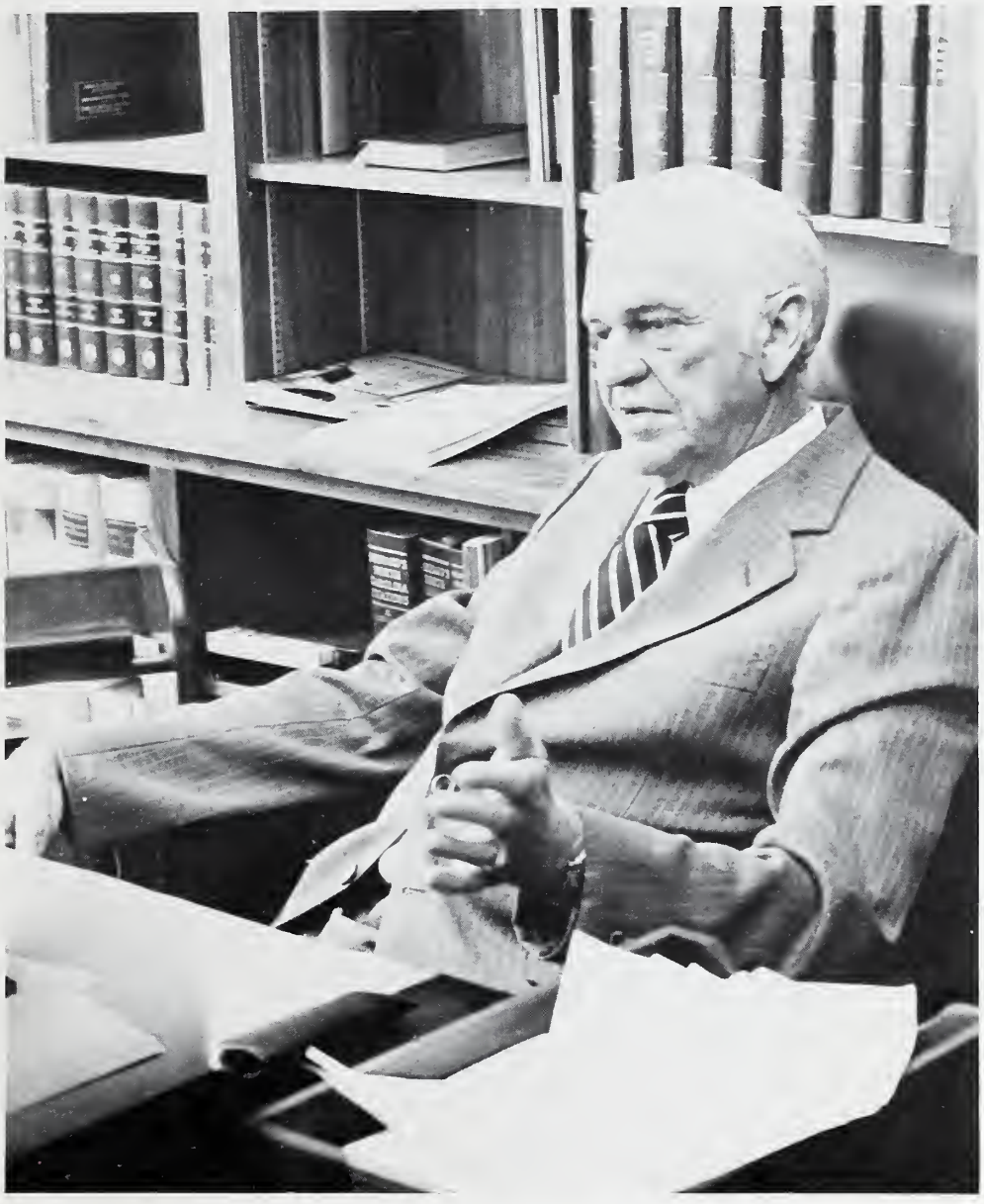

North Carolina Supreme Court Justice Joseph Branch

Wake Forest Jurist

Vol. 10, No. 1 Fall, 1979

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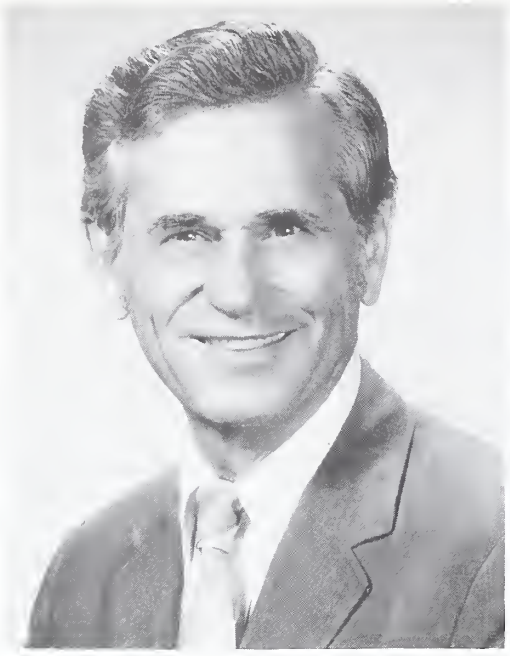
STATEMENT OF PURPOSE AND POLICY

The *Wake Forest Jurist* is published twice yearly by the Wake Forest School of Law of Wake Forest University. Its main purpose is to inform the friends and alumni of the Law School about activities and events of interest at the Law School, of recent important decisions by the courts of North Carolina and other jurisdictions, and news of the achievements and activities of fellow alumni. In this way the *Jurist* seeks to provide a service and a meaningful link between the School of Law and its alumni. Also, the magazine shall provide a forum for the creative talents of students, faculty and its alumni and an opportunity for legal writing by them. Opinions expressed and positions advocated herein are those of the authors and do not represent official policy of the School of Law.



John D. Scarlett

FROM THE DEAN

There is quiet air of expectancy in the Law School this fall which is not entirely due to the Mackovic Magic on the football field. With five new faculty members already on hand, a sixth arriving for the second semester, and a new Dean rattling around in the southwest corner of Carswell Hall, some of the familiar sights and sounds around the Law School inevitably are changing. The increasingly sophisticated demands of the legal profession must be reflected in an educational program designed to prepare our graduates for the practice of law and other legal careers as they will be carried on in the 1980's and beyond. Our challenge in the years just ahead is to mold such a program within the framework of the Wake Forest tradition, established and carried on most recently by men like Carroll Weathers and Nig Lee and Jim Webster and Hugh Divine. We will obviously need your help to meet that challenge, and we hope you will give us the benefit of your thoughts and feelings and advice both individually and through the Board of Visitors and the Law Alumni Association representatives as we lay out our course for the future.

I am delighted, of course, to be back at Wake Forest. I have always felt that there was something very special about this Law School, a kind of professional elan which is not replicated elsewhere in legal education institutions in this country. I can't really describe it, but after just a few months I am convinced it is still here, despite the great increase in the size of the school. I have already enjoyed meeting many of my old students and friends (and I use the adjective advisedly), and I am looking forward to meeting many more of you again in the months ahead.

As we look down the road there are a number of things which we need to think about and talk about together. First, however, I would like to express both publicly and in print my thanks and gratitude for the outstanding service performed by Acting Dean Leon Corbett during the past year to the University, to the Law School, and to me personally. Stepping into a difficult situation at a difficult time, he went well beyond the holding action expected of an acting administrator. With a combination of quiet competence and dedicated determination, he made the hard decisions and took the firm action needed to bring the Law School back on course and make my job a much easier one. In the process, he used up a lot of capital with his colleagues and others, and he earned the respect and gratitude of all of us. This year, as an encore, he is serving as Counsel to the University and as Associate Dean of the Law School.

The campaign to complete payment for the most recent addition to Carswell Hall is drawing to a close. Although we still need approximately $200,000 to retire this obligation completely, we are hopeful that this can be accomplished by the end of this year so the funds currently being diverted for debt servicing can be used for more productive purposes.

Late in February or early in March the Law School will be inspected by representatives of the Council on Legal Education of the American Bar Association as a part of its seven-year routine accreditation re-inspection program. The inspection report, and the subsequent actions of the Accreditation Committee, will almost certainly point up at least three serious problems in the present operations of the Law School. First, our library, as measured by accreditation standards, ranks in the bottom 5% of libraries in accredited law schools throughout the country. Even as a "working library," it has serious deficiencies; and as a research library, it simply does not stack up at all.

Our second problem may be even more damaging. We now have approximately 500 students in the Law School. When our new man joins the faculty for the spring semester, we will have sixteen full-time faculty members. When Professor Rose returns in the fall of 1980, we will have one more. These figures translate into a student-faculty ratio of about 31 to 1 in the spring and about 29 to 1 next fall. They are almost exactly twice as large as the ratios in the Wake Forest undergraduate college. Of more immediate concern, however, is the fact that they are right on the outer limits permitted by accreditation standards.

Our third problem is a more familiar one. Our faculty salary scale is substantially below the national median and average for law schools. This makes it extremely difficult for us to recruit and retain the kind of faculty Wake Forest alumni are used to and Wake Forest students deserve. The problem is complicated by the fact that the Law School salary scale is as high as, or higher than, that of any unit on the Reynolda campus. Unfortunately, however, our competitors for top faculty talent are other law schools, and in this league we could use a little Mackovic Magic.

The solution of each of these problems will require the development of additional resources for the Law School on a fairly large scale. Dean Corbett described the problem in last fall's issue of the *Jurist* better than I can:

> Having mentioned challenges and monetary needs, I would be remiss if I did not point out what I see as

perhaps the single greatest long term challenge to the school. That is the raising of sufficient endowment. Ninety percent of the school's operating expenses is paid by tuition – twice the percentage normally expected in good schools. That makes the continued support of the programs of the school dangerously dependent on continued high enrollment, a picture which could change drastically in the future. To insure a continued program of high quality in the years to come, we must secure endowment literally in the millions of dollars. That will not be an easy task but it is one which must be accomplished if the future quality, security and independence of the school is to be assured.

This "long term" challenge is rapidly assuming a new urgency and immediacy. Our success in meeting it may well determine both the short and long term shape and destiny of the Wake Forest Law School.

LAW SCHOOL NEWS

FRIENDS OF THE LIBRARY

The Library of the Wake Forest University School of Law will be the subject of a major fund-raising campaign to begin this winter. Headed by Professor Kenneth A. Zick, Director of Law Library Services, the Friends of the Library Campaign will be conducted to solicit donations to help overcome serious deficiencies in the library collection.

Professor Zick completed a survey of law libraries this fall which revealed some rather startling comparisons between Wake Forest Law Library and the law libraries of comparable schools. In 1978, there were only nine ABA-accredited law school libraries in the nation which possessed collections smaller than Wake Forest. These schools are Whittier College, Antioch School of Law in the District of Columbia, the University of Idaho, Valparaiso University, Southern University, North Carolina Central University, Oklahoma City University, Duquesne University, and Catholic University of Puerto Rico. In contrast, 154 libraries reported 1978 holdings greater than Wake Forest. Wake Forest presently has a collection of 76,000 volumes. Out of 164 accredited libraries, 121 or almost two-thirds possessed collections totalling over 100,000. In terms of dollars spent on the library per student, Wake Forest ranked almost equally with Detroit College of Law, University of Baltimore, Southern Methodist University, and Washington and Lee.

Professor Zick commented that while the statistical picture does not look favorable, Wake's Law Library must be assessed in terms of the needs of the School, the faculty, the students, and local practitioners. Even so, the library suffers serious deficiencies in a number of areas.

Students principally use the library as a basic source of information and research to supplement courses and to engage in extracurricular research and writing. One problem which cuts across the board is the library's financial inability to acquire many of the valuable monographs from the past or currently being published. While Wake's actual holdings constitute a collection of high quality, some areas simply do not have the necessary quantity of important books. Another lacking which affects students is the absence of state encyclopedias and regional digests other than those covering North Carolina. While such sets are expensive, they are also essential as a basic source for researching legal issues in other jurisdictions—the kind of research which any law review attempting to publish writing for a national audience must perform.

The principal need of faculty for the library, aside from their teaching duties, is research for writing on topics of personal concern. Professor Zick advised that a law library must, to a significant degree, seek to personalize its acquisitions program in light of the interests of the faculty. The problem is one of long-standing at the School insofar as faculty interests always expand and the library has attempted to handle faculty needs beyond Wake's collection through the inter-library loan system. This approach is proving less satisfactory as the faculty changes, their interests expand, and more requests are received. The loan system also results in

frustrating delays for faculty members and diverts funds from acquisitions because of fees and staff services involved. An added problem with the present system is that the less the library is able to develop areas outside of the immediate faculty's concerns and the more the library relies on the inter-library loan approach, the less the library is able to develop areas attractive to prospective faculty. This latter problem directly affects Wake's capacity to recruit and retain faculty members of outstanding scholarship when the need arises.

The area in which the library is perhaps strongest is that of materials relevant to practice. Wake has a substantial collection of current form-books, pleading and practice sets, multi-volume treatises, and loose-leaf services. For this reason, the Law Library has been a great resource for area attorneys. Over 200 attorneys use the facility on a regular basis, and many more use the library periodically. However, this part of Wake's collection, especially the loose-leaf services, consumes a major share of the library's annual budget. Area attorneys using the library will be invited to become Friends of the Library by aiding in its financial support.

Professor Zick follows the guidelines set forth by the American Association of Law Schools, the accrediting agency, in developing Wake's collection through acquisitions. But he pointed out that the library's problem is not only one of acquisitions; considerable expense is involved in maintaining the present collection. Indeed, 87% of the library's annual budget is spent to maintain loose-leaf services and for pocket-supplement subscriptions. While other schools continue to expand their holdings, Wake cannot afford to stand still.

The Friends of the Library Campaign will begin officially at the start of 1980. A committee will contact alumni, friends, and area attorneys by letter. The *Jurist* urges alumni and friends of the Law School to support this effort.

JAMES CLARK McREYNOLDS

by James E. Bond

Professor of Law, Wake Forest University School of Law.

