

APA's *Amicus Curiae* Program: Bringing Psychological Research to Judicial Decisions

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An important part of the American Psychological Association's (APA) mission is to advance psychological science "to promote health, education, and public welfare." Organizations with powerful influence on human welfare include state and federal appellate courts, especially the U.S. Supreme Court. Initially, APA's *amicus* briefs focused on issues of importance to both individual psychologists and public policy. As the program evolved, APA increasingly focused on informing the courts about psychological science relevant to important legal issues, including criminal, civil, juvenile, education, disability, and human rights law. These briefs, and the science that supported them, consistently challenged stereotypical beliefs of laypeople with solid, easily understood empirical research. APA impartially advocates for the use of psychological science research findings by the courts, not on behalf of parties. Volunteer experts, including representatives of relevant APA divisions, participate in creating APA briefs. On occasion, other scientific organizations may join with APA in its filings. The measure of an *amicus* brief is broader than citations in appellate decisions. Although APA's briefs have been cited many times by courts, a broader impact of APA briefs is seen by references to psychosocial research provided by APA in decisions where its briefs were not specifically cited. APA briefs are being read and are affecting major legal decisions. For APA, the relevant question is not whether its briefs "prevailed" in a case but whether the court was able to render a more informed decision. An important benefit of APA's *amicus* program has been advancing both the reputation of psychological science and APA.

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In general, judicial decisions in the United States are made on a record of facts developed through the adversary system, which allows for objections to unreliable or unduly prejudicial evidence and cross-examination of fact and expert witnesses. The world of *amicus curiae*—or "friend of the court"—briefs is an exception to the general rules of

evidence and allows for those who are not parties to the case but have relevant expertise to bring that knowledge to the courts' attention.

Supreme Court justices have advised that the right kind of *amicus* brief can bring invaluable expertise to the Court. For example, in a *New York Times* interview, Justice Steven Breyer noted that *amicus* briefs "play an important role in educating judges on potentially relevant technical matters, helping to make us, not experts, but educated laypersons, and thereby helping to improve the quality of our decisions" ("Justice Breyer," 1998, p. A17). Indeed, Supreme Court Justice Harry Blackmun specifically noted in an opinion that the American Psychological Association's (APA) *amicus* briefs informed and helped the Court in arriving at its decisions. (*Washington v. Harper*, 1990, addressing involuntary medication of psychotic prisoners). The Supreme Court rules describe an effective *amicus curiae* brief as follows:

An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the

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Court, and its filing is *not favored* (emphasis added). (Sup. Ct. R. 37.1)

Judicial decisions involve issues of interest to APA and its members in several ways. Legal cases can involve conditions that directly affect the practice of psychology and access by those in need of mental health services such as the scope of confidentiality, the duty to warn, insurance practices, and access to facilities. In addition, social science research is relevant to an exceptionally wide range of legal topics that come before the judiciary for resolution. From criminal law (e.g., insanity defense, death penalty, competence to stand trial or be executed, false confessions, eyewitness reliability, jury instructions) to minority rights (education, discrimination, stigma), family law issues (adoption, custody, marriage equality), individual rights (right to refuse medication; disability rights; lesbian, gay, bisexual, transgender [LGBT] and other minority rights; affirmative action), and research-related topics, psychology has knowledge to impart. *Amicus* briefs provide a natural tool to advance the application of research findings to human welfare through judicial decisions. Part of APA's stated mission provides:

The objects of the American Psychological Association shall be to advance psychology

- as a means of promoting health, education and human welfare, . . .
- by the increase and diffusion of psychological knowledge . . .
- to advance . . . the application of research findings to the promotion of health, education and the public welfare (emphasis added). (American Psychological Association [APA], 2017)

Early Supreme Court Case Relevant to Psychology

In 1954, the Supreme Court considered the landmark case *Brown v. Board of Education* (1954) challenging segregated schools as unconstitutional. Individual psychologists and other social scientists provided key social science research to the Court regarding the nature and effects of racial discrimination (Clark, Chein, & Cook, 2004; Pickren, 2004). In a unanimous decision, Chief Judge Earl Warren cited this research in support of the Court's ruling that racial segregation of public schools violated the Constitution. There is no evidence to suggest that APA governance considered and decided not to file an *amicus* brief in *Brown v. Board of Education*. But it is unlikely that the use of psychological research in this blockbuster judicial decision went unnoticed by APA. Prior to the *Brown* decision, APA seems to have been unaware of the *amicus curiae* brief as a tool for promoting judicial application of relevant psychological information. The notion of interdisciplinary work in the psychology-law arena does not manifest itself in the board minutes of this time period. That would change in the decades to come.

A review of the history of APA's *amicus* brief program shows its evolution from a solo brief filed in 1962 to a mature, recognized, and respected tool to accomplish some of APA's key institutional goals.

Foundation and Evolution of APA's *Amicus Curiae* Brief Program

A Few Early *Amicus* Briefs

APA's first brief in *Jenkins v. United States* (1962) provided the court with insights on the issue of psychologists' competence to testify as expert witnesses concerning the nature and existence or nonexistence of mental illness. The court ruled in favor of APA's position. Despite this success, APA filed only two more *amicus* briefs over the next 17 years. These briefs involved the best means to diagnose insanity (favoring psychological testing including the Rorschach test over the medical model; *United States v. Brawner*, 1972) and the right to treatment for those involuntarily confined in state institutions (*Wyatt v. Aderholt*, 1973).

