

TO LAWYER OR NOT TO LAWYER, IS THAT THE QUESTION?

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ABSTRACT

A central aspect of much of the debate over access to justice is the cost of legal services. The presumption of most participants in the debate is that individuals of limited or modest means do not obtain legal assistance because they cannot afford the cost of that assistance. The question I consider in this paper is whether income is a major factor in the decision to obtain the assistance of a qualified legal professional. Drawing upon data from five different countries (the United States, England and Wales, Canada, Australia, and Japan) I examine the relationship between income and using a legal professional. The results are remarkably consistent across the five countries: income has relatively little relationship with the decision to forego that assistance. The analysis suggests that those considering access to justice issues need to grapple with the more general issues of how those with legal needs, regardless of the resources they have available, evaluate the costs and benefits of hiring a lawyer.

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INTRODUCTION

One of the first steps in looking at access to justice is asking whether aggrieved persons seek redress. Starting with the legal needs studies of the 1970's (Curran 1977), we now have an extensive literature on the likelihood of grievants taking action (Royal Commission on Civil Liability and Compensation for Personal Injury 1978; Miller and Sarat 1980-81; FitzGerald 1983; Harris, Maclean, Genn, Lloyd-Bostock, Fenn, Corfield, and Brittan 1984; Bogart and Vidmar 1990; Kritzer, Bogart, and Vidmar 1991a; Kritzer, Vidmar, and Bogart 1991; Hensler, Marquis, Abrahamse, Berry, Ebener, Lewis, Lind, MacCoun, Manning, Rogowski, and Vaiana 1991; Ewick and Silbey 1998; Genn 1999; Genn and Paterson 2001; Murayama 2007). The thrust of these studies is that surprising few people in fact do seek redress, even in the supposedly litigious United States (see Abel 1987).¹

The obvious question is, "why"? A recurrent concern in the access to justice literature is that it reflects the unaffordability of legal assistance. That is, a significant part of the access to justice problem is access to lawyers or other forms of legal advice and assistance (Cappelletti and Garth 1978; Bogart, Zemans, and Bass 2005). In the United States, where government funded legal aid is minimal, many states have undertaken studies and developed policies to help meet the legal needs of low and moderate income

¹ This seems to be particularly true in the area of medical negligence (see Baker 2005, 22-44), an area where Americans are regularly charged with being excessively litigious resulting in skyrocketing medical malpractice premiums.

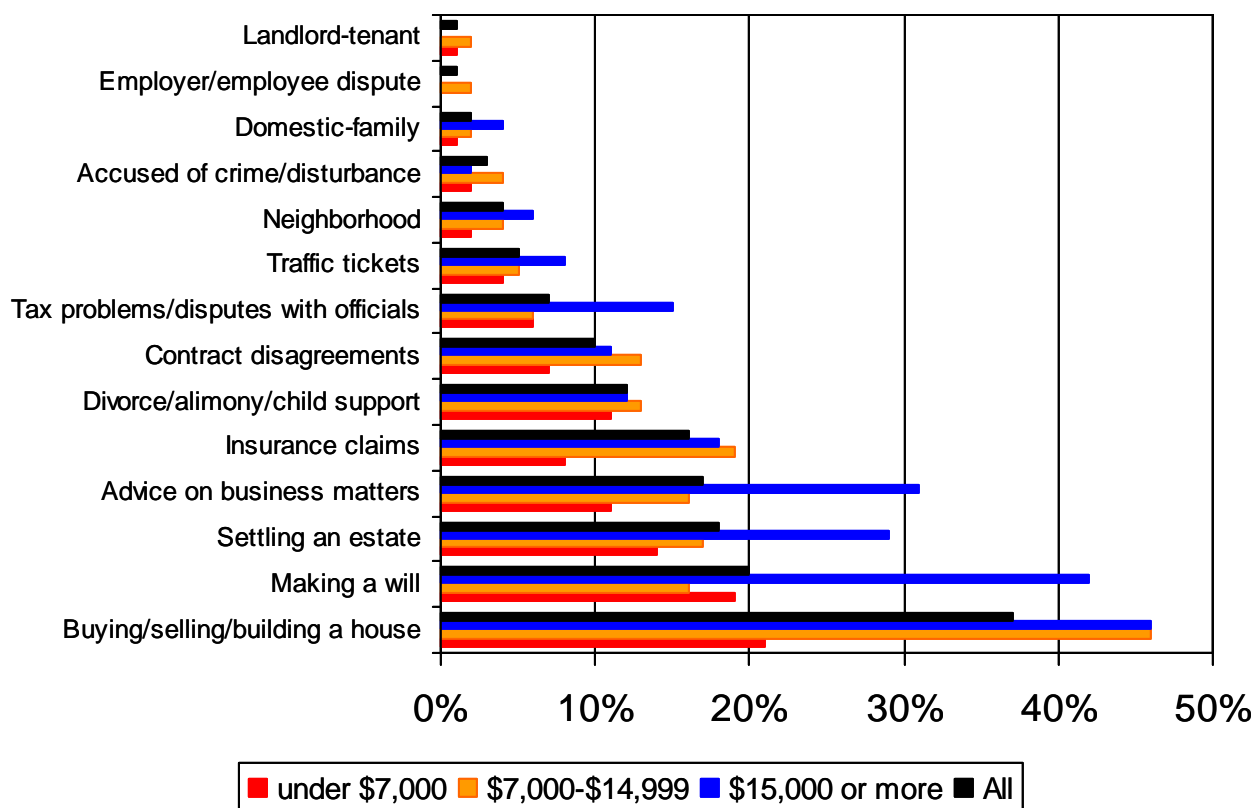
households;² the organized legal profession in the United States has sought to address this issue internally through the mechanism of *pro bono* legal services (Rhode 2005; Cummings 2004). All of this *assumes* that a central aspect of the ability to obtain redress is the financial resources to pay for legal assistance (or, in the alternative, legal aid in some form).

Is the assumption that the lack of financial resources is a major, or even *the* major, reason grievants fail to seek or obtain redress correct? There is some evidence that financial resources may have some influence. The 1993 American Bar Association study of the legal needs of low and moderate income households found that moderate income households were more likely to obtain the assistance of a lawyer to deal with their legal needs than were low income households (American Bar Association 1994, 27). Note that this study, along with many of the more recent state-based studies in the United States, did not include in its comparison higher income households; the implicit assumption seems to be that higher income households will get the legal assistance they need. The studies never consider the possibility that income and resources might not be the driving force in seeking redress and/or obtaining legal assistance.

However, there is an early study that calls into question the assumption that income is a major influence on the decision to seek legal assistance. Mayhew and Reiss (1969), drawing on the 1967 Detroit Area Study, provide evidence that the major factor in decisions to seek legal assistance is the social context of the problem. That is, it is the type of problem not the characteristics of the person having the problem that is the major

² States that have undertaken such studies include Connecticut (2003), District of Columbia (2003), Illinois (2005), Indiana (1992), Massachusetts (2003), Montana (2005), New Jersey (2002), North Carolina (2003), Oregon (2000), Tennessee (2004), Vermont (2001), Washington (2003), Wisconsin (2007). A list of the reports produced by each of these studies can be found in the Appendix.

FIGURE 1: LAWYER USE, 1967 DETROIT AREA STUDY



predictor of lawyer seeking.³ Figure 1 draws on results reported by Mayhew and Reiss to illustrate this pattern.⁴ Does this now 40 year-old study from a single city represent a general pattern or is it peculiar to time and place?. That is, to what degree can we generalize Mayhew and Reiss’s argument that it is the social organization of problems rather than the characteristics of the persons having the problem that predicts the use of lawyers and other responses to legal problems?

³ In addition to income, Mayhew and Reiss considered social status (blue collar versus white collar), education, home ownership, age, and religion.

⁴ 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 (Silberman 1985, 55, 103); 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.

