CASE COMMENT

MINORS' RIGHT TO LITIGATE PRIVACY INTERESTS WITHOUT PARENTAL NOTICE

M.S. v. Wermers, 557 F.2d 170 (8th Cir. 1977).

In *M.S. v. Wermers*,[1] the Eighth Circuit Court of Appeals found that a plaintiff's failure to comply with a court order was not grounds for dismissing a suit if obedience to the order would have a chilling effect on the privacy right plaintiff sought to vindicate. M.S., an unmarried minor, brought a class action alleging that a state health clinic's policy requiring parental consent before dispensing contraceptives to minors violated her constitutional right to privacy.[2] The trial court ordered the appointment of a guardian ad litem for M.S. and parental notification of the appointment hearing.[3] M.S. refused to notify her parents, claiming notice would chill the privacy right she was asserting.[4] The district court dismissed the suit under Rule 41(b) of the Federal Rules of Civil Procedure[5] but the Eighth Circuit reversed, and *held*: Dismissal under Rule 41(b) for failure to obey a court order is an

1. 557 F.2d 170 (8th Cir. 1977).

2. *Id.* at 173. *See* notes 37-39 *infra*. M.S. brought the action under 42 U.S.C. § 1983 (1976) claiming the state health clinic denied her and others similarly situated privacy interests guaranteed by the 14th amendment. For a contemporary discussion of § 1983 actions, *see generally* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 87-96 (1973); Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part 1*, 60 VA. L. REV. 1, 3-28 (1974).

3. 557 F.2d at 173 n.2.

4. *Id.*

5. FED. R. CIV. P. 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

While Rule 41(b) states the defendant may move to dismiss, courts may invoke this dismissal power sua sponte. Stanley v. Continental Oil Co., 536 F.2d 914, 916-17 (10th Cir. 1976); Welsh v. Automatic Poultry Feeder Co., 439 F.2d 95, 96 (8th Cir. 1971). *See generally* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2369, at 191 (1971).

abuse of judicial discretion when obedience to the order would chill the privacy interest the litigant seeks to protect.[6]

Rule 41(b) of the Federal Rules of Civil Procedure authorizes federal courts to dismiss an action for failure to comply with a court order.[7] The rule protects the integrity of the court order,[8] allows courts to dispose of their caseloads without undue delays,[9] and enables them to control their dockets.[10] Involuntary dismissal under Rule 41(b), however, has been described as "the most severe sanction that a court may apply"[11] because it denies judicial access for procedural rather than

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6. 557 F.2d at 176.

7. *See* Link v. Wabash R.R., 370 U.S. 626, 630-32 (1962); Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir. 1976); Von Bronkhorst v. Safeco Corp., 529 F.2d 943, 947 (9th Cir. 1976); Fender v. Westgate-California Corp., 527 F.2d 1168, 1170 (9th Cir. 1975); Darlington v. Studebaker-Packard Corp., 261 F.2d 903, 905 (7th Cir.), *cert. denied*, 359 U.S. 192 (1959). *See also* Note, *Involuntary Dismissals for Disobedience or Delay: The Plaintiff's Plight*, 34 U. CHI. L. REV. 922 (1966).

Most state jurisdictions have a similar rule of procedure or statute permitting involuntary dismissals for failure to prosecute or comply with court orders. *See, e.g.*, ALA. R. CIV. P. 41(b); ARIZ. R. CIV. P. 41(b); CAL. CIV. PROC. CODE §§ 581, 581a, 583 (Deering 1972); FLA. R. CIV. P. 1. 420(b), (e); GA. CODE ANN. tit. 81A, § 141(b), (c), (e) (1977); IND. R. CIV. P. 41(b)(e); IOWA R. CIV. P. 215; MICH. GEN. CT. R. 504.2; N.Y. CIV. PRAC. ACT § 3216 (West 1971); R.I. R. CIV. P. 41(b); WASH. REV. CODE ANN. § 4.56.120 (1962).

