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The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-National Courts as a Means of Advancing the Public Interest

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The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-National Courts as a Means of Advancing the Public Interest

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Abstract

Among the myriad ways that the interests of underprivileged persons and groups can be protected and promoted, and other causes of public interest can be served, is through the participation by amicus curiae in litigation adjudicating relevant issues. Amici must “identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief.” An amicus who has been adversely affected as an individual by enforcement of a law that a corporate litigant is contesting may be able to poignantly present the law’s ramifications through personal perspective and in eidetic detail. The benefits of such participation also may be apparent in public interest litigation, where an indigent or poorly-resourced litigant lacks adequate representation and amicus support advocates for a more promising disposition. Although the submission of briefs by amici can promote a greater understanding by the court of the potential impact and policy implications of its ruling, a number of issues have been raised about the advisability and utility of amicus participation. Pro bono representation of public interest amici is especially important in light of the increasingly common practice of filing amicus briefs, support for which typically is easier to marshal by the government and the private sector.

THE UTILITY OF *PRO BONO*
REPRESENTATION OF U.S.-BASED *AMICUS*
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*Madeleine Schachter**

INTRODUCTION

Among the myriad ways that the interests of underprivileged persons and groups can be protected and promoted, and other causes of public interest can be served, is through the participation by *amicus curiae* in litigation adjudicating relevant issues. *Amicus* participation has a long and venerable tradition with civil rights and other social justice causes in the United States. Used in a judicious fashion with adequate safeguards, *pro bono* representation of *amici* can serve such interests in non-U.S. and multi-national tribunals.

Although some have questioned whether the *amicus curiae* practice has lost sight of its role as a “friend of the court,” and become instead a “friend of the party,” *amicus* briefs have been filed with increasing frequency. It appears that courts give consideration to arguments advanced by *amici*, who assist the court by presenting alternative or supplementary arguments or empirical factual information, and thus play an important role in judicial analysis.

In the international arena, *amicus* submissions can play a val-

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uable role by presenting diverse experiences and perspectives to a court that may not previously have addressed the issue with which the court is confronted. *Pro bono* representation of underprivileged *amici* is critical as a means of fostering their interests, ensuring they are not over-shadowed by better-resourced *amici*, and providing assistance where other support has not adequately matured. Disclosures such as the nature of the *amici*'s interests and sources of funding help promote credibility and deter misplaced inferences of bias. Because *amici curiae*, like other litigants, must avoid knowing misstatements of law or fact, efforts to influence the court's determination through the *amici* device is directed through a prism of analytical thought or empirical foundation that is visible to the litigants and the public at large. Advocacy through the *amicus* device thereby helps further the administration of justice by promoting consideration of diverse viewpoints.

I. THE ORIGINS OF AMICUS CURIAE SUBMISSIONS

The Latin phrase "*amicus curiae*" means "friend of the court." The term refers to "[a] procedure whereby an appellate court may be informed by persons not parties to a legal action, who are nonetheless particularly informed or interested in the outcome (or at least in the law being declared)."¹

The definition comports with the historical roots of the practice of *amicus* filings. The submission of *amicus* briefs in some form "may be more than a thousand years old, beginning in ancient Rome. *Amici* provided information, at the court's discretion, in areas of law in which the courts had no expertise or information."² From this practice, or perhaps in a separately evolving practice,³ the English common law developed the practice of *amicus* participation as a means of "helping judges avoid errors and in maintaining judicial honor and integrity by acting as 'the judiciary's impartial friend,' providing information be-

1. Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2012 (1983).

2. Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 270 (2003); see also Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1607 & n.10 (1999).

3. See, e.g., Judith S. Kaye, *One Judge's View of "Friends of the Court,"* 61 N.Y. ST. BAR J., Apr., at 12-13 (1989).

yond the court's expertise."⁴

For example, in 1686, Sir George Treby, a member of Parliament, appeared as *amicus* by leave of the court to advise the tribunal about the intended meaning of a law the court was charged with interpreting.⁵ "The function of the *amicus curiae* at common law was a form of oral 'shepardizing,' the bringing up of cases not known to the judge. In this role, the *amicus* submission originally was intended to provide a court with impartial legal information that was beyond its notice or expertise, which is where the name *amicus curiae*, or 'friend of the court' is derived."⁶ Chief Judge Judith S. Kaye of New York's highest court characterized the *amicus* in this type of situation as "a sort of legislative hotline."⁷ There was no requirement that the *amicus* be a lawyer, "and the general attitude of the courts was to welcome such aid, since 'it is for the honor of a court of justice to avoid error.'"⁸

One commentator observed that "[n]o longer a mere friend of the court, the *amicus* has become a lobbyist, an advocate, and, most recently, the vindicator of the politically powerless."⁹ The process has been envisaged less as one imparting unbiased scholarly guidance to the Court and more as one comprising dueling *amici*. This phenomenon has not been without critics, one of whom opined that "[n]otwithstanding the judiciary's good intentions, the removal of restrictions on third party involvement has metamorphosed the *amicus curiae* doctrine into an adversarial weapon."¹⁰

Some interest groups have been established for the purpose of participating as *amici* in appellate cases. Such entities sometimes are described as "acknowledged adversaries" or "litigating

4. Walbolt & Lang, *supra* note 2, at 270.

5. See Samuel Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 *YALE L.J.* 694, 695 (1963).

6. Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 *FORDHAM URB. L.J.* 1605, 1607 (1999) (footnotes omitted).

7. Kaye, *supra* note 3, at 10.

8. Lucas, *supra* note 6, at 1607 & n.16 (quoting *Protector v. Geering*, 145 Eng. Rep. 394 (Ex. 1656)).

9. Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 *AM. U. L. REV.* 1243, 1245 (1992).

10. Michael J. Harris, *Amicus Curiae: Friend Or Foe? The Limits of Friendship in American Jurisprudence*, 5 *SUFFOLK J. TRIAL & APP. ADVOC.* 1, 6 (2000).

amic[i].”¹¹ Others engage in both direct representation and participate as *amici*. For example, the American Civil Liberties Union (“ACLU”) appears on behalf of litigants, and, with conspicuous frequency, as *amicus*. From 1969 through 1981, for instance, the ACLU participated in forty-four percent of all criminal cases in which an *amicus* brief was filed.¹² The ACLU has participated in such landmark rulings as *Mapp v. Ohio*,¹³ *Gideon v. Wainwright*,¹⁴ *Escobedo v. Illinois*,¹⁵ and *Miranda v. Arizona*.¹⁶ The ACLU is among civil rights groups that regularly use the *amicus* device to protect and advance civil rights.

Professional organizations, such as bar associations and medical associations, also participate in litigation as *amici*, as do corporations, unions, and banks.¹⁷ *Amici* cross a range of political spectra; one commentator surmised that there may be “almost as many ‘conservative’ public interest groups as liberal ones.”¹⁸

Groups with commercially-based interests have been created in order to advance the interests of their constituents. One such example is the Product Liability Advisory Council, Inc.,¹⁹ which is a non-profit association with more than a hundred members representing U.S. and international product manufacturers.²⁰

Another frequent *amicus* party is the government, at both the federal and State levels. This practice is believed to have originated nearly two centuries ago in *Green v. Biddle*.²¹ In that case, Henry Clay appeared on behalf of the State of Kentucky as

11. Walbolt & Lang, *supra* note 2, at 271 (citing Krislov, *supra* note 5, at 704).

12. See Gregg Ivers & Karen O'Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases, 1969-1982*, 9 J.L. & POL'Y 161, 168 (1987).

13. 367 U.S. 643 (1961).

14. 372 U.S. 335 (1963).

15. 378 U.S. 478 (1964).

16. 384 U.S. 436 (1966).

17. See generally Bruce J. Ennis, *Symposium on Supreme Court Advocacy: Effective Amicus Briefs*, 33 CATH. U. L. REV. 603 (1984).

18. *Id.* at 604 & n.3.

19. See, e.g., Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability — The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 755 n.57 (1998).

20. See, e.g., Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Appellants, In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., Nos. 00-8003, 02-8004, 02-8005 (7th Cir. 2002).

21. 21 U.S. 1 (1823).

amicus. The Office of the Solicitor General currently is among the most frequent *amicus* litigants in the U.S. Supreme Court.

Although the *amicus* frequently tends to support one party's position in opposition to that asserted by the other party, *amici* also may participate to protect third party interests exclusively. In one early case, the court allowed the *amicus* to argue that the suit between the parties was collusive and would impact the marital status of the *amicus*.²² The *amicus* thereby sought to protect both the interests of the *amicus* and the interests of the court. Subsequent cases, notably involving *amici* that represent not-for-profit groups or underprivileged persons, position *amici* as advocates for persons not otherwise officially before the court or who might be precluded from appearance because of standing prerequisites.

II. PROCEDURAL RULES GOVERNING AMICUS SUBMISSIONS

A. Prerequisites to Filing

Rule 37 of the Rules of the Supreme Court specifically contemplates the submission of *amicus* briefs.²³ Generally, in order to file an *amicus* brief, the *amicus* is required to secure the parties' consent or the Court's leave. Exceptions to consent and leave requirements in the Supreme Court apply to briefs submitted by the U.S. government and by States, including by State Attorneys General and authorized local law enforcement officers.²⁴

Motions for leave to file are granted routinely, mitigating an inclination by parties' counsel to refuse consent. Yet courts occasionally deny such motions. The New York Court of Appeals recently refused to allow Assembly Speaker Sheldon Silver to appear as *amicus*²⁵ in a bond bailout case, *Local Gov't Assistance Corp. v. Sales Tax Receivable Corp.*²⁶ The court, which allowed the Bank of New York to proceed as *amicus* as Successor Trustee under the

22. See *Coxe v. Phillips*, 95 Eng. Rep. 152 (K.B. 1736).

23. See SUP. CT. R. 37. Other rules apply to such filings, such as Rule 29, governing filing and service; Rule 30, addressing computation of time; and Rule 33, specifying format, page limits, and the colors of covers. See SUP. CT. R. 29, 30, 33.

24. See SUP. CT. R. 37.4.

25. See *Local Gov't Assistance Corp. v. Sales Tax Receivable Corp.*, Motion No. 334, 2004 N.Y. LEXIS 949 (N.Y. May 4, 2004).

26. See *Local Gov't Assistance Corp. v. Sales Tax Receivable Corp.*, 813 N.E.2d 587 (N.Y. 2004).

Local Assistance Corporation Bond Resolutions²⁷ and the New York State Conference to proceed as *amicus*,²⁸ did not explain its decision regarding Silver's motion.²⁹ Previously, the same court declined to bestow *amicus* status on legislators in cases determining the constitutionality of legislation.³⁰

Richard Posner, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, addressed the tendency of judges to grant motions for leave to file *amicus curiae* briefs without adequate deliberation.³¹ He noted that the vast majority of *amicus* briefs are filed by "allies of litigants" who repeat the arguments made in the parties' briefs, which merely serve to extend the length of each litigant's brief.³² "Such *amicus* briefs should not be allowed. They are an abuse," he concluded. "The term '*amicus curiae*' means friend of the court, not 'friend of a party.'"³³ Judge Posner posited three instances in which submissions generally should be permissible: when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the instant case, and when the *amicus* has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."³⁴

B. Disclosure Requirements

Interests are rendered more transparent and possible biases of *amici* are probed in three general ways through disclosure requirements for submissions to the U.S. Supreme Court. First, *amici* are required to submit a statement of interest in their briefs, which helps inform the Court about the interest groups or other entities and persons they represent.³⁵ Second, Supreme

27. See *Local Gov't Assistance Corp. v. Sales Tax Receivable Corp.*, Motion No. 293, 2004 N.Y. LEXIS 595 (N.Y. Apr. 1, 2004).

28. See *Local Gov't Assistance Corp. v. Sales Tax Receivable Corp.*, Motion No. 335, 2004 N.Y. LEXIS 952 (N.Y. May 4, 2004).

29. See *Local Gov't Assistance Corp. v. Sales Tax Receivable Corp.*, Motion No. 334, 2004 N.Y. LEXIS 949 (N.Y. May 4, 2004).

30. See *Court Denies Silver Amicus Status in Bond Bailout Case*, N.Y.L.J., May 5, 2004, at 1.

31. See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997).

32. See *id.* at 1063.

33. *Id.* (citations omitted).

34. *Id.* (citation omitted).

35. SUP. CT. R. 37.2(b), 37.3(b).

Court Rules require *amici*, other than governmental *amici*, to disclose “whether counsel for a party authored the brief in whole or in part.”³⁶ Third, *amici* must “identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief.”³⁷

As one commentator observed, “if *amici* are less than perfectly candid with the appellate tribunal as to their true motivation behind filing the brief, their objectivity — and thus their ability to represent the important interests of non-parties in litigation — becomes questionable. Such interested *amici* may, therefore, actually subvert the judicial system’s goal of serving the public interest.”³⁸ State court procedural rules vary among states, leading another commentator to suggest that Florida courts adopt the Supreme Court rule to promote “greater disclosures regarding both who funded and who wrote the *amicus* brief.”³⁹

Mindful of the “creative use” of *amicus* briefs by interested parties,⁴⁰ Rule 11 of the Texas Rules of Appellate Procedure requires *amici* to disclose the person or entity on whose behalf the brief is tendered and the source of any fee paid or to be paid for preparing the brief.⁴¹ The Rule has been criticized for failing to require disclosure of the author of the filing, “leaving open the possibility for a party’s counsel to create the brief and have it signed by an outside attorney[, a] maneuver [that] effectively extends the page limits imposed on the parties.”⁴² In addition, concern has been expressed that the party’s counsel may review and modify the *amicus* filing without apprising the court that it has done so, may handle similar cases that will be impacted by the ruling without so noting, or may be funded indirectly without disclosure.⁴³

36. SUP. CT. R. 37.6

37. *Id.*

38. Nancy Bage Sorenson, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 ST. MARY’S L.J. 1219, 1222 (1999).

39. Walbolt & Lang, *supra* note 2, at 308.

40. Sorenson, *supra* note 38, at 1222.

41. See TEX. R. APP. P. 11.

42. Sorenson, *supra* note 38, at 1222-23.

43. See *id.* at 1223.

C. Ethical Considerations

The American Bar Association Model Rules of Professional Conduct require a lawyer to “act with reasonable diligence and promptness in representing a client” and contemplate “tak[ing] whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”⁴⁴ The Rules also provide that a lawyer should zealously advocate on his client’s behalf.⁴⁵ It is the client who determines the objectives of litigation.⁴⁶

These principles have two basic implications in the context of *amicus* filings. First, the litigant’s counsel may deem it a disservice to his client to urge the court to adopt a broader ruling, lest doing so dilute the impact of the client’s primary objective.⁴⁷ The *amicus* party can fill such a void or complement the range of perspectives presented to the court.

