NC Division of Tourism, Film and Sports Development

On June 11, 2001, the U.S. Supreme Court ruled that police violated the Constitution's prohibition against unreasonable searches when they used a thermal imager (which monitors heat patterns emanating from the walls of a house) without a search warrant. The decision reversed a lower court's ruling that the homeowner had no reasonable expectation of privacy in the heat emitted from the walls of his home by the lights he used to grow marijuana in his garage.

After Dale Earnhardt's fatal car crash during the Daytona 500 on February 18, 2001, his widow argued that public disclosure of the medical examiner's autopsy photographs would violate the family's right to privacy. The Florida legislature responded by amending the state's public records law to bar the release of autopsy records without a court order.

In January 2001, surveillance cameras photographed 100,000 spectators as they passed through the turnstiles at the Super Bowl in Tampa, Florida. A biometric face-recognition system then matched the photographs against a database of convicted criminals maintained by the FBI and state and local police. Critics argued that the system violated individual privacy. Advocates responded that it was no more intrusive than the routine video surveillance that most people encounter every day in banks, stores, malls, and office buildings, at ATM machines, and on public streets.

Privacy and the Law

John L. Saxon

More than 80 percent of Americans say that they are concerned about the loss of their personal privacy— especially about the collection, use, and disclosure of personal, financial, and medical information by government agencies, insurance companies, banks, employers, medical providers, on-line businesses, and private data-collection agencies.[1]

The exponential growth of information technology—computerized systems of data collection, storage, and retrieval, electronic surveillance devices, and so forth—during the past thirty years has contributed to public concern about privacy by making it easier and easier for government agencies, businesses, and individuals to gather and exchange information.[2]

Concern about privacy is not new, however. More than one hundred years ago, responding to what they viewed as the unprecedented invasion of the "sacred precincts of private . . . life," Samuel Warren and Louis Brandeis asserted in the *Harvard Law Review* that the law should protect the "privacy of private life" by recognizing individuals' rights to prevent others' access to, use of, and public disclosure of their personal writings, thoughts, feelings, likeness, or private acts.[3] In the 1960s many people, including Justice William O. Douglas, believed that government surveillance constituted the primary threat to privacy.[4] Today many people think that the private sector threatens privacy as much as, or more than, government does.[5]

What Is Privacy?

Although privacy is clearly an important legal and social concept, only recently have there been any serious efforts to analyze what "privacy" means.[6] In one sense, privacy is a *nonlegal* concept, with psychological, social, and political dimensions, that describes the boundaries between an individual and other people, society, and government—between matters, beliefs, communications, and activities that are personal or private in nature and those that are social in nature or of public concern.[7] Privacy also is a *legal* concept, consisting of moral rules, social norms, and legal rights that recognize, protect, and sometimes limit individuals' expectations and claims.

In 1880, Judge Thomas Cooley offered one of the first definitions of the right to privacy: the right "to be let alone."[8] Cooley's definition was subse-

The author is an Institute of Government faculty member who specializes in social services, elder law, and child support issues. Contact him at saxon@iogmail.iog.unc.edu.

quently adopted and made famous as "the right most valued by civilized men" by Justice Brandeis in his 1928 dissent in *Olmstead v. United States*.[9]

More recently, privacy has been defined as

- the right to control others' access to, use of, and disclosure of information about oneself;[10]
- the right to be free from unjustified public scrutiny; and
- the right to be free from unreasonable intrusions on one's solitude and repose.

In addition, privacy today is generally understood to include both

- the right to be free from unwarranted surveillance or searches of one's home, person, or communications by government agencies, and
- the right to be free from governmental control, regulation, or coercion with respect to personal decisions or matters that lie at the core of individual autonomy (such as sexuality, birth control, abortion, family relationships, and personal beliefs).

No single definition of privacy, however, is wholly satisfactory or complete.[11] Instead, "privacy" appears to be an umbrella term that encompasses a wide variety of interests, claims, and rights.[12]

Why Does the Law Protect Privacy?