1979–1989, the Formative Decade for APA's *Amicus* Program

In 1979, the episodic use of *amicus* briefs changed. On January 18, 1979, under the leadership of APA President Nicholas Cummings, the Board of Directors voted that the ad hoc Committee on Legal Issues (COLI) be established "in order to obtain ongoing recommendations regarding possible involvement of APA in the judicial system" (APA, 1979). From its inception through 1989, COLI was chaired



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by Patrick DeLeon, subsequently president of APA. The membership of COLI during this first decade included psychologist–lawyers with a wide range of clinical, scientific, and educational expertise. These included Bruce Sales, a key figure in the establishment of joint law–psychology training programs, as well as individuals who had served as presidents of APA’s Division 41 (American Psychology–Law Society [AP-LS]). COLI worked on several fronts to advance interdisciplinary education, including joint projects with the American Bar Association, the American Association of Law Schools, and the American Law Institute. One of the key efforts by COLI was educating APA leadership on the use of *amicus curiae* briefs by APA to advance the application of psychological knowledge to judicial decisions.

At the same time COLI was formed, APA retained Donald Bersoff to serve as its first general counsel. Notably during his tenure in that position, Bersoff provided legal advice to APA on the array of legal issues it confronted, including preparation of *amicus* briefs, through the private law firm with which he was affiliated. APA did not create an internal Office of General Counsel until 1993. Bersoff held degrees in both psychology and law, and thus he was an exceptionally well qualified individual to expand and institutionalize an *amicus curiae* program. Bersoff came to APA with the express goal of working with COLI and the Board of Directors to use *amicus* briefs as a tool to advance psychology. He used several tools to look for appropriate cases, including reviewing weekly summaries of important federal cases and using an ad hoc network of lawyers and psychologists. During his tenure as general counsel from 1979 through 1988, APA accomplished this goal.

During the 1979–1988 period, APA filed 52 *amicus curiae* briefs on a broad range of topics, such as procedural issues involving the insanity defense (*United States v. Byers*, 1984), an institutionalized patient’s right to refuse medication (*Mills v. Rogers*, 1982; *New York v. Uplinger*, 1984; *Rivers v. Katz*, 1986), abortion restrictions (*Harris v. McRae*, 1980; *Thornburgh v. American College of Obstetricians and Gynecologists*, 1986), the death penalty (*Ford v. Wainwright*, 1986; *Lockhart v. McCree*, 1986), and the need for environmental impact statements (*Metropolitan Edison Co. v. People Against Nuclear Energy*, 1983). It is important to note that the first of many subsequent briefs filed in cases addressing rights of gay and lesbian people were developed and submitted during this period (*Ben-Shalom v. Marsh*, 1989; *Bowers v. Hardwick*, 1986; *Stover v. State*, 1986).

Although many briefs filed in this era apprised the courts of psychological research, a number of briefs presented policy or legal points with member interests mixed with public interest as a focus. For example, a number of *amicus* briefs were filed regarding practice issues such as hospital privileges (*CAPP v. Rank*, 1990), peer review (*Patrick v. Burget*, 1988), insurance reimbursement (*Insurance Board of Bethlehem Steel Corp. v. Muir*, 1987), duty to warn (*Ruby Davis v. Yong-Oh Lhim*, 1988), and scope of practice (*Blue Shield v. McCready*, 1982).

During this formative decade, COLI and Bersoff also developed an internal review process to screen *amicus* briefs utilizing COLI as the primary group evaluating potential *amicus* topics. As noted previously, the briefs filed during this period demonstrated the breadth of legal issues for which psychology is relevant. This was foundational for the development of the program.

Transitioning (1989–1996)

The 1990s saw a transition in APA’s structuring of its in-house legal counsel. During the period 1989 to 1993, APA operated without a designated general counsel. The formation of APA’s in-house Office of General Counsel in 1993, and the addition of a deputy general counsel with a litigation background in 1996, formed the basis for an expanded capability to file *amicus* briefs. During this transitional period, APA filed 22 briefs and the *amicus* program continued with primary guidance from COLI. APA continued to address legal issues around the rights of criminal defendants and prisoners, as well as a wide range of nonresearch-based practice topics such as the ongoing issue of definition of *medical treatment* in marital separation agreements and state and federal statutes (*Miller v. City of Poughkeepsie*, 1992), Health Care Finance Administration appeal processes (*National Kidney Patient’s Association v. Sullivan*, 1992), psychologists’ ability to provide expert testimony (*Chandler Exterminators v. Morris*, 1992), psy-

chologists' ability to practice independently from psychiatrists (*CAPP v. Rank*, 1990), and issues surrounding the patient–therapist privilege and duty to warn (e.g., *Menendez v. Superior Court*, 1992).

In addition, during this transitional period, social policy themes such as abortion rights (*Planned Parenthood of S.E. Pennsylvania v. Casey*, 1992) and gay and lesbian rights continued as topics of interest. The latter category included the general topic of discrimination based on sexual orientation (*Equality Foundation of Greater Cincinnati Inc. v. City of Cincinnati*, 1995; *Romer v. Evans*, 1996), family law issues such as adoption (*Bottoms v. Bottoms*, 1995; *Hertzler v. Hertzler*, 1995), and criminalization of sexual conduct through antisodomy laws (*Campbell v. Sundquist*, 1996; *Kentucky v. Wasson*, 1992; *State v. Morales*, 1994) emerged as areas of special interest.