Second, like the lawyer who represents a party, the lawyer who represents the *amicus* party works, within legal bounds, to advance his client’s interests. Thus the *amicus* party’s arguments focus on the application of the pertinent law to the *amicus*.

III. THE FREQUENCY AND APPARENT EFFICACY OF AMICUS FILINGS

The use of *amicus* briefing is increasing. In the 1965 to 1966 term of the U.S. Supreme Court, for example, thirty-five percent of cases decided by opinion included *amicus* filings; in the 1980 to 1981 term, seventy-one percent of such cases had *amicus* participation; by the 1998 to 1999 term, ninety-five percent had at least one *amicus* filing.⁴⁸ Increasingly, too, cases have *amicus* filings by more than one *amicus* or group of *amici*.

Some have questioned the utility of *amicus* participation. Criticism has been targeted primarily on the ground that the

44. MODEL RULES OF PROF’L CONDUCT R. 1.3 (1983).

45. See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1; see also MODEL CODE OF PROF’L RESPONSIBILITY CANON 7 (1980).

46. See MODEL RULES OF PROF’L CONDUCT R. 1.2(a) & cmt. 1. The clear exception to this rule is when a client wants the lawyer to perpetuate or aid in the commission of a crime or fraud. See MODEL RULES OF PROF’L CONDUCT, R. 1.16 cmt. 2; MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(b) (1980).

47. See, e.g., *infra* notes 78-97 and accompanying text.

48. See Alexander Wohl, *Friends with Agendas*, A.B.A. J., Nov. 1996, at 46; see also Ennis, *supra* note 17, at 603 (reviewing 90 cases argued before the Supreme Court in the 1998-99 term).

amicus party appears as a partisan advocate.⁴⁹ The efficacy of the role of the *amicus curiae* party has been characterized as “limited,” at least in part on the ground that his service as a friend to the court has been eclipsed by a loss of objectivity.⁵⁰

Although precise measurements of the impact of *amicus* submissions on the judiciary are not feasible, Professors Joseph D. Kearney of Marquette University and Thomas W. Merrill of Northwestern University worked to examine the empirical impact of *amicus curiae* briefs in the U.S. Supreme Court.⁵¹ Kearney and Merrill concluded definitively that the level of participation has increased dramatically over the second half of the last century; notwithstanding a decline in the number of cases that the Court disposed of on the merits during the same period, the number of *amicus* filings increased by more than 800 percent.⁵² The academicians also noted that *amicus* briefs supporting respondents enjoyed greater success rates than those supporting petitioners.⁵³ While *amicus* briefs cited by the Court appeared no more likely to be associated with the winning side than those not cited by the Court, *amicus* briefs submitted by “more experienced” lawyers may have been more successful than those filed by “less experienced” ones.⁵⁴

Dan Schweitzer, Supreme Court Counsel of the National Association of Attorney Generals, opined that “[a] *amicus* briefs unquestionably have an effect on Supreme Court opinions.”⁵⁵ Among several illustrations he cited as to the utility of *amicus* filings for various purposes, he recounted that during oral argument in *Grutter v. Bollinger*,⁵⁶ a case concerning affirmative action issues, Justice Ruth Bader Ginsburg questioned petitioner’s counsel about an *amicus* brief submitted on behalf of certain retired military officers; several minutes of oral argument were de-

49. See *infra* notes 168-69 and accompanying text.

50. See Harris, *supra* note 10, at 7.

51. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

52. See *id.* at 749.

53. See generally *id.*

54. See *id.* at 749.

55. Dan Schweitzer, *Development and Practice Note: Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 542 (2003).

56. 539 U.S. 306 (2003) (addressing the race-based admissions policy of the University of Michigan Law School).

voted to issues addressed in the brief.⁵⁷ When the Court issued its decision, the *amicus*' arguments comprised a paragraph of the opinion, and seven other *amicus* submissions were cited as well.⁵⁸ The Court specifically noted that the respondent law school's "claim of a compelling interest [was] further bolstered by its *amici*, who point[ed] to the educational benefits that flow from student body diversity."⁵⁹ Among the Court's citations was an *amicus* brief submitted by the American Educational Research Association that contended that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"⁶⁰ Schweitzer regarded this level of attention to *amicus* briefs to be relatively aberrational, but noted that "virtually all *amicus* briefs are read by the Justices and/or their clerks"⁶¹

In some instances, counsel for *amici* may even be permitted to present oral argument. In *Gideon v. Wainwright*,⁶² for example, the Supreme Court granted *certiorari* to consider "the problem of a defendant's federal constitutional right to counsel in a state court[, which had] been a continuing source of controversy and litigation in both state and federal courts."⁶³ The Court allowed, by special leave, the ACLU and the State of Alabama to argue the issue as *amicus curiae*.⁶⁴

Kathryn Kolbert coordinated the submission of *amici* briefs on behalf of the ACLU and the Planned Parenthood Federation in *Webster v. Reprod. Health Servs.*,⁶⁵ a case considering abortion rights that generated dozens of *amicus* briefs. Kolbert noted that "several briefs made overlapping arguments which diluted the

57. See Schweitzer, *supra* note 55, at 523-24 nn.2-3 (citing U.S. Sup. Ct. Official Transcr. at 7-13, 19-23, *Grutter v. Bollinger*, 539 U.S. 306 (2003), No. 02-241 (argued Apr. 1, 2003), available at <http://www.supremecourtus.gov/> (last visited Oct. 27, 2004) (referring to the Brief for Julius W. Becton, Jr., *et al.* as *Amicus Curiae*)).

58. See *Grutter*, 539 U.S. at 330.

59. *Id.*

60. *Id.* (citation omitted).

61. Schweitzer, *supra* note 55, at 524.

62. 370 U.S. 335 (1963)

63. *Id.* at 338.

64. See *id.*; see also *Mapp v. Ohio*, 367 U.S. 643 (1961) (allowing counsel for *amicus* American Civil Liberties Union ("ACLU") to be heard during oral argument).

65. 492 U.S. 490 (1989).

overall impact of the collection”⁶⁶ She opined that, nonetheless, “there is little doubt that the pro-choice *amici* effort both influenced the Court and significantly contributed to the public debate on the abortion question.”⁶⁷

IV. *PURPOSE OF AMICUS SUBMISSIONS*

Attorney Bruce Ennis credited *amicus* briefs with helping to shape court decisions by offering an analytical approach or furnishing factual information the parties did not discuss.⁶⁸ Ennis states, “A good idea is a good idea, whether it is contained in an *amicus* brief or in the brief of a party.”⁶⁹ Chief Judge Judith Kaye of New York opined that

[*a*]mici have unquestionably been important in Supreme Court decisionmaking. Their voices may affect the outcome of petitions for *certiorari*, and in pending cases they have served to inform the Court of likely repercussions of a decision, as well as to keep it abreast of developing law. The views of [S]tates and other entities expressed as *amici* have time and again proved influential where rules fashioned for the litigants will likely affect them as well. In instances where the Court has thought that special expertise would be beneficial, or where the Court has not been satisfied that a significant issue would be adequately presented, it has sought out assistance by inviting particular *amici*. In the Second Circuit, too, *amicus* briefs have proved useful by identifying larger issues not emphasized by the parties, and by filling a vacuum where representation otherwise is inadequate; that court also has on occasion invited *amicus* participation.⁷⁰

The Supreme Court Rules expressly dissuade the submission of arguments duplicative of those presented by the parties. Rule 37.1 states that the brief “brings to the attention of the Court relevant matter not already brought to its attention by the parties.”⁷¹ Richard Posner, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, observed:

66. Kathryn Kolbert, *The Webster Amicus Curiae Briefs: Perspectives on the Abortion Controversy and the Role of the Supreme Court*, 15 AM. J.L. & MED. 153, 157 (1989).

67. *Id.*

68. See Ennis, *supra* note 17, at 604.

69. *Id.*

70. Kaye, *supra* note 3, at 13.

71. SUP. CT. R. 37.1.

The bane of lawyers is prolixity and duplication, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.⁷²

One of the ways the federal appellate rules deter *amici* briefs that merely reiterate those submitted by the primary litigants is through the timing of the filings. The *amicus* brief is not due on the date the named party's brief is submitted, but may be filed thereafter,⁷³ which affords the *amicus* time to review the party's brief to avoid repetition.

A. *Amicus Submissions at the Certiorari Stage*

Amicus submissions serve different purposes at different stages of the proceedings. Those supporting a grant of a petition for *certiorari* generally present one or more of the following arguments:

- There is a conflict among the federal courts of appeal and/or among the supreme courts of multiple States.
- The issue is one of profound importance.
- The decision issued by the court below conflicts with Supreme Court precedents.
- The Supreme Court left the issue open when it ruled in prior cases.
- There is tension among decisions issued previously by the Supreme Court.⁷⁴

Thus, such briefs are designed to alert the Court to adverse ramifications were the decision issued by the court below allowed to stand. By illustration, the State of Ohio submitted an *amicus* brief in *City of Boerne v. Flores*,⁷⁵ which concerned the constitutionality of the Religious Freedom Restoration Act and its application to denial of a permit to enlarge a church based on an ordinance dealing with historic preservation. The *amicus*

72. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997) (Posner, J.).

73. See FED. R. APP. P. 29(e); see also Harris, *supra* note 10, at 14-15.

74. See generally SUP. CT. R. 10. See Schweitzer, *supra* note 55, at 527-28.

75. 521 U.S. 507 (1997). See Schweitzer, *supra* note 55, at 530.

brief argued that the dispute extended beyond issues exclusively relating to zoning regulations because it affected State prison systems. *Certiorari* was granted even though there was no extant split in circuit court decisions.⁷⁶

B. *Amicus Submissions at the Merits Stage*

Amicus briefs submitted at the merits stage, when either the Court has granted a writ of *certiorari* or the appeal has proceeded as of right, serve myriad purposes. First, the *amicus* party may offer guidance as to the legal constructs applicable to the case, as when the *amicus* presents alternative or supplementary arguments to support a conclusion or brings to the court's attention the existence of other pending cases that might bear on the ruling issued. Second, the *amicus* may be in a position to present empirical factual information that can help inform the court's understanding of the pragmatic impact of its decision. Third, the *amicus* might persuade a judge by enhancing the credibility of an argument by virtue of the very nature of the *amicus* party or simply due to the fact that increased attention has been placed on the case in light of the additional involvement of the *amicus* demonstrating divergent reach of the law.

1. Presentation of Alternative or Supplementary Arguments

One of the most important ways *amicus curiae* serve the administration of justice is by providing courts with an array of legal rationales that offer either alternative or supplementary grounds on which to premise rulings. *Amici* thereby assist judges with their efforts to more fully grasp the applicable substantive law and pragmatic implications of the decisions they craft. Chief Judge Chris W. Altenbernd of the Second District Court of Appeal of the State of Florida observed that

[a] *micus* briefs are best used where the court really does need an objective friend with some expertise. Appellate judges are about the only general practitioners remaining in Florida. We must study the law in all of its breadth. Ultimately, we must rule and possibly create precedent in fields where we have little personal experience or expertise.⁷⁷

76. See generally *Flores*, 521 U.S. at 507. See Schweitzer, *supra* note 55, at 530.

77. Walbolt & Lang, *supra* note 2, at 276 n.30 (quoting Chris Altenbernd, Chief Judge, Fla. 2d Dist. Ct. App.).

Because *amici* are not parties to the case and often represent somewhat disparate interests, they may present arguments for more extensive or more narrow relief than those advanced by the primary litigants. Such *amici* may be less constrained than the parties by tactical considerations that affect the overall posture of the case. For example, a party may decide to confine his argument to an assertion that the statute in issue is inapplicable to him; an *amicus* may assert that the statute is generally unenforceable and should be invalidated. Conversely, a party may argue that the statute in issue is unconstitutional; an *amicus* may have an interest in preserving the law while acknowledging that its application to the party is inappropriate and unlawful.

One example of a case in which the *amici* sought a more narrow ruling was *Askew v. Sonson*.⁷⁸ In that case, the Florida Supreme Court considered the plaintiffs' allegation that their "root of title" had remained of record and unchallenged for more than thirty years.⁷⁹ The defendants contended that the application of the Marketable Record Title Act against them would be unconstitutional because the lands in issue had been designated for school purposes under an Act of Congress that granted lands to the State of Florida.⁸⁰ The court expressly characterized the briefs filed by the parties and the *amici* as "excellent," noting:

The order requesting additional briefs restated and broadened the questions initially presented, so as to include the application of the marketable record title act to all [S]tate lands, of which section sixteen lands are merely one category. The question framed by the Court encompasses all categories of [S]tate properties, including sovereignty lands. Among the other categories of [S]tate properties are internal improvement lands, swamp and overflow lands, railroad lands, indemnity lands, and Murphy Act lands. The *amici curiae* urge the Court to reserve ruling on those arguments until they are presented in the context of a proper controversy. In other words, they urge us to confine our ruling to the question initially presented.⁸¹

The court accepted the *amici's* contention that the broader question of the statute's application to State-owned lands gener-

78. 409 S.2d 7 (Fla. 1981).

79. See *id.* at 7.

80. See *id.* at 7-8.

81. *Id.* at 8.

ally should be deferred and ruled on a more narrow question. The court noted:

It is a wise rule that courts will only determine issues which are based on a genuine controversy, supported by a sufficient factual predicate. This rule is particularly appropriate where complex issues of great public interest are concerned. This Court has stated that it will not address issues, particularly those of constitutional import, which are neither directly presented nor necessary to the resolution of the dispute at hand.⁸²

An example of a case in which the *amici* sought to broaden the scope of the court's determination can be found in *Braschi v. Stahl Associates Co.*, which addressed tenants' rights.⁸³ In that case, the ACLU represented the named plaintiff, the surviving gay life partner of the prime tenant, on his appeal to the New York Court of Appeals. The plaintiff faced eviction from a rent-controlled apartment after his partner, the prime tenant, died.

