We are not meant to know everything, Mae. Did you ever think that perhaps our minds are delicately calibrated between the known and the unknown? That our souls need the mysteries of night and the clarity of day? Young people are creating ever-present daylight, and I think that it will burn us all alive. There will be no time to reflect, to sleep to cool.\[1\]

For a certain portion of our population, there are no more “mysteries of the night”. The advent of tracking devices and applications has brought about a new perceived parental duty: to know where your child is at all times. The devices ask: how much would you pay for peace of mind? For a parent, the allure of knowing exactly where your child is at all times overcomes any unease with the marked invasion of their children’s privacy. But for children, the ramifications of these apps and devices are large and largely unexplored. From GPS trackers stuck on cars to apps reporting a child’s every move to the possibility of microchipping a child, it is not enough to look at this and dismiss it as the price of peace of mind. There must be a concerted effort to recognize that children must have privacy rights.

This article will look at both existing and pending technologies that make it not only possible, but also almost effortless, for parents to track their children. It will explore the different classes of devices and hypothesize about the impending possibilities of microchipping. Then, this paper will point to various case law, and show the trend of courts in recent decades to grant children increasingly more rights. The right to privacy has yet to be granted to children, but it is already in danger. The case of Georgia v. Randolph creates the legal possibility of a hierarchy
between parent and child that leaves children without recourse when their privacy has been violated. This paper will then navigate through the tensions between the protected right of parental autonomy and the importance of granting privacy rights to children. Finally, this paper will propose a solution: a six-factor test that takes into account the interests of both parent and child, and applies this test to the tracking devices and microchips discussed herein.

**Tracking Devices**

In order to understand the relevance of this article, it is first important to look at the evolution of child tracking devices. But from “black boxes” to advanced apps and devices, the marketing has remained the same: websites hawking tracking devices to parents repeatedly proclaim (sometimes in italic, bold font) that these devices are necessary for parental “peace of mind.”[2] The homepage of SkyNannyGPS starts by asking “Did you know that 800,000 children are reported missing every year in the United States? In other words, every 40 seconds, a child is reported as missing or abducted.”[3] The tactics used to sell these products works: to be a responsible parent, a parent that fulfills their duty to care and protect their children, these trackers are a must. The SkyNannyGPS site suggests that the key to parental “reassurance” lies in knowing where your child is at all times.[4]

**GPS Trackers**

The GPS-tracking market is inundated with brightly colored, minimalist looking trackers.[5] There are the simple (a wristband containing a QR code that, upon scanning, would reveal the child’s name, address, and phone number) and the infinitely more complicated (watch-type devices that allow geo-fencing, two-way communication, augmented reality, etc).[6] But an earlier iteration of these devices was a “black box”. Alltrack USA produced the DriveRight Car Chip, allowing parents to record “driving speeds, hard accelerations and decelerations,” as well as setting virtual fences for their child.[7] The DriveRight Car Chip[8] records 300 hours of trip details (about a month’s worth), “vehicle speeds driven, hard accelerations, hard decelerations braking, time and date for each trip, distance traveled,” and is able to beep at the driver when the child goes over certain speed threshold (set by parents).[9] AllTrack also sells software that can track a driver in real time, as well as email the parent a speed limit summary at the end of each day, letting them know if their child has complied with local posted speed limits.[10]

However, if a parent wants to track their child before driving age and beyond the car, there are plenty of trackers designed to attach to a child’s clothing, or disguised as a watch.[11] Trax (currently out of stock) can either clip to clothing or thread into a belt or pet collar. The accompanying app is free, comes with geo-fencing[12] features, and the ability to create multiple profiles (for multiple children).[13] The augmented reality feature allows one to point their phone directly in front of them and scan the area. The app then locates the child, and tells the parent how far in that particular direction their child is.[14] Another products, such
as the Weenect, the Loc8tor[15], and AngelSense[16] are nearly identical.