Editor's Note: James Clark McReynolds, who was born in his parents' bedroom on February 3, 1862, in Elkton, Kentucky, served on the Supreme Court from 1914 to 1941. Appointed to the Court by President Wilson, who thought that a man who had as Attorney General "broken" the trusts would liberalize the Court, McReynolds proved to be one of the most conservative justices ever to sit on the Court. He led the conservative opposition to Roosevelt's New Deal, stubbornly refusing to retire until after Roosevelt's election to a third term. By then, the senior Justice was in ill health and had been isolated on a Court most of whose members he loathed. McReynolds dissented more than any justice in the history of the American bench. The following is from the Epilogue to Professor Bond's completed manuscript entitled, *James Clark McReynolds: I Dissent*. Professor Bond's footnotes have been omitted.

EPILOGUE

Justice McReynolds penned his own epitaph when he told the Tennessee Bar Association:

Professor James E. Bond

> Always by resort to the fundamentals, one can find a way which to his own mind yields satisfaction, and when he does he loves to have it applauded, but whether applause or condemnation comes he is at peace with himself, and with himself he must live.

By the time McReynolds spoke those words; he had already served on the Court for more than two decades. He had been much praised and much criticized. Neither the praise nor the criticism affected his judgment. He did not seek the former, and he did not flinch from the latter. Whatever the result, regardless of the result, he followed his convictions. A lawyer friend recalled him in these words:

> He was in spirit a "Latter-Day" patriarch. As a veritable Luther, there he stood, unshaken in his resolute fidelity to the creed which he believed, with a fervent faith, which, in his mind, admitted no doubt or question.

McReynolds needed the patriarch's spirit, for he survived into a world that rejected his values and berated him for clinging to them. He is remembered today if at all as "the greatest judicial failure of any man who ever sat upon the Supreme Court," the Court's "greatest human tragedy." He is portrayed as a vain bigot whose mean-spiritedness and narrow, inflexible mind led him to pervert the Constitution in his unwavering defense of "the rights of property and the rights of wealthy men."

There is some truth to the caricature, but it is a caricature nonetheless. He shared the prejudices common to men of his day, class, and section. In other words, he discriminated against blacks, patronized women, and disliked Jews. He confused dignity with pompousness and character with manner. Consequently, he often concealed his extraordinary humanity behind a facade of formality; and he practiced customs that had long since passed from the quaint to the obsolete. He also had a terrible temper which he made little effort to control, believing apparently that there were things

about which a man ought to get angry. He could have been describing himself when he said of a lower court judge who had been asked to disqualify himself: "While 'an overspeaking judge is no well tuned cymbal' neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power."

Admittedly, McReynolds came to the bench with a fixed view of American government and the role of the Court in maintaining that governmental scheme. His view was Jeffersonian. The national government was supreme within the powers granted it, but those powers were limited and were to be construed narrowly. State governments retained substantial authority to legislate; but their powers, too, were limited. Individual citizens retained rights that no government, state or national, however responsive to transient majorities, could abridge . . . . In enforcing those rights, McReynolds often made decisions from which particular classes drew comfort. Yet he never enlisted himself in the service of any of those classes. Even his critics conceded that he was "free from influence from any quarter."

Moreover, the Jeffersonian view to which McReynolds adhered rested on a sound exposition of legal principles rooted in precedents reaching back to the beginnings of the American republic. Though the Roosevelt Court and its successors subsequently reassessed those precedents and repudiated that view, it was wholly consistent with the American constitutional tradition. That tradition included, additionally, a judicial commitment to enforce the law until and unless changed by competent authorities pursuant to prescribed procedures. McReynolds agreed wholeheartedly with Mr. Justice Sutherland, who said in *West Coast Hotel v. Parrish*:

> What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it . . . . The only true remedy is to amend the Constitution.

Believing judicial legislation to be "a hateful thing," the Justice thus refused even in crisis to re-interpret the Constitution so as to confer upon political authorities powers which they felt were desperately needed.

Adherence to principle and fidelity to duty are seldom cause for scorn, even when the principle is mistaken and the duty misconceived. Yet McReynolds was scorned. He was scorned because he dared question not only his opponents' wisdom but their morality as well . . . . On the whole, those he opposed proved shallow; and in their irritation they spread abroad the many stories of his intolerant, cantankerous, rude behavior. These were then interpolated into biographies of the other Justices and histories of the period, and they have shaped the prevailing picture of the Justice.

The record, however, does not support the caricature. McReynolds was on occasion intolerant, cantankerous, and rude; but he was far more often compassionate, kind, and generous. Although McReynolds lived comfortably and traveled widely, he gave much of what he earned to those in need; and in the end, he gave virtually all he had accumulated to charity. The full record of his giving will never be known because he typically gave quietly or anonymously. Yet enough is known about "the number and variety of his benefactions" to justify the conclusion that he was extraordinarily humane. His friends invariably described him with words such as "staunch", "stout", "loyal". He gladly sacrificed his own comfort for a friend, as when he passed up a rare opportunity to preside over the Court in Hughes' absence in order to visit a sick uncle in Tennessee.

Once his character is understood, his other, less admirable behavior is understandable if not wholly excusable. For the first four decades of his life McReynolds moved in circles where everyone subscribed to the orthodoxies he venerated. Not until he entered the President's Cabinet at the age of fifty and later went on the bench did he regularly have to deal on a personal and professional basis with men who dissented from those orthodoxies. By experience then, as well as by his own nature, he was ill-equipped to deal with them. Believing that his views were grounded in good, he naturally perceived contrary views as grounded in evil. Since good men do not advocate evil views, the Justice could only conclude that his opponents were themselves evil. While he therefore treated gentlemen as gentlemen, he treated scoundrels as scoundrels. He had, he often said, no patience with "flabby tolerance."

Finally, McReynolds strove to defend only the Constitution, though to be sure it was the Constitution as he understood it or, as he put it: "the Constitution as written and not as whittled away by tenuous reasoning." He did not consciously seek to make the world safe for capitalism or the capitalist. He sought only to make it safe for the individual citizen to exercise his inalienable rights. "The best thing about America," he once asserted, "is its individuality, which is derived from freedom."

If McReynolds' constitutional view was more a reflection of the past than a promise of the future, he espoused it with the "magnificence" of "a man who holds firmly to what he believes to be right, at whatever sacrifice of popular acclaim and of popular good will." The day after McReynolds had announced his intention to retire, the *New York Sun*, which did not think his principles mistaken or his duty misconceived, paid him a ringing tribute:

> He will go honored by all who hold intellectual honesty in sincere respect. No amount of smearing, no impugning of motives, no mud bath of epithets, among which 'reactionary' is mildest, can do permanent damage to the reputations of him and those other staunch upholders of American judicial tradition who have refused to bow the knee in the Temple of Expediency. A day will surely come when Americans will clean house of the current crop of false gods and return to their ancient faith. Great honor to the memory of a McReynolds will be paid on that happy day.

That day has not yet and may never come. Even if it does, McReynolds' voice will not likely be the one calling

America back to her republican past. He was not a great jurist. He failed for the most part, even in his major dissents, to clothe his Jeffersonian views in convincing argument and enduring language. Except for his *Meyer* and *Pierce* opinions, his work has not influenced subsequent courts. And subsequent courts probably followed those decisions because their underlying rationale was intrinsically compelling rather than because the Justice made a compelling argument for their rationale. His antipathy to principled analysis and his reliance on self-evident truths robbed his opinions of the persuasive impact they might otherwise have had.

McReynolds was, nevertheless, an extraordinary man who lived through extraordinary times that brought out the best and the worst in his character. The worst is well-known. The best has been forgotten. No public official ever adhered to his convictions with greater consistency or vigor. No public official ever stood more steadfastly against the current of public opinion. No public official ever served with less private profit. It is then reason enough for praise in a world where so few public officials have conviction or courage or conscience that McReynolds had all three. He did his duty as his God gave him the light to see it.

CHIEF JUSTICE BRANCH

"My ambition was to be a good lawyer, that's all. I never thought about being a judge."

—Chief Justice Branch
(October, 1979)

Editor's Note: On July 21, 1966, Joseph Branch (L.L.B. '38) was appointed a seat as Associate Justice of the North Carolina Supreme Court. The tall, silver-haired Branch, at age 64, was sworn in as the Chief Justice of the North Carolina Supreme Court on August 1, 1979.

After his graduation from Wake Forest Law School, Branch returned to his hometown of Enfield, N.C., and entered the practice of law as a sole practitioner. Branch again returned to Enfield following his Army Service during World War II, and entered the political arena. He was elected to four terms in the North Carolina House of Representatives and served as Governor Luther Hodges' legislative counsel in 1957.

Branch served as campaign manager for Dan K. Moore, who was elected governor in 1964, and in 1965 Branch worked as Moore's legislative counsel. In 1966, Governor Moore appointed Branch as an Associate Justice on the North Carolina Supreme Court.

Justice Branch is a member and former chairman of the Wake Forest University Board of Trustees. In 1971 he received the University's Outstanding Service Alumni Award, and in 1974 he was awarded Wake Forest's Distinguished Service Citation in Law.

This fall, Chief Justice Branch graciously gave his permission for three editors of the *Jurist* to visit him in his Raleigh office. Joe Long, *Jurist* alumni editor, Sally Foster, managing editor, and Keith Martin, graphics editor, set out for Raleigh early one morning loaded with questions. Notwithstanding his busy schedule, The Chief Justice allowed the visit to extend into lunch, when all four went to dine in the favorite hang-out of North Carolina's eminent jurists – Belk's Cafeteria. The following interview is a result of Justice Branch's kindness.

Q. What have you found to be the difference in your duties as Chief Justice of the North Carolina Supreme Court as opposed to your duties as an Associate Justice?

A. "A great deal of difference. Now I have more administrative duties. I have meetings every day with the Clerk and with the Administrative Office of the Courts, and I get all the complaints anytime anyone doesn't like what is happening. People feel free to walk right into the office. I used to be able to shut the door at 9:00 in the morning and work all day on writing an opinion. Now if I get a half day in, I'm pretty lucky. I still have to write the same number of opinions. I am afraid the quality is going to suffer. That's the big difference."

Q. What is your average working day?

A. "From 8:45 A.M. to 5:45 P.M. I generally carry work home with me. I thought I would outgrow that. Sometimes my days are a lot longer."

Q. In 1980 you will be eligible to run for a term expiring in 1988, and you will be eligible to serve until July 5, 1987, at which time you will reach the mandatory retirement age of 72. What is your opinion of the mandatory retirement age for justices?

A. "It is a good principle. In our case, however, we've lost four very competent, alert judges. All could work just as many hours as ever. We've lost Judge Lake, Judge Moore, Judge Sharp and Judge Bobbitt. I don't think I'll be here until I'm 72. I might want to stop before then. It depends on how you feel when you get up in the morning."

Q. You've commented that you might not serve a full term if re-elected possibly because you want to travel with your wife.

A. "My wife likes to travel; I don't. I'd like to go somewhere and sit down on the beach and vacation. My brother and I own a condominium at the beach. I've only gotten in five days down there this summer. That's not a good investment."

Q. Do you favor the present system of election for judges or are you in favor of a merit system selection?

A. "I'm on record as being in favor of a merit system. If you had a merit system that was out of politics it would be good. I've thought about it, but I don't know how to work that out. The difficulty with a merit system is that usually the group is not seeking the man, the man is seeking a job.

If you had a merit system where the committee was composed of a group of lawyers or persons not interested in politics, that would hire the best man for the job without any other considerations, it would be ideal.

The weakness in election of judges is that the people vote for the man they really like, whether he's good for the job or not. Over the years, election has worked well, particularly in [electing] the Superior Court bench. I would say we haven't had too much bad experience with election of judges. I'm nearly in the middle of the road on that issue. For years I've been saying I was in favor of a merit system, and I still am; I just don't know how to go about setting it up. It will depend on the type of system we have."

Q. Do you believe that for a person to qualify as a judge he should be a lawyer?

A. "I think, unquestionably, that judges ought to be lawyers. It's hard for non-lawyers to try civil cases. It's hard for me to believe that a man who has no legal training can properly charge a jury. Of course, they have the Pattern Jury Instructions. Everything being equal, how can one argue that judges shouldn't be lawyers?"

Q. Chief Justice Warren Burger has expressed his displeasure with the quality of lawyers he encounters in the U.S. Supreme Court. What is your reaction to Chief Justice Burger's opinion based upon the quality of lawyers you have encountered in N.C.?

A. "I think the law schools are turning out better prepared lawyers now than they were in my day. Generally, we have a very fine practicing Bar in North Carolina. Occasionally you will run into a lawyer who does not know how to get his appeal up here properly.

I think that Justice Burger is talking about lawyers who try to get into the United States Supreme Court. This is a day of specialization. Overall, I do not have any criticisms of our Bar. The ones that come here [N.C. Supreme Court] are very good. Over 90% do a good job."

Q. The U.S. Supreme Court recently handed down the *Gannett Newspapers v. DePasquale* decision which allows judges to close pre-trial hearings. What is your opinion on the closure of courts?

A. "I think the courts ought to be open. I agree with our N.C. statute which allows a judge to clear the courtroom in a rape case and an assault with intent to commit rape case, when the prosecuting witness is testifying. Our Constitution makes it clear that courts should be open. I think they should be open with the exceptions in our statutes.

In pre-trial hearings, judges should have some discretion. *Gannett*, if you read it closely, intimates a lot of things without directly saying them. I have a feeling they [U.S. Supreme Court] will back up on it. I wouldn't be surprised if you see them tighten the wheels a little. I don't think we've had too much trouble in North Carolina with the decision.

I think everyone will agree that generally the courts need to be open."

Q. Do you think that cameras should be allowed in courtrooms and that the televising of trials should be permitted?

A. "I'm not convinced that televising of trials helps. I get that question from the television folks every week. I made the mistake when I first heard about it [of saying] that I was was opposed to it but had an open mind. They call up about once a week to see if I've changed my mind. It wouldn't be up to me anyhow. I only have one vote.

The objective we are looking for is a fair and speedy trial. I don't see how televising the proceedings will help that. The television folks can report it. The things the television folks want to report are the things our statute says should not be reported. They don't want to report civil cases. Really, they only want to get in to televise a gory rape trial, or something spectacular.

I'm afraid it would impede the trial. I know lawyers. I was a trial lawyer for 29 years. You'll advertise when you have a big audience. You'll ask one or two extra questions when you have a full courtroom.