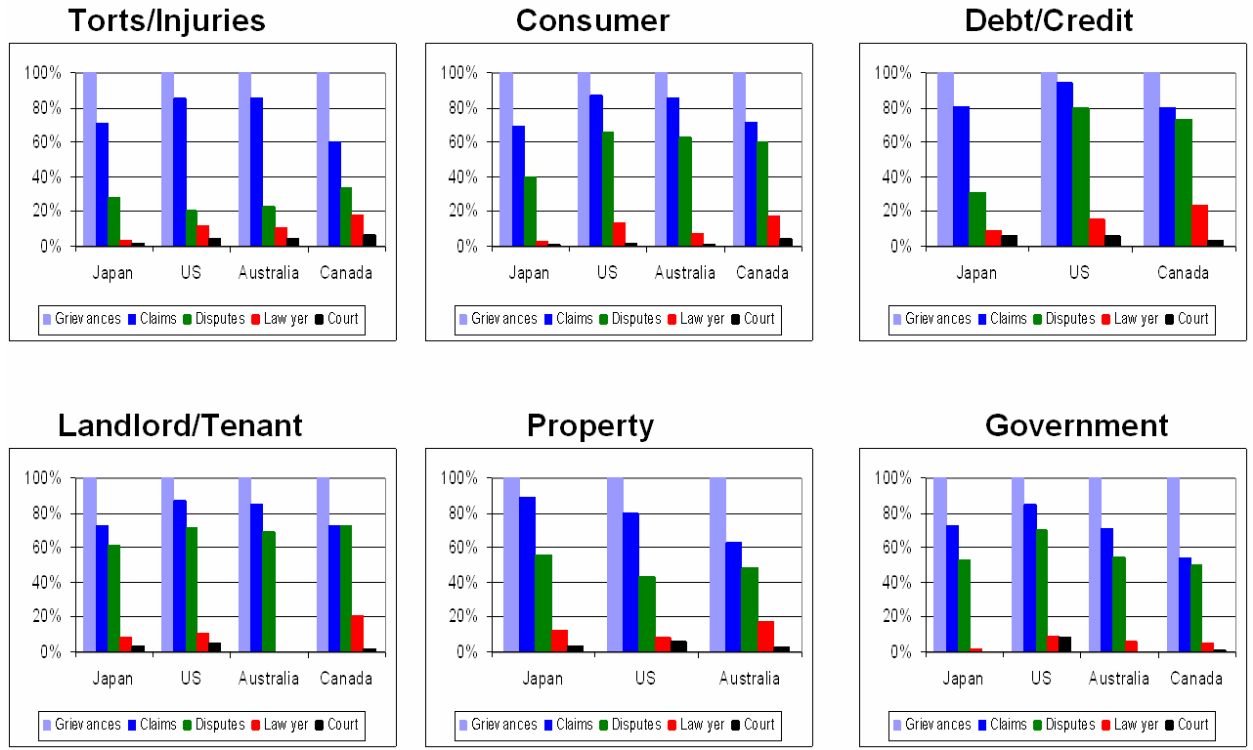
PROPENSITY TO CLAIM

As noted above, there is now an extensive cross-national literature on the propensity to claim. One striking aspect of that literature is that it consistently shows that demographic factors, including *income*, have at best a very small influence on the likelihood that a grievant will seek redress. For example, Miller and Sarat (1980-81, 552) find that a model containing background variables (including income, education, and ethnicity) and several measures of previous legal experience reduced predictive error by only 2.5%. The variable that best explains decisions to seek redress is the specific nature of the problem; when Miller and Sarat added type of problem to their model, the reduction in predictive error rose to 24%. Further analyses of the Miller and Sarat data looking within the broad category of torts and injury found that income had no effect on claiming although this is not surprising given the contingency fee system in the U.S. (Kritzer, Bogart, and Vidmar 1991a, 523); replicating this analysis with data from a similar survey in Ontario, found a relationship with income but it was by no means linear (*id.*, 527).⁵

The importance of problem type as a predictor of disputing behavior is illustrated by Figures 2 and 3, which show disputing behavior in the United States (Miller and Sarat 1980-81; Kritzer, Bogart, and Vidmar 1991a; Kritzer, Vidmar, and Bogart 1991), Canada (Bogart and Vidmar 1990), Australia (FitzGerald 1983), and Japan (Murayama 2007). While the two figures show only broad categories of dispute types, additional analyses that subdivide major dispute types such as torts/injuries, consumer, and

⁵ The other major study of claiming behavior in tort and injury cases is the RAND study of compensation for accidental injury (see Hensler et al. 1991). While the RAND authors do not report any models of claiming behavior which include income, I have been told by the lead author, Deborah Hensler, that the researchers ran models of that type but found no effects. A reanalysis of the RAND data that reports a model including income shows no effect (see Dunbar and Sabry 2007, 12).

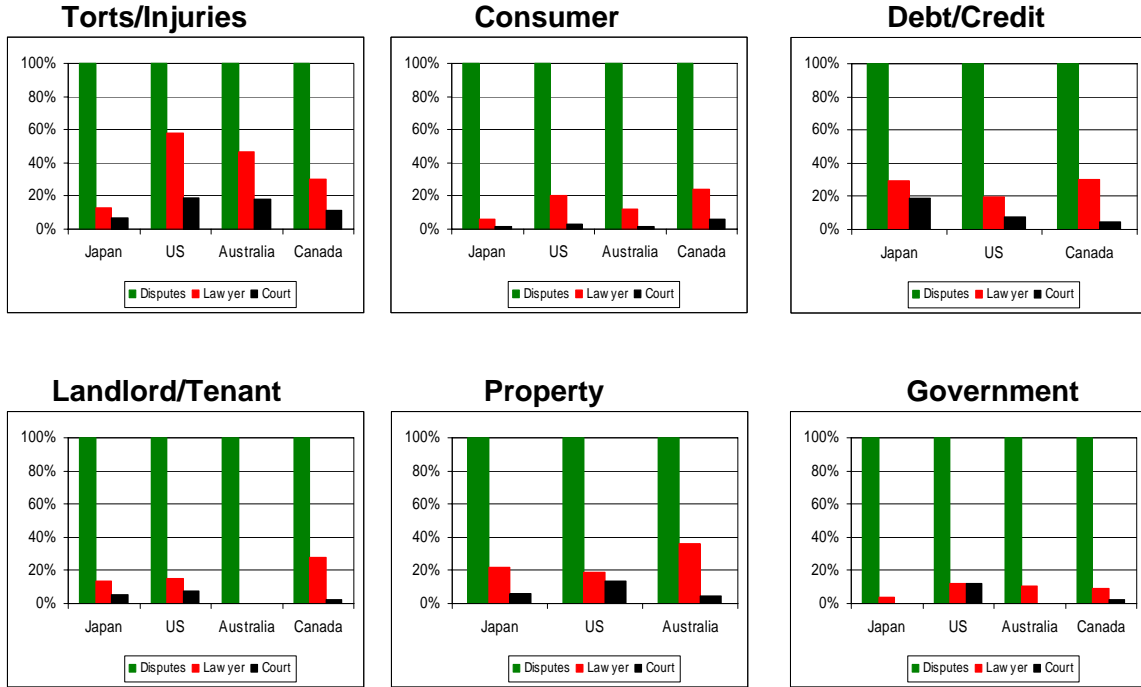
FIGURE 2: GRIEVANT BEHAVIOR IN FOUR COUNTRIES



discrimination into subtypes shows that even within dispute types, the specific subtype is the best single predictor of claiming and that demographic factors including income have at best marginal effects (Kritzer, Bogart, and Vidmar 1991b).

While Figures 2 and 3 show that relatively few people choose to use a lawyer (with the possible exception of torts and injuries), it reveals nothing about whether household income accounts for lawyer use. I now turn to a wide variety of studies from five different countries to explore whether income is a significant factor in the decision to employ a lawyer.

FIGURE 3: DISPUTANT BEHAVIOR IN FOUR COUNTRIES



DATA SOURCES

My analysis does not employ any new data collection. Rather, I rely upon a variety of extant studies to examine the relationship between income and lawyer use. In this section I briefly describe the various studies I use, country by country.

United States

I draw on three different national studies to look at the decision to use a lawyer in the United States. The first of these studies is the American Bar Foundation's (ABF) study of legal needs conducted in 1973-74 (Curran 1977). 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.). In the discussion that follows, I will refer to this as the "ABF Study."

The second U.S. study is the 1993 American Bar Association study of the legal needs of low and moderate income households (American Bar Association 1994) . This study, which focused on experience in 1992, was based on a telephone survey of 1,525 households falling into the category of low income (up to 125 percent of the federal poverty level) and 1,299 households with moderate incomes (above the 125 percent low income threshold but below \$60,000).⁶ As with the earlier ABF Study, this study included both disputes and transactional matters. I will refer to this study as the "ABA Study."

The third U.S. study is the survey conducted as part of the Civil Litigation Research Project (CLRP) in 1980 (Miller and Sarat 1980-81). It included 5,147 households, approximately 1,000 each in five federal judicial districts around the U.S. (Eastern Pennsylvania, Eastern Wisconsin, Central California, South Carolina, and New Mexico). The focus in this survey was to locate disputes involving at least \$1,000 (or, some significant intangible issue) that the respondent had been involved in during the previous three years; it did not include divorce issues except for problems that arose after a divorce had been finalized. I will refer to this study as the "CLRP Study."

Australia

The data for Australia come from a survey conducted by Jeffrey FitzGerald in 1981-82 in Victoria state (FitzGerald 1983). This study, designed as a replication of the CLRP

⁶ Only the top income quintile was excluded from the study. Hawaii and Alaska were not included in the study. The telephone survey was supplemented by a small survey of households without telephones.

Study, involved 1,019 households, and again focused on problems meeting a minimum threshold (AU\$1,000). I will refer to this study as the "Australia Study."

Canada

The data for Canada come from a survey conducted by W.A. Bogart and Neil Vidmar (Bogart and Vidmar 1990) in Ontario in 1988. It was also designed as a replication of the CLRP Study, involved 3,024 households, and focused on problems meeting a minimum threshold (CN\$1,000), during a three year window. I will refer to this study as the "Ontario Study."

England and Wales

The study I use for England and Wales was conducted in 2004 by the Legal Services Research Center (Plesance, Balmer, and Buck 2006).⁷ The design of this study was based on Hazel Genn's earlier "Paths to Justice" studies, one in England and Wales (Genn 1999) and a second done collaboratively with Alan Paterson in Scotland (Genn and Paterson 2001). The data for the "LSRC Study" (as I will call it) come from 5,015 respondents households, and focus on what the study labeled "justiciable problems" rather than setting a threshold as in the CLRP, Australia, and Ontario studies.⁸

⁷ Pascoe Plesance, the director of the Legal Services Research Center, generously provided me with the tabulations which form the basis of what I report below for the LSRC Study.

⁸ Genn defines a "justiciable event" as "a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system" (Genn 1999, 12). Events that were perceived by the respondents as trivial were excluded, with a trivial event being defined as one where the respondent took "no action whatsoever to deal with the problem because the problem had not been regarded as important enough to warrant any action" (*id.*, 13).