Apart from these trackers, there are riffs on smart watches: wearable, brightly colored bands range from simple $5 bands with QR codes containing a child’s contact information to watches with full blown telephone capabilities. The FlashMe band bears a QR code that a (hopefully benevolent) stranger can scan and access the child’s name, address, and an emergency phone number.[17] The PAXIE functions similarly as Trax, Weenect, or the Loc8tor, but under the guise of a colorful “fashion band”.[18] The more high-tech options include the Tinitell, MyFilip, and the hereO. These last three devices are both mobile phones and GPS enabled, all supplemented with apps that parents can install and monthly plans to keep it all running. On these apps, parents set safe zones, get notifications when the child’s device’s battery runs low, text within the app, call their child’s device, receive directions to their closest family member, and more.[19] As for the watches themselves, they are brightly colored and water/dirt resistant, as an appeal to younger children. Some watches have the ability to actually tell time, but the Tinitell does not, as one example. Children can make and receive calls from these watches to a preset list of numbers, and they often come with some sort of “panic button.”[20]

**Tracking Apps**

Separate from the physical tracking apparatuses that may link to a phone application, there are stand-alone apps that do much of the same, without encumbering the child with an extra device. A search for “child tracker” on an iPhone’s app store yields dozens of results. The highest rated one at the time this article was written is the Family Locator by Life360. According to Life360’s website, there are fifty million families that utilize their service.[21] One reviewer likened it to “OnStar on [her] phone for everyone in [her] family.”[22] The Family Locator creates “circles” that a parent can set up and be the administrator for. The app uses the location services in each individual’s smart phone to track locations at all times. All you have to do is open the app’s map and you would be able to see the whereabouts of each circle participant.[23] Family Locator has an emergency alert feature that, when pressed, sends a text, voice message, and email to every other user in the circle.[24] It also shows the location of registered sex offenders in relation to your circle members and when and where recent crimes were committed (along with a certain level of detail).[25] Like many of the trackers described above, the app can notify users when one of the members has left a certain, pre-specified zone, and offers in-app messaging services.[26]

Cell phone service providers also provide tracking services. The AT&T Family Map,[27] Verizon Family Locator,[28] T-Mobile Family Where,[29] and Sprint Family Locator[30] are all services offered by the providers to customers that have a family plan. These have the same perks: real-time locator, alerts at scheduled times or when a family member leaves a particular place, and messaging from the app.

**Micro-chipping: Too Close for Comfort**
In 1998, Professor Kevin Warwick became the first human to ever “have a microchip [NXT] implant placed under his skin.” This kind of chip is a Radio Frequency Identification Device, or RFID, that is made up of “a small coil of wire and a series of memory chips, which are inactive until the coil is energised by a larger coil of wire carrying an electric current, operating just like a transformer. When the larger coil is linked to a computer it means that the computer can be programmed to do certain things only when a particular code – the code in the implant – is received.” In June of 2015, at the age of fifteen, Byron Wake became the youngest person to ever have one of these chips inserted into his body. These RFID chips are not the same as GPS trackers. They use “short range radio frequency... signals” that “transmit your identity as you pass through” portals or transponders designed to read said signals.

While the technology to insert a GPS tracking chip into a human has yet to unfold, there are certain projects in the works to make this possibility a reality. Applied Digital Solutions, Inc. has “recently applied to the Food and Drug Administration for permission to begin testing its Verichip device in humans. About the size of a grain of rice, the microchip can be encoded with bits of information and implanted in humans under a layer of skin.” The company has also begun looking into “combining the Verichip with another ADS product called Digital Angel,” making that product combination into a microchip tracking device.

The implications of such a product are heavier than the GPS trackers discussed above. A chip is a bodily intrusion, with negative repercussions for privacy rights in general, but particularly for the unprotected class of children. Children that have had limited to no trust placed in them by their parents miss out on important social and developmental milestones. “Parents need to teach their children to be independent and to be able to cope with risks and dangers,” and failure to do so may impact a child’s development and behavior. Trackers may also lull parents into a false sense of security pertaining to their parenting skills. But just because their child’s every move is being tracked does not make a good, hands-on parent. Moreover, there remains fears of these chips being hacked into, exposing an individual’s private information to “potential abus[e].” And while these chips have yet to materialize, microchipping a child looms large in the minds of many parents. For example, BrickHouse Security, a surveillance company, fields “at least” two calls a day from parents asking if it is “possible to implant a tracking microchip in their kids?” For children, left without a right to privacy from parents, this could spell disaster. For instance, the possibility of hacking these chips in order to commit identity theft or kidnapping fulfills the very fear that parents attempt to avoid in tracking their children. The law fails minors in this field, with little in the way of legislation or case law to come to their aid.

**Legislation**

The Children’s Online Privacy Protection Act (or COPPA) “imposes certain requirements on operators of websites or online services directed to children under thirteen years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a
child under 13 years of age." According to the act, children under the age of thirteen must obtain parental permission before giving out personal information. While this 1998 act applied only to websites marketed to children under thirteen, or that had knowledge that the websites were being used by children under thirteen, it essentially laid out that parents have authority over the private information of their children. In a similar vein, Kentucky's Family Educational Rights and Privacy Act (FERPA) gives parents access to educational records, even over a child’s objections. It is only when the child reaches the age of eighteen that they have full control over their own educational records.

