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COMMENT

UNDERPRIVILEGED COMMUNICATIONS: THE RATIONALE FOR A PARENT-CHILD TESTIMONIAL PRIVILEGE

by Betsy Booth

In recent years a number of courts have considered recognition of a testimonial privilege for parent-child communications. The issues raised by a parent-child privilege are illustrated by the following hypothetical situation: Joey, a fourteen-year-old boy, spends time with a group of friends his parents consider “no good.” One morning Joey’s parents read in the newspaper that a local store has been vandalized the previous night. Joey was out with his friends that evening until very late. Joey’s mother confronts him with her suspicions and Joey, frightened and in need of guidance, confesses his part in the break-in. After a police investigation, Joey appears in juvenile court. Joey’s mother is requested to testify concerning what her son told her about the vandalism. She protests, not wanting to violate the confidence Joey placed in her or to be the means of establishing her own son’s guilt. Should the mother be forced to reveal her son’s confidence? If forced to testify, will she commit perjury? If she tells the truth, will Joey confide in her again?

The Federal Rules of Evidence, codified by the United States Congress, in 1975, do not recognize a parent-child privilege. Although more than half the states have similarly codified their own rules of evidence, none of these codifications recognizes a parent-child privilege. The law of evidence in Texas has also been compiled and revised in a Proposed Code of Evidence, which could become law as early as the fall of 1983.

1. The structure of the Texas juvenile court system is contained in title 3 of the Texas Family Code. TEX. FAM. CODE ANN. § 51.02 (Vernon 1975 & Supp. 1982-1983) provides jurisdiction over children aged 10 to 17. Id. § 51.04 provides for the designation of a juvenile court in each county.
3. Id.
4. Id. During the 67th Legislative Session, Senate Resolution 565 proposed a Senate Interim Committee on Rules of Evidence. This committee was formed and given the task of drafting a model code of evidence for Texas. Beginning in September 1981, this committee met with Judicial Council members and members of a state bar committee to commence the drafting work. Id. The Texas Supreme Court adopted the committee’s proposed code with some alterations and promulgated the code on November 23, 1982. Order Regarding New Rules of Evidence, 641 S.W.2d 1, 1 (Tex. Ct. Rules 1982) [hereinafter cited as New Rules].
5. Caperton & McGee, supra note 2, at 1351. The proposed rules will automatically
proposed Texas code does not contain a privilege allowing a parent to refuse to testify against his or her child. Although New York has not codified such a privilege, it is presently the only state that recognizes a judicially created testimonial privilege for parent-child communications.

This Comment advocates the inclusion of a parent-child privilege in the Texas Proposed Code of Evidence, and discusses the background of and justifications for testimonial privileges in general. The Comment examines the constitutional and policy support for a parent-child privilege, reviews existing case law on the topic, and concludes with a discussion of how such a privilege would fit into the current Texas law of privilege.

I. THE HISTORICAL AND RATIONAL BASES FOR TESTIMONIAL PRIVILEGES

A testimonial privilege allows the holder of the privilege either to refuse to testify in court or to prevent another from testifying against him. The testimony is not excluded because it is deemed irrelevant or incompetent; rather, the privilege exists to protect a relationship that society deems more important than the search for truth in a court proceeding. The testimonial privilege is a relatively recent innovation in the law, because the practice of compelling a witness to testify developed slowly. The modern witness, one with knowledge of the facts who is not a member of the jury, did not appear in England until the fifteenth century. In that year Parliament passed a statute imposing a penalty for failure to testify when requested to do so. The English Evidence Amendment Act of 1853 became effective on September 1, 1883, unless the Texas Legislature disapproves them before that date. New Rules, supra note 4, 641 S.W.2d 1, 1 (Tex. Ct. Rules 1982).

6. The proposed Texas code applies in civil cases. The Legislature, however, will be considering an amendment to make the code applicable in criminal cases also. This Comment supports such an amendment. Tartt & Caperton, Federal Rules—Proposed Texas Code Overlay; Part III, 45 Tex. B.J. 879 (1982). No parent-child privilege is recognized for either civil or criminal cases. The proposed code, however, recognizes a privilege for the attorney-client, clergyman-penitent, physician-patient, and marital relationships. Id. at 881-83, 885-87.


9. C. McCormick, Handbook of the Law of Evidence § 72 (2d ed. 1972). Evidentiary rules of exclusion must be distinguished from rules of privilege. The former guard "against evidence which is unreliable or is calculated to prejudice or mislead." Id. The latter "do not in any wise aid the ascertainment of truth, but rather they shut out the light." Id.

10. 8 J. Wigmore, Evidence § 2190 (McNaughton rev. 1961).

11. Id.

12. An Act for Punishment for such as shall procure or commit willful Perjury, 5 Eliz., ch. 9, § 12 (1562). By removing the possibility of a damages action by a party, the statute created a freedom, rather than a duty, to testify. 8 J. Wigmore, supra note 10, § 2190.

13. 16 & 17 Vict., ch. 83, § 3.
created the marital communications privilege upon which the proposed parent-child privilege is based. This statute provided that communications made in confidence between husband and wife could be protected from disclosure in court.\textsuperscript{14} Thus, the idea that communications between family members may be privileged has existed in the law for only 130 years.

Because testimonial privileges impede the judicial process, they are strictly construed, and courts and legislatures are extremely reluctant to create new privileges.\textsuperscript{15} Even those who disapprove broad testimonial privileges, however, do not advocate the removal of all privileges.\textsuperscript{16} Dean Wigmore, chief among such critics,\textsuperscript{17} developed a four-part test to determine when a privilege should be recognized:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.\textsuperscript{18}

This test, cited countless times in court decisions,\textsuperscript{19} has provided a rationale for the rare instances when privileges have been judicially created.\textsuperscript{20} The proposed privilege for confidential communications between parent and child arguably satisfies Dean Wigmore’s four criteria, and thus merits recognition as a rule of evidence.\textsuperscript{21}

\textsuperscript{14} Before 1853 a communications privilege was unnecessary because husbands and wives could not testify for or against each other in any case. The 1853 Act removed that disqualification. C. McCormick, supra note 9, § 78.

