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### Informal Justice: An Examination of Why Ontarians Do Not Seek Legal Advice

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[Aller au sommaire du numéro](#)

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Résumé de l'article

Selon la théorie moderne de l'accès à la justice, la réforme du droit doit être axée sur les problèmes juridiques vécus au quotidien par tous et chacun, et non seulement sur les problèmes traités au sein du système judiciaire formel. En 2014, le Forum canadien sur la justice civile [FCJC] a mené une vaste étude dans le cadre du projet sur le coût de la justice afin de déterminer les besoins juridiques en matière civile de la population canadienne en général. Selon l'une des nombreuses conclusions que les données de l'étude permettent de tirer, la plupart des Ontariens ne se tournent pas vers un avocat pour résoudre leurs problèmes juridiques. Ils ont plutôt tendance à recourir à des méthodes d'auto-assistance informelles. Dans ce document, l'auteur explore les raisons pour lesquelles les Ontariens ne cherchent pas à obtenir d'avis juridique formel lorsqu'ils sont aux prises avec un problème juridique. Il se penche sur différents facteurs susceptibles d'inciter les Ontariens à ne pas demander d'avis juridique formel, y compris le niveau de revenu des personnes interrogées, leur perception du droit et le type de problème juridique auquel elles font face. L'auteur conclut que la plupart des Ontariens décident de résoudre leurs problèmes juridiques à l'aide de méthodes d'auto-assistance informelles non pas en raison du coût prohibitif que représentent les services juridiques pour eux, mais plutôt en raison de leur perception des problèmes juridiques. Ce document permettra de mieux comprendre les raisons pour lesquelles la plupart des problèmes juridiques ne sont pas traités dans le système judiciaire formel, ce que se doivent de connaître les décideurs politiques qui souhaitent apporter des réformes significatives et inclusives au système de justice.

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## Informal Justice: An Examination of Why Ontarians Do Not Seek Legal Advice

Matthew Dylag\*

*Modern access to justice scholarship takes as its premise that the focus of legal reform must be on the legal problems experienced in the day-to-day lives of the public; not just those problems that are brought before the formal court system for adjudication. In 2014, the Canadian Forum on Civil Justice [CFCJ] completed a comprehensive survey for the Cost of Justice Project inquiring into the civil legal needs among ordinary Canadians. One of the many conclusions that can be drawn from the survey data is the finding that most Ontarians do not go to lawyers in order to resolve their legal problems. Ontarians, rather, tend to engage in methods of resolution that can be categorized as informal self-help methods. This paper explores possible reasons why Ontarians do not seek out formal legal advice when they experience a legal problem. It examines various factors that may influence Ontarians' decision not to seek formal legal advice including the respondents' income level, their perception of the law and the category of legal problem experienced. The paper concludes that most Ontarians seek to resolve their legal problems through informal self-help methods, not because of their inability to afford legal services, but rather because of how legal problems are perceived. This work will provide insight into why most legal problems do not end up before the formal legal system, which will be of significance to policy makers who desire to make meaningful and inclusive reforms to the justice system.*

*Selon la théorie moderne de l'accès à la justice, la réforme du droit doit être axée sur les problèmes juridiques vécus au quotidien par tous et chacun, et non seulement sur les problèmes traités au sein du système judiciaire formel. En 2014, le Forum canadien sur la justice civile [FCJC] a mené une vaste étude dans le cadre du projet sur le coût de la justice afin de déterminer les besoins juridiques en matière civile de la population canadienne en général. Selon l'une des nombreuses conclusions que les données de l'étude permettent de tirer, la plupart des Ontariens ne se tournent pas vers un avocat pour résoudre leurs problèmes juridiques. Ils ont plutôt tendance à recourir à des méthodes d'auto-assistance informelles. Dans ce document, l'auteur explore les raisons pour lesquelles les Ontariens ne cherchent pas à obtenir d'avis juridique formel lorsqu'ils sont aux prises avec un problème juridique. Il se penche sur différents facteurs susceptibles d'inciter les Ontariens à ne pas demander d'avis juridique formel, y compris le niveau de revenu des personnes interrogées, leur perception du droit et le type de problème juridique auquel elles font face. L'auteur conclut que la plupart des Ontariens décident de résoudre leurs problèmes juridiques à l'aide de méthodes d'auto-assistance informelles non pas en raison du coût prohibitif que représentent les services juridiques pour eux, mais plutôt en*