Japan

The study I use for Japan is an ongoing project in that country headed up by Masayuki Murayama (2007). This study is modeled in many ways on the CLRP study of 25 years ago. The Disputing Behaviour Survey from which I draw was carried out in March 2005, and produced responses from 12,408 individuals (a response rate of almost 50 percent). The Disputing Behavior Survey did not set any threshold level for the problems it asked about. A total of 2,343 respondents reported a total of 4,144 problems during the previous five years.⁹ I will refer to this study as the "Japan Study."

Additional Sources

One other source that I will employ is an unpublished analysis of the data from Australia Study and the CLRP Study (FitzGerald and Miller, n.d.) that carried out logistic regression analyses of the likelihood that disputants would employ lawyers. The logistic regression model included income as a variable as well as problem type and a variety of other variables.

ANALYSIS

My analytic strategy is to look separately at each study comparing lawyer use for different problem types controlling for income. The thrust of the results that I show below is that, after controlling for problem type, there is little in the way of a pattern of relationship between income and the use of a lawyer to deal with a given problem. This is not to say that there are no significant differences in the likelihood of using a lawyer;

⁹ A total of 12,408 respondents were interviewed; 18.9% (2,343) reported one or more problems (Murayama 2007, 6).

rather, where there are significant differences they do not show a consistently increasing monotonic relationship with income.

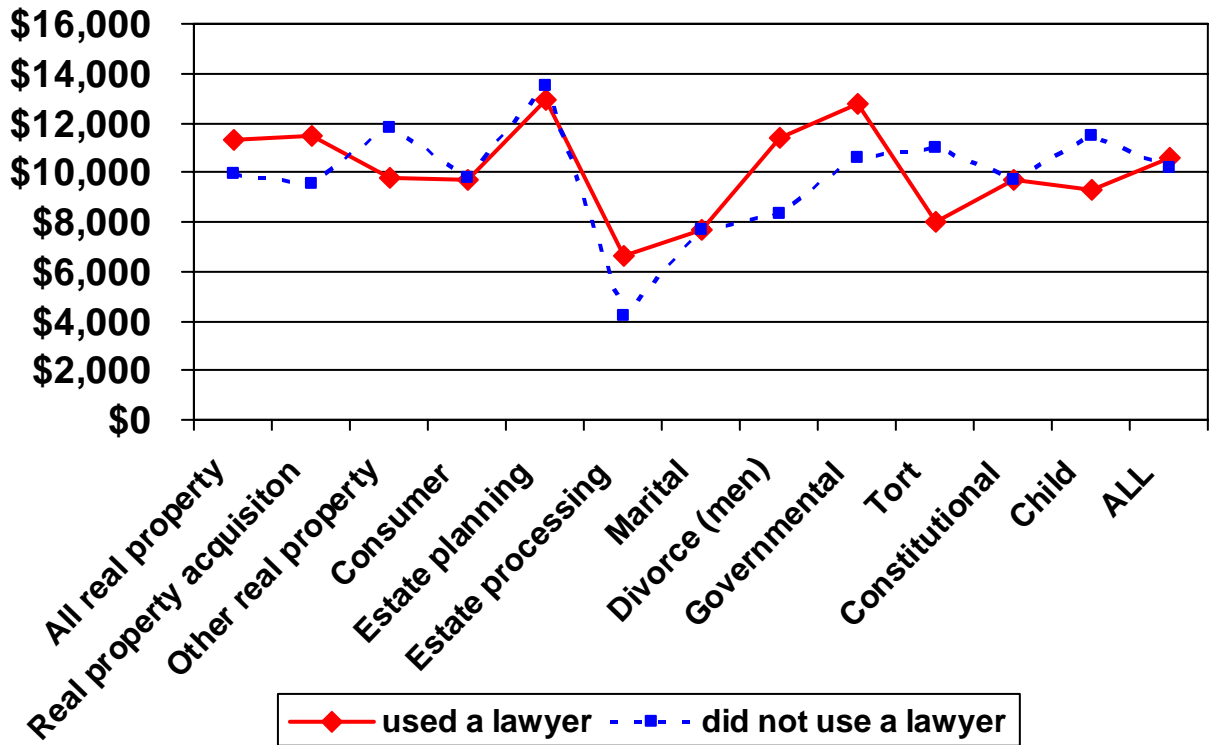
The United States

ABF Study

The ABF Study (Curran 1977) still stands as the most comprehensive legal needs study conducted nationally in the United States. Unlike the later ABA Study, 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 (Curran 1977: 152). Of course, the aggregate may hide important differences because the nature of problems may vary with income, and the type of problem may affect lawyer use. Curran also reports mean income for lawyer users and nonusers for each of nine different types of problems (Figure 4.32, page 153). I reproduce those patterns in Figure 4 (supplemented with some additional detail found in Curran's text). The pattern shown does not suggest a clear pattern of higher income leading to an increased likelihood of employing a lawyer to assist with a legal need.

Figure 5, which draws on results reported in Curran (pp. 154-157), 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 the next study I will consider omitted from its design 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

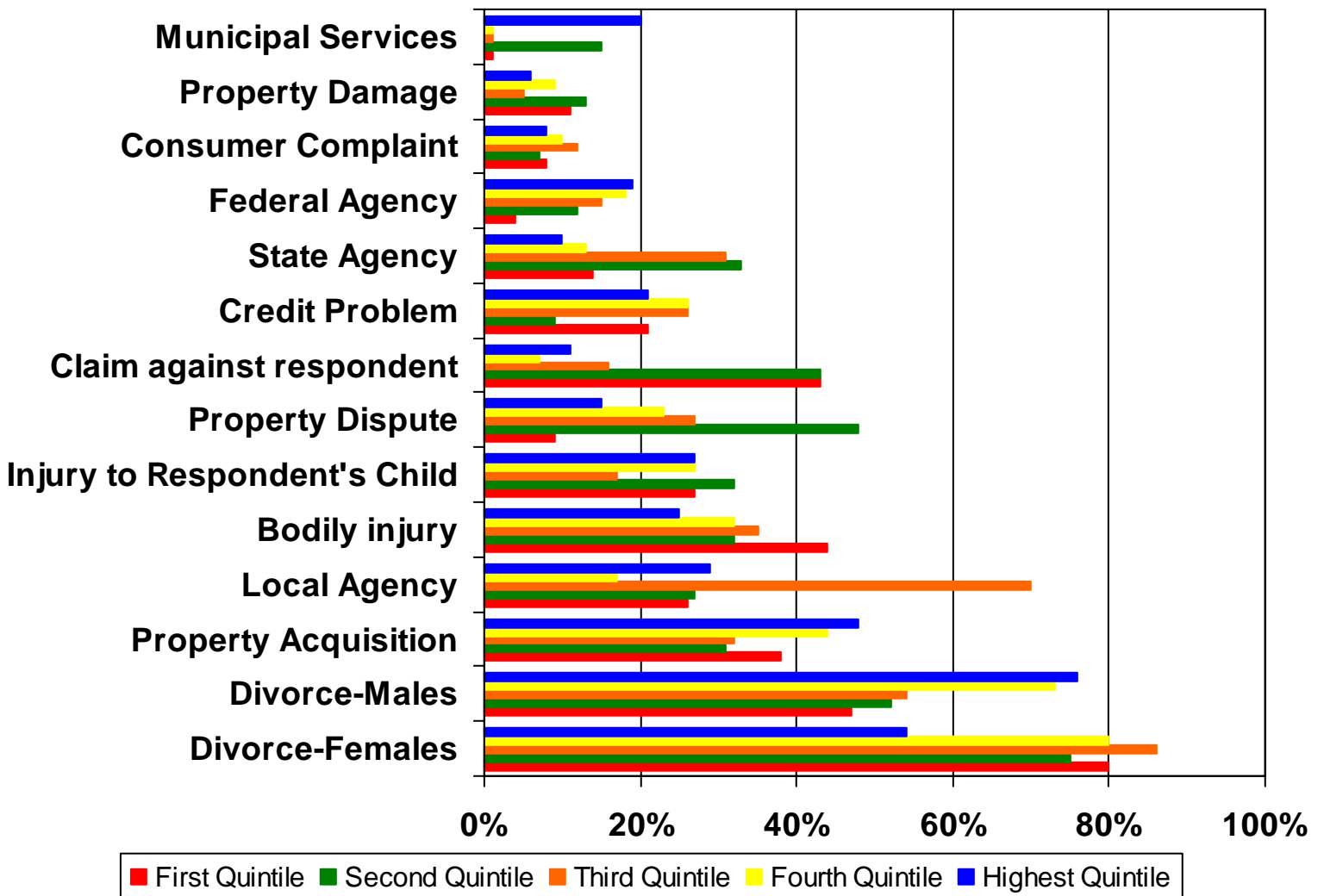
FIGURE 4: INCOME AND LAWYER USE, ABF LEGAL NEEDS STUDY (1973)



needs shown in Figure 5, in only three (federal agency problems, municipal service problems, and property acquisition) is the highest quintile the most likely to employ a lawyer.¹⁰ 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; it is also worth noting that the lowest quintile was the least likely to employ a lawyer in four types of needs (although it was tied with at least one other quintile in two of the four). Thus, it is difficult to discern any consistent

¹⁰ Using the binomial distribution, there is over a 20 percent 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.

FIGURE 5: LAWYER USE, ABF LEGAL NEEDS STUDY (1973)



pattern in the relationship between family income and the use of a lawyer in the ABF Study.

However, this does not mean that there is no pattern worth noting in Figure 5. 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 the clarity of this pattern is clearer for some types of problems than others. 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.

