

“AGAINST ALL SENSE AND REASON”^{*} OR CHANGE AND THE ART OF GETTING LUCKY

W. Jeremy Davis^{**}

I am a recidivist dean. There are others. Even some of my colleagues contributing to this issue of the University of Toledo Law Review have left one deanship for another. Some deans have even made the transition several times. I did not think I would ever do so. My long tenure as dean at the University of North Dakota was the result of a unique mix of needs and—dare I say—skills that I did not think would be replicated. But after 21 years as dean,¹ and even a bit longer as a faculty member at UND, I accepted the offer of the Appalachian School of Law to become the fourth dean in its young life.

The reasons for leaving a deanship for another are many and individualistic. Some leave for ambition, some to get away from something, some because their goals have been achieved, and some for a new challenge. I suppose most leave for a combination of these and other reasons. Maybe I left because things were too comfortable. Being a satisfied dean is not particularly good for a school, and I probably stayed too long. But I also know that I left because I saw an opportunity to maybe do some good at a place that deserves to succeed.

But it is tough to leave what has been your home for so long. Stability can be a good thing. At least there are some good things that come from it. Having had as students roughly 70% of the state’s lawyers and judges—as well as a number of the members of the executive and legislative branches—was at least good for having one’s phone calls returned. Knowing institutional history (or being able to reconstruct it without challenge) is a comforting and sometimes powerful resource.

One obvious down-side of a long-term deanship is reliance on the old ways. I had convinced myself that mentally and emotionally I could reinvent myself and the school periodically. That was likely more true in my mind than in practice. I was pretty sure that I was not going anywhere. My next move would not be to another law school as its dean but rather back upstairs, returning to the faculty “to concentrate on my first loves of teaching and research,” which were the reasons we all got into legal education in the first place. No, the next move, to be sure, was back to the classroom full-time, then in a few years perhaps achieve that most sought-after title of Professor Emeritus and maybe teach a course every other semester. Well, that is not happening. Why not? What pushed the move to join the Appalachian School of Law?

The Appalachian School of Law did not have a place in my consciousness until sometime in the summer of 1998. That was when I was asked by the Consultant’s office to serve as chair of a site team to visit the fledgling school in southwest

* L. Kinvin Wroth, *Thoughts on Decanal Recidivism*, 33 U. TOL. L. REV. 269, 269 (2001). This phrase is perfectly appropriate in reference to the decision to assume another deanship.

** Dean and L. Anthony Sutin Professor of Law, Appalachian School of Law, Grundy, Virginia.

1. I believe at the time I tied the incomparable Nina Appel for third in longevity among active deans at the same school.

Virginia that was seeking provisional approval. Where was Grundy, Virginia, I asked; so out came the road atlas. I noted—and this is routinely the case whatever geographic reference you may use—that southwest Virginia was clipped off the main map and relegated to an inset. Now, since I have become a resident of this beautiful corner of the world, I know that this “inset status” carries over into the way the region is viewed by the rest of Virginia. Perhaps a part of the Commonwealth by an accident of history,² Buchanan County,³ and all of southwest Virginia for that matter, is more of a distant relative than a close family member of genteel Virginia society.

As team members were appointed and preparations were being made for our March, 1999, accreditation visit, I found that I was looking forward to it with great anticipation.⁴ Although a veteran of a number of site visits, this was my first to a school seeking provisional approval. I had no idea how a new law school got up and running and was interested to see what kind of people could actually do such a thing.

It would not be an exaggeration to say that Grundy is remote. When our site team arrived at TriCities Airport,⁵ we learned that our journey had just begun; Grundy was still a two-hour drive. The trek, however, was an easy and delightful one, first through rolling hills with the layered backdrop of mountain ranges fading into the distance, and then up into those high mountains and their valleys.⁶ Our destination was sheltered by some of those mountains whose angled faces in March are in sharp contrast to the lush and vividly green softness they present in the summer.

Grundy is a friendly and accommodating small town. Entering its center, the team discovered that the local community had erected a banner welcoming the ABA. Of the many site visits on which I have served, I do not recall receiving such a public and friendly welcome. At the time of our site visit, there was not a motel in the community thought by our hosts to be suitable for their guests from the American Bar Association, so the team was accommodated in two private residences of ASL trustees who were spending the winter and early spring in warmer climes.