These acts are indicative of an already stacked deck. Parental autonomy trumps the privacy interests of children. Some scholars have even argued that it is parental and/or familial privacy that COPPA and FERPA are truly protecting, not that of the child. While this issue has yet to come up in courts, or to be widely explored by legal scholars, the advent of trackers and the looming threat of micro-chip trackers begs the question: does the law point to children possibly being granted the right to privacy? In order to answer this, we must look at a brief history of juvenile case law.

**Case Law**

Juvenile courts in the United States are a curious thing: the first was established in Illinois in 1899 as an informal process. The judge was meant to take the place of the parent, and guide the child to services that would help them. The state took on the role of parent, *parens patriae*, with the judge focusing on the “best interest of the child,” rather than the punitive justice of the adult criminal system. However, this system has drastically changed since then. While “today’s juvenile justice system still maintains rehabilitation as its primary goal,” it has become increasingly prone to punishing juvenile offenders, rather than rehabilitating them. A waterfall of decisions, beginning the in 1960’s, changed the rights of juveniles and the way the system actually deals with juveniles for good.

In *Kent v. United States*, 16-year-old Morris Kent was apprehended in connection to a rape investigation, and confessed to the police officers. He also “volunteered information as to similar offenses involving housebreaking, robbery, and rape.” The juvenile court decided to waive its jurisdiction, but first, “the Juvenile Court judge did not rule on these motions. He held no hearing. He did not confer with petitioner or petitioner’s parents or petitioner’s counsel.” The Supreme Court subsequently held that the “right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice,” and that the “[a]ppointment of counsel without affording an opportunity for hearing on a ‘critically important’ decision is tantamount to denial of counsel.” It is also in *Kent* that the Court begins to speculate that juvenile courts had started to move away from their intended purpose of rehabilitation, saying: “there is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”
A year later, the Supreme Court moved the juvenile system even further away ideologically from that first juvenile court established in 1899. In In Re Gault. 15-year-old Gerald Gault was detained for making phone calls of the “irritatingly offensive, adolescent, sex variety.”[54] The court held that juveniles have six constitutional, due process rights: right to notice of charges, right to counsel, right to confront witnesses, privilege against self-incrimination, right to the transcript of proceedings, and right to appellate review.[55] Like the Kent court, Justice Stewart wrote in his dissent that by making these juvenile cases more adversarial, the Court was allowing juvenile proceedings to essentially approximate an adult criminal proceeding.[56]

The cases go on: in 1970, In Re Winship set the juvenile standard of proof at “beyond a reasonable doubt.”[57] The case of New Jersey v. T.L.O., in holding that the school did not violate the Fourth Amendment rights of the juvenile, gave juveniles Fourth Amendment rights. This was in 1985.[58] By this time, juveniles were given a long list of rights, akin to adult rights. Beyond cases involving juvenile defendants, the trend in courts was to entrust minors with certain rights. Planned Parenthood v. Danforth held that it was the right of a competent minor to decide if she should get an abortion by declaring that “the State may not impose a blanket provision... requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor.”[59] In both California v. Hodari and Florida v. J.L., the Court “assumed, without discussion, that children had the same Fourth Amendment rights as adults.”[60] Another significant case, Carey v. Population Services, held that “the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults,”[61] and seven justices declared that the provision prohibiting minors’ access to contraceptives was unconstitutional.[62] Minors were being given more rights in general, true. But the right to privacy, particularly from individual non-state actors, remained out of reach.

**The Repercussions of Georgia v. Randolph**

Why this right, and why now? The specter of microchip trackers has yet to materialize, and this is not an issue that has been litigated or explored on a meaningful scale. But the decision of Georgia v. Randolph, combined with the tracking technologies already available to parents today, as well as the increase in rights of children in the past few decades makes for an interesting legal question. In Georgia v. Randolph, the Court held that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.”[63] In dicta, however, children were barred from this protection. The Court stated that without “some recognized hierarchy, like a household of parent and child... there is no societal understanding of superior and inferior,” “[e]ach cotenant... has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other.”[64]
This language has “broad implications for the validity of third-party consent in a variety of parent-child scenarios, including parental consent to a police search of computer files, social networking sites, e-mail exchanges, Internet searches, and closed containers or locked spaces belonging to the child” or the information that tracks a child’s location twenty-four hours a day and reports back to parents as frequently as once per minute.[65] But historically, minors clearly possess some sort of Fourth Amendment rights, “independent of their parents, it is equally clear that in some circumstances youth will receive less constitutional protection than adults.”[66]

