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Examining the Real Demand for Legal Services

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Examining the Real Demand for Legal Services

Herbert M. Kritzer

Abstract

Legal needs are real, but can also be virtually open-ended. Studies tell us that 85% of the civil legal needs of low income persons are currently not being met but we have no idea as to what portion of that 85% legal assistance would meaningfully help to resolve those needs, or how the cost of providing that assistance compares to the benefit that would be generated. This article examines extant studies of legal needs, and concludes that there is a need for baseline data to enable us to assess the degree of legal need that takes into account the range of factors that might influence people to seek legal assistance, as well as a need for more specific justifications for legal assistance.

KEYWORDS: civil litigation, access to justice, legal needs studies

EXAMINING THE REAL DEMAND FOR LEGAL SERVICES

*Herbert M. Kritzer**

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INTRODUCTION

Over the last quarter century (through 2008), at least twenty-six states plus the District of Columbia have seen investigations of legal needs of low and/or modest income citizens.¹ Some of these investigations were

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1. See AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS app. E (1995) (The commission heard testimony in ten cities, including Orlando, San Antonio, Boston, Sacramento, Chicago, Washington, D.C., New York, Phoenix, Minneapolis, and New Orleans.); Robert Echols, *State Legal Needs Studies Point to "Justice Gap"*, DIALOGUE, Summer 2005, at 32, 34 (The study covers ten states including Illinois, Montana, Oregon, Vermont, New Jersey, Connecticut, Massachusetts, Washington, and Tennessee.). To the studies listed in these two sources, I have added Wisconsin which published its study in 2007, Hawaii which published its study in 2007, and North Carolina which published its study in 2003. Several states have issued two reports over the last twenty-five years (e.g., Nevada and Massachusetts). The count above includes only general state-level legal needs studies. There are also some local studies, studies of the needs of specific constituencies (i.e., the elderly), and studies of legal needs for particular types of problems (i.e., family issues).

undertaken at the initiative of state bars; some were undertaken by or at the request of each state's highest court; and some were undertaken by ad hoc groups concerned about access to justice. The findings are remarkably consistent: for the vast majority of legal problems or legal needs of low income households, and only slightly fewer of the needs of moderate income households, no one from the household obtained the advice or assistance of an attorney. In the words of the 2003 report on civil legal needs in Washington state, "[l]ow-income people face eighty-eight percent of their legal problems without help from an attorney."²

This is a shocking figure. It calls for a response. It calls for action. If only 15% of persons of low income get legal assistance when they have a legal problem, there *must* be a problem. It seems self-evident that the problem must be that the vast majority of persons of low income cannot afford to get the legal assistance that they need. It also seems self-evident that measures are needed to obtain legal assistance, normally taken to mean the services of an attorney (at least in the United States),³ to literally the millions of people of low (and modest) income who do not have the resources to hire a lawyer. The legal profession needs to step up to the plate. The government (which really means the taxpayer) needs to step up to the plate. Law schools need to step up to the plate. The game is the affordability of legal services, or so we are told over and over by bar leaders, legal needs task forces, and prominent scholars.⁴ But is affordability *really* the central issue?

Respondents in legal needs studies have often been asked why they did not obtain the assistance of a lawyer. Only a small minority specifically mention concerns about costs. For example, the American Bar Association Comprehensive Legal Needs Study ("ABA Study") found that only 16% of low-income respondents and 8% of moderate-income respondents cited

2. TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 25 (2003) [hereinafter TASK FORCE]. A summary of state-level studies showed that the percentage of problems for which individuals sought or received legal help ranged from 9 to 18% (i.e., no help was sought or received for 82-91% of problems). See Echols, *supra* note 1, at 34 tbl.2. The 1993 national ABA study found that legal help was received for 21% of the problems. See Echols, *supra* note 1, at 34.

3. An issue I do not discuss in this paper is whether a significant portion of legal needs could be met by providing the assistance of nonlawyers. Elsewhere I provide evidence that specialist nonlawyers can be as effective, and sometimes more effective, than nonlawyers. See generally AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, *supra* note 1, at 9-10, 16; HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 50-77 (1998); Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 795-96 (2003).

4. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 3-5 (2004).

“cost concerns.”⁵ The Washington state study found that 22% of its respondents “were worried about cost” in deciding not to obtain assistance.⁶ The Oregon study found that only 11% of its respondents mentioned “worried about cost[s]” as among the reasons for not obtaining a lawyer’s help.⁷ Across the various studies, other factors, ranging from fatalism (e.g., “nothing could be done”), through self-help (e.g., “I was able to handle it myself”), to not recognizing the legal element of the problem or issue, tended to be mentioned more often than cost. What if the issue for most people, low income or otherwise, really is not cost? Or, what if cost is just as much an issue for those who could afford at least some legal assistance but choose to make a reasoned cost-benefit judgment? What if 85% of those in the top 20% income bracket are no more likely to turn to lawyers than are those in the bottom 20% bracket?

While the 85% figure (or whatever figure a particular legal needs study comes up with) is impressive, it is, as described in Darrell Huff’s classic book, *How to Lie with Statistics*, “a semi-attached figure.”⁸ Specifically, against what are we to judge a particular statistic or figure? Huff gives the example: “Four times more fatalities occur at 7 p.m. than at 7 a.m.”⁹ The implication is that it is safer to be on the road at 7 a.m. than at 7 p.m. What is not stated, but you may have guessed, is that many more people are on the road at 7 p.m. than at 7 a.m., and it may well be that traffic is four times as heavy at 7 p.m. than at 7 a.m.

