



MICRO-
SYMPOSIUM



INTRODUCTION TO THE MICRO-SYMPOSIUM ON

ERIC GOLDMAN'S

"WRITING TENURE REVIEW LETTERS"

WE HEARD FROM quite a few readers about Eric Goldman's article in our summer 2016 issue: *Writing Tenure Review Letters: My Top Ten Suggestions*.¹ Much of what those readers said was – as we like to put it in our micro-symposium calls for papers – “original, interesting, . . . potentially useful, and good-spirited.” So, we issued a call for papers commenting on Goodman's article. For those of you who are impatient to get to the micro-symposium and don't want to re-read *My Top Ten Suggestions* first, here are Goodman's top ten:

1. Say Yes if Asked to Write a Letter (Unless . . .)
2. Answer the Questions Asked
3. Apply the Requesting School's Tenure Standards
4. Be Succinct
5. Remember When You Were Young
6. Assess the Candidate's Oeuvre
7. Publication Placement Is a Poor Quality Proxy
8. Constructive Feedback Is OK
9. Confidentiality Is Wishful Thinking
10. Send Your Letter on Time²

Okay, now you should go ahead and read the micro-symposium.

– The Editors

¹ 19 GREEN BAG 2D 357 (2016).

² *Call for Papers: Tenure Review Letters: My Top Suggestion*, 20 GREEN BAG 2D 2 (2016).



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WHEN TENURE STANDARDS ARE WRONG

James Grimmelmann

ERIC GOLDMAN SAYS that outside reviewers should apply the tenure standards of the school asking for a review. It sounds tautological: what other standards could possibly apply? But Goldman's point is a little subtler. To paraphrase *Erie*, there is no general common "law" of tenure. One's job as a reviewer is not to apply some abstract standard of scholarly quality and quantity, but rather the specific standards a law school's senior faculty hold themselves to – and have told their junior colleagues to expect to be held to.

All of this is right, most of the time. But sometimes a school's tenure standards are *wrong*, and when they are, reviewers should say so. The most common problem I've seen is that tenure standards simply fail to consider whether scholarship is broadly accessible. The ideal of "publication" isn't an empty formal threshold: it entails a meaningful effort to make scholarship

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James Grimmelmann

public. A professor whose books and articles can be freely downloaded is doing a better service to the academy, the profession, and the public than one who writes \$250 books and doesn't put her articles online. (Don't even get me started on the cost of casebooks from the major publishers.)

It would be unfair to candidates to cite these concerns against them when their own schools' tenure standards don't. But silence is not the only alternative. *Please don't hold this against Professor X, I begin. But I think you as a faculty should discuss your tenure standards with respect to Y, and consider the standards you will apply in the future.*

The tenure process requires judging scholarship, but it's not just about judging scholarship. It's also about the formation of scholars: helping faculty find their voices and their places in their institutions and our professional community. And it's about articulating for ourselves our vision of who we are and what we do as professors – and recommitting to that shared purpose with every tenure letter and every tenure vote. Letter writers can help faculties better understand themselves, not just their new colleagues.





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TENURE IS DEAD, LONG LIVE
STUDENT RECOMMENDATIONS

ON ADAPTING GOLDMAN'S PRINCIPLES
TO OTHER ARENAS

Matthew Reid Krell

ERIC GOLDMAN'S *Writing Tenure Review Letters: My Top Ten Suggestions*¹ offers a magisterial view of the gatekeeping function senior scholars serve when they render opinions over whether junior faculty should receive tenure. Given efforts to eliminate tenure,²

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¹ 19 *Green Bag* 2d 357 (2016).

² Colleen Flaherty, "Trying to Kill Tenure," *Inside Higher Educ.* (June 1, 2015), available at www.insidehighered.com/news/2015/06/01/wisconsin-faculty-incensed-motion-eliminate-tenure-state-statute (last accessed January 24, 2017); Colleen Flaherty, "Killing Tenure," *Inside Higher Educ.* (Jan. 13, 2017), available at www.insidehighered.com/news/2017/01/13/legislation-two-states-seeks-eliminate-tenure-public-higher-education (last accessed January 24, 2017).

and the fact that these efforts appear to bring American universities in line with world standards,³ I wonder whether Goldman's essay is useful as it is written. The casualization of the academic workforce may also render tenure review obsolete. When we're all adjuncts, it won't matter how good our scholarship is.⁴

But I write not to bury Goldman. His guidelines offer insights not only into tenure review, but into the gatekeeping academic function more generally. The power of the tenure review letter lies in the author's ability to credibly serve as an arbiter of the candidate's work. This power is not limited to the tenure review process, and it may be helpful to examine how well Goldman's principles "travel" to other contexts, and may inform activity. In particular, the practice of writing student recommendations seems consistent with Goldman's approach to tenure review letters. Thus, the remainder of this essay asks the question, "If tenure ceases, does Goldman tell us anything helpful about student recommendations?"