A Rule 41 dismissal is also the terminal sanction for a plaintiff's failure to prosecute or other dilatory conduct. *See, e.g.*, Santiago v. Rivera, 553 F.2d 710, 713 (1st Cir. 1977) (failure to appear at pretrial conference); SEC v. Power Resources Corp., 495 F.2d 297, 298 (10th Cir. 1974) (per curiam) (three year delay in presenting motion for preliminary injunction); Krodel v. Houghtaling, 468 F.2d 887, 887-88 (4th Cir. 1972) (per curiam) (failure to interview or subpoena witnesses whose whereabouts plaintiff knew); Maiorami v. Kawasaki-Kisen K.K., 425 F.2d 1162, 1163 (2d Cir. 1970) (per curiam) (plaintiff's counsel deliberately failed to appear at trial without requesting an adjournment). In a nonjury case, Rule 41(b) allows the defendant to move for dismissal if, at the close of the plaintiff's case, he has failed to show a right to relief. *See* James v. DuBreuil, 500 F.2d 155, 156 n.2 (5th Cir. 1974); Trask v. Susskind, 376 F.2d 17, 19 (5th Cir. 1967). *See generally* C. WRIGHT & A. MILLER, *supra* note 5, § 2371.

Notwithstanding the statutory language of Rule 41(b), it has also been used to effect pretrial discovery. *See* First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613, 628 (8th Cir. 1957); Mooney v. Central Motor Lines, 222 F.2d 569, 571-72 (6th Cir. 1955). The practice of using Rule 41(b) in discovery has been criticized as being outside the scope of the rule. *See* Societe Int'l v. Rogers, 357 U.S. 197, 206-07 (1958). *See generally* Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 480-84 (1958).

8. *See* Fendler v. Westgate-California Corp., 527 F.2d 1168, 1170 (9th Cir. 1975) (per curiam).

9. *See* Canada v. Mathews, 449 F.2d 253, 255 (5th Cir. 1971); Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 914 (2d Cir. 1959).

10. *See* Pond v. Braniff Airways, Inc., 453 F.2d 347, 349 (5th Cir. 1972); Flaska v. Little River Marine Constr. Co., 389 F.2d 885, 887 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968).

11. Durham v. Florida E. Coast R.R., 385 F.2d 366, 368 (5th Cir. 1967). *See also* Boazman v. Economics Laboratories, Inc., 537 F.2d 210, 212 (5th Cir. 1976); O'Brien v. Sinatra, 315 F.2d 637, 641 (9th Cir. 1963).

substantive reasons and has the same res judicata effect as a decision on the merits.[12]

Dismissal of an action under Rule 41(b) is a matter of judicial discretion[13] and an appellate court will reverse only for abuse of that discretion.[14] In applying this standard of review, courts examine the

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12. Rule 41(b) provides in pertinent part:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, *operates as an adjudication upon the merits.*

Id. (emphasis added). *See* Costello v. United States, 365 U.S. 265, 285 (1961); Sepia Enterprises, Inc. v. City of Toledo, 462 F.2d 1315, 1316-17 (6th Cir. 1972); Himalayan Indus. v. Gibson Mfg. Co., 434 F.2d 403, 404 (9th Cir. 1970); Pearson v. Dennison, 353 F.2d 24, 27 (9th Cir. 1965); Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964). *See also* 31 MD. L. REV. 85 (1971). *But see* Madden v. Perry, 264 F.2d 169, 174-75 (7th Cir. 1959) (because Rule 41(b) derogates the common law rule of res judicata, it should be strictly construed and not bar reaching the merits later unless a court designates otherwise).

13. *See* Fendler v. Westgate-California Corp., 527 F.2d 1168, 1170 (9th Cir. 1975); Dewey v. Farchone, 460 F.2d 1338, 1340 (7th Cir. 1972) (per curiam); Marshall v. Farm Bureau Cas. Co., 36 F.R.D. 186, 188 (W.D. La. 1964), *aff'd*, 353 F.2d 737 (5th Cir.), *cert. denied*, 384 U.S. 910 (1966). *See generally* Link v. Wabash R.R., 370 U.S. 626, 633 (1962).

14. Link v. Wabash R.R., 370 U.S. 626, 633 (1962); Connolly v. Papachristi Shipping Ltd., 504 F.2d 917, 920 (5th Cir. 1974); United States v. Inter-America Shipping Corp., 455 F.2d 938, 940 (5th Cir. 1972) (per curiam); Von Poppenheim v. Portland Boxing & Wrestling Comm'n, 442 F.2d 1047, 1049 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). *Cf.* Marshall v. Sieboff, 492 F.2d 917, 918 (3d Cir. 1974) (abuse of discretion is also the standard of review for Rule 41(b) dismissals for failure to prosecute). *See also* Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394, 395 (2d Cir. 1970) (per curiam); Shafer v. Warehouse Employee's Local 730, 408 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1968).