I had an old law partner who was a great jury lawyer. He had a murder case. At the preliminary hearing the courtroom was packed. The prosecution put on its evidence of probable cause. My partner got up and made an argument that must have gone on for twenty minutes. The prosecutor leaned over and asked my partner, 'You *know* we have probable cause, don't you?' My partner replied, 'Advertising, Advertising.' When you have a big crowd, you're liable to do a little bit more than normal."

Q. What is your opinion on the N.C. Speedy Trial Act?

A. "The Act is on the books. I'm trying to contact all resident judges and District Attorneys to find out any problems they have so we can help."

Q. Do you favor the N.C. Death Penalty?

A. "I'm on the record as being in favor of it. Nobody likes to do it. I'm still convinced it is a deterrent."

Q. When you first joined the Supreme Court in 1966, the docket was apparently awesome since the Supreme Court had to hear every case which came up on appeal. With the creation of the Court of Appeals, there was a lessening of demand on Supreme Court Justices. You recently observed that the Supreme Court's docket is growing longer.

A. "I believe we have double the number of cases we had last year."

Q. To what do you attribute this growth in the docket?

A. "Well, there's more crime; everyone has an absolute right of appeal on everything. The State will furnish a lawyer and pay for the transcript in the case of indigency. All those things contribute to it."

Q. What steps do you plan to take, or think should be taken to reduce the work load of the Supreme Court and the North Carolina Court of Appeals?

A. "I don't know of anything we [the Supreme Court] can do. Ours is mainly a *certiorari* court now. In the criminal area, the only cases we get originally are life sentences and death penalties.

The Court of Appeals is heavily burdened. I don't know just how much it has increased, but they have tremendous filings over there. I guess they have a better way of handling it in panels of three. They can move along a lot faster than we can because all of us have to read every record and go over every case and never know who's going to get the case until the last day in court. We're a little slower.

We had 25 cases last week and 25 the week before. I picked up eight to write opinions on.

I'm setting up some meetings with the judges across the state. I'm trying to get some ideas. I've had running around in my mind making the Court of Appeals a *certiorari* court in some instances if the legislation could be passed. For instance, we have cases where people come in, plead guilty, and then change their mind; I think that should be *certiorari.* Also, maybe juvenile matters should be *certiorari.*"

Q. Do you favor mandatory continuing legal education for practitioners after they are admitted to the Bar?

A. "I'm on a committee to look into that. It will be hard to implement. It certainly wouldn't hurt."

Q. Do you have an opinion as to whether or not there should be more clinical programs in law school?

A. "Clinical programs are good if you can get them in. The primary purpose of law school is to teach you the theory. I'm very strong on getting second-year students hired as law clerks. That's the finest thing we can do for law students. It does two things. First, it gets them the feel of what is going on. Second, it gives them the opportunity for future employment. I had a clerk the year I left Wake and hired him subject to his passing the Bar.

The main thing is that it gives you a feel for what is going on. When I came out of law school, I knew you had to issue a summons. I wasn't sure whether you went to the Clerk's office or the Register of Deeds to get one.

There's an advantage of starting off with another attorney. I went in practice by myself originally. Good lawyers didn't mind helping me."

Q. What do you think of the emphasis on teaching North Carolina law at Wake Forest?

A. "I think its pretty good if you want to get by the Bar. Secondly, I've found that North Carolina law, except for procedure, runs along with the national rule. We [in N.C.] follow New Jersey a great deal.

Wake Forest has always been that way. When I was in law school, we had a review course which no one else had. Students from Duke and Carolina came over to Wake's course to get by the Bar."

Q. You have reached a position which many attorneys dream of and aspire to achieve. When you were in law school and early in your years of practice in Enfield, did you have ambitions to become a justice on the N.C. Supreme Court? If not, what were your ambitions when you graduated from Wake Forest?

A. "To be a good lawyer, that's all. I never thought about being a judge. I was in a small town and I did everything from marital counseling to first degree murder. I practiced by myself two years, then joined a firm. We covered the waterfront."

I know you're not going to believe this, but I never thought about being put on the Supreme Court, even when I was working with Dan Moore. He never mentioned it to me and I never thought about it.

I was happy with what I was doing down there [in Enfield]. I had a good law practice and three brothers and sisters living on the same street."

Q. What about Wake Forest impressed you the most when you were in the law school?

A. "First, at Wake we had one of the finest faculties any law school ever had. I was fortunate enough to study under Dr. Gulley, Professor Stansbury, Professor Lake and Professor

White. All were just tremendous professors. Wake Forest was a small school. I believe we had 26 in my law school class.

Wake Forest, itself, when I went there, was a small school; everyone knew everyone else. In those days, if you didn't speak to people you'd wake up the next morning bald headed. It was a close, friendly place. Even today, if I see a Wake Forest person on the street I haven't seen in 25 years, I recognize the face and he mine and we learn each other's name. It was a great place. There was a great closeness of students and faculty."

NEW FACULTY

BARKMAN

The *Jurist* takes this opportunity to introduce to the Alumni a peripatetic law professor, Mr. Barkman. His one-year visitorship here is but one of many stops he has made along his varied legal career.

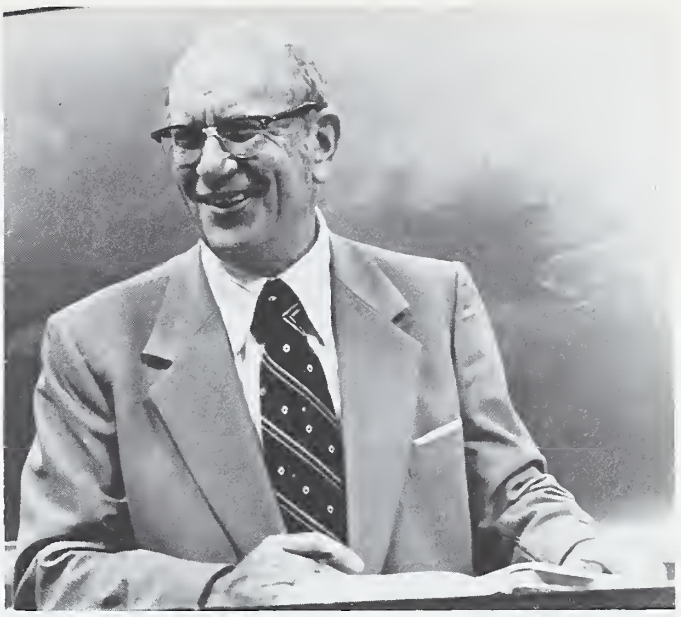
Professor Barkman received his B.A. from St. Johns College, Annapolis, Maryland in 1938 and his J.D. from Duke in 1941. Immediately upon graduation from law school, he was drafted into the army where he served for "five years, one month, and ten days." Professor Barkman practiced law with Sullivan and Cromwell in N.Y.C. for the next ten years and was primarily involved in litigation.

Having enjoyed a little teaching in the Army, Mr. Barkman made the move from the big city to Ohio in order to teach at the University of Toledo. He has already prepared and taught 25 subjects there. While at Toledo; he found time for a multitude of academic activities. Professor Barkman received a Ford Foundation Fellowship at Harvard Law School, and from 1959-60 he studied such varied subjects as "Atomic Energy and the Law" and "Soviet and American Law." He received his LI.M. from N.Y.U. over the summers of 1960, '61, '65 and '66. While at N.Y.U., Professors Barkman and Sizemore met and enjoyed each other's company. (Supposedly, Mr. Sizemore keeps threatening to bring in two pictures a classmate of theirs took in N.Y. Put next to each other, the pictures would show Professor Sizemore lecturing to a sleeping student, Barkman.)

In 1969, Mr. Barkman was a Fellow in Social Science Methods in Legal Education at the University of Denver and the following summer was a Tutor at the Law Science Academy conducted by Hubert Winston Smith. In 1975-76 he accepted a visitorship at Gonzaga School of Law in Spokane, Washington. Professor Barkman barely had enough time to resettle in Toledo with his wife when he agreed to become a visiting law professor here at Wake Forest during the 1979-80 year.

When asked about his wanderings, Professor Barkman's response is enthusiastic He enjoys visiting new campuses, teaching at different schools, and being exposed to a wide variety of students and attitudes. Of course, he singled out Wake Forest students as unique in their curiosity and delight with the law. He attributes part of that stimulation to the beautiful surroundings.

Mr. Barkman's hobby is particularly compatible with his traveling; he is a rock hound and has already joined the Forsyth County club. Since his philosophy is to share all of a lawyer's experiences with the law students, the people in Torts, Criminal Law, and Evidence will be exposed not only to those subjects, but also to rocks, different law schools, and diverse legal experience. How could we possibly absorb it all in a year? Mr. Barkman says he will try to make the effort enjoyable.



Professor Francis E. Barkman

CASTLEMAN

Professor Castleman should have known that teaching was his true vocation. As a 1964 graduate of Lambuth College in Jackson, Tennessee, and a 1967 graduate of the University of Tennessee, Mr. Castleman first entered general practice in Memphis. During this time, the Memphis State School of Business asked that he become an occasional guest lecturer, and he accepted and enjoyed this position. In 1972, he undertook the job of general counsel for Medical Development Services in Memphis, which required travel across the United States. However, when his two-year-old son Scott began calling him "Bye-Bye," Mr. Castleman realized that he wanted a more relaxing work environment. Subsequently, he accepted a position at Drake University School of Law, and the family moved to Des Moines, Iowa, in January of 1975.

At Drake, Professor Castleman served as a consultant to law firms as a specialist in tax and estate planning matters. He also did research and wrote legal articles. Now at Wake Forest, he is negotiating a contract with a prominent tax service to write on agricultural business and estate planning.

One of Professor Castleman's projects at Wake is the preparation of a new course to be offered in the spring of 1980, entitled Agricultural Tax Planning. The purpose of the course is not so much to encourage attorney specialization but rather to acquaint the general practitioner with some of the problems and procedures peculiar to this area of tax planning. Mr. Castleman recently attended an agricultural tax planning seminar in Minnesota and plans to develop the Wake Forest course materials from these ABA materials in addition to his own research.

Outside of his teaching and research duties, Professor Castleman leads an enjoyable home life with his wife Tommie and their four children. His hobbies include skiing, golf, racquetball, and tennis. Also, he is a cub scout den-father for his son's den, and last summer he coached Little League baseball. Mrs. Castleman is kept busy caring for the family and especially its newest member, a baby girl Tori. She also enjoys birdwatching and playing tennis with her husband. While living in Iowa, Mrs. Castleman taught a Bible course and has begun a similar group here.

Professor Castleman has a brother in Charlotte, N.C., and several friends of many years in this area. Although the Castlemans are native Tennesseans, they feel they have returned "home" in coming to North Carolina.

EICHENGRUN

Bridge is only one of the activities Professor Eichengrun enjoyed while studying law at Harvard. Eichengrun also pursued sailing and hiking as well, and took undergraduate courses in musicology and English literature in addition to his legal studies.

Graduating in 1972, Eichengrun has compiled an interesting legal career in the past seven years. He began in Atlanta, working for Lipshutz, Macey, Zussman and Sikes for two years before returning to New York in 1974. Lipshutz, of course, went on to Washington with the Carter administration as White House counsel. In New York, Eichengrun worked with Proskauer, Rose, Goetz and Mendelsohn in litigation.

After a few years with the Proskauer firm, Eichengrun went to work for four years with Pryor, Cashman, Sherman and Flynn of New York, a firm with a substantial number of clients in the entertainment industry. At Pryor, Eichengrun and others represented Neil Diamond in a claim that his original production company failed to pay royalties on records he made before becoming famous. Eichengrun was also involved, as counsel for ABC television network, in a suit brought by the Monty Python production team quarreling over artistic control in editing, for commercial television, episodes of the Monty Python show recorded by the BBC in England.

Professors Newman, Zick and Telly

In a third suit of interest, Eichengrun and others represented a company which held the copyright to Ronnie Mack's song, *He's So Fine,* in an infringement action against ex-Beatle George Harrison. Plaintiffs brought a piano into the district court and played the first 32 bars of *He's So Fine,* followed by the identical bars in Harrison's hit single, *My Sweet Lord.* The presentation was so effective that defense counsel was compelled to demand that the pianist stop between songs so the difference between the two could be pointed out.

As interesting as his work in litigation has been, Mr. Eichengrun prefers teaching and is pleased to be a member of the faculty at Wake Forest. He says he enjoys the stimulation provided by students and the dynamics of the classroom, particularly in his first year Property course. Professor Eichengrun finds his course on Professional Responsibility equally challenging, but in different ways. The *Jurist* welcomes Professor Eichengrun to Wake Forest.

Professors Castleman, Herring, Covington and Peeples

PEEPLES

Professor R. A. Peeples' three years at New York University School of Law and his three years of practice with the Cleveland, Ohio firm of Squire, Sanders and Dempsy mask his Charleston rearing only until the words "out," "house," and "about" enter the conversation. A 1973 graduate of Davidson College, Professor Peeples was not only a Root-Tilden Scholar at NYU, but was also the first Commissioner of Softball.

Professor Peeples finds the realm of legal academia an interesting successor to corporate practice and the questionable ambience of Cleveland. He finds the Wake Forest students "basically very likeable and very bright" (naturally). He also feels the refreshingly relaxed atmosphere of the school conducive to the development of strong professional friendships.

The professor's personal interests include wood working, music (from Willy Nelson and Jackson Brown to Louis Armstrong) and a new-found affection for racquetball. One activity he failed to note, but that should be mentioned, is his

newly acquired expertise as a marathon commuter. Professor Peeples makes a daily trek to Wake Forest from Hillsborough, N.C. The method to this interstate madness is found in his wife Dr. Faith Peeples, a third year Pediatrics resident at Duke Hospital. When asked how a native Charlestonian attending law school in New York City and a native New Yorker attending the Medical University of South Carolina in Charleston could possibly have nurtured a budding romance, he replied that they "spent a *lot* of time in airports."

Professor Peeples, presently teaching Legal Bibliography and Debtor – Creditor, will also teach Real Property Security and Suretyship in the spring. He serves on both the Clinical Committee and the Curriculum Committee. The development of a strong clinical program and the preservation of what he feels is the unique warmth of the law school community rank among his top priorities for Wake's future development.