The case of *Jaffee v. Redmond* (1996), advising the Supreme Court regarding the need for confidentiality for police officers consulting with counselors, led to an affirmative ruling from the Court and was a capstone of both APA *amicus* briefs addressing practice issues and of this period.

The Modern Period of APA *Amicus* Briefs

In the period 1997–2016, the APA *amicus* program matured as a powerful tool for applying psychological research to public law questions, after additional legal staff and increased resources were added to the Office of General Counsel. The APA Board of Directors formalized review procedures and criteria for *amicus* briefs that became effective in 1997. At a steady pace, during the next 20 years APA filed 96 *amicus* briefs (see Figure 1).

The process of selecting and preparing an APA *amicus* brief in the last 20 years. APA learns of cases that may be appropriate for *amicus curiae* briefs through requests from lawyers, tracking by the Office of General Counsel, member notification, and news reports. The last 20 years have seen the maturing of APA's process for selecting cases in which to file *amicus* briefs and making strategic choices about topics to pursue for maximum impact. It is now common for APA to receive numerous requests from coun-

sel for parties, organizations, and advocacy groups to file *amicus* briefs in a given year. During the last 20 years, APA has declined more requests to file than it has accepted. Over the years, the review process for briefs has developed into a rigorous, multitiered internal review by APA's General Counsel, APA's Executive Management Group (composed of the senior executive staff), the Committee on Legal Issues, and finally the Board of Directors.

Effective in January 1997, the APA Board of Directors adopted procedures to be followed in deciding whether to file an *amicus* brief in a given case (Procedures of Submission of *Amicus Curiae* Briefs, approved in December 1996 and amended in June 2003; APA, 1996, 2003). As this policy has developed, it has resulted in the following process and criteria:

- All requests are initially submitted to the Office of General Counsel, which makes a threshold determination as to whether the request involves subject matter that is directly relevant to psychology and there are both adequate time and resources to prepare a high-quality *amicus curiae* brief.
- In the event there is interest in considering filing, the General Counsel consults with the relevant Executive Directors and the Executive Management Group (EMG) regarding the matter, including a careful consideration of APA's policies, what is known about the pertinent body of research or position that is being considered, and advice regarding who should be consulted. If the EMG votes to proceed, the matter is referred to APA's Committee on Legal Issues.
- COLI is charged with making a recommendation to APA's Board of Directors based on the following considerations: whether participation will be consistent with the objectives and policies of the Association; the significance of the case to psychology; whether APA can make a useful contribution to the case; whether there is sufficient research, data, and literature to present a strong position; the substantive views of relevant Divisions, State/Provincial Association, and others; how participation might be viewed by various APA constituencies; what may be the public or external results of participation; and other appropriate issues posed by a given case.
- The result of COLI's review is provided to the Board of Directors with a recommendation to proceed or not to participate. The Board receives the recommendation in writing and can either decide to proceed unanimously by electronic vote, or by majority vote on a conference call if discussion is warranted.
- To assure that APA speaks with one voice, these procedures also apply to any Division that is interested in participating as an *amicus* in a given case.

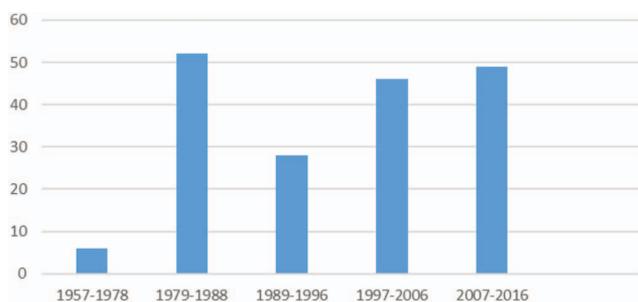


Figure 1. Number of APA *amicus* briefs filed by decade. See the online article for the color version of this figure.

The Supreme Court has made clear that it is only seeking from *amicus* any relevant information that the parties themselves have not provided. Accordingly, a critical screening criterion is assuring that an APA brief will provide only information that APA is in a unique position to provide. Over the last 20 years the briefs have become increasingly research-based and scientific in tone.

In addition, in the last two decades APA legal counsel began to evaluate *amicus* requests for the potential to file repeat briefs on a topic and to expand filings beyond the federal courts to include state appellate courts, when APA had already filed federal court briefs on the same topic or when there was reason to believe an issue would be addressed in multiple state courts across the country. This approach enhanced the impact of briefs on each given topic and resulted in both increased attention and requests for *amicus* assistance. A review of topics addressed in this period shows that APA developed the strategy of going deeper and on a more sustained basis in addressing some key legal issues where psychological research was robust and relevant (see the discussion of this later).

Inherent in the process of developing APA's *amicus curiae* briefs is the need to recognize tensions between the way the two disciplines of psychology and law approach issues. These tensions have affected what briefs APA files and how they are written. Understanding these tensions also has arguably led to more effective and impactful submissions.

Researchers are often concerned that they do not have the final answer to the question the court is adjudicating. They note accurately that research is never really complete. More may be known in 10 years or even "next year." In contrast, in the legal world, a case is pending, the record is being developed now, and a decision will be made soon based on the information before the court. There will be a winner and a loser, and the court will explain why it reached its decision. Not only will the decision be made, but it will set precedent that will affect other cases for years to come. This is especially true regarding the U.S. Supreme Court, whose decisions control all federal courts, are powerful authority for state courts, and are seldom revisited or overturned.