Eighty-five percent is impressive because of what amounts to an implicit base of comparison: everyone should always get legal assistance when a legal problem arises. We would never say that everyone should always get medical attention when a medical problem arises. We do not go to see a doctor (or nurse practitioner or physician’s assistant) every time we have a cold or we stub—and possibly break—a toe (“take aspirin; it will heal by itself” is the usual response to the toe). We need to put the number of unmet legal needs of any particular group into perspective. A complication is that, as with medical or health needs, all unmet legal needs are not equal, and the nature of legal needs vary by a variety of demographic factors including income.

5. See AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994) [hereinafter ABA 1994 STUDY].

6. TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, *supra* note 2, at 47.

7. D. MICHAEL DALE, THE STATE OF ACCESS TO JUSTICE IN OREGON 34 (2000).

8. DARRELL HUFF, HOW TO LIE WITH STATISTICS 74-86 (1954).

9. *Id.* at 78.

The earliest legal needs studies done in the United States tended to conduct surveys of the entire population rather than zeroing in on low or low and moderate income groups.¹⁰ More recent studies have almost always surveyed only those falling into a single category labeled “low income” or into two categories, “low income” or “moderate income,” including the 1994 ABA Study.¹¹ Importantly, the combination of “low” and “moderate” income accounted for approximately 80% of the population. That is, often only the top income quintile was excluded from the survey.¹² Including the top quintile would have had relatively little effect on the overall cost of the surveys¹³ and the responses from the top quintile would provide a useful base of comparison.¹⁴

I. WHAT CAN WE FIGURE OUT USING EXTANT STUDIES?

While common sense seems to say that income should be a major factor in the decision to use a lawyer, there are some U.S. studies from the 1960s and 1970s that call that common sense into question. Crucial in these studies is controlling for the type of legal problem involved. A variety of research has demonstrated that whether legal advice is sought depends very heavily on the nature of the problem at issue,¹⁵ and the decision to seek

10. Probably the best example of these earlier studies is the American Bar Foundation study done in 1973-74. BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977) (report presenting results of the study).

11. See ABA 1994 STUDY, *supra* note 5, at 3.

12. See *id.* at app. A-1 for study design, samples, and implementation.

13. A major cost in telephone surveys is making the initial contact with the respondent. Only after making that contact can you determine if the respondent is eligible. The typical legal needs survey deems respondents whose income exceeds some cut-off as ineligible and terminates interviews of those persons. The cost of completing the interview once the contact is made, even for those whose incomes fall in the top quintile, is not going to increase the total survey cost that much—something clearly less than 25% (my guess is probably on the order of 10-15%).

14. When I served as a consultant to the State Bar of Wisconsin’s Access to Justice Committee as the committee was designing a legal needs study, I urged the inclusion of all income groups, both because of the marginal additional cost and in order to provide a baseline for comparison. My suggestion was not accepted, and the study was restricted to low and moderate income groups.

15. HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 141 (1999); DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 127-28 (1991); Jeffrey M. Fitzgerald, *Grievances, Disputes & Outcomes: A Comparison of Australia and the United States*, 1 *LAW IN CONTEXT* 15, 31 (1983); Masayuki Murayama, *Experiences of Problems & Disputing Behaviour in Japan*, 14 *MEIJI L.J.* 1, 26-33 (2007); Herbert M. Kritzer et al., *Context, Context, Context: A Cross-Problem, Cross-Cultural Comparison of Compensation Seeking Behaviour* (June 26-30, 1991) (unpublished paper, available at <http://www.tc.umn.edu/~kritzer/research/LSA-1991.pdf>).

legal assistance is part of that response. Some of the overall difference in lawyer use as a function of income reflects the different types of problems those with lower incomes frequently experience, as compared to those with higher incomes.

A. The Detroit Area Study

The first study providing useful information is part of a University of Michigan series of surveys known as the Detroit Area Studies.¹⁶ Mayhew and Reiss drew on the 1967 Detroit Area Study to produce evidence that the major factor in decisions to seek legal assistance is the social context of the problem.¹⁷ More specifically, it is the type of problem, not the characteristics of the person having the problem, that is the major predictor of lawyer seeking.¹⁸ Figure 1 uses results reported by Mayhew and Reiss to illustrate this pattern, and to show that once you control for type of problem there is not a consistent pattern showing that income is related to using a lawyer.¹⁹ For a number of types of problems, the highest income group was the most likely to employ a lawyer; however, most of those problems were such that a cost-benefit analysis would make the expenditure on a lawyer more likely for those with higher incomes (and hence more assets) than for those with low incomes (and hence relatively little in the way of assets). Moreover, for some types of problems, the highest income group was not the most likely to employ a lawyer.

16. The Detroit Area Studies, which began in 1951, serve as a training vehicle for students at the University of Michigan studying survey methods. See UNIV. OF MICH., DETROIT AREA STUDY, available at <http://deepblue.lib.umich.edu/handle/2027.42/51400>.

17. See Leon H. Mayhew & Albert J. Reiss, Jr., *The Social Organization of Legal Contracts*, 34 AM. SOC. REV. 309 (1969).

18. In addition to income, Mayhew and Reiss considered social status (blue collar versus white collar), education, home ownership, age, and religion. *Id.*

19. *Id.* at 314. Another report based on the same 1967 Detroit Area Study found that higher income households were more likely to consult a lawyer for a “serious” dispute. MATTHEW SILBERMAN, *THE CIVIL JUSTICE PROCESS: A SEQUENTIAL MODEL OF THE MOBILIZATION OF LAW* 55, 103 (1985). However, even among the highest income group only about 16% saw a lawyer (compared to about 6% for the lowest income group). Moreover, this analysis did not specifically control for type of problem. *Id.* at 55.