\textsuperscript{15} United States v. Nixon, 418 U.S. 683 (1974). “[T]hese exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” Id. at 710; see also Elkies v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (refusal to testify should be allowed only when refusal serves a public good more important than the search for truth).

\textsuperscript{16} See 3 B. Jones, supra note 8, § 21.1 (recognizing “a few rare relationships [in which] the public policy of protecting the relationship overrides the public policy of unrestricted inquiry”); see also 8 J. Wigmore, supra note 10, § 2192.

\textsuperscript{17} 8 J. Wigmore, supra note 10, § 2192.

\textsuperscript{18} Id. § 2285 (emphasis in original).


\textsuperscript{20} In In re A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978), the court discussed Wigmore’s test in reaching its decision to recognize a parent-child privilege. See infra note 106 and accompanying text; see also Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1959) (Fahy, J., concurring) (recognition of clergyman-penitent privilege on basis of Wigmore’s four criteria); Allred v. State, 554 P.2d 411, 417 (Alaska 1976) (court relied on Wigmore’s test in creating psychotherapist-patient privilege). Such judicial action is unusual. C. McCormick, supra note 9, § 77.

\textsuperscript{21} See infra notes 45-48 and accompanying text; see also Coburn, Child-Parent Com-
II. POLICY SUPPORT FOR A PARENT-CHILD PRIVILEGE

The four elements of Dean Wigmore's test, requiring a community-favored relationship based on confidentiality that would be seriously harmed by disclosure of confidences in court, raise considerations of the importance and fragility of the family unit. While few would deny the gravity of these considerations, the critical role of the family in socializing and educating children must be emphasized.\textsuperscript{22} Parents bear the primary responsibility for teaching children the values, morals, and interpersonal skills needed to function in society.\textsuperscript{23} This educational process requires a high level of communication between parent and child.\textsuperscript{24} Communication in turn requires protection from outside intrusion, since a child will not trust a parent and turn to that parent for guidance if the child knows he risks disclosure of his confidences.\textsuperscript{25} A child who has experienced the forced disclosure of parental confidences in court will be reluctant to make similar communications in the future,\textsuperscript{26} with resultant damage to the closeness of the parent-child relationship to the child's detriment.\textsuperscript{27} Recognition of a testimonial privilege for communications between parent and child would protect the relationship by creating an atmosphere of privacy.\textsuperscript{28}

Forced disclosure of confidential communications between parent and child in court may also cause harm reaching beyond damage to the parent-child relationship. For example, sociological research indicates that juvenile delinquency may be related to a lack of communication within the family.\textsuperscript{29} In one experiment, comparing five hundred delinquent adoles-


\textsuperscript{23} Note, The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication, 44 BROOKLYN L. REV. 63, 66-67 (1977); see also Furlong, supra note 22, at 105.

\textsuperscript{24} Furlong, supra note 22, at 115. "Studies of the growth and development of children and of the functioning of adults in society show a close relationship between the individual's functioning in society and the quality of the relationships within his family." \textit{Id}.

\textsuperscript{25} Coburn, supra note 21, at 644. Levy also makes a strong statement regarding the importance of autonomy in family communications. Perpetuation of the family unit will occur "only if the family is considered to be and is treated as an autonomous unit, and if families are protected from untoward governmental interference with their operations." Levy, supra note 22, at 693.

\textsuperscript{26} A parent could commit perjury in such a situation to avoid disclosure. Although the parent's perjured testimony would protect the parent-child relationship, the act of perjury would severely damage the child's respect for the legal system and subject the parent to possible criminal sanction. Comment, From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?, 1978 B.Y.U. L. REV. 1002, 1011.


\textsuperscript{28} The child would not be forced to choose between receiving guidance at the expense of a parent's damaging testimony in court or turning away the parent's help to prevent such testimony. One commentator argued that to reach the truth in a juvenile court proceeding at the cost of the parent-child relationship is to "win the battle and lose the war." Coburn, supra note 21, at 632.

\textsuperscript{29} The results of a decade of research are contained in S. & E. GLUECK, UNRAVELING
cents with the same number of nondelinquent adolescents, the researchers concluded that a child's emotional ties to his parents are probably the most potent influences in the entire complex range of factors contributing to antisocial behavior. A large proportion of the delinquent boys had no close emotional attachment to their fathers, while children having a warm relationship with either parent were less likely to be delinquent. Feelings of cohesion and family loyalty were also stronger among nondelinquent subjects. These findings suggest the vital importance of close family relationships in proper child development.

Other researchers have specifically concluded that the opportunity to request advice from parents is a necessary part of a child's development. The child's need to express dependency feelings is equally important, and when met, enhances the likelihood of internalization by the child of the parents' values. Since parent-child communication is so important to a child's education and socialization, a testimonial privilege for confidential communications between parent and child should be adopted if it promotes such communication.

The principal argument put forth by those who oppose a parent-child privilege is that very few parents and children are aware of the privilege and would not rely on the privilege in deciding to make or accept communications. This contention originated in criticisms of the marital commu-
communications privilege, which protects confidential communications between spouses from disclosure by either spouse in court. Because the marital and the parent-child privileges rest on similar justifications, which include fostering of the family relationship, the criticism is valid as to both privileges if valid at all.

The proposition that few spouses, parents, or children are aware of testimonial privileges lacks empirical support. The contention has logical appeal, however, since the average layman presumably is not concerned with the law of evidence. Nevertheless, a family member, even without knowledge of the existence of a specific privilege, may well believe that family confidences will remain private. Furthermore, the contention that few persons are aware of and rely on testimonial privileges may be accepted without eliminating the justification for a parent-child privilege. Regardless of a child's lack of knowledge prior to involvement in a court proceeding, firsthand experience of forced disclosure of parent-child communications will decrease the child's willingness to confide in his parents in the future. Assuming that the family unit continues to deserve protection after a child runs afoul of the law, communication within the family remains important to the child's development. Thus prospective protection of the child's relationship with his parents satisfies Dean Wigmore's four criteria for creation of a testimonial privilege due to the essential nature of the confidential family communication and the potential injury to the relationship from disclosure.


