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# VI. Constitutional Law & Civil Rights

plier's oral estimate.[112] Although the *Campbell* decision helps to remove some of the worry involved in construction bidding situations, the last few hours before the prime contract deadline will remain a hectic and frustrating time for both general contractors and suppliers.[113] After *Campbell*, North Carolina contractors can rely with more certainty on the oral estimates that potential suppliers make during the last few minutes before a bid deadline.[114] The *Campbell* decision, therefore, reflects the more popular view on the issue of promissory estoppel and the statute of frauds[115] and establishes a clear rule in North Carolina that allows a court to apply promissory estoppel to enforce an oral contract for the sale of goods despite the UCC's statute of frauds.[116]

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## VI. CONSTITUTIONAL LAW & CIVIL RIGHTS

### A. *Civil Rights Actions: Borrowing State Statutes of Limitations*

Individuals seeking to redress grievances of racial discrimination by private employers may file complaints with a state administrative agency[1] or in federal

112. *See* 708 F.2d at 932-34. The Fourth Circuit's decision in *Campbell* provides persuasive authority to North Carolina courts and practitioners because the Fourth Circuit decided the case as the court believed the North Carolina courts would decide it on the same facts. *See id.* at 933-34; *see supra* note 25 (discussion of *Erie* doctrine). The *Campbell* decision should approximate what a North Carolina court would have decided because the Fourth Circuit merely extended the promissory estoppel doctrine that the North Carolina courts expressly had approved. *See supra* note 27 (discussion of *Wachovia Bank* case which recognized doctrine of promissory estoppel in North Carolina).

113. *See supra* notes 1-8 and accompanying text (description of bidding process and problems that arise).

114. *See supra* note 112 and accompanying text (discussion of importance and effect of *Campbell* on North Carolina law).

115. *See supra* notes 41-97 and accompanying text (discussion and analysis of decisions of other courts).

116. *See supra* note 112 and accompanying text (practical effect of *Campbell* holding on North Carolina law).

1. *See, e.g.*, COLO. REV. STAT. § 24-34-303 (1973) (establishing Colorado civil rights commission); MD. ANN. CODE art. 49B § 1 (1979) (establishing Human Relations Commission); MASS. GEN. LAWS ANN. ch. 6 § 56 (West 1983) (establishing Massachusetts Commission Against Discrimination). State legislatures have established civil rights agencies to resolve complaints of discrimination on a state level. *See* CENTER FOR NATIONAL POLICY REVIEW, STATE AGENCIES AND THEIR ROLE IN FEDERAL CIVIL RIGHTS ENFORCEMENT 1 (1977) (survey of state civil rights agencies). Each state provides its commission with specific powers and duties. *See id.* at 17-21, Appendix B; *see, e.g.*, N.C. GEN. STAT. § 143B-391 (1983) (commission may study problems concerning human relations, promote goodwill and promote equality of opportunity for all citizens); S.C.

court under section 1981 of the Civil Rights Act of 1866.[2] Agency enabling statutes provide specific time limitations for complaints filed with the state

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CODE ANN. § 1-13-70 (Law Co-op 1976 & Supp. 1983) (commission may promulgate rules and regulations in accordance with statute, form policies to effect statute, create advisory agencies, issue publications, hold hearings, receive complaints, and issue subpoenas); VA. CODE § 15.1-687.3 (1983) (commission may promote policies to ensure equal opportunity and serve as agency for receiving, investigating and assisting in resolution of citizen complaints of discriminatory practices). The Maryland Human Relations Commission primarily focuses upon discrimination in housing, employment, and public accommodations. *See* MD. ANN. CODE art. 49B, § 5-8, 14-30 (1983) (reviewing unlawful practices in housing, employment and public accommodations). Article 49B governs both the substantive and procedural aspects of Maryland's discrimination law. *See id.*

2. Act of Apr. 9, 1966, Ch. 31, 14 Stat. 27 *reenacted* as Act of May 31, 1870, Ch. 114, 16 Stat. 144 (codified at 42 U.S.C. § 1981) (1976). Section 1981 provides that all citizens shall have the same right as white citizens to make and enforce contracts, sue parties, and give evidence. *See id.* While § 1981 refers specifically to the enforcement of contracts,the United States Supreme Court has interpreted § 1981 as prohibiting racial discrimination in private employment. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975) (affirming federal court decisions in recognizing that § 1981 affords federal remedy against racial discrimination in private employment). Congress enacted § 1981 under the authority of the thirteenth amendment to secure civil rights for blacks after the Civil War. *See* Runyon v. McCrary, 427 U.S. 160, 179 (1976) (§ 1981 constitutes exercise of federal legislative power under § 2 of thirteenth amendment); Civil Rights Cases, 109 U.S. 3,22 (1883) (Civil Rights Act of 1866 enacted under authority of thirteenth amendment to eliminate incidents of slavery); United States v. Harris, 106 U.S. 629, 640 (1882) (Congress enacted Civil Rights Act of 1866 by virtue of § 2 of thirteenth amendment); U.S. CONST. amend. XIII, § 2 (Congress may enforce prohibition against slavery and involuntary servitude with appropriate legislation). *See generally Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 33, 35-68 (1968) (reviewing legislative history of § 1981) [hereinafter cited as *Developments*].

In *Johnson v. Railway Express Agency*, the Supreme Court reviewed the nature of an action based on § 1981. 421 U.S. 454, 459-60 (1975). The Supreme Court determined that § 1981 provides a specific federal remedy for victims of racial discrimination in private employment. *Id.* at 460. If the complainant wins the suit against his employer, the court may award equitable and legal relief, and need not restrict awards of back pay. *Id.* The *Johnson* Court observed that while conciliation and persuasion are desirable means to eliminate discrimination, private suits provide an alternative to agency actions for resolving disputes. *Id.* at 461.

Individuals seeking to redress grievances of discrimination by private employers also may proceed under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. *See* Civil Rights Act of 1964, Pub. L. 88-352, § 730, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e, 2000e-4) (1981) (creating Equal Employment Opportunity Commission). Under Title VII, a complainant must file a discrimination charge with the appropriate state agency and wait 60 days from the date of filing before filing a grievance with the Equal Employment Opportunity Commission. (EEOC) *Id.* A complainant may address the EEOC prior to the expiration of the 60-day period only if the state agency has terminated the complainant's proceeding. *Id.* In *Johnson v. Railway Express Agency*, the Supreme Court examined the procedural and substantive aspects of Title VII actions. 421 U.S. 454, 457-58 (1975). The *Johnson* Court noted that the EEOC investigates individual complaints and promotes voluntary adherence to Title VII requirements. *Id.* at 458. If the EEOC is unsuccessful in resolving the complaint, an individual may demand a right-to-sue letter and institute a Title VII action personally. *Id.* If the complainant wins an award of backpay, he may recover at the maximum the amount of money lost over a two-year period. *Id.*; 42 U.S.C. 2000e-5g. The Supreme Court also determined that the legislative history of Title VII reflected Congress' intent to allow an individual to pursue independently his or her rights under a federal civil rights statute such as § 1981. *See* 421 U.S. at 459; Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-54 (1975) (examining Title VII actions). *See generally* Comment, *Title VII and 42 U.S.C.* §

agency.[3] Congress, however, did not provide the Civil Rights Acts with periods of limitation.[4] Federal courts, therefore, must borrow an appropriate statute of limitations from the state in which the action is pending.[5] If state law specifically provides a statute of limitations for actions filed under federal law, that statute is applicable.[6] If, however, no statute is directly applicable, federal courts must choose the limitation period applicable to a state cause of action that is most analogous to the federal cause of action.[7] In *McNutt*

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1981: Two Independent Solutions, 10 U. RICH. L. REV. 339, 342 (1976) (analyzing differences between Title VII and § 1981); P. WEINER, EMPLOYMENT DISCRIMINATION LITIGATION 1979, 401-38 (1979) (comparing litigation under Title VII and § 1981).

3. *See, e.g.*, MD. ANN. CODE art. 49B, § 9 (1983) (individuals must file complaint with Maryland Human Relations Committee within 6 months of occurrence of alleged discriminatory conduct); S.C. CODE ANN. § 1-13-90 (Law Co-op. 1982) (individuals required to file complaint with South Carolina Commission on Human Affairs within 180 days of occurrence of alleged discriminatory conduct); W. VA. CODE § 5-11-10 (1982) (individuals required to file complaint with West Virginia Human Rights Commission within 90 days of occurrence of alleged discriminatory conduct).

4. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1974) (Congress did not provide specific federal statute of limitations for cause of action under § 1981). Congress did not incorporate periods of limitations into the Reconstruction Civil Rights Acts. *See* Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144) (codified at 42 U.S.C. § 1981) (1981) (all citizens shall have same right to make and enforce contracts); Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982) (1981) (all citizens shall have same right to inherit, purchase, lease, sell, hold, and convey real and personal property); Acts of July 31, 1861, ch. 33, 12 Stat. 284, and April 20, 1871, ch. 22, § 2, 17 Stat. 13 (codified at 42 U.S.C. § 1985) (1981) (authorizes cause of action for conspiracy to interfere with civil rights).