In her paper, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, Professor Kristen Henning searches “for continuity and coherence in Fourth Amendment jurisprudence involving minors” and “argues that parental authority too often prevails over children’s rights, even when context and demonstrated capacity would support affirmation of those rights.”[67] She looks at *Georgia v. Randolph* with concern that the *Randolph* rule would not be extended “when the occupants have the relationship of parent and minor child.”[68] Indeed, the Superior Court of Alameda County, California held that, taking into account the “rights and obligations” of “parents of minor children,” “*Randolph* does not require the police to defer to an objecting minor child over a consent to search by his or her parent.”[69]

Children’s “legitimate expectation of privacy to be free from unreasonable searches of his person, house, papers, or effects” is safeguarded by societal interests,[70] yet a “child has no recourse in the Fourth Amendment to exclude evidence at trial obtained by a parent who... delivers it to the police.”[71] Henning’s concern is that when the state needs to obtain consent to the search of a minor, the minor could not legally object as long as the parent has given consent.

Henning realizes that “the notion of parental autonomy is so deeply embedded in American society that courts have recognized a constitutionally protected interest in parents’ rights to raise children as they deem appropriate with minimal government interference.”[72] She looks at *Meyer v. Nebraska*, *Troxel v. Granville*, and *Belloti v. Baird* to identify the “fundamental right of parents to make decisions regarding the care, custody, and control of their children.”[73] She also points to *In Re Scott K* to bolster her position. In that case, “the California Supreme Court held that a father could not validly consent to a search of his minor son’s locked toolbox and... did not meet the... common authority standard. The toolbox unequivocally belonged to the son.”[74] Here, she states, “although there is presumptively little reason to doubt the motives and judgment of parents in matters of education, religion, and visitation, it may be unwise to presume a unity of interest between parents and children in the contexts of crime and delinquency.”[75]

But the lack of a minor’s privacy rights manifests itself in two ways: first, there are no privacy rights afforded to children against state actors when parental consent goes against minor’s consent. Second, minors have no privacy rights against an individual person. Arguing for a juvenile right to privacy goes deeper than the interest in avoiding criminal charges. A minor should have a graduated right to
privacy, decided on a case-by-case basis, against their parents. “Appellate courts in both Massachusetts and California have relied on the principles articulated in *Minnesota v. Olson* to conclude that minors have a legitimate expectation of privacy in the space identified as their home” in *Commonwealth v. Porter* and *In Re Rudy F.*[76]

**Parental Autonomy v. Privacy Rights**

In 1965, the Supreme Court found that, in penumbras of the Bill of Rights, there existed a constitutional right to privacy.[77] The Court held that the Third, Fourth, Fifth, and Ninth Amendments guarded a “a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system.”[78] For a right so seemingly integral to an individual, and to our society, it is a failing that this right is not extended to our youth.

While it is true that parental autonomy rights “often prevail in competition with the State,”[79] cases in which the child and the parent significantly disagree on consent or privacy are not many.[80] Even in these cases, “parents’ rights are not without limits and must be weighed against the rights and well-being of the minor.”[81] It is not unprecedented for courts to rule in favor of the minor over the parent.[82] The Court in *Belloti v. Baird* recognized that the right of a mature minor to get an abortion without parental consent was of such import that it outweighed parental autonomy rights.[83]

*In Re Gault* stated that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”[84] *In Re Scott K* showed that there is a limit to parental autonomy, in holding that the right to be free from unreasonable searches and seizures must “be protected even when the right imposes a burden on parents or limits parental control.”[85] *Prince v. Massachusetts* stated that “[F]amily itself is not beyond regulation in the public interest … [a]nd neither rights of religion nor rights of parenthood are beyond limitation.”[86] There is additionally a societal interest in ensuring that children grow up to become responsible, well-functioning adults, “ready and able to participate in society.”[87] Finally, courts have been arcing towards giving minors more and more rights in recent decades. Thus, particularly in the context of new technological advancements, there must be some privacy afforded to minors, from both the state and their parents.

