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## In Memoriam: John T. Gaubatz

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Jeffrey N. Pennell, Hilarie Bass, Alan C. Swan, Anthony M. Paul, Thomas A. Robinson, George Mundstock, Rebecca Yagerman, Jerome M. Hersch, and Irwin P. Stotzky

## IN MEMORIAM: JOHN T. GAUBATZ

JEFFREY N. PENNELL\*

John Gaubatz was special.

We know that in part because this is only the fourth time this *Law Review* has dedicated an issue in tribute to a former professor. Looking at a record of John's service to the University of Miami School of Law you see that he was instrumental in numerous important ways, above and beyond anyone's notion of the call of duty. But this opportunity to remember John is not about his accomplishments, of which there were many. Instead, I hope to share a little of what I knew about John as a person, to record and to honor his spirit, how he improved our being around him, and our loss.

To give you a small insight from his early teaching days, John was tapped to be an associate dean at Case Western Reserve Law School *before* he received tenure. John was neither foolish nor stupid, so it had to be that his colleagues, even then, knew that John was thoughtful, kind, and effective, in his firm but compassionate way of helping, guiding, and leading. This is what we knew about John from well before his prime in law teaching. That he was willing to assume a potentially dangerous role to him personally, simply because his institution needed him. He showed the same dedication as an army captain during the Viet Nam conflict. That selfless dedication never wavered.

I encountered John at an early stage in my own career, when I was a pup teaching at the University of Oklahoma. Apparently my name came to John's attention in his role as then Associate Director of the Estate Planning Institute sponsored by the University of Miami. One of John's earliest successes at the law school was in effectively assisting his colleague Phil Heckerling—the legendary founder of the LL.M. Program in Estate Planning and the nation's most well regarded estate plan-

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\* Richard H. Clark Professor of Law, Emory Law School.

ning institute that today bears Phil's name. John stepped into Phil's very large shoes when he took over, first as Phil's associate, and then as Director in full when Phil became ill.

Talk about difficult! If you think of legendary coaches in high profile situations, you know that successfully succeeding a bigger-than-life predecessor is nearly always impossible. This was the task that John undertook, with characteristic achievement. True to the legacy that he upheld and continued, John once said to me that he always felt like he had Phil on his shoulder. He didn't mean that as a burden: he meant that he felt a special obligation to be true to what Phil created, to run the Program and the Institute as a partnership with Phil's vision and memory. That made it an even larger responsibility, one that John bore for a dozen years with humility and grace. The Institute and the Program flourished after Phil's death, which is a lasting tribute to them both.

Several years after Phil died John asked me to stand in for him for a year on the Miami faculty, which I was grateful to do. That experience was made facile by the wonderful hospitality and generosity of John and his wife, Kathy. Later, through the years, John and I served on professional committees together, taught at the Law School together, and shared writing projects and conversation. From near and not so, in various roles, John and I went back nearly thirty years. And from the first day John was a friend, an ally. He understood, and always was supportive.

In that regard, it fascinates me that John had the compassion and insight of one who knew what it was like to be down and looking up. A rather remarkable trait if you remember his physical stature, and recognize that John excelled in life. Notwithstanding his measured gait and somewhat laconic outward appearance, John burned bright. Yet unlike so many successful people, John was never full of himself. I never knew him to be ugly or less than totally helpful and gracious. In a word, John was a friend to everyone. Maybe that was the Denver in his background—John never met a stranger. He always made you feel welcome. It was another of his special traits.

This is not to say that John would pander. He wasn't a friend because he told you what you wanted to hear. No, John was a truth teller, in a way that made hearing a sometime inconvenient truth a little more palatable than if it came from someone else. Especially if the message was not happy or encouraging, John knew how to share your discomfort.

Unfortunately, John also knew about pain. I never had the occasion to inquire, but I believe that if I had asked him what he was most proud of he would have said with no hesitation: it was his son Daniel, who

died unexpectedly just months before his graduation from Swarthmore. I respected John for not hiding from his grief—he did not mask or disguise those feelings. Not that he was maudlin, but just that real men *do* cry, and John was not afraid to own that emotion. John had a big heart. As Kathy reported in the *Miami Herald*, after Daniel's death John became a "surrogate" father to various law students who had troubled relations with their own fathers. You can imagine that there was some truth telling in that endeavor—family conflicts seldom are entirely one sided—but you also know that John exhibited a lot of heart in taking the grief of his own loss and turning it into something positive for others.

Now, some students report—at least the legend has it—that John was tough in the classroom, especially in Elements. He understood the value of the Socratic method, and he knew how to use it. Not that he was a *Paper Chase* kind of Professor Kingsfield in his demeanor. He was conscientious and he knew quality, he didn't suffer fools or laziness, but did you ever know him to lose his temper?

The following story, told by our mutual friend Professor Lad Boyle, about Daniel's first car is probably a better description of John as a teacher. Apparently Daniel crunched the front end of that car, and together John and Daniel went to the automobile salvage yard to find replacement body parts, which they installed together. The problem was that the replacement parts were not a matching color. John was willing to help Daniel get back on the road, but not necessarily to downplay the event that led to the nonconventional two-toned appearance of the car. Sure, John could have paid to repaint that car, but every parent sees the value in going just so far to help Daniel and then letting him live with a small reminder of the lesson, now well learned. In that respect John was both supportive as a parent, and a great teacher.

There were many accomplishments in John's career, but John always remained humble. Nearly to a fault. I remember that John once said to me that he was "not an estate planner"—that he was a trusts and estates teacher (which he knew was different)—and I believed him. Only to discover later that what he really meant was that he didn't view himself in the same way that he regarded the faculty who taught at the Institute and in the LL.M. Program, the "talent" he heralded and supported in his role as Director. It wasn't true—John was an academic, a scholar, but every bit an estate planning expert. His comment to me was just an example of John being self-effacing, which was his style.

Never one to be boastful or egocentric, John was not prone to thrust himself into the limelight. Yet his work in the American College of Trust and Estate Counsel revealed him to be an inspired seer, with a penchant for innovation in law reform. Among a variety of projects that

John shepherded to fulfillment, he authored a path-breaking proposal to improve the law that would permit “portability” of a decedent’s unified credit (the tax benefit that allows virtually all estates to be nontaxable)—an idea that is under active consideration today and that may become law when Congress finally reforms the death tax (rather than repeal it). John developed that concept decades before it became the most popular and landscape altering death tax reform currently being considered on Capitol Hill. And, were he alive to see it pass, I don’t imagine that John would claim ownership or paternity. To him that kind of self-promotion simply would not come naturally or be appropriate.

There was another side to John’s scholarship. I hardly knew that his first book (ultimately of nine) was about appellate advocacy: moot court. When they were revamping their law school the United Arab Emirates actually invited John to consult as an expert because of his moot court background and book. The University of Miami School of Law has now named its 1L moot court competition after John. So he had several totally different dimensions. Most folks don’t make it to the pinnacle of one field. John was tops in two very different legal arenas. And can you imagine more diversity than appellate advocacy (litigation) and estate planning (transactional)? John was both deep and wide in his influence and exposure.