5. *See* Holmberg v. Armbrecht, 327 U.S. 392, 295 (1945) (Supreme Court generally has interpreted Congress' silence to mean that federal courts should apply state limitations period); *See, e.g.*, American Pipe and Construction Co. v. Utah, 414 U.S. 538, 556 n.27 (1974) (when Congress does not designate a period of limitations federal courts generally look to local law to obtain limitations period); O'Sullivan v. Felix, 233 U.S. 318, 322 (1914) (absent period of limitations for federal assault charge, court should apply state statute of limitations); Campbell v. Haverhill, 155 U.S. 610, 616 (1895) (absent limitations period for federal patent infringement action, courts reasonably may assume that Congress intended courts to apply state statutes of limitation). *See generally*, 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 3.07[2] (2d 1983) (survey of federal laws which do not have limitations periods and criteria for selecting state statutes of limitations); C. WRIGHT, LAW OF FEDERAL COURTS § 60, at 394 (4th ed. 1984) (discussing rules for applying state statutes of limitations to federal actions without limitations periods); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 76 (1972) (discussing selection of state statutes of limitation for § 1981 actions); Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953) (review of federal statutes without limitations periods and criteria for selecting state statutes of limitations).

6. *See, e.g.*, COLO. REV. STAT. § 13-80-106 (1973) (two-year limitations period applicable to federal actions without period of limitations); NEB. REV. STAT. § 525-219 (1975) (three-year limitations period applicable to federal actions without period of limitations); TENN. CODE ANN. § 28-3-104 (1980) (one-year limitations period for actions brought under federal civil rights statute).

7. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1974) (absent period of limitations under § 1981, court must apply most appropriate limitation period that state law provides). *See generally*, Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97 (examining circuit and district court selections of state statutes of limitations);

*v. Duke Precision Dental and Orthodontic Laboratories*,[8] the Fourth Circuit considered which period of limitations to apply in an action based on section 1981.[9]

In *McNutt*, the plaintiff alleged that his employer had violated section 1981 by firing the plaintiff because of his race.[10] The plaintiff had filed his complaint in the United States District Court for the District of Maryland approximately one and one-half years after his discharge.[11] The district court recognized that Maryland does not provide a specific period of limitations for actions filed under the Civil Rights Acts.[12] The court determined, however, that article 49B of the Maryland Code,[13] which governs complaints filed with the Maryland Human Relations Commission,[14] and section 1981 had substantial commonality of purpose.[15] The district court held, therefore, that the six-month limitations period applicable to article 49B applied to McNutt's claim

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*Developments, supra* note 2, at 219 (survey of statutes of limitations applied to § 1981 actions); Note, *A Call for Uniformity: Statutes of Limitations in Federal Civil Rights Actions*, 26 WAYNE L. REV. 61 (1979) (reviewing history of § 1981 and problems in applying state statutes of limitations).

8. 698 F.2d 676 (4th Cir. 1983).

9. *Id.* at 677.

10. *See* Brief for Appellant at 2-3, McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983) [hereinafter cited as *Brief for Appellant*]. Plaintiff McNutt was a black male who worked at Duke Precision Dental and Orthodontic Laboratories. *Id.* at 2. McNutt, alleged that on February 28, 1980, a fellow employee, Tankin, assaulted McNutt with a loaded gun because McNutt was black. *Id.* at 3. McNutt called the police who arrested Tankin. *Id.* at 3-4. McNutt alleged that his employer, Charles Duke, attempted to impede the police investigation of the assault. *Id.* at 3. McNutt also alleged that Duke failed to protect McNutt by not firing Tankin. *Id.* at 4. Duke instead fired McNutt in March 1980. *Id.*

In addition to alleging a racially discriminatory discharge, McNutt alleged that Duke and Tankin violated 42 U.S.C. § 1985(3) by attempting to convince the state prosecutors to drop the charges against Tankin. *Id.* at 4; *see* Act of July 31, 1861, ch. 33, 12 Stat. 284, and April 20, 1871, ch. 22, § 2, 17 Stat. 3 (codified at 42 U.S.C. § 1985 (1983)) (authorizing private cause of action for conspiracy to interfere with civil rights). The Fourth Circuit observed that § 1985(3) provided a remedy for violations of federal and constitutional rights. 698 F.2d at 680. The *McNutt* court recognized, however, that McNutt did not have a federal right to foreclose pleas of leniency. *Id.* Consequently, the court concluded that McNutt could not sustain an action based on § 1985(3). *Id.*

11. *See* 698 F.2d at 677.

12. *See id.*.

13. MD. ANN. CODE articles 49B (1983).

14. *See id.* (creating Maryland Human Relations Commission). To initiate a proceeding with the Maryland Human Relations Commission, an individual must file a complaint with the Commission. *See id.* § 9a. The Commission then responds by investigating the validity of the complaint. *Id.* §§ 9b, 10a. If the complaint is valid, the Commission attempts to resolve the conflict through conference, conciliation, and persuasion. *Id.* § 10b. If the parties fail to reach an agreement, the parties must participate in a hearing. *Id.* § 11a. The Commission then may subpoena any witnesses and documents needed as evidence. *Id* § 11d. If complainant wins, the Commission may apply appropriate equitable relief. *Id.* § 11e. Article 49B limits the assessment of a backpay award to a two-year period and requires the deduction of interim earnings from the actual award. *See id.*

15. *See* 698 F.2d at 678; O'Hara v. Kovens, 625 F.2d 15, 18 (4th Cir. 1980) (defining commonality of purpose test), *cert. denied*, 449 U.S. 1124 (1981); *supra* notes 70-73 and accompanying text (analyzing *O'Hara* decision).

and barred the plaintiff's cause of action.[16] The plaintiff appealed to the Fourth Circuit arguing that article 49B governed only the procedures for administrative complaints and did not apply to a federal action based on section 1981.[17]

The *McNutt* court observed that article 5-101 of the Maryland Code[18] provided a three-year limitations period for all causes of action that did not have a specific limitation.[19] The Fourth Circuit suggested that the three-year limitation for article 5-101 should apply to a section 1981 action unless the six month limitation provided by article 49B was more appropriate.[20] To determine which limitations period to apply to McNutt's cause of action, the Fourth Circuit compared the procedures necessary for initiating an action under article 49B and section 1981.[21] The *McNutt* court observed that article 49B merely requires an individual to present a grievance to a commission employee in an informal manner to initiate an agency proceeding and toll the limitations period.[22] The commission then investigates the grievance.[23] In contrast, an individual seeking a judicial remedy under section 1981 must first obtain counsel and allow substantial time for preparation before filing a complaint.[24]

The Fourth Circuit also examined the objectives of article 49B and sec-

16. *See* 698 F.2d at 678.

17. *See Brief for Appellant, supra* note 10, at 5. The defendants in *McNutt* argued that article 49B was the state statute most analagous to § 1981 and that the district court therefore was correct in applying 49B's six-month limitation period. *See* Brief for Appellee, McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 678 (4th Cir. 1983) [hereinafter cited as *Brief for Appellee*]; MD. ANN. CODE art. 49B § 9(a) (1983) (providing six-month limitations period for complaints filed with Maryland Human Relations Commission). The defendants argued alternatively that if article 49(B) was inapplicable, Maryland's one year statute of limitations for assault, libel, or slander actions barred the plaintiff's claim. 698 F.2d at 679; *see* MD. CTS. & JUD. PROC. CODE ANN. § 5-105 (1980) (individuals must file actions for assault, battery, libel, slander within one year from date of alleged act). The Fourth Circuit acknowledged that McNutt's complaint contained allegations of assault and defamation but concluded that McNutt ultimately sought to recover for the defendants' discriminatory conduct. *See* 698 F.2d at 679. The *McNutt* court also noted that the alleged slander occurred after the defendant had terminated McNutt and therefore did not contribute to McNutt's § 1981 claim. *See id.*

In addition to the arguments that the plaintiff and defendants advanced, the Fourth Circuit received an amicus brief from Record Data of Maryland. *See id.* Record Data of Maryland urged the Fourth Circuit to transfer the case to the Maryland Court of Appeals to enable the state courts of Maryland to determine which statute of limitations was most appropriate for an action based on § 1981. *See id.* The Fourth Circuit noted, however, that the Court of Appeals of Maryland did not have more experience than a federal court in determining the appropriateness of a state statute unintended for application to a federal cause of action. *See id.* The Fourth Circuit concluded that 42 U.S.C. § 1988 placed the burden of selecting an appropriate state statute on the federal courts. *See id.*; Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, *re-enacted* May 31, 1870, ch. 114, § 18, 16 Stat. 144 (codified at 42 U.S.C. § 1988 (1976)) (whenever Civil Rights Acts are deficient in provisions necessary to furnish remedy, courts must apply state law if federal law is unsuitable).

18. MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1980).

19. 698 F.2d at 677.

20. *Id.*

21. *Id.* at 678-79.

22. *Id.* at 678.

23. *Id.*

24. *Id.*

tion 1981.[25] The *McNutt* court determined that under article 49B, the administrative agency tries to eliminate the employer's discriminatory conduct by negotiation and persuasion.[26] A short period of limitations is desirable since the chances for reconciliation decrease with time.[27] The Fourth Circuit noted that complaints filed under section 1981, however, initiated an adversarial process and functioned as vehicles for litigation.[28] The *McNutt* court noted that because of the differing objectives of administrative and judicial remedies, statutes of limitation applicable to judicial actions generally provide longer limitations periods than statutes applicable to administrative proceedings.[29]

The Fourth Circuit acknowledged that short limitations periods might be desirable in resolving controversies over employee discharges.[30] The *McNutt* court recognized, however, that federal courts must apply a limitations period incident to the state action that is most analogous to the federal cause of action.[31] The *McNutt* court determined that statutory limitations upon the informal initiation of administrative proceedings were not applicable to a judicial action based on section 1981.[32] The Fourth Circuit, therefore, found the three-year limitations period more appropriate for McNutt's action and vacated the district court's dismissal of McNutt's section 1981 claim.

The Fourth Circuit's determination that section 1981 and article 49B have dissimilar procedures and goals is consistent with other decisions that have identified the nature and origin of each statute.[34] The Supreme Court has noted that Congress enacted section 1981 under the authority of section two of the

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25. *Id.* at 679.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 678.

31. *See id.* at 678. The *McNutt* court noted that a majority of circuits have held that the period of limitations for an agency proceeding to be inapplicable to actions based on § 1981. *See id.* at 678 n.3; Zuniga v. AM-FAC Foods, Inc., 580 F.2d 330, 384 n.5 (10th Cir. 1978) (limitations periods for state agency proceedings are inapplicable to civil right's actions filed in courts of law); Chambers v. Omaha Public School Dist., 536 F.2d 222, 226 (8th Cir. 1976) (three-year limitation period for liability based on statute more appropriate for § 1981 claim than 180-day limit for agency complaint); Mason v. Owens-Illinois, Inc., 517 F.2d 520, 521-22 (6th Cir. 1975) (six-year limitations period for liability created by state statute more appropriate for § 1981 claim than one-year limitation period for complaints filed with Ohio Civil Rights Commission); Waters v. Wisconsin Steel Works of International Harvesters Co., 427 F.2d 476, 488 (7th Cir.) (statute governing civil actions without specified periods of limitation more appropriate for § 1981 claim than statute specifying 120-day limitation on claims filed with Illinois Fair Employment Practices Commission), *cert. denied*, 400 U.S. 911 (1970). The Fourth Circuit also acknowledged that the First Circuit represented the minority view. 698 F.2d at 678; *see* Holden v. Commission Against Discrimination, 671 F.2d 30, 33 (1st Cir.) (six-month period of limitations for agency proceedings is most appropriate limitations period for civil rights actions), *cert. denied*, ___U.S.___, 103 S. Ct. 97 (1982); Hussey v. Sullivan, 651 F.2d 74, 76 (1st Cir.) (same), *cert. denied*, 449 U.S. 893 (1980).

32. *See* 698 F.2d at 680.

33. *See id.* at 680.

34. *See supra* note 2 (reviewing cases that document § 1981 origins in thirteenth amendment); *infra* note 36 (citing cases documenting history of Human Relations Commission).

thirteenth amendment to eliminate the badges and incidents of slavery.[35] Maryland state courts have determined that the Maryland legislature created the Human Relations Commission to study ways to promote good will and to make periodic proposals to the governor.[36] Other courts examining judicial and administrative procedures and remedies have concluded that federally protected constitutional rights are distinct from and exceed those rights created by a state civil rights statute.[37] Courts, therefore, should not circumscribe federal causes of action with rules applicable to agency proceedings.[38]

The *McNutt* court's decision also is consistent with policies that the Supreme Court has developed in decisions involving section 1981.[39] In *Johnson v. Railway Express Agency*,[40] the Supreme Court considered whether the timely filing of a complaint with the Equal Employment Opportunity Commission (EEOC) tolled the limitations period for an action based on the same facts under section 1981.[41] The Supreme Court compared the purpose, procedure, and remedies involved in actions filed with the EEOC and actions filed under section 1981.[42] The *Johnson* court concluded that although directed towards similar ends, administrative and judicial remedies are separate and distinct.[43] Thus, the Supreme Court concluded that a timely filing with the EEOC did not toll the statute of limitations for a section 1981 action.[44] In *McNutt*, the Fourth Circuit similarly recognized distinctions between agency and judicial proceedings.[45]

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35. *See* Civil Rights Cases, 109 U.S. 3, 22 (Civil Rights of 1866 enacted under authority of thirteenth amendment to eliminate badges and incidents of slavery).

36. *See* Prince George's County v. Commission on Human Relations, 40 Md. App. 473, 475-86, 392 A.2d 105, 108-11 (1978) (reviewing original purpose of Maryland Human Relations Commission), *vacated on other grounds*, 285 Md. 205, 401 A.2d 661 (1979); Gutwein v. Easton Publishing Co., 272 Md. 563, 575, 325 A.2d 740, 746-47 (1974) (historical discussion of Human Relations Commission), *cert. denied*, 420 U.S. 991 (1975).

37. *See* Evans v. Chesapeake and Potomac Tel. Co. of Maryland, 535 F. Supp. 499, 503, 504, 506 (D. Md. 1982) (violation of § 1981 more serious than violation of state civil rights statute due to constitutional origin of § 1981); Chambers v. Omaha Public School, 536 F.2d 222, 226 (6th Cir. 1976) (administrative procedures and remedies not comparable to plenary judicial powers available in § 1981 actions).

38. *See* Hickman v. Fincher, 483 F.2d 855, 856 (4th Cir. 1973) (modern civil rights acts not meant to circumscribe broad effect of early civil rights statutes).

39. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975) (administrative and judicial remedies are separate, distinct and independent); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (highlighting differences between administrative and judicial remedies).

40. 421 U.S. 454 (1975).

41. *Id.* at 455.

42. *See id.* at 457-61 (comparing Title VII to section 1981); *supra* note 2 (reviewing *Johnson* Court's analysis of difference between § 1981 and Title VII).

43. 421 U.S. at 461.

44. *Id.* at 466. Although the *Johnson* Court determined that filing a complaint with the EEOC did not toll the statute of limitations for a § 1981 action, the Supreme Courts limited grant of certiorari foreclosed consideration of which state statute of limitations was the most appropriate for a § 1981 action. *Id.* at 462 n.7.

45. *See supra* notes 21-29 and accompanying text (discussing *McNutt* court's comparison of administrative and procedural remedies).

The Supreme Court has recognized that absent a specific federal limitations period for an action based on section 1981, federal courts must apply the most appropriate limitation period that state law provides.[46] The Supreme Court also has recognized that the state statute of limitations that a court selects must be compatible with the national policy inherent in the federal cause of action.[47] The Court has refrained, however, from indicating a preference for a specific type of statute.[48] As a result, the decisions of the circuits vary depending upon the analysis that a court uses to determine appropriateness[49] and the state statutes available for consideration.[50]

In *Waters v. Wisconsin Steel Works of International Harvester Co.*,[51] for

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46. *See supra* note 5 (reviewing Supreme Court's policy of applying state statutes of limitations to federal actions without periods of limitation).

47. *See* Autoworkers v. Hoosier Corp., 383 U.S. 696, 706 (1966) (characterization of action for purposes of selecting period of limitations is ultimately question of federal law). In *Occidental Life Insurance Co. of California v. EEOC*, the Supreme Court warned that state legislatures did not create periods of limitations with national interests in mind. 432 U.S. 355, 367 (1977). Therefore, federal courts must ensure that the state statute of limitations selected will not frustrate or interfere with the implementation of the national policy inherent in the federal cause of action. *Id.*

48. *See* Runyon v. McCrary, 427 U.S. 160 (1975), *aff'g* 515 F.2d 1082 (4th Cir. 1975). In *Runyon*, the Fourth Circuit determined that in Virginia the two-year statute of limitations for personal injuries governed actions brought under § 1981. *See* 515 F.2d at 1097. The *Runyon* Court declared that the Supreme Court would not displace the Fourth Circuit's judgment especially because the Virginia district courts applied the same two-year statute of limitations to § 1981 actions in Virginia. 427 U.S. at 180-81. The *Runyon* Court observed that when a federal right is dependent upon the interpretation of state law, the Supreme Court would accept the state court's conclusions, even if a new examination of the issue by the Supreme Court would result in a different interpretation. *Id.* at 181; *see* Johnson v. Railway Express Agency, 421 U.S. 454 426 n.7 (1975) (Johnson Court declined to consider appropriateness of state statute of limitations applied).