2. One widely believed but undocumented story is that the Buchanan County representative to the meeting of Virginia counties determined to secede from the Commonwealth and create the state of West Virginia (thus siding with the North in the War Between the States) got sidetracked by a hard-drinking poker game en route to what is now Charleston. Had he showed up at that meeting, this area may well have become part of West (by-God) Virginia.

3. The “ch” is pronounced as “k.”

4. The team was comprised of extraordinarily skilled and professional colleagues. Team members were: Professor Marina Angel of Temple; The Honorable Ray Krause, then a Minnesota Tax Court Judge and on the faculty at Hamlin; Peg Corneille, Director of the Minnesota State Board of Law Examiners; Professor Fred Hart of New Mexico; and Professor Michael Whipple, then of the University of Puerto Rico School of Law.

5. TRI is a good-sized feeder airport serving Kingsport, Johnson City, and Bristol, Tennessee. Bristol’s twin, Bristol, Virginia, is also part of the metropolitan area, but I suppose “Quad Cities” had already been taken.

6. I now know how to shave ten minutes off that two-hour drive to the TriCities Airport by risking life and limb going over, instead of around, those mountains on secondary roads not wide enough to qualify for a yellow line down the middle.

It was during this site visit in March, 1999, that I made my first acquaintance with ASL President Lu Ellsworth, who several years later would help me decide to join the School. I also met a new faculty member by the name of Tony Sutin. Tony had been a partner in the Washington office of Hogan and Hartson, but a good deal of his professional career had been spent in public service. From 1994 to 1998, he served in several senior positions in the U.S. Department of Justice, including being a founder and deputy director of the COPS program.⁷

Tony had just started teaching at ASL that semester. He and his wife, Margaret Lawton, had moved from the D.C. area to join the young law school, in part because *its mission of community service was in line with their own ideas of what lawyers' responsibilities to the community and society ought to be.* Here was a couple who put their ideals into practice and commitment.

While the site visit went well, provisional approval was not forthcoming, and as a result morale at the school ebbed. But true to the spirit and mission of the school, faculty and staff redoubled their efforts. Tony was appointed dean in July, 2000, and the school went through another site visit in the fall of 2000. At its February, 2001 meeting, the American Bar Association endorsed the Council's recommendation of provisional approval of the Appalachian School of Law. Things were looking up for this law school that had the determination and spunk of "the little engine that could."⁸

The Appalachian School of Law is a unique law school; the reasons for its existence differ some from those of other new and developing law schools. Why establish a law school in a town of 1200 and where the total county population is only 25,000? What is the payoff for a law school serving a region historically and chronically in economic depression? Certainly if the reason for starting a law school were to profit from the enterprise, it would make much better sense to site the school in an urban area or population center, which has been the case for every other new law school in recent American legal education history. But such a location would not serve the mission of the school.

To understand why ASL is situated in Central Appalachia, one need look no further than its Statement of Purpose, which reads in part:

The Appalachian School of Law exists to provide opportunity for people from Appalachia and beyond to realize their dreams of practicing law and bettering their communities. We attract a qualified, diverse and dedicated student body, many of whom will remain in the region after graduation and serve as legal counselors, advocates, judges, mediators, community leaders, and public officials.

Central Appalachia is generally considered to be comprised of all of West Virginia, the easternmost parts of Tennessee and Kentucky, the western parts of

7. Later, many of us came to know of Tony, an expert on election law, from his thoughtful commentaries on the 2000 election and recount.

8. This term was affectionately used by Chief Justice Gerald VandeWalle of North Dakota, former Chair of the Section of Legal Education, to refer to ASL on the occasion of my "going-away party" held by the State Bar Association of North Dakota in November, 2002. It is an apt metaphor.

North Carolina, and southwestern Virginia.⁹ It is a region of breathtaking beauty, of mountains and valleys (or “hollers”) rich in vegetation and game.¹⁰ The Europeans arrived in the 1700s; these immigrants were largely the cast-offs of England and Scotland, sentenced to transportation for various misdeeds or merely because of their social and economic status. Largely without skills or education, the immigrants survived by hunting game and farming the occasional bottom land.¹¹ These hardworking new Americans, isolated and in a survival existence, kept to themselves; even within Appalachia, the harshness of the geography prevented much interaction among the pockets of communities. Social services and formal education were nearly nonexistent and roads, such as there were, were not maintained. The language of the region was derived from Elizabethan English, circa 1600-1700, and developed into almost a dialect. The poverty and remoteness of the region set its residents apart economically and socially from mainstream America.