If you knew John at all you also knew that he was intrigued by computers and technology. Dean Lynch remembered at a memorial service that John expanded the exhibit hall at the Estate Planning Institute because he wanted to include software vendors. It turns out that making that one change helped to catapult the Institute into being the most important annual gathering for estate planners from all over the nation. John simply made it easier for consumers to shop for content and services as well as to learn about our arcane area of the law. The fun aspect of all this is that I only learned after John’s death that he came by his computer acumen and interest naturally—as an undergraduate science major (B.S. in Physics—with high distinction, no less). No wonder he liked the odd quirks and quarks of wealth transfer taxation. But don’t you wonder how he got from physics into law, and then tax? He also taught Elements, ERISA, and Patent Law, in addition to the wealth transfer courses. *That* is a diverse and difficult curriculum, and by all accounts he was effective at all of it.

By the way, John was the first author I knew who produced a camera-ready manuscript for a law school text—he was very proud to have mastered word processing to such an extent, to do desktop publishing that eliminated the frustrating step of proofreading typeset copy in the publication process. His coauthor on that project, Professor Ira Bloom,

reports that “John was way ahead of the times with computers” and that, regarding the substance of that book, “John’s idea to write an integrated casebook—one that reflected the realities of practice—was visionary.” There it is again: John was a seer; he was ahead of his times. Sadly, he preceded us in death too, dying (at sixty-five) way too young.

I only saw snippets of his varied roles—father and then surrogate father; husband, political advisor, and cheerleader to Kathy; computer and technology maven; faculty shepherd; caretaker to the nation’s most successful and popular estate planning program; author, scholar, and teacher. I can only guess but I suspect that, if you asked John what he was most proud of in his professional life, he would say his students. I’m biased but I think he embraced the sense that, above all else, what mattered most was simply being a teacher. He loved ideas, he produced and respected careful scholarship, but most readers of this tribute will remember John for the influence that he had in their lives, as a teacher. Most everything I’ve said about John informs his being tops at that: diligent, humble, scholarly, practical, helpful, gracious, forgiving (when appropriate), demanding—of himself and of his students—when necessary. He was admired, respected, loved. Said John’s law school colleague, Professor Pat Gudridge: “We will remember John Gaubatz for his character, unquestioned integrity, intellectual honesty, and hard work—and also for the gifts of his friendship and humor.” He had a beautiful spirit.

## HILARIE BASS\*

John Gaubatz was my favorite law school professor. There was stiff competition for that designation—but, for me, John Gaubatz won that prize hands down. The reason is simple: He was the person who convinced me that I wanted to be a lawyer.

Like so many other UM law students over the years, I sat in that first-year Elements class wondering what I had gotten myself into by deciding to attend law school. Here was this tall, lanky guy with a Cheshire cat grin, flipping through his stack of index cards as he walked back and forth across the front of the room. Each and every time he flipped to the next card, all 125 of us in the room would squirm until we heard another student's name called. And then the magic began.

You see, John Gaubatz was the king of the Socratic method. He would elicit information from each student through a series of questions intended to push us to the limits of our intellectual capabilities—each successive question posed requiring less book knowledge and more analysis and creativity. Ultimately, the questioning led us to see the fact pattern, the case, and the day's lesson, from a perspective that had never even crossed our minds when we walked into class that day.

For most of that first semester of law school, none of it seemed to make much sense to me. In fact, there was a point eight or nine weeks into that first year when the thought of having to brief another New York court case about the concept of contractual indefiniteness at the turn of the last century would cause an uncontrollable sigh to be emitted all across the room.

But then—in the middle of that frustration and confusion—I had an experience that I remember as if it was yesterday even though it occurred more than twenty-five years ago. John had broken the class into small groups—law firms, he called them—and required each of the groups to argue one or the other side of yet another fact pattern on contractual indefiniteness. Unfortunately for us, we would show up for class each day not knowing who would be selected to argue or which side we were going to be asked to defend. So, on my lucky day, I found myself standing in front of my entire class trying to defend our group's position through thirty minutes of unrelenting questions from one John Gaubatz. I truly felt like I was a boxer, weaving and ducking to avoid his jabs. But when it was over, I felt like Rocky on the steps of the

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\* Hilarie Bass graduated first in her class from the University of Miami School of Law in 1981. Ms. Bass currently chairs the National Litigation Group of Greenberg Traurig.



Philadelphia Museum of Art. I had survived! But more importantly, the light had gone on in my brain, and suddenly everything he had been training us to do, all he had told us about how he wanted us to think, it all came together and made sense for the first time. It was then and there that I knew I wanted to be a litigator, and it is a day I remember vividly and with tremendous emotion all these many years later.

Over the last weeks of John's illness, I cannot tell you how many other friends and colleagues have called or stopped by to tell me that John had a similar effect on their careers; that he was their favorite professor; that he was responsible for their selection of a particular legal field; that he had helped them talk through a personal problem; or that he had assisted them with a career decision. My experience with John Gaubatz was not unique. I know that there are literally hundreds of other UM law students that John Gaubatz taught over his thirty-year career who have similar memories of how significantly he effected them—not just by his brilliance in the classroom, but also by his personal commitment to them.

John will be remembered for the huge impact that he had on all of our lives; how he made his classes come alive with his creativity and wit; how his compassion for others always came across in anything he did; how he made each student feel special—that they had something unique to offer. Most importantly, John Gaubatz always reminded us that the law was not just about rules and statues, it was about real people and how we, as new lawyers, could learn to help them solve their problems.

John Gaubatz was a man of incredible intellect, but also someone who genuinely cared deeply and personally about his students and the people that they would become. He gave so much of himself to all of us. He will be deeply missed.

ALAN C. SWAN\*

I first met John Gaubatz in 1966 when I hired him as a part-time research assistant. He was a third-year student at the University of Chicago Law School, and I was a newly hired assistant vice president of the university. Unfortunately for me, a couple of days after John started work he received an offer from Professor Kenneth Culp Davis to be a research assistant. Davis was a prominent administrative law scholar in the law school so, needless to say, John did not exactly agonize over which opportunity to pursue. In my next encounter with John we never actually met. However, we both received offers to join the law faculty at Case Western Reserve University in Cleveland. John accepted the offer. I declined, so again our paths crossed only briefly. We finally met when John accepted Dean Soia Mentchikoff's offer to join the faculty of the University of Miami School of Law. For me it was the start of a long and treasured friendship as colleagues in an exciting enterprise.

Early in John's career at Miami, Soia tapped him to be associate dean—her first associate dean. Although she was a visionary, energetic, and highly successful dean, as an administrator, Soia was chaotic. There were virtually no rules, recordkeeping was at best episodic and administrative staff soon learned that their job description was whatever Soia needed done at the moment. John, however, with his physics background, had a strong penchant for order. He had the somewhat peculiar idea that staff should know their priorities and be judged on how well they performed those tasks; that records of faculty decisions should be readily accessible along with intelligible committee meeting minutes. In search of more reliable admissions criteria, John spent long hours comparing students' undergraduate records with their law school performance. Above all else John had an unswerving commitment to orderly process and administrative transparency.

This did not always go down well with the enigmatic Mentschikoff. Where she should have welcomed the support, she was, more often, critical and unreceptive. And John suffered, albeit quietly, both frustration and no small doubt concerning the move to Miami. After faithfully soldiering on, he finally and very wisely came to the conclusion that scholarship and teaching were his life and that, having made his contribution to the administration of the school, the associate deanship was a diversion that needed to be terminated. If one harbors any lingering doubt

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\* Professor of Law, University of Miami School of Law.

concerning John's abilities as an administrator, all they need do is consider his tenure as Director of the Heckerling Institute on Estate Planning. Under his leadership, the Heckerling Institute became what is today the most successful continuing education program of any law school in the country; an institute that has made an unparalleled intellectual contribution to the practicing bar and financial contribution to the law school.