Every person has some degree of personal privacy regardless of whether the law recognizes and protects it. An individual, however, has a legal right to privacy only to the extent that the law (1) recognizes as legitimate that individual's interest, expectation, or claim to privacy; (2) imposes a corresponding duty on others not to invade or interfere with the individual's privacy; and (3) protects his or her right to privacy against others.[13]

But why should the law protect individual privacy? What individual and social interests does privacy serve?

Every individual has an interest in personal privacy, solitude, and autonomy. Simply put, some matters are "nobody else's business."[14] Sociologist Amitai Etzioni argues that privacy is a veil behind which one may shield what is legitimately private from public view.[15] (Richard Posner offers a contrary view, which may not be widely shared: that privacy facilitates fraud and misrepresentation by allowing people to conceal true but embarrassing information about themselves from others in order to gain unfair social or economic advantage.)[16]

Psychologically and socially, people need a certain degree of privacy and solitude—"a refuge within which [they] can shape and carry on [their] lives . . . without the threat of scrutiny, embarrassment, judgment, and the deleterious consequences they might bring."[17] Privacy protects individual autonomy; safeguards people from tangible social or economic harm or discrimination resulting from the disclosure of sensitive, embarrassing, or negative information;[18] and allows people to establish and maintain important personal, social, and professional relationships.[19]

Privacy is more than an *individual* value, however; it also is a social one. Privacy is

> *important not only because of its protection of the individual as an individual but also because individuals share common perceptions about the importance and meaning of privacy, because it serves as a restraint on how organizations use their power, and because privacy—or lack of privacy—is built into systems and organizational practices and procedures . . . [thereby giving] privacy broader social, not only individual, significance.*[20]

Moreover, in at least some instances, privacy serves public or social purposes that are unrelated to, or go beyond, the protection of individuals' interests. For example, federal rules regarding the confidentiality of treatment records for alcohol and drug abuse protect patients from stigma or harm they might suffer as a result of public disclosure of their status. But the rules also serve an important public and social purpose: minimizing the social impact of alcohol and drug use by encouraging patients to seek treatment without fear of public scrutiny and by protecting the confidential relationship between patients and professionals that is required for successful treatment.[21]

Is Privacy Absolute?

Is privacy absolute? The short answer is no.

The reason is threefold. First, absolute privacy is simply impossible in society. The very act of engaging in personal relationships with others and living in society necessarily requires an individual to relinquish his or her personal privacy to some extent.[22]

Privacy protects individual autonomy; safeguards people from tangible social or economic harm or discrimination resulting from the disclosure of sensitive, embarrassing, or negative information; and allows people to establish and maintain important personal, social, and professional relationships.

Second, legal rights to privacy are more limited in scope than the concept of privacy itself. Privacy encompasses a broad range of individual and social interests, and not every invasion or loss of privacy is of sufficient importance or weight to warrant legal protection.[23]

Third, and most important, although privacy is an important individual and social value, it is not the only value that the law and public policy must take into consideration.[24] Individual and social interests in privacy often must be balanced against competing individual and social interests, such as governmental account-

ability, public safety, and administrative efficiency.[25] In some instances the competing interests may either limit or completely override individual and social interests in privacy. For instance, virtually every statute or legal rule recognizing an individual's legal right to privacy in the information gathered about him or her includes one or more exceptions under which otherwise private, privileged, or confidential information may or must be disclosed to someone in some circumstances for some purpose.[26]

The real issue, of course, is how much weight to give privacy versus other interests in any particular situation. Some privacy advocates contend that a presumption of privacy should be the "default setting of the Information Age."[27] By contrast, sociologist Amitai Etzioni argues that privacy should not be accorded special status. Instead, it should be treated like any other individual right that must be balanced with concerns for the common good.[28]

What Rights to Privacy Does the Law Protect?