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*raison de leur perception des problèmes juridiques. Ce document permettra de mieux comprendre les raisons pour lesquelles la plupart des problèmes juridiques ne sont pas traités dans le système judiciaire formel, ce que se doivent de connaître les décideurs politiques qui souhaitent apporter des réformes significatives et inclusives au système de justice.*

## I. INTRODUCTION

Modern access to justice scholarship takes as its premise that the focus of legal reform must be on the legal problems experienced in the day-to-day lives of members of the public, not just those problems that are brought before the formal court system for adjudication.<sup>1</sup> Legal problems in this model are thought of in a broad sense: the literature defines “legal problem” as any consequential issue for which a legal remedy may exist.<sup>2</sup> This is an important qualification as it allows scholarship to examine legal problems that may otherwise not be brought to the attention of legal professionals. Studies have consistently found that when responding to legal problems it is far more common for individuals to either handle the problem on their own or seek non-legal assistance than it is for people to seek formal legal advice.<sup>3</sup> These findings are consistent with how Ontarians respond to legal problems. The 2014 Cost of Justice project survey, completed by the Canadian Forum on Civil Justice [CFCJ], found that only 17.9% of Ontarians sought formal legal assistance by contacting a lawyer at some point during their resolution process.<sup>4</sup>

In this paper, I draw on the data collected by the CFCJ for their Cost of Justice project survey to examine why Ontarians often do not seek legal assistance when faced with civil legal problems. These problems relate to private rights and remedies and thereby do not include criminal and quasi-criminal matters. I examine various factors that may influence Ontarians’ decisions not to seek formal legal advice including the respondents’ income level, the type of legal problem experienced, and their perception of the law. The paper concludes that advice-seeking behaviour is not determined by income. Rather Ontarians will more likely seek formal legal advice when they perceive the problem as being legal in nature, explaining why certain problem types have higher incidence of respondents seeking legal advice. This work will provide insight into how individuals respond to legal problems, which will be of significance to policy makers looking to make meaningful and inclusive reforms to the justice system.

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<sup>1</sup> See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa, 2013) at 2 online: <[http://www.cfcjfcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcjfcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)>.

<sup>2</sup> See e.g. Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999) at 5.

<sup>3</sup> See e.g. Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa, Canada Department of Justice, 2009) at 55–56; For a discussion regarding the findings of 23 national surveys see also Pascoe Pleasence & Nigel J Balmer, “Caught in the Middle: Justiciable Problems and the Use of Lawyers” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 27 [Pleasence & Balmer, “Caught in th Middle”].

<sup>4</sup> See Methods of Resolution, *below*, for further discussion on these findings.

## II. ACCESS TO CIVIL JUSTICE

In Canada, there is a growing acceptance that access to civil justice should be defined expansively such that its focus is not just on those problems that are brought to a lawyer but rather on all legal problems experienced in the day-to-day lives of members of the public.<sup>5</sup> In this problem-centric model, legal problems are thought of in a broad sense: the literature defines legal problems as any non-trivial justiciable issue<sup>6</sup> or, phrased another way, any consequential problem for which a legal remedy may exist.<sup>7</sup> As such, it is unnecessary that an individual act upon the problem or even recognize that there is a legal element involved in order for the problem to be considered a legal problem, which is an important qualification as it allows the scholarship to examine legal problems that are not brought to lawyers.<sup>8</sup> This public-centric model is of particular importance given that legal needs research has consistently found that a large proportion of individuals with legal problems do not seek legal advice.<sup>9</sup> In her landmark study of English and Welsh civil legal needs, Hazel Genn reported that only 15.0% of respondents with legal needs sought formal legal advice when trying to resolve a legal problem.<sup>10</sup> In the Canadian context, it was found that only 16.5% of respondents sought formal legal assistance, and that it was far more common for people to either handle the problem on their own or seek non-legal assistance, than it was to seek formal legal advice.<sup>11</sup> These findings raise the question of why most people with civil legal problems do not seek out formal legal advice.

One explanation as to why many individuals do not seek legal advice may be tied to the existence of numerous objective and subjective “barriers” that are often cited as reasons that prevent people from bringing their legal problem to the courts and lawyers.<sup>12</sup> For example, systemic barriers such as the

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<sup>5</sup> Currie, *supra* note 3; Action Committee on Access to Justice in Civil and Family Matters, *supra* note 1; Trevor C W Farrow, “What is Access to Justice ?” (2015) 51:3 Osgoode Hall LJ 957; Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); Jane Bailey, Jacquelyn Burkell & Graham Reynolds, “Access to Justice for All: Towards an Expansive Vision of Justice and Technology” (2013) 31:2 Windsor YB Access Just 181.