STUDENT RECOMMENDATIONS

As instructors, we get asked to write recommendations for students for jobs, clerkships, and further education (either graduate school or fellowships).⁵ The effect of these recommendations is uncertain. In graduate school admissions, there is reason to believe that letters are weak indicators of student quality, but much better indicators of degree attainment.⁶ This is the point where I must note that selection bias infects these findings.⁷ Degree attainment requires students to be admitted, and students who

³ Simon Batterbury, "Tenure or Permanent Contracts in North American Higher Education? A Critical Assessment," 6 *Pol. Futures in Educ.*, 286 (2008).

⁴ One hope to maintain quality: the possibility of the constitutionalization of academic freedom to protect professors at public institutions. See Matthew Reid Krell, "The Ivory Tower Under Siege: A Constitutional Basis for Academic Freedom," 21 *Geo. Mason Univ. C.R.L.J.* 259 (2011).

⁵ Even the graduate teaching assistant gets asked to do this (sometimes).

⁶ Nathan Kuncel, Rachael Kochevar, and Deniz Ones, "A Meta-Analysis of Letters of Recommendation in College and Graduate Admissions: Reasons for Hope," 22 *Int'l J. of Sel. and Assessment* 101, 104-06 (2014).

⁷ J.J. Heckman, "Sample Selection Bias as a Specification Error," 47 *Econometrica* 153, 156 (1979).

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receive strong recommendations are more likely to be admitted *and* to be capable of degree attainment.

This suggests that student recommendations are being written and evaluated through the lens of “can this student complete the degree here?” This comports with Goldman’s insistence that tenure review letters speak to the tenure standards at the school where the candidate seeks tenure.⁸ Thus, whether writing for students or more junior colleagues, faculty should be cognizant that their work will be viewed through the lens of that institution’s standards. Failing to explicitly compare the candidate to those standards may cause erroneous determinations – a tragic waste of a funding line in the event of false positives, and a potentially career-derailing disaster in the case of false negatives.

With regard to when to agree to write, Goldman offers three possible rules of decision. I suggest that for student letters, the “presumptive yes” may be inappropriate. Student recommendations are relationship-driven; as I say in syllabi, “your job as a college student is to become the kind of student professors can rave about in recommendations – hardworking, collegial, and intellectually inquisitive and honest. Consider maintaining relationships over time with professors, so that they know you well enough to write for you.”⁹ Since professors do not “assess the candidate’s oeuvre” when writing student letters,¹⁰ we can only base our reference on the relationship we already have. Thus, saying yes only to positive letters, or presumptively saying no (absent some compelling nature) seem like more sensible rules than agreeing to write references for students who may not deserve them. Again, the gatekeeping function of references means that selecting out unworthy candidates prior to evaluation may improve the salience of recommendations.¹¹

Finally, remembering our own youth is probably *more* salient in writing student letters than in tenure review letters.¹² Junior colleagues should, as

⁸ Goldman, note 1 *supra*, at 363.

⁹ Matthew Reid Krell, “Political Science Methods: Syllabus”, available at syllabi.ua.edu/apis/docs/api/v1/renderDocument/id/5866c90074424eb2b453ad6f?contextId=20171012641 (last accessed January 24, 2017).

¹⁰ Goldman, note 1 *supra*, at 364.

¹¹ Kuncel, Kochevar, and Ones, note 7 *supra*; Heckman, note 8 *supra*.

¹² Goldman, note 1 *supra*, at 364.

Goldman notes, not be held to the same standards that senior colleagues hold themselves, as they are not as established. Even more so, students should be held to standards appropriate for their age and experience. Twenty-two-year-olds cannot be reasonably expected to display the professionalism and patience that we expect from our colleagues. So, peccadillos like repeatedly asking for the letter, or perhaps not communicating as professionally as we might like, should be ignored in letters – much like how, in tenure review letters, we should not “expect tenure candidates to start their careers producing flawless masterpieces.”

Other of Goldman’s suggestions seem less salient for students. Since students approach referees privately, without the intervention of the reviewing institution, Goldman’s analysis regarding rates of refusal does not apply. And obviously, reviewing publications is unnecessary when the modal value for students’ publications is zero. And “be succinct” and “answer the questions asked” seem more like “advice for writing” rather than being relevant to any specific type of product. But, taken as a whole, it appears that some of Goldman’s principles may still be salient even if the day ever comes when tenure is eliminated.





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MAKE SURE YOU FIT
THE NEEDS OF THE SCHOOL

Michael Risch

WHEN I WAS UP FOR TENURE, my committee allowed me to suggest names of potential letter writers. It turned out that one of the people I listed had only been tenured a couple years earlier. This surprised me, as she had a full body of work and was well known in my field. Even so, my committee suggested that it may not be persuasive to have a letter come from someone so recently tenured. Off the list she went.

Fast forward a year or so later: I received my first request to write a tenure letter. I learned from my own experience, and asked the requestor to make sure that it was acceptable that someone who just obtained tenure write a letter. I asked the same question for the next two years, and no one ever withdrew the request.