41. C. Mccormick, supra note 9, § 78.

42. See supra notes 22-28 and accompanying text; see also Note, supra note 39, at 150 (since marital privilege is the only other nonprofessional privilege, "its policy rationale is important in an analysis of the parent-child privilege").

43. See Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 CALIF. L. REV. 1353, 1372-74 (1973). The author noted that the proposition originated in Hutchins & Slesinger, supra note 40, at 682, and was put forth without supporting authority. The argument caught on, however, and "in the best tradition of a self-perpetuating proposition the commentators eventually began to cite each other." Reutlinger, supra at 1373. Reutlinger argued that many people are in fact aware of testimonial privileges, but cited no authority for the statement. Id. at 1374.

44. In the context of the marital privilege, Dean Wigmore speaks of society's "natural repugnance" at condemning a person on the testimony of a spouse. 8 J. WIGMORE, supra note 10, § 2228.


46. The assumption has not received universal support. See Note, supra note 39, at 154: "The privilege allegedly operates to further the parental role in discouraging child behavior that may have legal ramifications. Yet, presumably some unacceptable behavior has occurred already if the privilege is invoked in legal proceedings in order to withhold incriminating evidence."

47. See supra notes 29-38 and accompanying text.

III. The Constitutional Right of Privacy and Parent-Child Communications

The concept of a right of privacy originated in an article written by Samuel Warren and Louis Brandeis in 1890. The authors defined privacy as essentially the right to be let alone. Because the interests protected by a right of privacy could not be covered by the law of property, slander, or libel, Warren and Brandeis advocated the establishment of a new legal doctrine of privacy rights. The authors did not indicate whether they found a constitutional basis for the new right. During the first half of the twentieth century the right of privacy continued to be the subject of some discussion centering around the use of this right as a means of preventing eavesdropping and unwanted publicity. Even prior to the Warren-Brandeis article the fourth amendment restriction on governmental searches and seizures protected a specific right to privacy. This provision is too narrow, however, to serve as the sole justification for a general right of privacy covering activities outside the search and seizure area.

While the right of privacy was being propounded in early twentieth century legal literature, the United States Supreme Court repeatedly recognized the importance and autonomy of the family. Ultimately, the right of privacy was linked to family matters. The early cases, however, laid the foundation for the Court's later opinions on family privacy. The Supreme Court first discussed the independence of the family unit in Meyer v. Nebraska. In Meyer the Court invalidated a statute that prohibited the teaching of a foreign language to elementary school children as a violation of fourteenth amendment due process. The Court emphasized the right of parents to decide, independently of state influence, what their children would be taught. According to the Court, liberty includes the right to "establish a home and bring up children" free from unwarranted government interference.

The right of parents to direct their children's upbringing was again upheld in Pierce v. Society of Sisters, in which the Court struck down an Oregon statute requiring students to attend public schools. The Court

50. Id.
51. Id. at 197-98.
52. The authors apparently viewed the right as a tort concept. Id.
55. The United States Supreme Court relied in part on the fourth amendment in recognizing a general right to privacy in Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
56. 262 U.S. 390 (1923).
57. Id. at 403.
58. Id. at 399.
60. The statute contained a narrow exception for parents holding a special permit. Id.
emphasized the rights of parents to choose schools for their children, stating that the child is not a creature of the state; rather, the parents have a right and duty to nurture and direct the child. While reemphasizing the importance of family independence in *Prince v. Massachusetts*, the Court nevertheless upheld a Massachusetts statute prohibiting children from selling articles of any kind on the street. The Court affirmed a conviction under the statute and held that the family is not beyond regulation in the public interest. The Court emphasized, however, that such regulation is the exception rather than the rule, because the state cannot interfere with many family matters. These three decisions leave little doubt as to the protected position of the family under the Constitution.

In recent years the United States Supreme Court has continued to protect the family by recognizing and expanding a constitutional right of privacy derived from the due process clause of the fourteenth amendment. While the exact boundaries of the right of privacy remain undefined, the Supreme Court has extended its protection to include matters of family life. Although the Court has never included parent-child communications within the scope of the right of privacy, the language of the Court’s opinions on family rights arguably is broad enough to give constitutional protection to a parent-child privilege.

*Griswold v. Connecticut*, the earliest Supreme Court decision that recognized a fundamental right of privacy protecting married persons, reversed a conviction for providing contraceptives to married couples in violation of state law. The Court based the right on "penumbras" emanating from specific guarantees in the Bill of Rights. According to the

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at 551. The Court found that the law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.” *Id.* at 534-35.

61. *Id.* at 535.
63. *Id.* at 166. *Id.* at 159.
64. *Id.* at 166. The Court recognized a “private realm of family life which the state cannot enter”; the custody, care, and nurture of the child are primarily parental, not state, duties. *Id.*
65. See Note, *supra* note 23, at 71 (finding two threads running through these cases: the restricted role of the state and the broad scope of family rights).
66. U.S. Const. amend. XIV, § 1 provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”
70. 381 U.S. at 484. The majority in its opinion found the right of privacy to cover use of contraceptives by single
Court, the state law swept more broadly than necessary to protect any state interest and invaded a fundamental right, marital privacy. Thus, in its first application, the new right of privacy concerned a family matter.

The Supreme Court did not issue another decision concerning the right of privacy until 1972, but in the intervening years it discussed family autonomy in other contexts. In *Ginsberg v. New York* the Court upheld the appellant's conviction for selling nude magazines to a minor. The Court noted that the parents' claim to authority "to direct the rearing of their children is basic in the structure of our society." According to the Court, parents are entitled to the support of laws designed to help them raise their children. In *Wisconsin v. Yoder* the Court discussed child-rearing in the context of the free exercise of religion under the first amendment. For religious reasons, members of the Amish faith did not wish their children to attend school beyond the eighth grade, as required by Wisconsin law. The Court upheld the right of the Amish to direct their children's education and emphasized parental independence in raising children.