The broad scope of discretion afforded trial courts in the implementation of Rule 41(b) can produce seemingly harsh results. *See, e.g.*, Hardin v. Brisco, 504 F.2d 885, 886 (5th Cir. 1974) (per curiam) (court ordered prisoner to send a sworn statement to the court, but because prisoner could not obtain notary service, compliance was impossible and the action was dismissed); United States v. Inter-America Shipping Corp., 455 F.2d 938, 940 (5th Cir. 1972) (dismissal held abusive where only six months had elapsed between filing of the complaint and the dismissal order); Brown v. Thompson, 430 F.2d 1214, 1216-17 (5th Cir. 1970) (trial court dismissal for failure of the plaintiff to offer evidence that was contained in inaccessible police files, *held*: reversed); Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441, 444 (2d Cir.) (trial court dismissed and ordered plaintiff to seek redress from an administrative agency that was not empowered to give the relief sought by the plaintiff, *held*: reversed), *cert. denied*, 393 U.S. 846 (1968); *cf.* Societe Int'l v. Rogers, 357 U.S. 204 (1958) (compliance with a discovery order under Rule 37 would have caused the plaintiff to violate foreign law, *held*: reversed).

The fear of abusive dismissals has caused at least one state to enact court rules that limit the judge's discretion. *See* CAL. RULES OF COURT, Rule 203.5(e). This rule, however, has been used sparsely. *See* Note, *The Demise (Hopefully) of An Abuse: The Sanctions of Dismissal*, 7 CAL. W.L. REV. 438, 464 (1971).

For a general discussion of appellate review of Rule 41(b) dismissals, see Waterman, *An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed For The Purpose of Insuring Compliance With Pretrial Orders*, 29 F.R.D. 420 (1961).

plaintiff's actions for evidence of delay or contumacious conduct[15] and consider whether the order itself was proper.[16] Dismissal under Rule 41(b) is erroneous if it is premised on plaintiff's failure to comply with an improper or invalid order.[17]

Rule 17(c) of the Federal Rules of Civil Procedure empowers courts to issue any order—including appointment of a guardian ad litem—to insure that the interests of minors seeking legal redress are protected by a competent adult.[18] Although courts must consider whether appointment of a guardian ad litem is necessary whenever minors pursue litigation,[19] the appointment decision is within the trial court's discretion.[20] The minor's parents may be appointed guardians ad li-

15. Graves v. Kaiser Alum. & Chem. Co., 528 F.2d 1360, 1361 (5th Cir. 1976); Durham v. Florida E. Coast Ry., 385 F.2d 366, 368 (5th Cir. 1967). *See also* Boazman v. Economics Laboratory, Inc., 537 F.2d 210, 213 (5th Cir. 1976); International Ass'n of Heat & Frost Insulators v. Leona Lee Insulation & Specialties, Inc., 516 F.2d 504, 505 (5th Cir. 1975).

16. *See* Carpenter v. Carpenter, 156 F.2d 857, 857 (D.C. Cir. 1946) (per curiam); Rossi v. McCloskey & Co., 149 F. Supp. 638, 641 (D. Pa. 1957); note 17 *infra*.

17. Michael v. Clark Equip. Co., 380 F.2d 351, 352 (2d Cir. 1967) (dismissal for failure to obey order of the court to "set forth causes of action clearly" reversed on the ground that there is no requirement under the Federal Rules that a complaint state a cause of action); Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 190 (2d Cir. 1943) (dismissal reversed because order directing plaintiff to amend his pleadings held improper). *See generally* First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613, 628 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957).

18. FED. R. CIV. P. 17(c) provides:

> Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

For a discussion of the use of guardians ad litem, see Hohmann & Duyer, *Guardians Ad Litem In Wisconsin*, 48 MARQ. L. REV. 445 (1965); Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619 (1976); Note, *Guardians Ad Litem*, 6 IOWA L. REV. 376 (1960). For traditional views of the functions of the guardian ad litem, see J. WOERNER, GUARDIANSHIP § 21 (1897).

19. *See* Noe v. True, 507 F.2d 9, 11 (6th Cir. 1974) (court's consideration of the propriety of a guardian ad litem appointment deemed critical); Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958) (court's failure to consider the necessity of a guardian ad litem to protect the interests of a minor litigant is grounds for reversal).