John's decision to step aside from administration and concentrate on teaching was a singular moment for the students at the school. Teaching gave full play to John's talent. Among the more notable and recurring questions about the law school curriculum, has long been "Elements." What's it all about? For one, but only one, answer—there is no single answer—one need only see what John was doing. He was, with a quite unique style, bringing first-year students into a genuine encounter with one recurring and critical function of the lawyer's craft—a function rarely taught to first-year students. It was the art of intellectual combat, courteous and disciplined, but still given to finding an opponent's weak point and driving the winning argument home. Whether it be litigation or a transactional negotiation, a confidential investigation or the mediation of a dispute, intellectual combat accompanies the lawyer whenever he or she is professionally engaged. For first-year students starting the long hard path to professional maturity, the opportunity to experience this reality, to understand its place in their lives, to learn what it requires of intellectual discipline, even to enjoy it, is a rare thing, an opportunity to be treasured. And with John's passing, the law school curriculum has an important gap to fill.

Besides John's contribution as a teacher, he also played a unique role in the life of the faculty. As the years wore on, he gradually and with considerable relish became something of a curmudgeon—incisive, sometimes fractious, but a role always played with telling effect. Especially when faculty discussions (whether they concerned law school governance or more erudite matters of legal theory) became too heated, too abstract, or too convoluted, John would intervene, often with a true-to-life example, and he would demand to know the practical affect of what was being discussed on the people in the example. There was always a pause; some were caught up short, some didn't get the point and some reveled in the challenge of a new direction with an assurance of greater practical relevance. We'll miss you John; we'll miss you badly!

John Thomas Gaubatz, all six feet, six inches, will be missed; missed as an always substantial presence in the law school community;

missed as one utterly dedicated to training the minds of young would-be lawyers; missed as a source of common sense and common decency; and missed as a true friend. Farewell.

ANTHONY M. PAUL\*

In 1968 John Thomas Gaubatz married Kathryn Ball, whom I have known since college. Soon thereafter, they undertook to introduce each other to their respective far-flung friends. When they visited me in Baltimore that summer, I was finishing my PhD in philosophy, and John had recently graduated from law school. Among the many topics we discussed on that occasion were law and teaching. John spoke enthusiastically of his fascination with the law, and I went on at some length about the allure of academic life. Our respective rhapsodies on these pursuits must have been extraordinarily convincing, because soon thereafter John became a law professor, and I entered law school.

In the subsequent years we got together numerous times—in Denver, in my home town, Cleveland, where John was teaching at Case Western Reserve, and later in Coral Gables after he joined the faculty of the University of Miami School of Law. Kathy and John's presence in South Florida was a major reason why my wife Jaswinder and I moved here in 1999. They welcomed us into their home while we looked for a place to live, and ever since they have been wonderful friends and a ready source of wise counsel on many subjects, especially on adapting to life in this unique part of the world.

John was an especially avid and gracious consumer of my wife's Indian cooking. After such a meal she would be rewarded with fulsome praise and a hug that lifted her a foot or two off the floor. Needless to say, she was ready at any time to lay on such a feed. As further compensation, we have often been the happy beneficiaries of Kathy's seemingly effortless gourmet cooking—and when she was out of town, we enjoyed some of the creative and tasty meals that John concocted up on his own.

John was a faithful golf buddy. Like most golfers, he had a love-hate relationship with the game. On Saturday mornings we would sally forth to abase ourselves before the golf gods in the company of Jack Coe, Jerry Hubbart, and other lawyers, judges, and fellow supplicants. John and I alternated weeks driving to the course. John always welcomed his week because the driver of the car also drove the golf cart, and no golfer thinks that anyone else drives a cart as well as he does. John's height enabled him to hit the ball hard with a relatively easy swing. He learned to live, sometimes a bit ruefully, with the correlative

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\* Anthony M. Paul received his PhD in Philosophy from the John Hopkins University and taught philosophy for several years. He then earned a JD from Yale Law School and practiced law for nineteen years. Now retired, he teaches philosophy part-time at the University of Miami.

fact that the farther you are from the ball, the smaller the target it presents and so the harder striking it squarely becomes. However, he always made a few memorable shots, and this was enough to keep him coming back.

Perhaps in part due to his upbringing in eastern Colorado—in the zone between the Midwest and the West—John was reflective and laconic by nature. Nevertheless, when he was enthused or riled he could be as voluble as anyone, and he possessed an innate ability to reach out to people and express affection, friendship, and his wry sense of humor. Due to his broad knowledge and acute analytical ability, his conversation was stimulating and informative on a wide range of topics. On the rare occasions when something he had said proved to be illogical or wrong, he would readily correct himself with alacrity typical of those possessed of true intellectual self confidence and who wish to reach the truth of a matter regardless of whose idea it is. In interpersonal situations his powers would be employed in seeking not his own advantage but that of everyone affected or of the person most affected. More than occasionally it would be he who figured out for you where your best interest or course of action lay.

John was most generous with his counsel, his help, and his hospitality. I could take whatever I had on my mind to him and be assured of an interesting and useful discussion of it. He was always ready to lend his tools and give advice on their use, or even to do the job himself. I recall one time walking through the airport on the way home and seeing him standing in the corridor talking with someone. When I exclaimed on the coincidence of our unexpectedly being in such a place at the same time, he said no, he was there because he'd decided it would be nice for me to have a ride home. Just a few months ago, when he was in one of the stages of his medical treatment where he could hardly even walk, he volunteered to drive *me* home from a hospital. Visiting him during his penultimate hospital stay, we were surprised to see him reach (with some difficulty) into the refrigerator beside his bed and produce a cold beer for his anxious but thirsty visitor.

John's death was not sudden, nor did it follow a period of steady decline. Rather, it ended a two-year roller coaster ordeal of physical and emotional stress, of hopes raised and dashed, and of pain and frustration. Through all of this, both John and Kathy—never faltering or betraying despair—did everything they possibly could do to produce a favorable outcome. Of course, such travails are endured by many. However, I would wager that few manage to confront them with the exemplary grace, intelligence, and perseverance that John and Kathy mustered up against this terrible period in their lives.

Jaswinder and I are grateful to John for being such a wonderful husband to our beloved Kathy and for his great friendship to us. We are grateful to Kathy for taking such good care of John, especially through his final ordeal. And we hope we can be of some help to Kathy as we all mourn our great loss.

We commend the *University of Miami Law Review* for its memorial to one of the university's finest teachers of law.

# John T. Gaubatz: Teacher, Reformer, Colleague & Friend

THOMAS A. ROBINSON\*

“I read recently that one of the professors at your law school died.”

“Who?”

“I think his name was Gaubatz.”

“Gaubatz? You mean John Gaubatz? I knew he was ill—but dead? What an incredible loss. Professor Gaubatz was one of my first-year teachers. He taught me Elements,<sup>1</sup> and I also took him for Trusts and Estates.”

“Elements? What’s that?”

“Well, you know how the first year teaches you ‘how to think like a lawyer,’ whatever that means?”

“I guess. I know I think about things differently after law school. Even my ex-girlfriend noticed it. We broke up during my first year. It reminded me of my Marine Corps basic. I don’t know how it was done, but it seemed to work.”

“Well, Elements is sort of like the first year—concentrated and on steroids. It’s not on the bar, so profs don’t have to worry about teaching anything but some of the fundamental skills of lawyering. Elements is one of the things that makes University of Miami Law special.”