The Supreme Court returned to the issue of privacy in family matters in *Stanley v. Illinois*. In *Stanley* an unwed father challenged a state law that automatically removed his children from his custody when the mother died. The Court held that the interest of the father in the care and management of his children warranted constitutional privacy protection and could not be infringed without a hearing to determine his fitness as a father. This concept of family integrity received further emphasis the following year in the landmark decision of *Roe v. Wade*. In the process of invalidating Texas's abortion statute, the Court based the right of privacy squarely upon the due process clause of the fourteenth amendment. The Court stated that the right covers only those personal rights deemed fundamental. Because a state's power to interfere with a fundamental right is

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71. 381 U.S. at 485-86.
72. See infra notes 80-81 and accompanying text.
73. 390 U.S. 629 (1968).
74. A state statute made the magazines obscene as to minors, but not as to adults. *Id.* at 634-35.
75. *Id.* at 639.
76. *Id.*
78. U.S. Const. amend. I.
79. 406 U.S. at 236. The Court noted that the history and culture of Western civilization reflect the primary parental role of nurturing children as an enduring tradition. *Id.* at 232.
80. 405 U.S. 645 (1972).
81. *Id.* at 649-51. The Court noted that this protection had been applied to the integrity of the family unit in the past. *Id.* at 651.
83. 410 U.S. at 153.
84. *Id.* at 152.
restricted, the Court found that the right to decide whether or not to terminate a pregnancy, a fundamental right, could not be denied or regulated in the absence of a compelling state interest. In discussing other fundamental rights receiving privacy protection, the Court noted that the right of privacy "has some extension to activities relating to marriage . . . procreation . . . family relationships . . . and childrearing and education." The language of the Supreme Court's most recent opinion on the right of privacy within the family, Moore v. East Cleveland, extends the protection of family autonomy further than any previous decision. The Court invalidated a housing ordinance that permitted only members of a nuclear family to share a single dwelling unit. The Court rested its decision on a line of cases that acknowledged a "private realm of family life which the state cannot enter." The Court noted the family's importance as a source of support for its members in times of trouble. "Especially in times of adversity . . . the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." The arrest of a child for possible involvement in crime is surely a time of adversity for any family.

Review of these Supreme Court decisions indicates that the family occupies a favored and protected position under the Constitution. The language of the opinions is arguably broad enough to include confidential

85. Id. at 154. The Court found the state's interest in protecting the mother's health justified some regulation of abortion during the second trimester of pregnancy, and the state's interest in protecting the child became sufficiently compelling during the third trimester to allow prohibition of abortion. Id. at 163.

86. Id. at 152-53 (emphasis added; citations omitted). The Court repeated its list of matters included in the right of privacy in two subsequent opinions. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), a case involving invalidation of a maternity-leave-without-pay statute, the Court cited Griswold and Roe for the proposition that "freedom of personal choice in matters of marriage and family life" is protected by the due process clause. Id. at 639-40. In Paul v. Davis, 424 U.S. 693 (1976), the Court refused to extend the right of privacy to cover dissemination of a suspected shoplifter's photograph. The Court held that the right of privacy covered only those matters listed in Roe v. Wade. Id. at 713; see also Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), aff'd without opinion, 425 U.S. 901 (1976) (limiting privacy to matters concerning "marriage, home or family life").


88. Mrs. Moore was convicted of violating the ordinance because her grandson lived with her. Id. at 495-97.

89. Id. at 499 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). "Our decisions establish that the . . . sanctity of the family . . . is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." 431 U.S. at 503-04; see also Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977) (importance of the family is product of the intimacy and instruction it provides children).

90. 431 U.S. at 505. Behavioral researchers analyzing human privacy needs have documented this need for sustenance. Two writers concluded that privacy has two aspects: the right to be let alone and the right to communicate. These researchers noted that individuals must communicate with others in order to test beliefs, reduce anxiety, and shape personal thoughts. Such communication, likened to nourishment, is "essential to growth and, indeed, to survival." Reubhausen & Brim, Privacy and Behavioral Research, 65 COLUM. L. REV. 1184, 1189 (1965); see also Bloustein, Group Privacy: The Right to Huddle, 8 RUT-CAM. L. REV. 219 (1977); Fried, Privacy, 77 YALE L.J. 475 (1968).
communications between parent and child in the right to privacy. While the family is not beyond regulation in the public interest, the important question is whether the state's interest in compelling testimony outweighs the privacy right. The Supreme Court has used a balancing approach to determine whether the state interest or the privacy right will be protected in a particular case, and the state interest must be compelling to justify interference with a fundamental right. In the context of the parent-child privilege, as well as marital and physician-patient privileges, some courts have recognized the right of privacy and chosen to protect that right in the face of claims of compelling state interest. The importance of open communication within the family to the child's development supports extension of the right of privacy to parent-child communications. While the Supreme Court's opinions have not so extended the right, recognition of a parent-child privilege would not be a long step for the Court to take.

IV. RECOGNITION OF A PARENT-CHILD PRIVILEGE IN STATE AND LOWER FEDERAL COURTS

While the United States Supreme Court has not considered the validity of a testimonial privilege for parent-child confidential communications, a number of state and lower federal courts have ruled on the issue. These courts have considered both the policy reasons and constitutional support for the privilege in many varying fact situations. The courts' responses to the issue raise considerations of age limitations on the proposed privilege.