20. *See, e.g.*, Noe v. True, 507 F.2d 9, 11-12 (6th Cir. 1974); Jacobs v. Board of School Comm'rs, 490 F.2d 601, 603-04 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975); Foe v. Vanderhoff, 389 F. Supp. 947, 957 (D. Colo. 1975). *See also* 3A MOORE'S FEDERAL PRACTICE ¶ 17.26, at 280 (2d ed. 1978). In state jurisdictions that have patterned their applicable rule of procedure after FED. R. CIV. P. Rule 17(c), *see* note 18 *supra*, the appointment of a guardian ad litem is also discretionary. *See, e.g.*, COLO. R. CIV. P. 17(g); IDAHO R. CIV. P. 17(c); IOWA R. CIV. P. 17.

tem,[21] but it is improper for the court to do so when there is a potential conflict between the parents' interest and the right the minor is asserting.[22]

Although minors are not accorded the full panoply of adult constitutional rights,[23] courts have upheld their right to sue without parental approval,[24] to free speech[25] and religion,[26] and to due process[27] and

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While some jurisdictions provide for the mandatory designation of a guardian ad litem to represent minors or incompetent litigants, *see, e.g.*, ARK. STAT. ANN. § 27-823 (1947); GA. CODE ANN. § 3-115 (1959); S.D. COMPILED LAWS ANN. § 26-1-3 (1976); TEX. R. CIV. P. 173, such appointments have been deemed procedural in nature, thus permitting federal courts to employ the discretionary elements of FED. R. CIV. P. Rule 17(c). *See* Travelers Indem. Co. v. Bengston, 231 F.2d 263, 266 (5th Cir. 1956). *See also* Slade v. Louisiana Power & Light Co., 418 F.2d 125, 126 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 38-39 (5th Cir. 1958). *See generally* C. WRIGHT & A. MILLER, *supra* note 5, § 1571.

21. *See* United States v. Noble, 269 F. Supp. 814, 816 (E.D.N.Y. 1967). *See also* Note, *supra* note 18, at 386. Courts, however, are not obligated to appoint the parents, *see* Fong Sik Leung v. Dulles, 226 F.2d 74, 82 (9th Cir. 1955); the minor's attorney is more often designated as guardian ad litem. *See, e.g.*, Mutual Life Ins. Co. of N.Y. v. Ginsburg, 228 F.2d 881, 883 (3d Cir. 1956); First Nat'l City Bank v. Gonzalez & Co., 308 F. Supp. 596, 600 (P.R. 1970); Greer v. Mid-West Nat'l Fire & Cas. Ins. Co., 305 F. Supp. 352, 354 (E.D. Ark. 1969). *See also* N.Y. SURR. CT. PROC. ACT § 404 (McKinney 1967) (guardians ad litem must be attorneys).

22. Guerra v. American Colonial Bank, 21 F.2d 56, 61 (1st Cir. 1927); Horacek v. Exon, 357 F. Supp. 71, 74 (D. Neb. 1973) (mem.); Swift v. Swift, 61 F.R.D. 595, 598 (E.D.N.Y. 1973); United States v. Noble, 269 F. Supp. 814, 816 (E.D.N.Y. 1967); United States v. E.I. DuPont De Nemours & Co., 13 F.R.D. 98, 105 (N.D. Ill. 1952); United States v. 15,883.55 Acres of Land, 45 F. Supp. 558, 561 (W.D.S.C. 1942); *cf.* Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974) (per curiam) (state cannot adequately represent a minor ward in a lawsuit by that minor to force the state to provide her with an abortion; they have adverse interests); Salaices v. Sabraw, 400 F. Supp. 367, 368 (N.D. Cal. 1975) (mem.) (when a conventional guardian's interests obviously conflict with those of the child, the court should appoint a separate guardian ad litem).

23. Constraints on the freedoms of minors may be acceptable "even though comparable restraints on adults would be constitutionally impermissible." Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part). *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 554-56 (1971) (jury trial is not constitutionally required in the adjudicative phase of a state juvenile court proceeding); Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970) (eighteen year olds may be denied the right to vote in state and local elections); Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) (parents may block a minor's access to literature sent through the mail if they feel it is offensive); Ginsberg v. New York, 390 U.S. 629, 638 (1968) (obscenity standards may be more restrictive when applied to minors); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (child labor laws may operate to circumscribe a minor's freedom of religion). *See generally* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 314 (1974).