The *amici curiae* emphasized the civil rights aspect of the case and broadened the claim beyond the gay community. For example, The Legal Aid Society argued that its poor clients lived together as families without legal sanction because in many cases they could not afford lawyers to get divorces or adoptions. The City of New York, the Association of the Bar of the City of New York, Community Action for Legal Services, Gay Men's Health Crisis, Lambda Legal Defense and Education Fund and others pointed out to the [S]tate's highest court how the court's ruling would widely impact the community and demonstrated the breadth of the political support for the position. In a landmark decision, the New York Court of Appeals in *Braschi*, held that family included non-legally recognized relationships for purposes of succession rights to rent controlled apartments.⁸⁴

A corollary point is that an *amicus* may wish to emphasize a point that received scant attention from the parties, lest the issue be overlooked or relegated to cursory review. The presentation by an *amicus* of arguments supplementary to those put forth by a party in the suit has two significant purposes. First, the *amicus*

82. *Id.* (citations omitted).

83. See generally 74 N.Y.2d 201 (1989).

84. Lynn M. Kelly, *Lawyering for Poor Communities on the Cusp of the Next Century*, 25 *FORDHAM URB. L.J.* 721, 723-24 (1998).

may effectively provide the court with additional rationales in support of the desired holding, thereby fortifying the court's conviction in its conclusion and buttressing the bases of its analysis. Perhaps, as well, such supplementary analyses may persuade a justice to concur in a plurality opinion on another ground.

A notable example of the presentation by *amici* of an alternative argument is *Mapp*, in which the Supreme Court considered an appeal by a woman convicted of knowing possession of lewd and lascivious books, pictures, and photographs in violation of Ohio's penal code.⁸⁵ The appellant challenged the constitutionality of the obscenity statute.⁸⁶ The ACLU, appearing as *amicus*, urged the Court to review *Wolf v. Colorado*, in which the Court previously had held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."⁸⁷ The *Mapp* Court observed that "appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled"⁸⁸ Indeed, when counsel for appellant was "pressed" during oral argument as to whether he was urging the Court to overrule *Wolf*, he "expressly disavowed any such purpose."⁸⁹

Instead, it was "the *amicus curiae*, who was also permitted to participate in the oral argument, [who] urge[d] the Court to overrule *Wolf*,"⁹⁰ which was the ground upon which the majority Court rested its decision to reverse. Ultimately, the Court concluded that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."⁹¹

Second, an alternative or supplementary doctrinal frame-

85. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

86. See *id.* at 646; see also *id.* at 672-73 (Harlan, J., dissenting) (stating "the new and pivotal issue brought to the Court by this appeal is whether § 2905.35 of the Ohio Revised Code making criminal the mere knowing possession or control of obscene material, and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. That was the principal issue which was decided by the Ohio Supreme Court, which was tendered by appellant's Jurisdictional Statement, and which was briefed and argued in this Court.") (emphasis in original) (footnotes omitted)).

87. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

88. *Mapp*, 367 U.S. at 646 n.3.

89. *Id.* at 673 n.6 (Harlan, J., dissenting).

90. *Id.* at 646 n.3.

91. *Id.* at 655.

work offered by an *amicus* may affect the way that the court's ruling is applied to the *amicus* party. It may influence the disposition of subsequent litigation, even when the rationale is relegated to mere dicta. As Supreme Court Justice Arthur Goldberg observed, "A traditional function of an *amicus* is to assert 'an interest of its own separate and distinct from that of the [parties]' It is 'customary for those whose rights [depend] on the outcome of cases . . . to file briefs *amicus curiae*, in order to protect their own interests.' Th[e] Court has recognized the power of federal courts to appoint '*amici* to represent the public interest in the administration of justice.'"⁹² This is especially important in the context of *amicus* briefs submitted on behalf of under-represented litigants, whose positions may not be highlighted adequately in judicial, legislative, and other contexts. Furthermore, such litigants might benefit prospectively from court rulings that effectively deter potential exposure for liability and the ensuing costs and burdens associated with having to defend against claims that otherwise could have been deemed cognizable.

One example of a Supreme Court justice's reliance on *amicus* briefing to frame his opinion is that written for the majority Court by Justice Anthony Kennedy in *Romer v. Evans*.⁹³ The Court noted that the Colorado law in issue effectively placed homosexuals "in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."⁹⁴ Much of the analysis was consistent with the arguments put forth in an *amici* brief submitted by, among others, Laurence Tribe of Harvard Law School, that the law constituted a *per se* violation of the equal protection guarantees embodied in the Fourth Amendment.⁹⁵

Even when the court rejects an *amicus*' position, its decision may reflect consideration of the arguments put forth. One illustration of a State court case in which the court's comments

92. *United States v. Barnett*, 376 U.S. 681, 738 (1964) (Goldberg, J., dissenting) (citations omitted).

93. 517 U.S. 620 (1996). See *Lucas*, *supra* note 2, at 1610.

94. *Romer*, 517 U.S. at 627.

95. See *Lucas*, *supra* note 2, at 1609.

about the *amicus* brief substantiated the court's review was *Polaroid v. Travelers Indem. Co.*,⁹⁶ in which a Massachusetts court addressed issues raised by an *amicus* when it upheld the refusal by insurers to settle pollution claims of the insured.⁹⁷

Another purpose of *amicus* briefs is to apprise a court of the possible consequences of a particular ruling that might not be readily apparent from the context of the proceeding. *Amici* can serve an important function in this manner by alerting the court to practical, albeit potentially unintended, effects of its decisions in ways that the litigants either have not considered or with which they are not concerned. For example, a ruling might affect a type of party that is not before the court. This potential effect is especially significant in the context of *amicus* filings by underprivileged litigants, who may be susceptible to having a court fail to appreciate the effects on them or on a not-for-profit organization of a decision issued in a commercial dispute.

2. Presentation of Empirical, Scientific, or Other Technical Data

In addition, *amicus* submissions at the merits stage can furnish the court with empirical factual information that is not necessarily contained within the appellate record. Such matter is known colloquially as a "Brandeis Brief"⁹⁸ after a brief filed by Louis Brandeis in *Muller v. Oregon*.⁹⁹ In that case, Louis Brandeis had marshaled evidence about the hazardous effects of long work hours on women's health and presented it to the Court in support of an argument that the public interest would best be served if the number of hours worked by women was regulated.

Thereafter, the Supreme Court relied on Brandeis Briefs in such landmark rulings as *Brown v. Board of Edu. of Topeka*,¹⁰⁰ in which the Court cited several social science publications to support its conclusion that segregation generates a feeling of inferiority among African-Americans. In *Roe v. Wade*,¹⁰¹ the Court relied on numerous submissions by legal, medical, and religious organizations to discuss the physical risks of abortion at various

96. 610 N.E.2d 912 (Mass. 1993).

97. See generally Lucas, *supra* note 2, at 1610.

98. Such factual information also has been referred to as "legislative facts."

99. 208 U.S. 412 (1908).

100. 347 U.S. 483 (1954).

101. 410 U.S. 113 (1973).

stages of pregnancy and beliefs regarding the beginning of life, referring at length in the opinion to the information reviewed. In *Doe v. Bolton*,¹⁰² a companion case to *Roe v. Wade*, the Court referred to “many” studies that showed that it is safer for a woman to have a medically induced abortion than to bear a child.¹⁰³

The nature of factual information reviewed by courts may range from the presentation of scientific or other technical data to an explication of historical practice or jurisprudence. The “main contribution,” and, arguably, the primary source of potential mischief of Brandeis Briefs, has been described as a means of “mak[ing] extra-legal data readily available to the court.”¹⁰⁴ Such submissions have been controversial in light of their presentation of empirical data that has not necessarily been tested through an adversarial evidentiary process in the courts below. One commentator observed, “[b]y keeping the contours of the *amicus* concept nebulous and within the realm of judicial discretion, courts have been able to use the *amicus curiae* as a tool to surpass the limitations placed on the court by an adversary system of justice.”¹⁰⁵

The Federal Rules of Evidence contemplate the admission of expert testimony “if scientific, technical, or other specialized knowledge will assist the trier of fact”¹⁰⁶ When scientific evidence is proffered at the trial level, it must undergo a rigorous analysis, consistent with factors enumerated by the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*,¹⁰⁷ that are designed to assess the studies’ reliability and relevance. By contrast, *amicus* briefs comprising factual information are not under such constraints. Nor are they necessarily tested through the adversarial process, in which a party objecting to the methodology, statistical analysis, or conclusions of the study can challenge the evidence by presenting testimony elicited from an opposing expert witness or by proffering contrary data.

102. 410 U.S. 179 (1973). See *Roe v. Wade*, 410 U.S. at 116.

103. See *Doe*, 410 U.S. at 217 n.5.

104. *McClesky v. Kemp*, 753 F.2d 877, 888 (11th Cir. 1985) (quoting Peter W. Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Advisory Process*, 63 JUDICATURE 280, 285 n.31 (1980)), *aff'd*, 481 U.S. 279 (1987), *superseded by statute as stated in Baker v. Duckworth*, 1997 U.S. App. LEXIS 10805 (7th Cir. May 7, 1997).

105. Lowman, *supra* note 9, at 1247.

106. FED. R. EVID. 702 (2004).

107. 509 U.S. 579, 593-94 (1993).

Many have also questioned whether appellate courts are adequately equipped to evaluate the methodology of research data or to give sufficient credence to such indicia as whether the research has been peer reviewed. The proffer of scientific evidence, including social scientific evidence, prompted some to recall the admonition repeated by Mark Twain that “[t]here are three kinds of lies: lies, damned lies and statistics.”¹⁰⁸ More formal processes may be needed for consideration of the qualifications of the principal investors, and of their sources of funding, which in turn may implicate bias or, arguably, nearly as deleterious, the appearance of bias.

Others have a different perspective. Justice Stephen Breyer lauded *amici* participation as playing “important roles in educating the judges on potentially relevant technical matters” and cited as an example the utility of discussions by *amici* of palliative care, which helped the Court as it grappled with end-of-life issues “identify areas of technical consensus and disagreement.”¹⁰⁹ Thus, the degree to which medical science can mitigate the risk of death in severe pain informed the analysis as to whether the right to assisted suicide is a liberty of constitutional proportions.¹¹⁰ With respect to whether it is critical for arbiters to utilize scientific findings, consider as well the perspective of Justice Oliver Wendell Holmes, who stated, “The life of the law has not been logic: it has been experience.”¹¹¹

Some have observed that

[t]he alternative to admitting social science data is to return to nineteenth century legal formalism, according to which justice or other powerful groups substitute their own normative beliefs for scientific findings. . . . Third-party *amici* providing social science data can be an important check against governmental abuse of power. . . . The problem of integrating social science research into constitutional decision-making is “complicated by the fact that not all social science is

108. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 93 & n.3 (1993) (citing MARK TWAIN, 1 MARK TWAIN’S AUTOBIOGRAPHY 246 (1924)) (noting that Mark Twain attributed statement to Benjamin Disraeli).

109. Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 26 (1998).

110. *See id.* at 24-25.

111. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35 (1881).

created equal."¹¹²

These commentators suggested that concerns about *amici*'s proffer of scientific data could be mitigated, among other ways, by the judicial appointment of social science experts such as advisory panels with whom the Court could consult on issues relating to data interpretation, by the commission of studies and submission of factual disputes to specialized social science courts analogous to specialized courts such as the Court of Customs or the Court of Patent Appeals, and by the creation of a research agency devoted to law and policy issues that require extra-legal investigations.¹¹³

The U.S. Court of Appeals for the First Circuit "remark[ed] that the prime, if not sole, purpose of an *amicus curiae* brief is what its name implies, namely, to assist the court on matters of law. While, presumably, an *amicus*' position on the legal issues coincides with one of the parties, this does not mean that it is to engage in assisting that party with its evidentiary claims."¹¹⁴ One commentator was particularly troubled about the use of facts outside the record in the participation of private *amicus* interests in criminal proceedings,¹¹⁵ warning "the introduction of extra-record facts by a private party could raise significant due-process concerns."¹¹⁶

A notable example in a recent case where Brandeis Briefs were submitted is *Washington v. Glucksberg*,¹¹⁷ which addressed a state prohibition on physician-assisted suicide. Critical to the Su-

112. Rustad & Koenig, *supra* note 108, at 161-62 (quoting David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1079 (1989)). Faigman noted that "The legal relevance of social science research simply cannot be divorced from its scientific credibility." Faigman, *supra*, at 1081.

113. See Rustad & Koenig, *supra* note 108, at 158-59.

114. *Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 65 n.9 (1st Cir. 1981) (citation omitted), *cert. denied*, 454 U.S. 1098 (1981).

115. See Walbolt & Lang, *supra* note 2, at 296.

116. *Id.* at 296 & n.157 (citing *Stumbo v. Seabold*, 704 F.2d 910, 911-12 (6th Cir. 1983) (granting writ of *habeas corpus* for depriving defendant of due process when facts were cited and arguments were made to jury that were not supported by record evidence)). Of course, *amicus* submissions in support of the criminal defendant may work to help protect the rights of the accused, whereas those submitted on behalf of the prosecutor may at least in some circumstances jeopardize due process and other rights, especially if the latter's arguments are not the target of rebuttal arguments by the defense or other *amici*.