91. But see Note, supra note 39, at 169 (communications revealing a child's possible criminal activity do not merit privacy protection).
93. The state's interest in requiring disclosure has been described as compelling. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 93 (1964) (White, J., concurring) (describing power to compel disclosure as "[a]mong the necessary and most important of the powers of the states as well as the Federal Government").
94. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). When the state interest concerns protection of a child's mental or physical health, that interest is likely to outweigh the individual right. Id. at 230. When a parent-child privilege is involved, however, protection of the privacy right rather than the state interest will protect the child's mental health. See infra notes 29-38 and accompanying text.
95. Roe v. Wade, 410 U.S. at 162-63. Minors as well as adults are protected by the right of privacy. In re Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). The Supreme Court has held, however, that the state has broader authority to regulate the activities of children than those of adults. Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The parent-child privilege, however, may implicate the parent's right of privacy in guiding the child who comes to him for advice. Thus the state must justify an invasion of an adult's, as well as a child's, privacy.
limitations on who may invoke the privilege, and limitations on the kind of communications viewed as confidential. To date only the New York state courts have judicially recognized a parent-child privilege. Other courts, however, have recognized the persuasiveness of the arguments in favor of the privilege, but have declined to create a privilege in the absence of a statute.\textsuperscript{97}

\section*{A. New York Cases}

In a series of six cases the state courts of New York have created a parent-child privilege and defined its scope. The issue first arose before the appellate division of the New York Supreme Court in \textit{In re A & M}.\textsuperscript{98} In that case a sixteen-year-old boy was suspected of involvement in arson at a nearby student center. Shortly after the arson occurred the boy discussed his involvement in the crime with his parents. The district attorney subpoenaed the parents to appear before a grand jury and testify concerning what their son had told them. The parents moved to quash the subpoenas. On appeal the appellate division granted the motion to quash.\textsuperscript{99} While the court refused to hold that the statutory marital confidential communications privilege covered the fact situation, it recognized a specific protection for parent-child communications.\textsuperscript{100}

The court first found that the constitutional right of privacy, as defined by the United States Supreme Court, requires protection for confidential communications between parent and child.\textsuperscript{101} According to the court, when the state attempts to regulate such communications by requiring disclosure, the asserted state interest must be carefully examined in order to insure that a legitimate purpose exists for abridging the family interest.\textsuperscript{102} The state's interest does not justify compelling a parent's testimony, stated the court, when a child has confided in a parent for the purpose of receiving guidance.\textsuperscript{103} The court also based its decision on the contention that proper child development requires open lines of communication to the parents.\textsuperscript{104} Although the court noted that Dean Wigmore's four criteria


\textsuperscript{99} 403 N.Y.S.2d at 377. The court did hold, however, that the parents could be asked if their son was at home on the night in question. \textit{Id.} at 382 n.10.

\textsuperscript{100} \textit{Id.} at 377. The court also refused to apply the attorney-client privilege. The court found it merely a coincidence that the boy's father was an attorney. \textit{Id.} at 377-78.


\textsuperscript{102} 403 N.Y.S.2d at 378.

\textsuperscript{103} \textit{Id.} "It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to her mother and father." \textit{Id.}

\textsuperscript{104} \textit{Id.}
for the creation of a privilege had been satisfied, it refused to call this protection of parent-child communications a privilege and stated that the duty of creating privileges belonged exclusively to the state legislature. Finally, the court limited its opinion to those cases in which both parent and child wish to preserve the confidentiality of their discussion. The court indicated concern that, without this limitation, a child could invoke the privilege in proceedings instituted by parents unable to control the child. Thus, the A & M court created a constitutionally based protection, which must be invoked by both parent and child, for confidences made to a parent by a minor child in search of guidance.

Although the A & M court did not limit its holding to criminal cases, a lower New York court later implicitly restricted application of the parent-child protection to criminal cases. In Berggren v. Reilly a young boy was struck and injured by the defendant's vehicle. The injured boy told his father how the accident occurred, and the father refused to repeat this conversation during a pretrial examination. Stating that no privilege is recognized in law for a conversation between a parent and his child, the court summarily dismissed the father's claim of a parent-child privilege.

The court may have meant that no privilege was recognized in the civil law, as opposed to the criminal law, may have been unaware of the then recent A & M decision, or may have felt that the nature of the boy's conversation with his father did not fit the criteria set forth in the A & M opinion. Whatever the explanation, the protection given to parent-child communications in New York has never been applied in a reported civil case.

The appellate division soon had occasion to reemphasize the requirement that before a confidential communication to a parent regarding a crime deserves protection, it must be made for the purpose of receiving guidance or advice. In In re Mark a minor was adjudged a juvenile delinquent for daubing paint on a parked car. During court proceedings the father was asked whether he had had any discussion with his son about

105. Id. at 381; see supra note 18 and accompanying text.
106. 403 N.Y.S.2d at 381. Commentators have nevertheless labelled this protection a privilege. See Barker, Evidence, Survey of New York Law, 32 Syracuse L. Rev. 303, 307 (1981) ("There is, of course, no parent-child privilege to be found in the New York [statutes], but we seem to have such a privilege all the same"); Note, supra note 39, at 144 n.17.
107. 403 N.Y.S.2d at 381 n.9.
108. The court compared the fact situation before it with that in In re Terry W., 59 Cal. App. 3d 745, 747 n.1, 130 Cal. Rptr. 913, 914 n.1 (1976), in which the mother did not wish to claim the privilege. See infra notes 144-45 and accompanying text.
109. The court ultimately remanded the case so that the trial court could determine whether the parent-child discussion had really taken place in confidence for the purpose of guidance. 403 N.Y.S.2d at 382.
111. 407 N.Y.S.2d at 962.
112. The court's opinion is interpreted in this manner in Annot., 6 A.L.R. 4TH 544, 546 n.2 (1981).
113. The A & M opinion required that the communication be made in confidence for the purpose of receiving guidance from the parent. See supra note 109 and accompanying text.
the occurrence. An objection on grounds of parent-child privilege was
overruled, and the father answered, "He said he did it." On appeal the
court noted the lack of a statute creating the parent-child privilege, but
stated that such a privilege may nevertheless exist if both parent and child
wish the communication to remain confidential. The court held, however,
that the communication presently under consideration was not privi-
eged because it was not made for the purpose of receiving guidance.