49. *See* Stafford v. Muscogee County Board of Education, 688 F.2d 1383, 1389 (5th Cir. 1982) (court selected period of limitations applicable to actions for recovery of wages, overtime or damages because of remedy plaintiff desired); Beard v. Robinson, 563 F.2d 331, 334 (7th Cir. 1977) (court selected limitations period applicable to civil actions created by statute by determining which statute would govern an analogous action brought in state court). In *Burns v. Sullivan*, the First Circuit based its selection of a state statute of limitations on four factors. 619 F.2d 99, 105 (1980), *cert. denied*, 449 U.S. 893 (1980). The *Burns* court first considered the nature of the cause of action. *Id.* Second, the court identified analagous state causes of action. *Id.* Third, the court examined the state statutes of limitations applicable to the state causes of action. *Id.* Finally, the court determined which period of limitations would be most appropriate under federal law. *Id.*

50. *See* Burns v.Sullivan, 619 F.2d 99, 105 (1st Cir. 1980) (court selected six-month agency statute over tort and contract statute of limitations), *cert. denied*, 449 U.S. 893 (1980); Keyse v. California Texas Oil Corp., 509 F.2d 45, 47 (2d Cir. 1978) (court selected three-year statute of limitations for actions based on statute); Skehan v. Board of Trustees of Bloomsburg State College, 590 F.2d 470 477 (3d Cir. 1978) (court selected six-year statute for wrongful interference with employment contracts).

51. 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). In *Waters v. Wisconsin Steel Works of International Harvestor Co.*, the plaintiff alleged that the defendant company maintained a discriminatory hiring policy designed to exclude blacks from employment as bricklayers. 427 F.2d at 479. The defendants argued that the district court correctly dismissed the plaintiff's complaint because the 120-day period for filing a complaint with the Fair Employment Practices Commission of Illinois barred the plaintiff's action. *Id.* at 488.

example, the Seventh Circuit declined to apply the 120-day limitations period applicable to a claim filed with the Illinois Fair Employment Practices Commission to an action based on section 1981.[52] The *Waters* court noted that actions filed under section 1981 differed from administrative remedies because in section 1981 actions the private litigant had the entire burden of investigation.[53] In addition, while administrative remedies promoted conciliation, individuals usually sought judicial relief when conciliation had failed.[54] The Seventh Circuit held, therefore, that agency limitations periods were inappropriate for actions based on section 1981.[55]

In *Mason v. Owen-Illinois, Inc.*[56] the Sixth Circuit considered whether to apply a one-year administrative agency limitation to an action based on section 1981.[57] The Sixth Circuit observed that the Ohio Civil Rights Act[58] specified a one-year limitation for complaints that the Ohio Civil Rights Commission filed.[59] The court determined that the agency statute by its terms did not apply to actions that private litigants commenced.[60] The *Mason* court selected instead the six-year period of limitations applicable to civil actions based on a statute.[61]

Only the First Circuit has determined consistently that agency statutes of limitations are appropriate for federal civil rights actions.[62] In *Carter v. Supermarkets General Corp.*,[63] the First Circuit considered whether to apply the Massachusetts six-month agency limitation, a three-year tort limitation, or a six-year contract limitation to an action based on section 1981.[64] The agency statute in *Carter* governed complaints filed with the Massachusetts Commis-

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52. 427 F.2d at 488.

53. *Id.*

54. *Id.*

55. *Id.*

56. 517 F.2d 520 (6th Cir. 1975). In *Mason v. Owens-Illinois, Inc.*, the plaintiff alleged that the defendant company refused to promote the plaintiff and subsequently discharged the plaintiff solely because of his race. *Id.* at 521. The plaintiff filed his complaint approximately two years after the alleged occurrence of discriminatory conduct. *Id.* at 522.

57. *Id.*

58. OHIO REV. CODE ANN. § 4112.05(B) (Baldwin 1982).

59. 517 F.2d at 522.

60. *Id.*

61. *Id.*

62. *See* Carter v. Supermarkets General Corp., 684 F.2d 187 (1st Cir. 1982) (six-month period of limitations for agency proceedings is most appropriate limitations period for civil rights actions); Holden v. Commissioner Against Discrimination, 671 F.2d 30, 33 (1st Cir. 1982) (same); Burns v. Sullivan, 619 F.2d 99, 107 (1st Cir.) (same), *cert. denied*, 449 U.S. 893 (1980).

63. 684 F.2d 187 (1st Cir. 1982). In *Carter v. Supermarkets General Corp.*, the plaintiff alleged that her employer had discriminated against her because of her race and sex. *Id.* at 189. Consequently, after approximately six months of employment with the company, the plaintiff resigned. *Id.* One year after the plaintiff's resignation, the plaintiff unsuccessfully sought reemployment with the company. *Id.* The plaintiff claimed that the employer refused to rehire her for discriminatory reasons. *Id.* The plaintiff filed an action under § 1981 and Title VII approximately one and one half years after the defendant's refusal to rehire the plaintiff. *Id.*

64. *Id.*

sion Against Discrimination.[65] The *Carter* court suggested, as did earlier First Circuit decisions, that if federal claims had longer limitation periods than state claims, individuals would not seek administrative remedies and federal courts would be overwhelmed with personnel disputes.[66] The *Carter* court consequently held that a complaint alleging racial discrimination under section 1981 was not subject to a general contract or tort statute of limitations because Massachusetts provided a statute that was more analogous to the federal cause of action.[67]

The Fourth Circuit's holding in *McNutt* effectively revises the Fourth Circuit's prior standards for determining which state statute of limitations to apply to federal causes of action without periods of limitation.[68] In *O'Hara v. Kovens*,[69] the Fourth Circuit used the commonality of purpose test to determine which Maryland statute of limitations to apply to a federal securities action.[70] The *O'Hara* court noted that the commonality of purpose test requires courts to determine the policy behind the federal action and then to identify a state statute having similar policy considerations.[71] The *O'Hara* court suggested that courts should apply the statute of limitations applicable to the similar state statute regardless of whether the state cause of action operated differently than the federal cause of action.[72] The *McNutt* court indicated that application of the commonality of purpose test could lead to anomalous results.[73] Thus, to ensure an accurate determination of which statute was most appropriate for section 1981 actions, the Fourth Circuit's decision in *McNutt* encourages examination of the objectives and procedural aspects of the state and federal statutes.[74]

In *McNutt*, the Fourth Circuit determined that Maryland courts may not

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65. *Id.* at 189 n.3; *see* MASS. GEN. LAWS ANN. ch. 6, § 56 (West 1976 & Supp. 1982) (creating Massachusetts Commission Against Discrimination); MASS. GEN LAWS ANN. ch. 151B, § 5 (West 1982) (defining procedures for filing complaint with Massachusetts Commission Against Discrimination).

66. 684 F.2d at 190.

67. *Id.*

68. *See supra* notes 70-73 and accompanying text (reviewing prior Fourth Circuit standards for selecting state statutes of limitation).

69. 625 F.2d 15 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981).

70. *Id.* at 17. In *O'Hara*, the plaintiff alleged that the defendant violated § 10(b) of the Securities Exchange Act of 1934. *See id.* at 15, 17; Act of June 6, 1934, ch. 404, Title 1, § 10, 48 Stat. 891 (codified at 15 U.S.C. § 78j(b)). Section 10(b) of the Securities Exchange Act does not have a specified period of limitations. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976) (Congress did not provide statute of limitations for civil actions under § 10(b)).

71. 625 F.2d at 18.

72. *Id.*

73. 698 F.2d at 678. The *McNutt* court implied that use of the "commonality of purpose" test could lead to imprecise results because the defendant in *McNutt* could argue that Title VII and § 1981 had a substantial commonality of purpose since both statutes prohibited racial discrimination in employment. *Id.* at 678; *See supra* note 2 (comparing Title VII and § 1981). The defendant in *McNutt* (then could allege that McNutt had to bring his cause of action within 180 days of the alleged discriminatory conduct, as required in a Title VII action. 698 F.2d at 678; *see* 42 U.S.C. § 2000e-5(e) (specifying limitations period for Title VII action).

74. *See* 698 F.2d at 678-79 (scrutinizing objectives and procedural aspects of § 49B and § 1981).

apply agency limitations periods to actions based upon section 1981.[75] The Fourth Circuit's decision will not dictate the outcome in similar controversies because federal courts must make an original determination of which limitations period to apply, based on the state statutes available for consideration.[76] The *McNutt* holding, however, decreases the possibility that courts will apply administrative agency limitations to a federal cause of action and establishes a principle for a process that has few guidelines.[77] Since most statutes of limitations applicable to civil actions are longer than agency limitations, the Fourth Circuit's decision affords plaintiffs more time to file section 1981 suits and lengthens the time defendants must be prepared to defend such actions.[78] The Fourth Circuit's decision in *McNutt* is consistent with the majority of circuit court decisions and affirms the Supreme Court's opinion that administrative and judicial remedies are distinct.[79]

ANNE-MARIE GRANDE

### B. *Statutes of Limitations and Private Actions Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] prohibits surreptitious interception of private conversations.[2] Congress enacted Title III in part to prevent unwarranted invasions of privacy.[3] In addition

75. 698 F.2d at 678.