TELLY

One of the Law School's more gregarious and academically diverse professors is Mr. Charles S. Telly. Mr. Telly's academic pursuits have spanned a number of fields. He received his masters in the field of philosophy, writing a thesis entitled *The Christian Man of Kierkegaard and the Ubermensche of Nietzsche*. Professor Telly received his doctorate in the area of business and the theory of the firm. He currently is pursuing a J.S.D. at Columbia University in corporate law. His writing requirement consists in updating the theories presented in *The Modern Corporation and Private Property* by Adolph Berle and Gardner Means. The book will focus on the changes the common law corporation has undergone as a result of the dilution of the property relationships and control factors of the owners. In the future, Mr. Telly hopes to research and write in the area of legal ethics.

Mr. Telly possesses a diverse range of interests. Chess ranks as his favorite hobby, although academic pursuits leave little time to play. Despite his demanding schedule, jogging is a necessary part of his daily routine. Reading history and philosophy for enjoyment and international travel for the study of history, singing in the church choir, and setting up and managing trusts are among a few of his other interests. Mr. Telly teaches Corporations, Agency and Partnership, Securities, and Trusts.

Although Mr. Telly was hesitant to leave the University of Dayton School of Law and the North, he and his family have been pleased with their new home. As a student of philosophy and psychology, Professor Telly had some interesting observations on the people in this area: "Southerners are very friendly and gentlemanly. Individuality is a dominant characteristic. The people of this area seem more involved in the ethic of our society than people in some areas of the country." Mr. Telly has also been pleased with his first two months at Wake Forest Law School. He feels Wake Forest is a school with a great deal of tradition devoted to teaching the law and legal ethics. We are pleased to welcome Professor Telly to the faculty, and look forward to his many contributions to the Wake Forest tradition.

Professor Ralph A. Peeples

MOOT COURT BOARD

On November 2–4, two Moot Court teams traveled to Richmond, Virginia, to participate in the thirteenth annual National Moot Court Competition. The two teams of Victoria Farmer, Jon Mundorf and Marc Sandman, and Steve Sartorio, Marla Tugwell and Gordon Widenhouse briefed and argued the question of whether a jury trial may be used for cases involving complex civil litigation.

The Board recently voted to attend five inter-collegiate tournaments in the spring. Wake Forest will be well represented in the Philip C. Jessup International Law Competition in March by the team of Rick Glazier, Fred Granum, Debra Meyer, and Richard Poole. The team will brief and argue a problem involving an international dispute which raises questions of air and outer space law. Over 200 teams from thirty-two nations are expected to participate in this year's contest.

Teams will also travel to the Ninth Annual William and Mary Invitational Tournament on February 23, 1980; the J. Braxton Craven, Jr., Memorial Moot Court Competition to be held in Chapel Hill, North Carolina, February 27 – March 1, 1980; the Robert F. Wagner Labor Law Competition in New York on March 27–30, 1980; and the Irving R. Kaufman Securities Law Competition, which will also take place in New York in April. Teams will be selected for these competitions at the end of this semester.

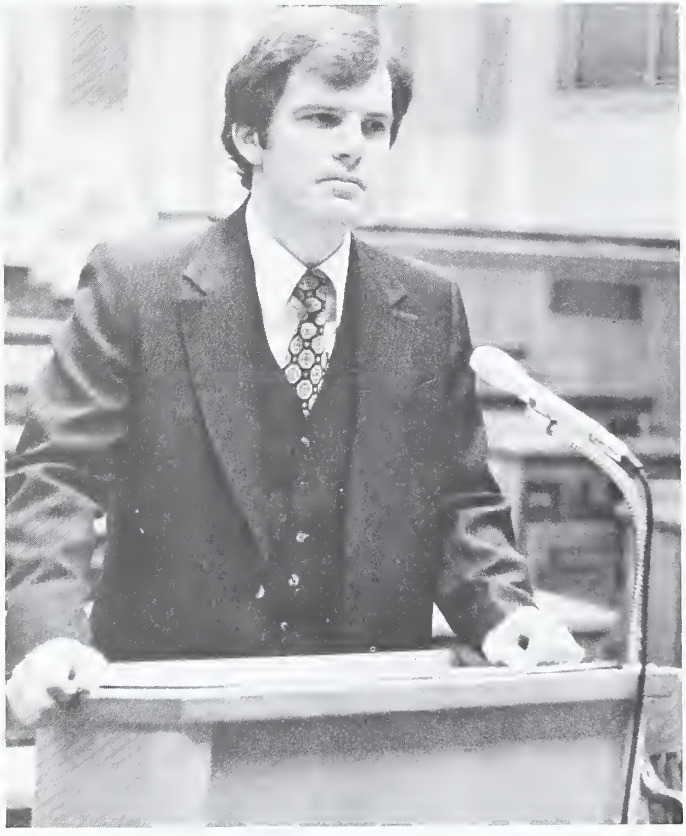
In addition to the Stanley Competition, nine students briefed and argued record problems prepared by members of the Moot Court Board. Members of the faculty and local Bar served as judges for the arguments. Under the direction of Wayland Sermons, the Board assists the faculty in the administration of the appellate advocacy courses open to second and third year students in the fall and spring semesters.

1979 STANLEY

Katherine Hemphill, winner

This semester, the Moot Court Board conducted the annual Judge Edwin M. Stanley Competition. The intramural competition attracted a record number of forty-three participants from the second and third year classes. Directed by Marc Van Nuys, last year's winner, the incredibly complex affair involved over seventy-five attorneys from the Triad area serving as judges for the preliminary rounds. The final and semi-final rounds were held Saturday, November 17. In the closest competition in memory, Katherine Hemphill was declared the winner over finalist Fred Granum by fifteen one-hundreths of a point.

Judge Robert R. Mehrige, Jr., of the United States District Court for the Eastern District of Virginia, led a distinguished panel for the final arguments. Joining Judge Mehrige were Russell A. Eliason, United States Magistrate, United States District Court for the Middle District of North Carolina, and Norwood Robinson of Hudson, Petree, Stockton, Stockton and Robinson of Winston-Salem. The question briefed and argued by Stanley contestants was



Fred Granum, finalist

Bill Gwyn, semi-finalist

COMPETITION

whether appointed counsel is immune from civil malpractice liability. Hemphill, after successfully arguing petitioner plaintiff's position in the semi-final round Saturday morning, won the final round that afternoon arguing for respondent defendant.

Granum and Hemphill both survived close semi-final competition. Granum as petitioner prevailed over Bill Gwyn by two points Saturday morning, and Hemphill won in her round with Rick Glazier. The Hemphill-Glazier contest was resolved by one and one-half points. The panel of judges for both semi-final rounds was headed by the Honorable Peter Hairston, Superior Court Judge for the Twenty-second Judicial District, who was joined by the Honorable Donald R. Huffman, Chief Judge for District Court for the Twentieth Judicial District, Roger S. Tripp of Wilson, Biesecker, Tripp and Wall in Lexington, James Van Camp of Van Camp, Gill and Crumpler in Southern Pines, and Douglas R. Gill, also of Van Camp, Gill and Crumpler.

Hemphill during semi-final round

ADMISSIONS

The following is a profile of the 1979 entering class.

Number of Applications:	1,082	Average Grade Point Average	3.19
(Fall, 1978:	1,200)	(Fall, 1987:	3.2)
(Fall, 1977:	1,400)	(Fall, 1974:	3.0)
Total Number in Class:	178 (100%)	Average LSAT	606
Males:	130 (73%)	(Fall, 1978:	630)
Females:	48 (27%)	(Fall, 1974:	590)
In-State Students	106 (59%)	Minority Students	5
Out-of-State Students	72 (41%)	Undergraduate Schools Represented	52

PLACEMENT

The 1979 graduating class had 143 members. Approximately half of the class reported finding employment before graduation. This June, a survey was conducted of the remainder of the class. In total, 123 graduates have informed the Placement Office of their current status, with the following data as a result:

I.	Employment of Graduates	(80%)*	(114)
	1. *Law Firms*	(52%)	(73)
	a. 1—10 members		56
	b. 11—25 members		8
	c. 26—50 members		4
	d. over 50 members		5
	2. *Opened Own Office*	(2%)	(3)
	3. *Judicial Clerkships*	(7%)	(10)
	a. N.C. Supreme Court		2
	b. N.C. Court of Appeals		1
	c. U.S. District Court (N.C.)		2
	d. U.S. District Court (Fla.)		1
	e. U.S. Court of Claims		1
	f. Bankruptcy Judge (M.D.N.C.)		1
	g. U.S. Magistrate (M.D.N.C.)		1
	h. Pennsylvania Court of Common Pleas		1
	4. *Banks and Corporations*	(8%)	(12)
	a. Ashland Oil		1
	b. Blue Bell, Inc.		1
	c. First Union Corp. (In House)		1
	d. Integon Insurance		1
	e. Jefferson Standard (Legal Dep't)		2
	f. Research Group, Inc.		2
	g. Wachovia Bank & Trust (Trust Dep't)		1
	h. Washington Group (In House)		1
	i. Western Electric (Labor Div'n)		1
	j. Western Electric (Patent Div'n)		1
	k. Family business (non-legal)		1
	5. *State and Local Government*	(5%)	(7)
	a. N.C. Attorney General's Office		1
	b. N.C. Industrial Commission		1
	c. Assistant District Attorneys		3
	d. County Court Magistrate		1
	e. Public Defender's Office (S.C.)		1
	6. *Federal Government*	(5%)	(7)
	a. Staff, U.S. Attorney's Office (M.D.N.C.)		1
	b. Standing Trustee, Bankruptcy Court (M.D.N.C.)		1
	c. I.R.S. Honors Program		1
	d. National Labor Relations Board		1
	e. U.S. Accounting Office		1
	f. U.S. Army J.A.G. Corps		2
	7. *Legal Aid Services*	(1%)	(2)
II.	Graduates Continuing Education	(3%)	(4)
	1. *Masters in Law*	(2%)	(3)
	2. *Masters in Business Administration*	(1%)	(1)

*Percentage of 143 graduates.

BALSA

In keeping with its commitment to increase substantially the number of Black students attending the Wake Forest Law School, the Black American Law Student Association is planning to continue a program of recruiting at predominantly Black colleges and universities in North Carolina and throughout the southeast. In cooperation with the Admissions Office, BALSA members are aiding in recruitment at many schools.

An extension of this effort includes a visitation day for minority students. The first one was held last Spring, and BALSA hopes to enlarge the program to include more visitors. This year, the Dean's Office, the Admissions Office, and the University Office of Minority Affairs have all pledged their support in this effort.

BALSA also plans to offer a full range of activities for its present members. Among the programs planned are a reception for the Black members of the local Bar, a speakers program, and social activities which will include the undergraduate community. The speaker committee has invited Judge Richard Erwin of the North Carolina Court of Appeals and Senator Morgan's nominee for a recently created federal judgeship. The committee also plans to invite a nationally known speaker for visitation day. BALSA maintains an open invitation to all law students sharing interests with BALSA to join in its activities.

PHI ALPHA DELTA

The Timberlake Chapter of Phi Alpha Delta Law Fraternity has enjoyed much success and accomplishment this year since its last Spring Banquet keynoted by Chief Justice Joseph Branch of the North Carolina Supreme Court. Maintaining the image of "the professional international law fraternity," Phi Alpha Delta has engaged in many activities of benefit to both the student bar and the Winston-Salem community. Phi Alpha Delta's most successful program to date has been the annual apartment hunt weekend for incoming first year students. This summer, several first year students found apartments through the weekend tour of Winston-Salem. At the same time, these new students were introduced to life at the school of law thereby making them feel more at home when they began their studies in August.

Another of Phi Alpha Delta's contributions to law school life has been a continuation of its outstanding speakers program, through which prominent members of the North Carolina Bench and Bar hold informal discussions in the school. This year PADs have also participated in a police ride program and court observation days. A continuation of these annual events along with a police booking demonstration and a tour of the North Carolina Supreme Court and Court of Appeals in Raleigh is planned.

As a part of the fraternity's community service initiative, PAD recently held a mock trial for local junior high school students. Phi Alpha Delta also plans to serve the community this year by producing a series of public service radio "spots" on narrow points of law of interest to the public.

The intramural and social activities of the Timberlake Chapter have focused lately on much needed retreats from the rigors of law school life as well as on the increased need for post-football game victory parties. With success in 1979, Phi Alpha Delta looks forward to an even better year in 1980.

CHRISTIAN LEGAL SOCIETY

This semester the Christian Legal Society had a full schedule of social and professional events which afforded its members an opportunity to share vocational and professional concerns involving the interaction of the Christian faith and the legal profession.

CLS sponsored a cook-out for incoming first year students and returning members, as well as a covered dish supper, and plans a Christmas party. Speakers this semester included sole practitioner Paul Stam of Greensboro and attorney H. "Chub" Seawell of Carthage, North Carolina. Third year student Sam Lanham spoke on the priorities of the Christian law student, and second year student Anna Wilson told of her experiences as an intern at CLS National Headquarters in Oak Park, Illinois, this summer. Plans for next semester include a conference for law students from all North Carolina law schools and a combined meeting with the Christian Medical Society.

This year's officers are Sam Lanham, chairman; Jon Mundorf, secretary-treasurer; John Kornegay, speaker chairman. CLS encourages all students and members of the faculty to attend its meetings.

WOMEN-IN-LAW

The 1979–1980 year promises to be exciting for Women-in-Law. After last year's limited participation, this year's dues-paying members approach fifty, and the majority are fresh and energetic first year students. The group's current committees include Library Acquisitions, chaired by Lynn Yerges; Admissions and Recruitment, Philis Edelman; North

Carolina Center for Laws Affecting Women, Rachel Cummings; Legal Aid and Community Projects, Marilyn Forbes; Intramural Sports, Carol Nash Norman; Public Relations, Joan Rodgers; and Social Activities, Lorrie Ridder.

One of this year's larger projects is Women-in-Law's participation in the library acquisition program. With the advice of the library staff, members will help determine both subject-matter and types of materials that are lacking and will work toward acquisition in those areas. Members of Women-in-Law also will follow up the Friends of the Library campaign with letters and phone calls. Eventually, Women-in-Law plans to aid the library in acquiring publications emphasizing the interests of various minority groups.