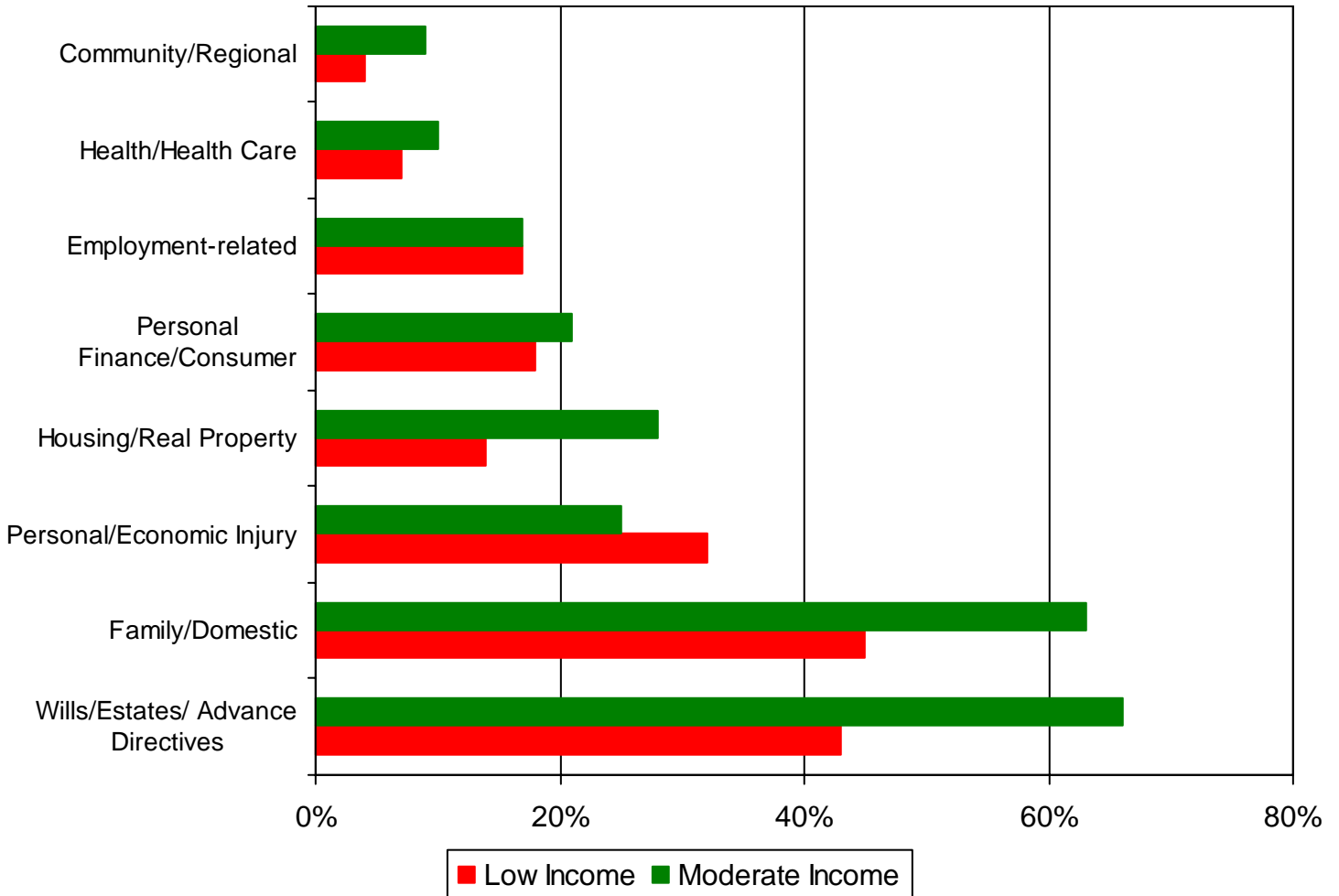
ABA Study

One study that does seem to show a pattern of lawyer use related to income is the ABA Study of the 1990s. That study reports that in 21 percent of cases involving low-income households lawyer assistance/involvement was obtained compared to 28 percent of moderate-income households (American Bar Association 1994, 27). Figure 6 shows the involvement of lawyer by income group and type of problem. For six of eight comparisons moderate income households were more likely to obtain legal assistance than were low income households. For only one type of problem (personal or economic injury) were low income households more likely to obtain the involvement of a lawyer; for one type of problem, employment-related, there was no difference between the two income groups. Importantly, these latter two types of problems are the kinds of problems where lawyers are most likely to be hired on a no-win, no-pay basis, which means that the resources of the client plays at best a small role in the availability of legal assistance.¹¹

However, while Figure 6 does show a relatively consistent pattern of a greater likelihood of lawyer involvement for moderate income households compared to low

¹¹ Resources may correlate with the amount of a potential recovery, and this may impact lawyers' decisions about whether to take a case on a no win, no pay basis (see Kritzer 2004, 84-86).

FIGURE 6: LAWYER USE, ABA LEGAL NEEDS STUDY (1993)



income households, the figure again shows the dominant influence of type of problem on the use of lawyers. The largest gaps between modest and low income are for family/domestic problems and for will/estates/advanced directives.¹² For these types of

¹² The differences in the probability of using a lawyer are statistically significant for these two types of needs; the difference for housing/real property is also significant, and the difference for community/regional problems is significant if one assumes a directional hypothesis.

problems, the likelihood of a low income household using a lawyer is greater than the likelihood of a moderate income household using a lawyer for any of the other six categories of legal needs. Thus, as with the earlier ABF Study and Detroit Area Study, type of problem is a greater factor in the involvement of lawyers than is household income.

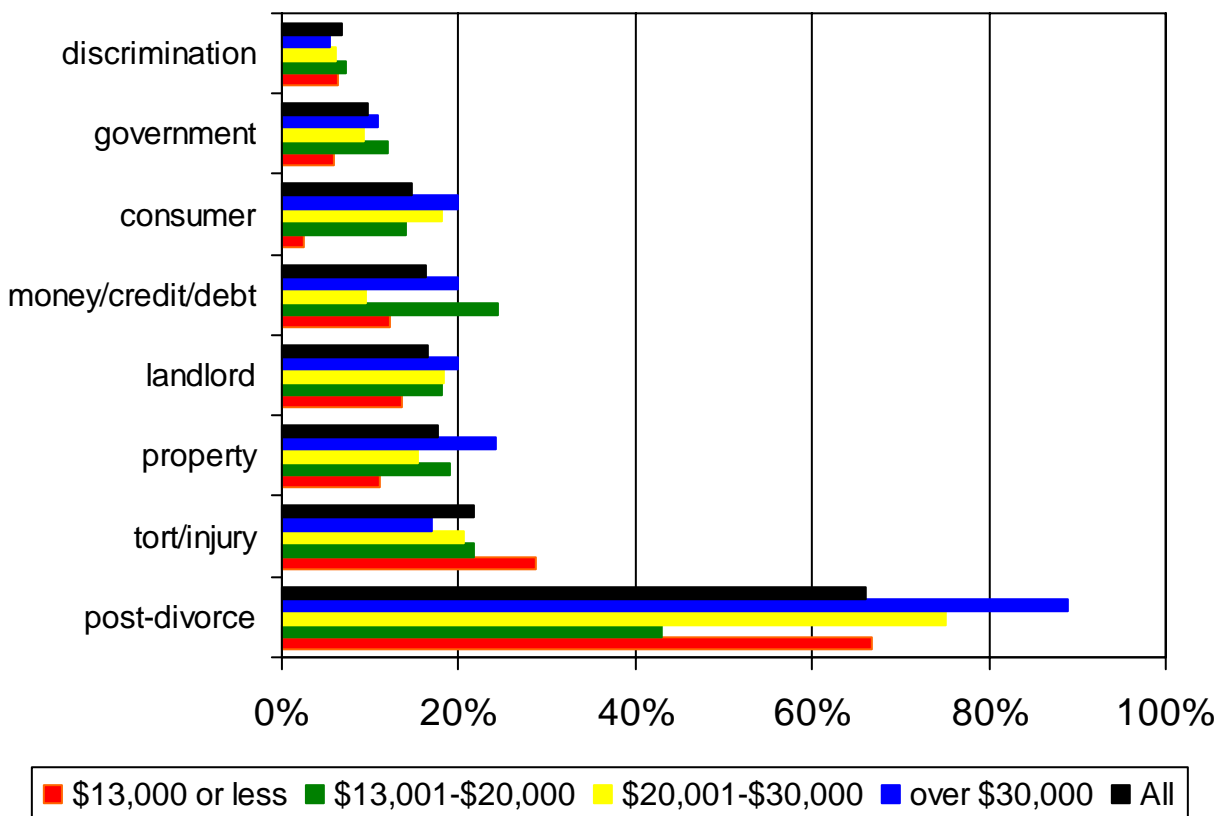
CLRP Study

The CLRP (Civil Litigation Research Project) 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. 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. As noted previously, “middle range” disputes were defined to be those involving at least \$1,000 (in then current dollars) or some significant non-monetary issue (e.g., child custody). The CLRP Study distinguished between “grievances” (i.e., problems that had a potential legal remedy) and “disputes” defined grievances for which a resolution was sought but where there was at least some difficulty in achieving a resolution.¹³ The distinction between grievances and disputes makes it possible to look separately at lawyer use for all grievance and lawyer use only when there was a dispute.

Figure 7 shows the pattern of lawyer use for eight types of grievances. Income was roughly divided by quartile. For three of the eight types of grievances shown, the

¹³ The idea was to exclude grievances where no claim was made and cases in which a claim was made and immediately satisfied in full. The latter might be something such as a significant property damage automobile accident where the other driver’s insurance company did not dispute fault and paid in-full for repairs.