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\* Copyright 2008 by Thomas A. Robinson, Professor of Law, University of Miami School of Law, and John Gaubatz’s colleague for over twenty years. I want to thank the *Law Review* for giving me the chance to reacquaint myself with John’s work. I also want to thank Roger W. Andersen, Ira Mark Bloom, F. Ladson Boyle, M. Minnette Massey, Taylor Mattis, Lewis D. Solomon, and Irwin P. Stotzky for their comments. Robin C. Schard and Sue Ann Campbell were very helpful in identifying and assembling John’s core publications. I license readers to make unlimited photocopies of this article. For other reproductions, please e-mail requests to lawreview@students.law.miami.edu, which will grant or forward to me.

1. “*Elements* . . . is an intensive study of selected materials aimed at developing an understanding of the theory and practice of American law.” LAW SCHOOL BULLETIN (Univ. of Miami Sch. of Law, Coral Gables, Fla.), 2003–2004, at 9. The fuller description is this:

[I]n addition to the traditional, required first-year courses in Contracts, Property, Torts, Civil Procedure, Criminal Procedure, and Constitutional Law, all entering students take a course entitled *Elements: The Theory and Craft of American Law*. Unlike most first-year courses, which concentrate on specific substantive fields of law, “*Elements*” focuses explicitly on legal institutions, the theories underlying them, the process of legal reasoning and the ways in which the law evolves. Students assume the roles of judge, counsel for plaintiff, and counsel for defendant to analyze how differing statements of facts and legal issues shape the development of a case and, ultimately, legal doctrine.

*Id.* at 8.



“Did it work for you?”

“Well, when I started, I was confused most of the time. I had no idea what was going on. But slowly it developed my ability to distinguish cases from each other. It was my most difficult course but by far my favorite.”<sup>2</sup>

“Wow, the lectures must have been terrific.”

“Well, that’s what is so unusual. Professor Gaubatz asked questions; there wasn’t much lecturing. It really forced me to think.”<sup>3</sup>

“What about the Trusts and Estates course?”

“That was mostly questions too. Boy did we cover a lot! My bar review course was a breeze after Gaubatz. But, you know, what struck me was Professor Gaubatz’s incredible courage. Here he was ill, and yet he was concerned with covering all the material even in the face of sickness and pain.”<sup>4</sup>

“Wait a minute! At my law school, I seem to remember my moot court book was written by someone named Gaubatz.<sup>5</sup> You don’t suppose it was the same guy?”

“In fact, it was. Professor Gaubatz said that he had taken Elements<sup>6</sup> and Moot Court<sup>7</sup> from Soia Mentschikoff<sup>8</sup> at the University of Chicago before she became dean at UM. She brought both Elements

2. The dialogue paraphrases selected student evaluations from John’s Fall 2005 Elements course. One student stated, “When I started . . . I had no idea what was going on. [N]ow . . . I read cases *much* more precisely and utilize the skill from this class in all others.” Student Evaluations for John T. Gaubatz’s Elements Course (Fall 2005) (on file with the University of Miami Law School). Another stated, “I am sure that when I look back . . . I will place Elements as the most worthwhile and useful class.” *Id.* Yet another said, “Although we are confused most of the time, it does force us to think.” *Id.* One said, “I . . . *thought* most about the material in this class.” *Id.* “This was my most difficult course and yet by far my favorite,” said another student. *Id.* Another comment declared, “I went from loving to hating to loving this class.” *Id.* “Confusing as to what this course is about [at first], but slowly it developed . . . my ability to *distinguish* cases from each other,” noted another evaluation. *Id.*

3. *See id.*

4. The dialogue paraphrases selected student evaluations from John’s fall 2005 Trusts and Estates course. One evaluation noted, “I hope that you feel better really soon and that you go into remission even sooner than that.” *Id.* A student stated, “I very much admire your courage and look forward to your full recovery. It shows an amazing inner strength to continue with normalcy in the face of sickness and pain.” *Id.* Another student said, “Very much appreciate that despite of his illness, he’s still teaching the class and is concerned about covering all the material.” *Id.* One evaluation declared, “Thank you Professor for sticking to your guns [and] teaching us even through your sickness.” *Id.* Another evaluation declared, “Thank you for the wonderful class.” *Id.*

5. JOHN T. GAUBATZ & TAYLOR MATTIS, *THE MOOT COURT BOOK* (3d ed. 1994).

6. John T. Gaubatz, *Of Moots, Legal Process, and Learning To Learn the Law*, 37 U. MIAMI L. REV. 473, 487 (1983).

7. GAUBATZ & MATTIS, *supra* note 5, at v.

8. *See generally* Warren E. Burger, *Tribute to Dean Soia Mentschikoff*, 37 U. MIAMI L. REV. ix (1983).

and Professor Gaubatz to UM. If Professor Gaubatz was Socratic in the classroom, he seems more a Sophist in the moot court book,<sup>9</sup> which is a sort of detailed recipe book for appellate advocacy that helps students learn how to argue effectively.<sup>10</sup>

“He even brought it into our Elements course. I remember he said that he had written an article about both the course and how he integrated moot court into the course.<sup>11</sup> In my Elements course, he divided us into groups.<sup>12</sup> We had to make arguments for our ‘client’ using first one case, then two, then a number, as precedent.<sup>13</sup> I remember that, with just the first case alone, our side was hopeless, just hopeless.<sup>14</sup> The other side couldn’t lose. They were all smiles. But their smiles faded as more cases were added: our side got stronger as the fairness of our position began to affect the later cases we argued. Our side’s case never became a slam dunk, but at least the developing law began to put us on an equal footing.”<sup>15</sup>

“You know, I mentioned Gaubatz’s death to another of your UM classmates, and he said that he attended a ceremony in Gaubatz’s honor, where one of Gaubatz’s former students spoke eloquently about how Gaubatz had changed her life; she said Professor Gaubatz was personally responsible for her decision to become a practicing lawyer.<sup>16</sup> I guess it must have been Gaubatz’s Elements course. Now that I think about it, I think your classmate said that your school’s moot court competition had been named in Gaubatz’s honor.<sup>17</sup> I’m beginning to get a little envious. I don’t have anything like that at my law school. I’d like to know more about Gaubatz. So he was primarily a moot court guy?”

“Oh no. Most of his academic career was in estate planning. For example, he coauthored a very ambitious early book for the Trusts and Estates course.<sup>18</sup> You know that, like Professor Gaubatz, my undergrad-

9. In ancient Greece, Sophists were teachers of, among other things, rhetoric. 17 THE NEW ENCYCLOPAEDIA BRITANNICA 11 (15th ed. 1975). It’s somewhat ironic that John uses “sophistry” in its pejorative sense. See GAUBATZ & MATTIS, *supra* note 5, at 2.

10. See GAUBATZ & MATTIS, *supra* note 5, at 3, 35–40.

11. See Gaubatz, *supra* note 6, at 473, 487.

12. See *id.* at 488.

13. *Id.*

14. See *id.*

15. *Id.* at 488–89.