An expansion of the guidelines concerning the parent-child privilege oc-
curred in In re Michelet P. when the privilege was extended to a court-
appointed guardian. A fifteen-year-old Haitian boy having no relatives
in the United States was taken into custody on suspicion of killing a wo-
man. The boy confessed to a court appointed guardian that he had mur-
dered the woman. The appellate division affirmed suppression of the
boy's confession as privileged, because the prosecutor had allowed and
even urged the guardian and boy to confer privately, thus creating an at-
mosphere of confidentiality. There was no indication that the state-
ments to the guardian were made for the purpose of receiving guidance or
that the guardian joined with the boy in moving to suppress the confes-
sion. The opinion thus seems to extend the parent-child privilege to any
confidential communication and to allow the child alone to invoke the
privilege. The court, however, may have based its decision in part on
the attorney-client aspect of the guardian-child relationship.

The scope of the parent-child privilege in New York was further ex-
panded in People v. Fitzgerald. This county court case concerned a
twenty-three-year-old defendant charged with negligent homicide in a hit-
and-run accident. Two days after the incident the defendant spoke pri-
vately to his father about the accident. The defendant and his father

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115. 410 N.Y.S.2d at 465.
116. Id.
117. Id. at 465-66. "It does not appear that respondent made the statement to his father
in confidence and for the purpose of obtaining support, advice or guidance, nor that the
father wished to remain silent and keep respondent's answer confidential." Id.
119. 419 N.Y.S.2d at 709.
120. The appellate court found that appointment of the guardian was improper, al-
though it decided the privilege issue independently of that holding. The guardian was the
victim's son. Id. at 706, 708.
121. Id. at 710.
122. Id. at 708. The court quoted extensively from In re A & M on the need for a grow-
ing child to confide in his parents and held that the reasoning applied to the case at hand.
Id. at 709-10.
123. The guardian voluntarily repeated the boy's confession to the authorities. Id. at
708.
124. Several commentators support the requirement that both parent and child must de-
sire to invoke the privilege based on a belief that giving a child sole veto power would
weaken parental authority at a time when it is urgently needed. See Comment, supra note
26, at 1028; Comment, supra note 27, at 804-06. But see Coburn, supra note 21, at 632 (child
should have power to prevent willing family member from testifying).
125. "[The guardian's] role vis-a-vis respondent was not unlike that of an attorney and
his client." 419 N.Y.S.2d at 709.
127. The defendant was self-supporting and had not lived at home for two years.
moved to preclude the father's grand jury testimony concerning the conversation on grounds of parent-child privilege. The court held that because the parent-child privilege was a fundamental right based on both the United States and New York Constitutions, no age limits could be placed on it. The court accordingly refused to limit the privilege to children under age eighteen and ruled that the father's grand jury testimony was protected. The court noted that the need for trust and guidance in the parent-child relationship does not end at a certain age, because the relationship of mutual trust, respect, and confidence should be fostered throughout the lives of the parent and child. While the court's reasoning is persuasive, the opinion may open the door to abuse of the privilege.

The appellate division's most recent pronouncement on the parent-child privilege, People v. Harrell, concerns the effect on the privilege of a third party's presence. In that case a police officer overheard a seventeen-year-old boy, arrested for robbing and stabbing a store owner, tell his mother that he had committed the crime. The court held that the police officer's testimony as to what he had heard should have been suppressed and that the police officer should have given the boy privacy or warned him of the officer's presence. The court found that the boy had sought the guidance and advice of his mother and that the "unfriendly environs of a police precinct" made a privilege for such guidance even more important. Whether the presence of a third party at a conversation occurring in a place other than a police station would destroy the privilege remains an open question.

The New York cases on parent-child privilege have created an extremely broad privilege, although its precise boundaries are not clear. Courts in other states, however, have declined to follow the New York courts' lead in recognizing the privilege. Many of the cases from states refusing to create a parent-child privilege can be distinguished from the New York line of cases as involving facts inappropriate for the privi-

128. Id. at 312-13. The court noted that because the privilege was a constitutional right, the judiciary need not wait for the legislature to create the privilege by statute. Id. at 313.
129. Id. at 314.
130. Id. at 315. The court reaffirmed the requirement that both parent and child must assert the privilege. Id.
131. Id. at 313.
132. For a criticism of application of the privilege to all age groups, see Barker, supra note 106, at 307-08. "Should, for example, a fifty-year-old son's confidences to his seventy-five-year-old mother be protected? What about the person, minor or adult, who confides in his aunt by whom he was raised? If those examples go too far, why do they go too far?" Id.
134. The presence of a third party usually prevents the marital communications privilege, which is closely related to the parent-child privilege, from operating. 8 J. WIGMORE, supra note 10, § 2336.
135. 31 CRIM. L. RPR. at 2213. The court held, however, that the failure to suppress was harmless error and affirmed the conviction. Id.
136. Id.
137. Id.
le.\textsuperscript{138} In other cases, the state courts have recognized the reasons for the privilege, but have deferred to the legislature creation of the privilege.\textsuperscript{139}

B. Cases from States Other Than New York

Although most of the cases considering the privilege have been decided in recent years, the first state court to address the issue did so in 1919. In \textit{Lindsey v. People},\textsuperscript{140} during a private conversation with a juvenile court judge, a boy confessed to killing his father. When the boy's mother was later accused of the murder, the juvenile court judge refused to testify concerning his conversation with the boy.\textsuperscript{141} The judge claimed he stood in the shoes of a parent and thus the boy's confidential communication was privileged. The Colorado Supreme Court disagreed, however, and held that no such privilege existed to protect either the judge or a natural parent.\textsuperscript{142} The court described the argument in favor of the privilege as interesting, but found no law to support a parent-child privilege.\textsuperscript{143}

More recently, a California appeals court recognized the desirability of the proposed privilege, but declined, as did the \textit{Lindsey} court, to create the privilege judicially. In \textit{In re Terry W.},\textsuperscript{144} the only evidence supporting a boy's conviction of burglary was his confession to his mother. The confession was ruled admissible over an objection based upon a parent-child privilege.\textsuperscript{145} The appellate court affirmed the ruling, holding that the constitutional right of privacy did not require protection of confidential parent-child communications.\textsuperscript{146}

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\textsuperscript{139} \textit{In re Terry W.}, 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976); Lindsey v. People, 66 Colo. 343, 181 P. 531 (1919).