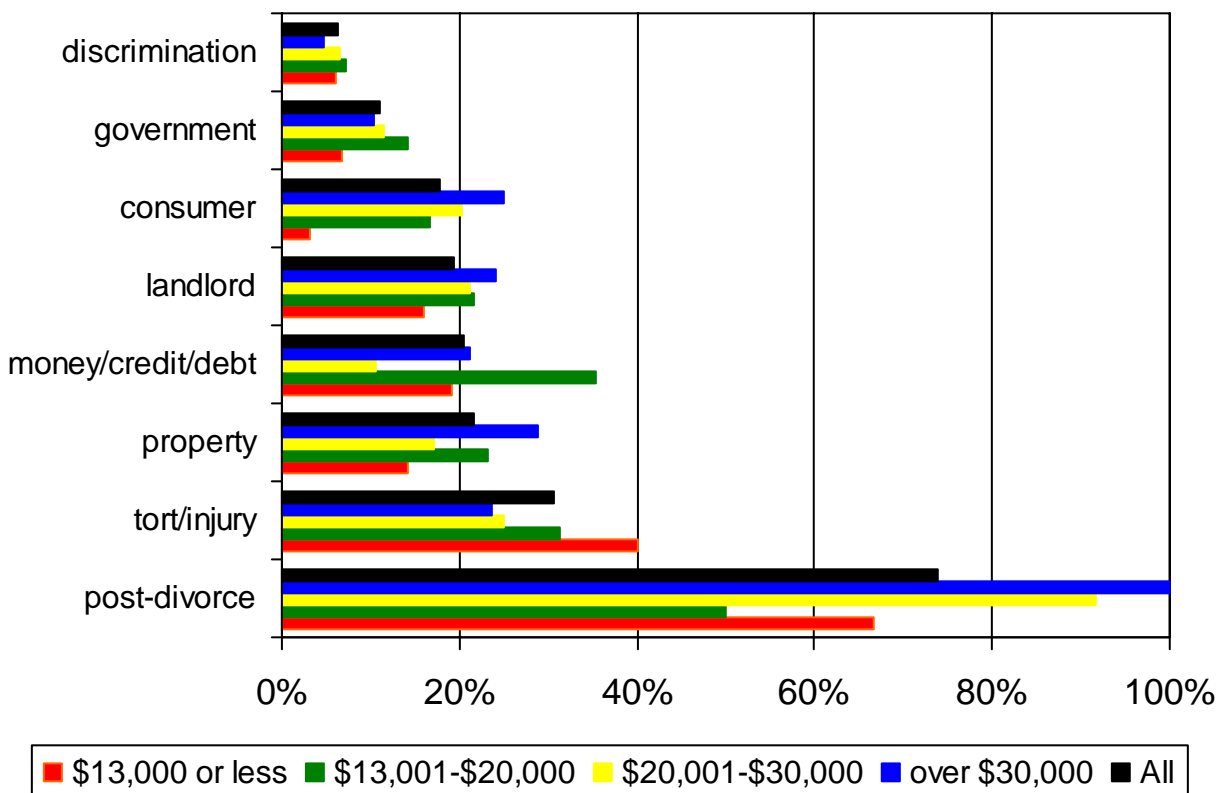
**FIGURE 7: LAWYER USE BY GRIEVANTS
CIVIL LITIGATION RESEARCH PROJECT (1980)**



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 7 is that again the dominant factor in lawyer use appears to be type of problem. Income is at best operating at the margin.

Figure 8 shows lawyer use for those grievances that matured into disputes. The pattern is similar to that in Figure 7. 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

**FIGURE 8: LAWYER USE BY DISPUTANTS
CIVIL LITIGATION RESEARCH PROJECT (1980)**

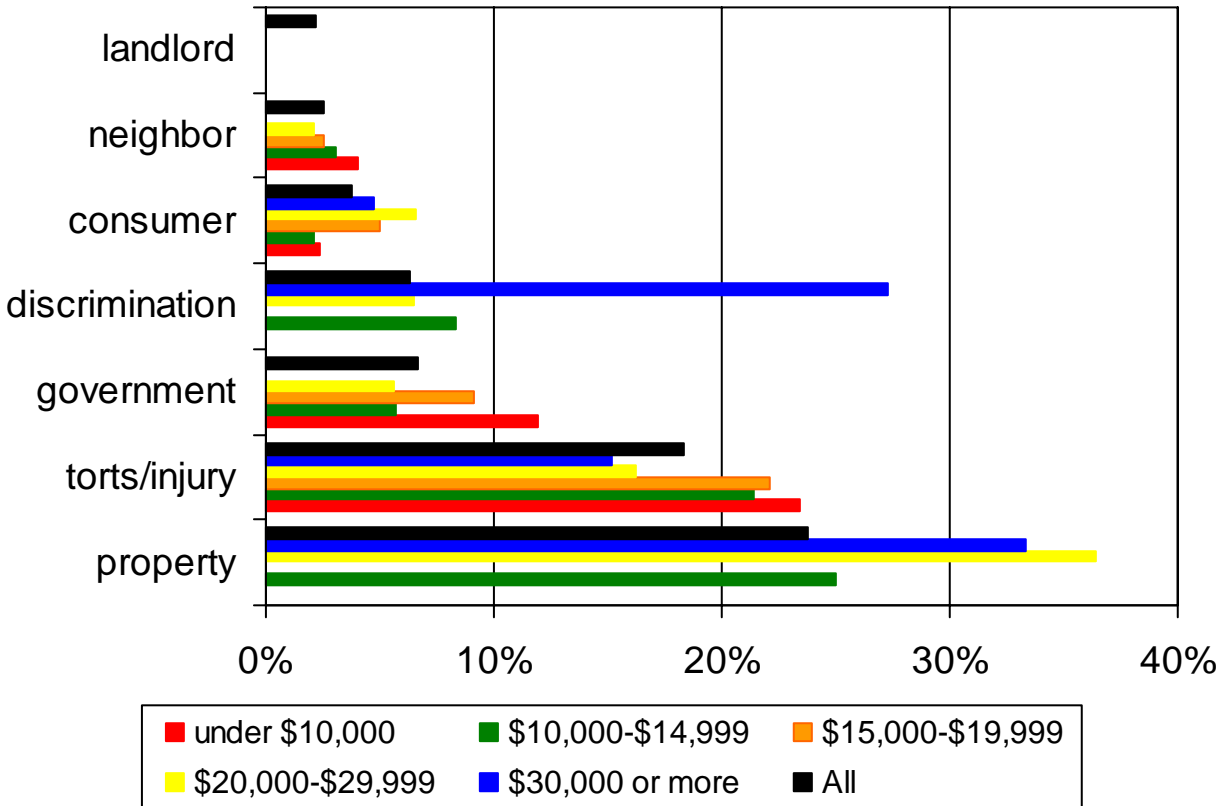


least likely. Still, the figure makes clear is that type of problem dominates with income have only a marginal effect.

Australia

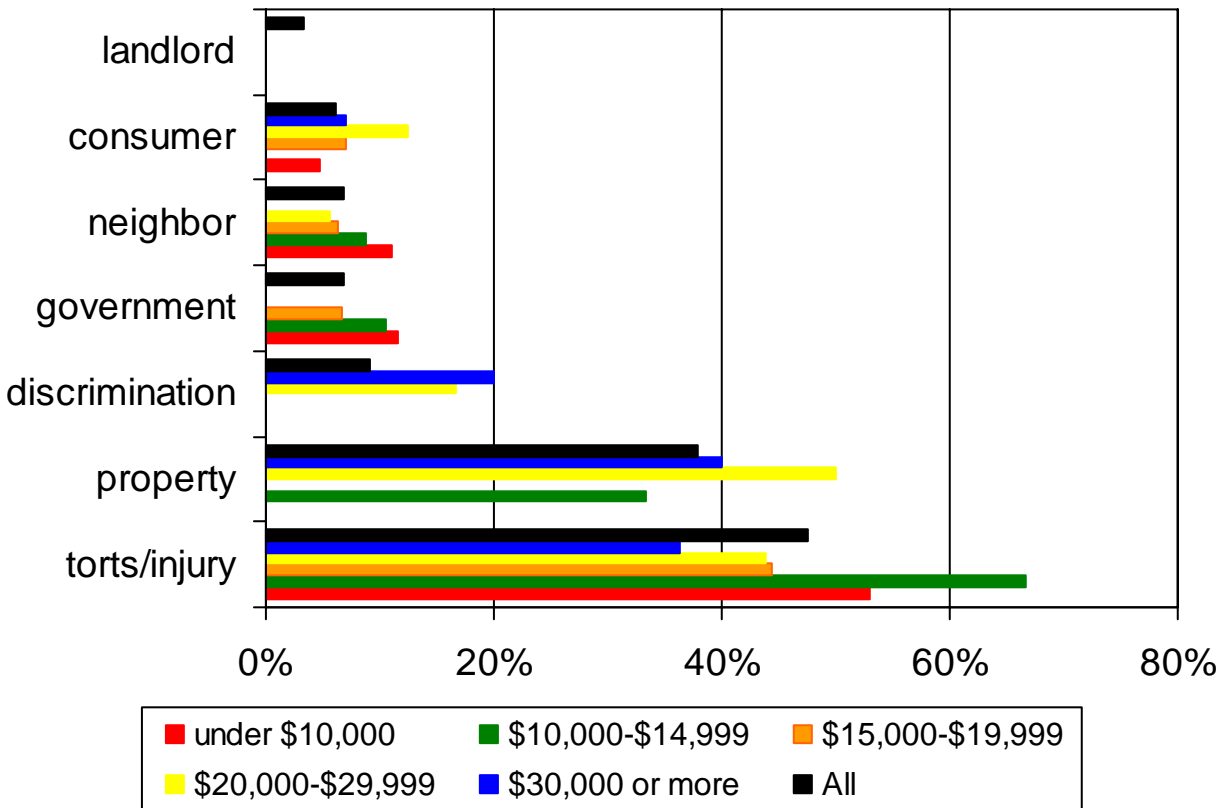
As noted previously, the Australia Study was modeled after the CLRP Study. Figures 9 and 10 show lawyer use for seven different types of problems; Figure 9 is based on grievances and Figure 10 on disputes. Again income is broken down roughly by quartiles. Looking at Figure 9, one sees that for only one type of problem (discrimination) is the highest quartile the most likely to turn to a lawyer, and for only one is the lowest

**FIGURE 9: LAWYER USE BY GRIEVANTS
AUSTRALIA DISPUTES STUDY (1981-82)**



quartile the least likely (although for two other types of problems no one in the first income quartile and at least one other quartile used a lawyer. As Figure 10 shows, essentially the same pattern holds for problems that became disputes. And, most importantly, the dominance of dispute type in the decision to hire a lawyer is clearly apparent.