Rather than asking, "Do we know everything there is to know about this?" the better question in deciding whether to provide a court with APA's views and psychological research findings may be, "Do we know enough that is unique to psychology to reliably (i.e., with reliability and validity) assist the court in its decision?"

Drafting the *amicus curiae* brief. In creating an *amicus* brief, it is important for APA to avoid relying on unreplicated findings, seeking instead to base the briefs on robust findings that have proven themselves over time and in multiple studies. The most immediate goal is to accurately portray the scientific research in a succinct and easily understandable way that is linked to the legal issues at hand.

Nuances are important—and so are caveats. APA advocates for psychological science, not for a party to the case, though often the research does weigh in favor of one party. APA's goal is to rely on the best empirical research available, focusing on general patterns rather than any single study. Before citing a study, APA critically evaluates its methodology, including the reliability and validity of the measures and tests it employed and the quality of its data collection procedures and statistical analyses. APA also makes clear that scientific research is a cumulative process and that no empirical study is perfect in its design and execution. Most of the studies and literature reviews APA cites have been peer-reviewed and published in reputable academic journals. In addition, other academic books, book chapters, and technical reports, which typically are not subject to the same peer-review standards as are journal articles, are included when they report research employing rigorous methods, are authored by well-established researchers, and accurately reflect professional consensus about the current state of knowledge. APA makes a good faith effort to include all relevant studies and does not exclude any study because of its findings. In crafting its briefs, APA avoids overstating research findings and will decline to file if credibility requires such heavy caveats as to be useless.

The drafters look for a professional consensus—though not necessarily unanimity—as the foundation for our briefs. Typically, an *amicus* brief will not be filed unless there is a strong body of research pointing in one direction. Of great importance to APA's credibility is the commitment to acknowledge, sound research to the contrary, if that is known.

A new phenomenon that APA has encountered is the recent explosion of information on the Internet, including publication of allegedly scientific research that appears legitimate. Courts can be inundated with "scientific" information that may or may not be reliable and valid. Although APA has largely refrained from specifically criticizing these nonacademic sources, their existence has made APA's role even more crucial in helping the Court to understand the difference between unfounded or poorly supported claims and rigorous scientific research. As a result, as APA's *amicus* briefs have become more and more research-based, their value to the courts has increased.

The role of APA policy. Often there are other sources within APA that provide direction in considering a request for an *amicus* brief. A key area of initial focus in any request is whether there is an APA policy on a given point or issue. For example, in the case of *Panetti v. Quarterman* (2007), the issue was what conditions were acceptable to execute a seriously mentally ill convicted murderer.

In the *Panetti v. Quarterman* (2007) case, the Court considered the constitutionality of executing a defendant who suffered from psychotic delusions. Scott Panetti had been diagnosed with schizoaffective disorder and believed that he was to be executed not for his crime (murder) but for

“preaching the Gospel.” In this case, the APA did not stand alone. In 2003, the APA had joined with the American Bar Association in forming a Task Force on Mental Disability and the Death Penalty. In 2005, the task force issued its findings and recommendations, which resulted in the adoption of almost identical policies by both organizations, which hold,

If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition and the prisoner’s own case, the sentence of death should be reduced to a lesser punishment. (*Task Force on Mental Disability and the Death Penalty*, 2005)

Consistent with these policies, and supported by similar policies of the National Alliance on Mental Illness and the American Psychiatric Association, APA’s *amicus* brief explained the manner in which delusions could impair the person’s understanding and appreciation of the nature of the death penalty and the relationship between his or her crime and execution. APA also explained to the Court how mental health professionals can reliably identify and diagnose these conditions in a manner that will assist the courts. The Court ruled 5–4 in favor of Mr. Panetti, citing the APA *amicus* brief as critically important in helping the Court to decide the case.

The briefs filed by APA involving gay and lesbian rights, including marriage equality, were also directly related to a group of APA Council policies, including one case where the APA resolution expressly directed the filing of APA *amicus* briefs (APA, 2011).

The critical role of volunteer experts. The most critical part of developing any APA *amicus* brief is assembling a team of experts who can assist APA in identifying the relevant research and in reviewing, commenting, and editing parts of the briefs. APA has made the strategic decision to always author its own briefs and never to simply sign on to others’ briefs. The only exceptions to serving as lead *amicus* have been a few highly collaborative partnerships with the American Psychiatric Association. This approach has allowed APA to exercise tight control of the tone and content of its briefs and to apply rigorous standards to the research cited in the briefs. The participation of dedicated, talented volunteer experts in research review, brief development, and critiques, often under tight deadlines, has enabled APA to maintain quality control and high standards in its *amicus* briefs.

Divisions are often the source of expertise and information on key topics. Not surprisingly, Division 41, the American Psychology–Law Society (AP-LS), has been a major contributor to APA’s *amicus* efforts on many areas of

forensic interest (e.g., criminal law, expert testimony). “White papers” prepared by AP-LS on such important topics as eyewitness testimony and false confessions have been quick springboards to preparation of science-based *amicus* briefs. Division 33 (Intellectual and Developmental Disabilities/Autism Spectrum Disorders) has provided a deep bench of experts for briefs involving intellectual disability.