\textsuperscript{140} 66 Colo. 343, 181 P. 531 (1919).

\textsuperscript{141} The lower court held the judge in contempt of court and fined him for his refusal to testify. 181 P. at 536.

\textsuperscript{142} Id.

An interesting argument is presented in favor of the claim of privilege based upon the supposed powers and duties conferred by the state, in its capacity of \textit{parens patriae}, upon [the judge], and his assumed position in \textit{loco parentis}. There is no law to support this argument, and the privilege claimed by it is one which is denied a natural parent.

\textit{Id.}

\textsuperscript{143} \textit{Id.} Three justices dissented, arguing that the decision would tend to destroy the child's trust in the court. \textit{Id.} at 537.

\textsuperscript{144} 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976).

\textsuperscript{145} The boy's counsel raised the objection. The boy's mother, to whom the confession was made, did not claim a parent-child privilege. 130 Cal. Rptr. at 914 n.1. Some commentators would require both parent and child to invoke the privilege. \textit{See supra} note 124 and accompanying text. The boy also based his objection to the evidence on his constitutional rights to counsel and against self-incrimination. The court found that the mother had not acted as counsel and that her recounting of the conversation did not cause her son to incriminate himself, because the mother could not be considered a mere extension of the son. 130 Cal. Rptr. at 914.

\textsuperscript{146} \textit{Id.} at 914-15.
extended only to the relationship of husband and wife. Although the court found the policy reasons in support of the parent-child privilege persuasive, it concluded that creation of the privilege must be left to the legislature.

*Lindsey* and *Terry W.* both involved fact situations most conducive to protection of confidential communications between parent and child: a minor, accused of a crime, turns to a parent or guardian for guidance, and then both parent and child express a mutual desire to prevent disclosure of the communication in court. The appeal to interests in family autonomy is strongest in such a case. When the fact situation lacks this inherent appeal, state courts have quickly refused all consideration of a parent-child privilege. For example, in *Hunter v. State* both parents were convicted of cruelty to a child. The parents asserted a parent-child privilege to prevent the victim, their seven-year-old adopted son, from testifying against them. The Indiana court soundly denounced the proposed privilege. The court's holding was no doubt correct. No benefit to the child or to the parent-child relationship would result from recognition of the privilege in this type of situation.

C. Federal Cases

Several federal courts also have considered the issue of a parent-child testimonial privilege. Although no federal court has recognized this privilege, federal courts that have considered the subject expressed approval...
of the policy reasons supporting the privilege. The parent-child privilege issue first arose in a federal court in In re Kinoy.154 In Kinoy an attorney was subpoenaed to testify before a grand jury as to the location of his adult daughter, who was believed to be harboring a fugitive. Kinoy moved to quash the subpoena, claiming his communications with his daughter were protected by a parent-child privilege.155 The federal district court, while noting the father's difficult position, overruled the motion because the facts did not justify enforcement of the asserted privilege.156 Thus, although the court voiced sympathy for the problems of a parent required to testify against a child, it refused the privilege on the facts before it, stating that "there is no such [privilege]."157 The court offered some hope, however, noting that in some situations the parent could invoke the privilege against self-incrimination to protect parent-child communications.158

The Fifth Circuit Court of Appeals discussed the parent-child testimonial privilege in In re Grand Jury Proceedings, Appeal of Teresa Starr.159 Starr, an adult, refused to testify before a grand jury concerning her mother's and stepfather's involvement in a homicide; she claimed her testimony was protected by a parent-child privilege. Noting the lack of scholarly and federal judicial support for the privilege, the Fifth Circuit declined to recognize the privilege under the circumstances of the case before it.160 The court cited the New York decisions of In re A & M161 and People v. Fitzgerald,162 but distinguished those opinions as reflecting an intent to avoid discouraging a child from confiding in his parents.163 Because that intent is a major justification for the parent-child privilege,164 and because Teresa Starr's testimony did not concern any confidential statements made by her to her parents, the Fifth Circuit correctly refused the privilege on the facts before it.

with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. See S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 198 (2d ed. 1977) (Federal Rules of Evidence create uncertainty as to which privileges will be recognized).

155. Id. at 406. Kinoy also asserted the attorney-client privilege. The court found, however, that he was not acting as an attorney when his daughter communicated with him. Id. at 403-06.
156. Id. at 406. The court noted that the father's testimony would not necessarily incriminate his daughter. Id.
157. Id.
158. Id. Such would be the case when both parent and child were involved in illegal activity and the communication between them incriminated both.
159. 647 F.2d 511 (5th Cir. 1981).
160. Id. at 512-13. "Discussion of such a privilege is conspicuously absent from the discussions of scholarly evidentiary authorities." Id. at 513 n.3.
161. 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978); see supra notes 98-109 and accompanying text.
162. 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979); see supra notes 126-32 and accompanying text.
163. 647 F.2d at 513 n.4.
164. See supra notes 22-28 and accompanying text.
The Seventh Circuit Court of Appeals is the only other federal court that has addressed the parent-child privilege issue. In *United States ex rel. Riley v. Franzen* the seventeen-year-old defendant appealed from a murder conviction, claiming that the denial of his request to see his father while in custody violated his constitutional rights. The Seventh Circuit disagreed and noted in a dictum that the defendant had not claimed communication with his father to be privileged. The appellate court stated that the judiciary is extremely reluctant to create new privileges and prefers to leave that task to the legislature despite any policy reasons supporting recognition of a particular privilege. Thus, the Seventh Circuit's creation of a parent-child privilege is unlikely, even though the court's citation to sources advocating the privilege indicates an appreciation of the reasons supporting the privilege similar to that of the *In re Kinoy* court.