In the late 1800s, the rich resources of Central Appalachia attracted the attention of industrialized America. Coal and timber were available here in quantities sufficient to feed the northern factories seemingly forever. All that was needed was to steal it. And steal it they did. The high level of illiteracy in the region and the fact that there were virtually no lawyers to represent local landowners made it open season for the sharp outsiders. In addition, the people living on the land often did not own it; formalities of title were not high on these squatters’ priorities. Timber and mineral rights were purchased on the cheap from owners who had no idea of the value of what they were selling.¹² Many could not read the documents they were signing. Furthermore, a conscious—and unconscionable—manipulation by the northern moneyed interests depicted the residents of Appalachia as ignorant, stupid, and lazy (they are anything but), resulting in little sympathy from the authorities or anyone else outside Appalachia. With few lawyers to assist them and no assistance from the government, the result was preordained. By the early 1900s, most of the timber and coal resources of Central Appalachia were controlled by absentee owners who had little interest in anything but extracting the valuable resources they had just acquired.¹³

Laborers were needed to cut and haul the timber and mine the coal, and in the period bracketing the First World War, many Appalachians left the farms and hollers for the first wage-paying jobs they ever had. Immigration swelled the population of the region. Public schools were built, and public services and utilities

9. This history of Central Appalachia and the law school has been drawn from several sources including the school’s feasibility study, several of its self studies, and various reports by and about the school. I owe a special debt to ASL board member, attorney, and author Frank Kilgore for helping me with the facts.

10. At least two tribes of American Indians, the Shawnee and Cherokee, hunted these mountains until displaced by the white man.

11. Crops included corn, the distilling of which created a thriving cottage industry that, I am informed, continues to this day, perhaps even in Buchanan County.

12. Sometimes the mineral interests went for free as a “bonus” along with the sale of standing timber.

13. Even today, nearly one-quarter of the surface and over 50% of the mineral acres of Buchanan County are owned by non-resident interests, and estimates of the percentage of southwest Virginia coal and gas controlled by outsiders range as high as 90%.

were introduced. Of course, those modern comforts came at some cost, and local governments had difficulty paying for them; the tax base was unable to bear the cost of these modern comforts because the northern corporate interests were able to figure out ways of keeping their taxes down.¹⁴ So public services waned, and local governments incurred substantial debt to pay for what remained. Exploitation of the labor force¹⁵ prevailed until much later when the unions finally got a foothold, and then a firm grip, on the region. What had appeared to have been the beginning of positive economic and social growth in the mountains of Central Appalachia was merely a hiccup on the graph of Appalachian downward economic spiral.

Since then to modern times, the economic and social history of Central Appalachia has continued to be boom and bust—mostly the latter. Exacerbating the effect of the Great Depression on the region, oil had been replacing coal in the late 1920s, resulting in severe unemployment and a decline in population. Floods are common to the region,¹⁶ and abusive logging practices, unregulated strip-mining, and the steep mountain slopes all contributed to washing the limited tillable topsoil downstream, ruining much of the farmland. Roosevelt's administration established the New Deal programs just in time, providing jobs, public assistance, and infrastructure to the region. The United Mine Workers union ultimately reversed the labor/management power imbalance.

After the Second World War, the resources of Central Appalachia were again in demand, war veterans went to college, and relative prosperity prevailed in the region. However, salaries and opportunity for advancement in the professions remained low. By the end of the 1950s, much of the better timber had been taken, and coal miners were being replaced by machines. Another period of population decline ensued, and the local economy took another downward turn.

The poverty of the region was finally beginning to receive national notice. Public attention was drawn to the hardship of trying to eke out a living in Appalachia,¹⁷ and

14. This was done legitimately, by wielding their considerable political power, and unlawfully, through the widespread corruption of local authorities.

15. See, for example, the mid-Twentieth Century musical rendition of *Owe My Soul to the Company Store (Sixteen Tons)*, recorded by Tennessee Ernie Ford.