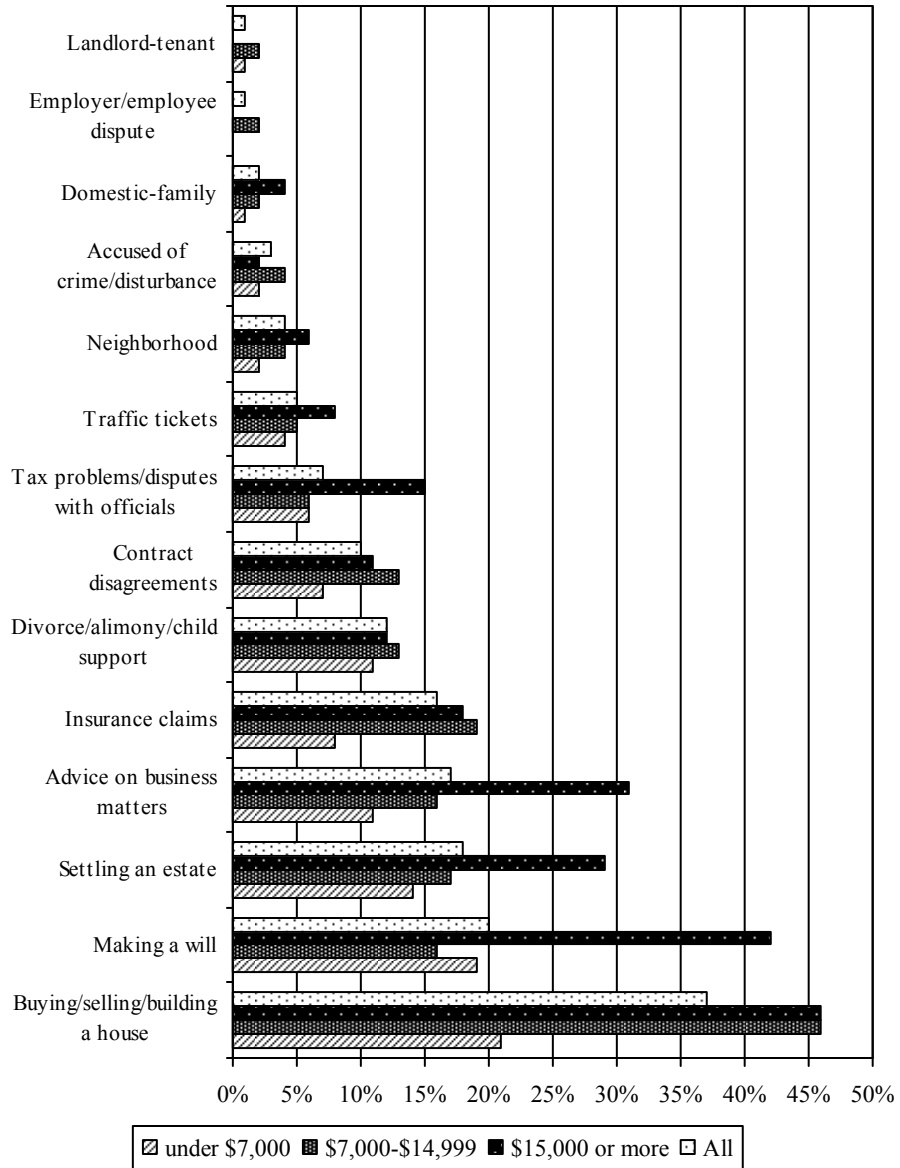


Figure 1. Lawyer Use, 1967 Detroit Area study

B. American Bar Foundation Legal Needs Study

The American Bar Foundation's ("ABF") study of legal needs was conducted in 1973-74.²⁰ This study surveyed 2,064 households about a range of legal needs, both those involving disputes and those involving transactional matters (property acquisition wills, etc.). This study still remains the most comprehensive legal needs study conducted nationally in the United States. Unlike the 1994 ABA Study,²¹ the ABF study included all income groups. In the aggregate, the study found little difference in mean income between those who did and did not employ a lawyer to assist with their legal needs: \$10,600 for those who used lawyers and \$10,200 for those who did not.²² As discussed above, the aggregate hides important differences because the nature of problems may vary with income, and the type of problem affects lawyer use. Curran also reports mean income for lawyer users and nonusers for each of nine different types of problems.²³ I reproduce that information in Figure 2 (supplemented with some additional detail found in Curran's text). The pattern shown does not suggest that higher income leads to an increased likelihood of employing a lawyer to assist with a legal need. For some problems, the users of lawyers have higher average incomes, while for others it is the nonusers whose incomes are higher on average. Figure 3, which also draws on results reported by Curran,²⁴ is structured the same way as Figure 1 from the Detroit Area Study and thus shows the likelihood of employing a lawyer to deal with twelve different types of legal needs controlling for income. Income here is divided into quintiles, which is useful because of the tendency of legal needs studies to exclude the highest income quintile. If income were a driving force in the decision to employ a lawyer, one would expect the highest income group to stand out as more likely to employ a lawyer. Of the twelve types of legal needs shown in Figure 3, in only three (federal agency problems, municipal service problems, and property acquisition) is the highest quintile the most likely to employ a lawyer.²⁵ It is worth noting that the lowest quintile was the most likely to employ a lawyer in two of the twelve types of legal needs (although in one of those the lowest quintile was tied with the second quintile). Also noteworthy is that the lowest

20. CURRAN, *supra* note 10, at xxvii.

21. See ABA 1994 STUDY, *supra* note 5.

22. CURRAN, *supra* note 10, at 152.

23. *Id.* at 153 fig.4.32.

24. *Id.* at 154-57.

25. Using the binomial distribution, there is over a 20% chance that one of the five income categories would be the most likely to employ a lawyer in three or more of the twelve comparisons.

quintile was the least likely to employ a lawyer in four types of needs; however, it was tied with at least one other quintile in two of the four. Thus, it is difficult to discern any consistent pattern in the relationship between family income and the use of a lawyer in the ABF study.