117. 521 U.S. 702 (1997).

preme Court's determination were briefs filed by medical personnel, such as the American Medical Association, which reviewed the ethical principles for physicians and the efficacy of palliation on chronic pain.¹¹⁸

When the Florida Supreme Court considered a related issue in a case seeking a declaratory judgment that a Florida statute prohibiting physician-assisted suicide was unconstitutional, the court pointedly noted that persons with serious disabilities have a "vital interest" in the matter and cited an *amicus* brief submitted by the Advocacy Center for Persons with Disabilities.¹¹⁹ The court also looked to a consolidated submission by the American Medical Association, the Florida Hospices, the Florida Medical Association, the Florida Nurses Association, the Florida Osteopathic Medical Association, the Florida Society of Internal Medicine, the Florida Society of Thoracic and Cardiovascular Surgeons, noting that "while not all healthcare providers agree on the issue, the leading healthcare organizations are unanimous in their opposition to legalizing assisted suicide."¹²⁰ Both the *amici's* expertise and their consensus were plainly significant to the court; this was vividly apparent in the court's rhetorical question: "Who would have more knowledge of the dangers of legalizing assisted suicide than those intimately charged with maintaining the patient's well-being?"¹²¹

Controversial social and political issues such as those pertaining to end-of-life decisional rights have generated a predominance of cases surveyed in which twenty or more *amicus* briefs were filed.¹²² *Cruzan v. Director, Mo. Dep't of Health*, another right-to-die case, generated thirty-nine *amicus* submissions.¹²³ Other issues triggering more voluminous *amicus* briefing include abortion, affirmative action, church-state relations, free speech, and

118. See Brief of the American Medical Ass'n, et al. as *Amicus Curiae* in Support of Petitioners, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 76-110). Schweitzer offers another example; in *City of Chi. v. Morales*, 527 U.S. 41 (1999), an ordinance designed to prevent loitering was challenged on constitutional grounds. The Center for the Community Interest filed an *amicus* brief that pointed to actual harm caused by gangs in urban areas and community responses. See Schweitzer, *supra* note 55, at 532.

119. *Krischer v. Mclver*, 697 So. 2d 97, 101-02 (Fla. 1997).

120. *Id.* at 103-04.

121. *Id.* at 104.

122. See Kearney & Merrill, *supra* note 51, at 755.

123. 497 U.S. 261, 329 (1990).

the takings of property.¹²⁴ In *Webster v. Reprod. Health Servs.*,¹²⁵ for example, the Court considered the parameters of abortion rights. Seventy-eight *amicus* briefs were filed; of these, forty-six supported the petitioner, the Attorney General of Missouri who argued that *Roe v. Wade* should be overturned, and thirty-two supported the respondents, who endorsed the re-affirmation of *Roe v. Wade*.

3. *Amicus* Attention to the Proceeding

Amicus participation may be a means of influencing a court because increased attention has been brought to a case. *Amici* can help illuminate the impact of a court's ultimate decision. Further, an *amicus* party might help buttress the credibility of a party's argument by virtue of the nature of the *amicus*.

In *Metromedia, Inc. v. San Diego*, for example, the court considered whether billboards could be excluded from certain areas of a city for the purpose of "‘eliminat[ing] hazards to pedestrians and motorists brought by distracting sign displays' and 'to preserve and improve the appearance of the City'"¹²⁶ Appellants were companies engaged in the outdoor advertising business who wished to display commercial messages. The appellants agreed that the lesser constitutional protections accorded to commercial speech applied, but contended that the San Diego ordinance could not meet even that standard.¹²⁷

The ACLU, appearing as *amicus*, was in a better position to highlight the ways in which the law might chill political speech, which historically has received more solicitude than commercial speech.¹²⁸ The Supreme Court ultimately struck the ordinance, notwithstanding that a majority deemed its regulation of commercial speech to be constitutional.¹²⁹ Possibly the *amicus* participant transmuted the ordinance's infirmity from one not only impacting commercial speech, but to one worthy of scrutiny under the more exacting standard applied to political speech.

124. See Kearney & Merrill, *supra* note 51, at 755.

125. 492 U.S. 490 (1989).

126. 453 U.S. 490, 493 (1981) (citing San Diego Ordinance No. 10795 (New Series), enacted Mar. 14, 1972).

127. See *id.* at 506-08.

128. See, e.g., Lucas, *supra* note 6, at 1626 & n.153; Ennis, *supra* note 17, at 607 (noting that the Court was closely divided).

129. See *Metromedia*, 453 U.S. at 506-08.

V. AMICUS BRIEFING IN NON-U.S. AND MULTI-NATIONAL COURTS TO ADVANCE THE PUBLIC INTEREST

Notwithstanding the concomitant self-interest of an *amicus* party, the facilitation of an informed, deliberative, and fair-minded court ruling is among the most laudable purposes of an *amicus* submission. Non-U.S. and multi-national perspectives can be presented through *amicus* filings as a viable means of offering a court alternative analytical approaches founded on established jurisprudence or empirical experience. Not-for-profit and indigent *amici* can alert the Court to the interests of under-represented groups and individuals, who otherwise might not have their concerns brought to the court's attention by commercial or other litigants. This opportunity is especially important in locales where not-for-profit and similar litigating *amici* do not exist to represent the interests of the underprivileged.

A. *Amicus Submissions in International Courts*

In the international arena, *amicus* submissions can play a valuable role by presenting diverse experiences and perspectives to a court that may not previously have confronted the issue it must adjudicate. One commentator notes that “[i]ndividuals and human rights [non-governmental organizations (“NGOs”)] in Europe and the Americas have exploited the concept of the *amicus curiae* as a mechanism for participating in, and shaping the course of, human rights adjudication before the European Court of Human Rights and the Inter-American Court of Human Rights.”¹³⁰ The Inter-American Commission of Human Rights historically considered issues relating to forced disappearances, extra-judicial executions and torture, and, more recently, has been confronted with issues of public interest significance, including those relating to violations of due process and delays in judicial proceedings.¹³¹ In these contexts, “[a]micus briefs have . . . provided comparative law analysis and practical information that the Court otherwise would have been unable to ac-

130. Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons From the European and Inter-American Courts of Human Rights*, 8 M.S.U. J. INT'L L. 377, 384 (1999).

131. See Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 202 (2004).

quire.”¹³²

The European Court of Human Rights has accepted *amicus* submissions in cases involving fair trial, freedom of information, privacy, and arbitrary detention by individuals, professional organizations, human rights NGOs, and governments.¹³³ One survey indicated that in 1994, the court found violations in seventy-five percent of the cases in which *amicus* briefs were filed; absent *amicus* participation, violations reportedly were found in only fifty percent of the cases.¹³⁴ The court has discretion to invite any High Contracting Party who is not a party to the proceedings or any person other than the applicant claiming to be a victim of a violation to submit written comments or participate in hearings.¹³⁵

Abdelsalam A. Radwan Alfog-hi Mohamed pointed out the impact of an *amicus* brief submitted by Amnesty International among several examples of the influence of such briefs on the adjudication of human rights.¹³⁶ The brief was excerpted and adopted in the court’s ruling in *Soering v. United Kingdom*, which concerned British responsibility for the extradition of a defendant accused with a capital offense in the United States.¹³⁷

The Inter-American Court of Human Rights has relied on *amicus* filings, even occasionally exercising its discretion to solicit submissions by interested groups and allowing oral argument by such groups.¹³⁸ The European Court of Justice uses a system of Advocates General, who represent the public interest.¹³⁹ In one case concerning the supremacy of Community law, the Advocate General appeared as *amicus curiae* before the Court.¹⁴⁰ Mohamed noted that “[t]he practice of the [European] Court [of Justice] in relation to *amicus* intervention has been so exten-

132. Mohamed, *supra* note 130, at 389.

133. *See id.* at 385.

134. *See* Dinah Shelton, *Non-Governmental Organizations and Judicial Proceedings*, 88 *AM. J. INT’L L.* 611, 637 (1994).

135. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, E.T.S. No. 155, art. 35(1).

136. *See* Mohamed, *supra* note 130, at 386.

137. [1989] 11 E.H.R.R. 439, [1989] E.C.H.R. 14038/88.

138. *See* Mohamed, *supra* note 130, at 391.

139. *See* Shelton, *supra* note 134, at 629.

140. *See id.* at 629 & nn.108-09 (citing *Costa v. Enel*, Case 6/64, [1964] E.C.R. 1143, [1964] C.M.L.R. 435).

sive that on some occasions the Court has exercised its discretion and called upon interested groups to present their views and, more importantly, to be heard orally by the Court.”¹⁴¹

Professor Dinah Shelton noted that NGOs are playing an increasingly important role in international litigation, including through the submission of *amicus* briefs. She concluded, “[n]ational and regional human rights tribunals have shown the usefulness of *amicus* briefs in reaching well-reasoned and accurate opinions. Such briefs have provided information to the courts beyond what the parties have been willing or able to submit. They also have aided in the resolution of new or technical issues and provided an alternative viewpoint where there is no true adversarial position between the petitioner and the respondent.”¹⁴²

Amicus briefs submitted in the context of international disputes also offer an opportunity to address matters of policy rather than more pointedly “assessing the merits of the specific dispute,”¹⁴³ which is where the parties typically direct their focus. *Amici* who appeared in a U.S. Supreme Court case concerning the international arbitration of statutory claims, for instance, emphasized “policy justifications for reaching alternate potential outcomes.”¹⁴⁴

B. *Pro Bono Representation of Amici*

It has been observed that “[d]irect lawyer *pro bono* service ‘remains a vital component of any plan for legal access.’”¹⁴⁵ Among the most obvious benefits of *pro bono* lawyering in public interest litigation is the saving of legal fees. Other benefits include “help[ing to] lend prestige and weight to a case or a cause. . . . mak[ing] a case more politically palatable,” and providing substantive experience.¹⁴⁶ Professor Martha Davis cites as

141. Mohamed, *supra* note 130, at 391.

142. See Shelton, *supra* note 134, at 611, 640.

143. Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 938 (2003).

144. *Id.*

145. Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U.L.Q. 317, 330 (2001) (quoting Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 73 FLA. B.J., Apr. 1999, at 19).

146. Martha F. Davis, *Historical Perspectives on Pro Bono Lawyering: Our Better Half: A*

an example the request by the Center on Social Welfare Policy and Law (subsequently known as the Welfare Law Center) to Archibald Cox to handle the re-argument in the Supreme Court in *Shapiro v. Thompson*,¹⁴⁷ a case that considered the right of welfare recipients to travel.¹⁴⁸ After briefing by Legal Services lawyers who were familiar with the case, Davis notes that Cox, a former U.S. Solicitor General, “was able to go into the Court and take command of the argument in a way that would be very hard for a Legal Services lawyer to do. Many considered Cox’s handling of Shapiro to be pivotal in the Court’s decision to overturn waiting period requirements in [S]tate welfare programs.”¹⁴⁹ *Pro bono* representation of *amici* has benefits to the administration of justice analogous to those of *pro bono* representation of litigants.

Christina M. Cerna, of the Organization of American States’ Secretariat for the Inter-American Commission on Human Rights, recommended that law schools incorporate course curricula relating to the Inter-American system for the protection of human rights.¹⁵⁰ In addition, schools could create a legal aid clinic to assist petitioners to pursue their rights before the Inter-American Commission on Human Rights.¹⁵¹ Such academic training and clinical inculcation also could help spur attention to multi-national human rights violations and inspire interest and expertise in *pro bono* participation as *amicus* counsel.

Pro bono representation of not-for-profit or indigent *amici* in the international arena may be accommodated fairly easily, notwithstanding constraints on time and resources that might otherwise inhibit acceptance of *pro bono* cases. The *amicus* counsel typically can research applicable law and write the brief as his daily schedule permits, within applicable filing deadlines. Because necessary resources generally involve computerized legal databases and word processing functionality to which many lawyers already have access, the costs relating to such representations are manageable (at least when extensive empirical investi-

Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation, 9 AM. U.J. GENDER SOC. POL’Y & L. 119, 120-21 (2001).

147. 394 U.S. 618 (1969).

148. See Davis, *supra* note 146, at 120 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

149. *Id.* at 120.

150. See Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT’L L. 195, 211 (2004).

151. *Id.*

gation is not contemplated). Unlike other types of *pro bono* work, expenses for expert witnesses, forensic testing, deposition costs, and the like, are absent. The filing itself may be coordinated through affiliation with a local lawyer in the non-U.S. jurisdiction, thereby securing advice about procedural requirements and local practice, facilitating relationships with non-U.S. counsel, and sensitizing another lawyer to public interest needs.

More significantly, such work can be very gratifying. As well, it appears to be efficacious. Review of the submission of *amicus* briefs in public interest litigation suggests “a significant impact.”¹⁵² One case in which the *amicus* party has been widely credited with shaping the U.S. Supreme Court’s opinion is *Mapp*.¹⁵³ There, the Supreme Court, addressing the exclusionary rule, premised its decision on the concluding point advanced by the ACLU and its fellow *amici*. Somewhat ironically, the public interest may have been better served had the appellant prevailed in her challenge to the State obscenity statute, especially because her conviction was predicated on the “knowing possession of four little pamphlets, a couple of photographs and a little pencil doodle . . . [which] the appellant — and a friend of hers — said were odds and ends belonging to a recent boarder, a man who had left suddenly for New York and had been detained there.”¹⁵⁴

The ACLU, appearing as *amicus*, argued in favor of the exclusionary rule ultimately adopted by the Court.¹⁵⁵ The ACLU thus offered the Court an alternative, highly significant rationale for its holding, which advanced the cause of criminal justice. Justice William O. Douglas, concurring in the decision, acknowledged the existence of “theoretical remedies” to the “‘shabby business’ of unlawful entry into a home,” including self-scrutiny and disciplinary action within the hierarchy of the police system and an action for trespass by the homeowner against the offending officer.¹⁵⁶ But such avenues are “mainly illusory” in light of the disincentives for a district attorney to prosecute himself or fellow associates for well-meaning violations of the search and

152. Shelton, *supra* note 134, at 619.

153. 367 U.S. 643, 673 nn.5-6 (Harlan, J., dissenting).

154. *Id.* at 668-69 (Douglas, J., concurring).