16. DVD: Moot Court Cocktail Reception Honoring John Gaubatz (University of Miami School of Law 2007) (on file with the University of Miami Law School). The former student was Hilarie Bass, who is a member of the University of Miami Board of Trustees, a shareholder and executive committee member of Greenberg Traurig, and the National Chair of Greenberg Traurig’s litigation department. *Id.*

17. David Smiley, *John Gaubatz, 65: UM Professor, Trust Law Expert*, MIAMI HERALD, June 16, 2007, at B4.

18. JOHN T. GAUBATZ & IRA MARK BLOOM, *ESTATES, TRUSTS AND TAXES* (1983).

uate major was physics, and his course book seemed a lot like what was going on in physics at the time, a kind of estate-planning Theory of Everything, combining gratuitous property concepts with federal tax concepts. Professor Gaubatz's idea was that, to properly understand property concepts in estate planning, you had to understand the tax consequences and vice versa.<sup>19</sup> His book built, from basic concepts to its final goal, the ability to plan a simple estate plan with tax consequences, say a \$1 million estate in 1983 dollars."<sup>20</sup>

"That's a pretty ambitious goal for one book. At my law school we had separate courses and separate books."

"Yes, perhaps it was *too* ambitious. The ancestor book gave birth to two descendant lines, one in gratuitous transfers<sup>21</sup> and another in tax.<sup>22</sup> Perhaps they were intended for separate courses like at your school, maybe even taught in parallel. All of the descendants, except perhaps the gratuitous transfer descendant articulate a unifying theme, but, instead of combining gratuitous transfers with tax, they combine an analytical approach with a problem-method approach.<sup>23</sup>

"These two lines had different subsequent histories. The gratuitous transfer descendant line morphed into quite a different course book, although the lead author pays homage to its founders.<sup>24</sup>

"The other line, the tax line, continues more of a family resemblance to the original. The editions in this line are more, well, Gaubatzian. The first starts with the four main federal estate-planning taxes,<sup>25</sup> then shifts to taxable transactions, such as revocable transfers,<sup>26</sup>

19. *Id.* at ix.

20. *See id.* at x.

21. This line includes JOHN T. GAUBATZ, IRA MARK BLOOM & LEWIS D. SOLOMON, *ESTATES AND TRUSTS* (1989), and ROGER W. ANDERSEN, JOHN T. GAUBATZ, IRA MARK BLOOM & LEWIS D. SOLOMON, *FUNDAMENTALS OF TRUSTS AND ESTATES* (1996).

22. The tax line began with LEWIS D. SOLOMON, IRA MARK BLOOM & JOHN T. GAUBATZ, *FEDERAL TAXATION OF ESTATES, TRUSTS AND GIFTS* (1st ed. 1989). From there the line grew to include IRA MARK BLOOM, F. LADSON BOYLE, JOHN T. GAUBATZ & LEWIS D. SOLOMON, *FEDERAL TAXATION OF ESTATES, TRUSTS AND GIFTS* (2d ed. 1998) [hereinafter BLOOM, BOYLE, GAUBATZ & SOLOMON, SECOND EDITION], and IRA MARK BLOOM, F. LADSON BOYLE, JOHN T. GAUBATZ & LEWIS D. SOLOMON, *FEDERAL TAXATION OF ESTATES, TRUSTS AND GIFTS* (rev. 3d ed. 2002) [hereinafter BLOOM, BOYLE, GAUBATZ & SOLOMON, THIRD EDITION].

23. GAUBATZ, BLOOM & SOLOMON, *supra* note 21, at ix; SOLOMON, BLOOM & GAUBATZ, *supra* note 22, at ix; BLOOM, BOYLE, GAUBATZ & SOLOMON, SECOND EDITION, *supra* note 22, at vii; BLOOM, BOYLE, GAUBATZ & SOLOMON, THIRD EDITION, *supra* note 22, at vii. This second unifying approach was anticipated in the "ancestor" course book. *See* GAUBATZ & BLOOM, *supra* note 18, at xi.

24. ANDERSEN, GAUBATZ, BLOOM & SOLOMON, *supra* note 21, at xxviii.

25. *See* SOLOMON, BLOOM & GAUBATZ, *supra* note 22, at xi-xvi. The four main federal estate-planning taxes include three relevant wealth-transfer taxes—the estate tax, gift tax, and tax on generation-skipping transfers. I.R.C. §§ 2001-2664 (2000). The fourth is the federal income taxation of estates, trusts, beneficiaries, and decedents. *Id.* §§ 641-692.

26. *See* SOLOMON, BLOOM & GAUBATZ, *supra* note 22, at xvii-xx.

then to tax-planning techniques including, surprise-surprise, a penultimate chapter on the estate-planning process in the context of a concrete problem<sup>27</sup> (shades of moot court). The book finishes with something new: a medley of policy perspectives by various reform-minded authors.<sup>28</sup> The family resemblance continues in the second<sup>29</sup> and third<sup>30</sup> editions, although they rearrange and expand the income taxation of trusts and estates, integrate planning concepts back into earlier discussions, and drop the final concrete problem—very un-Gaubatzian. Still, Professor Gaubatz lives on more in this line of tax course books.”

“That’s a pretty full and successful career. No wonder you seem to think a lot of this Gaubatz guy.”

“But that’s not all Professor Gaubatz did. I’m not sure that you know it, but besides Elements, UM is widely known for its estate-planning institute.<sup>31</sup> The late Philip Heckerling began an institute that every year brought together various estate-planning professionals, such as attorneys, trust officers, accountants, and insurers.<sup>32</sup> Phil also started a graduate law program on estate planning,<sup>33</sup> which is still unique. Professor Gaubatz headed both.<sup>34</sup>

“Professor Gaubatz recognized that the institute had more than a continuing-education function; it was, de facto, the estate planners’ annual convention. And, for ten years, Professor Gaubatz was the editor of the annual publications of its speakers’ papers.”<sup>35</sup>

“I’ve heard about UM’s graduate program in taxation and its great reputation. I assume the graduate program in estate planning was modeled on the graduate tax program?”

“Not really. Part of Phil’s genius was to innovate. Phil cut the spring courses (and, at first, even some fall courses) into self-contained weeklong modules.<sup>36</sup> This allowed students and professors to come to

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27. *Id.* at 743.

28. *See id.* at 749–60.

29. BLOOM, BOYLE, GAUBATZ & SOLOMON, SECOND EDITION, *supra* note 22.

30. BLOOM, BOYLE, GAUBATZ & SOLOMON, THIRD EDITION, *supra* note 22.

31. *See* Heckerling Institute on Estate Planning, <http://www.law.miami.edu/heckerling> (last visited Feb. 22, 2008).

32. *See* John T. Gaubatz, *CLE Courses in Estate Planning Survey Trends, Advance Skills*, NAT’L L.J., Apr. 13, 1987, at 15.

33. *Id.* *See* University of Miami School of Law, Graduate Program in Estate Planning, <http://www.law.miami.edu/estateplanning> (last visited Feb. 22, 2008), for a description of the program.

34. ASS’N OF AM. LAW SCH., *THE AALS DIRECTORY OF LAW TEACHERS 2006–2007*, at 520 (2006). John Gaubatz is listed as director of the Heckerling Institute on Estate Planning from 1983 through 1994 and as Director of the Graduate Program in Estate Planning from 1983 through 1992. *Id.*

35. *Id.*

36. Gaubatz, *supra* note 32.

Miami for a week to take and teach courses in estate planning.<sup>37</sup> The peripatetic-student part never worked out (what ever goes as planned?), but the teacher part worked out great. The program could attract nearly anyone for a week, particularly as association with the University of Miami became increasingly prestigious. It also didn't hurt that Miami's winter is balmy, and, as a private university, UM could show its visiting program profs a good time. Like the institute, Professor Gaubatz fine-tuned the graduate program to high perfection."