16. Natural and man-made. One of the most famous of the latter sort occurred in Logan County, West Virginia, about 40 miles (but a two-hour's drive!) from Grundy, on February 26, 1972. One of the three impoundments or "gob dams" constructed by the Buffalo Mining Company on the Middle Branch of Buffalo Creek collapsed, sending 132 million gallons of black waste-water and mine sludge through seventeen miles of the narrow Buffalo Creek Valley and over a dozen company towns. In less than 30 minutes, 125 were dead, 1100 injured and over 4000 left homeless. The Pittston Coal Company, parent of the Buffalo Mining Company, finally settled the lawsuit filed on behalf of over 600 victims of the disaster for a reported \$13.5 million. See generally GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (Vintage Books 1977) (1976).

17. One verified anecdote tells of the move of a family from Number Seven, McDowell County, West Virginia (not far from Grundy) to Orange County, California in the late 1950s. The matriarch of the family became a contestant on the then-popular *Queen for a Day* television show. The show awarded prizes to the contestant who told the most compelling story of family hardship. Merely by reciting a "day in the life" of an Appalachian coal miner's wife, she walked off with all the booty. (Postscript: the people of No. 7 got advance notice of the show and the two televisions in the town were tuned to *Queen for a Day* that day, with most of the population looking in. Shortly thereafter, many of the families of that small company town left for Orange County.) (Post-postscript: several other former residents of No. 7 subsequently appeared on *Queen for a Day*. Their record of winning

interest in the unique culture of the area was beginning to spread across America.¹⁸ The Appalachian Regional Commission was created by Congress during the Kennedy administration for the purpose of assisting in the economic and community development of the region. Then, during the oil embargo of the 1970s, resurgence in the demand for coal led to a brief spike in the local economy. Unfortunately, it too was short-lived.¹⁹

Today, modern services, roads, and even the internet have transformed Central Appalachia, but it still has not been able to attract—to most places—the industries that would take the place of the extractive economy of yesterday.²⁰ And the modern roads, while helping to bring to, and keep some industry in, the area, have also made it easier for people to leave. Many of those looking for work or education, particularly professional and post-graduate education, must go elsewhere to find it. Of those who can afford to send their children to college, most understand that once out of the region their children will not likely come back except to visit. Thus, the population has been in a steady decline.

So from where will the future leaders of the region come? Where will Central Appalachia get its community leaders and its lawyers and judges? It was the search for answers to these questions that began the process that led to the establishment of the Appalachian School of Law.

Joe Wolfe may have been thinking about it for a long time, but it was not until 1993 that the Norton, Virginia, attorney sought support for a law school in southwestern Virginia. He discussed his idea with his friend and neighbor, experienced educator Lu Ellsworth.²¹ Community and regional support was quickly forthcoming; it became clear that this was one way—perhaps the only way—to secure a stream of future lawyers and community leaders for Central Appalachia.

Within a year, the law school's Steering Committee had installed Ellsworth as President, chartered the school, obtained IRS 501(c)(3) tax status, and begun preparation of a feasibility study to survey more formally the need for and support of a law school in the area. In late spring of 1995, the school received approval from Virginia's Council of Higher Education. Due diligence was performed, contact with ABA Consultant James P. White was made, other law schools were

caused the show's producers to place a moratorium on further contestants from No. 7.)

18. And continues to this day. The music of local Bluegrass Legend Dr. Ralph Stanley of Dickenson County, Virginia, next to Buchanan County, was not well known outside of the region until he recently won an academy award for the sound track of the film, *O BROTHER, WHERE ART THOU?* (Universal 2000).

19. This brief period of boom had a serious downside, for it was during this time that under-regulated strip-mining resulted in the permanent scarring of the countryside and mountaintops.

20. Tax breaks and other local government incentives have had some limited success enticing manufacturing into a few locales within the broad political definition of Appalachia, but these are not places where one would find the social, cultural, and economic norms of Central Appalachia discussed above.

21. Ellsworth was at the time Vice Chancellor and Dean at Clinch Valley College of the University of Virginia in Wise, Va. CVC is now known as the University of Virginia's College at Wise. Ellsworth's experience in higher education is extensive. He has served as Professor of History and Provost of the University of West Florida, as Associate Vice Chancellor for Academic Affairs of the State University system of Florida, and as Chief Academic Officer for the Tennessee Higher Education Commission.

visited, and Jack Grosse, former Dean of Northern Kentucky, was retained as the school's consultant for ABA approval.