24. *See* Bellotti v. Baird, 428 U.S. 132, 145 (1975) (if parents refuse to allow their minor daughter to obtain an abortion she may independently obtain a court order permitting her to receive one). *See also* Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35 (5th Cir. 1958); T—H— v. Jones, 425 F. Supp. 873 (D. Utah 1975); Doe v. Exon, 416 F. Supp. 716 (D. Neb. 1975); Swift v. Swift, 61 F.R.D. 595 (E.D.N.Y. 1973); 3A MOORE'S FEDERAL PRACTICE ¶ 17.26 (2d ed. 1978); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1570 (1971 & Supp. 1978).

25. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969) (minor students allowed

equal protection.[28] Limitations on minors' constitutional rights result from balancing the minor's rights against the distinct interests of parents and the state.[29] While parents have a due process right to direct the upbringing of their children,[30] the state has an interest in protecting minors from their own immature acts.[31] The parents' "essential" right

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to wear arm bands protesting government policy in Vietnam); Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (school officials may not compel students to salute the flag).

26. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225-26 (1963) (no state or school board may require bible readings in a public school); Engel v. Vitale, 370 U.S. 421, 430 (1962) (prayers may not be recited in public schools).

27. The minor's due process rights have been recognized primarily in the context of criminal proceedings. "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." Haley v. Ohio, 332 U.S. 596, 601 (1948) (due process limitations apply to the extraction of confessions from a minor defendant). *See also* Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962).

Juvenile courts are also bound by some due process requirements. *In re* Gault, 387 U.S. 1, 31-42 (1967); Kent v. United States, 383 U.S. 541, 557-63 (1966). *See* Breed v. Jones, 421 U.S. 519, 541 (1974) (Constitution protects minor from double jeopardy); *In re* Winship, 397 U.S. 358, 368 (1970) (standard of proof in adjudicatory stage of delinquency proceeding is "beyond a reasonable doubt"). For an overview of the minor defendant's due process and equal protection rights during the juvenile court process, see F. MILLER, R. DAWSON, G. DIX, & R. PARNAS, THE JUVENILE JUSTICE PROCESS 387-601 (2d ed. 1976). *See generally* NATIONAL JUVENILE LAW CENTER, LAW AND TACTICS IN JUVENILE CASES (2d ed. 1974).

Minors are also entitled to due process rights in school disciplinary actions. *See* Wood v. Strickland, 420 U.S. 308, 326 (1975) (dictum); Goss v. Lopez, 419 U.S. 565, 572-76 (1975).

28. *See, e.g.*, Gomez v. Perez, 409 U.S. 535, 537-38 (1973) (per curiam) (the denial of child support benefits to illegitimate children violates the equal protection clause); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972) (denial of death benefits to illegitimate children violates their equal protection rights); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (segregation in public schools violates students' equal protection rights).

29. *See generally* Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285 (1976); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1014-16 (1975).

30. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); May v. Anderson, 345 U.S. 528, 533 (1953); Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Drollinger v. Milligan, 552 F.2d 1220, 1226 (7th Cir. 1977); Doe v. Irwin, 428 F. Supp. 1198, 1206-07 (W.D. Mich. 1977). *See generally* 1976 B.Y.U.L. Rev. 296, 300.

31. At common law infants do not possess the power to exercise the same legal rights as adults. The disabilities of infants are really privileges, which the law gives them, and which they may exercise for their own benefit, the object of the law being to secure infants from damaging themselves or their property by their own improvident acts or prevent them from being imposed on by others. The rights of infants must be protected by the court, while adults must protect their own rights.

Dixon v. United States, 197 F. Supp. 798, 803 (W.D.S.C. 1961). *See generally* Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837, 847 (1977); Note, *supra* note 29, at 1007-08; 1974 UTAH L. REV. 433-35.

to autonomy in childrearing[32] may conflict with the state's interest[33] in protecting children from their incapacity for self-determination, and both can modify the minor's exercise of constitutional rights.[34]

The Supreme Court has recognized a constitutional privacy right in decisions regarding contraceptives[35] and abortions,[36] and has extended it in a limited fashion to minors.[37] In *Planned Parenthood v. Danforth*,[38] the Court held that the minor's privacy right prevents the state from prohibiting abortions without parental consent;[39] and in

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The state's power over the minor is traditionally considered to emanate from its police power or the concept of parens patriae, the responsibility of the state to care for a child whose natural parents have either been unable to fulfill or have abdicated their responsibilities in the nurture of the child. *See* Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Prince v. Massachusetts, 321 U.S. 158, 168 (1944). *See generally* Kleinfeld, *The Balance of Power Among Infants, Their Parents and The State*, 5 FAM. L.Q. 64, 107 (1971).

32. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

33. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923).

34. *See, e.g.*, Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) (parents may prohibit the mailing to their children of literature that they deem offensive); Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (the state may more restrictively prohibit the sale of obscene literature to children); Prince v. Massachusetts, 321 U.S. 158, 168 (1943) (state has the power to restrict child labor); United States v. DiPrima, 472 F.2d 550, 551 (1st Cir. 1973) (parents may waive child's protection against unconstitutional search and seizure); Merriken v. Cressman, 364 F. Supp. 913, 921 (E.D. Pa. 1973) (parents may waive their children's fifth amendment rights against self-incrimination by allowing them to fill out a questionnaire designed to identify potential drug abusers). *But see* Bartley v. Kremens, 402 F. Supp. 1039, 1048 (E.D. Pa. 1975) (absent a showing that his interests have been fully protected, parents may not waive their child's due process rights). *See also* 12 U. RICH. L. REV. 221, 227 (1977).

35. Eisenstadt v. Baird, 405 U.S. 438, 452-55 (1972); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

36. Doe v. Bolton, 410 U.S. 179, 189 (1973); Roe v. Wade, 410 U.S. 113, 153 (1973).

The Supreme Court has also identified privacy interests in marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and child rearing, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). For an excellent description of the genesis and contemporary status of these rights, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15 (1978).

37. "[T]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults." Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). *See generally* notes 39-48 *infra* and accompanying text. *See also* Note, *Third Party Consent to Abortions Before and After Danforth: A Theoretical Analysis*, 15 J. FAM. L. 508, 520 (1977).

38. 428 U.S. 52 (1976)

39. *Id.* at 74. *See* Bellotti v. Baird, 428 U.S. 132 (1976); Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Abortion Coalition of Mich., Inc. v. Michigan Dep't of Pub. Health, 426 F. Supp. 471 (E.D. Mich. 1977); Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 421 F. Supp. 734 (N.D. Ind. 1976), *aff'd mem.*, 429 U.S. 1067 (1977); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975); LA. REV. STAT. ANN. §§ 40:1065.1, :1095-96 (Supp. 1977) (statutory authorization for minors to receive nontherapeutic abortions without parental consent).

Carey v. Population Services International[40] it invalidated New York's blanket prohibition of the distribution of contraceptives to minors.[41]

Although absolute restrictions are unconstitutional, the Court has indicated that a minor's privacy right may be narrowed to accommodate the competing interests of parents and the state.[42] In *Danforth*, four justices found the parental consent requirement satisfactory,[43] and Justices Stewart and Powell, although rejecting the absolute parental veto, endorsed some parental involvement in the decisionmaking process.[44] The Court, in *Bellotti v. Baird*,[45] remanded a challenge to a statute providing that a minor could obtain a court order granting her abortion for "good cause shown" despite her parents' refusal of consent.[46] If the state interpreted the statute as not unduly burdening the minor's right to abort but simply as preferring parental consultation, the Court indicated that it would be upheld.[47] Justice Powell stated in his *Carey* concurrence that a parental consultation requirement would not imper-

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40. 431 U.S. 678 (1977).

41. The court found the statute not rationally related to the state's asserted interest in inhibiting minors' sexual activities. *Id.* at 691-96. *See also* T—H— v. Jones, 425 F. Supp. 73 (D. Utah 1975), *aff'd*, 425 U.S. 986 (1976). *But see* Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich. 1977).

There have been fewer cases challenging the restriction of minors' contraceptive rights because many states recognize the minor's right to obtain contraceptives. *See, e.g.*, COLO. REV. STAT. § 13-22-105 (1973); GA. CODE ANN. § 99-3103 (1976); ILL. REV. STAT. ch. 91, § 18.7 (Smith-Hurd Supp. 1978); MD. ANN. CODE art. 43, § 135(a) (1971); ORE. REV. STAT. § 109.640 (1971); VA. CODE § 32-137(7) (Supp. 1976).

At least one court has also held that minors have a privacy interest in their identity. *See* Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973). For a general discussion concerning minors' interest in the integrity of their own bodies, see Bennett, *supra* note 29, at 311.

42. *See* 431 U.S. at 703-12 (Powell, J., concurring). *See generally* notes 30-34 *supra* and accompanying text.

43. 428 U.S. at 92-105 (Burger, C.J., White, Rehnquist, & Stevens, J J.).

44. There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.

Id. at 91 (Stewart, J., concurring).

45. 428 U.S. 132 (1976).