155. See *supra* notes 85-91 and accompanying text.

156. *Mapp*, 367 U.S. at 670 (Douglas, J., concurring) (quoting *Wolf v. Colorado*, 338 U.S. 25, 46 (1949)).

seizure clause and the “meager relief” available to a citizen who pursues an onerous trespass suit.¹⁵⁷ Justice Douglas concluded that “[w]ithout judicial action making the exclusionary rule applicable to the States, *Wolf v. Colorado* in practical effect reduced the guarantee against unreasonable searches and seizures to ‘a dead letter’”¹⁵⁸

It was the ACLU as *amicus* who helped persuade the Court to this conclusion, although the extent of the ACLU’s own emphasis of the point has been questioned. Justice John M. Harlan, dissenting in *Mapp*, noted that while “[t]he appellant’s brief did not urge the overruling of *Wolf* [; i]ndeed it did not even cite the case,” the brief of the American and Ohio Civil Liberties Unions, appearing as *amici*, “did in one short concluding paragraph of its argument ‘request’ the Court to re-examine and overrule *Wolf*, but without argumentation.”¹⁵⁹

Regardless of the extent to which the ACLU argued the exclusionary rule point, the Court’s opinion makes clear by its reference to the ACLU that the ACLU spurred consideration of the argument, which in turn helped shape the Court’s rationale for its holding. *Amicus* participation, including facilitating such participation on a *pro bono* basis, can be critical to ensuring that the interests of under-represented litigants are put before the court. This is especially important in light of the development of litigating *amici*, who have been created or supported to promote commercial interests,¹⁶⁰ and the extensive participation as *amicus* by the government,¹⁶¹ neither of which are necessarily as pre-disposed to emphasizing the interests of underprivileged factions.

C. *Utility of Amicus Participation*

Notwithstanding the potential impact by *amici* on judicial decisions, participation in litigation through the *amicus* device in U.S. and international court practice has both advantages and disadvantages. As an advocacy mechanism, it is generally less expensive than lobbying efforts or the mounting of an extensive publicity campaign. *Amicus* participation also is less costly than

157. *Id.*

158. *Id.* (quoting *Wolf*, 338 U.S. at 47 (Rutledge, J., dissenting)).

159. *Id.* at 673 n.5 (Harlan, J., dissenting).

160. See *supra* notes 19-20 and accompanying text.

161. See *supra* note 21 and accompanying text; see also *infra* notes 176-79.

the initiation of a separate lawsuit by the interested party. From a procedural standpoint, *amicus* participation by a non-governmental *amicus* is not cumbersome, generally requiring that the *amicus* elicit the consent of the parties or submit a short motion for leave.

Furthermore, although means for involvement in a lawsuit are available through various options, such as joining a class action, becoming a co-party through joinder, or moving to intervene, prerequisites for *amici* are more informal and flexible. They are considerably easier to fulfill than those pertaining, for instance, to a motion for intervention in the suit. One may intervene as of right only when a statute of the United States confers an unconditional right to intervene, or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."¹⁶² Generally, one may intervene with permission only when a statute of the United States confers a conditional right to intervene, or when an applicant's claim or defense and the main action have a question of law or fact in common.¹⁶³ By contrast, an *amicus* typically offers a general interest in the ongoing litigation.

Moreover, while *amici* are dissuaded from merely echoing a party's brief, *amici* can expound on nuances of arguments that were inartfully or cursorily asserted. An *amicus* who has been adversely affected as an individual by enforcement of a law that a corporate litigant is contesting may be able to poignantly present the law's ramifications through personal perspective and in eidetic detail. Nor are *amici* presumptively constrained to address solely the issues framed by the parties through their briefing. Through the device of Brandeis Briefs, *amici* may also proffer factual information that *dehors* the record in the case.¹⁶⁴

In addition, *amici* are not directly bound by the decision. Moreover, while principles of *stare decisis* may operate once an appellate or supreme court has issued its decision, *amici* likely

162. FED. R. CIV. P. 24(a).

163. See FED. R. CIV. P. 24(b).

164. See *supra* notes 98-125 and accompanying text.

are not prevented by *res judicata* or collateral estoppel from litigating identical issues in another case.

Unlike parties to the suit, however, *amici* at an intermediate appellate level do not automatically have another avenue to pursue. Chief Judge Kaye succinctly noted the unique position of *amici* in litigation: “[t]hey can contribute but they can’t complain.”¹⁶⁵

Nor do *amici* control the management or tactical considerations of the proceedings. Indeed, in one case, the U.S. Court of Appeals for the Sixth Circuit criticized the district court for, in effect, elevating the *amicus* to a party having “full litigating rights of a named party,” including the ability to file pleadings, conduct discovery, present and compel the attendance of witnesses, proffer evidence at hearings, and issue subpoenas.¹⁶⁶

Thus, a party supported by an *amicus* may assert a position that the *amicus* regards as strategically inappropriate. In addition, absent leave of the court, *amici* generally do not participate in oral argument, and therefore do not have an opportunity to address or clarify issues with which the court is grappling after the briefing has been completed.

The advantages of *pro bono* support for *amicus* participation may be amplified in the international arena, where “*amicus* status may be the only available avenue of participation in many international cases.”¹⁶⁷ The benefits of such participation also may be apparent in public interest litigation, where an indigent or poorly-resourced litigant lacks adequate representation and *amicus* support advocates for a more promising disposition. Moreover, when underprivileged litigants are pitted against well-resourced adversaries, the latter may have enlisted *amicus* support that, absent *pro bono* representation of opposing *amici*, would be left unchallenged or would be disproportionately represented in the proceedings.

165. Kaye, *supra* note 3, at 13.

166. *United States v. Michigan*, 940 F.2d 143, 162-64 (6th Cir. 1990) (describing trial court’s treatment of *amicus* as “mutant” and ruling that litigating *amicus* had no standing to exercise rights as named party or real party in interest), *cert. denied*, 513 U.S. 925 (1994).

167. Shelton, *supra* note 134, at 612.

VI. ISSUES RELATING TO THE SUBMISSION OF AMICUS FILINGS

Although the submission of briefs by *amici* can promote a greater understanding by the court of the potential impact and policy implications of its ruling, a number of issues have been raised about the advisability and utility of *amicus* participation. Generally, such concerns do not obviate the usefulness of *amicus* participation, but simply counsel against unfettered availability of the device irrespective of procedural and other safeguards. The issues surrounding the role of *amici curiae* are particularly worthy of attention in circumstances when the use of such briefing is encouraged in order to protect the rights of underprivileged parties.

A. *The Partisan Nature of Amicus Filings*

Amicus participation has been criticized on the ground that in recent times the *amicus* has been transmuted from its historical origins of “friend of the court” to “friend of the party.” Concern has been expressed that the *amicus* process has lost sight of the entity that it is designed to serve.

However, it is not realistic to presuppose a framework in which *amici* participate with inherent neutrality. They have entered the vortex of litigation in order to express a view and protect their interests. The attorney representing the *amicus* is ethically bound to advance the *amicus*' position as advocate for his client.¹⁶⁸

Nor is it necessary to the integrity of the process to aspire to such neutrality. The court serves as the impartial arbiter of the proceedings and is assisted in its function in two critical ways. First, the fundamental nature of an adversarial process contemplates and accommodates the presentation of point and counterpoint; distortions of law or fact by a party, whether appearing as a primary litigant or as an *amicus* party, may be challenged and rebutted by the opposing litigant or by another *amicus*. Second, the court is assisted by one or more clerks whose paramount professional focus rests with the court.

Amici curiae assist the court by expounding fair and impartial statements of relevant law and facts, so that the court is well

168. See *supra* notes 44-45 and accompanying text.

positioned to appreciate competing considerations. Because advocacy in the context of litigation regularly positions the argument, within ethical constraints, in the most favorable and persuasive light for the party asserting it, it is helpful to promote the acceptance of *amicus* filings so that additional *amici* are more likely to present alternative viewpoints and rebut misguided arguments.

In some situations, dueling *amici* may be absent from the case or there otherwise may be potential for distortion of a position because of a preponderance of more interested, more motivated, or better-resourced *amici* on one side of the equation. In those circumstances, the judiciary should be vigilant to search for distortion. U.S. Supreme Court Justice Antonin Scalia observed that even though “[t]here is no self-interested organization out there devoted to pursuit of the truth in the federal courts[, t]he expectation is . . . that th[e] Court will have that interest prominently — indeed, primarily — in mind.”¹⁶⁹ Sometimes courts invite prospective *amici* to participate. In addition, the court could entertain a motion by the putatively disadvantaged litigant to extend his page limitations to allow increased opportunity for rebuttal of more conspicuously advanced positions.

B. *Potential Distortion of Competing Interests*

Militating against the receptivity by courts of *amicus* submissions is “a legitimate institutional concern about opening the floodgates to participation by every individual and association interested in its proceedings.”¹⁷⁰ From a practical standpoint, facilitating increased submission of *amici* filings through the formulation of court rules and judicially-established practice may have the unintended effect of escalating submissions by well-resourced, commercial or governmental parties, to the detriment of under-served persons and entities.

Twenty years ago, the U.S. government’s petitions to the U.S. Supreme Court for *certiorari* were estimated to have been

169. *Jaffee v. Redmond*, 518 U.S. 1, 35-36 (1996) (Scalia, J., dissenting).

170. *Shelton*, *supra* note 134, at 624. *Shelton* proposed that the International Court of Justice interpret the term “international organization,” which are those entities eligible to participate in *amicus* filings, to mean non-governmental organizations with consultative status at the United Nations. *See id.* at 625.

granted at an annual rate of nearly eighty percent, and in approximately eighty percent of those cases, the U.S. government's position on the merits was supported.¹⁷¹ Indeed, one of the three major duties of the U.S. Solicitor General is to present the U.S. government's views as *amicus curiae* in those cases of interest where the U.S. government is *not* a party.¹⁷² Unlike other prospective *amici*, the government need not secure the parties' consent or move for leave of court to submit an *amicus* brief.¹⁷³ Sometimes, the Court even suggests that the Solicitor General file an *amicus* brief, issuing "invitations which are treated like orders."¹⁷⁴

Theoretically, the U.S. government is allowed enhanced access to the Court because it is perceived as representing the public interest and has greater means of acquiring "expertise and data on an array of social interests to aid courts in the decision-making process."¹⁷⁵ Nevertheless, "although purporting to act in the public interest, the Solicitor General has, at times, argued for positions that were more in line with the presidential administration's policies and supported less by Supreme Court precedent."¹⁷⁶

Commercial parties, industry groups, and other well-resourced persons or entities typically have superior access to legal representation. Not only does this affect the frequency with which *amicus* briefs may be filed on their behalf, but it also may affect the quality of such submissions. One commentator noted that "[t]he Court's inability to give exhaustive consideration to each petition for review encourages it to use authorship as a 'quality cue.'"¹⁷⁷ Another opined that "[t]here are certain groups and individuals the court pays particular attention to because they have built up a certain credibility with the court over

171. See 1984 ATT'Y GEN. ANN. REP. 5.

172. See General Functions of the Office of the Solicitor General, 28 C.F.R. § 0.20(c) (1989). Other responsibilities include presenting or overseeing the government's arguments when it is a party before the Supreme Court and deciding when the government should seek review by the Supreme Court after it has been defeated in an appellate court. See 28 C.F.R. § 0.20(a)-(b).

173. See *supra* note 24 and accompanying text.

174. James L. Cooper, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 680 (1990).

175. Sorenson, *supra* note 38, at 1234.

176. *Id.* at 1235.

177. Cooper, *supra* note 174, at 684 (footnote omitted).

the years.”¹⁷⁸ Thus, for example, “[r]epeat players such as the Solicitor General are especially likely to emerge favorably from such a process.”¹⁷⁹ This heightens the need for underprivileged litigants to receive competent assistance.

Interested groups may orchestrate the submission of a high volume of *amicus* briefs in an apparent effort “to generate the impression of powerful interest group support for the outcome desired.”¹⁸⁰ In *Webster v. Reprod. Health Servs.*, for instance, the plurality acknowledged that while a woman’s interest in having an abortion is a form of liberty protected by the due process clause, States may regulate abortion procedures in ways that permissibly furthers the State’s interest in protecting potential human life.¹⁸¹ Anti-abortion advocates filed forty-six briefs; pro-choice groups submitted thirty-two. The appellees’ *amicus* briefs

represent[ed] 331 organizations and thousands of individuals, the collective scholarship of over 120 authors, [which] produced a unique and convincing defense of *Roe [v. Wade]* that fully explores the ramifications of removing a fundamental constitutional right from a generation of women who have grown to depend on and exercise that right some 1.6 million times each year. The organizing efforts of activists throughout the country that were successful in convincing so many organizations and individuals to participate in the case in such a short period of time should be commended.¹⁸²

But other commentators opined that:

At least on the pro-life side, it appears that there was a deliberate strategy among pro-life groups to try to create the impression, by filing as many briefs as possible, of widespread and intense opposition to *Roe v. Wade*. . . . [I]t is hard to imagine that thirty-two briefs were needed in order to lay out all the considerations to a reaffirmation of *Roe v. Wade*. At some level, the pro-choice forces appear also to have sought to generate the impression of powerful interest group support for the outcome desired. The net effect was that the two sides largely neutralized each other, at least in terms of trying to demonstrate greater public support for their respective po-

178. Marcia Coyle & Marianne Lavelle, *High Court Has 78 “Friends” in Abortion Case*, NAT’L L.J., Apr. 17, 1989, at 5 (quoting Professor Christine Kellet).

179. Cooper, *supra* note 174, at 684.

180. Kearney & Merrill, *supra* note 51, at 823.

181. See 492 U.S. 490, 519-20 (1989).

182. Kolbert, *supra* note 66, at 154-55.

sitions.¹⁸³

Another means of potential distortion may occur in jurisdictions in which judges are elected, such as Texas. One commentator expressed concern that “an interest group — albeit in an *amicus* brief — may dangle its support in front of the judge by communicating its concern regarding how the court will decide a particular issue.”¹⁸⁴

With rare exceptions,¹⁸⁵ however, *amici* typically are opposed by other *amici*. Thus, countervailing viewpoints are argued to the court. This practice highlights the importance of encouraging *pro bono* representation of not-for-profit groups, indigent litigants, and other under-served groups and persons to ensure that their viewpoints receive attention and are not overshadowed by *amici* who have more resources but are offering countervailing positions. Indeed, despite the criticism of the *amicus* process as tantamount to sanctioned lobbying, its utility has been recognized as a tool for protecting the underprivileged; recall the commentator who characterized the *amicus* party as the “vindicator of the politically powerless.”¹⁸⁶

C. Reciprocity of Submissions

In the event that non-U.S. courts are receptive to the submission of *amicus* briefs by U.S. citizens or U.S.-based parties, there likely will be an expectation of reciprocity by tribunals in the United States. Some U.S. courts already have accepted such submissions; one example is the recent filing of *amicus* briefs in *Atkins v. Virginia*,¹⁸⁷ in which the Supreme Court ruled that executing mentally retarded defendants constituted cruel and unusual punishment.¹⁸⁸ In determining the Eighth Amendment violation, the Court specifically noted the “national consensus”

183. Kearney & Merrill, *supra* note 51, at 823.

184. Sorenson, *supra* note 38, at 1248.

185. One such exception is *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Court considered whether statements made by a police officer to her therapist during counseling sessions after a fatal shooting were protected from compelled disclosure in a federal civil action brought by the family of the deceased. Fourteen briefs were submitted on behalf of the respondent, but none was submitted in support of the petitioner. The Court affirmed the appellate decision and held that the communications with the therapist were privileged under Rule 501 of the Federal Rules of Evidence. *See id.* at 18.