<sup>6</sup> Currie, *supra* note 3 at 31-32.

<sup>7</sup> Genn, *supra* note 2 at 5.

<sup>8</sup> *Ibid* at 12.

<sup>9</sup> Genn, *supra* note 2; Currie, *supra* note 3; Pascoe Pleasence & Nigel J Balmer, *How People Resolve “Legal” Problems* (Cambridge: Legal Services Board, 2014) at 25 [Pleasence & Balmer, “Legal Problems”]; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Windsor, 2013) at 82, online: <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>>.

<sup>10</sup> Genn, *supra* note 2 at 82–83. According to Genn, 60% of respondents sought some form of advice for non-trivial justiciable issues. This number, however, must be understood within the context of the survey and the United Kingdom’s legal landscape where there are a plethora of non-formal avenues for advice (e.g. citizen advice bureaus, local council, ombudsman, etc.). Thus, of that 60% that sought advice, Genn reported that only a quarter sought formal legal advice from a solicitor, barrister, court staff, or law centre.

<sup>11</sup> Currie, *supra* note 3 at 56.

<sup>12</sup> See generally Roderick A Macdonald, “Access to Civil Justice” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 493 at 510–515 (this article provides an excellent overview of the development of access to justice research).

physical design of a law office or the complexity of litigation are often cited as barriers to justice.<sup>13</sup> Other subjective barriers including mental health issues, legal literacy, or broad socio-cultural barriers may result in communication issues that make seeking and understanding legal advice more difficult.<sup>14</sup> One “systemic barrier” that may have particular impact on advice-seeking behaviour is the high cost of legal services.<sup>15</sup> While the hourly rates of legal services vary depending on factors such as region and experience of the lawyer, in 2012 it was estimated that the average cost of a lawyer in Canada ranged anywhere from \$195 per hour to \$380 per hour, with the entire cost of a civil action, including trial, costing anywhere from \$13,561 to \$124,574, depending on the length of trial.<sup>16</sup> These costs are significant and individuals who experience legal problems may choose not to speak to a lawyer because they either cannot afford to, or because they believe it is more efficient from a cost-benefit perspective to try and resolve their problem on their own.<sup>17</sup>

Another explanation as to why individuals do not seek out legal advice, however, may lie in how people understand and interact with the law. Numerous studies have shown that the type of legal problem experienced is far more determinative of whether one seeks legal advice than the cost of legal services.<sup>18</sup> In these studies, individuals who experienced certain problems, such as those categorized as family law problems or wills and powers of attorney, sought legal assistance at a much higher rate than for other problems such as consumer or debt problems.<sup>19</sup> One explanation for this may be that certain problems are perceived as being properly situated in the formal system while others are not. For example, many family law problems, such as divorce, require a court order and thus may be understood as being legal in nature and requiring legal advice. Conversely, many consumer problems can be dealt with through complaints to customer service departments or to an ombudsman.

It has been noted that legal problems are social constructs that are shaped not only by the formal institutions but also by individual and community experiences.<sup>20</sup> Simply because a law is formalized on the books, it does not necessarily follow that the formal law is understood or known to the community. For example, in a study of Canadian youth and social media, Jacobs found that while many youth were able to articulate a right to privacy, few knew of the legislated regime that protects that right or the formal

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<sup>13</sup> See e.g. Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Law Society of Ontario, 2010).

<sup>14</sup> See e.g. Patricia Hughes, “Advancing Access to Justice Through Generic Solutions: the Risk of Perpetuating Exclusion” (2013) 31:1 Windsor YB Access Just 1.

<sup>15</sup> See generally Action Committee on Access to Justice in Civil and Family Matters, *supra* note 1 at 3 (this report states that there is a major gap between what legal services cost and what the vast majority of Canadians can afford); See also Noel Semple, “The Cost of Seeking Civil Justice In Canada” (2015) 93 Can Bar Rev 639.

<sup>16</sup> Action Committee on Access to Justice in Civil and Family Matters, *supra* note 1 at 4; see also Semple, *supra* note 14.

<sup>17</sup> Currie, *supra* note 3 at 55–59; Herbert M Kritzer, “To Lawyer or Not to Lawyer: Is that the Question?” (2008) 5:82 J Empir Leg Stud 875.

<sup>18</sup> Currie, *supra* note 3; Pleasence & Balmer, “Legal Problems”, *supra* note 8.