Division 44 (Society for the Psychological Study of Lesbian, Gay, Bisexual, and Transgender Issues) has been the source of several key experts, including extensive work by Gregory Herek, who have worked closely with APA general counsel and Clinton Anderson of APA’s Public Interest Directorate for years to develop the research briefs that have driven the psychological research basis for equal protection rulings by the courts that benefited gay and lesbian couples. Without the knowledge and hard work of volunteers like these, APA would never be able to produce the quality of brief that the courts have come to expect of it.

In producing its *amicus* briefs, APA strives for the best collaboration between an ad hoc team of psychological experts, COLI representatives, and APA lawyers, as well as top-tier Supreme Court legal counsel such as David Ogden of the law firm WilmerHale and Paul Smith of the law firm Jenner & Block.

The role of co-*amici*. In addition to working with psychological experts, APA, as lead *amicus* on its briefs, may be joined by other nonprofit organizations who wish to “sign on” to APA’s brief, especially in those filed in the U.S. Supreme Court. It is APA’s practice to alert state psychological associations when it will be filing in a case originating in that state. It is not uncommon for a state psychological association to join APA as an additional *amicus*. Other frequent co-*amici* are the American Psychiatric Association; the National Association of Social Workers; and, depending on the subject matter, the American Medical Association; the American Academy of Pediatrics; the American Academy of Psychiatry and the Law; and other similar entities with interest in the specific topic before the Court. By bringing in well-respected co-*amici*, APA adds force to its briefs and can provide additional expertise and perspectives that strengthen the content of the brief. APA considers requests to join from potential co-*amici* based on the stature and relevance of the organization and has turned down such requests on occasion.

The Substantive Focus of APA’s *Amicus* Briefs in the Last 20 Years

During the two decades from 1997 to 2016, the *amicus* program continued to gain authority with the courts and was more fully institutionalized within the Office of General Counsel. The array of topics covered by APA’s briefs remained broad. As in prior periods, the focus of APA’s *amicus* briefs was related to the key legal issues of the time,

where psychological research was relevant. During this period, however, APA also moved to foundational briefs that allowed multiple filings in different courts.

In death penalty litigation, APA advised the Supreme Court and federal appellate courts regarding involuntary medication of inmates, the conditions that allow execution of persons with serious mental illness, and the constitutionality of execution of juveniles and people with intellectual disabilities. Each of these subject areas led to further briefs and citations. For example, APA's research presented to the Court in the landmark case *Roper v. Simmons* (2005) was directly reflected in the Court's opinion declaring the death penalty unconstitutional for crimes that were committed when the offender was a teenager. That body of research, updated and refined, was then presented again when the Court considered the constitutionality of life without parole sentences for juveniles convicted of noncapital crimes (*Graham v. Florida*, 2010; *Sullivan v. Florida*, 2010) and subsequently the legitimacy of mandatory life without parole sentences for juveniles committing capital crimes (*Miller v. Alabama*, 2012).

In the area of constitutionality of the death penalty for persons with intellectual disability, APA's brief in *Atkins v. Virginia* (2002) was foundational for the Court's opinion that executing those with limited intellectual capacity could not satisfy the constitutional requirements for execution and that mental health professionals would be able to accurately diagnose that condition. The later APA brief in *Hall v. Florida* (2014) explaining the correct application of the standard error of measurement (SEM) to IQ testing scores was cited by the justices both in oral argument and in the Court's decision requiring the application of the SEM to scores as part of the test for determining intellectual disability in death penalty contexts.

Similarly, in *Moore v. Texas* (2017), in a brief filed in 2016, APA provided guidance to the Supreme Court on the professional consensus around sound protocols to evaluate the adaptive behavior prong in assessing intellectual disability. *Moore* involved a challenge to a Texas appellate decision finding that Texas could use its own, nonclinical court approach based on a laymen's sense of what constitutes intellectual disability (benchmarked to John Steinbeck's *Of Mice and Men*; S. M., 2016) to the exclusion of widely accepted current professional protocols. On March 28, 2017, the Supreme Court invalidated Texas's use of lay-based stereotypes, noting, as described by APA, the lack of any scientific basis for its approach. In reaching its decision, the Court cited APA's brief as support for the accepted clinical standards used to diagnose intellectual and developmental disabilities.

In perhaps the most sustained *amicus* effort by APA, this period also saw the development and extension of a core science brief to be used in court challenges regarding gay and lesbian rights. APA had begun to file *amicus* briefs in

cases involving discrimination against gay and lesbian people, specifically in cases involving custody, adoption, and military matters in its earlier stages of *amicus* participation. But, beginning with its brief in *Lawrence v. Texas* (2003), which addressed a state statute criminalizing sex between same-sex couples, APA developed over the course of multiple *amicus* filings the definitive psychological research brief presenting the psychological research findings regarding sexual orientation, effective parenting by same sex couples, the effects of stigma caused by discriminatory laws, and other relevant points.