186. *See* Lowman, *supra* note 9 at 1245.

187. 536 U.S. 304 (2002).

188. *See id.*

against such executions, citing an *amicus* brief submitted by the European Union.¹⁸⁹ The *amicus* had pointed out that “[w]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”¹⁹⁰ Schweitzer pointed out that the case illustrates the utility of *amicus* submissions as a means of amplifying a point that received more cursory attention in a litigant’s submission, noting that while the European Union’s brief discussed the argument “at length, . . . Atkins’ brief made th[e] point in a mere sentence and footnote.”¹⁹¹

When the U.S. Supreme Court considered affirmative action issues in *Grutter v. Bollinger*, two concurring justices observed that a race-conscious program having “‘a logical end point’ . . . accords with the international understanding of the office of affirmative action.”¹⁹² For example,

The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.¹⁹³

Yet another example of such *amicus* filings was seen in connection with the proceedings involving detentions at Guantánamo Bay, Cuba. In the consolidated cases of *Rasul v. Bush* and *Al Odah v. United States*,¹⁹⁴ a bipartisan coalition of national and international NGOs filed an *amicus* brief in support of the petitioners.¹⁹⁵ They argued collectively that the federal

189. *Id.* at 316 & n.21.

190. *Id.* at 316 n.21.

191. Schweitzer, *supra* note 55, at 536.

192. 539 U.S. 306, 342 (Ginsburg, J., concurring) (citations omitted) (Justice Breyer joined in the concurrence).

193. *Id.*

194. See *Rasul v. Bush*, 126 S. Ct. 2686 (2004).

195. See Brief as *Amicus Curiae* Bipartisan Coalition of Nat’l and Internat’l Non-Governmental Organizations in Support of Petitioners, *Rasul v. Bush*, 126 S. Ct. 2686 (2004), Nos. 03-334, 03-343 (submitted Jan. 14, 2004). The coalition was comprised of the Lawyers’ Committee for Human Rights, Amnesty International, Human Rights Watch, the ACLU, the Anti-Defamation League, the Association of the Bar of the City of New York, the National Association of Criminal Defense Lawyers, the National Association of Social Workers Legal Defense Fund, the People for the American Way Foundation, the Rutherford Institute, Trial Lawyers for Public Justice, the American Jewish

courts have jurisdiction to hear the *habeas* claims of the petitioners, hundreds of people held by the United States at its military base in Guantánamo Bay.¹⁹⁶ The *amici* also offered multi-national legal perspectives about the confinements, arguing that Israeli, British, and international law all required review of the legality of the executive detentions.¹⁹⁷

Another *amicus* brief was submitted by Abdullah Al-Joaid, a Saudi Arabian citizen who is the brother of a Saudi national confined at Guantánamo Bay.¹⁹⁸ Yet another *amicus* brief was filed in support of the petitioners by 175 members of both Houses of Parliament of the United Kingdom,¹⁹⁹ and still another brief was filed by the Commonwealth Lawyers Association.²⁰⁰

Developments in online and other forms of communication and increased travel (including more opportunities for international dialogue among judges) have contributed to the globalization of consideration of legal process and the evolution of statutes and jurisprudence. Accordingly,

cross-pollination and dialogue between jurisdictions is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being “givers” of law while others are “receivers.”²⁰¹

U.S. courts may find it useful to accept *amicus* briefs from non-U.S. nationals for the same reasons that filings by U.S. *amici*

Committee, Islamic Circle of North America, National Council of the Churches of Christ in the U.S.A., and the Union for Reform Judaism. *See id.* at 1-5.

196. *See id.* at 8, 11.

197. *See id.* at 23.

198. *See* Brief as *Amicus Curiae* Abdullah Al Joaid in Support of Petitioners at 1, Rasul v. Bush, 124 S. Ct. 2686 (2004), Nos. 03-334, 03-343 (submitted Jan. 14, 2004).

199. *See* Brief as *Amicus Curiae* of 175 Members of Both Houses of Parliament of the United Kingdom, Rasul v. Bush, 124 S. Ct. 2686 (2004), Nos. 03-334, 03-343 (submitted Jan. 14, 2004).

200. *See* Brief for the Commonwealth Lawyers Association as *Amicus Curiae* in Support of the Petitioners, Rasul v. Bush, 124 S. Ct. 2686 (2004), Nos. 03-334, 03-343 (submitted Jan. 14, 2004). Signatories to the brief are members of the English bar. *See id.* at 1.

201. Elizabeth M. Schneider, *Ann Hirsch Lecture: Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689, 693 (2004) (quoting Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998) (emphasis omitted)).

help non-U.S. and multi-national courts. Such briefs enhance the range of perspectives brought to the court, present diverse cultural and empirical experiences, and provide substantive expertise on matters of non-U.S. law.

Consideration by the U.S. Supreme Court of matters of non-U.S. law and norms has not been without its critics. In *Lawrence v. Texas*, the Supreme Court struck down state criminal sodomy laws.²⁰² The majority opinion took into account a case decided by the European Court of Human Rights.²⁰³ But Justice Antonin Scalia lamented in dissent that

[c]onstitutional entitlements do not spring . . . into existence, as the Court seems to believe, because [*non-U.S. Nations*] decriminalize conduct. . . . The Court's discussion of . . . [non-U.S.] views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose [non-U.S.] moods, fads, or fashions on Americans."²⁰⁴

But Justice Sandra Day O'Connor noted that while the Supreme Court generally has been reluctant "to look to international or [non-U.S.] law in interpreting our own Constitution and related statutes," the Court has "looked to international-law notions of sovereignty when shaping our federalism jurisprudence and to international-law norms in boundary disputes between [U.S. States]."²⁰⁵ She indicated that she anticipated increasing attention to international legal standards in U.S. contexts; because issues of "international and [non-U.S.] law are being raised in our courts more often and in more areas than our courts have the knowledge and experiences to address," she emphasized the importance of "expanded knowledge in this field."²⁰⁶ U.S. Supreme Court Justice O'Connor characterized the relevance of conclusions reached by other Nations and the international community as "transjudicialism."²⁰⁷ Such norma-

202. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

203. See *id.*

204. *Id.* (Scalia, J., dissenting) (citation omitted) (emphasis in original).

205. Sandra Day O'Connor, *Justice O'Connor Predicts Greater Domestic Reliance on Norms of International Law and Praises Institute's Increasing Transnational Focus*, 24(4) A.L.I. REPORTER, Summer 2002, available at http://www.ali.org/ali/R2404_4_Norms.htm (last visited June 21, 2004).

206. *Id.*

207. *Id.*

tive principles, she noted, "should at times constitute persuasive authority in [U.S.] court[s]," notwithstanding that such laws are rarely binding on U.S. tribunals.²⁰⁸

One way consideration of non-U.S. law by the U.S. Supreme Court has been accomplished is through the *amicus* device. In the context of international human rights issues in particular, an *amicus* brief was submitted by a group of international legal scholars and human rights specialists in support of a federal civil rights action pursuant to the Violence Against Women Act.²⁰⁹ The *amicus* emphasized the International Covenant on Civil and Political Rights, which had been ratified by the United States, and contended that the United States was obligated to provide remedies for victims of gender-based violence.²¹⁰ Likewise, in *Nguyen v. INS*, Equality Now submitted an *amicus* brief in connection with the constitutionality of a federal law that imposed disparate requirements on U.S. male and female citizens who sought to confer citizenship on children born outside the United States.²¹¹ As Professor Schneider observed, however, "growing invocation of transnational sources by lawyers and consideration by judges does not solve the vexing questions of how these laws should be integrated into our complex system of federalism and what weight they should have, if considered."²¹²

D. Principles of Comity and Respect for Cultural Diversity

Decisions issued by non-U.S. courts that are repugnant to the U.S. system of justice nevertheless may be legally countenanced in the Nation in which they were issued. Conversely, efforts to enforce certain decisions by non-U.S. tribunals in the United States may be challenged on constitutional grounds. One notable example is the resistance non-U.S. litigants have encountered in connection with efforts to enforce libel verdicts secured in courts that do not have legal standards commensurate with U.S. First Amendment jurisprudence. Thus, in *Matusevitch v. Telnikoff*, the court granted summary judgment to a writer

208. *Id.*

209. See *Brzonkala v. Morrison*, 529 U.S. 598 (2000) (cited by Schneider, *supra* note 201, at 709).

210. See Schneider, *supra* note 201, at 709-10 & n.122.

211. See 533 U.S. 53 (2001).

212. Schneider, *supra* note 201, at 700.

against whom a British court had issued a libel judgment.²¹³ The U.S. court determined that the plaintiff, a public figure, was required to obtain recognition of the judgment in order to enforce it.²¹⁴ But the court also determined that under the Uniform Foreign-Money Judgments Recognition Act of 1962,²¹⁵ the plaintiff could not do so because British libel standards were repugnant to the public policies of the United States and the State of Maryland.²¹⁶

In another case, however, Dow Jones & Company (“Dow Jones”), a U.S. corporation, failed to secure a declaratory judgment in a New York federal court that an article it had published was not defamatory as a matter of U.S. law.²¹⁷ Specifically, Dow Jones had argued that an action for defamation based on the article would be summarily dismissed under the federal and State constitutional law of any U.S. jurisdiction because the publication comprised only non-actionable expression of opinion based on true statements and contained no facts capable of being proved false.²¹⁸ However, the U.S. Court of Appeals for the Second Circuit affirmed the trial court’s holding that the action was non-justiciable because it was not ripe for adjudication.²¹⁹ The court below declined to exercise jurisdiction to hear the case under the Declaratory Judgment Act on the grounds that no useful purpose would be served by a declaration and that it

213. See 877 F. Supp. 1 (D.D.C. 1995); see also *Bachchan v. India Abroad Publ’ns, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

214. See *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 2 (D.D.C. 1995).

215. MD. CODE ANN., Cts. & Jud. Proc. § 10-704(b)(2) (2004).

216. See *Matusevitch*, 877 F. Supp. at 3-4.

217. See *Dow Jones & Co., Inc. v. Harrods, Ltd.*, 346 F.3d 357 (2d Cir. 2003) [hereinafter *Dow Jones II*].

218. See *Dow Jones & Co., Inc. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 402 (S.D.N.Y. 2002) [hereinafter *Dow Jones I*]. For example, Dow Jones asserted that under British law: (1) the defendant bears the burden of proving the truth of defamatory statements; (2) defamation is a strict liability tort and the plaintiff need not prove that the defendant acted with fault, in contrast with the “actual malice” standard that applies to libel claims asserted by public figures and public officials under American First Amendment principles; (3) protection for expression of opinion is severely limited; (4) only limited protection is available for statements about public officials or public figures; (5) aggravated damages are permitted if certain defenses are asserted, such as when a defendant seeks to justify the publication; (6) the plaintiff’s attorneys fees and costs must be paid by the unsuccessful defendant; and (7) multiple, repetitive suits are allowed for each individual publication, for example, for different media or various places of publication. See *id.* at 403 n.18.

219. See *Dow Jones II*, 346 F.3d at 359-60.

would contravene principles of international comity.²²⁰

Concerns about transgressing principles of comity or trepidation about subverting or usurping diplomatic and treaty-making efforts through the *amicus* device in non-U.S. courts are largely absent when the United States is a signatory to the applicable treaty that established the court because jurisdictional and standing issues effectively have been accommodated. In some situations, as is the case, for example, with the Inter-American Commission on Human Rights, alleged victims must have exhausted U.S. remedies at the national level as a prerequisite for consideration of their petitions.²²¹ As one of the Commission's lawyers observed, "This requirement is crucial and underlines the general principle of international law that the international system plays a subsidiary role and is triggered by the failure of national law to function properly."²²² Therefore, the institutional structure of the proceeding presupposes prior involvement by participants in courts other than the adjudicating multinational tribunal to which the *amicus* briefs are submitted. The offer of positional statements by U.S. parties is legitimized and receptivity to non-U.S.-based *amicus* briefs likely will fare relatively well in such multi-national courts.

When the matter is pending in a local court, a brief submitted by a U.S. citizen or entity sometimes can still be very useful, most notably by offering another perspective or detailing experience with the analysis of a similar or related issue. This role is especially important as to a number of matters involving the public interest. Even when the arguments advanced by *amici* are not dispositive, they can be instructive.

The solicitude paid by the U.S. legal system to freedom of speech, for instance, furthers a free press, helps deter and expose governmental corruption and other malfeasance, and perpetuates robust and open dialogue about political, scientific, literary, artistic, and other matters of inherent importance to the populace. Libel law has developed jurisprudentially, with a significant constitutionally-rooted gloss, and thus provides a framework for the resolution of competing interests in the free flow of information and protection of reputation. An *amicus* brief sub-

220. See *Dow Jones I*, 237 F. Supp. 2d at 439, 443-46.

221. See Cerna, *supra* note 131, at 200.

222. *Id.*

mitted by a member of a U.S. press entity to a non-U.S. court adjudicating efforts to censor or impose sanctions on journalists who reported about political issues could offer significant guidance to the court. Current U.S. law on the public official/public figure and private figure dichotomy, which was addressed most prominently in cases that spanned a decade before the U.S. Supreme Court, could be succinctly summarized to a non-U.S. tribunal.²²³ Legislation enacted by the U.S. Congress to address efforts to hold Internet speech providers accountable for online defamatory speech created by third parties,²²⁴ and the ensuing court decisions that applied the statute,²²⁵ likewise could assist non-U.S. judges as they grapple with the appropriate allocation of liability.