It is generally agreed that the law recognizes and protects four distinct rights to privacy:

- Freedom from unreasonable searches by government agencies or officials
- Individual autonomy—the right to make personal decisions about sexuality, birth control, abortion, and family relationships free from governmental control or coercion
- Freedom from unwarranted intrusions on personal solitude or seclusion
- "Informational privacy," protecting individuals from unreasonable collection, use, and disclosure of personal information

Each of these rights depends on dozens (if not hundreds) of laws—federal and state constitutional provisions, federal and state statutes and regulations, court decisions, and the common law.[29] Those laws determine what privacy means in particular situations: whether an individual has a legal right to privacy, what the nature and the scope of that right are, and how that right will be protected.[30]

Constitutional Rights

Although the U.S. Constitution does not expressly refer to a right to privacy, it clearly protects at least three aspects of individual privacy. First, the Fourth Amendment's prohibition against unreasonable searches limits government surveillance that unduly intrudes on an individual's home, person, or communications.[31] (For a detailed discussion of the Fourth Amendment's guarantees, see the article on page 13.)

Second, the Supreme Court has recognized a constitutional right of privacy that protects individual liberty and autonomy by limiting government interference with or control of personal decisions regarding birth control, abortion, marriage, parenting, and family.[32]

Third, the Supreme Court's 1977 decision in *Whalen v. Roe* suggested that the Constitution's protection of individual privacy encompasses a right to "informational privacy," which may limit the authority of federal, state, and local governments to obtain, use, or disclose personal information about individuals. The *Whalen* case involved a New York law that required doctors to send a copy of all prescriptions for certain legal but dangerous drugs to the state health agency, which maintained a computerized database including the name, the address, and the age of the patients for whom the drugs were prescribed. The Court recognized that "the accumulation of vast amounts of personal information in computerized data banks or other massive government files" threatens individual privacy.[33] However, the Court also recognized that the government's collection and use of personal informa-

Several municipalities in North Carolina are authorized to mount cameras at intersections to photograph drivers running red lights.

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tion is necessary in order to collect taxes, enforce criminal laws, protect the public health, and administer government programs, and that its right to collect personal information generally is accompanied by a corresponding legal duty to avoid unwarranted disclosure or use of that information.

Further, the *Whalen* decision recognized, at least implicitly, that the Constitution establishes a floor for the protection of individual privacy, including a right in some circumstances not to have one's private affairs made public by the government. However, the Court held that New York did not violate the constitutional privacy rights of patients because the state's collection of prescription records from pharmacists was reasonably related to its legitimate interest in controlling the distribution of dangerous drugs and minimizing their misuse, and the law adequately protected the patients' confidentiality by limiting access to, use of, and disclosure of the information.

Although the North Carolina Constitution does not expressly recognize a right to informational privacy, both the North Carolina Supreme Court and the North Carolina Court of Appeals have held that the state constitution nonetheless includes a right to privacy that is similar to the constitutional right to informational privacy recognized in *Whalen*.[34]

Federal Laws and Regulations

The federal Privacy Act limits, but does not completely prohibit, the disclosure of personal information from most record systems maintained by federal agencies without the written consent of the individual to whom the record pertains.[35] The act generally does not apply to state or local government agencies—even if those agencies receive federal funding.[36]

The federal Freedom of Information Act (FoIA) requires most federal agencies to make information in their records available to the public. But it also allows federal agencies to refuse to release information or records if (1) disclosure would constitute a clearly unwarranted invasion of privacy or (2) the records are considered confidential or protected from disclosure under a federal statute (other than the Privacy Act).[37] The FoIA applies only to federal agencies; it does not apply to state or local governments.