The successful brief in *Lawrence v. Texas* (2003) regarding the lack of a rational basis for, and the harmful effects of, antisodomy laws evolved over many iterations through subsequent state and federal court proceedings into the brief that was ultimately filed and cited in the landmark Supreme Court decision in *Obergefell v. Hodges* (2015), declaring that there was a federal constitutional right to marriage from which same-sex couples could not legitimately be excluded. Similarly, APA's brief in *United States v. Windsor* (2013) presented this research in the case that led to rejection of a federal statute barring same-sex couples from any federal benefits flowing from marriage. In all, APA filed 34 briefs on issues related to gay and lesbian rights during the 20-year period from 1997 to 2007 and watched the legal issues at stake evolve from the legitimacy of criminal statutes banning same-sex couples' acts of sexual intimacy to achieving the right to marry. APA's briefs were cited in a number of state and federal decisions during this period involving gay and lesbian rights. and of greater importance, the research APA provided was often at the core of favorable decisions.

In addition, during the last two decades, APA mined other veins of research to develop and file multiple briefs on topics challenging laypeople's stereotypes. This approach included six briefs presenting the research on risk factors for false confessions, which explained the many dispositional and situational factors that contribute to them. The first APA brief on this topic addressed the legitimacy of Pennsylvania's interpretation of its Post-Conviction DNA Testing statute, barring from DNA testing anyone who had confessed to the crime (*Commonwealth v. Wright*, 2011). The Pennsylvania Supreme Court ruled in *Wright*'s favor, citing APA's brief. This research was the basis for subsequent briefs, including challenges to New York's interpretation of its statute providing for compensation for those wrongfully convicted (*Warney v. New York*, 2011). Exonerated by other evidence, the plaintiff sought compensation, which was denied because he had confessed, albeit falsely, to the crime. New York's highest court reversed the lower court's ruling and allowed compensation. These briefs garnered multiple citations in state appellate courts addressing potential false confessions and mention in a *New York Times* editorial on the topic ("False Confessions," 2011).

APA also filed five briefs providing the Supreme Court and several state courts with the body of research on reliability of eyewitness testimony. In the Supreme Court decision in *Perry v. New Hampshire* (2012), APA's brief was cited by both the majority and dissent, both recognizing the scientific basis for the fallibility of eyewitness identifications. Other recent cases in which eyewitness reliability research was presented included the need for eyewitness jury instructions (*Commonwealth v. Gomes*, 2015; *Payne v. Virginia*, 2016) and the use of expert testimony to explain eyewitness reliability research to juries (*State of Connecticut v. Artis*, 2014).

During this same time period, APA also filed briefs providing the courts with pertinent research in cases involving the use of race as a factor in secondary and higher education admissions. Through five briefs, APA presented research regarding benefits to minority and majority students of diverse educational experiences, as well as implicit bias and other relevant information. This research was provided to the Supreme Court (*Fisher v. Texas*, 2013, 2016) and lower federal courts *Comfort v. Lynn*, 2005; *Parents v. Seattle School District and Meredith v. Jefferson County Board of Education*, 2007).

APA Amicus Record Spans Public Interest, Science, Practice, and Education

Looking at the body of APA's *amicus* briefs over the last 54 years as a whole, the breadth of legal issues addressed is impressive. All APA *amicus curiae* briefs can be found by subject <http://www.apa.org/about/offices/ogc/amicus/index-issues.aspx>, by chronological date (<http://www.apa.org/about/offices/ogc/amicus/index-chron.aspx>), and by name (<http://www.apa.org/about/offices/ogc/amicus/index-alpha.aspx>). The largest number of APA's briefs (75) address social issues outside the criminal law system. A large number of these briefs (52) provide research related to civil rights of gay and lesbian people in such areas as family law (e.g., custody, adoption, marriage) and service in the military. APA was a leader in bringing science to the courts on legal issues surrounding discrimination based on sexual orientation, filing its first brief in 1984 regarding a New York loitering law used to criminalize "deviate" sexual intercourse (*New York v. Uplinger*, 1984). Other key briefs provided research relevant to judicial consideration of efforts to restrict abortion rights (11 briefs), civil rights of people who have been involuntarily committed (seven briefs), civil rights of the disabled (three briefs), and sex discrimination (two briefs). Use, validity, and security of psychological tests and test data were the focus of another five briefs.

Over 65 of APA's briefs address critical issues in the criminal justice system, including the insanity defense, competence to stand trial, the death penalty, sentencing,

false confessions, criminalization of sexual orientation, child witnesses, eyewitness testimony, and involuntary medication.

Another 48 briefs address practice issues bearing on psychologists' ability to provide services to the public, including confidentiality and privilege, duty to warn, hospital privileges, competence to testify as experts, and scope of practice.

In the area of education, APA's primary focus has been on research related to legal challenges to the use of race in both secondary and higher education. For example, in *Comfort v. Lynn* (2005) and in *Parents v. Seattle School District and Meredith v. Jefferson County Board of Education* (2007), each of which involved voluntary desegregation plans in public school systems, APA provided the courts with research regarding the social and educational benefits of racial integration in primary and secondary education. In *Grutter v. Bollinger* (2003), challenging Michigan's admissions criteria for its undergraduate and law schools programs, and in the two subsequent cases challenging the use of race in admissions in Texas's state higher education (*Fisher v. University of Texas at Austin*, 2013, and *Fisher v. University of Texas at Austin*, 2016) APA provided the courts with research regarding implicit bias and the benefits of diverse classrooms for majority and minority students, among other relevant research.

