 (1963); Loudon v. Loudon, 114 N.J. Eq. 242, 246, 168 A. 840, 841 (1933).
\item \textsuperscript{163} If nonaccess testimony is the only evidence available to support the litigant's cause of action, the application of the rule might violate due process principles. See text at notes 172-75 infra.
\item \textsuperscript{164} Loudon v. Loudon, 114 N.J. Eq. 242, 246, 168 A. 840, 841 (1933).
\item \textsuperscript{165} In his dissent in Commonwealth ex rel. Leider v. Leider, 210 Pa. Super. Ct. 433, 233 A.2d 917 (1967), Judge Hoffman observed:
\begin{quote}
I can find no justification or morality in a rule which tends to absolve the rightful father of his duty of support, while imposing such an obligation upon an innocent husband merely because of his marital relationship.
\end{quote}

\item \textsuperscript{166} One of the central emotional concerns of the domestic-relations litigant may often be to have the \textit{opportunity}—even if the suit should fail—to present one's own side of the facts. To the extent that this therapy is denied by the rule, dissatisfaction with the litigation and with the judicial system may result.
\end{itemize}
other instances in which such social costs may be justified by the important interests furthered by the exclusion of evidence,\textsuperscript{168} it has been shown above that no overriding social policy is consistently advanced by the rule.

Finally the courts’ continued reliance on the rule tends to perpetuate legal disabilities. That is, to the extent that the rule prevents declarations of illegitimacy,\textsuperscript{169} the judiciary and legislature are insulated from pressure that, if more individuals were subject to such disabilities, might otherwise be generated to change the laws related to illegitimacy.\textsuperscript{170}

The presumption of legitimacy, on the other hand, uniformly affects all domestic relations proceedings not by excluding otherwise relevant evidence but rather by allowing all relevant evidence to be received and weighed by the factfinder against a stringent burden of persuasion. As Justice Roberts of the Pennsylvania Supreme Court pointed out in a concurring opinion recommending abolition of Lord Mansfield’s Rule: “We should not blind ourselves to germane evidence as to non-access when it is available . . . . [B]y the same token, we should require those who would establish illegitimacy through such testimony to carry a heavy burden, one which is in accordance with our public policy in favor of legitimate status.”\textsuperscript{171}

A strong presumption of legitimacy safeguards the child while maintaining the integrity of the judicial process as a search for truth.

Related to the above policy consideration is a possibly more serious criticism: it may be that Lord Mansfield’s Rule is constitutionally suspect on due process grounds. In reviewing other contexts, the Supreme Court recently used the due process clause to strike down conclusive statutory presumptions that are not supported by a legitimate state interest\textsuperscript{172} or that assume facts which are not “necessarily or universally true in fact.”\textsuperscript{173} In jurisdictions that commingle a


\textsuperscript{169} Such instances admittedly do not occur with great frequency. See notes 13 & 83-86 supra and accompanying text.

\textsuperscript{170} See Note, supra note 134, at 563.


\textsuperscript{172} Stanley v. Illinois, 405 U.S. 645, 657-58 (1972) (right of natural father to offer proof of fitness to have custody of illegitimate child).

\textsuperscript{173} Vlandis v. Kline, 412 U.S. 441, 452 (1973) (emphasis added) (right to offer proof to rebut presumption of nonresidency regarding college tuition). Accord, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 643-48 (1974) (right to offer proof to rebut presumption that pregnant women are physically incapable of fulfilling teaching duties).
stringent presumption of legitimacy with Lord Mansfield’s Rule, 174
the theoretically rebuttable presumption of legitimacy may be ren­
dered irrebuttable in a practical sense:

To impose upon the plaintiff the burden of proving beyond a rea­
sonable doubt the impossibility of access at the time of conception
of the child and then to disqualify both her and her former husband
as witnesses to that fact, is to set up an insuperable barrier to the
establishment of the truth. 175

Although there are policy considerations favoring a presumption
of legitimacy, there is no basis for universally assuming that, as a
factual matter, spouses had sexual relations during the period of time
relevant to the litigation. Moreover, with the availability of patern­
ity proceedings against third parties 176 and public assistance from
our current system of welfare, it also seems unclear that any state
interest exists for utilizing the rule other than the desire to maintain
familial institutions. 177 As was argued above, 178 it is highly ques­
tionable whether even this interest in familial institutions is in fact
furthered at all by the rule. Hence, a decree in a divorce case in
which the rule was invoked that assesses support payments against
the nominal father is, arguably, a taking of property without due pro­
cess of law, for here the rule serves no legitimate state interest and
as a practical matter operates as an irrebuttable presumption. 179