The Admissions and Recruitment Committee, with the help of Mary Bryan Matney, is planning a career weekend for February 29 — March 1, 1980. Undergraduate women will attend classes on Friday followed by registration and dinner, with a keynote speaker, that evening. On Saturday morning, the students will attend seminars in various areas of legal expertise, including labor, corporations, trial practice, estate planning, and government. This committee is also planning to mail a brochure to all female law school applicants.

The Social Committee is sponsoring a party at which the purchaser of a Wake Forest Law School tumbler will be entitled to all the refreshments she or he can drink. The infamous WIL-Faculty basketball game, now an institution at the Law School, will be played in the spring, with proceeds going toward the Spring Picnic at Tanglewood.

This year's officers are Kathy Fortino, president; Karen Raschke, vice-president; Kathy Ziegler, second year representative; and Rachel Cummings, first year representative.

ENVIRONMENTAL LAW SOCIETY

The Environmental Law Society is an informal organization of students wishing to share their enjoyment and concern for the environment and to explore professional opportunities in the rapidly expanding field of environmental law. This year, the organization has approximately twenty members and is co-chaired by Kay Killian and Chuck White. Myressa Schoonmaker, who teaches environmental law this semester as an adjunct faculty member, serves as the faculty adviser for ELS.

Topics of interest discussed at ELS meetings include the transportation and disposal of nuclear wastes, artificial modification of weather systems, solar energy, and the setting aside of wilderness areas for preservation. During 1979 — 1980, ELS plans to initiate a speakers program featuring practitioners who have had experience litigating environmental issues. Another project is for ELS members to provide research assistance to attorneys handling cases presenting complicated or unfamiliar environmental issues. ELS also is encouraging students to write essays for national writing competitions. Two such contests involve problems of public land use and litigating damage claims arising out of nuclear accidents such as that at Three Mile Island. ELS has sponsored one day hike at Hanging Rock park this past October and plans a similar outing this coming spring.

WAKE FOREST LAW REVIEW

With the aid of 32 staff candidates added over the summer, the *Wake Forest Law Review* has begun work on the numbers for which the 1979–80 Board of Editors are responsible. The final issues of 1979 will bring to a close the second six-issue volume of the *Review*. The present Board of Editors remains committed to the six-issue volume. It recognizes the flexibility that the format provides in meeting the needs of the bulk of the *Review*'s subscribers, the North Carolina and Fourth Circuit practitioners.

A major undertaking of this year's *Review* is a five-year cumulative index. Under the supervision of Research Editors Paula Dean and Allen Moseley, the *Review* has compiled the index to supplement the separate cumulative index for volumes 1–10 published in 1976. The index will be printed in the December 1979 number of the *Review* and provided to subscribers at no extra cost.

The *Review* plans to publish a number of articles and student notes in the coming months of interest to its subscribers. Lead articles of North Carolina interest, edited by Articles Editors Richard Gay, David Jones and Jim McKinnon, include looks at two new statutory schemes — governing juvenile justice and products liability — enacted by the last session of the N.C. General Assembly. Student notes, edited by Notes and Comments Editors, Larry McGee, Mark Poovey and Cindy Pauley, and articles dealing with Fourth Circuit topics include a look at the Fourth Circuit judicial selection process by a member of the selection committee and an evaluation of the Fourth Circuit's treatment of patronage dismissals.

Before leaving office, the 1978–79 Board of Editors made cash awards for outstanding student writing submitted during its term. Raymond E. Dunn, Jr., won first place and Carson Carmichael, III, won second place in the James F. Hoge competition. Robert Adams Singer won the *Wake Forest Law Review* Prize. Ann J. Heffelfinger won the *Scribes* Award.

STUDENT BAR ASSOCIATION

This year's Student Bar Association appears to be comprised of energetic and creative law students who are willing to work to make a difference. The current officers are Linda Stott, president; Peyton Hairston, vice-president; Doug Faris, secretary; and John Mann, treasurer.

The first project of the year was the First Annual Race Judicata, a foot race through Reynolda Gardens followed by a class-competition walk from the Law School to the Safari Room, the local "watering hole." Surprisingly, the winner of the trophy for most participants in the walk was the first year class. Women's winner of the race was Randall Morrow, while the men were led by Rick Kopf with a 17:12 winning time over the 3.2 mile course. The highlight of the event was the sale of Race Judicata T-shirts designed by Kenny Patterson who, along with the able assistance of John Lassiter, did most of the footwork necessary to prepare the race. Faculty members participating in the race and actually finishing the long haul were Professors Covington, Newman, Zick, and Telly.

The second SBA social event was a student and faculty softball tournament in which fourteen ten-person teams participated. Unquestionably, the most memorable moment of the tournament occurred when the game cheerleaders (consisting of those rabble rousing Torts Club members) serenaded Professor Herring (while at bat) with a rousing rendition of "Macho Man."

The SBA Speakers Committee, consisting of Doug Faris, Al Kwasikpui, and Linda Stott, sponsored a "Meeting With the Dean" for all the students who had not had an opportunity to meet him and an informal lunch-time speech with Football Coach John Mackovic. The SBA hopes that the clubs around the Law School will take advantage of their invitation to co-sponsor speakers of interest for the student body.

The SBA Second Annual Book Sale (they told us it wouldn't work) netted $250. Tom Pitman deserves most credit, as does Lynn Yerges for her assistance.

The Old Student Lounge, next to Room 7, has been converted into a Club Room by the SBA. The carrells there now are labelled with the names of the various Law School organizations so that each one may have a headquarters in the school. Hopefully, communication among the members of these clubs will be facilitated. Phil Searcy developed this project.

In addition to the traditional social functions, the SBA this year has been encouraged by Dean Scarlett to work closely with the faculty and administration. The Dean has hosted a luncheon for the SBA representatives in an effort to establish lines of communication that are new and refreshing to us all. These luncheons are expected to be monthly affairs whereby the Dean may communicate with the Law School leaders through the SBA.

The SBA has also sponsored a committee of students to work with Dean Scarlett to assure the third year class of the best possible 1980 Bar Review preparation. John Lassiter and Tom Pitman are participating in this effort. Peyton Hairston and John Davis have been appointed to assist Mrs. Meyers with placement.

The academic project that the SBA hopes to get off the ground this year is a Volunteer Income Tax Assistance (VITA) program that they will either undertake with the help of the local Legal Aid Society or on its own. This project provides an opportunity for law students to help low-income individuals fill out their income tax returns and obtain applicable refunds.

An exceptional Law Day is anticipated this spring, so Alumni are urged to mark April 12, 1980 on their calendars. Vikki Farmer will assist us with preparations for the fete to be held at Bermuda Run Country Club, while Lynn Yerges and Gary Thomas are diligently searching for just the right speaker. Any suggestions from Alumni in regard to a speaker are more than welcomed. In addition to the traditional Law Day Banquet, to make the trip to Winston-Salem especially worthwhile, Student-Alumni Golf and Tennis Tournaments are being tentatively scheduled on that Saturday.

Editor's Note: Alumni should make plans now to attend Law Day, April 12, 1980. We look forward to a truly exceptional student and Alumni turnout because the SBA anticipates that Law Day this year will be a top drawer affair.

LAW SCHOOL ALUMNI HOMECOMING 1979

Judge Robert R. Merhige, Jr.

Judge Hiram H. Ward

Eddie Knox, President of Lawyers' Alumni Association

ABA-LSD

The American Bar Association is an unincorporated voluntary membership association of attorneys with over 250,000 members. The Law Student Division, with approximately 35,000 members, is one of twenty-five sections and divisions under the umbrella of the ABA. Any law student attending an ABA-approved law school is entitled to become a member of the Law Student Division. Dues are $6.50 per year. The purposes of the Division are to further academic excellence through participation by law students in the efforts of the organized bar in the formation and revision of standards of legal education, to achieve awareness and promote the involvement of law students in the solutions to problems that confront today's changing society, and to encourage Student Bar Association participation in the programs and activities of the Division.

Wake Forest benefits from its students' participation in ABA/LSD in several ways. First, a 30% membership rate within the student body enables student projects to be eligible for funding of some degree. Presently, Wake Forest has 139 LSD members, which is a 29% membership rate. Hopefully, even a handful of waivering students will decide to join this fall and push the ratio above 30%, so that the school will be eligible for funding through LSSF.

In addition, the school can collect at a rate of 50 cents per LSD member money from the "LSD Representative Fund," which has no restrictions on its use. Finally, the recognition and reputation of the school is enhanced when its students actively communicate with those of schools nationwide, sharing and contrasting clinical opportunities, social functions, relations with faculty and administration, and Student Bar Association activities. The ABA/LSD has tremendous opportunities for law students to enlarge their learning experience, if they are simply willing to take advantage of it.

STUDENT TRIAL BAR

The Student Trial Bar is an organization of students who are interested in gaining practical knowledge in the area of trial law. The organization was formed in the spring semester of 1978. The current slate of officers was appointed last year by an executive committee. The officers are: Van Britt, president; Rod Guthrie, vice-president; and Kay Killian, secretary.

This year's activities have already begun and the fall semester promises to be an interesting one. The STB has arranged a lecture series to be conducted by members of the North Carolina Academy of Trial Lawyers. Mr. Osburne Lee of Lumberton, N.C., conducted the first lecture on the topic "An Over-view of a Civil Trial." The second lecture, on the topic "Direct and Cross-Examination," was conducted by Mr. Art Donaldson and Mr. Bob Saunders, both from Salisbury, N.C. Future lectures will be on such topics as "Voir Dire of the Jury," "Opening and Closing Statements," and "Discovery Techniques."

The first student-participation exercise will be conducted late this semester. These exercises are designed to complement the Trial Court course offered in the third year. The STB has scheduled one student exercise for the fall, and four in the spring. A report on these exercises will be made in the next issue of the *Jurist*.

NATIONAL TRIAL TEAM

This year's Region Three National Mock Trial Team Competition, sponsored by the Texas Young Lawyer's Association, will be held February 7, 8, and 9, 1980.

Representing the Wake Forest 1979–1980 trial team are Dan Boone, Bill Britt, Maxine Dalton, and Tom Kakassy. The team is sponsored by Professors Billings, Corbett, and Taylor. They will be traveling to Birmingham, Alabama, where the competition will be held at the Cumberland School of Law of Samford University.

This year's problem involves a defamation action arising from an incident in which a local bank manager was accused of shoplifting by the manager of a grocery store. The bank manager subsequently brought suit for damages to his reputation and his business.

The two teams will be fully prepared to represent both plaintiff and defendant with opening statements, examination and cross-examination of two witnesses, and closing arguments.

Awards will be presented to the regional finalists and later to the winners when the final rounds are held in Houston, Texas.

Editor's Note: Results of the competition will be reported in the Spring 1980 *Jurist*.

Professor Charles H. Taylor

LEGAL ARTICLES

NORTH CAROLINA'S NEW JUVENILE JUSTICE CODE

by Larry Bowman

Attorney at Law in the firm of Folger, Folger & Bowman, Mount Airy, N.C., and Adjunct Professor, Wake Forest University School of Law.

With the ratification of House Bill 474 by the North Carolina General Assembly on June 7, 1979, North Carolina now has a unified, and substantially modified, code controlling court involvement with young persons in this state.[1] The bill was the outgrowth of work done by the Juvenile Code Revision Committee which was established in 1977 and which made its final report to the Legislature in 1979.[2] This article is written to acquaint the practicing bar with some major features of the new code and as such it cannot be exhaustive of all significant changes.

Technically, the new code repeals present G.S. 7A-277 through G.S. 7A-289 and 289.7 and substantial parts of Chapters 110 and 134A. All of these sections are replaced by the new Unified Juvenile Code appearing in new sections 7A-506 through 7A-641.[3] The new code section 7A-507 contains a vastly enlarged definition section which, while not significantly changing most of the definitions in present G.S. 7A-278, does define many more terms with which the practicing attorney must be familiar.[4] The effective date of the Code is January 1, 1980.

One of the most extensive changes in the new Code is the screening procedure required before any petition can be filed. Under present law, some effort is made to divert cases which would benefit from informal adjustment as opposed to a formal hearing, but such diversion is provided only after the petition is filed.[5] Under the new Code, all petitions of whatever nature will be screened and possibly diverted before any petition is filed. All "complaints" alleging delinquent or undisciplined acts will be examined by the court counselor's staff and may be handled without the filing of a petition except in cases of certain very serious crimes which are non-divertible.[6] Likewise, all "complaints" alleging abuse, neglect, or dependency are to be screened by the Department of Social Services and considered for diversion.[7] If the complaining party does not agree with any decision to divert a complaint, he may appeal to the District Attorney, who can reverse the decision of the court counselor or the director of social services and allow a petition to be filed.[8] While this procedure will not be totally new to some areas of the state, it is designed to assure that all children in North Carolina, potentially in danger of court involvement, benefit from an intake system designed "to divert juvenile offenders from the juvenile system . . . when this approach is consistent with the protection of the public safety."[9]

In the area of pre-hearing procedures, the new Code fills many gaps which are left in question by the much shorter present code. New section 7A-536 clarifies the already existent authority of law enforcement authorities to arrest or take custody of juveniles suspected of criminal activity. The section goes further, however, and creates new authority for officers, court counselors, and social workers to assume temporary custody of children without court order when an "emergency" exists.[10] Attorneys who advise any of the above officials should be very careful to notice the strict limits to these new powers. Section 7A-549 allows police interrogation of juveniles but limits the use of its results if the child is under 14 years of age and no parent, guardian, or attorney is present. Additionally, prosecutors may now seek orders allowing nontestimonial identification procedures,[11] and both prosecution and defense are provided with discovery devices already present in adult criminal actions.[12]

Hearing procedures under the new Code have a number of significant but easily overlooked changes from present practice. Section 7A-544 eliminates the old problems of waiver of counsel in delinquency cases by directing the judge to appoint counsel if none is retained. This section appears to mean that counsel simply cannot be waived in future delinquency actions. Problems with constitutional rights to public trials in delinquency actions are eliminated by the requirement of section 7A-568 which makes a public hearing mandatory if the juvenile requests an open hearing. Further, the juvenile is guaranteed all rights afforded to adult offenders except right to bail, right of self-representation, and right to jury trial.[13]

Finally, two portions of the Code clarify and expand two areas of law that are at present confusing or inadequate. While juvenile records are supposed to be closed and confidential, all too frequently information about a child's adjudication are available and used to the child's detriment. Sections 7A-600 through 7A-602 allow certain records to be expunged and destroyed much like present drug records are expunged in Chapter 90 of the General Statutes. Also, the new Code provides for the first time a method of establishing and recording emancipation proceedings which replaces the present uncertainties existing under the common law.[14]

While other important changes in the new Code cannot be covered in this article, the author hopes that the article will serve as a springboard for further study and examination of all parts of the new Code by all persons who will be involved with its implementation.