<sup>19</sup> Currie, *supra* note 3 at 60–61. According to Currie, 48.8% of respondents that experienced a relationship breakdown sought legal assistance and 21.2% of respondents who had a wills or powers of attorney issue sought legal assistance. This can be compared to the 5.3% of respondents who had a consumer issue and sought legal assistance or the 8.5% of respondents who had a debt issue and sought legal assistance.

<sup>20</sup> Rebecca L Sandefur, “Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services” in Trebilcock, Duggan & Sossin, *supra* note 4, 222 at 233 [Sandefur, “Money”].

remedies available to them in the case of a violation of the right.<sup>21</sup> This understanding of privacy rights is shaped by Canadian youths' concerns regarding information technology and the digital economy in which they are situated.<sup>22</sup> In such cases where individuals may not construe a legal right as legal in nature it may simply not cross their mind to seek formal legal assistance.<sup>23</sup> Even in instances where individuals understand that a legal problem has a legal element, how that legal problem is socially construed will determine behaviour.<sup>24</sup> In his study of a small midwest American county, Engel found that the local community strongly valued independence and self-reliance such that the community viewed personal injury litigation negatively and pressured individuals within that community to seek alternative methods of resolution.<sup>25</sup> Similarly, other studies have shown that many members of minority and disadvantaged communities avoid interaction with the formal legal system because of negative experiences that shaped a view of these institutions as sources of violence and oppression.<sup>26</sup> Thus, while some may not seek legal advice because they are not aware of the legal implications of the problem, others may simply not see lawyers and the formal system as a reasonable way to resolve an issue.

This paper seeks to provide further insight into why most individuals do not seek legal advice for their legal problems by examining the findings of the Cost of Justice project survey completed in 2014. This survey conducted by the CFCJ – a national non-profit organization dedicated to access to justice research – examined the social and economic costs of legal problems within Canada. This paper looks specifically to the experience of Ontarians and examines the rate at which Ontarians seek legal advice and how they resolve legal problems. Noting that most Ontarians do not, in fact, seek legal advice in order to resolve non-trivial problems, it then looks at three specific variables that may influence advice-seeking behaviour: income level, problem type, and perception of problem. The paper concludes that income level alone does not impact advice-seeking behaviour, however, the type of problem experienced does. It further argues that the reason problem type is more determinative of advice-seeking behaviour is explained by how those types of problems are perceived.

### III. SURVEY METHODOLOGY

The CFCJ's Cost of Justice project focused on the social and economic costs of accessing justice and their 2014 survey collected empirical data regarding the legal problems experienced in the everyday lives

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<sup>21</sup> Lesley A Jacobs with Nachshon Goltz & Matthew McManus, *Privacy Rights in the Global Digital Economy: Legal Problems and Canadian Paths to Justice* (Toronto: Irwin Law, 2014) at 53.

<sup>22</sup> *Ibid* at 56.

<sup>23</sup> See e.g. David M. Engel & Frank W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago: University of Chicago Press, 2003).

<sup>24</sup> Currie, *supra* note 3 at 2.

<sup>25</sup> David M Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984) 18 *Law Soc Rev* 551.

<sup>26</sup> See e.g. Sarah Buhler, "'Don't Want to Get Exposed': Law's Violence and Access to Justice" (2017) 26 *J Law Soc Policy* 68; Janet E Mosher, "Lessons in Access to Justice: Racialized Youths and Ontario's Safe Schools" (2008) 46:4 *Osgoode Hall LJ* 807; Austin Sarat & Thomas R Kearns, "Making Peace with Violence: Robert Cover on Law and Legal Theory" in Austin Sarat, ed, *Law, Violence, Possibility Justice* (Princeton: Princeton University Press, 2001) 49.

of Canadians.<sup>27</sup> For the survey, the project interviewed 3,263 randomly selected Canadian adults between September 2013 and May 2014, and asked them about the nature and frequency of legal problems in their everyday lives. Out of the 3,263 surveyed for the Cost of Justice Project, 1,191 respondents reside in Ontario and will be the focus of this paper. The sample selection and interview process of the Cost of Justice project survey are explained in detail in the report *Design and Conduct of the Cost of Justice Survey*.<sup>28</sup> In brief, respondents were asked about their experiences in the past three years with eighty-five problems that have a formal legal remedy. The legal problem questions were organized into sixteen problem types such as consumer problems, employment problems, or family problems (see Table 1).