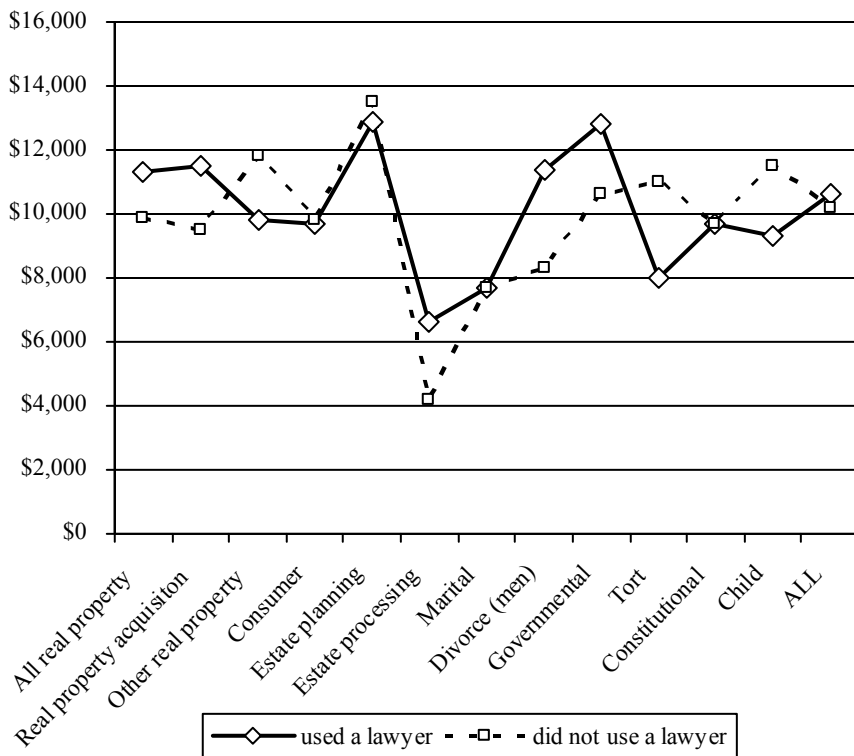


Figure 2. Income and Lawyer Use, ABF Legal Needs Study (1973)

There are, however, still patterns worth noting in Figure 3. The pattern that is apparent is the same one identified by Mayhew and Reiss in their analysis of the Detroit Area Study: the likelihood of using a lawyer is tied to the type of problem, although this pattern is clearer for certain types of problems than others.²⁶ For example, for injuries to the respondent’s child, property damage, bodily injury, consumer complaints, and credit problems there is relatively little variation by income, but there is substantial variation among the types of need. There is more variation within the types of government problems, although some of this reflects small samples.

26. See Mayhew & Reiss, *supra* note 17.

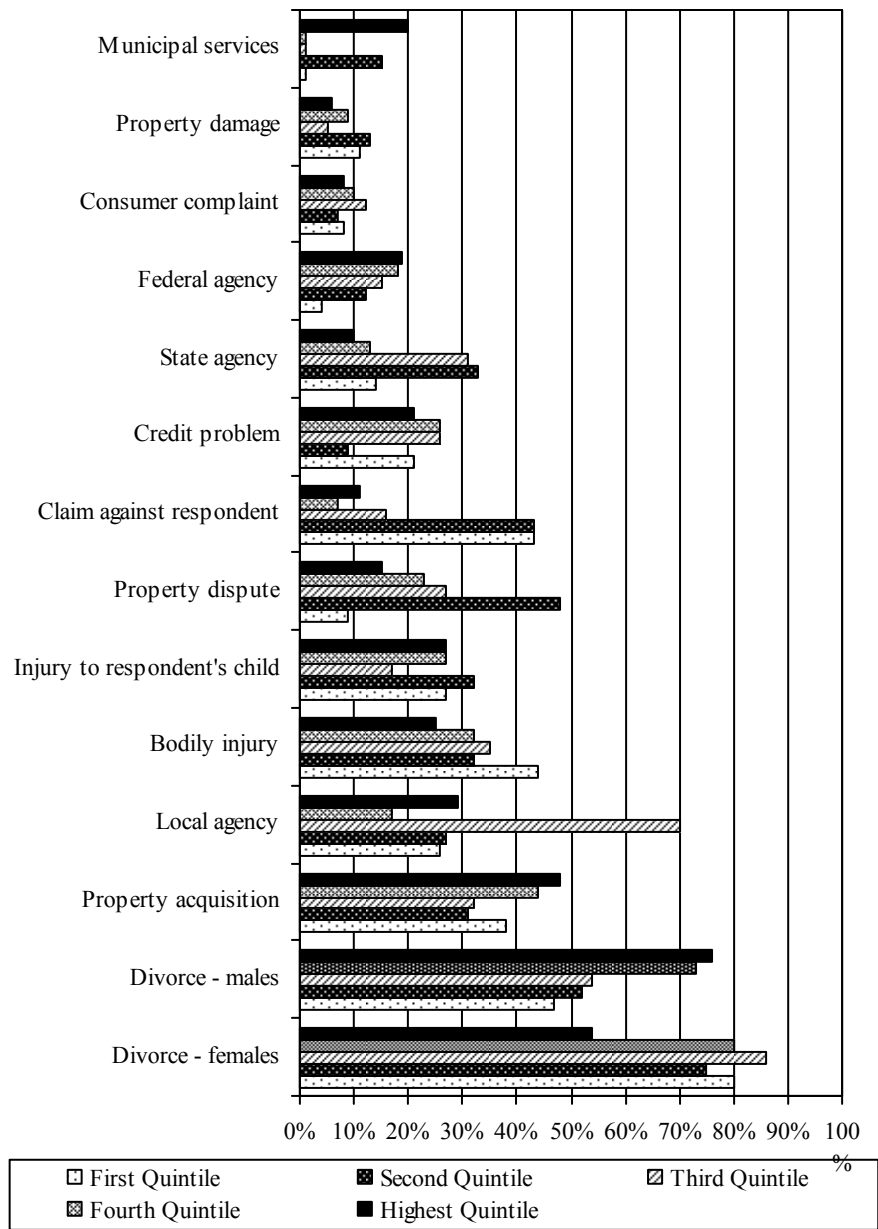


Figure 3. Lawyer Use, ABF Legal Needs Study (1973)