76. *Compare* Runyon v. McCrary, 515 F.2d 1082, 1097 (4th Cir. 1975) (Virginia's two-year limitation period applicable to personal injury applied to actin based on § 1981), *aff'd*, 427 U.S. 460 (1976) *with* McNutt v. Duke Precision Denial and Orthodontic Laboratories, 698 F.2d 676, 677 (4th Cir. 1983) (three-year limitation period applicable to civil actions without periods of limitation applied to § 1981 action).

77. *See* 698 F.2d at 678 (concluding that six-month agency limitations period is inappropriate for § 1981 actions); *see also* Grattan v. Burnett, 710 F.2d 160, 162 (4th Cir. 1983) (reaffirming decision in *McNutt* that six-month agency limitations period is inappropriate for civil rights actions).

78. *See supra* note 31 (state civil rights action statutes generally provide longer limitations period than agency statutes provide).

79. *See supra* notes 39-44 and accompanying text (reviewing Supreme Court's decisions on judicial and administrative remedies).

1. 18 U.S.C. §§ 2510-2520 (1976 & Supp. V 1981).

2. *See id.* § 2511(1)(a) (any person who willfully intercepts wire or oral communication shall be fined not more than $10,000 or imprisoned not more than five years or both). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 defines oral communication as any communication uttered with the justifiable expectation of privacy. *Id.* § 2510(2). Title III prohibits the disclosure of the contents of an oral communication intercepted in violation of Title III. *Id.* § 2511(1)(c).

3. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2153 (Title III has dual purpose of protecting private communications and

to specifying criminal sanctions, Title III provides aggrieved individuals with a broad range of private remedies.[4] In providing a private cause of action for violation of Title III, however, Congress did not specify a limitations period on Title III actions.[5] When Congress fails to include a limitations period on a federal cause of action, the federal courts will borrow the limitation period that governs the most closely analogous state action.[6] In *Brown v. American*

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delineating circumstances in which government and private parties may intercept communications). Congress enacted Title III in response to two Supreme Court opinions that threatened the government's ability to combat organized crime through the use of evidence obtained by means of surreptitious interception of private communications. *Id.* at 66, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2153; *see* Katz v. United States, 389 U.S. 347, 359 (1967) (government violated suspect's fourth amendment rights by surreptitiously monitoring conversations in which suspect had a reasonable expectation of privacy); Berger v. New York 388 U.S. 41, 58-60 (1967) (state violated suspect's fourth amendment rights by surreptitiously monitoring conversations under authority of statute that permitted excessively broad intrusions).

As originally proposed, Title III did not forbid a participant in a conversation or a person acting with the consent of a participant in a conversation from secretly monitoring a conversation. *See* S. REP. NO. 1097, *supra*, at 175-76, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2236-37 (Sen. Phillip Hart's views regarding consensual wiretapping and eavesdropping). Senator Hart asserted that to permit monitoring with the consent of a participant would be to condone private invasions of privacy. *Id., reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2236-37. In response to Senator Hart's assertions, Congress amended the proposed bill to prohibit consensual monitoring when the recording party acts with a criminal, tortious, or injurious purpose. 18 U.S.C. § 2511(2)(d) (1976).

Under the common-law tort of invasion of privacy, electronic eavesdropping of a person's conversations in his own home constitutes an impermissible intrusion. *See* Hamberger v. Eastman, 106 N.H. 107, ____, 206 A.2d 239, 241 (1964). In *Hamberger*, the plaintiffs stated a cause of action by alleging that the defendant, who was the plaintiffs' landlord, secretly placed microphones in the plaintiffs' bedroom. *Id.* at ____, 206 A.2d at 242. Although the *Hamberger* defendant physically entered the private quarters of the plaintiffs, the *Hamberger* court recognized that technology permits the invasion of privacy without physical entrance onto private property. *Id.* at ____, 206 A.2d at 242. Under the common-law, a person retains a sphere of privacy even while in a public place. *See* Nader v. General Motors Corp., 25 N.Y.2d 560, 570, 255 N.E.2d 765, 771 (1970) (plaintiff stated cause of action by alleging that defendant, as part of general scheme of surveillance and harassment, tried to observe plaintiff's transactions at bank teller's window). The common-law invasion of privacy doctrine recognizes that personal information voluntarily revealed to another loses its private character if the party receiving the information chooses to reveal it to others. *Id* at 568-69, 255 N.E.2d at 770 (person revealing private information assumes risk that friend or acquaintance might breach confidence). In *Dietemann v. Time, Inc.*, the defendant news reporters gained permission to enter the plaintiff's home by ruse, and surreptitiously recorded and photographed the plaintiff. Dietemann v. Time, Inc., 449 F.2d 245, 245-46 (9th Cir. 1971). The *Dietemann* court found that although the plaintiff admitted the defendants voluntarily and although other parties were present in the plaintiff's home, the plaintiff reasonably could expect that his guests were not eavesdroppers. *Id.* at 249. The court therefore held that under California law, the defendants' actions constituted a tortious invasion of privacy. *Id.* at 248.

4. *See* 18 U.S.C. § 2520 (1976) (person whose communications are intercepted may recover $100 for each day of interception, actual damages, punitive damages, and attorney's fees).

5. *See* 18 U.S.C. §§ 2510-2520 (1976 & Supp. V 1981) (Title III does not include statute of limitations); Awbrey v. Great Atlantic & Pacific Tea Co., 505 F. Supp. 604, 607 (N.D. Ga. 1980) (Title III provides no statute of limitations).

6. *See* United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 (1981) (timeliness of suit brought under § 301(a) of Labor Management Relations Act determined by reference to state

*Broadcasting Co.*,[7] the Fourth Circuit considered whether Virginia's statute of limitations barred the plaintiff's recovery for an alleged violation of Title III.[8] The *Brown* court also considered whether Virginia recognizes a common-law cause of action for invasion of privacy.[9]

In *Brown*, employees of the House of Representatives Select Committee on Aging (Committee) invited an American Broadcasting Company (ABC) news team to participate as observers in the Committee's investigation of fraudulent practices in sales of insurance to the elderly.[10] At a meeting set up by the Committee, ABC secretly videotaped the plaintiff, an insurance sales representative.[11] On two days in November of 1978, ABC broadcast approximately ten seconds of Brown's sales presentation on the ABC Nightly News as part of a report on insurance and the elderly.[12] Although the ten second segment clearly portrayed Brown, the plaintiff, the report did not identify Brown otherwise.[13] Brown did not learn of the taping or the broadcast until September 1980, when an attorney for another insurance agent whom ABC had taped under similar circumstances contacted Brown.[14]

Brown filed a diversity action in federal district court in January of 1981, more than two years after the surreptitious taping and broadcast.[15] Brown asserted several state claims including common-law invasion of privacy.[16] Brown

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statute of limitations); Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980) (in suit brought under Civil Rights Act, court must borrow state statute of limitations governing analogous state cause of action); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975) (same); Awbrey v. Great Atlantic & Pacific Tea Co., 505 F. Supp. 604, 607 (N.D. Ga. 1980) (under Title III of Omnibus Crime Control Act, state statute of limitations governing most closely analogous state cause of action determines limitations period).

7. 704 F.2d 1296 (4th Cir. 1982).

8. *Id.* at 1304-05.

9. *Id.* at 1302-03.

10. *Id.* at 1298-99. In *Brown*, the House of Representatives Select Committee on aging (Committee) was investigating the practice of "overloading" elderly customers with unnecessary and expensive insurance policies. *Id.*

11. *Id.* at 1299. In *Brown*, a Committee employee had arranged a sales meeting with Brown, the plaintiff, on the pretext that the employee's mother-in-law wanted to review her insurance coverage. *Id.* An elderly Committee employee met with Brown at the Alexandria, Virginia home of another Committee employee. *Id.* The Committee employees had given ABC permission to install a video recording camera behind a two-way mirror in the house. *Id.* ABC recorded the entire meeting, which lasted one and one-half hours. *Id.*

12. *Id.*

13. *Id.*

14. Brief for Appellant at 10, Brown v. American Broadcasting Co., 704 F.2d 1296 (4th Cir. 1983).

15. 704 F.2d at 1299. Brown filed her complaint in the United States District Court for the District of Maryland. Brief for Appellees at 2, Brown v. American Broadcasting Co., 704 F.2d 1296 (4th Cir. 1982). The Maryland district court found that venue was improper and transferred the case to the United States District Court for the Eastern District of Virginia. *Id.*

16. 704 F.2d at 1299. In addition to bringing suit for invasion of privacy, Brown sued ABC and the Committee employees under Virginia law for conspiracy to injure reputation, defamation, intentional interference with business, and conspiracy to interfere with business. *Id.* The district court dismissed Brown's claims for conspiracy to injure reputation and defamation. *Id.* The district court held that Brown's claims for conspiracy to injure reputation and defamation

also claimed that ABC and the Committee employees had violated Title III

accrued at the time of the broadcasts in November 1978. *Id* The district court did not decide whether Virginia's one or two year statute of limitations governed Brown's claims for injury to reputation and defamation because Brown had filed both claims more than two years after the causes of action had accrued. *Id.* at 1299; *see* VA. CODE § 8.01-243(A) (1977) (Virginia provides two-year limitation period on actions for personal injury); *id.* § 8.01-248 (Virginia provides one-year limitation on actions for which no other limitation is specified).