Nevertheless, in some cultures and under certain circumstances, U.S.-based *amici* risk offending a court if they submit unsolicited briefs grounded in U.S. policy or law and presenting arguments as superior to locally-evolved precedent or norms. Although *amici* in U.S. courts generally need not satisfy traditional notions of standing otherwise imposed on the original litigants or intervenors, such *amici* typically demonstrate some basis for participating in the pending litigation that suggests an interest in the outcome of the determination by the court. These interests attenuate when *amici* appear before a court that lacks jurisdiction to enforce a ruling against the *amici* who seek to opine about the matter. It is especially important, therefore, that such *amici*, while zealously advocating fundamental principles of justice, remain sensitive to the normative principles governing the adjudicating tribunal.

E. Transparency of Interests

Critical to the fair administration of justice — as well as to the nearly equally important objective of the appearance of the fair administration of justice — is transparency of the nature of interested parties. The U.S. Supreme Court has appropriately

223. See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

224. See Communications Decency Act, 47 U.S.C. § 230 (2000).

225. See, e.g., *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1999), *cert. denied*, 524 U.S. 937 (1998). Cf. *Lunney v. Prodigy Services Co.*, 723 N.E.2d 539 (N.Y. 1999) (considering similar issues without resorting to application of the Communications Decency Act), *cert. denied*, 529 U.S. 1098 (2000).

established requirements for disclosure about the nature and sponsorship of the *amici* parties and the influence of the primary litigant on the brief submitted.²²⁶ Although latent biases still may exist, as when an industry trade group is anonymously funded by a litigant, disclosure rules such as those implemented by the Court deter support for a party that cannot be recognized and taken into account by the tribunal.

Even when non-U.S. or multi-national court procedures do not require such disclosures by *amici*, a practice of transparency should be adopted. Those who represent important interests of others can help legitimize their position by identifying the basis on which they proceed in the court. In addition, disclosures by *amici* enhance their credibility before the court, both by openly identifying interests and potential biases and by negating any biases that a court might erroneously or presumptively infer.

F. *The Proffer of Scientific and Other Technical Data That Dehors the Record*

The submission of empirically-based social science and other data that *dehors* the record has been the subject of controversy.²²⁷ The appellate process is designed to contain factual matters that the higher court can review, focusing its attention on factual evidence that has been adequately tested through the adversarial process in the court(s) below. The presentation of scientific or other technical studies by an *amicus* has been questioned as circumventing this process.

Nevertheless, it is important to recognize that even in a Brandeis Brief, the *amicus* typically is not offering corroborative or rebuttal evidence directly probative of the parties' dispute, but rather is presenting social science or other information designed to inform the court's decision generally. Thus, for example, in *Roe v. Wade*, the Supreme Court noted that

Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or

226. See *supra* notes 35-37 and accompanying text.

227. See *supra* notes 98-125 and accompanying text.

lower than the rates for normal childbirth."²²⁸

The *amici*'s data was neither designed nor considered to test the plaintiff's specific allegations that she "could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions."²²⁹

Moreover, it is clear that judges routinely take into account extra-judicial matters when they formulate their opinions. This is the case with respect to the development of various legal doctrines. By illustration, much of U.S. common law privacy jurisprudence derives from a law review article written by Samuel Warren and Louis Brandeis published in 1890²³⁰ and a taxonomy of causes of action fashioned by William Prosser.²³¹ In 1977, the *Restatement (Second) of Torts* outlined the same cluster of invasions of privacy rights.²³² All of these sources have been relied on extensively by courts adjudicating privacy disputes.

Courts also may review factual data obtained in ways other than Brandeis Briefs. In *Mapp*, the Supreme Court not only considered briefing and argument submitted by *amicus* ACLU,²³³ but the Court also took into account the remarks of Herbert Hoover, then Director of the Federal Bureau of Investigation. Although the federal courts had operated under the exclusionary rule for almost a century before considering a similar issue in *Elkins v. United States*,²³⁴ "it ha[d] not been suggested either that the Federal Bureau of Investigation ha[d] thereby been rendered ineffective, or that the administration of criminal justice in the federal courts ha[d] thereby been disrupted."²³⁵ In considering the empirical impact of its prior rulings and those of the state courts, the *Mapp* Court noted that "[t]here is no war between the Constitution and common sense."²³⁶

Indeed, judges often are influenced by a wide range of scholarly and other writings, even when they do not necessarily

228. *Roe v. Wade*, 410 U.S. 113, 149 (footnote omitted).

229. *Id.* at 120.

230. See Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

231. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

232. See RESTATEMENT (SECOND) OF TORTS § 652.

233. See *supra* notes 85-91 and accompanying text.

234. 364 U.S. 206 (1960).

235. *Mapp v. Ohio*, 367 U.S. 643, 660 & n.10 (1961) (citing Herbert Hoover, Director of the Federal Bureau of Investigation).

236. *Mapp*, 367 U.S. at 657.

attribute the reasoning or phrasing to another. Among the most well-known of Justice Harry Blackmun's pronouncements is his endorsement of affirmative action in *Regents of the Univ. of Cal. v. Bakke* that "[i]n order to get beyond racism, we must first take account of race. There is no other way."²³⁷ *The New York Times* reporter Linda Greenhouse spent several weeks reviewing Justice Blackmun's collected papers in the Library of Congress and discovered in his file on the *Bakke* case an article on affirmative action. The article, which had been published in the November 1977 issue of the *Atlantic Monthly*, was marked by Justice Blackmun as having been read on May 6, 1978, "in other words, as he was preparing the opinion that was issued the next month"²³⁸ The article's author, McGeorge Bundy, former National Security Advisor and Dean of Harvard, had written: "To get past racism, we must take account of race. There is no other present way."²³⁹ Justice Blackmun's opinion did not attribute his apparent use of the quotation, however.

Factual information similarly comes to the Court's attention independently of the parties' record on appeal. As of the writing of this Article, the Supreme Court has been considering the question of whether U.S. President George W. Bush's administration improperly declared José Padilla an "enemy combatant" and wrongfully detained him. Weeks after briefing was completed and oral argument concluded in the case, the Department of Justice declassified and released documents that reportedly supported the government's position that Padilla had "plot[ted] to detonate a radiological 'dirty bomb' or blow up an apartment building"²⁴⁰ Although "the new material is not expected to be entered into the record,"²⁴¹ it might nonetheless "have 'an inevitable spillover in unduly influencing the high court just as it nears a decision in the case,'" noted counsel for *amicus* the National Association of Criminal Defense Lawyers.²⁴² Access to press reports and even to the newly-released material

237. 438 U.S. 265, 407 (1978).

238. Linda Greenhouse, *Correspondence/The Blackmun Papers; At a Shrine of American Documents, Pathos, Poetry and Blackmun's 'Rosebud,'* N.Y. TIMES, Mar. 7, 2004, § 4, at 7.

239. *Id.* (quoting McGeorge Bundy, ATL. MONTHLY, NOV. 1977, available at <http://www.etsu.edu/cas/history/docs/bundy.htm> (last visited Oct. 3, 2004)).

240. Eric Lichtblau, *U.S. Spells Out Dangers Posed By Plot Suspect*, N.Y. TIMES, June 2, 2004, at A1.

241. *Id.*

242. *Id.* (quoting Donald G. Rehkopf, Jr.).

itself might influence the Court — or fail to persuade it — in ways neither Padilla nor the *amici* can contest or possibly even know.

Is it conceivable that the U.S. Supreme Court is unmindful of the abuses at the Abu Ghraib, Iraq prison that were reported by the press as the Court deliberates about the legality of executive detentions at Guantánamo Bay, Cuba in *Rasul v. Bush* and *Al Odah v. United States*? Indeed, in an open letter to U.S. President George Bush, Britons Shafiq Rasul and Asif Iqbal, who had been held at Guantánamo Bay, accused U.S. military guards of subjecting them to abuses similar to those perpetrated in the Abu Ghraib prison.²⁴³ In establishing standards for military detention of prisoners in the pending case, it seems highly likely that the justices will recall the vivid images reported in the press of the abuses at Abu Ghraib.

Likewise, a memorandum prepared for U.S. Secretary of Defense Donald Rumsfeld in March 2003 concluded that President Bush was not bound by either an international treaty that proscribes torture or by federal anti-torture prohibitions.²⁴⁴ When the memorandum was made public in June 2004, *The New York Times* noted that the lawyers who drafted the memorandum contended that any torture committed at Guantánamo Bay would not violate the federal statute “because the base was under [U.S.] legal jurisdiction and the statute concerns only torture committed overseas.”²⁴⁵ The newspaper observed, “[t]hat view is in direct conflict with the position the administration has taken in the Supreme Court, where it has argued that prisoners at Guantánamo Bay are not entitled to constitutional protections because the base is outside [U.S.] jurisdiction.”²⁴⁶ While public attention to these issues is critical, it appears that the Court’s consideration of these issues may be grounded in sources other than those submitted to the Court. Judges naturally bring their experience and recollections to the matters they adjudicate and it is not necessarily inappropriate for courts to be influenced by extra-judicial matters simply because they are outside the record.

243. See, e.g., Suzanne Goldenberg, et al., *Guantánamo Abuse Same As Abu Ghraib, Say Britons*, *GUARDIAN*, May 14, 2004, at 1.

244. See, e.g., Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn’t Bind Bush*, *N.Y. TIMES*, June 8, 2004, at A1.

245. *Id.*

246. *Id.*

The *amicus* process, though, has laudable procedural, ethical, and disclosure requirements that sometimes may be lacking in certain press reports and other sources.

Amicus filings offer a mechanism to influence the court in a fashion open to scrutiny by the primary litigants and the public at large. Judges are positioned to premise their decisions on empirically-founded or statistically significant data, rather than having to resort to potentially distorted personal impression or mere recollection. Sources of persuasion are thereby better known to the public and to those interested in the outcome of the proceeding and are subject to challenge or endorsement. *Amicus* briefs are submitted through a prism of procedural requirements that demand (or should demand) revelation of matters pertaining to possible biases, such as sources of funding for the briefs. Participation by *amici* who support the public interest is especially critical to ensuring that such viewpoints receive adequate attention. Furthermore, the *amicus* device in such circumstances offers a critical means by which positions that disserve the under-represented public can be viably contested.

When such participation takes the form of a Brandeis Brief, disclosure requirements should be more extensive. The *amicus* litigant should be expected to explain the methodology utilized to obtain the proffered data and disclose whether the findings put forth are statistically significant. Directly conflicting studies known to the *amicus* should be identified, just as an *amicus* party would be expected to disclose in connection with a legal argument that the decision upon which he relies has been reversed by an appellate court. Moreover, disclosure requirements pertaining to funding should extend beyond the specification of persons or entities who financially supported the submission of the brief and identify as well those who sponsored the underlying research. Such transparency would help enable assessment by opposing litigants, including opposing *amici* and the judicial arbiter, of the credibility, reliability, and relevance of the data proffered.

Pro bono support of public interest *amici* seeking Brandeis Brief-type participation is especially important to the fair administration of justice. Unlike an *amicus* filing premised exclusively on matters of legal interpretation, a Brandeis Brief may necessitate research investigation. Securing factual support for a position often may be more costly and more cumbersome than un-

dertaking legal research, thereby requiring a greater commitment of financial and other resources.

The *amicus* device allows a legitimate and appropriate way for persons or groups with a lower threshold level of interest to meaningfully participate in the litigants' dialogue with the court. In contrast to legislative endeavors, direct lobbying efforts or other direct communications with judges in order to influence the outcome of litigation typically are not available options. *Amicus* briefs can be submitted by diverse factions in a controversy in order to cogently express viewpoints in connection with the court's deliberations about a case.

VII. A MODEL FOR PRO BONO AMICUS PARTICIPATION IN NON-U.S. AND MULTI-NATIONAL TRIBUNALS

The submission of *amicus curiae* briefs should be encouraged by non-U.S., multi-national, and U.S. courts. The primary reason that courts should be receptive to such filings is that they can help advance the judiciary's ultimate objective of issuing principled, reasoned decisions that are premised on adequate consideration of competing interests. Additional briefing helps ensure that more perspectives are considered, that judicial pronouncements do not have unintended consequences, and that court rulings fairly contemplate (or pointedly exempt) application to persons or groups who should not be covered by the decisions.

U.S. parties may perhaps be in a position to offer a perspective from experience, perhaps because U.S. jurisprudence may have considered the issue or because a public interest group or other organization may have delivered about the underlying policies or conducted relevant empirical research. Courts, including non-U.S. and multi-national tribunals, regularly grapple with the fashioning of legal precepts that have expansive, and thus predictive, application. Justice Harlan admonished that "it is the task of the law to form and project, as well as mirror and reflect[; thus] we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society."²⁴⁷ Nearly a century ago, the U.S. Supreme Court commented, "Legislation, both statutory and constitu-

247. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

tional, is enacted . . . from an experience of evils [But] its general language should not . . . be necessarily confined to the form that evil had theretofore taken [A] principle to be vital must be capable of wider application than the mischief which gave it birth.”²⁴⁸

By adding to the scope and diversity of perspectives to which the court has access, *amici* assist the judiciary as it works to fashion more durable pronouncements because *amici* can sensitize judges to the interstitial application of nuanced phrasing of rulings that might otherwise escape notice. Robust speech, even when conflicting and cacophonous, enhances the “marketplace of ideas”²⁴⁹ from which the court can divine and craft principled analysis.

It should not be surprising that the highest volume of *amicus* filings are in cases involving profound matters of privacy and social policy, such as those considering end-of-life issues.²⁵⁰ A non-U.S. court that is called upon to adjudicate such issues without the benefit of *amicus* submissions presumably faces a more daunting task. As the New Jersey Supreme Court stated when it considered an issue of “transcendent importance, involving questions relating to the definition and existence of death,”²⁵¹ when such issues do arise, “[l]aw, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of.”²⁵² Diverse sources of perspective and experience help courts fashion decisions in a deliberative and well-founded manner.