FOOTNOTES

1. Unified Juvenile Code Act, ch. 815, 1979 *N.C. Adv. Leg. Serv.* 401 (Michie) (to be codified in *N.C. Gen. Stat.* §§ 7A-506 to -641 (Cum. Supp. 1979)).

2. *Final Report of the Juvenile Code Revision Committee* (1979).

3. At the time of the writing of this article, the 1979 Cumulative Supplement to the General Statutes had not been published. Readers are reminded that section numbers given in the text refer to those in the 1979 *N.C. Advance Legislative Service* (Pamphlet No. 7), and may be changed when codified for the General Statutes.

4. A significant change in definition appears in section 7A-508, where the court is now deprived of jurisdiction of children under 6 years of age alleged to be delinquent or undisciplined.

5. *N.C. Gen. Stat.* § 7A-281 (1969).

6. 1979 *N.C. Adv. Leg. Serv.* 408-11 (Michie) (to be codified in *N.C. Gen. Stat.* §§ 7A-510 to -514 (Cum. Supp. 1979)).

7. *Id.* at 412-15 (to be codified in *N.C. Gen. Stat.* §§ 7A-517 to -520 (Cum. Supp. 1979)).

8. *Id.* at 411, 415 (to be codified in *N.C. Gen. Stat.* §§ 7A-515, -516, -521, and -522 (Cum. Supp. 1979)).

9. *Id.* at 401 (to be codified at *N.C. Gen. Stat.* § 7A-506(1) (Cum. Supp. 1979)).

10. *Id.* at 424 (to be codified at *N.C. Gen. Stat.* § 7A-536 (Cum. Supp. 1979)).

11. *Id.* at 439-42 (to be codified in *N.C. Gen. Stat.* §§ 7A-550 to -556 (Cum. Supp. 1979)).

12. *Id.* at 444-48 (to be codified in *N.C. Gen. Stat.* §§ 7A-562 to -565 (Cum. Supp. 1979)).

13. *Id.* at 449 (to be codified at *N.C. Gen. Stat.* § 7A-570 (Cum. Supp. 1979)).

14. *Id.* at 500-04 (to be codified in *N.C. Gen. Stat.* §§ 7A-631 to -640 (Cum. Supp. 1979)).

PRODUCT LIABILITY LEGISLATION

by Henry C. Lauerman

Professor of Law, Wake Forest University School of Law

General Comments. On May 28, 1979, the North Carolina General Assembly enacted a new Chapter 99B of the N.C. General Statutes, entitled "Product Liability."[1] The following comments point out briefly the substantive changes and particular difficulties the practitioner may encounter in assessing and litigating product liability claims under the 1979 Act.

In general, the N.C. General Assembly appears to have rejected the rule of strict liability in tort in product liability actions (herein abbreviated PLA) against sellers and manufacturers of chattel, a rule obtaining in some form in 46 states. Instead, the legislature prefers a scheme of product liability based on negligence generally and on breach of warranty as provided in the Uniform Commercial Code (herein abbreviated U.C.C.), and now modified by the new Act. This preference will perpetuate the commingling of commercial sales law and consumer product liability law to the possible detriment of both.

Next, the General Assembly has mandated that a middleman, including a seller, who has made no express warranty, shall not be made a defendant in a PLA based on negligence or breach of implied warranty except when special circumstances obtain. By providing a conditional bar to actions against middlemen, the General Assembly may have effectively precluded recovery of *small* product liability claims where the middleman makes no express warranty and the manufacturer has no assets in N.C. upon which to satisfy a judgment, and precluded recovery of *substantial* claims when the manufacturer has no assets in the United States.

By codifying six affirmative defenses, the General Assembly has indicated an intent to restrict recoveries in most product liability actions to those cases in which the fault of the product is the sole proximate cause of the claimant's harm.

Definitions. Section 99B-1(1)-(4) provides definitions of "Product liability action," "Manufacturer," "Seller," and "Claimant." The definition of a product liability action (PLA) in section 99B-1(1) "includes any action brought for or on account of personal injury, death or property damage" resulting from certain enumerated activities normally occurring in production or distribution of any product. These activities include several not necessarily performed by either manufacturers or sellers (i.e., developing of standards, certifying, testing, and advertising of products). Thus, there are three classes of potential defendants in a PLA: manufacturers, sellers, and those performing the activities enumerated in section 99B-1(1) who are neither "manufacturers" under subsection (2) or "sellers" under subsection (3). The term "product" is not defined in the Act or in reported North Carolina case law. Probably, "product" means any article encompassed by the definition of "goods" set forth in the U.C.C.[2]

"Manufacturer," as defined in section 99B-1(2), "means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer . . . ." Hence, manufacturers apparently include those persons or entities responsible merely for the design of a product or component. In addition, since most products are to some extent prepared for sale by middlemen, the courts will have to decide how much preparation of a product will convert a middleman into a manufacturer.

"Seller," as defined in section 99B-1(3), "includes a retailer, wholesaler, or distributor . . . engaged in the business of selling a product" for resale or for use or consumption. Section 99B-1(3) also includes as a seller a "lessor or bailor engaged in the business of leasing or bailment of a product." However, a "manufacturer" is not expressly included in the definition of a "seller." The definition of "manufacturer" in section 99B-1(2), on the other hand, allows a seller to be treated as a manufacturer only if the seller is "owned in whole or significant part" by the manufacturer or the manufacturer is similarly owned by the seller. Thus, section 99B-1(3), when read together with section 99B-1(2), implies that a manufacturer is not a "seller" although a person or entity otherwise falling within the definition of a "seller" may be treated as a "manufacturer" based on ownership. That a manufacturer is not included within the definition of a "seller" is contrary to customary usage in product liability law.[3] Moreover, a middleman distributing a product under his private label is apparently deemed a "seller" rather than a "manufacturer." This is contrary to the usual rule by which a private brand distributor is deemed to be a manufacturer for purposes of product liability.[4]

Conditional Bar to Actions Against Sellers. Section 99B-2(a) provides a conditional bar to actions against a "seller" of defective products. The bar has no application to actions against manufacturers or developers of standards, certifiers, testers, or advertisers of products.

The syntax of subsection 2(a) is difficult.[5] The subsection provides, in effect, that the existence of any one of four conditions, if shown, will remove the bar. The four conditions are as follows: (1) the manufacturer is not subject to the jurisdiction of the North Carolina courts; (2) the manufacturer "has been judicially declared insolvent;" (3) the defendant seller damaged or mishandled the offending product while in his possession; and (4) the product was acquired and sold by the defendant seller under circumstances which afforded him a reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of; provided that this clause shall not apply if the product was acquired and sold by the seller in a sealed container.

Section 99B-2(a), when applicable, bars a claimant's action against a middleman based on negligence or breach of an implied warranty. The bar is analogous to the bar interposed by the running of the statute of limitations, where the defendant has the burden of pleading the avoidance under N.C. Rule of Civil Procedure 8(c). If a middleman pleads the bar, the claimant must respond with an allegation and proof of at least one of the four conditions which defeat the bar.[6] If the claimant fails in his proof, no PLA, except for breach of express warranty, may be maintained against the middleman. If the claimant prevails in proving one of the four conditions by a preponderance of the evidence, then he may proceed to the trial of his negligence or breach of implied warranty action against the middleman.

The four conditions which defeat the bar demand careful study. First, a manufacturer, wherever located, probably will be subject to the jurisdiction of N.C. courts if the claimant's harm occurs in N.C. and the manufacturer knows his product is being sold through the United States, the southeast, or in N.C.,[7] and service of process complies with our statute.[8] However, if the claimant's harm occurs outside of N.C. and the manufacturer is not a resident of the state and does no business here, the N.C. courts will have no jurisdiction and the subsection 2(a) bar cannot be interposed by a N.C. middleman.

Second, a manufacturer may be effectively judgment proof for many reasons other than judicially declared insolvency. However, the General Assembly has decreed that proof of the manufacturer's judicially declared insolvency is required to defeat the bar in this way, and mere proof by a claimant of his *probable* inability to collect a future judgment against a manufacturer is insufficient to defeat the bar.[9]

Third, a seller's mishandling or damage need not be a proximate cause of the claimant's harm; claimant need only prove the seller's mishandling or damage to remove the bar. However, if the alleged damage while in the seller's possession is not readily apparent, proof that the seller caused it, rather than a carrier or handler in the distribution chain, usually will be impossible. Moreover, proof of mishandling likewise will be difficult because the defendant seller and his employees usually will be most knowledgeable of the way the product was handled.

Fourth, a reading of the last condition — a condition which may be alleged only if the product was not acquired and sold in a sealed container — suggests that the courts may have difficulty in determining what kind of evidence and how much of it a claimant must adduce in order to prima facie prove that a seller had a reasonable opportunity to inspect the product in such a manner that he should have, in the exercise of reasonable care, discovered the defective condition. If the courts minimize the quality and quantity of the evidence which a claimant must adduce, the effectiveness of the bar will decrease. In order to preserve the effectiveness of the bar which the General Assembly created for the benefit of middlemen, the courts probably will place a heavy burden of proof on claimants alleging that a seller had the prescribed opportunity to inspect.

Effect When Bar Validly Interposed. When a seller has made no express warranty and the claimant cannot overcome the bar — circumstances which will obtain in the great majority of product liability actions — then claimant's sole source of compensation is the manufacturer. If the manufacturer does not do business in N.C., he may not be sued in small claims court.[10] Claimants — even one with a claim of $500 or less — probably will have to retain an attorney and seek a default judgment in district or superior court. The claimant may then have to bring a second action to collect the judgment debt in another state where the manufacturer has assets. It is likely, therefore, that hereafter N.C. sellers will be immune from most product liability under 2(a), and out-of-state manufacturers will be liable only when the claim is large enough to justify the expense of a foreign law suit to collect the judgment. Small product liability claims will be practically uncollectable unless the manufacturer does business in North Carolina.

If a claimant has obtained a valid and substantial default judgment against a manufacturer who has no assets in the United States, the judgment debt may never be satisfied although the manufacturer is solvent. This is so because another country probably will not give credit to a N.C. default judgment for product liability against a manufacturer who does no business in North Carolina and is a national of that country.[11] In such a case, the claimant will have to bring an action abroad where the manufacturer does business or go without relief because of the subsection 2(a) bar to actions against middlemen.

Relaxation of Privity Requirement. Subsection (b) of section 99B-2 specifies the classes of claimants who "may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty," regardless of privity of contract. The subsection allows suit by "[a] claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved, or who is a member or a guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer not covered by workmen's compensation insurance . . . ."

Subsection (b) makes four changes in the law regulating product liability actions against manufacturers based on breach of implied warranty. First, the subsection modifies and expands somewhat the classes of claimants, lacking privity, who may bring an action against the manufacturer on breach of implied warranty.[12] Under subsection (b), domestic, agricultural, and casual employees of the buyer not covered by workmen's compensation insurance[13] may now bring an action on breach of implied warranty. However, employees covered by such insurance acquire no additional rights and may not bring an action based on breach of an implied warranty.[14]

Second, under former law, only a buyer could recover for property damage resulting from breach of implied warranty. Other claimants were limited to personal injury damages. Under section 99B-2(b), all claimants who are therein authorized to sue may recover property damage.

Third, section 99B-2(b) is not limited as to the categories of products involved. Under former law, the right of action directly against a manufacturer in breach of implied warranty was limited to cases wherein the offending product was an advertised food or drug sold in a sealed container.[15] Section 99B-2(b) dispenses with this limitation on the right of action.

Fourth, section 99B-2(b) authorizes a proper claimant to bring an action directly against a "designer" of a product on breach of implied warranty. Since section 99B-1(2) includes one who designs a product in the definition of "manufacturer," a designer now may be sued for breach of his implied warranty as well as for negligence.

Two final points deserve comment with respect to this subsection. First, section 99B-2(b) does not, by its terms, apply to a PLA brought against a developer of standards, a certifier, a tester, or an advertiser of a product. Second, the fact that, under former law, a manufacturer was liable, either directly *or* indirectly, for *all* damages adjudged as resulting from the failure of his product to conform to an implied warranty when it left his hands must be taken into account when ascertaining the impact of section 99B-2(b).[16]

Affirmative Defenses. Sections 99B-3 and 99B-4 codify six affirmative defenses available to a manufacturer or a seller in any product liability action: (1) unauthorized "alteration or modification of the product by a party other than the manufacturer or seller" occurring after the product left the control of such defendant and which was *a* proximate cause of claimant's harm; (2) use of the product contrary to the manufacturer's intent; (3) failure to observe routine maintenance; (4) use contrary to instructions and warnings which the user knew or should have known with the exercise of reasonable and diligent care; (5) use with knowledge of a defect or an unreasonably dangerous condition; and (6) negligent use by the claimant which is *a* proximate cause of the harm. Proof of any one of these defenses exonerates a manufacturer or seller from all liability to the claimant. While the protection of sections 99B-3 and 99B-4 does not extend to developers of standards, testers, certifiers, or advertisers of a product, the courts, in all probability, will so extend the protection.

Two of the six defenses, use contrary to instructions and use with knowledge of danger, need have no causal relation to claimant's harm.[17] However, a causal relation between the conduct described and the claimant's harm must exist if such conduct is to constitute one of the other four affirmative defenses.

Some of the defenses seem unduly broad, such as: a change in the use from that *intended* by the manufacturer; a failure to observe *routine* maintenance; use contrary to instructions which the user should have known in the exercise of reasonable and *diligent* care; and a claimant's contributory negligence in the use of a product.