A number of federal laws impose privacy requirements on state and local governments as a condition of receiving federal funding. The federal Family Educational Rights and Privacy Act (FERPA), for example, prohibits the U.S. Department of Education from providing federal funding to educational institutions whose policies or practices regarding the release of personally identifiable information contained in student education records do not comply with FERPA's confidentiality requirements.[38]

Other federal laws impose confidentiality requirements that are not tied to federal funding. For example, the federal Computer Matching and Privacy Protection Act of 1988 restricts the use and redisclosure of personal information that state and local social services agencies receive from federal record systems for use in computerized data-matching programs.[39] Similarly, one provision of the federal Privacy Act limits, but does not completely negate, the authority of state and local governments to require individuals to disclose their Social Security numbers in connection with their exercise of any right, benefit, or privilege provided by law.[40] The federal Videotape Privacy Protection Act prohibits businesses that are engaged in the rental or sale of videotaped movies from disclosing information that personally identifies

Many Web sites use encryption software to protect the information that passes across the Internet.

the specific videotaped materials rented or bought by consumers unless the disclosure is allowed under the act.[41] And the federal regulations on medical privacy adopted pursuant to the Health Insurance Portability and Accountability Act (discussed further in the article that begins on page 44) apply to virtually all health care providers and health care plans.[42]

State Statutes

North Carolina's General Assembly has enacted a number of statutes restricting the collection, use, or disclosure of personal information by state and local governments. For example, the state's Financial Privacy Act limits, but does not completely preclude, access by state and local government agencies to customers' financial records maintained by banks and other financial institutions.[43] Further, state statutes limit the disclosure by state and local government agencies of information from agency records regarding individual taxpayers, children involved in juvenile court proceedings, people who apply for or receive public assistance or services from county social services agencies, and public employees.[44]

North Carolina law also protects privacy by limiting disclosure of certain types of personal information collected by businesses, professionals, or individuals. For example, state rules governing the licensing of attorneys, doctors, psychologists, and other professionals often impose restrictions regarding the disclosure of confidential information about clients or patients.[45] Further, state statutes provide that "privileged" communications between clients, patients, or other specified types of individuals, and doctors, psychologists, clergy, or other specified categories of people generally may not be admitted as evidence in legal proceedings.[46] Other state laws restrict the disclosure of patients' prescription records by pharmacists, the disclosure of patients' records by public or private mental health facilities, the disclosure by any person that another person has HIV or AIDS, and the disclosure of library users' records by public libraries and private libraries that are open to the public.[47] In at least one instance, state law recognizes and protects a right to privacy with respect to personal solitude and repose by limiting the time and the manner of telephone solicitation calls.[48]

On the other hand, some state statutes *limit* privacy by requiring the release of information to state or local government agencies even if the information might otherwise be considered confidential. For example, state law generally requires individuals, businesses, professionals, and government agencies to share information with county social services agencies in cases involving child abuse and neglect or child support enforcement.[49]

Common Law

Courts in other states have recognized four distinct common law rights to privacy that protect individuals against

- unreasonable public disclosure of their private information;
- unreasonable intrusion on their solitude or seclusion or into their private affairs;
- misappropriation of their likenesses or identities; and
- being placed in a false light before the public.

North Carolina's courts have recognized a common law right to privacy for claims based on the misappropriation of an individual's name or likeness and on intrusion on solitude or seclusion.[50] But they have refused to recognize common law privacy claims based on placing an individual in a false light or claims involving the public disclosure of private information.[51] On the other hand, North Carolina law recognizes legal claims based on the improper disclosure by attorneys, doctors, or other professionals of confidential information regarding their clients or patients, as well as claims based on a person's (or, perhaps, a government employee's or agency's) intentional or negligent infliction of emotional distress by unreasonably disclosing personal information about an individual.[52]

Summary

Privacy is clearly an important public issue and a primary value of an open society—a value that has been recognized, protected, and sometimes limited by law. Privacy also is a multifaceted concept, sometimes confusing and complicated and not always clearly understood.

This article has provided a brief overview of the meaning of privacy, the individual and social interests that privacy serves, the competing public interests that may limit individual privacy, and the nature and the sources of legal rights to privacy. Other articles in this issue examine in more detail how privacy laws may affect state and local government agencies and officials.

Notes

1. The case referred to in the first panel on page 6 is Kyllo v. United States, 121 S. Ct. 2038 (2001). For a further discussion of it, see the article on page 13.