**FIGURE 10: LAWYER USE BY DISPUTANTS
AUSTRALIA DISPUTES STUDY (1981-82)**

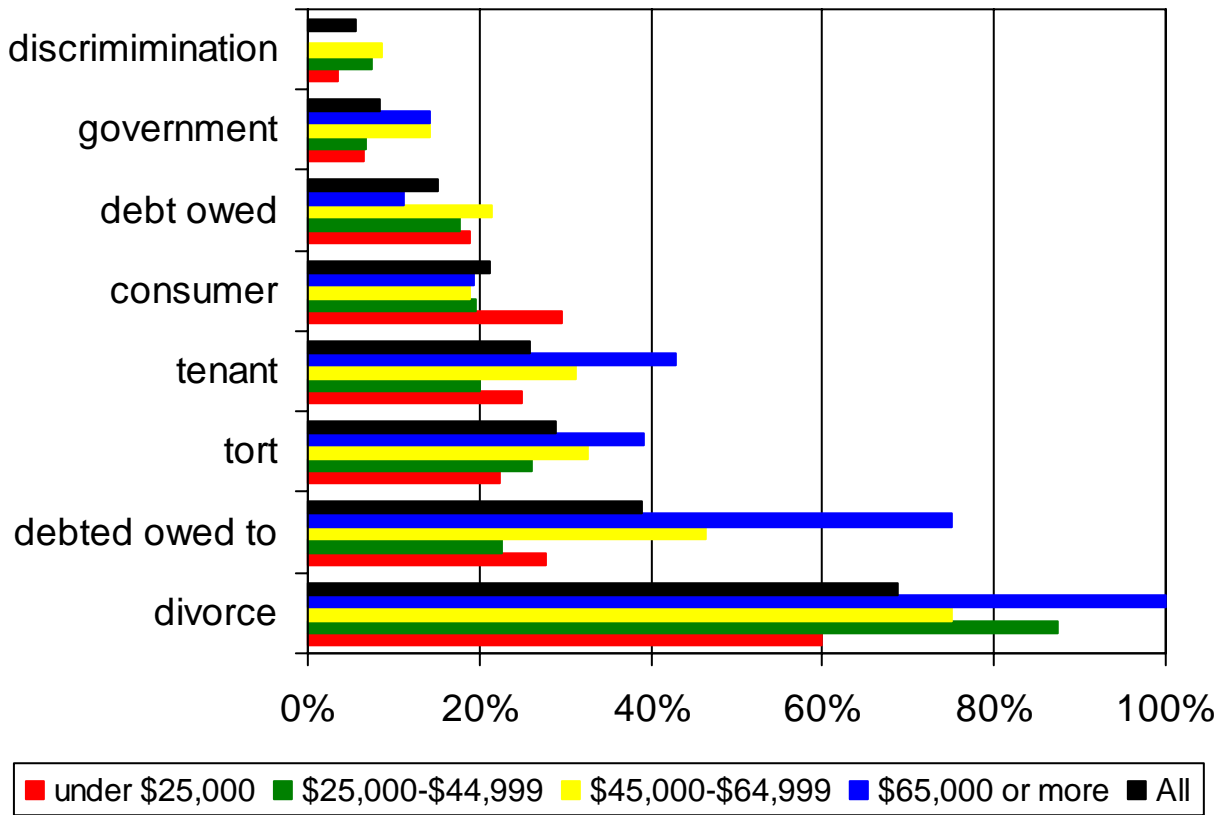


Canada

The Ontario Study, done in 1988, was also modeled on the CLRP Study's household survey. Figure 11 shows the pattern of lawyer contact for all grievances regardless of whether or not a claim was made.¹⁴ The same basic pattern emerges here as in the previous studies. In four of seven categories of problems, the highest income quartile was the most likely to contact a lawyer, and in three of seven categories, the

¹⁴ Among those seeking redress, lawyers were contacted in 28.4% of grievances (slightly more than half before the claim was made); of those not seeking redress from the opposing party, only 13.7% contacted a lawyer.

**FIGURE 11: LAWYER USE BY GRIEVANTS
ONTARIO DISPUTE STUDY (1988)**

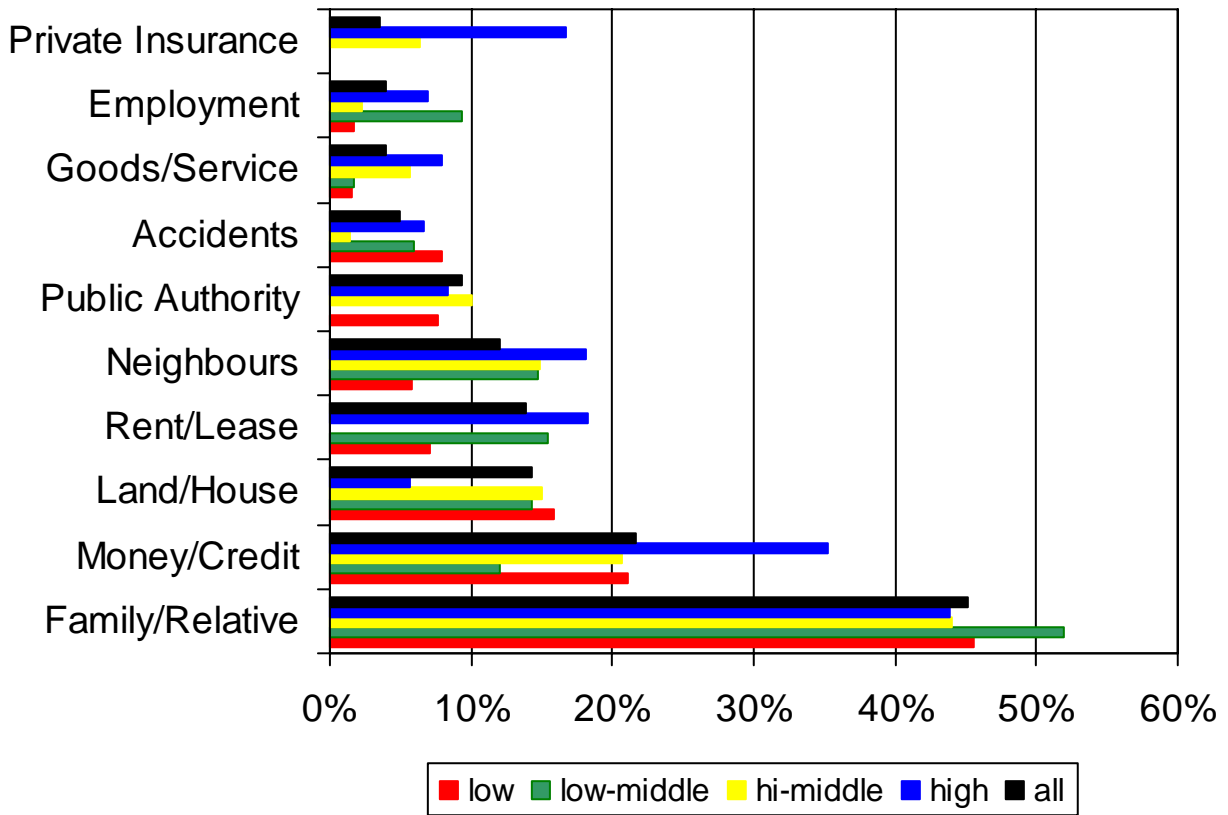


lowest quartile was least likely. However, the dominant pattern is the influence of type of problem. The one clear exception is the category of “debt owed to” the respondent where the highest income quartile was much more likely to contact a lawyer.