Over the years, APA's briefs have increasingly focused on presenting psychological research to the courts as they grapple with important public law disputes, such as those described earlier, that will provide broad precedent for future judicial decisions. Thus, in one sense, the very focus of much of APA's *amicus* program has been on promoting psychological science, translating science to the public via the judiciary, where the research is robust and relevant. In addition, a few briefs have addressed scientific policy issues as they relate to researchers and research itself. For example, APA has addressed whether animal rights advocates have standing to sue to stop animal research (*International Primate Protection League v. Institute for Behavioral Research*, 1986) and whether unfunded grant proposals are subject to disclosure by federal agencies (*PAWS v. University of Washington*, 1994).

Overall, the focus of APA's *amicus curiae* briefs has spanned the core areas of public interest, science, practice, and education, with relative emphases reflecting the extent to which these areas of psychology intersect with the legal system. The briefs can be roughly categorized as follows: social issues (75), criminal law (66), practice issues (48), science research (five), and education (five; see Figure 2). A few briefs are counted twice in the figure, because they relate to more than one category. For example, a brief providing research related to the constitutionality of state antisodomy criminal laws addresses both criminal law and sexual orientation, which is classified under social issues.

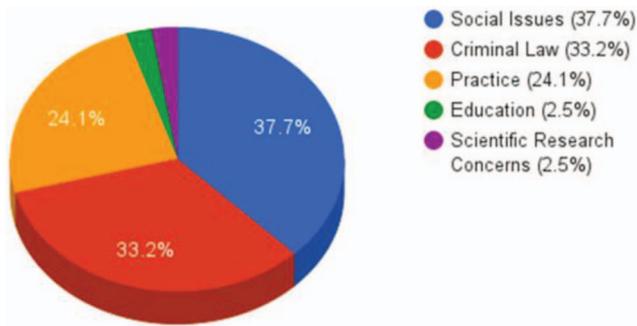


Figure 2. APA *amicus* briefs by category. See the online article for the color version of this figure.

The strict criteria for review and development of APA's briefs adopted by the APA Board of Directors and applied since 1997 mean that among the hundreds of *amicus* briefs filed, APA's briefs are actually read. In a survey of Supreme Court clerks regarding effective *amicus* briefs, APA was among a few frequent Supreme Court *amici* whose briefs are reportedly to actually be read (Lynch, 2004). Equally important, APA's briefs have been specifically cited 26 times by state and federal courts. For example, APA filed a brief in the Supreme Court in the case of *Perry v. New Hampshire* (2012) that involved the legal question of whether the Court should require a due process hearing before admission into evidence of any eyewitness identification that occurred under suggestive circumstances. APA's brief laid out the deep body of research regarding reliability of eyewitness identification. In an 8–1 decision, the Court declined to require due process hearings unless the police are responsible for the suggestive circumstances. In the majority opinion, however, Justice Ginsburg cited APA's brief in emphasizing that there is no doubt of either the importance or the fallibility of eyewitness identifications. Justice Sotomayor wrote a strong dissent with heavy citations to the scientific literature APA had provided.

Pitfalls and Rewards of APA's *Amicus* Brief Program

There are certainly potential pitfalls to participating in high-profile legal cases. Although not true in every case, often the science explaining human behavior seems to line up with what is perceived as more "liberal" positions. Our research about attributes of felons with intellectual disabilities, those with serious mental illnesses, or those who are juveniles, who should be excluded from the death penalty under the governing legal standard, are viewed by some in such a light. Research about the parenting skills of LGBT parents that undermines the justification for legislation barring adoptions by same-sex couples or any LGBT persons are viewed by some in the same manner. Other briefs presenting science on affirmative action, false confessions,

eyewitness testimony, and the effects of abortion can also be viewed as reflecting this stereotype. For better or worse, the party APA files in support of is often advancing the more "liberal" position. This has the potential to undermine other public policy efforts by APA government relations staff or state association lobbying efforts on unrelated legislation. This possibility has not proven to be a material problem thus far but is a potential pitfall to note.

APA can also be perceived as inconsistent or disguising advocacy as research. In what has become known as the issue of "Did APA flip-flop?" APA's *amicus* brief in *Roper v. Simmons* (2005) involving the juvenile death penalty drew a lot of comment from proponents of the juvenile death penalty and from Justice Scalia. Among other things, APA's brief presented the psychosocial research regarding attributes of juveniles as a group—such as susceptibility to peer pressure, impulsivity, and so on—that bore on culpability for crimes committed during adolescence and should mitigate blameworthiness in sentencing. (Notably APA had refused to participate in a group brief led by the American Medical Association and the American Psychiatric Association because the primary focus of that brief was on recent and evolving functional magnetic resonance imaging research about brain development rather than psychosocial research on juvenile behavioral characteristics).

In 1989, 16 years prior to its *Roper v. Simmons* (2005) brief, APA had filed a brief in a case challenging a Minnesota statute that required parental notification before an adolescent girl could obtain an abortion, presenting as a secondary argument that adolescents have the same cognitive skills as adults and can make medical decisions for themselves (*Hodgson v. Minnesota*, 1990). The brief was more complicated than that, but proponents of the juvenile death penalty made much of this as an asserted inconsistency, failing to note the distinctions between the two legal issues and the distinct bodies of research addressed in the two briefs. Justice Kennedy grilled counsel for Simmons at oral argument about the purported inconsistency, and Justice Scalia criticized APA's brief in his *Roper* dissent from the majority science-based decision striking down the juvenile death penalty. This uproar was uncomfortable for APA but would never have happened if APA's *Roper* brief were not perceived as effective—and even powerful. The research APA cited in its brief was a focal point of Justice Kennedy's majority opinion.