The district court ruled that Virginia's five-year statute of limitations for injury to property governed Brown's claims for intentional interference with business and conspiracy to interfere with business. 704 F.2d at 1303; *see* VA. CODE § 8.01-243(B) (1977) (Virginia provides five-year statute of limitations for injury to property). The district court permitted the jury to hear the interference with business and conspiracy claims since Brown had filed suit within the five-year period. *Id.* at 1299. The jury found for the defendants on both claims. *Id.*

On appeal to the Fourth Circuit, Brown challenged the dismissal of her claims for conspiracy to injure reputation and defamation. *Id.* Brown asserted that these claims had not accrued until September of 1980 when she learned of the taping and suffered emotional distress. *Id.* at 1299-1300. The Fourth Circuit rejected Brown's asserted accrual date because the broadcast of Brown's picture constituted the final element of the torts of injury to reputation and defamation. *Id.* at 1300. The Fourth Circuit therefore held that the statute of limitations barred Brown's claims for injury to reputation and defamation because the causes of action had accrued in November 1978, more than two years before the time at which Brown filed her claims. *Id.* at 1299.

On appeal, Brown raised an additional claim under Virginia law. *id.* at 1303. Brown claimed that ABC's use of Brown's picture constituted a violation of a Virginia statute that prohibited the use of a person's likeness for advertising or commercial purposes without the person's consent. *Id.; see* VA. CODE § 8.01-40 (1977 & Supp. 1982) (nonconsensual use of person's image for advertising or commercial purposes constitutes tortious and criminal violation of law). The Fourth Circuit refused to consider the statutory claim since Brown had failed to raise the claim during trial. 704 F.2d at 1303. Brown also urged the Fourth Circuit to vacate the jury verdict and remand the case for retrial on her claims for intentional interference with business and conspiracy to interfere with business. Brief for Appellant at 18, Brown v. American Broadcasting Co., 704 F.2d 1296 (4th Cir. 1982). Brown contended that the district court erred in refusing to permit Brown's expert witness to testify because of Brown's failure to comply with a pretrial order. 704 F.2d at 1298. Brown's expert witness planned to testify regarding Brown's claims for intentional interference with business and conspiracy to interfere with business. *Id.* at 1305. Since the Fourth Circuit held that the statute of limitations should have barred these claims, the Fourth Circuit refused to consider whether the district court improperly excluded the expert's testimony regarding these claims. *Id.* The Fourth Circuit, however, ordered the district court to provide additional time for discovery prior to retrial of the Title III claim. *Id.*

The defendants challenged the district court's application of Virginia's five-year statute of limitations to Brown's claims for intentional interference with business and conspiracy to interfere with business. *Id.* at 1303. The defendants asserted that Virginia's one and two-year statutes of limitations governed these claims because the claims were merely reiterations of Brown's defamation claim. Brief for Appellee at 30, Brown v. American Broadcasting Co., 704 F.2d 1296 (4th Cir. 1982). The Fourth Circuit agreed with the defendants and held that Virginia's five-year statute of limitations was inapplicable to a situation in which the plaintiff's underlying claim was actually for a personal injury. 704 F.2d at 1303. The Fourth Circuit therefore denied Brown's request for retrial on these claims. *Id.* at 1304.

The *Brown* defendants also asserted that the district court lacked personal jurisdiction over the ABC news reporter who was present at the taping session. *Id.* at 1300. The defendants claimed that the reporter's presence at the taping session constituted insufficient contact with Virginia to subject the reporter to the jurisdiction of a Virginia court. *Id* at 1300-01. The *Brown* court rejected the defendants' argument, holding that the district court properly exercised jurisdiction over the ABC news reporter. *Id.* at 1300-02. The court reasoned that a violation of Title III constituted a tort within the meaning of Virginia's long-arm statute, thereby authorizing a court

by surreptitiously taping the sales meeting.[17] The district court dismissed Brown's claims for invasion of privacy and violation of Title III on the grounds that Virginia's one and two year statutes of limitations on these claims had elapsed by the time Brown had filed suit.[18] On appeal to the Fourth Circuit, Brown challenged the dismissal of her claims for common-law invasion of privacy and violation of Title III.[19] The defendants cross-appealed, contending that the district court erred in assuming that Virginia recognized a common-law cause of action for invasion of privacy.[20]

On appeal, the Fourth Circuit ruled that the district court properly dismissed the common-law invasion of privacy claim, but that the statute of limitations constituted the wrong reason for dismissal.[21] The Fourth Circuit held that a common-law cause of action for invasion of privacy does not exist in Virginia.[22] The *Brown* court recognized that although the Virginia Supreme Court never has addressed the issue, several federal district courts have ruled that Virginia recognizes only a narrow, statutory cause of action for invasion of privacy.[23] The Fourth Circuit's decision, therefore, denied

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to assert jurisdiction. *Id.* at 1301. The Fourth Circuit recognized that the exercise of jurisdiction over a defendant based on a single transaction does not offend due process when the single transaction gives rise to the cause of action asserted by the plaintiff. *Id* at 1302. *See generally* Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (due process clause limits power of state court to render valid personal judgment over non-resident defendant).

17. 704 F.2d at 1299.

18. *Id.*

19. *Id.*

20. *Id.* at 1302.

21. *Id.* at 1302-03.

22. *Id.* at 1303.

23. *Id.*; see infra note 62 (citing Federal District Court cases that hold that no common-law cause of action for invasion of privacy exists in Virginia). In *Brown*, the Fourth Circuit recognized that the Virginia legislature has enacted a limited statutory right of privacy. *Id.* at 1302; *see* VA. CODE § 8.01-40 (1977 & Supp. 1982). Section 8.01-40 prohibits the unauthorized use of a person's name, portrait or picture for the purposes of trade or advertising. *Id.* Section 8.01-40 authorizes issuance of an injunction and award of both compensatory and exemplary damages if the defendant knowingly violates the statute. *Id.* Section 18.2-216.1 provides for a minimum fine of $50 and a maximum of $1,000 for knowingly using a person's likeness without consent. VA. CODE § 18.2-216.1 (1982).

The Virginia legislature enacted the Virginia privacy statute in 1904 based on a similar statute which the New York legislature had enacted two years earlier. *See* N.Y. CIVIL RIGHTS LAW §§ 50, 51 (Consol. 1976 & Supp. 1982). The New York legislature enacted the statute in response to the public outrage that followed the New York Court of Appeals' opinion in *Roberson v. Rochester Folding-Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). *See* PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 803 (4th ed. 1971). In *Roberson* the court held that no common-law right of privacy existed and therefore rejected a woman's invasion of privacy claim against a company that used the woman's picture for advertising purposes without her consent. *Roberson*, 171 N.Y. at 556, 64 N.E. at 447-48.

In addition to acknowledging that the federal courts that have construed Virginia law uniformly have rejected a common-law privacy action, the Fourth Circuit recognized that recent federal interpretations of New York law do not indicate a probable change in Virginia law. 704 F.2d at 1302-03. The Fourth Circuit correctly held that the New York state courts do not recognize the common-law tort of invasion of privacy. *See, e.g.*, Wojtowicz v. Delacorte Press, 43 N.Y.

Brown relief on her invasion of privacy claim.[24]

The Fourth Circuit, however, reversed the district court's dismissal of Brown's federal claim for violation of Title III.[25] The *Brown* court recognized that state statutes of limitations govern a Title III action, but held that federal law controls the time of accrual of federal causes of action.[26] The *Brown* court held that the federal discovery rule controls accrual of a cause of action for surreptitious interception under Title III.[27] The discovery rule states that a cause of action accrues when the plaintiff discovers, or by the exercise of due diligence could have discovered, that someone had intercepted his or her private communications.[28] The *Brown* court rejected the rulings of several other circuits which hold that the statute of limitations begins to run at the time of the interception and may be tolled if the defendant fraudulently conceals[29] the existence of facts that constitute the cause of action.[30] The Fourth Circuit, therefore, remanded the case to determine when Brown discovered or could have discovered the existence of the cause of action.[31]

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2d 858, 860, 374 N.E.2d 129, 130, 403 N.Y.S.2d 218, 219 (1978) (no right to relief for invasion of privacy exists in New York except under statute); MacDonald v. Clinger, 84 A.D.2d 482, 484, 446 N.Y.S.2d 801, 803 (1982) (psychiatrist's disclosure of patient's confidential information not actionable under invasion of privacy theory); Arrington v. New York Times Co., 78 A.D.2d 839, 840, 433 N.Y.S.2d 164, 165 (1980) (no right of privacy exists other than statutory rights); *see also* Greenawalt, *New York's Right of Privacy—The Need for Change*, 42 BROOKLYN L. REV. 159, 160-61 (1975) (although majority of states recognize a common-law right of privacy, New York courts have rejected common-law cause of action).