2. Judith Wagner DeCew, In Pursuit of

PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 1–2, 145–64 (Ithaca, N.Y.: Cornell Univ. Press, 1997); PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 69 (Chapel Hill: The Univ. of N.C. Press, 1995).

3. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARVARD LAW REVIEW 193 (1890).

4. *See* Osborn v. United States, 385 U.S. 323 (1966).

5. *See* AMITAI ETZIONI, THE LIMITS OF PRIVACY 187 (New York: Basic Books, 1999).

6. *See* DECEW, IN PURSUIT OF PRIVACY; DAVID M. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY (New York: Praeger, 1979); VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION (Philadelphia: Temple Univ. Press, 1991).

7. DECEW, IN PURSUIT OF PRIVACY, at 58; O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY, at 232; SAMAR, THE RIGHT TO PRIVACY, at 19.

8. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (Chicago: Callaghan & Co., 1880).

9. Olmstead v. United States, 277 U.S. 438, 478 (1928).

10. *See* ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (New York: Atheneum, 1967). The right to control access to personal information encompasses the right to control *what information* is known to others and *who* knows it.

11. DECEW, IN PURSUIT OF PRIVACY, at 46–60; SAMAR, THE RIGHT TO PRIVACY, at 51–60.

12. DECEW, IN PURSUIT OF PRIVACY, at 1.

13. *Id*., at 27; SAMAR, THE RIGHT TO PRIVACY, at 14–18.

14. Of course, people differ in their experiences, feelings, needs, expectations, and actions with respect to personal privacy. For example, some people refuse to buy anything over the Internet or use cell phones because they fear that their credit card numbers or other personal information will be intercepted or disclosed. Others "blithely give out their credit-card numbers," Social Security numbers, or other personal information to government agencies and businesses. CHARLES J. SYKES, THE END OF PRIVACY 11, 13–15 (New York: St. Martin's Press, 1999).

15. ETZIONI, THE LIMITS OF PRIVACY, at 210.

16. Richard Posner, *An Economic Theory of Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 333, 337–38 (Ferdinand D. Schoeman ed., Cambridge, Eng.: Cambridge Univ. Press, 1983).

17. DECEW, IN PURSUIT OF PRIVACY, 64, 67.

18. The federal Privacy Act (discussed later in text) expressly recognizes that an individual's legal rights and opportunities with respect to employment, insurance, and credit may be endangered by the disclosure of personal information. *See also* Mark I. Soler & Clark M. Peters, *Who Should Know What? Confidentiality and Information Sharing in Service Integration*, RESOURCE BRIEF, No. 3 (New York: Nat'l Center for Service Integration, 1993); MARK I. SOLER *et al*., GLASS WALLS: CONFIDENTIALITY PROVISIONS AND INTERAGENCY COLLABORATIONS (San Francisco: Youth Law Center, 1993).

19. DECEW, IN PURSUIT OF PRIVACY, at 69–70; JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 215–16 (New York: Random House, 2000); John L. Saxon, *Confidentiality and Social Services (Part I): What Is Confidentiality?* SOCIAL SERVICES BULLETIN, No. 30, at 32–39 (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 2001).

20. REGAN, LEGISLATING PRIVACY, at 23, 221, 223.

21. LEGAL ACTION CENTER, CONFIDENTIALITY AND COMMUNICATION 4 (New York: Legal Action Center, 2000).

22. WESTIN, PRIVACY AND FREEDOM, at 32–39; Whalen v. Roe, 429 U.S. 589, 605–06 (1977).

23. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY, at 19.

24. ETZIONI, THE LIMITS OF PRIVACY, at 4.

25. *Id*.; O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY, at 20, 27; Saxon, *What Is Confidentiality?* at 7–9.

26. FERPA, for example, allows the disclosure of information from student records for "directory" purposes (say, in a university's student directory); to school personnel for legitimate educational purposes; when disclosure is necessary to protect health or safety; pursuant to court order; or for other purposes specified in the statute. 20 U.S.C. § 1232g(b).