Japan

The Japan Study was also influenced by the design of the Civil Litigation Research Project study. The household survey for the Japan Study asked about a range of problems. It distinguished between “consulting a lawyer” and “hiring a lawyer.” Figures 12 and 13 show the patterns respectively for these two types of actions. I have labeled the

**FIGURE 12: CONSULTING LAWYERS
JAPAN DISPUTING BEHAVIOUR STUDY (2005)**

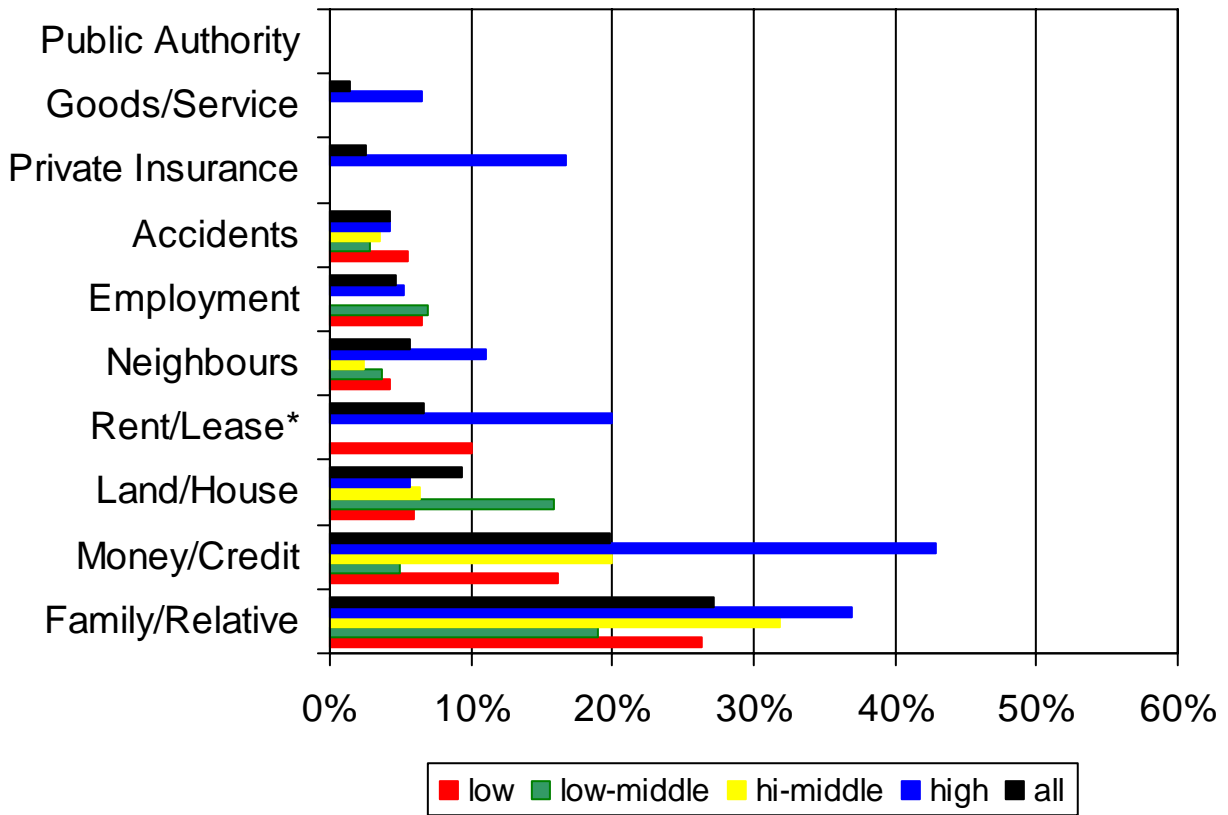


income categories as “low”, “low-middle”, “high-middle”, and “high” because the categories used in the survey do not combine to form approximate quartiles.¹⁵

Essentially the same type of pattern emerges yet again. There is a tendency of the highest income group to be the most likely to consult or hire a lawyer, and perhaps a pattern of the lowest income group being the least likely. However, the income pattern is clearly overwhelmed by the pattern defined by problem type. Family/relative problems are most likely to involve lawyers more or less regardless of income, followed by

¹⁵ The categories were defined as under ¥4,000,000 (low), ¥4,000,000 to ¥5,999,999 (low-middle), ¥6,000,000 to ¥8,999,999 (high-middle), ¥9,000,000 or more (high).

FIGURE 13: HIRING LAWYERS
JAPAN DISPUTING BEHAVIOUR STUDY (2005)



money/credit problems. In contrast, accidents, goods/services, and employment problems are unlikely to involve lawyers regardless of income.

England and Wales

Given that the LSRC Study in England and Wales was modeled Hazel Genn’s work on *Paths to Justice*, it falls somewhere between the legal needs studies and the dispute-oriented approach founded by the Civil Litigation Research Project. The focus is on “justiciable problems” rather than on “grievances,” “disputes,” or “legal needs.”

**FIGURE 14: LSRC STUDY, ENGLAND & WALES
CONSULTING A SOLICITOR FOR A JUSTICIABLE PROBLEM (2005)**

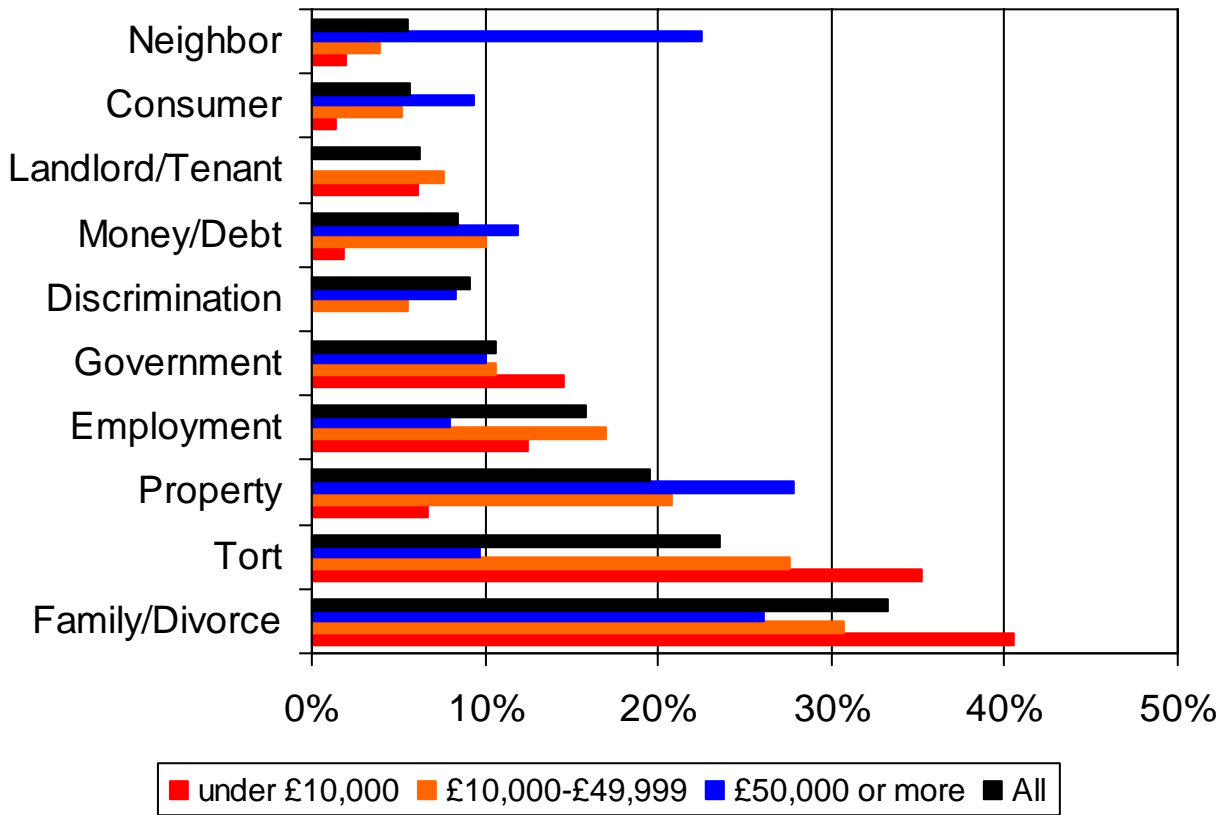


Figure 14 shows the likelihood of consulting a solicitor for seven types of justiciable problems; income is broken into three categories: low, less than £10,000; medium, £10,000-£49,999; and high, £50,000 or more.

As the figure shows, for two of the seven problem types, tort and family/divorce, there is substantial variation by income; however for both of these categories, it is the low income group that is most likely to consult a solicitor. There is variation in some of the other types of problems, but for those less than 20 percent of any group consulted a solicitor. There are three types of problems for which the high income group was most

likely to consult a solicitor, but for all three, the high income group was only a couple of percentage points more likely to have seen a solicitor than was the middle income group. Most important, as with the other studies, it is the type of problem that seems to be the stronger factor in accounting for contacting a solicitor.

Multivariate Analysis

The patterns described above are sufficiently consistent that relatively little would be added by undertaking multivariate analyses with additional control variables. Nonetheless, it is worth considering one such analysis that was done using the data from the CLRP Study and the Australia Study. This analysis appears in an unpublished paper by Jeffrey FitzGerald and Richard E. Miller (n.d.). The analysis predicted lawyer use by disputants including problem type, family income, characteristics of the head of the household (education, age, occupation, gender, and ethnicity), legal resources and experience (personal contacts with a lawyer or legal official, prior lawyer use, and previous experience as a plaintiff or defendant in a lawsuit), whether the other side employed a lawyer, with the disputant had resorted to a third party, whether the claim is monetary or nonmonetary and if monetary, the amount at stake, whether the opposing party is an individual or an organization, and whether the respondent knew or had prior contact with the opposing party. FitzGerald and Miller reported the results of their analysis in the form of predicted probabilities, where those probabilities were obtained by varying the value of one variable while the other variables were held at their mean values.¹⁶

¹⁶ The n's for the two logistic regressions are 821 and 334 for the U.S. and Australia respectively; the respective reductions in predictive error are 22.5% and 39.0%.