C. The Civil Litigation Research Project Study

The Civil Litigation Research Project (“CLRPP”) Study is the third U.S. study. It was undertaken not to identify “legal needs,” but rather to identify households which had experienced a “middle-range” dispute during the previous three years.²⁷ The focus was on disputes where the parties had a choice of whether or not to involve a court; consequently, divorce cases were excluded although post-divorce disputes were included. The study also excluded smaller disputes, limiting its focus to those involving at least \$1,000 (in then current dollars) or some significant non-monetary issue (e.g., child custody). The CLRPP study distinguished between “grievances” (i.e., problems that had a potential legal remedy) and “disputes”, defined as grievances for which a resolution was sought but where there was at least some difficulty in achieving a resolution.²⁸ The distinction between grievances and disputes makes it possible to look separately at lawyer use for all grievances and lawyer use when there was only a dispute.²⁹

Figure 4 shows the pattern of lawyer use for eight types of grievances. Income was roughly divided by quartile.³⁰ For three of the eight types of grievances shown, the highest income quartile was the most likely to use a lawyer; in four of the eight, the lowest income quartile was least likely to use a lawyer. Thus, there would appear to be at least some relationship with income. However, the most striking aspect of Figure 4 is that, again, the dominant factor in lawyer use appears to be type of problem. Income is, at best, operating at the margin.

27. See Herbert M. Kritzer, *Studying Disputes: Learning from the CLRPP Experience*, 15 LAW & SOC’Y REV. 503, 508-10 (1980-81); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 528 (1980-81).

28. The idea was to exclude grievances where no claim was made as well as cases in which a claim was immediately satisfied in full. The latter might include something such as significant damage in an automobile accident, where the other driver’s insurance company did not dispute fault and paid in-full for repairs.

29. See extant studies reporting results from the CLRPP study in Miller & Sarat, *supra* note 27, at 537; see also Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC’Y REV. 499 (1991).

30. Figures 4 and 5 are based on the author’s analysis of the CLRPP data.

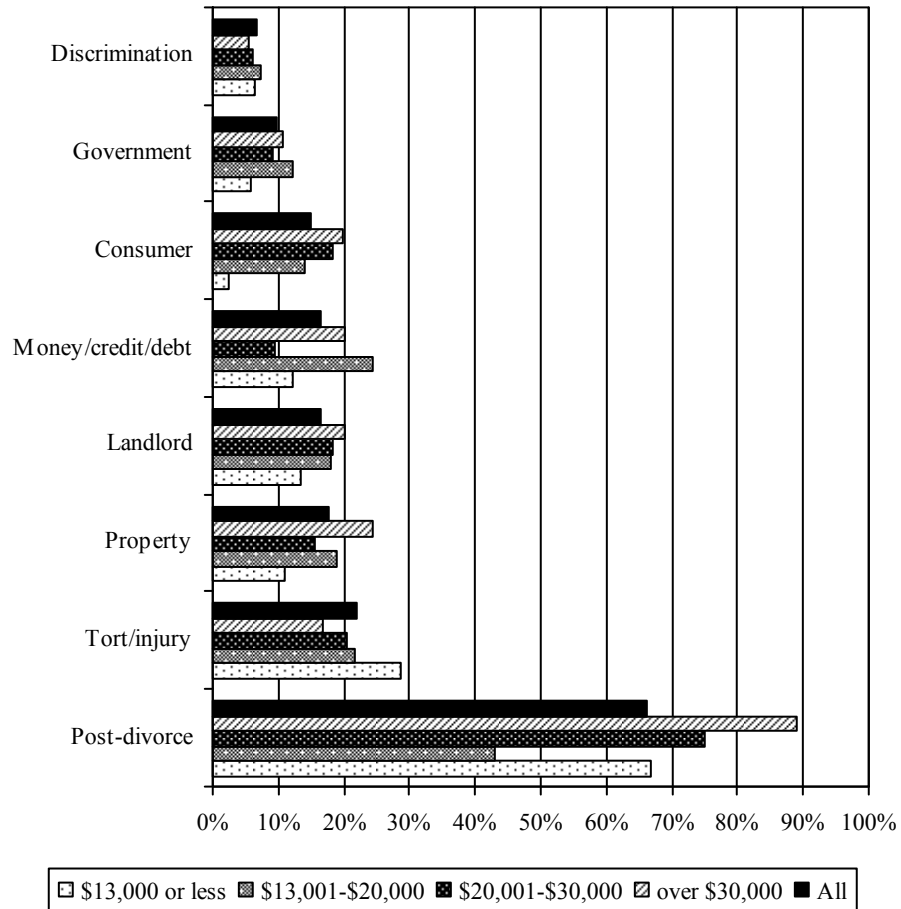


Figure 4. Lawyer Use by Grievants, Civil Litigation Research Project (1980)

Figure 5 shows lawyer use for those grievances that matured into disputes. The pattern is similar to that in Figure 4. In four types of problems, the highest income quartile was most likely to use a lawyer; in four types of problems the lowest quartile was least likely. Still, what the figure makes clear is that the type of problem dominates, and income has only a marginal effect.³¹