"OK, Gaubatz as teacher, author, and administrator. Anything else?"

"Sure, Professor Gaubatz was a law reformer and wrote important pieces urging improvements in gratuitous transfer law and in the wealth-transfer taxes. For example, he urged a more flexible approach in probate to protect the needs of a decedent's dependents, which, once this approach protects the dependents, paradoxically allows a relaxation of the extreme formality in proving and carrying out a decedent's other wishes,<sup>38</sup> and he suggested that concepts of 'standing' in public law controversies can be used to clarify the more muddled collection of cases brought by trust creators to enforce the trusts they create.<sup>39</sup>

"Professor Gaubatz also made important contributions in the federal wealth-transfer tax area. Shortly after Congress passed the Tax Reform Act of 1976,<sup>40</sup> he suggested that Congress further rationalize and integrate the estate and gift taxes.<sup>41</sup> In a later article, he urged a simplifying change to the generation-skipping tax that put wealthy transferors on the same footing as the super-rich.<sup>42</sup> Then, in a sort of General

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37. *Id.*

38. John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 557-63 (1977).

39. See John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905, 941 (1984). John suggests grantors have standing when they have "either an economic interest, a substantial expectation interest, or a representational interest" in the trust they created, implying thereby that standing should exist in cases where it is not currently recognized. *Id.* at 927.

40. Pub. L. No. 94-455, 90 Stat. 1520.

41. See John T. Gaubatz, *The Unfinished Task of Estate and Gift Tax Reform*, 63 IOWA L. REV. 85, 89 (1977). John's proposals are complicated and detailed. A key suggestion is that, insofar as possible, transferred "succession-type" interests be reportable only once, either in the gift tax or the estate tax, and that detailed gift tax definitions become essentially primary, leaving the estate tax whatever is left over. *Id.* at 117, 120-22. This is a reversal of roles and a clarifying improvement not reflected even in the modern wealth-transfer taxes. Interestingly for John's later generation-skipping suggestions discussed in the text and note 43 below, John also proposed that a transferor be allowed to elect earlier gift tax treatment and avoid a later estate tax. *Id.* at 119.

42. See John T. Gaubatz & Bruce Stone, *The Generation Skipping Transfer Tax—A Legislative Solution*, PROB. & PROP., July-Aug. 1990, at 6, 7-10 (suggesting replacing complicated premortem trust drafting with a relatively straightforward postmortem election, which

Theory of Wealth Tax Reform,<sup>43</sup> Professor Gaubatz suggested a stunning simplification of the wealth-transfer taxes by arguing that the generation-skipping tax become *the* default tax—at a flat rate—while preserving traditional wealth-transfer tax progressivity<sup>44</sup> by allowing election into a presumably lower progressive integrated wealth-transfer tax.”<sup>45</sup>

“This Gaubatz sounds like a terrific asset to your law school. I hope they appreciated him.”

“I don’t know, but I heard he once told a colleague that other competing law schools looked, but simply couldn’t afford to hire him.”

“Sounds smart, to keep a guy like Gaubatz. So I take it that you like Gaubatz.”

“I’m not sure ‘like’ is the right word. Oh, he was personable enough. He was more like that high school coach you’d run though walls for. I recall one of my fellow Elements students telling me that he had written on Professor Gaubatz’s evaluation ‘A God amongst men.’<sup>46</sup> I’m not sure I’d go that far, but I was certainly fortunate that I had Professor Gaubatz.”

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accomplished essentially the same result, that is, picking the minimum wealth-transfer tax upon the death of an affected trust beneficiary).

43. See generally John T. Gaubatz, *A Generation-Shifting Transfer Tax*, 12 VA. TAX REV. 1 (1992) (suggesting a rewriting of estate, gift, and transfer taxes laws).

44. I include in “progressivity” the Unified Credit exemption-equivalents, which renders most gratuitous transfers nontaxable. See I.R.C. §§ 2010, 2505 (West 2007).

45. Gaubatz, *supra* note 43, at 18–19.

46. The dialogue paraphrases additional selected student evaluations from John’s fall 2005 Elements course. The actual comments include “Like the High School Coach you’d run through a wall for.” Evaluations for John T. Gaubatz’s Elements Course, *supra* note 2. Another evaluation states, “Gaubatz is . . . A GOD amongst MEN.” *Id.*

## GEORGE MUNDSTOCK\*

When I thought about being on this panel, and was trying to figure out how I could be worthy, I knew I would have to dig into philosophy or art. I decided to rip off *It's A Wonderful Life*.<sup>1</sup> The movie presented the question of how the world would have been different without George Bailey, the character played by Jimmy Stewart. And the question on the table today is how the University of Miami School of Law would be different without John Gaubatz. I think one would find it a very, very, very different place—and, when I refer to the law school, I do not just mean the current facility and people, but also its entire culture, including the alumni.

Think of how different students' lives would be: For example, there would be almost no graduates with any idea of what *Elements* was about. There would be considerably fewer trust and estates lawyers out there. I know so many people who were so inspired.

For years, without having been able to characterize John as Darth Vader, students could not have done an Equity Playhouse.<sup>2</sup> John cherished that he was always cast in Star Wars routines as Darth Vader: an important role in any institution! Additionally, John had a leading role in developing moot court as a vigorous part of the law school's programs, an accomplishment for which he has been honored.

Those are some of his contributions to the students; he also made contributions to the administration. Professor Gaubatz was on the admissions committee. When he was the head of admissions—I was a couple doors down from his office at the time—he spent a good amount of time running Excel off of little floppy drives on old 286 machines, trying to get some kind of grip on what would be a good predictor of success in law school and on the ever-important bar; he spent hours and hours and hours trying to get that.

And of course, as Associate Dean, John also organized and rationalized our scheduling of classes—which lasted, I think, thirty seconds after he was the Associate Dean. Not everything lasts forever. But I know he was very proud of systematizing and rationalizing the schedule, which hadn't happened in the previous thirty years.

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\* Professor of Law, University of Miami School of Law. This tribute has been adapted from a speech given on April 24, 2007, at a retirement reception and naming ceremony in honor of Professor John Gaubatz's thirty years of service to the University of Miami School of Law.

1. *IT'S A WONDERFUL LIFE* (Liberty Films 1946).

2. The Equity Playhouse is a student-run theatre production that has been a tradition at the University of Miami School of Law for over forty years.

Finally, think of the contribution that he made to the institution of the School of Law: I cannot overemphasize the importance of the Heckerling Program<sup>3</sup> to the school and its reputation. After Phil Heckerling stepped down, I remember going into John's office and seeing him cutting and pasting cardboard mock-ups of materials. He was worried about how people would carry the materials on airplanes so they can take them home and remember this place and come back the following year. He gave attention to every detail in order to protect the University of Miami brand, to keep the program going and growing to become the premier continuing education program in the country.

The entrepreneurship! And John never even viewed himself as an estate planner. To a true trusts and estates lawyer, an estate planner is sort of like a sleazy, tax shelter lawyer: someone with whom you would wear a face mask if you were in the room with them. Nevertheless, he was able to slum and build and cultivate the program in ways that made an amazing contribution. One year, Claude Sowle<sup>4</sup> told us that if it had not been for the money raised by the Heckerling Institute, we would not have been able to have our Summer Research Grant Program—which raised interesting accounting issues I won't go into. But assuming Claude's analysis was correct, just think about how much larger our problems with hiring would have been, and how many fewer Lexuses, BMWs, and Mercedeses there would have been in the parking lot.