174. Virtually all the states adopting the rule identified in note 43 supra also
adhere to a stringent presumption. See Annot., 46 A.L.R.3d 158 (1972).
1941).
176. See text at note 91 supra.
177. See text at note 68 supra. But see Trimble v. Gordon, 97 S. Ct. 1459
(1977), where the interest in furthering the familial institution was apparently found
insufficient to justify the discriminatory classification of illegitimate children. See
note 121 supra.
178. See text at notes 76-79 supra.
179. In the only cases dealing with this issue, two different panels of the Michi­
gan Court of Appeals reached opposite results. Noting that independent testimony
and blood tests might be available to spouses, one panel held that there was no
irrebuttable presumption of legitimacy because Lord Mansfield’s Rule does not pro­
N.W.2d 429, 431-32 (1975). However, another panel ruled that a “rule of law need
not exclude all evidence contrary to a presumption to be constitutionally infirm.”
other grounds, No. 58211 (Mich., filed Oct. 24, 1977). The Serafin court held that,
if the rule operates to deny a party a fair opportunity to rebut the presumption, it is
constitutionally defective. 67 Mich. App. at 524, 241 N.W.2d at 275. Unlike Wis­
eman, it was clear in Serafin that no potential independent evidence of illegitimacy was
available, but the court failed to emphasize this distinction: “Preventing a party
from introducing his own evidence runs contrary to basic tenets of fundamental fair­
Even if the holding in Serafin is limited to cases in which there is no potential
independent evidence of illegitimacy, the rule is still ineffective because where in­
dependent evidence is available it might be sufficient to rebut the presumption. Under
V. ALTERNATIVES TO LORD MANSFIELD'S RULE

Independent criticisms indicate that the exclusion of spousal testimony concerning nonaccess not only involves unnecessary social costs but also may be constitutionally infirm. Several proposals might be advanced to correct these deficiencies. First, the scope of the rule could be expanded to exclude a broader range of evidence in order to further more effectively the concerns said to underlie the rule. Second, the rule could be limited to apply to only those situations in which spousal testimony is uncorroborated. Third, application of the rule could be limited to those cases in which the rule clearly advances the policies supporting it; this suggestion would apply the rule only to most divorce cases and cases in which there is a potential of inheritance disability. Lastly, the rule could be abolished in favor of a strong presumption of legitimacy. The last of these proposals appears to be the most reasonable alternative.

The first alternative, to expand the scope of the rule so that its supporting justifications might be realistically accomplished, would appear to exclude too much probative evidence. It would require exclusion of all testimony tending to scandalize the marital relation and the bond between parent and child, all testimony tending to place the burden of support of a child on the state, and all testimony tending to subject the child to the legal and social disabilities of illegitimacy. Such an alternative appears unreasonable. It has already been shown that the trend of judicial opinion is to abolish such restrictions and that the external policy considerations supporting the rule have substantially diminished in contemporary society.

The second alternative, which would admit spousal nonaccess testimony only if it is supplemented by corroborating testimony, already enjoys application in some jurisdictions. However, this option may have the constitutional infirmity of rendering the pre-
sumption of legitimacy irrebuttable in some instances. Also, such a liberalization of the rule would fail to mitigate its harsh social consequences, and the best and most relevant evidence of nonaccess would still be excluded when corroborating testimony is unavailable.

Application of the rule might alternatively be limited to those cases in which the supporting rationales of the rule are consistently furthered. Such a limitation, however, mistakenly assumes that a desired substantive result—the inhibition of illegitimacy decrees—is best achieved through the use of rules of evidence. It has already been demonstrated that the social norm and public charge rationales are not furthered by the rule. However, in the context of divorce cases or where stricter proof requirements are imposed to prevent the loss of benefits, application of the rule arguably advances the best interests of the child. Yet, in practice, the best-interests policy translates into imposing a desired substantive result: insuring a source of financial support for the child, regardless of the source's moral responsibility. It is more rational to achieve that result by substantive law than by a rule of evidence. Thus, the best interests ought to be considered directly as a factor in decisionmaking, or the general presumption of legitimacy might be adjusted in proportion to the strength of the interests in a particular case. In any event, the substantive presumption of legitimacy is a superior means of safeguarding the policies relevant to Lord Mansfield's Rule.

The total abolition of Lord Mansfield's Rule is subject to none of these criticisms. The presumption of legitimacy with a stringent standard of proof adequately safeguards the interest of society in protecting the child from a declaration of illegitimacy without incurring the costs associated with Lord Mansfield's Rule. Being rebuttable, the presumption is not subject to a constitutional challenge based on due process. More importantly, it guarantees that the trier of fact will be able to reach a determination based on a full and fair hearing of all of the facts.

185. See text at notes 174-75 supra and note 179 supra.
186. See text at notes 161-70 supra.
187. See J. Thayer, Preliminary Treatise on the Law of Evidence 511-15 (1898), quoted in 1 J. Wigmore, supra note 2, § 2, at 8. Professor Thayer argued that the use of evidentiary rules to achieve substantive results increased the likelihood of unjust decisions.
188. See text at note 86 supra.
189. See text at notes 91-100 supra.
190. See text following note 151 supra.
191. For example, only a preponderance of evidence might be required in paternity cases where a finding of illegitimacy would benefit the child. In divorce cases, however, such a decree would involve a loss of support, and thus a more stringent burden—clear and convincing evidence—might be required.
192. See text following note 160 supra.
Finally, it should be noted that there is no basis for deference to the legislature in abolishing the rule. Although it has been argued that the longstanding acceptance of the rule makes its rejection a legislative function, \textsuperscript{193} time alone does not immunize a rule from judicial change. \textsuperscript{194} The rule is not one upon which reliance has been placed, and thus its abolition creates no unfairness to any of the parties before the court.

Moreover, abolition of the rule will not cause a profound change in our thinking about legal policy concerning the law of evidence and illegitimacy. Such changes have already occurred, both in the courts and society. Rather, these modern notions of public policy should be applied to purge our judicial system of a burdensome and unnecessary rule.


\textsuperscript{194} See Davis v. Davis, 521 S.W.2d 603, 608 (Tex. Ct. App. 1975).