46. *Id.* at 134-36. In order to receive judicial permission, the minor had to show "good cause." *Id.* at 135. The court stated that "good cause" is shown when it is demonstrated that the abortion is in the child's best interests. *Id.* at 145.

47. *Id. See generally* Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837, 840-44 (1977). *Bellotti* was decided by a unanimous Court on the same day as *Danforth*. *See* notes 38-39 *supra* and accompanying text.

missibly interfere with a minor's right to contraceptives.[48]

In *M.S. v. Wermers*,[49] the Eighth Circuit acknowledged the district court's obligation to consider the appointment of a guardian ad litem and its power to order a hearing for that purpose,[50] but found that the lower court abused its discretion when it dismissed plaintiff's claim.[51] The court noted the absence of "a clear record of delay or contumacious conduct by the plaintiff"[52] that would have justified dismissal;[53] although plaintiff had initially opposed the appointment of a guardian ad litem, she later suggested potential candidates for the position.[54]

The court then examined the propriety of the court order.[55] Because plaintiff was challenging the constitutionality of a parental veto over a minor's access to contraceptives,[56] Judge Webster, for the court, concluded that it would be inappropriate to appoint the minor's parents as guardians ad litem; their interests clearly were adverse.[57] The majority noted that her parents' knowledge of the litigation would chill the privacy interest plaintiff was asserting[58] and held that conditioning the lawsuit's progression on parental notice would have a similar, unnecessary, chilling effect.[59] Because the minor's alleged privacy right outweighed accommodation of parental concerns at this stage of the proceeding, the court's order was improper and dismissal for failure to comply with it was an abuse of discretion.[60]

Judge Henley, in dissent, reasoned that the propriety of the district court's dismissal involved the resolution of two issues. First, he agreed with the majority that it would be improper for plaintiff's parents to act

48. "A requirement of prior parental consulation is merely one illustration of permissible regulation in this area." 431 U.S. at 710 (Powell, J., concurring).

49. 557 F.2d 170 (1977).

50. *Id.* at 174.

51. *Id.* at 175.

52. *Id.* (quoting Graves v. Kaiser Alum. & Chem. Co., 528 F.2d 1360, 1361 (5th Cir. 1976)).

53. *Id.*

54. Plaintiff's counsel requested that the court appoint him or a former family planning director as guardian ad litem. *Id.* at 173 n.2.

55. *Id.* at 175 (citing Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968); Michael v. Clark Equip. Co., 380 F.2d 351 (2d Cir. 1967); Original Ballet Russe Ltd. v. Ballet Theatre, Inc., 133 F.2d 187 (2d Cir. 1943)).

56. 557 F.2d at 173.

57. *Id.* at 176.

58. *Id.* (citing Roe v. Ingraham, 346 F. Supp. 536, 541 n.7 (S.D.N.Y.), *rev'd on other grounds*, 480 F.2d 102 (2d Cir. 1973)).

59. 557 F.2d at 176.

60. *Id.*

as guardians ad litem.[61] It did not follow, however, that her parents should not be notified of the guardian ad litem hearing.[62] Because minors often are unable to determine their best interests, the state and the minor's parents are empowered to protect children from ill-advised decisions.[63] The right of plaintiff's parents to the control and custody of their child required that they be notified of her involvement in the litigation.[64] Notice would enable the parents to insure that the minor's decision to litigate was not unduly influenced by outsiders.[65] Thus, the dissent concluded, the minor's right to privacy in litigation does not outweigh the parent's right to know their child is a party plaintiff.[66]

Although Rule 41(b) facilitates the smooth dispensation of justice and insures the efficacy of court orders,[67] its unfettered use may result in injustice.[68] In *M.S. v. Wermers*,[69] the majority held that the district court abused its discretion under Rule 41(b) because compliance with its order would have compromised the privacy interest plaintiff was asserting.[70] The court's holding turns on its implicit recognition of a broad privacy right for minors.

The court correctly concluded that plaintiff's parents could not properly act as guardians ad litem; it does not necessarily follow, however, that they must be excluded from the guardian ad litem hearing. This

61. *Id.* (Henley, J., dissenting).

62. While it may be inappropriate to appoint parents to act as guardians ad litem in litigation challenging a grant of parental veto power, it does not follow that it is equally inappropriate to condition the further progress of the lawsuit upon notification to the parents of the hearing on the appointment of a guardian ad litem. There is a crucial distinction between appointing parents to serve as guardians ad litem and notifying them that their minor child is involved in serious litigation for which a guardian ad litem may be appointed.