Review of the state and federal court cases in which an assertion of a parent-child testimonial privilege has been considered indicates that most courts will not judicially create such a privilege. Nevertheless, some courts have voiced sympathy with the policy justifications for the privilege and seem to be urging state legislatures to act on the issue. Few courts, with the exception of those in New York, have considered the constitutional ramifications of a parent-child privilege. The vast majority of courts have either not considered the issue at all, or have done so in the context of fact situations that do not justify the privilege. Under these circumstances, proponents of a parent-child privilege should direct their efforts toward state legislatures. Many state legislatures have recently codified or are in the process of codifying state rules of evidence. Includ-
sion of a parent-child privilege in these codes should be the goal of those who support such a privilege.

V. RECOGNITION OF A PARENT-CHILD PRIVILEGE IN TEXAS

The Proposed Texas Code of Evidence does not contain a parent-child privilege, although a closely related existing privilege, that of confidential marital communications, is recognized. The statutes currently in effect recognize the marital communications privilege in both civil and criminal cases, as would the proposed code. An early case under the existing civil statute, Mitchell v. Mitchell, justified the marital privilege as necessary to preserve the confidence and security of marriage. The court extended the privilege to both written and verbal communications and held that whether a particular communication was confidential would depend upon the facts of the case. Thus one type of family communication is currently protected in Texas. Protection of family communication should be extended to the parent-child relation. The parent-child relationship and the proper development of the child require the same security and privacy as the marital relationship. Thus, the following rule is proposed

177. Rule 504 of the proposed code prepared by the Senate and bar committees limited the marital privilege, providing that the spouse of an accused can refuse to testify for the state only in a criminal prosecution. Tartt & Caperton, supra note 6, at 883. The Texas Supreme Court, however, reinstated the substance of the existing marital communications privilege. Rule 504(b) as drafted by the supreme court provides: “A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during their marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to his spouse while they were married.” New Rules supra note 4, 641 S.W.2d 9-10 (Tex. Ct. Rules 1982).

178. TEX. REV. CIV. STAT. ANN. art. 3715 (Vernon 1926) creates a privilege in civil cases: “The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife.” TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979) provides for the privilege in criminal cases: Neither husband nor wife shall, in any case, testify as to communications made by one to the other while married. Neither husband nor wife shall, in any case, after the marriage relation ceases, be made witnesses as to any communication made while the marriage relation existed except in a case where one or the other is on trial for an offense and a declaration or communication . . . goes to extenuate or justify the offense. (The statute then provides for voluntary testimony by either when an offense against the other or against a child, or bigamy, or nonsupport, is charged).

Article 38.11 does not qualify “communications” with the word “confidential,” but court decisions applying the statute have required that the communication be confidential in order to be privileged. See Cole v. State, 48 Tex. Crim. 439, 88 S.W. 341 (1905); 1 R. Ray, Texas Law of Evidence § 436 (Texas Practice 3d ed. 1980).

179. 80 Tex. 101, 15 S.W. 705 (1891); see also Gross v. State, 61 Tex. Crim. 176, 183, 135 S.W. 373, 377-78 (1911).

180. 80 Tex. at 116, 15 S.W. at 710.

181. Id.

182. Extending protection of family communication to the parent-child relation would be in line with the prevailing view in the civil law countries of Western Europe that no one may be required to disclose confidences between himself and a family member. Coburn, supra note 21, at 600 n.5; Quick, Self-Incrimination Under the Uniform Rules of Evidence, 3 WAYNE L. REV. 1, 5 (1956).

183. See supra notes 22-38 and accompanying text.
for addition to the Proposed Texas Code of Evidence:

A parent or guardian of a minor child may refuse to testify as to confidential communications made to the parent or guardian by the child for the purpose of receiving guidance or advice. Voluntary testimony by the parent or guardian shall not be prevented by objection of the child.184

This single rule would apply in both civil and criminal cases, since the proposed Texas code potentially creates a single set of rules to apply in both types of cases.185

The proposed privilege cannot be asserted in a situation in which a parent wishes to testify over the child's objection. In such a situation recognition of a testimonial privilege would not protect a strong parent-child relationship. The relationship presumably has deteriorated to some degree already, since the parent is seeking outside assistance in controlling the child. Promotion of the bond between parent and child, important to the child's proper development, is the principal justification for the privilege. When the bond is absent, the child's need for guidance and support is no longer at stake. Allowing a parent to testify over the child's objection admittedly would not promote a strong future parent-child relationship. Recognition of the privilege as part of a constitutional right of privacy, however, requires a balancing of interests. This family right outweighs the state's interest in compelling testimony only when a close family relationship exists.

The United States Supreme Court has recognized that a child has rights as against his parent when the two come in conflict.186 The proposed privilege will protect the rights of both when the privilege is mutually asserted.187 When the child alone asserts the privilege, the child's right will be subject to the combined parental and state interests in controlling the child. In either situation, proper guidance of the child is the ultimate goal.

VI. CONCLUSION

A testimonial privilege allows the holders of the privilege to refuse to testify in court. Courts and legislatures are usually reluctant to create new privileges, because such privileges impede the judicial process by preventing disclosure of relevant information. Instances exist, however, in which a privilege is necessary to protect a certain kind of relationship that society deems more important than the efficient functioning of the judicial system. Under this reasoning a privilege for confidential communications between parent and child should be recognized. The parent-child relationship re-

184. See supra note 124 and accompanying text.
185. Tartt & Caperton, supra note 6, at 879.
187. See supra note 95.
quires privacy and open communication. Once a child learns that his confidences to a parent must be disclosed in court, he will be hesitant to confide in the parent and will thus be denied a source of socialization and guidance critical to his proper development. The need to protect the family also warrants recognition of a parent-child testimonial privilege. Moreover, although the Supreme Court has not directly discussed the issue of a parent-child privilege, the Court's decisions on family privacy could be deemed broad enough to include the privilege in the constitutional right of privacy.

Presently, in Texas a proposed code of evidence potentially applicable to both civil and criminal cases awaits action by the state legislature. Thus, the ideal time exists for recognition of a parent-child testimonial privilege in Texas. The Proposed Texas Code of Evidence should be amended to include this privilege.