**FIGURE 15: MULTIVARIATE ANALYSIS OF LAWYER USE
U.S. AND AUSTRALIA**

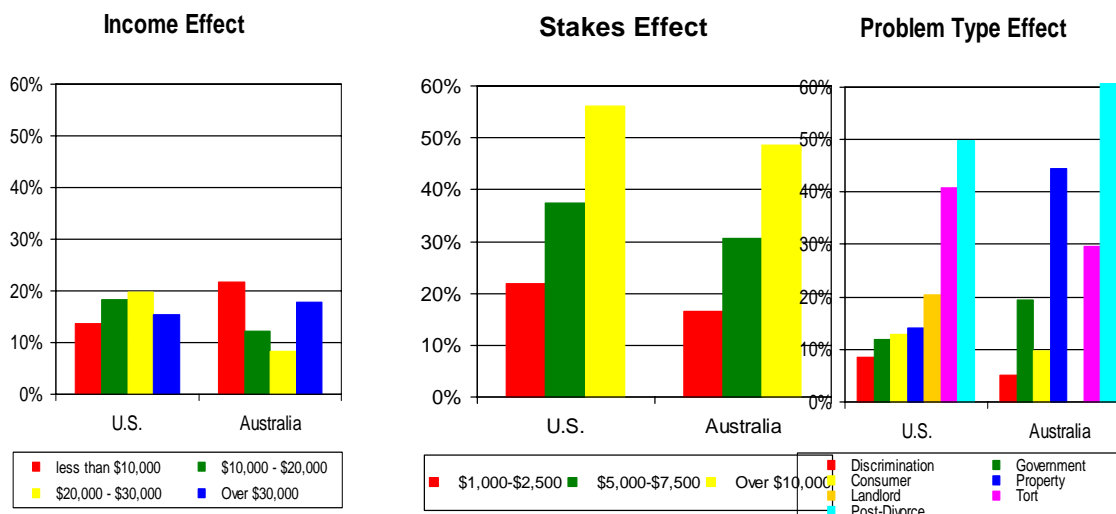


Figure 15 shows how the estimated percentages vary depending on type of problem, amount at stake (for monetary claims), and family income.¹⁷ The figure shows strong effects for stakes and for type of problem. It shows no pattern of increasing use of lawyers dependent on the disputant's family income. In fact, family income does not have any statistically significant effect on the use of lawyers in this analysis.

DISCUSSION

The patterns presented above are remarkably consistent: income has relatively little impact on grievants' or disputants' decisions to seek the assistance or advice of a lawyer. While income may play some role in such decisions, that role is very small compared to the type (and size) of the matter at issue. The small role of income seems in many ways counterintuitive. Except for matters handled on a no-win, no-pay basis, or for

¹⁷ The actual predicted percentage of Australians using lawyers for post-divorce matters was approximately 100%; to avoid distorting the graphs, I limited the maximum percentage for all three graphs to 60%.

persons and matters qualifying for legal assistance, the cost of legal assistance is likely to be significant, and it seems logical that a person's resources would play a major role in the decision to get that assistance. Why do people choose not to get legal assistance, even when they can afford to do so?

The ABA Study did ask the respondents, all of whom resided in low or moderate income households, why they did not seek help from the legal/judicial system, which included seeking the assistance from a lawyer. Only 16 percent of low income respondents and only 8 percent of moderate income respondents cited cost concerns. Many more, 30 percent of low income respondents and 33 percent of moderate income respondents, thought that it would not help or that the issue was "not really a problem" (American Bar Association 1994, 26).

Reflected in the response pattern above is a kind of cost-benefit calculation that turns on an assessment of the likely benefit a lawyer would provide. Such calculations are not limited to low and moderate income households. This was clearly illustrated in a tax appeal case I observed during an earlier research project (Kritzer 1998, 87-88). The case involved a pilot for a major airline who was appealing a decision of the Wisconsin Department of Revenue to disallow a deduction related to a speculative gold mine he had invested in. The hearing was a very confused affair because of the taxpayer's decision to appear without legal counsel. Clearly, this was someone who was in the top 10% income bracket and who could have afforded to hire a lawyer but made a decision not to. In fact, before the hearing started, the taxpayer commented to the tax commissioner who was to

hear the appeal that he had not brought an attorney because, “I believe that the attorney costs in the matter would probably exceed the amount the department claims I owe.”¹⁸

Even if people with adequate resources are making cost-benefit calculations that lead them not to hire a lawyer to assist with a legal need, that reflects a choice they are in a position to make. A person with limited means does not have that luxury. However, does that prevent a person of limited means from hiring a lawyer if the person believes that a lawyer would provide a significant benefit? The answer to this question may be less apparent than many would assume.

A study in Denver, Colorado compared the sentence outcomes obtained in felony criminal cases by public defenders and by privately retained defense counsel for cases filed during calendar year 2002. The study found that clients of public defenders experienced worse outcomes than did the clients of privately retained counsel, even after controlling for nature of the offense. The authors speculate that this may reflect decisions of “marginally-indigent” defendants rather than the effectiveness of the lawyer:

If you are a marginally-indigent defendant, and you know not only that you are guilty but that there is a very high probability that you will be convicted (for example, your crime was captured on videotape), it is not unreasonable to imagine that you will be less inclined to scrape together the money for private counsel than if, for example, you know you are wrongly accused.

The authors suggest that the difference between the outcomes achieved by public defenders and privately retained lawyers may result from the clients of the public defenders having, on average, worse cases (Hoffman, Rubin, and Shepherd 2005, 230). In

¹⁸ The amount at issue was \$9,000 plus interest, which put it beyond the Tax Commission’s “small claim” procedure. Normally the tax commissioner would not rule orally on cases that are not small claims, but he offered to do so in this case if the two parties consented; the parties did consent, and the commissioner ruled against the taxpayer. The taxpayer’s presentation of his case was extremely confusing; it is possible that an experienced tax attorney could have presented the case in a way that would have been successful, but that is pure speculation on my part.

fact, the authors' analysis shows that 41 percent of defendants facing serious charges ("class one" or "class two" felonies) managed to retain private counsel compared to 28 percent for all felony defendants (*id.*, p. 239-240, percentages computed by the author); there is no reason to assume that those facing serious charges had greater financial means than those facing lesser charges.

My analysis has not focused on criminal cases. However, the study described above suggests that when thinking about decisions of individuals to pay to hire a lawyer, one must consider those individuals' assessment of the seriousness of the issue and the likely benefit that a lawyer might produce. There may be many justiciable problems where a rational actor will come to the conclusion that the potential benefit is not worth the cost of legal counsel.

From the viewpoint of understanding issues related to access to justice, this takes us to the question of what baseline should be used in assessing "unmet legal needs." The standard approach has been to determine what legal problems low and moderate income households have experienced, and then to label that proportion where legal assistance was not obtained as "unmet legal needs." Researchers and policymakers fail to ask the question of whether someone with adequate financial resources would choose to expend those resources to hire a lawyer to assist with the legal problems that are identified. In fact, recent studies in the United States have tended to exclude from the study households in some higher income bracket (often the top quintile). By excluding higher income households, one cannot determine whether those households make similar or different decisions about hiring legal counsel when they confront legal problems. If the likelihood that such households would hire a lawyer differ little from what low and moderate

income households do in similar situations, it raises the question of whether the absence of such assistance truly represents an “unmet legal need” that should be addressed through some form of legal aid or *pro bono* program. Whether the consumer’s decision is rational or irrational, is something that might need to be addressed. In the end, we may need to ask the difficult questions of whether employing a lawyer would have made a meaningful difference in dealing with the legal problem or legal need, and even if a lawyer would have made a difference, whether that difference is sufficient to justify the cost, regardless of who bears the cost, of those legal services?

APPENDIX

State-Level Studies of Legal Needs in the United States

Connecticut: Civil Legal Needs Among Low-Income Households in Connecticut, A Report Provided by the Center for Survey Research & Analysis at the University of Connecticut (April 2003).

District of Columbia: Civil Legal Services Delivery in the District of Columbia, A Report by the District of Columbia Bar Foundation (September 2003).

Illinois: The Legal Aid Safety Net: A Report on the Legal Needs of Low-Income Illinoisans (February 2005).

Indiana: Legal Needs Study of the Poor in Indiana (February 1992)

Massachusetts: Massachusetts Legal Needs Survey: Findings from a Survey of Legal Needs of Low-Income Households in Massachusetts (May 2003).

Montana: Legal Needs of Low Income Households in Montana: Final Report. By D. Michael Dale, A Study Conducted by the Montana State Bar Association (2005). Report available at http://www.nlada.org/DMS/Documents/1149970443.85/MT%20LNS%20Full_Report.pdf [last visited June 5, 2007].

- New Jersey: Legal Problems, Legal Needs: The Legal Assistance Gap Facing Lower Income People in New Jersey. A Report from the Poverty Research Institute of Legal Services of New Jersey (2002)
- North Carolina: North Carolina Legal Needs Assessment. North Carolina Legal Services Planning Council (2003).
- Oregon: The State of Access to Justice in Oregon; Part I: Assessment of Legal Needs, by D. Michael Dale (March 2001).
- Tennessee: Report from the Statewide Comprehensive Legal Needs Survey for 2003. Prepared for the Tennessee Alliance for Legal Services by Barbara Barton, Bingham Pope, and Karen Homer, Office of Research and Public Service, College of Social Work, University of Tennessee (January 2004).
- Vermont: Report on Investigation of Need and Assessment. Committee on Equal Access to Legal Services (September 2001).
- Washington: The Washington State Civil Legal Needs Study. Task Force on Civil Equal Justice Funding, Washington State Supreme Court (September 2003).
- Wisconsin: Bridging the Justice Gap: Wisconsin's Unmet Legal Needs. Final Report, Access to Justice Committee, State Bar of Wisconsin (March 2007), available at http://www.wisbar.org/am/template.cfm?section=bridging_the_justice_gap [last visited June 5, 2007].

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