27. SYKES, THE END OF PRIVACY, at 246.

28. ETZIONI, THE LIMITS OF PRIVACY, at 4.

29. The legal bases of privacy and confidentiality are discussed in more detail in John L. Saxon, *Confidentiality and Social Services (Part II): Where Do Confidentiality Rules Come From?* SOCIAL SERVICES BULLETIN, No. 31 (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 2001).

30. In analyzing legal rights to privacy, it is important to identify the *subject* of the right (the people who hold the right), the *object* of the right (the types of information, decisions, or behaviors that are protected), the *respondents* (individuals, businesses, government agencies, or others) against whom the right may be asserted, and the *reason* (interest, policy, or justification) on which the right is based. *See* SAMAR, THE RIGHT TO PRIVACY, at 14–18.

31. *See* Katz v. United States, 389 U.S. 347 (1967). The North Carolina Constitution (Art. I, Sec. 20) also prohibits unreasonable searches by government agencies or officials.

32. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

33. Whalen v. Roe, 429 U.S. 589, 605 (1977).

34. Treants Enter. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 365 (1986), *aff'd on other grounds*, 320 N.C. 776, 360 S.E.2d 783 (1987); ACT-UP Triangle v. Commission for Health Serv., 345 N.C. 699, 483 S.E.2d 388 (1997).

35. 5 U.S.C. § 552a.

36. St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369 (9th Cir. 1981).

37. 5 U.S.C. § 552(b)(6). *See* United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (holding that disclosure of individual's FBI "rap sheet" would constitute unwarranted invasion of privacy under FoIA even though it contained information obtained from public records).

38. 20 U.S.C. § 1232g; 34 C.F.R. § 99.

39. 5 U.S.C. §§ 552a(a)(8)–(12), 552a(o)–(r).

40. 5 U.S.C. § 552a (note). *See* David M. Lawrence, *Local Government Requirements for and Use of Social Security Account Numbers*, LOCAL GOVERNMENT LAW BULLETIN, No. 55 (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1994). *See also* G.S. 143-64.60.

41. 18 U.S.C. § 2710. Enacted under Congress's authority to regulate interstate commerce, this federal act preempts state laws that otherwise would allow or require the disclosure of protected information.

42. 65 Fed. Reg. 82,462 (Dec. 28, 2000); 45 C.F.R. pts. 160, 164.

43. G.S. 53B-1 through -10.

44. G.S. 105-259; G.S. 7B-302(b), -2901, -3000; G.S. 108A-80; G.S. 115C-319 through -321; G.S. 126-22 through -30, 153A-98, 160A-168.

45. *See, e.g.*, 27 N.C. ADMIN. CODE 2.1, r. 1.6; 21 N.C. ADMIN. CODE 63.0507.

46. *See, e.g.*, G.S. 8-53, -53.2, -53.3; Michael v. Foil, 100 N.C. 178, 6 S.E. 264 (1888).

47. G.S. 90-85.36; G.S. 122C-52 through -56; G.S. 130A-143; G.S. 125-19.

48. G.S. 75-30.1.

49. G.S. 7B-302(e); G.S. 110-139(d).

50. Miller v. Brooks, 123 N.C. App. 20, 25–26, 472 S.E.2d 350, 354 (1996); Flake v. Greensboro News Co., 212 N.C. 780, 790–93, 195 S.E. 55, 62–64 (1938).

51. Renwick v. News and Observer, 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984); Hall v. Post, 323 N.C. 259, 263–70, 372 S.E.2d 711, 714–17 (1989).

52. *See* Jones v. Asheville Radiological Group, 134 N.C. App. 528, 518 S.E.2d 528 (1999), *rev'd on other grounds*, 351 N.C. 348, 524 S.E.2d 804 (2000); *Hall*, 323 N.C. at 268, 372 S.E.2d at 716; Woodruff v. Miller, 64 N.C. App. 364, 307 S.E.2d 176 (1983); Burgess v. Busby, 142 N.C. App. 393, 399, 544 S.E.2d 4, 7 (2001).