Nonetheless, I learned a lot from this experience. It is a disservice to the tenure candidate (and to the school) to write a letter that will carry no

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weight. This can be doubly true for candidates at large research institutions where the candidate must pass through review cycles outside of the law school. Candidates (and their law schools) deserve the best quality letter (regardless of viewpoint) available.

I continue to make sure – when appropriate – that my review is a good fit. Do I have some expertise in the area to judge the scholarship? Do I have enough time? Do I have any biases I need to check? This philosophy has served me well. In a recent request to review three articles, one was far outside my area of focus. I sent a note to the requestor suggesting someone who would be a better fit. It turns out that my suggested reviewer was already on the list! We swapped articles, and were likely both happier with the subject matter, better suited to review, and more engaged with the scholarship.

Ensuring that a tenure letter will fit the needs of the requesting school and tenure candidate is unlikely to be an issue in every case. But reviewers should be cognizant of the possibility that the fit is not right, and consider whether to change how the letter is written or change who is writing the letter based on thoughtful consideration.





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CONFIDENTIALITY IS WISHFUL
THINKING . . .

BUT GET IT IN WRITING ANYWAY

Suzanna Sherry

WE ARE LAWYERS. We put *everything* in writing, except the things for which we don't want to be held accountable. And giving up the hope of confidentiality is essentially abdicating accountability for keeping the tenure process honest. We might as well just abandon the charade of tenure review letters and let each faculty evaluate its own candidates' work.

When I receive a request to write a tenure review letter, I always ask whether the candidate will be able to see it.¹ If the answer is positive, I decline to write a letter and explain my reason:

Suzanna Sherry is the Herman O. Loewenstein Professor of Law at Vanderbilt University. She has written (and read) countless tenure review letters in her 35-year career.

¹ Short of litigation. I recognize that we can't do anything about the discovery process, although the Rules Committee may be doing it for us. See, e.g., 2015 Year-End Report on the Federal Judiciary, at 6-11 available at www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (highlighting changes to discovery rules to increase judicial supervision).

Suzanna Sherry

Please do not take my refusal to write a tenure letter for Professor X as a negative comment on her work. On principle, I agree to write these letters only if they are completely confidential, because allowing a candidate to see the letter taints the whole process. No one will write an honest letter if they know that the candidate will see it – both because identities have a way of leaking out and because it feels mean to write something really negative if you know the subject of the negative comments will see it. So a lack of confidentiality just exacerbates the tendency of law professors to write only positive letters and of law schools to tenure everybody regardless of merit.

At least twice in the last few years, the person requesting the tenure letter has responded to my refusal by agreeing to keep my letter confidential from the candidate despite the school's customary practice. Both times I insisted on having that agreement in the official letter asking for my evaluation of the candidate.

Imagine if we all refused to write tenure review letters unless we were promised in writing that the letters would be kept confidential. Any school that chose to make tenure review letters available to the candidate would quickly find itself unable to get letters at all. Confidentiality would no longer be wishful thinking, and the tenure process would once again be actually evaluative instead of a formulaic exercise with a foregone conclusion.

One last important point: When I refuse to write because of the lack of confidentiality, my refusal always includes a note that the requester of the letter should feel free to forward my explanation to those in charge of the tenure process. This is an especially important addendum for those law schools whose anti-confidentiality rules are imposed by the university administration or by the state legislature. The hapless Associate Dean or Tenure Committee Chair whose job it is to solicit letters usually doesn't have authority to change the procedural rules governing the tenure process. But if enough of us explain that the anti-confidentiality rules are negatively affecting the whole process, perhaps those in power will be persuaded to make a change.

Professor Goldman apparently thinks that forcing schools to promise confidentiality is only half the battle. He argues that "even when a school represents that tenure review letters are confidential, that's more of a hope than a promise." But that's why getting it in writing matters. Getting it in writing will make everyone think twice about exactly what they reveal to

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the candidate. Getting it in writing will turn previously ordinary revelations into furtive rule-breaking. Getting it in writing makes the promise of confidentiality more likely to be kept and more easily enforceable.

In other words, let's act like the lawyers we are (or at least once were): lawyers who put everything from contracts to constitutions in writing, so that agreements "may not be mistaken, or forgotten."² If we get it in writing, it may actually become a promise and not just a hope.



² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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"BE SUCCINCT"

Edward T. Swaine

PROFESSOR GOLDMAN ADVISES THAT, to make sure letters are read in full, reviewers should avoid long summaries of major disputes in the field, or extensive explanations of how the candidate's work proves the brilliance of the reviewer's own work. Reasonable advice – since time and attention spans among the candidate's colleagues may be limited – but as those particular excesses often do a nice job of revealing the reviewer's potential biases, keep it up and forget you read Goldman (or this).

Instead, cut back on long summaries of the articles being evaluated, providing no more than is necessary to understand and assess your appraisal. Writing more is padding, shirks your task of evaluation, and runs the risk of distracting tenured faculty at the requesting school from their own indispensable and time-consuming task: carefully reading the evaluated articles for themselves.

That's all, folks.



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