Another contribution he has made to the institution is that, because of his willingness to attack conventional wisdom in faculty meetings and otherwise participate in discourse, generations of my colleagues have not needed to look in the dictionary to find the meaning of the word "curmudgeon."

Finally, I just want to point out that *It's a Wonderful Life*, as I later learned, was based on a story called *The Greatest Gift*.<sup>5</sup> From my point of view, the greatest gift John gave was to me. If John had not recruited me back from Minnesota, I would still be freezing my butt off on interminable dog walks and would generally have been completely miserable. He was also responsible for pushing my file for tenure. Given what a thorny little jerk I am and was, that certainly could not have been easy, and I very much appreciate it. He was a mentor, he was a friend. Thank you John!

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3. The Heckerling Institute on Estate Planning is the nation's leading conference for estate-planning professionals.

4. Claude Sowle served as Dean of the University of Miami School of Law from 1982 to 1986.

5. See JEANINE BASINGER, *THE IT'S A WONDERFUL LIFE BOOK* 94-102 (1986).



# Fighting the Legacy of Mr. Rogers

REBECCA YAGERMAN\*

On July 5, 2007, the *Wall Street Journal* published an extremely provocative article entitled “Blame It on Mr. Rogers: Why Young Adults Feel So Entitled.”<sup>1</sup> The basic premise of this article, which elicited a myriad of op-ed responses,<sup>2</sup> is that Mr. Rogers did our generation a disservice by telling us “you are special just the way you are.” All that self-esteem-boosting mantra made students today feel entitled to good grades without the requisite hard work. “Signs of narcissism among college students have been rising for 25 years,” claims the author, Jeff Zaslow.<sup>3</sup> And while many of the subsequent op-eds disagreed with Zaslow’s premise that Mr. Rogers was to blame, almost none of them disagreed with the fact that our generation is guilty of maintaining a sense of entitlement.

Zaslow quotes one college professor as saying students view lower grades as an excuse to “hit you up for an A because they came to class and feel they worked hard.”<sup>4</sup> And in my experience, this is an accurate statement. I speak for myself and for many of my colleagues when I say we feel cheated after studying hard and going to class, only to receive a lower grade than we feel we deserve. The same professor who mentioned this phenomenon laments the fact that more students don’t take the outlook that “[t]he world owes you nothing. You have to work and compete. If you want to be special, you’ll have to prove it.”<sup>5</sup>

That is precisely the perspective Professor Gaubatz worked so hard to instill in his students. I found myself resentful on occasion, thinking: I did the reading and I show up for class. What more does he want from

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\* J.D. Candidate 2008, University of Miami School of Law. [Both Ms. Yagerman and her mother, Katherine L. Simmons, had Professor Gaubatz for Elements.—Ed.]

1. Jeffrey Zaslow, *Blame It on Mr. Rogers: Why Young Adults Feel So Entitled*, WALL ST. J., July 5, 2007, at B5.

2. E.g., Craig Benedict, Letter to the Editor, *Come On—Grow Up and Quit Bellyaching*, WALL ST. J., July 18, 2007, at A13; Bill Isler, Letter to the Editor, *In Mr. Rogers’ Neighborhood, Hard Work Made You Feel Special*, WALL ST. J., July 12, 2007, at A13; Emily Meehan & Cassandra Vinograd, *We May Be Self-Centered But We Are Not To Blame*, COLLEGE J. FROM WSJ.COM, July 20, 2007, <http://college.wsj.com/columnists/actone/20070720-meehan.html>; Jeffrey Zaslow, *The Entitlement Epidemic: Who’s Really To Blame?*, WALL ST. J., July 19, 2007, at D1.

3. Zaslow, *supra* note 1 (citing a recent study led by a San Diego State University psychologist).

4. *Id.*

5. *Id.*

me? Professor Gaubatz wanted a lot more than that. He expected us to grapple with the material on our own before coming to class. He taught us that to get ahead we need an eye for detail and to use some good old-fashioned elbow grease (figuratively speaking, of course). Showing up for class merely having done the reading did not entitle any of us to an A—or even to his good graces.

I remember entering his classroom with a healthy sense of fear—fear that he would ask a question I couldn't answer; fear that I would be humiliated in front of my classmates. After the first couple weeks of class, I was working harder than I had ever done before just to prepare for each class session. Professor Gaubatz gave me my first taste of what it was like to prepare for court. You can't win a case by simply showing up and saying "but Judge, I read all the case law and statutes." It is imperative to have done the analysis ahead of time.

My mother, a University of Miami School of Law graduate, has told me countless times how valuable she found Professor Gaubatz's Elements class. He gave her the skills she needed to become a successful lawyer. Of course, the job back then was a lot easier because Mr. Rogers had not infiltrated her mind the way he would later do to me and to my generation. Students were likely a lot more receptive to people telling them to work harder.

In fact, I recall a lawyer who graduated from the University of Miami a generation before my mother telling me that when he went to school, students did not even take for granted that they would all pass law school. I believe he said that only one in three did. The dean used to give a speech at orientation and say, "look to your left and look to your right because in three years you will not see either of these people." Today the speech is "look to your left, look to your right, because these are the people who will be your colleagues in three years." We take for granted that we are entitled to graduate from law school. But just because we may be entitled to graduate, does not mean we will automatically become good lawyers.

Professor Gaubatz worked hard to kick our sense of entitlement to the curb. He gave new meaning to the notion that we have to work hard to succeed—work hard to earn the praise and respect of our colleagues. We might all be special, but that does not make us all good lawyers. Professor Gaubatz did his part to reverse the damage done to our generation by all the Mr. Rogers types. And I truly believe that every student who passed through his classroom is better off for it.

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# Gaubatz at the Bat

JEROME M. HESCH\*

When I joined the Law School faculty in the fall of 1980, I learned that the Law School not only had a softball league, but that it played both semesters, something not available in upstate New York where I was teaching before I came to Miami. And, even better, the faculty had a team in the league. My excitement was somewhat dampened during my first year on the faculty team. The faculty team, although competitive, never seemed to break out of its .500 funk. Our games were close, and our players were good. But, there was always an error or a fly out with the bases loaded. We were never able to cross that threshold from mediocrity to a power to be reckoned with. Something always kept us in our mediocrity funk. For example, our shortstop, Doug Kramer, a former legal-writing instructor, had a tremendous range. His quickness allowed him to vacuum up every ground ball, and he had a rifle arm. The only problem was that our first baseman, Terry Anderson, at five feet seven inches, was not the imposing giant one would normally expect at first base. Because of this, our shortstop aimed his throws to our first baseman, and far too many of his throws were just out of Anderson's reach. It looked like the faculty team would never make the playoffs.

One day John Gaubatz was regaling about his days on the Case Western Reserve Faculty. He described a faculty-law review basketball game where John, at six feet seven inches tall, played center. John told us how he just stood in the key, and when opposing players tried to penetrate, he would reach up to block shot after shot. You could see that John enjoyed teaching law students another lesson in Elements, that being, do not try to shoot over a six feet seven inch center waiting to leap up and block your shot. While telling the story, John stood up and stretched out his hand to show us how he would swat away those foolish enough to drive the key. As John raised his arm, it dawned on me that he was our answer to first base. The next semester we added John to the faculty team, sending Anderson to the outfield, which allowed us to bring Ken Casebeer, who could not run, in from the outfield. We moved Ken to the pitcher's mound where all he had to do was get the ball over the plate. These moves improved our team in several respects. First,

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replacing Casebeer with Anderson improved the speed in the outfield. Since it was slow-pitch softball, and since Ken was used to throwing softball questions to his students in class, he did the same thing on the pitcher's mound. And John, who showed up with the biggest first-base glove I had ever seen, raising his reach another foot, took over first base. Well, this did wonders for our shortstop, who, upon seeing this huge target, no longer felt he had to aim his throws. The shortstop now reared back and let it loose. Even if a throw was off the mark, nothing ever got by John at first base. Needless to say, we now had an airtight infield, all because of John and his ten-foot wingspan.