31. Elsewhere I report a regression analysis done by the original researchers that controlled for problem type, stakes, and a variety of other factors, and showed no significant

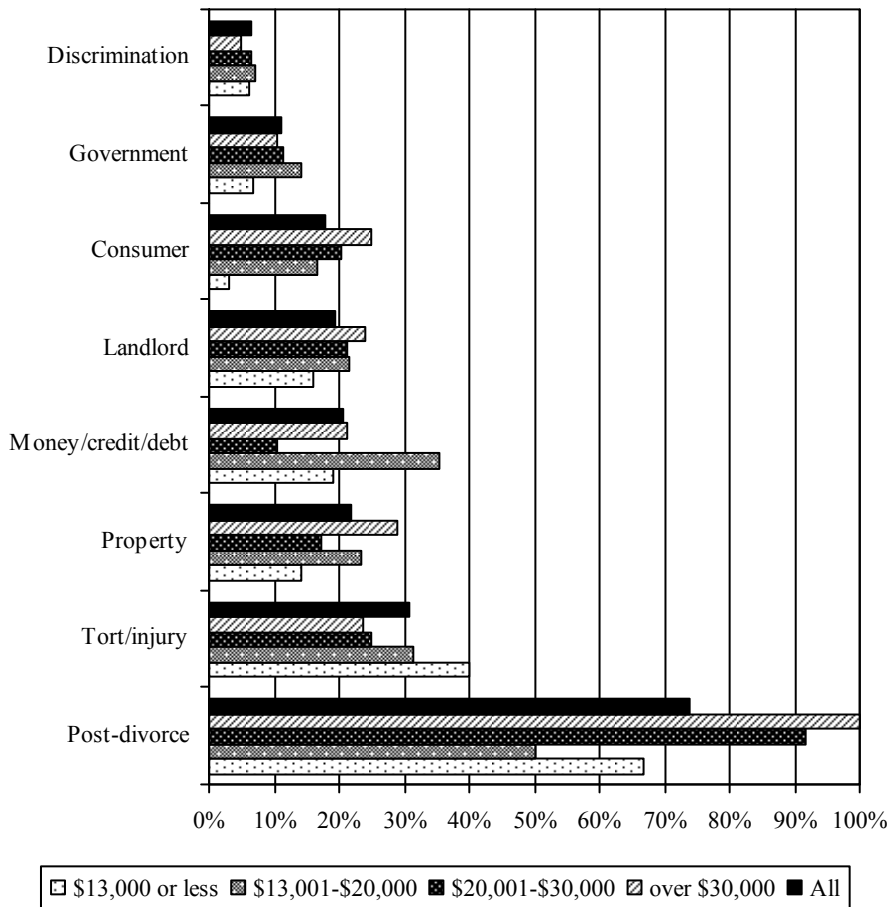


Figure 5. Lawyer Use by Disputants, Civil Litigation Research Project (1980)

D. Later Studies

All of these U.S. studies are at least thirty years old (or almost thirty years old as this is written). It would be helpful to be able to determine whether these patterns will continue. Unfortunately, we have neither state nor national surveys from the last fifteen years that include all income groups. One study, from Washington State, included three income groups: up to 125% of the federal poverty level (\$22,625 for a family of four when

effect for income. See Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is That the Question?*, 5 J. OF EMPIRICAL LEGAL STUD. 875, 900-02 (2008).

the survey was completed), 125-200% of the federal poverty level (\$36,200), and 200-400% of the poverty level (\$72,400).³² Unfortunately, while the report from this study does show breakdowns of lawyer use by broad problem types and for certain demographic groups,³³ it does not include any breakdowns of lawyer use by income.

There have been studies in other countries that do show these same patterns by income breakdown.³⁴ One of those countries is our neighbor to the north, Canada.³⁵ This study was conducted by the Canadian Department of Justice in early 2006,³⁶ and is similar to a study conducted in 2004.³⁷ The survey was conducted by telephone and the questions covered seventy-six specific types of problems during a three-year period that were “difficult to resolve.”³⁸ There were a total of 6,665 respondents. Figure 6 shows the patterns in this study. For some problems, income positively relates to consulting a lawyer (the higher the income, the more likely a lawyer was consulted); in other problems the relationship was inverse (lower income respondents were more likely to consult a lawyer).³⁹ Overall, there is again no clear relationship between lawyer use and income.

32. TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, *supra* note 2, at 19.

33. *Id.* at 26-27.

34. Elsewhere I show information on comparable patterns for Japan, the United States, Australia, and Canada. *See* Kritzer, *supra* note 31, at 879.

35. There is also an earlier Canadian study from Ontario that parallels the CLRP study described above. Data from that study follow essentially the same pattern as the CLRP study. *See* W.A. Bogart & Neil Vidmar, *Problems and Experiences with the Ontario Civil Justice System: An Empirical Assessment*, in ACCESS TO JUSTICE: BRIDGES AND BARRIERS 1 (Alan Hutchinson ed., 1990).

36. *See* Ab Currie, *The Legal Problems of Everyday Life*, in SOCIOLOGY OF CRIME, LAW AND DEVIANCE, VOL. 12: ACCESS TO JUSTICE 1 (Rebecca Sandefur ed., 2009).

37. The 2004 survey focused on individuals with incomes under \$35,000 per year and families with incomes under \$50,000 per year. *See* Ab Currie, *A National Survey of the Civil Justice Problems of Low—and Moderate—Income Canadians: Incidence and Patterns*, 13 INT’L J. LEGAL PROF. 217 (2006). There were no income limitations for the 2006 survey. *See* Currie, *supra* note 36.

38. *See* Currie, *supra* note 36. The study was modeled on research by Hazel Genn. *See* GENN, *supra* note 15, at 32-34.