**Table 1: Number of Questions in Each Problem Category**

	<b>Problem Category</b>	<b>Number of Questions</b>
1	Consumer	6
2	Employment	7
3	Debt	7
4	Social Assistance	3
5	Disability Assistance	4
6	Housing	10
7	Immigration	8
8	Discrimination	6
9	Treatment by Police	4
10	Criminal	1
11	Family	12
12	Wills and Incapacity	4
13	Personal Injury	3
14	Medical Treatment	5
15	Threatened with Legal Action	2
16	Neighbourhood Problems & Property Damage	3
	<b>Total</b>	<b>85</b>

The survey questions were designed to elucidate how individuals perceive the law, what problems they have experienced over the past three years, how those problems affected them, and how they tried to resolve those problems. The questions, however, were framed in a way that did not require the respondent to be aware of a particular remedy or to recognize the problem as being explicitly legal in nature. For example, the survey asked, “In the last three years, have you been unfairly fired or dismissed from a job?”<sup>29</sup> There is no mention of formal remedies or implied presumption that the only valid response is to seek legal advice. Respondents were then asked a series of questions about how they resolved one of those

<sup>27</sup> Trevor Farrow et al., *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto, 2016) online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.

<sup>28</sup> David Northrup et al., *Design and Conduct of the Cost of Justice Survey* (Toronto, 2016) online: . Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/sites/default/files/Design%20and%20Conduct%20of%20the%20Cost%20of%20Justice%20Survey.pdf>>.

<sup>29</sup> *Ibid.*

problems, how they understood the problem, whether they received legal assistance, and the current status of the problem. This type of legal need survey continues in the problem-centric tradition established by Hazel Genn in her landmark *Paths to Justice* survey completed in 1997.<sup>30</sup> Since then numerous countries have conducted legal needs surveys asking about the type of problems individuals have encountered in their day-to-day lives and how they resolved them.<sup>31</sup> The Cost of Justice Project survey is one more piece that will help us understand how individuals respond to legal problems and help to explain why individuals respond to legal problems in the way that they do.

#### IV. RESPONSE TO CIVIL LEGAL PROBLEMS

Of particular importance in contextualizing the following discussion is the finding that of the 1,191 Ontarians surveyed for the Cost of Justice project, 52.9% experienced one or more justiciable problems during the three-year reference period.<sup>32</sup> This finding is consistent with other surveys that demonstrate that legal problems are pervasive in the day-to-day lives of members of the public.<sup>33</sup> And while this finding alone is of importance to Ontario, this paper is concerned with how these 52.9% of Ontarians responded to their legal problems, particularly how many of them sought legal advice. The following sections will examine this issue, first by looking at how Ontarians resolve their legal problems generally and then with reference to whether three specific variables – income, problem type, or perception of the legal problem – influence Ontarians advice-seeking behaviour. In doing so it will engage with the theories introduced above to explain the underlying rationale for Ontarians' advice-seeking behaviour.

##### A. Methods of Resolution

The strong majority of Ontarians (94.7%) who have experienced one or more legal problems do take some type of action in an attempt to resolve their issue.<sup>34</sup> Though it may not be surprising that most people would try to resolve a serious legal issue in some manner, what may be surprising to those unfamiliar with previous legal need surveys is that only a minority of individuals (17.9%) actually sought formal legal advice at some point during their resolution process.<sup>35</sup> Instead, Ontarians tended to engage in types of resolution that could be categorized as informal self-help methods. Specifically, the strong majority of Ontarians tried to resolve their problem by talking to the other party directly (71.5%), by seeking the

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<sup>30</sup> Genn, *supra* note 2.

<sup>31</sup> See, generally, Pleasence & Balmer, "Caught in the Middle", *supra* note 3 (this article provides an excellent overview of twenty-three national legal needs surveys conducted since the early 1990s).

<sup>32</sup> Of the 1,191 Ontarians interviewed, 630 reported having experienced one or more legal problems during the three-year reference period.

<sup>33</sup> See e.g. Currie, *supra* note 3 at 10–12; Genn, *supra* note 2 at 23.