The acts or omissions constituting the defenses, except a claimant's negligent use of a product, may be attributed to a non-claimant third party as well as to a claimant. Ordinarily, such third party conduct would result in the defendant manufacturer or seller being held jointly and severally liable to the claimant as a co-tortfeasor with the third party wrongdoer, with a right to contribution from such third party, whenever the negligence or breach of warranty by the manufacturer or seller and the third party conduct were the proximate causes of claimant's harm. However, the General Assembly, in sections 99B-3 and 99B-4, has decreed that, in a PLA, intervening third party conduct which is *a* proximate cause of claimant's harm (but not necessarily the sole proximate cause) shall insulate or cut off the prior negligence or breach of warranty, express or implied, of the manufacturer or seller — regardless of the fault of the latter two.

The six defenses in sections 99B-3 and 99B-4 are in addition to the defenses that may be available under the U.C.C. when the claim is based on breach of warranty. Such U.C.C. defenses include the following: (1) disclaimer,[18] or (2) limitation of liability of the warrantor,[19] and (3) failure of the claimant to give notice of a breach of warranty within a reasonable time after the breach is discovered.[20]

Limitation and Accrual of Actions. Section 2 of the 1979 Act adds a new clause (6) to G.S. 1-50 as follows: "(6) No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of the initial purchase for use or consumption." This section applies equally to actions based on negligence and on breach of warranty, express or implied.[21]

The bad news for a manufacturer under G.S. 1-50(6) is that, whereas the period of limitations for breach of warranty actions under former law was only four years from the date of sale by the manufacturer,[22] the period is now six years from the first sale for use or consumption. The good news for a manufacturer in a PLA based on negligence is that the period of limitation is no longer dependent, as under former law, on the apparent or non-apparent nature of the harm caused by the product. The manufacturer's exposure to liability for negligence formerly was either three years from the date of the accident or from the date the harm should have been discovered. In a recent case, recovery was allowed although the offending product had left the hands of the manufacturer 19 years before the accident.[23] Assuming that few new products are in distribution channels for more than two years, a

manufacturer can now rest assured that a product which he sold eight or more years ago will not be the source of a product liability claim.

Clause (6) is at odds with the general principle that a period of limitation cannot begin until a right of action has accrued. Even though a claimant's right to bring a PLA does not accrue until his harm occurs, clause (6) arbitrarily bars that right after six years from the first purchase for use or consumption. If the accepted useful life of a product exceeds six years, there seems little justification to deny a claimant's right to bring an action because the product failed from a design or manufacturing defect six years and one day from the first purchase for use or consumption.

Summary. In conclusion, the N.C. General Assembly appears to have rejected the rule of strict liability in product liability actions in favor of a scheme based on negligence or breach of warranty which perpetuates the commingling of commercial sales law and product liability law to the possible detriment of both. The General Assembly, moreover, has provided increased protection for sellers who make no express warranty, with the result that claimants will often obtain no recovery for small claims unless the manufacturer has assets in the state, or for substantial claims unless the manufacturer has assets in the United States. The 1979 Product Liability Act presents the practitioner with a number of substantive changes and practical difficulties which will require more detailed study than can be undertaken in the present article. The foregoing remarks are intended, however, to alert the practitioner to important aspects of the new Act in order that he may effectively assess and litigate product liability claims under the new law.

FOOTNOTES

1. Product Liability Act, ch. 654, 1979 *N.C. Adv. Leg. Serv.* 185 (Pamphlet No. 6) (Michie).

2. *N.C. Gen. Stat.* § 25-2-105 (1965).

3. *Restatement (2d) Torts*, § 402A, comment f.

4. *Restatement (2d) Torts*, § 400.

5. "99B-2. *Liability of seller.*—(a) No product liability action, except an action for breech of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession; provided, that the provisions fo this section shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent."

6. *See* Reidsville v. Burton, 269 N.C. 206, 210, 152 S.E.2d 147, 150 (1967); Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967); Parsons v. Gunter, 266 N.C. 731, 733, 147 S.E.2d 162, 164 (1966).

7. *N.C. Gen. Stat.* § 1-75,4(4)(b) (1969).

8. *But cf.*, Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 229, 176 S.E.2d 784, 788 (1970) (test of minimum contacts and fair play must be met for valid exercise of jurisdiction).

9. One may also speculate what a N.C. court will do if a manufacturer is a domiciliary of a nation which has no procedure culminating in a judicial declaration of insolvency. Such a manufacturer may be totally and notoriously insolvent, and yet claimant would be unable to overcome the 2(a) bar.

10. *N.C. Gen. Stat.* § 7A-211 (1969) (at least one defendant must be a resident in the county where the magistrate resides).

11. No rule of international law requires one sovereign to recognize a judicial act or judgment of another. The United States has no treaties relating to mutual recognition of judgments. The recognition or effect which the courts of another nation will give to a judgment of a U.S. federal or state court will depend on principles of "comity" and will vary from nation to nation, with the nature of the proceeding and the relief granted. In general, judgments in tort are less apt to be recognized than judgments in contract. *See* II Ehrenzweig & Jayne, *Private International Law* §§ 183-202 (1973).

12. Under former law, the only claimants who could bring an action for breach of implied warranty directly against a manufacturer with whom they were not in privity were claimants (1) who had suffered personal injury and (2) who were buyers, members of a buyer's family or his household, or his household guests, as provided in G.S. 25-2-318, and (3) when, and only when, their personal injury was caused by an advertised food or drug sold in a sealed container or caused by the container itself. *See* Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 304-05, 154 S.E.2d 337, 339-40 (1967); Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 137, 226 S.E.2d 534, 536 (1976); Gillispie v. Thomasville Coca-Cola Bottling Co., 17 N.C. App. 545, 549, 195 S.E.2d 45, 48-49 (1973).

13. *N.C. Gen. Stat.* § 97-2(1) to -2(2) (1972).

14. *See* Wyatt v. North Carolina Equipment Co., 253 N.C. 355, 359, 117 S.E.2d 21, 24 (1960).

15. *See* note 12 *supra*.

16. This result followed because a buyer could sue his immediate seller for *all* consequential damages in an action for breach of implied warranty, and other proper claimants under G.S. 25-2-318 could also sue the buyer's immediate seller for their personal injuries, no matter what the product was, how it was packaged, and whether advertised or not. Then, under the common law of sales and the U.C.C., the seller who incurs liability because the product fails to conform to an implied warranty has a right to indemnity from his seller, if the goods when sold by the latter failed to conform to the implied warranty. Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961); Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951). In this fashion, the manufacturer was ultimately liable for all damages caused by his product when the product did not conform to the implied warranty when it left his hands.

17. Thus, if a person drives his auto knowing the brakes are faulty and dangerous but the steering gear fails because of a design defect, causing the car to crash, and the brakes were not a contributing factor, then the manufacturer would be exonerated from all liability for his negligent design of the gear according to the way section 99B-4(2) is phrased.

18. *N.C. Gen. Stat.* § 25-2-316 (1965).

19. *N.C. Gen. Stat.* § 25-2-719 (1965).

20. *N.C. Gen. Stat.* § 25-2-607(3)(a) (1965).

21. Section 1-50(6) is not by its terms applicable only to a PLA, but is applicable to harm "arising out of any alleged defect or any failure in relation to a product." Conceivably, the section applies to actions based on harm to claimants resulting from a third party's *use* of a defective product (such as a beautician using a defective hair dryer or lotion). However, such questions require an examination of the relation between section 1-50(6) and other provisions in the General Statutes pertaining to limitations of actions, which is beyond the scope of this article. However, it should be noted that the 1979 Act under discussion added a clause (16) to G.S. 1-52, amended G.S. 1-53(4), and repealed G.S. 1-15(b).

22. *N.C. Gen. Stat.* § 25-2-725(1) (1965).

23. Raftery v. William C. Vick Construction Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

OUTSTANDING ALUMNUS

The 1979 Outstanding Alumnus Award, co-sponsored by the *Jurist* and the Student Bar Association, was presented to Mr. Allen Bailey at the Law Day Program on April 7, 1979. Mr. Bailey richly deserves the honor. He has not only distinguished himself as one of North Carolina's best trial lawyers, but he has unselfishly devoted himself to improving the state's criminal justice system and has performed invaluable services on behalf of the Wake Forest University School of Law. At this time, the *Jurist* would like to extend to the alumni the opportunity to nominate candidates for the 1980 Outstanding Alumnus Award. Without nominations from the alumni, eminent graduates such as Mr. Bailey might go unrecognized.

The Outstanding Alumnus Award is designed to give recognition to graduates of the School of Law based primarily on the following factors:

(1) Standard of excellence throughout the nominee's career, though not necessarily just the legal career;
(2) Service to Wake Forest University School of Law;
(3) Service to the community, the state, and the nation; and
(4) General good character.

The award will be presented at the Law Day Banquet in April, and the *Jurist* will include in its spring issue an article on the recipient.

Past recipients of the award have been alumni clearly deserving prestige and the praise of their colleagues. Along with Mr. Bailey, they have included the following:

Basil M. Watkins	R. P. Burns
Judge J. J. Hayes	G. C. Carswell
J. F. Hoge	Judge Edwin M. Stanley
James W. Mason	Judge John D. Larkins
Dr. Norman A. Wiggins	Judge Walter J. Bone
Justice Joseph Branch	Dean Carroll W. Weathers
Senator Robert B. Morgan	Justice David Britt
Judge Woodrow Jones	Ralph James Scott

Judge Hamilton Hobgood

The Student Bar Association and the *Jurist* hope that the alumni will again aid us in the selection of this year's Outstanding Alumnus. All nominations should be submitted to the nominating committee by March 1, 1980. Please include a brief description of the individual's qualifications and submit it to: The *Jurist*, Wake Forest University School of Law, Post Office Box 7206, Winston-Salem, North Carolina 27109.

A. J. FLETCHER (1887-1979)

This past spring, Wake Forest University School of Law lost one of its finest and most long-standing friends. Mr. A. J. Fletcher, at the age of 91, died on April 1, 1979.

A self-made, energetic man, Mr. Fletcher grew up as one of fourteen children born to a poor Baptist minister in mountainous Ashe County, N.C. His life spanned the whole of the modern era in American history. In 1893 when Fletcher was but six years old, the historian Frederick Jackson Turner announced that the American frontier was irrevocably closed. The dominant concerns of the U.S. Supreme Court during the nineties were railroads, trusts, labor, and exclusion of the Chinese from American society.

Fletcher overcame the hard times of his youth and went on to graduate from the Law School at Wake Forest College in 1912. While there, he supported himself in part by typing law papers for 75 cents a paper. Not until the year after his graduation did the Sixteenth Amendment authorize Congress, for the first time, to tax that 75 cents as income.

In the year that Prohibition began (1919), Mr. Fletcher opened a law office in Raleigh. But his business interests have never related solely to the legal profession. He served as editor on newspapers in Mooresville and Apex, N.C. In 1939, he established Capitol Broadcasting Company, which became an umbrella covering stations WRAL-TV, WRAL-FM, the Tobacco Radio Network, the N.C. News Network, and other publications and businesses. Mr. Fletcher also founded Dixie Life Insurance Company, which later became Southern Life. Following the faith of his father, he helped establish Hayes Barton Baptist Church in Raleigh and designed and built Wake Memorial Gardens cemetery.

Mr. Fletcher gained a reputation for two-fisted, conservative editorials on social and political issues, but he is also remembered by well over one million school children and their parents for his generous support of opera. As a boy in North Wilkesboro, N.C., he heard his first aria – *Faust* sung in English. Over forty years later in 1948, he founded the Grass Roots Opera Company to perform opera in English for school children throughout the southeast. Although consistently his sole financial failure, the touring group survives today as the National Opera Company because of Fletcher's largess.

Mr. Fletcher was honored in 1972 as Wake Forest's Distinguished Alumni. In 1978, he created the A. J. Fletcher Memorial Scholarship, which provides deserving Wake Forest law students with full support. Mr. Fletcher's three sons also attended Wake. The memory and continuing benefice of Mr. Fletcher will long be appreciated at Wake Forest.

1979 GRADUATES

Following is a list of business addresses for nearly all the 1979 law school graduates. Only those persons for whom we had complete business addresses have been included. If there has been a mistake or if your address has been omitted, please contact the *Jurist* for inclusion in the next issue.

Doug B. Abrams
Blanchard, Tucker, Twiggs & Denson
Drawer 30
Raleigh, NC 27602

Rayford Adams, III
Standing Trustee, Wage Earner Plan
Federal Building and Court House
Winston-Salem, NC

Linda F. Agee
Ashland Oil Corp.
Ashland, Kentucky

Wesley F. Agee
Jenkins, Fenstermaker, Kreiger,
Kayes & Farrell
Box 2688
Huntington, WV 25728

Carl Edwin Allman, III
Hatfield, Allman & Hall
Winston-Salem, NC

Reginald Stewart Barroll
c/o Sheldon B. Siedel
110 N Division Street
Salisbury, MD 21801

Samuel Behrends
Reid & Priest
Attorneys at Law
Washington, DC

Paul Bell, Jr.
4001 Foxcroft Road
Charlotte, NC 28211

Harry Boles
c/o R. Allen Osborne
108½ S. Main St.
Kernersville, NC 27284

David W. Boone
J. Kenyon Wilson
731 Riverside Ave.
Elizabeth City, NC 27909

Deborah J. Bost
Tuggle, Duggins, Meschan,
Thornton & Elrod
Post Office Drawer X
Greensboro, NC 27402

Samuel Fraley Bost
Womble, Carlyle, Sandridge & Rice
Post Office Drawer 84
Winston-Salem, NC 27102

Russell R. Bowling
Jones, Key, Melvin & Patton
P.O. Box 108
Franklin, NC 28734

Alan Kent Brown
5031 Troost Ave., Apt. 3
Kansas City, MO 64110

Christopher Lynn Byerly
220 Third Avenue
Siler City, NC 27344

Zachary T. Bynum, III
Hall & Liner
Attorneys at Law
108 West Third St.
Winston-Salem, NC 27101

Hubert Morris Caddell, Jr.
Clerk, US Court of Claims
717 Madison Place
Washington, DC 20005

Robert Lee Cherry, Jr.
Leath, Bynum, Kitchin & Neal
PO Box 1257
Rockingham, NC 28379

Martha Holton Clark
Clerk, US District Court for
Eastern District of NC
Federal Building
Raleigh, NC 27611

William Arthur Clark
c/o Robert Musselman
413 7th St., N.E.
Charlottesville, VA 22901