These considerations are particularly important in the context of matters that affect the public interest and in cases that adjudicate the rights of under-represented persons or groups that otherwise might have their concerns or advocacy overshadowed by opposing litigants with better resources. Absent submissions by *amici* in support of their positions, courts might lose sight of arguments favoring underprivileged litigants or be inadequately directed to focus on competing considerations that af-

248. *Weems v. United States*, 217 U.S. 349, 373 (1910).

249. *See, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

250. *See supra* notes 122-24 and accompanying text.

251. *In re Quinlan*, 355 A.2d 647, 652 (N.J. 1976), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

252. *Id.* at 665.

fect them. In non-U.S. locales where public interest organizations have not been established or have not matured to the point of adequately serving these interests, the need for *pro bono* assistance by U.S. and other *amici* is even more acute.

Nevertheless, unfettered entitlement to file *amicus* briefs in the absence of procedural and other safeguards risks manipulation of the process to the detriment of the very litigants most deserving of protection and support. Accordingly, while *amicus* filings should be encouraged, both the approach and the requisite procedural requirements should be considered.

When participation by U.S. litigants is contemplated in multi-national tribunals, as when the United States is a signatory to a treaty conferring jurisdiction on U.S. citizens, concerns about participation by U.S.-based *amici* dissipate. In other circumstances, however, the U.S. *amicus* may want to participate in the process while evincing respect for the jurisdiction's law and culture.

One meaningful way that civil rights and other social justice causes can be furthered is through *pro bono* representation not just of litigants but also of *amici*. A useful model for advancing the interests of under-served persons and organizations in non-U.S. and multi-national courts can be found in an *amicus* brief that offers the U.S. view contextualized within an international perspective. This method may be especially valuable when the *amicus* is not aligned, in whole or in part, with either party.

This approach also comports with U.S. legal paradigms about the proffer of expert testimony to assist the court on matters relating to non-U.S. law. The Federal Rules of Civil Procedure specifically contemplate the admissibility of such expert testimony.²⁵³ Indeed, in determining a matter of non-U.S. law, a U.S. court may consider "any relevant material or source . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence."²⁵⁴ A federal court may apply non-U.S. law in this situation even when neither party so requests.²⁵⁵

A brief that explains U.S. jurisprudence and the policies un-

253. See FED. R. CIV. P. 44.1

254. *Id.*

255. See, e.g., *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

derlying due process rights for criminal defendants, for example, might well assist a non-U.S. or multi-national court assess the inherent fairness of the manner in which a defendant has been prosecuted. By offering an established analytical framework for the adjudication of the charges, the *amicus* may successfully furnish principles for adoption — albeit even with some modification — by the non-U.S. tribunal.

One notable recent illustration of this approach can be found in the case of *Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of “La Nación” Newspaper v. The Republic of Costa Rica*²⁵⁶ (“*La Nación* case”). There the Open Society Justice Initiative submitted an *amicus curiae* brief in support of the application by the Inter-American Commission on Human Rights to order Costa Rica to revoke the criminal defamation conviction of Mauricio Herrera Ulloa “and bring its criminal libel and insult laws in line with international standards.”²⁵⁷

The Open Society Justice Initiative *amicus* brief pointed out the requirements of Article Thirteen of the American Convention and the standards of the European Court of Human Rights, as well as relevant legal principles of Argentina, Australia, Germany, India, Japan, New Zealand, Pakistan, the Philippines, South Africa, and the United Kingdom.²⁵⁸

The Committee to Protect Journalists (“CPJ”) also submitted an *amicus curiae* brief to the Inter-American Court of Human Rights in support of the Costa Rican journalist, likewise objecting to his conviction of criminal defamation.²⁵⁹ Joining CPJ in the *amicus* effort were The Associated Press, Cable News Net-

256. Case No. 12.367, [2001] Inter-Am. C.H.R. Report No. 128/01.

257. Brief as *Amicus Curiae* of Open Society Justice Initiative in Support of the Inter-American Commission on Human Rights’ Application at 1 [hereinafter Justice Initiative Brief], *Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of “La Nación” Newspaper v. The Republic of Costa Rica*, Case No. 12.367 (Inter-American Court of Human Rights, submitted May 2004).

258. *See id.* at 7-30.

259. *See* Brief as *Amici Curiae* of the Associated Press, Cable News Network LP, LLLP, El Comercio, Committee to Protect Journalists, the Hearst Corporation, the Miami Herald Publishing Company, El Neuvo Día, La Prensa, the Reforma Group, Reuters Ltd, El Tiempo and Tribune Company in Support of Mauricio Herrera Ulloa and Fernan Vargas Rohrmoser, *Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of “La Nación” Newspaper v. The Republic of Costa Rica*, Case No. 12.367 (Inter-American Court of Human Rights, submitted Feb. 18, 2004), available at http://www.cpj.org/news/2004/Costa19feb04_AmicusBrief.pdf (last visited Nov. 2, 2004) [hereinafter CPJ Brief].

work LP, LLLP, *El Comercio*, *El Nuevo Día*, *El Tiempo*, The Hearst Corporation, *La Prensa*, The Miami Herald Publishing Company, The Reforma Group, Reuters Ltd, and the Tribune Company.²⁶⁰ These *amici*, represented on a *pro bono* basis by Debevoise & Plimpton LLP,²⁶¹ argued that Costa Rica's criminal conviction of the journalist violated international standards of defamation law.²⁶²

This approach also comports with Judge Posner's elucidation of one of the key purposes that an *amicus* serves when the *amicus* has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."²⁶³ The *amicus* briefs filed by the Open Society Justice Initiative and CPJ broadened the perspectives put before the Inter-American Court of Human Rights and enabled it to consider how liability for criminal libel is analyzed by several other legal systems. In July 2004, the court ordered Costa Rica to annul the conviction of the reporter, "emphasiz[ing] that public officials and public figures must be more open to criticism than private individuals . . . and [holding] that the Costa Rican trial court had wrongly forced the reporter to prove the truth of statements that originally appeared in another publication."²⁶⁴ *Amici* counsel characterized the former point as "a tenet that many Latin American legal systems have been slow to recognize,"²⁶⁵ a point

260. *See id.*

261. *See* Debevoise & Plimpton LLP, Departments, Pro Bono, available at <http://www.debevoise.com/practices/group.asp?groupid=6> (last visited Nov. 3, 2004) (describing its *pro bono* work "[c]ounseling and litigating for the Committee to Protect Journalists in support of its efforts to combat violations of press freedom worldwide," and noting that the firm "filed amicus briefs for CPJ in the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the courts of Croatia and Taiwan to challenge criminal libel prosecutions of journalists . . .").

262. *See* CPJ Brief, *supra* note 259, at 20-40.

263. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1063 (7th Cir. 1997) (citations omitted).

264. Erik Bierbauer & Pablo Valverde, *Inter-American Court Rules for Defendants in Two Criminal Defamation Cases: A Step Forward for the Press in Latin America*, MLRC MEDIALAWLETTER, Oct. 2004, at 41. The ruling effectively voided the sentence that had been imposed against the reporter in 1999 on the ground that the state "violated the right to freedom of thinking and expression, in the terms of Article 13 of the American Convention on Human Rights." *Costa Rica: Court Overturns Costa Rican Defamation Sentence; CPJ Welcomes Decision*, 2004 NEWS ALERT (Comm. to Protect Journalists), Aug. 4, 2004, available at <http://www.cpj.org/news/2004/Costa04aug04na.html> (last visited Nov. 2, 2004) (quoting court decision). The court also ordered Costa Rica to pay Herrera Ulloa U.S.\$20,000 in damages and U.S.\$10,000 for legal fees. *See id.*

265. Bierbauer & Valverde, *supra* note 264, at 41.

the *amici* helped highlight for the court. The *amici*'s lawyers further noted that "[u]ntil the last several years, it was widely accepted in Latin America that government officials received *greater* protection from criticism by the press than private individuals."²⁶⁶

Even when U.S. *amici* are not participating in a multi-national court established by a treaty with jurisdiction over the *amici*, participation by *amici curiae* in human rights and other public interest contexts can help further intrinsic principles of justice. As well, the presentation by the *amici* of an array of multi-national legal approaches also serves to dilute a potential negative perspective that a U.S.-based organization presumptuously seeks to have a court adopt the laws or jurisprudence of the United States. Furthermore, the argument that numerous other nations' laws already have recognized the position advanced by the *amici* buttresses their position, as was the case when the Open Society Justice Initiative contextualized its argument within an international consensus on the issue.

U.S.-based *amici* can serve a valuable function even when they premise arguments exclusively on federal or state law. They can explain the historical experience of U.S. jurisprudence, perhaps by expounding on rationales that have been discredited by courts in favor of principles that evolved through examination of the empirical impact of earlier rulings. Concerns about the presumptuousness of appearances by U.S. *amici* may attenuate in connection with the submission by U.S. *amici* of Brandeis Briefs. In such cases, there may be a greater tendency by a tribunal to recognize that factual support for the position advanced may not be available from other sources because investigation and research had not been undertaken elsewhere. A countervailing consideration is that certain factual investigation, such as that involving social science research, may encompass cultural norms unique to U.S. society. U.S. *amici* may offer perspectives while remaining sensitive to disparate cultural practices and experiences.

This approach is somewhat analogous to the U.S. federal system, which precludes the admission of expert testimony on matters of U.S. law.²⁶⁷ When non-U.S. law is at issue, however, a

266. *Id.* at 42-43 (emphasis in original).

267. See FED. R. EVID. 702; see also *Nieves-Villaneuva v. Soto-Rivera*, 133 F.3d 92, 99

federal court may admit testimony from an expert as to the law of another country.²⁶⁸ Thus, the U.S. paradigm accommodates the solicitation of testimony by experts on matters of non-U.S. law, even as it recognizes the U.S. judge as the paramount determinant of U.S. law issues. Because U.S. *amici* are not proffering expert testimony on matters of another nation's sovereign law, they are not presumptively foreclosed from arguing how another country's law should be interpreted or applied. But when the U.S. *amici* participate to elucidate U.S. legal principles (which are a matter of non-U.S. law to the adjudicating tribunal), the *amici's* perspectives on the U.S. experience may well constitute the "unique information or perspective" envisaged by Judge Posner.²⁶⁹

Procedural requirements should be imposed on *amici*, even if such requirements effectively are self-imposed absent explicit court rules. Thus, *amici* should disclose the nature of the *amici* parties, any meaningful authorship by a party to the litigation, and the sources of funding for the *amicus* submission, including the sponsorship of any empirical research.²⁷⁰ Such disclosures should presumptively apply as well, for example, when a primary litigant party receives extensive funding for his filing from another, including from a U.S.-based entity. The Open Society Justice Initiative expressly noted in its *amicus* brief submitted in the *La Nación* case that it is an organization that

pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York.²⁷¹

The Open Justice Initiative also informed the court, both by so

(1st Cir. 1997) (stating, "It is black-letter law that 'it is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.')" (citations omitted).

268. See FED. R. CIV. P. 44.1.

269. See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1063 (7th Cir. 1997).

270. See *supra* notes 35-37 and accompanying text.

271. Justice Initiative Brief, *supra* note 257, at 2. Indeed, the *amicus'* Statement of Interest comprised more than another page of its brief. See *id.*

noting on its brief and by so stating in a cover letter, that it was assisted in the preparation of the brief by the New York-based law firm Simpson Thacher & Bartlett LLP, which acted as of counsel on a *pro bono* basis.²⁷²

Another important disclosure concerns explanation of the methodology utilized by *amici* proffering scientific or other technical data, such as in the form of a Brandeis Brief. In addition, sources of the funding for the research should be disclosed. Such transparency measures enable the court to more accurately scrutinize possible biases and interests not otherwise readily apparent from the mere identity of the *amicus*.

CONCLUSIONS

Non-U.S. and multi-national courts should be receptive to participation by non-U.S. *amici*. Such participants should respect principles of comity and normative cultural diversity while working to advocate principles of fundamental fairness in the adjudicatory process and the application of inherent principles of justice. Tension between these objectives may exist, but it behooves *amici* appearing in non-U.S. and multi-national courts to prioritize efforts to promote justice and the public interest over an attempt to harmonize international law merely for the sake of consistency with U.S. statutes and jurisprudence.

The partisan nature of many *amici* briefs is neutralized by requirements of disclosure as to interest, authorship, and sources of funding, and is legitimized by counter-point party and *amici* submissions and by the role of judges and clerks as impartial arbiters. But partisanship is important in the context of advocating on behalf of public interest causes, both as a means of urging justice for underprivileged factions and in order to rebut opposing positions.

Pro bono representation of public interest *amici* is especially important in light of the increasingly common practice of filing *amicus* briefs, support for which typically is easier to marshal by the government and the private sector. As Judge Posner ob-

272. See *id.*; see also Letter from James A. Goldston, Executive Director of Open Society Justice Initiative, to Pablo Saavedra Alessandri, Secretary of Inter-American Court of Human Rights (May 6, 2004); Simpson Thacher & Bartlett LLP, Practice, Pro Bono, available at <http://www.simpsonthacher.com/practice.htm> (last visited Nov. 9, 2004).

served, one of the most important purposes served by *amicus* filings is to assist a party who is not represented competently or is not represented at all.²⁷³ Even when the primary litigants are well represented, the not-for-profit sector can highlight the effects of the law's application on underprivileged parties, supplement the parties' arguments, and rebut assertions by parties and other *amici* that support positions antithetical to the public interest. Lawyers who undertake on a *pro bono* basis to represent *amici* to advance the causes of such parties provide a critical service in the fair administration of justice.

Issues *amici* raise can be considered by the court before it renders its ruling, in effect offering an opportunity to save the tribunal from erroneously interpreting a law, failing to take into account unintended effects of its ruling, omitting consideration of important factual information, or inadvertently ignoring other pending cases or exigent relevant circumstances. *Amici* can help facilitate the rational development of the law, enhance access by courts to diverse viewpoints, and exploit a legitimate, productive, and visible means of insurgency against injustice. *Pro bono* representation of public interest *amici* offers an opportunity to participate as a significant catalyst for the preservation and advancement of justice. Accordingly, notwithstanding the inevitable self-interest of the *amici* in furthering their causes, the *amici* are, as the lexicon suggests, "friends of the court." And *amici* who participate to advance important causes of the public interest are, as well, friends of justice.

273. See *Ryan*, 125 F.3d at 1063 (citations omitted).