24. 704 F.2d at 1303; *see also supra* note 16 (Fourth Circuit denied Brown's state-law claims for conspiracy to injure reputation, defamation, intentional interference with business, and conspiracy to interfere with business).

25. 704 F.2d at 1304-05.

26. *Id.* at 1304.

27. *Id.* The *Brown* court held that a cause of action for violation of Title III accrues when a plaintiff knows or reasonably should have known of the existence of a cause of action. *Id.* The Fourth Circuit reasoned that the tort of surreptitious interception of private communications by its nature remains concealed from potential plaintiffs. *Id.* The *Brown* court found that unless a Title III defendant takes affirmative steps to reveal the interception, the tort may remain concealed. *Id.* The *Brown* court, therefore held that the discovery rule governs accrual of an action for violation of Title III. *Id.*

28. *Id.; see* Awbrey v. Great Atlantic & Pacific Tea Co., 505 F. Supp. 604, 609 (N.D. Ga. 1980) (cause of action for violation of Title III accrues when plaintiff discovers or by exercise of due diligence could have discovered interception). Although the Fourth Circuit held that the statute of limitations did not begin to run on the Title III action until Brown should have discovered the existence of the surreptitious taping, the *Brown* court never specified which Virginia statute of limitations governed the Title III action. 704 F.2d at 1304-05; *see supra* note 16 (describing Virginia limitations statutes).

29. *See infra* notes 37-40 and accompanying text (defining fraudulent concealment doctrine).

30. 704 F.2d at 1304; *see* Clark v. United States, 481 F. Supp. 1086, 1094 (S.D.N.Y. 1979) (fraudulent concealment tolls running of statute of limitations in surreptitious monitoring action); Cole v. Kelley, 438 F. Supp. 129, 138 (C.D. Cal. 1977) (same).

31. 704 F.2d at 1304-05. The *Brown* court held that the discovery rule governs accrual of a Title III claim. *Id.* at 1304. The court therefore instructed that on remand the jury should determine when Brown knew or should have known of the monitoring. *Id.* The *Brown* defendants, however, contended that § 2511(2)(d) of Title III relieved the defendants from liability because all of the participants in the taping, except for Brown, had consented to having their

The distinction between accrual and tolling is significant because federal law determines the time of accrual of a federal claim[32] whereas state law generally governs tolling.[33] A cause of action accrues when the defendant commits acts that give rise to liability and the plaintiff can maintain a suit.[34] The statute of limitations begins to run when the cause of action accrues.[35] A tolling principle suspends the running of a statute of limitations.[36] The doctrine of fraudulent concealment is an example of a tolling principle.[37] Fraudulent concealment occurs when the defendant intentionally conceals from the victim the existence of facts that otherwise would inform the victim that the defendant had committed a wrong.[38] The suspended statute of limitations begins to run anew only when the victim discovers or, by the exercise of due diligence, should have discovered the existence of a claim.[39]

Precedent indicates that the doctrine of fraudulent concealment is an important federal policy.[40] The federal interest in applying the fraudulent concealment doctrine historically has outweighed the federal interest in applying

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conversations monitored. *Id.* at 1305; *see* 18 U.S.C. § 2511(2)(d) (1976) (Title III permits consensual monitoring if not intended for criminal, tortious, or injurious purpose). The Fourth Circuit rejected the defendants' assertions that § 2511(2)(D) relieved the defendants of liability as a matter of law. 704 F.2d at 1305. The *Brown* court held that a jury must decide whether the defendants monitored the conversation for the purpose of committing any criminal, tortious, or injurious act. *Id.*

32. *See e.g.*, Cope v. Anderson, 331 U.S. 461, 464 (1947) (federal law determines when state statute of limitations begins to run on federal cause of action); United Klans of America v. McGovern, 621 F.2d 152, 153 n.1 (5th Cir. 1980) (per curiam) (federal law controls accrual of federal cause of action); Awbrey v. Great Atlantic & Pacific Tea Co., 505 F. Supp. 604, 607 (N.D. Ga. 1980) (same); *see also* C. WRIGHT, THE LAW OF FEDERAL COURTS 394 & n.38 (4th ed. 1983) (federal law governs accrual of federal claims).

33. *See* Board of Regents v. Tomanio, 446 U.S. 478, 483-92 (1980) (federal courts must adopt state tolling doctrine along with state statute of limitations unless tolling doctrine is inconsistent with federal policy); Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975) (state limitation period is interrelated with state tolling and revival provisions).

34. Rawlings v. Ray, 312 U.S. 96, 98 (1941).

35. *Id.*

36. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

37. *See* Marcus, *Fraudulent concealment in Federal Cases: Toward A More Disparate Standard?*, 71 GEO. L.J. 829, 830 (1983) (wrongdoer's fraudulent concealment of basis for claim may permit plaintiff to assert cause of action after statute of limitations has expired).

38. *Id.; see* Richards v. Mileski, 662 F.2d 65, 69-70 (D.C. Cir. 1981) (fraudulent concealment occurred when defendants confronted plaintiff with false evidence of plaintiff's homosexuality in order to induce plaintiff to resign from government employment).

39. *See* Richards v. Mileski, 662 F.2d 65, 71 (D.C. Cir. 1981) (plaintiff's discovery of secret memorandum indicating that defendants fabricated accusations of homosexuality against plaintiff revived statute of limitations). *See generally* Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933) (discussing origins of fraudulent concealment doctrine).

40. *See* Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (in cases arising in equity, court will read doctrine of fraudulent concealment into every federal statute); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874) (when defendant fraudulently conceals basis for claim, statute of limitations shall not run against plaintiff); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.) (in cases arising at law, court will read doctrine of fraudulent concealment into every federal statute), *cert. denied*, 368 U.S. 821 (1961).

state tolling principles.[41] The Supreme Court recently has stated, however, that federal courts applying state statutes of limitations should apply state tolling principles.[42] After stating this rule, the Supreme Court has not reaffirmed the validity of the fraudulent concealment doctrine.[43] By basing *Brown* on accrual principles which are governed by federal law, the Fourth Circuit avoided potential inconsistencies with Supreme Court doctrine.[44]

The federal courts that have discussed the time of accrual of a claim for surreptitious interception have reached conflicting conclusions regarding the time at which the statute of limitations begins to run.[45] In *Clark v. United States*,[46] the District Court for the Southern District of New York held that a Title III claim against several Watergate conspirators accrued when the defen-

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41. *See supra* note 40 and accompanying text (discussing seminal fraudulent concealment cases). Several courts have held that fraudulent concealment suspends the statute of limitations on Title III actions. See Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (secrecy surrounding Watergate wiretap scheme constituted fraudulent concealment), *cert. denied*, 453 U.S. 912 (1981); Clark v. United States, 481 F. Supp. 1086, 1095-96 (S.D.N.Y. 1979) (although cause of action for surreptitious wiretap accrues at time of interception, existence of fraudulent concealment will toll statute of limitations); Cole v. Kelley, 438 F. Supp. 129, 138-40 (C.D. Cal. 1977) (tolling of statute by fraudulent concealment ends when victim could have acquired knowledge of potential claim).

In *Smith v. Nixon*, columnist Hedrick Smith sued former President Nixon and other Watergate conspirators for tapping Smith's phone. 606 F.2d at 1186-87. The *Smith* court found that Title III imposes upon the government a duty to inform affected parties that the government has intercepted their conversations. *Id.* at 1190; *see* 18 U.S.C. § 2518(8)(d) (1976) (government promptly must notify parties affected by judicially authorized interception). The *Smith* court determined that the existence of fraudulent concealment tolled the statute of limitations. 606 F.2d at 1190-91. Section 2518(8)(d), however, only applies when the government seeks to intercept communications pursuant to a valid warrant. *See* 18 U.S.C. § 2518(8)(d) (1976). Section 2518(8)(d) does not apply to cases involving consensual monitoring for which Title III requires no warrant. *See* 18 U.S.C. § 2511(2)(c) (1976) (person acting under color of law does not violate Title III by making consensual recording); *Id.* § 2511(2)(d) (private party does not violate Title III by making consensual recording unless he records with injurious, tortious, or criminal purpose). The *Smith* court's holding that Title III requires the disclosure of the interception, therefore, is probably inapplicable to *Brown*, which involved consensual recording.