**A Resolution**

The focus of the Supreme Court’s jurisprudence in regards to the right to privacy “has been on relational privacy, that is, the privacy of a relationship or relational unit, such as the marital relationship or the parent-child relationship.”[88] In order for children to be respected and protected, courts must view privacy as an individual right for all, even in respect to minors. “Recognizing merely relational privacy as a protection of the parent-child relationship as a unit is problematic, since there is a danger that children and their interests will be obscured from view and that those interests will simply be subsumed within the unity of the family.”[89]
Taking into account that children have “rights of a limited magnitude,”[90] or as rights limited in scope,[91] there must be a standard that ensures that these rights exist at all for children. Minors’ right to privacy should be extended to children, “from their parents according to their age and capacity, always bearing in mind the necessity of at least some private spaces for children.”[92] In light of new technology available to parents, a standard must be set when trackers are in use. GPS trackers can either enable helicopter parenting to an extreme degree or, on the other end of the spectrum, allow parents to become overly complacent in their parenting.[93] When this becomes an issue, when the privacy of the child is put at odds with the autonomy of the parent, courts must engage in a case-by-case analysis. The age of the child, that particular child’s maturity, the objective intent of the parent, the level of intrusion, the actor doing the tracking (state or parent), and the severity of all possible outcomes must be weighed. Under this standard, more mature, older children would be given more deference than their younger counterparts.

This six-factor analysis would most likely allow tracking devices and tracking apps to pass muster, as long as it is a parent tracking the child. The fact that the tracking is not permanent and that there are recourses available to minors (such as working for their own phone, or even just taking off the device) would most likely lower the possibility of a deeply unfavorable outcome. However, in cases involving the state, the consent of the parent and a mature minor must be obtained before any location tracking history is to be released. In cases involving chipping minors, the level of intrusion and severity of the outcomes would always outweigh the other factors. Since micro chipping involves an intrusion of both bodily autonomy and privacy, along with a risk of tampering or hacking, the test should never uphold the micro chipping of a child as legal. Unless the child is both in agreement and of an exceptionally mature mindset, this technology should not be placed in children until they reach the age of majority.

Conclusion

After the Court’s dicta in Georgia v. Randolph, along with the technological boom in child tracking devices, the time to protect our children is now. Parents cannot be permitted to overrule the privacy concerns of the children in a blanket fashion. The mature minor standard has already been applied to areas that courts have viewed as extremely important; there are few rights more important than those protected in our Bill of Rights. The right to privacy protects the most vulnerable of our society from being taken advantage of, from the dangers of identity theft and hacking, and from the psychological negative consequences being placed upon them. It is time for us to look after our children.


[4] Id.


[6] Id.


[14] Id.


[20] Id.


[23] Supra note 20.

[24] Id.

[26] Id.


[32] Id.

[33] Id.

[34] Jordyn Taylor, Can We Microchip Our Kids to Prevent Kidnapping?, Observer (Mar. 18, 2015, 8:00 AM) http://observer.com/2015/03/can-we-microchip-our-kids-to-prevent-kidnapping/.


[37] Id.


[39] Supra note 34.

[40] Supra note 33.


regulated not in terms of a right belonging to the child, but “as an interest of the parent or guardian”).


[47] Supra note 42.


[50] Id. at 544.

[51] Id. at 546.

[52] Id. at 561.

[53] Id. at 556.

[54] In re Gault, 387 U.S. 1, 4 (1967).

[55] Id. at 10.

[56] Id. at 78-81.


[62] Id. at 697.

[64] Id. at 114.
[65] Supra note 57, at 59.
[66] Id. at 55.
[67] Id.
[68] Id. at 87.
[70] Supra note 57, at 69.
[71] Id. at 70.
[72] Id. at 73.
[73] Id. at 74, (citing to Troxel v. Granville, 530 U.S. 57, 65 (2000) (“The liberty interest... of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”; Pierce v. Soc’y of Sisters, 268 U.S. 510, 534- 35 (1925); Meyer, 262 U.S. at 399 (1923))).
[74] Id. at 78, (citing to In Re Scott K., 24 Cal. 3d 395 (1979)).
[75] Id. at 98.
[76] Id. at 72.
[78] Id. at 486.
[79] Supra note 57, at 79.
[80] Id. at 78.
[81] Id. at 79.
[84] In re Gault, 387 U.S. 1, 13 (1967).
[85] In Re Scott K., 24 Cal. 3d 395, 403 (1979).
[87] Supra note 57, at 93.

[88] Supra note 40, at 772.

[89] Id. at 776.


[92] Supra note 40, at 793.

[93] Supra note 37.

© Sarah Saba

Source URL: https://www.natlawreview.com/article/big-mother-making-case-juvenile-right-to-privacy