But, this is not the end of the story. We soon observed that John was only a singles hitter. John did not swing with his wrists. But that did not matter, being slow pitch softball. John tried to get bat speed by swinging with his arms. But as any physics person will tell you—coincidentally John was an engineering major in college—the longer the radius, the slower the outer edge moves. By not having quick bat speed, John could not get much power behind his swing. But, this also worked to his advantage. When John came to the plate, an imposing six feet seven inches tall, the opposing outfielders naturally moved deep, expecting someone of his stature to be a power hitter. With his slow bat speed, no matter how hard he swung, all John could do was hit short fly balls. Since the outfielders were playing extra deep, John's short fly balls, which barely made it over the heads of the infielders, always seemed to drop well in front of the outfielders. The opposing players had no idea he was a bloop singles hitter because they had never seen John play before. John managed to go three for four every game. His Texas-league fly balls always seemed to land in front of the frustrated outfielders.

After John joined the faculty team, it quickly became a powerhouse, going fifteen and five that first year he was on the team. I remember one game in particular, against a team of first-year law students. They came out on Sunday morning, anticipating beating up on the faculty, especially since the team was primarily composed of first-year teachers, like Gaubatz, Anderson, and Casebeer, and a few legal-writing instructors. Here was their chance to finally have the faculty on their playing field, not in Elements class. In fact, that was all they could talk about the week before the game. Well, there was no joy in First Yearville that eventful Sunday morning. The game was called after four innings with the faculty leading fourteen to two. You see, there was a slaughter rule where the game was mercifully stopped after four innings if a team had a ten-run lead.

After the faculty team's rousing success that first year with John at

first base, we added Louie Levy, the former law-school softball-league commissioner who had just graduated and was now eligible as an alumni addition to the faculty team. Actually the alumni had their own team called the Carbozos, the name a take-off on a law-school student group called the Cardozo Legal Society. We added Louie so that we could interpret the softball-league rules in our favor.

Expecting to dominate once again, we moved John to the cleanup spot. Opposing outfielders would more likely assume that the cleanup batter was a power hitter. Unfortunately, we started to play teams for the second and third time, and once they became familiar with John's hitting, we saw the introduction of the now famous "Gaubatz Shift," similar to the shift major-league teams did against hall-of-fame player Ted Williams. What was the Gaubatz Shift you may ask? Well, the outfielders, realizing John could not hit the ball with any power, moved in, daring John to hit the ball over their heads. In fact, they moved in so close that regular fly balls to the outfield would have gone over their heads. This frustrated John as he did not like the idea of flying out. Because of the Gaubatz Shift, we had to drop him to the tail end of the batting order. Since John was the quintessential first baseman, the faculty was still able to win its share of games, and at the end of the semester, we made it into the playoffs.

Right before the playoffs, John decided to apply what he taught in law school and examined the *elements* of hitting a baseball. Accepting that elemental principle of physics that force creates power, and that the formula for force is mass times velocity, John worked on his bat speed, even having a few of us come out to the field for hitting practice. We threw fast pitches to John so that he had to use his wrists for bat speed instead of swinging with his arms. John was now ready to beat the Gaubatz Shift.

I vividly remember that first playoff game. The first few times John came to the bat, the opposing team used the dreaded Gaubatz Shift, and John flied out. Finally, it was the last inning, with two outs, the faculty at bat, and we were behind by two runs. But alas, it looked like John's season was going to end, and he would never be able to beat the Gaubatz Shift because the two batters before John were Casebeer and Anderson, both not the strongest of hitters. If only John could get one last whack, we knew he would finally beat the Gaubatz Shift. Since Casebeer was a lulu and Anderson was a cake, there seemed but little chance of John getting to bat. But Casebeer let drive a single to the wonderment of all, and Anderson tore the cover off the ball. And, when the dust had lifted, there was Anderson safe at second and Casebeer a huggin' third. Now, with two outs and our team two runs behind in the

bottom half of the last inning, John strode up to the plate. There was an ease in John's manner, pride in his bearing and a smile upon his face. As soon as John stepped to the plate, the opposing team implemented the dreaded Gaubatz Shift, not knowing that John finally applied Elements to his hitting. Standing at the plate, you could see John mentally shuffling index cards with student names on it. We knew that he was about to apply the Socratic method to that pitch! With a moot-court determination, and a smile of Christian charity, John's visage shone. His face grew stern and cold, and we saw his muscles strain. And now the pitcher holds the ball, and now he lets it go, and now the air is shattered by the force of John's blow. Had the outfielders been playing at normal depth, there is a chance one of them may have caught the long fly ball John hit. But, by playing so close, the ball traveled well over their surprised heads. Anderson easily scored. Casebeer scored, and now the game was tied. And there came John lumbering around second base. Unfortunately, bat speed does not equate into foot speed, and, as the ball came in from the outfield, John was only able to reach third base, tying the game with two outs in the last inning.

I do not remember how the game ended or whether we were able to get John in from third base, but what will live in my mind, and in the minds of all of us that played on the faculty team that fateful day, was that the mighty Gaubatz finally beat the Gaubatz Shift!



# John T. Gaubatz

IRWIN P. STOTZKY\*

John Gaubatz came to the University of Miami School of Law from the Case Western Reserve University School of Law in 1976 as a visiting professor and associate director of the Institute on Estate Planning. He was so intrigued with our law school that he decided not to return to Case Western. Indeed, John never taught anywhere else in his remaining over thirty years of teaching.

John came here for many reasons, including the opportunity to work with Dean Soia Mentschikoff, one of the leading figures—indeed a shining star—in the legal universe. Dean Mentschikoff had been instrumental in the drafting and ratification effort of the Uniform Commercial Code. She was also one of the pioneers for the importance of the role of women in American law. She was often referred to as the “first woman everything in American Law.” As an example, she was the first female professor at Harvard, at a time even before they accepted female students, and she was the first female professor at Chicago.

One of the inducements she offered John was the opportunity to teach Elements. Over the course of the next thirty years, John told me, on numerous occasions, that this offer was one of the main intellectual reasons he decided to come to Miami. John simply loved teaching Elements!

The first case students study in Elements, and the topic that John writes about in his article,<sup>1</sup> *Butler v. Wolf Sussman, Inc.*, is an introduction to the common law tradition. Over the years, John, Terry Anderson, Alan Swan and I often talked about the many layers of complexity and the many ways of teaching the *Butler* case. Several years ago, John decided to do some detective work about the legal actors in the case and about what may have happened to the ring at issue. John’s article is the result of his never ending curiosity, his deep commitment to the common law, and, of course, his unyielding, deeply felt passion for giving students the tools they need to succeed in the law.

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1. See John T. Gaubatz, *A Narrative of Butler v. Wolf Sussman, Inc.*, 62 U. MIAMI L. REV. 707 (2008).



William and Eleanor Butler, circa 1928.