39. The tabulations that are the basis of Figure 6 were provided to the author by Ab Currie. E-mail from Ab Currie, Department of Justice Canada, to Herbert Kritzer, William Mitchell College of Law (Oct. 22, 2007, 13:21:11 CST) (on file with author).

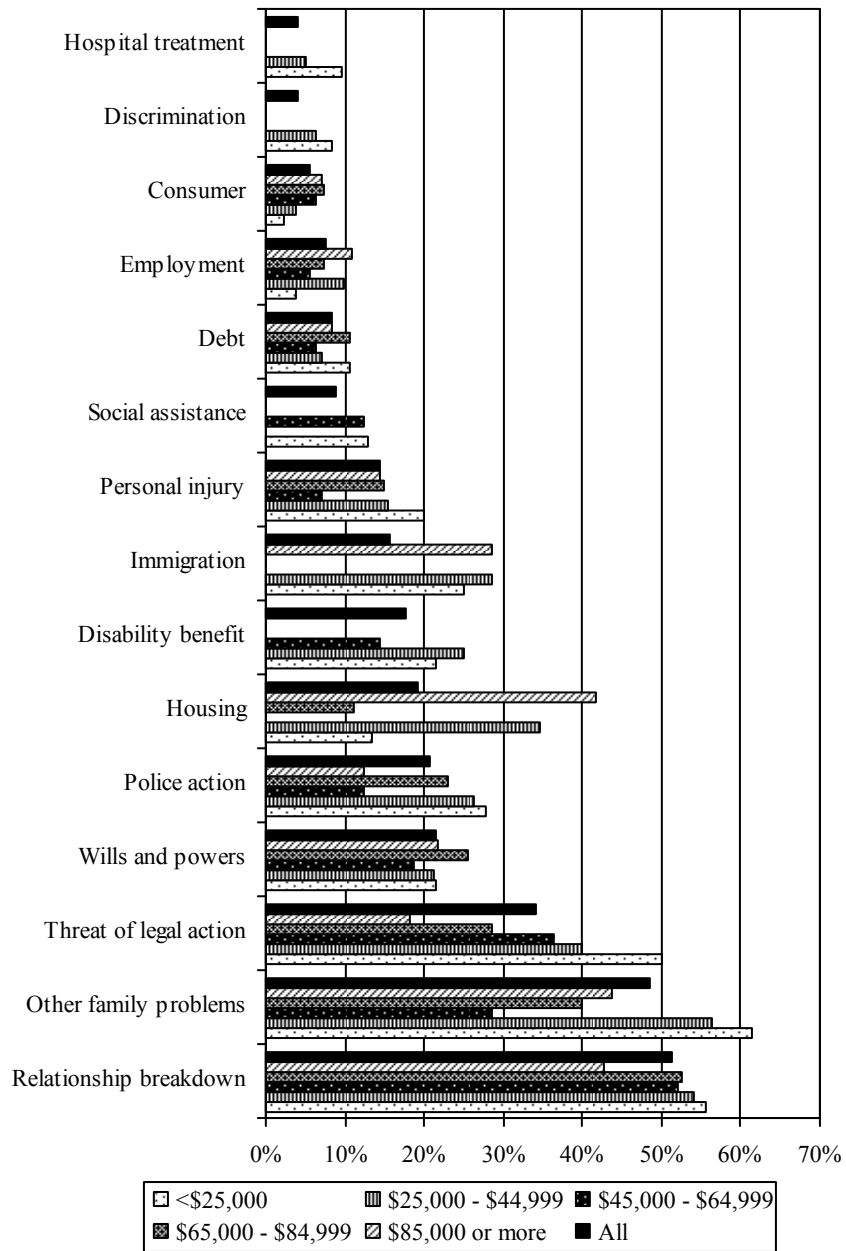


Figure 6. Lawyer Use in Canada, Canadian Legal Needs Study (2006)

II. IMPLICATIONS

A challenge to the patterns discussed above may lie in the several studies showing that, because of capacity problems, legal services offices turn away many potential clients. A significant number of those turned away both meet eligibility requirements and have problems of the type the legal services programs are authorized to address.⁴⁰ What these figures do not reveal is what percentage of those who go to legal services offices would choose to do so if there were some costs involved. Making judgments about the demand for legal services, and the impact of income on that demand, is difficult if we are looking at services that are provided at no cost. While crude, one can draw comparisons to decisions that consumers make when confronted with faulty products. More specifically, consider decisions regarding whether to seek repair of a product: when a product is under warranty and costs the consumer little or nothing to repair, I suspect that most consumers will seek repair; when a consumer has to pay the cost of repair, I suspect that most will decide to discard the product if the cost of repair is high relative to the value of the item or the cost of replacement.⁴¹ Or, consider decisions to have cars repaired after they suffer body damage. If the repair is covered by collision or comprehensive insurance (or by another driver's liability insurance), I suspect that most car owners are likely to have the car repaired; if the cost of the repair is not covered in whole or in significant part, then the owner is probably more likely to drive the car even without repairing the body damage.⁴²

Imagine if there were some copayment along the lines of what exists for many health insurance programs. Copayments were instituted specifically to deal with the dilemma that if seeing a physician had no cost, consumers would go to the physician for even the most minor of problems.⁴³

40. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5-8 (2d ed. 2007), available at <http://www.lsc.gov/justicegap.pdf>.

41. I recently purchased an inexpensive (\$10) watch. It is "guaranteed" for one year. If it malfunctions, I can mail it back to the manufacturer (at a cost of perhaps \$5.00) with a check for \$7.95 to cover "handling and return postage." Guess what I did when I had a problem with the watch six months after I purchased it?

42. See Georges Dionne and Robert Gagné, *Deductible Contracts Against Fraudulent Claims: Evidence from Automobile Insurance*, 83 REV. ECON. & STAT. 290, 293 (2001).