42. *See supra* note 33 (citing cases in which Supreme Court recently has held that federal courts must adopt state tolling principles as well as statutes of limitation).

43. *See* Marcus, *supra* note 37, at 834 (recent Supreme Court decisions cast doubt on continued validity of federal fraudulent concealment doctrine); C. WRIGHT, *supra* note 32, at 395 n.41 (suggesting that recent Supreme Court decisions cast doubt on continued applicability of fraudulent concealment doctrine).

44. *Compare* Cope v. Anderson, 331 U.S. 461, 464 (1947) (federal law controls when state statute of limitations begins to run on federal cause of action) *with* Board of Regents v. Tomanio, 446 U.S. 478, 483-92 (1980) (federal courts must borrow state tolling doctrine when courts borrow state statutes of limitations).

45. *See infra* notes 46-56 and accompanying text (discussing Title III accrual cases). *Compare* Awbrey v. Great Atlantic & Pacific Tea Co., 505 F. Supp. 604, 609 (N.D. Ga. 1980) (cause of action for surreptitious wiretap accrues when plaintiff discovers, or by the exercise of due diligence could have discovered the existence of the interception) *with* Clark v. United States, 481 F. Supp. 1086, 1094-95 (S.D.N.Y. 1979) (illegal wiretap action accrues at time of interception because cause of action for illegal wiretap is not inherently impossible for plaintiff to ascertain).

46. 481 F. Supp. 1086 (S.D.N.Y. 1979).

dants committed illegal surveillance.[47] The court held that the statute of limitations began to run at the time of interception, but could be tolled if the plaintiff showed fraudulent concealment.[48] The *Clark* court distinguished cases in which other federal courts had adopted the discovery rule, reasoning that the discovery rule only applied to claims that were physically impossible to detect until some time after the tort occurred.[49] The *Clark* court found that because the occurrence of the interception was humanly knowable, the plaintiff's discovery of the interceptions was not physically impossible.[50] In *Awbrey v. Great Atlantic & Pacific Tea Co.*,[51] however, the District Court for the Northern District of Georgia applied the discovery rule in a case in which the plaintiffs alleged that their employer had violated Title III by taping the plaintiffs' telephone conversations.[52] The *Awbrey* court rejected the fraudulent concealment doctrine, noting that a violation of Title III normally is concealed from the plaintiff.[53] The court reasoned that a defendant would not have to commit any acts of concealment to maintain the secrecy of the violation.[54] Furthermore, the *Awbrey* court found that the courts that relied on the doctrine of fraudulent concealment to toll the statute of limitations in a Title III action reached the same result that they would have reached if the courts had applied the discovery rule.[55] The *Awbrey* court, therefore, held that the

47. *Id.* at 1094. In *Clark*, eight members of the "New Left" sued former President Nixon and various other federal officials for violating Title III and the plaintiffs' constitutional rights. *Id.* at 1090. The plaintiffs alleged that the defendants had burglarized the plaintiffs' homes and installed illegal wiretaps. *Id.*

48. *Id.* at 1094; *accord* Cole v. Kelley, 438 F. Supp. 129, 138-40 (D.C. Cal. 1977).

49. 481 F. Supp. at 1093-94; *see, e.g.*, Urie v. Thompson, 337 U.S. 163, 170 (1949) (discovery rule determines accrual of statute of limitations when plaintiff alleges injury due to silicosis); Toal v. United States, 438 F.2d 222, 225 (2d Cir. 1971) (discovery rule determines accrual when plaintiff alleges medical malpractice under Federal Tort Claims Act); Hammond v. United States, 388 F. Supp. 928, 932 (E.D.N.Y. 1975) (discovery rule determines time of accrual for claim of negligent administration of polio vaccine).

50. 481 F. Supp. at 1094-95. Although the *Clark* court held that a cause of action for violation of Title III accrues at the time of interception, the court found that the defendants allegedly had committed fraudulent concealment. *Id.* at 1095. The *Clark* court therefore held that fraudulent concealment had tolled the statute of limitations. *Id.*

51. 505 F. Supp. 604 (N.D. Ga. 1980).

52. *Id.* at 606, 609. In *Awbrey*, the plaintiffs complained that their employer violated Title III by installing wiretaps on the employer's telephones and taping the personal conversations of the employees. *Id.* at 606.

53. *Id.* at 609.

54. *Id.*

55. *Id.*; *see* Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (fraudulent concealment tolled statute of limitations), *cert. denied*, 453 U.S. 912 (1981); Clark v. United States, 481 F. Supp. 1086, 1094-96 (S.D.N.Y. 1979) (although cause of action for surreptitious wiretap accrued at time of interception, existence of fraudulent concealment tolled statute of limitations); Cole v. Kelley, 438 F. Supp. 129, 138-40 (C.D. Cal. 1977) (tolling of statute of limitations by fraudulent concealment ended when victim could have acquired knowledge of potential claims); *see also* United Klans of America v. McGovern, 621 F.2d 152, 153-54 (5th Cir. 1980) (per curiam) (when U.S. Attorney General announced intention at press conference to use counterintelligence unit to crack down on "white hate" groups, Ku Klux Klan should have known that it would be target of government's program and therefore should have known of basis for claim).

discovery rule determines the time of accrual of a claim for violation of Title III.[56]

The legislative history of Title III reflects the same concern expressed by the *Awbrey* court that surreptitious interceptions of private communications frequently remain unknown.[57] The drafters of Title III emphasized that Title III should deny an intruder the fruits of his unlawful actions.[58] The discovery rule effectuates Title III's broad remedial and punitive plan by avoiding the fraudulent concealment doctrine's requirement that the plaintiff prove that the defendant intentionally concealed the existence of the interception.[59] The discovery rule focuses solely on whether the plaintiff knew or should have known of the interception.[60]

In addition to adopting the discovery rule as the rule governing accrual of a Title III action, the *Brown* court acknowledged that no Virginia state court ever has recognized a common-law privacy action.[61] The *Brown* court's rejection of the common-law privacy action is consistent with the holdings of every federal court that has considered whether Virginia courts would recognize a privacy action.[62] Furthermore, the only Virginia court that has considered the privacy claim held that no common-law right to privacy exists in Virginia.[63]

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56. 505 F. Supp. at 609.

57. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 69, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2156 (invasion of privacy by surreptitious monitoring frequently will remain unknown).

58. S. REP. No. 1097, 90th Cong., 2d Sess. 69, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2156.

59. *See* Awbrey v. Great Atlantic & Pacific Tea Co., 505 F. Supp. 604, 608-09 (N.D. Ga. 1980) (discovery rule best effectuates federal policy expressed in Title III); *supra* note 4 and accompanying text (Title III provides broad range of criminal and civil sanctions); *see also* Alioto v. Holzman, 54 F.R.D. 602, 604 (E.D. Wis. 1972) (plaintiff's cause of action for electronic eavesdropping did not accrue until plaintiff learned of facts constituting cause of action).

60. *See supra* notes 46-56 and accompanying text (comparing discovery rule cases with fraudulent concealment cases).

61. 704 F.2d at 1303; *see* Evans v. Sturgill, 430 F. Supp. 1209, 1213 (W.D. Va. 1977) (common-law action for invasion of privacy does not exist in Virginia); Comment, *The Case for a Broader Right of Privacy in Virginia*, 7 WM. & MARY L. REV. 127, 134 (1966) (existence of common-law cause of action for invasion of privacy is doubtful because Virginia Supreme Court has not recognized common-law privacy action and sole Virginia case addressing issue held that no common-law privacy action exists); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971) (Virginia does not recognize common-law right of privacy).

62. *See* Falwell v. Penthouse International, Ltd., 521 F. Supp. 1204, 1206 (W.D. Va. 1981) (Virginia recognizes no common-law right to privacy); Ward v. Connor, 495 F. Supp. 434, 440 (E.D. Va. 1980) (same), *rev'd on other grounds*, 657 F.2d 45 (4th Cir. 1981), *cert. denied sub nom.* Mandelkorn v. Ward, 455 U.S. 907 (1982); Evans v. Sturgill, 430 F. Supp. 1209, 1213 (W.D. Va. 1977) (same); Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 829 (D.D.C. 1955) (same), *aff'd*, 232 F. 2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956).

63. *See* Cyrus v. The Boston Chemical Co., 11 VA. L. REG. 938 (Richmond Equity Court 1905) (otherwise unreported) (no right of action for invasion of privacy exists except for right created by statute for unauthorized use of one's picture for advertising purposes), *cited in* Note, *The Virginia "Right of Privacy" Statute*, 38 VA. L. REV. 117, 118 & n.14 (1952). The summary of the holding of *Cyrus v. The Boston Chemical Co.* in the Virginia Law Register is the only printed record of a Virginia state court's consideration of the topic of a right to privacy.