Grundy was not the first choice for the location of the school. The city of Norton, in Wise County, seemed a perfect site; CVC/UVa-Wise and the Mountain Empire Community College would be in close proximity, and Norton is convenient to more populated communities and the services they offer. The Buchanan County Board of Supervisors, however, had a different idea. A 350-student professional school would have a profound economic impact on their small county of 25,000.²²

As inducement to settle in Buchanan County, the Supervisors offered the new law school two public school buildings in Grundy²³ and a package that included \$6.5 million for building renovation and operating expenses. While there were benefits to locating the school in Norton, there were also many advantages to settling in Grundy; the Steering Committee chose the latter.

The building renovations were nearly completed when, in August, 1997, the Charter Class of 71 students matriculated at the Appalachian School of Law. A little over a year later, the school applied to the Council on Legal Education and Admissions to the Bar of the American Bar Association for provisional approval. At the time of the 1999 site visit, the school was already working on its second dean. Dennis Olson, the founding dean, had stepped down and was replaced by Eric Holmes²⁴ in July, 1998. Holmes' tenure as dean, however, lasted only one year, and on July 1, 2000, Tony Sutin was appointed the school's third dean. It was under Tony's leadership and guidance that the school obtained provisional approval in February, 2001.

The horrific events of January 16, 2002, shattered the upbeat environment at the school that had been created by achieving provisional accreditation and by the management style of the personable and brilliant Tony Sutin.²⁵ Around noon on that Wednesday, law student Peter Odighizuwa²⁶ shot and killed Tony, Professor

22. The Buchanan County leaders are visionary. Based in part on the success of ASL, they recently formed the University of Appalachia and created its first school, the College of Pharmacy. Although not structurally associated with ASL, the presence of other higher education and professional schools in the area will provide many advantages and benefits to the Law School, its students, and faculty.

23. With a population of 1200, Grundy is the largest and only incorporated town in Buchanan County.

24. A published scholar and recognized teacher, Holmes had been Charter Professor of Law and was the school's senior faculty member.

25. In truth, an established law school can pretty much run itself. But a relatively new one, one that is creating tradition, not echoing it, requires constant attention to detail. And whether a law school is a good place to be or a not-so-good place to be, depends a lot on who is occupying the Big Chair. At ASL, Dean Sutin not only put together an approvable law school, but he did it in a way that made the school a good place to be.

26. Although widely reported that Odighizuwa had flunked out of school, he had not. The day prior to the shooting, he had voluntarily withdrawn from the law school, presumably because of his poor performance, but he was technically in good academic standing at the time of his withdrawal.

Tom Blackwell, and student Angela Dales.²⁷ Odighizuwa also wounded three other students.²⁸

The personal tragedies—the lives profoundly and directly affected by Odighizuwa's acts—are staggering in number and depth. The effect on the law school, though certainly pale in comparison to those personal tragedies, has been extreme. For those who have not lived through the event and its aftermath, which continues to this day, it is impossible to understand its full measure. That the school existed on January 2, 2003, almost a year after the shooting and the day that I walked into Tony's old, and my new, office, is a tribute to President Ellsworth and Acting Dean Paul Lund, as well as the faculty, staff, students, and trustees of ASL and the citizens of southwest Virginia.

But the Appalachian School of Law did continue to exist, and does exist today. As this is written, we are in our last eighteen months of the five-year window between the grant of provisional approval and the deadline for full approval. True to its primary mission, fully 60% of the school's students come from our target area of Central Appalachia.²⁹ Tony had the school on the right course. Ellsworth, Lund, and the others continued on that course under what were the most difficult of conditions. In the year and a half or so that I have been here, I have discovered the strong foundation, the excellent faculty, and the terrific students that have prepared this place for the next step.

So why change? What would make me leave a comfortable job for a new one in a new place on a short timeline? I just got lucky, I guess.

27. Tom was a well-loved teacher in his third year of teaching at ASL; Angela, a native of Buchanan County, had previously been an Admissions Counselor for the School, who then decided to go to law school herself. She was in her first year.

28. Facing three counts of Capital Murder, three counts of Attempted Capital Murder, and six counts of related firearm charges, Odighizuwa pled guilty and is currently serving six consecutive life sentences plus 28 years. The Appalachian School of Law is presently defending a lawsuit filed on the second anniversary of the shootings on behalf of the daughter of Ms. Dales and the three injured students.

29. Seventy-two percent of the class that entered in August, 2004.