43. For a summary of the research related to this issue, see JONATHAN GRUBER, THE ROLE OF CONSUMER COPAYMENTS FOR HEALTH CARE: LESSONS FROM THE RAND HEALTH INSURANCE EXPERIMENT AND BEYOND (2006), available at <http://www.kff.org/insurance/upload/7566.pdf>. For a study of Medicaid, a service perhaps directly analogous to legal services, see LEIGHTON KU ET AL., THE EFFECTS OF COPAYMENTS ON THE USE OF MEDICAL

Copayments are intended to make consumers stop and ask themselves if they really need to see the physician for the current condition. What would happen to the demand for currently free legal services if there were some modest copayment required? It might be that the kinds of problems legal services are dealing with are sufficiently serious that it would have no effect at all. We simply do not know, and more generally we do not know the degree to which the current excess demands placed on legal services organizations reflects the “free” nature of the services being offered.

A. The Need for a Baseline

The absence of good comparative data in a survey that excludes the top quintile of income makes it difficult to assess the degree of legal need that takes into account the range of factors that might influence people to seek legal assistance. If one assumes that those in the top income quintile are able to make economically rational decisions about the value of legal assistance when facing a legal problem, the pattern of those decisions could provide a baseline for assessing the degree of need among the remaining 80% of the population. The distribution of problems encountered by those in the top quintile is likely to be different from those encountered by persons with less income. This means that comparisons across levels of income require studies to introduce controls for type of problem. It also probably means that it makes sense to include controls for the scale of the problem (i.e., how much is at stake if the problem is primarily monetary in nature); one would expect a greater willingness to make expenditures on legal assistance when what is at stake is sufficient to justify that expenditure.

The argument above makes the assumption that those with means do make rational decisions. If the top quintile’s pattern of lawyer use, controlling for type and scale of problem, is quite similar to lawyer use by those of lesser means, it may reflect a broad misunderstanding of the kind of assistance that lawyers can provide. The issue may not be rational decision making but a broad educational problem that is not limited to persons of modest income. Alternatively, it might indicate that the legal profession’s view of the value of lawyer assistance is overstated. It is possible that the overall judgment among potential consumers of legal assistance is reasonably accurate.

B. The Need for More Specific Justifications for Legal Assistance

Studies of legal needs tend to make blanket statements about legal needs. Alternatively, the issue of when legal assistance should be made available might be better framed in terms of the consequences of specific problems. For example, the Supreme Court has not found that the state is obligated to provide public defender (or equivalent) services for all criminal defendants. Rather, it is when a defendant faces the threat of the loss of his or her liberty that there is such an obligation.⁴⁴ Thus, the Court has drawn a bright line between when a defendant faces incarceration and when a defendant is facing some lesser sanction such as a fine, probation, or community service.

The assessment of legal needs in connection with non-criminal matters needs to be carried out with some consideration of the implications of the problem for person involved. One type of problem that is sometimes mentioned as being at the same level of seriousness as the threat of incarceration is the loss of parental rights.⁴⁵ Are there other types of problems that rise to this level, perhaps something such as the denial of medical treatment (or insurance coverage for medical treatment)? Arguably these types of problems should be entitled to legal assistance without imposing on the recipient any obligation to contribute toward the cost if the individual falls below some level of economic resources. Are there then other types of problems where recipients of legal aid should be expected to contribute toward the cost, so to require them to evaluate whether the severity of the problem or the prospects for success are sufficient to bear some of the cost?

44. See *Scott v. Illinois*, 440 U.S. 367, 381-82 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 29-30 (1972).

45. Res. 112A, ABA House of Delegates, Report to the House of Delegates 2-3 (2006) (discussing the ABA's amicus brief in *Lassiter v. Dept. of Soc. Servs. of Durham County*, 452 U.S. 18 (1981)), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. More generally, the resolution calls for government to provide legal counsel "as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction." *Id.* at 1; see also Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 180 (2004) ("In almost every state parents have a right to counsel when the state seeks to terminate their parental rights. The vast majority of parents in termination proceedings are indigent, which often means that their counsel is appointed by the court or provided through a public defender or contract system.").

CONCLUSION

Legal needs are real. Unfortunately, legal needs can also be virtually open-ended. No one would argue that *every* problem with a legal dimension merits the assistance of a legal professional. How do we assess whether the potential assistance is worth the cost of providing that assistance, either to the recipient or in a broader social sense? Does the likelihood that the assistance will make a meaningful difference come into play? How do we make those kinds of decisions in a system in which the recipient does not have to consider the costs and benefits? We are told that 85% of the civil legal needs of low income persons are currently not being met; we have no idea as to what portion of that 85% legal assistance would meaningfully help to resolve those needs, or how the cost of providing that assistance compares to the benefit that would be generated.

One could also ask under what circumstances is a legal professional's assistance legitimate. For example, if a tenant is being evicted due to nonpayment of rent, or violation of other terms of a lease from a well-maintained apartment, and the tenant has in fact not paid and/or has violated other terms of the lease, legal assistance might delay the eviction. Is such delay, when the action of the landlord is justified, an appropriate use of legal assistance? Should someone in this circumstance be provided with taxpayer-financed legal assistance, or the services of a lawyer working on a pro bono basis? Would it make any difference if the property involved was a "mother-in-law" apartment located physically within the landlord's own residence? More generally, how does one determine appropriate and inappropriate uses of legal assistance? Where should we draw the lines between what should and should not be provided on some basis other than fee-for-service? For example, does it matter whether the "opposing side" is a governmental body, a corporation, a small business, or an individual? Does it matter whether the procedure involved is formally adversarial, or must there be some genuine issue in dispute? These are only a few questions that need to be considered in thinking about more nuanced ways of assessing "unmet legal needs."