Id.

63. *Id.* at 177-78.

64. Consonant with this right [the right of parents to the control and custody of their minor children], parents may need to know that their minor child has embarked upon a course of litigation, particularly where they probably will not serve as guardians ad litem and where the outcome of the action need not be fatally affected by their awareness of it.

Id. at 178.

65. *Id.*

66. *Id.* The dissent, however, specifically stated that its view of the propriety of parental notice was not dispositive of the merits of plaintiff's action. "Though the two decisions may involve the analysis of similar elements, a finding in favor of the parental right at this stage of the proceedings would not preclude a different finding upon consideration of the merits of the case." *Id.*

67. *See* notes 7-10 *supra* and accompanying text.

68. *See* notes 11-14 *supra* and accompanying text.

69. 557 F.2d at 176.

70. *Id.*

conclusion results only if the majority believed the plaintiff was asserting a broader privacy interest than the right to obtain contraceptives without parental consent. Certainly the minor's right to privacy in pursuing litigation, at issue in the court's notification order, was broader than the right to obtain contraceptives without parental consent, at issue in the law suit. The court could have upheld the district court's order without chilling the right to obtain contraceptives. The fact that it did not suggests that it implicitly recognized a broad privacy right in minors.

Because the dissent acknowledged the distinction between the privacy interests involved, it reasoned that compliance with the court order would not chill the narrow interest at issue in the litigation.[71] The minor's right to challenge a parental consent statute and the parents' interest in their child's decision to litigate the matter are not mutually exclusive; notifying the plaintiff's parents of the guardian hearing is not dispositive of the merits.[72]

If the *M.S.* majority intended to endorse a broad privacy right in minors, its decision is inconsistent with recent Supreme Court decisions. Although *Danforth* and *Carey* struck down blanket parental vetoes over minors in their use of contraceptives and abortions,[73] the concurring and dissenting opinions in these cases and the *Bellotti* remand decision suggest that parents have a right to share in a minor's decisions relating to sexual activity.[74] A minor's privacy interest does not dominate the parents' right to control their children and, the Court seems to be saying, parental involvement—short of a veto—in the minor's decision satisfactorily accommodates the two interests.[75]

The Federal Rules of Civil Procedure favor disposition of litigation on substantive rather than procedural grounds.[76] By excusing the plain-

71. *See* notes 62 & 64 *supra*.

72. *See* note 62 *supra*.

73. *See* notes 38-41 *supra*.

74. *See* notes 42-48 *supra* and accompanying text.

75. Admittedly, even minimal parental involvement in the minor's decision to use contraceptives may be tantamount to a veto. To maintain that a child is able to approach her parents and seek their reasoned advice in the use of contraceptives presupposes an exceedingly stable and open family relationship. Adolescents are often reluctant to discuss sexual matters with their parents. *See* Stein, *Furnishing Information and Medical Treatment to Minors for Prevention, Termination and Treatment of Pregnancy*, 5 CLEARINGHOUSE REV. 131, 154 (1971). A minor's desire to avoid parental confrontation may discourage obtaining birth control materials as effectively as parental veto power. *Cf.* State v. Koome, 48 Wash. 2d 901, 906, 530 P.2d 260, 264 (1975) (requiring minors to consult their parents may unduly limit a minor's right to obtain an abortion).

76. *See, e.g.*, Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974) (Rule 41(b) is contrary to

tiff from complying with a court order that would chill the privacy right being asserted, the Eighth Circuit complied with this policy. In light of recent Supreme Court decisions, however, the majority's holding in *M.S.* is questionable. Along with the court's efforts to rectify a perceived denial of procedural justice, it has afforded the minor plaintiff a privacy interest exceeding that recognized by the Supreme Court.

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the judicial policy of deciding cases on their merits); Sepia Enterprises, Inc. v. City of Toledo, 462 F.2d 1315, 1318 (6th Cir. 1972) (per curiam); Almance Indus. v. Filene's, 291 F.2d 142, 146 (1st Cir. 1961) (court consideration of expedition for its own sake over the rights of the plaintiff causes emphasis of secondary considerations over primary ones); Fakouri v. Cadais, 147 F.2d 667, 669 (5th Cir. 1945) (the Federal Rules of Civil Procedure indicate a policy of disregarding technicalities and a preference for deciding claims on their merits). *See generally* Note, *supra* note 14, at 464.