Keith Ashford Clinard
Womble, Carlyle, Sandridge & Rice
Post Office Drawer 84
Winston-Salem, NC 27102

Robert E. Clute
Pillans, Reams, Tappan, Woods,
Roberts & Vollmer, P.C.
The Pillans Building
3662 Dauphin St.
Mobile, AL 36608

Michael Allen Colliflower
Jefferson-Standard Ins.
Legal Dept.
Greensboro, NC

David Thomas Conley
Reymer, Lewis, Ensile & Patterson
PO Box 127
Statesville, NC 28677

Julius H. Corpening, II
Prickett & Scott
PO Box 867
Wilmington, NC 28401

Margaret Crosby Courtright
Younce, Wall & Chastain
415 W. Friendly Rd.
Greensboro, NC

Martin Louis Cross
Compton, Latimer, Compton & Compton
9315 Grant Ave.
Manassas, VA 22110

Laura Ellen Crumpler
Clerk, Chief Justice Branch
NC Supreme Court
Justice Building
Raleigh, NC 27602

George Thomas Davis, Jr.
Attorney at Law
Swan Quarter, NC 27885

Terrie Allen Davis
Craig, Brawley, Liipfert & Ross
PO Box 2836
Winston-Salem, NC 27102

Juanita B. DeRoos
Western Electric Corp.
Legal Staff
Greensboro, NC

Dorothy M. Douglas
Westmoreland & Sawyer
1144 West Fourth St.
Winston-Salem, NC 27101

Raymond E. Dunn, Jr.
Dunn & Dunn
411-412 Elks Bldg.
New Bern, NC 28561

William A. Eagles
Whiting, Horton, & Hendrick
PO Box 2996
Winston-Salem, NC 27102

Harry Craig Farver
Gwyn, Gwyn & Morgan
108 S. Main St.
Reidsville, NC 27320

Samuel L. Feemster
Ralph A. Gingles, Jr.
260½ Page Avenue
Gastonia, NC 28052

Thomas W. Ferrell
Clerk, Russell Eliason
U.S. Magistrate
Suite 224
Federal Building & Court House
Winston-Salem, NC 27101

Mary Caroline Gamble
Trust Department
Wachovia Bank & Trust Co.
PO Box 3099
Winston-Salem, NC 27102

William Ward Gardner
Gambrell, Russell & Forbes
Attorneys at Law
Atlanta, GA

Michael G. Gibson
Lincoln & Gibson
Raleigh, NC

Deborah M. Glass
NLRB
1717 Pa. Ave., NW
Washington, D. C.

Richard James Godlewski
Bell Labs
Legal & Patent Office
Crystal Mall One
1911 Jefferson Davis Hwy.
Arlington, VA 22202

Dorian Hayes Gunter
Casstevens & Hanner, P.A.
Suite 812 Cameron-Brown Bldg.
Charlotte, NC 28204

Stephen Paul Halstead
Integon Life Insurance
Claims Department
PO Box 3199
Winston-Salem, NC 27102

Billy Curtis Hamlet
Gunn & Messick
Pittsboro, NC

Thomas Neil Hannah
Assistant District Atty.
PO Box 789
Newton, NC 28658

Averill Currie Harkey
Harkey, Faggart, Coira,
Fletcher & Lambeth
Wachovia Center
Charlotte, NC 28285

Ann June Heffelfinger
Williamson, Herrin & Stokes
Greenville, NC 27834

Patricia Lee Holland
U.S. Attorney's Office
Eastern District of NC
Federal Building
Raleigh, NC 27611

Claude H. Hughes
Johnson & Lyerly, P.A.
PO Box 585
Newland, NC 28657

Maurice Scott Smothers Hull
Keziah, Gates & Samet
PO Box 2608
High Point, NC 27261

James Randal Hunter
Beaman, Kellum, Mills & Kafer
PO Box 866
New Bern, NC 28560

Bonnie Kay Johns
Clerk for Bankruptcy Judge
U.S. Post Office & Court House
PO Box V-1
Greensboro, NC 27402

Sarah Morris Johnson
NC Industrial Commission
Dobbs Bldg.
Raleigh, NC 27602

Jonathan Ley Jones
Frye, Booth & Porter
203 Northwestern Bank Bldg.
Cherry & Third Streets
Winston-Salem, NC 27101

Suzanne Lorraine Jowdy
In House Council
Washington Group, Inc.
3069 Trenwest Drive
Winton-Salem, NC 27103

Marilyn Porter Koch
In House Council
First Union Corp.
Charlotte, NC

Diane Leigh Appleton (formerly Krekorian)
Golding, Crews, Meekins, Gordon & Gray
400 Attorneys Building
806 E. Trade St.
Charlotte, NC 28202

William Joseph Kubida
Lundy & Associates
1020 Anthony Wayne Bank Bldg.
Fort Wayne, Indiana 46802

Richard Douglas Laws
c/o M. Roy Short, P.A.
Gastonia, NC 28052

Alan Lee Levengood
1060 Crestwood Drive
Pottstown, PA 19464
(clerk for Richard S. Lowe, Resident Judge, Montgomery County, PA)

Thomas Kinkaid McClellan
Lee & Lee
15 Church St.
Asheville, NC 28802

Thomas Conklin McGraw
Coke & Coke
3600 First National Bank Bldg.
Dallas, TX 75202

Mitchell Sutton McLean
Carter Jones
217 W. Main St.
Ahoskie, NC 27910

Joseph F. McNulty, Jr.
Blue Bell, Inc.
Legal Dept.
Greensboro, NC

Warner Barker Miller
E. T. Hunter, P.A.
1930 Tyler St.
Hollywood, FL 33020

Beverly Ruth Mitchell
Suite 919 First Union Bldg.
310 West Fourth St.
Winston-Salem, NC 27101

Bruce D. Mitchell
Robert G. Bowers
Dunn Building
New Bern, NC 28561

Charles Allen Moore
Carter Jones, P.A.
217 W. Main St.
Ahoskie, NC 27910

Jennifer Mulligan
c/o Tonita Foster
1117 2nd St.
Roanoke, VA 24016

Eugene Wilson Muse
Weeks, Muse & Surles
211 East Pitt Street
Tarboro, NC 27886

Lillian Burrow O'Briant
Miller, Beck & O'Briant
115 S. Fayetteville St.
Asheboro, NC 27203

Jeffrey Neil Plowman
McCauley, Owen & Sweeny
1616 Peachtree St.
Cain Tower
Atlanta, GA 30303

Donald Raymond Raney, II
Evans & Dixon
16th Floord, Marquette Bldg.
314 N Broadway
St. Louis, MO 63102

Mary Ward Root
Clerk, US District Court
US Post Office & Court House
PO Box V-1
Greensboro, NC 27402

John Bruce Ross
Hatch, Little, Bunn, Jones Few & Berry
PO Box 527
Raleigh, NC 27602

Charles Stanley Rountree, III
Don Evans
120 Howard Street
Rocky Mount, NC 27802

Jeffrey Oakes Saufley
PO Box 205
Grottoes, VA 24441
(US Army JAGC)

Douglas Allan Scott
Legal Aid
Greensboro, NC

David Shouvlin
Covenant House Legal Services
New York, NY

Robert Adams Singer
Brooks, Pierce, McLendon, Humphrey & Leonard
P O Drawer U
Greensboro, NC 27402

Patrick Underwood Smathers
Winner & Smathers
303 Northwestern Bank Bldg.
Asheville, NC 28801

Scott MacGreagor Stevenson
McConnell, Howard, Pruett & Bragg
City National Center
200 S Tryon St.
Charlotte, NC 28202

Ned Allen Stiles
Golding, Crews, Meekins, Gordon & Gray
400 Attorneys Bldg.
Charlotte, NC 28202

David Ferris Tamer
Clerk, Assoc. Justice David M. Britt
Justice Bldg.
Raleigh, NC 27602

Robin Kenton Vinson
Clerk, NC Court of Appeals
Ruffin Bldg.
One W. Morgan St.
Raleigh, NC 27601

James Flynn Walker
c/o Mitchell M. McEntire
Graham, NC 27253

Mona Lisa Lane Wallace
Carlton, Rhodes & McLaughlin
109 West Council St.
Salisbury, NC 28144

John Hamilton Watters
Reynolds & Howard
PO Box 27525
Raleigh, NC 27611

A. Grant Whitney, Jr.
Grier, Parker, Poe, Thompson, Berstein, Gage & Preston
1100 Cameron-Brown Bldg.
Charlotte, NC 28204

John Bundy Yorke
Wardlow, Knox, Knox, Robinson & Freeman
Suite 1490, City National Center
S. Tryon & 4th Streets
Charlotte, NC 28202

Edward Vaughan Zotian
Tuggle, Duggins, Meschan, Thornton & Elrod, P.A.
Drawer X
Greensboro, NC 27402

DECEMBER '78 GRADUATES

James Robert Hitchens
Tunnell & Raysor
PO Box 151
Georgetown, DE 19947

Claude L. Hughes
Johnson & Lyerly, P.A.
Newland, NC

CLASS NOTES

1922

James L. Taylor of 1217 Cowper Drive, Raleigh recently retired.

1930

J. Lee Wilson passed away on Oct. 30, 1979. A member of the North Carolina Bar, Wilson was a partner in the firm of Wilson, Biesecker, Tripp and Wall. Wilson had practiced in Lexington, North Carolina since 1930 and served as Lexington City attorney for several years. He was a former member of the State Legislature and Chairman of the Davidson County Democratic Executive Committee. Wilson, whose home was at 8 Hege Drive, Lexington, N.C., was born in the Davidson County community of Churchland in 1908.

1949

Rawls H. Frazier is presently serving as an Administrative Law Judge in the Bureau of Hearings and Appeals of the Department of Health, Education, and Welfare, 150 So. Los Robles Avenue, Pasadena, California 91101. Mr. Frazier served as a military judge in the General Courts Martial from 1962 until 1974 when he retired from the U.S. Army JAG Corp. From August 1, 1972, until his retirement in 1974, Colonel Frazier was Chief Judge, 4th Judicial Circuit, which encompasses the entire Western United States. Colonel Frazier is the recipient of the Bronze Star and has been awarded the Legion of Merit on three occasions. He presently resides at 3660 Woodcliff Road, Sherman Oaks, California 91403.

1950

Carl L. Bailey, Jr., of Plymouth, N.C., passed away on September 21, 1979. A member of the North Carolina Bar, Bailey had practiced in Plymouth since graduation.

1963

H. Edward Knox was elected mayor of Charlotte, N.C., on November 6, 1979. A former State Senator, he is a partner in the Charlotte firm of Ward, Knox, Knox, Robinson and Freeman. He is the President of the Lawyers' Alumni Association of Wake Forest.

1966

David A. Clark was recently appointed as Administrative Law Judge with the United States Department of Labor in Washington, D.C. For the previous eleven years he was a trial attorney with the United States Department of Justice. Mr. Clark and his family reside at 12616 Wycklow Dr., Clifton, Va. 22024.

1967

W. Bailey Watson has accepted the position of Staff Attorney in the home office of TransSouth Financial Corporation, in Florence, South Carolina. Mr. Watson assumed his duties on August 6, 1979. His present address is P.O. Box 5030, Florence, S.C.

John P. "Jack" Simpson has changed his business address to P.O. Drawer 1197, 108 N. 7th Street, Morehead City, N.C. 28557.

1973

R. Lee Farmer has recently been appointed a member of the North Carolina Criminal Code Commission by North Carolina Attorney General Rufus Adminsten. Mr. Farmer is a partner in the firm of Blackwell and Farmer, in Yanceyville, N.C. engaged in the general practice of law.

Michael Reeves is currently a vice-president with AMI Title Insurance Company in Charlotte, N.C., after having practiced law with the firm of Kellogg, White and Reeves in Kitty Hawk, N.C., from 1973 until 1978. He and his wife Francis (Fran) proudly announce the birth of a daughter, Kathryn Laney Reeves, born April 1, 1979. The Reeves reside at 1024 Court Drive in Charlotte, N.C.

1975

Frank R. Edrington is in house counsel for Belcher Oil Company in Miami, Florida.

1977

Ernest George Cole has been named a Fund member attorney of Lawyers' Title Guaranty Fund. Mr. Cole practices in New Port Richey, Florida.

Kenneth H. Zuzulka is with the Legal Department of Vulcan Materials Company in Birmingham, Alabama.

1978

Marc E. Acree is Assistant District Attorney in LaGrange, Georgia.

Kay Ruthven Hagen is trust officer for North Carolina National Bank's Trust Division.

J. Danny Kersh completed his Masters in Tax at Emory University and is associated with Cherry, Bekaert and Holland in Charlotte, N.C.

D. Michael Parker is an associate with Graham and Cheshire in Hillsborough, N.C.

G. Clifton Patterson, III, is associated with Horowitz, Oneglia, Goldstein, Foran and Parker in College Park, Maryland.

Gregory E. Williams has joined the firm of Hudson, Jones and Jaywork of Dover, Delaware. Mr. Williams will be the resident attorney at the Rehoboth Beach office of the firm.

JURIST ALUMNI INFORMATION FORM

The *Jurist* was born in 1971 when Reid Potter conceived the idea for an alumni magazine and sold the administration on his proposal. The primary purpose of the *Jurist* is communication between Wake Forest Law School and its alumni. We invite you to submit information on your status for the Class Notes section, using the form below. Simply cut out the form and return it to the *Jurist* at the address listed on the back.

Name: Year Graduated:

Home Address:

Business Address:

Are You A Member Of A Legal Fraternity?

If Yes, Specify:

Are You Engaged In A General Practice Of Law?

If Not, What Are Your Specialty Areas?

JURIST ALUMNI INFORMATION FORM

List All Public Office, Professional, And Civic Honors and Activities, With Dates:

Please Give Brief Account Of Personal Items Of Current Interest: (Recently Married, Birth Of A Child, Current Professional Positions, Professional Plans In The Immediate Future, etc.)

Remember, the *Jurist* needs your nomination for Outstanding Alumnus.

Return To:

The Wake Forest Jurist
School of Law
Wake Forest University
Winston-Salem, NC 27109

Too busy to write? You can telephone the *Jurist* office directly. Call us today at (919) 761-5441.

DEAN'S ASSOCIATES

The following donors each contributed $1,000 or more to the 1978-79 Law Fund.

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