Another pitfall occurs when APA provides the court with information regarding especially contentious issues, such as abortion or same-sex marriage, in which some APA members might have strong beliefs that are in conflict with the APA briefs. This risk has been significantly mitigated, however, by rigorous drafting that carefully avoids partisan advocacy and sticks to the science (see the earlier discussion regarding criteria for cited research). For example, a review of APA's briefs in recent years in abortion-related cases,

which are among the most contentious, has focused on only the findings of the APA Task Force Reports on Abortion (American Psychological Association, Task Force on Mental Health and Abortion, 2008), which reviewed the scientific literature and summarized the conclusion that there is no evidence of harm to a woman associated with a legal abortion in the first trimester of pregnancy.

There are also times when APA's silence can be misinterpreted. Because APA does not file unless there is a strong body of research, cases in which other parties or *amici* are citing slim research may go un rebutted. In the so-called violent video games case (*Brown v. Entertainment Merchants Association*, 2011), assessing the constitutionality of a California statute penalizing sales of violent videos to minors, the state cited research supporting the proposition that violent video games cause aggressive behavior in those who play them. APA had considered filing in the case but declined. There was an early APA policy criticizing such games, but the later relevant research had developed and gone in several directions. At the time, there was dissension in the field of psychology about whether these games had material adverse effect on players. APA decided not to file a brief, citing lack of a strong consensus in the research. But in this case, a brief informing the Court that there were differing views would actually have been relevant to the matter before the Court. APA's requirement of a strong consensus may have led it to not be a true "friend of the court."

Despite these potential pitfalls, there are significant benefits to APA of participating as an *amicus curiae* that the authors believe outweigh the risks associated with any pitfalls. Although perhaps obvious, the most significant benefit of APA's *amicus* program is that the briefs are actually being read and are affecting decisions. This is evident because the briefs are cited. Supreme Court justices discuss them from the bench and in speeches, and they are the subject of press coverage ("False Confessions," 2011; Lynch, 2004; S. M., 2016).

Indeed, courts want and expect to hear from APA. In the case of *United States v. Gomes* (2002), the U.S. Court of Appeals for the Second Circuit sent APA the sealed record in the case and an order directing APA to file an *amicus* brief regarding involuntary medication to achieve competence to stand trial. In the violent video games case, *Brown v. Entertainment Merchants Association* (2011), Justice Breyer in his dissent to the majority decision applying the First Amendment to strike down restrictions on sales of the games to minors, plainly expected APA to file and included selected psychological research citations to buttress his position that aggression is linked to playing these games, even citing an old APA policy on this point.

An additional benefit of *amicus* briefs is the public declaration of a carefully obtained consensus among psychological science researchers. In addition to providing

thoughtful, relevant, and current research, expert witnesses in lower courts can refer to the APA *amicus* brief relevant to a particular topic at bar as evidence that research has achieved acceptance in the profession. In one particularly gratifying case, APA's Supreme Court brief regarding eyewitness testimony in *Perry v. New Hampshire* (2012) was cited in a different case in the 7th Circuit—one APA didn't know about. In *Philips v. Allen* (2012), an acquitted defendant filed a civil damages case against a police officer who had said his name within earshot of an eyewitness to a robbery who subsequently picked him out of a lineup. The civil plaintiff—who was the prior defendant—sought a rule that mentioning the name of a suspect within earshot of a potential witness necessarily biased any later identification. Surprisingly, Judge Easterbrook, who wrote the decision, had found APA's *Perry* brief, and two pages of the court's 11-page decision were taken verbatim from the APA brief. The court concluded, "Without a solid basis in the social science of eyewitness identification, a court could not create the rule" the plaintiff sought (*Perry v. New Hampshire*, 2012, p. 917). Appropriately, the judge also wrote, "Lawyer's talk is no substitute for data" (*Perry v. New Hampshire*, 2012, p. 916).

All of this would suggest that APA's *amicus* program is reaching the audience it hoped to reach and that the courts are getting the message that in evaluating questions of human behavior, psychological research is important, informative, and perhaps even essential to good judicial decision-making. Assessing the effectiveness of *amicus* participation can be difficult because there always exists the possibility of a court's reaching the right result for the wrong reason. For APA, the relevant question is not whether its briefs "prevailed" in a case but whether the court was able to render a decision that was better informed. Impact analyses of *amicus* briefs customarily focus on references in the opinions to material presented in the briefs, particularly where the opinions explicitly cite the briefs or where decisions track arguments presented in briefs. Though no formal impact analysis has been done, the number of APA briefs that have been cited by courts, and the decisions in cases where APA has filed that have included psychological science research provided by APA, suggest that APA's briefs have been effective.

Conclusion

APA's mission is to "advance the creation, communication, and application of psychological knowledge to benefit society and to improve people's lives" APA (2009). Its *amicus* program, translating psychological science research findings to the courts on critical public law issues, has been an important tool in advancing that mission—and advancing the reputation of APA and psychological science. Future legal issues cannot be predicted, but it is certain that psy-

chological science will be relevant to some of these disputes and, provided to the courts by APA as an *amicus curiae*, will assist the courts in making fair and informed decisions.

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