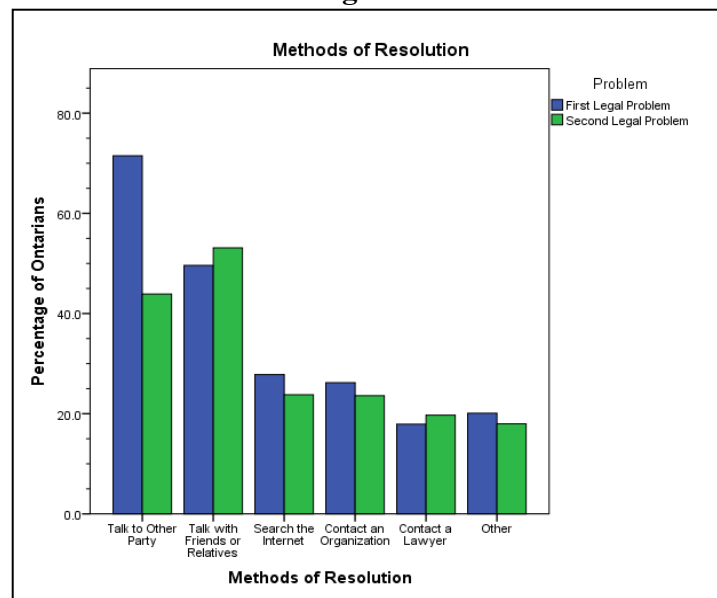
<sup>34</sup> Of the 630 Ontarians who reported having experienced one or more legal problems during the three-year reference period, 68 were not asked about resolution because they experienced seven or more problems. The report *Design and Conduct of the Cost of Justice Survey*, Northrup et al, *supra* note 28 at 7, explains that this was done in part to mimic methods used by the research team in previous studies to facilitate comparisons over time. Of the 562 Ontarians who were asked about resolution, only 30 respondents reported that they did nothing to try and resolve the first problem discussed.

<sup>35</sup> A consistent finding among legal needs surveys is that most individuals do not seek formal legal advice. See discussion below.



advice of friends or relatives (49.6%), and/or by searching for information on the internet (27.8%). In terms of looking for assistance, approximately one-quarter of Ontarians with legal needs sought non-legal assistance by contacting an organization, such as the police, a trade union, or a professional association, for advice or guidance (26.2%) (see Figure 1). These numbers do not change dramatically when looking how Ontarians try to resolve a second legal problem, except that fewer respondents talked to the other party directly (56.1%) and a few more contacted a lawyer (19.7%).<sup>36</sup> This approximate 15% drop in respondents talking to the other party is an interesting finding and may warrant examination in future research given that the problems asked about were randomly selected and not related to seriousness, cost, timing, or other factor.<sup>37</sup> Even so, the fact remains that seeking formal legal advice remains the most uncommon method of resolving legal problems.

**Figure 1**



It is clear from the data presented above that most Ontarians will not seek legal advice when attempting to resolve their legal issues. Rather, the majority will attempt to resolve these issues through informal self-help methods. An intuitive explanation might be related to the high cost of legal services as discussed above. Many studies have shown that people turn to legal institutions when they expect favourable outcomes.<sup>38</sup> However, seeking legal assistance is often a costly exercise that is only worthwhile from an economic perspective when favourable outcomes are expected to exceed the cost.<sup>39</sup> Even having an initial conversation with a lawyer to better understand how the formal law applies to a particular incident often

<sup>36</sup> Of the 562 Ontarians asked about resolution, 315 reported two or more problems and were therefore asked about how they resolved a second problem.

<sup>37</sup> Northrup et al, *supra* note 28.

<sup>38</sup> Tom R Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006) at 71–72.

<sup>39</sup> Kritzer, “To Lawyer or Not to Lawyer,” *supra* note 17 at 900-901.

incurs expense that may be unnecessary. Therefore, individuals acting rationally will look to apply their own informal and inexpensive methods – for example, talking to the other side directly – prior to turning to formal legal institutions in an attempt to resolve their legal problems.<sup>40</sup> While lawyers may understand the formal law and may be trained in skills such as mediation and negotiation, lawyers are not strictly necessary to resolve most disputes. Parties can reach informal agreements among themselves and are perfectly capable of understanding the benefits of settling a dispute. It is only when these informal methods of resolution fail that Ontarians may believe that the cost of legal advice is warranted.<sup>41</sup>

Arguably, the perception that informal methods are the most cost-efficient way to resolve a problem may be mistaken, since a problem can quickly escalate without legal advice, or could be resolved much more quickly or more favourably with legal advice.<sup>42</sup> Further, as noted by Sandefur, some legal services – such as writing a simple will – are not very expensive and, when asked, Americans are generally content with the fees that they were charged for legal services.<sup>43</sup> However, these considerations, while valid, may not be taken into account by Ontarians during the resolution process and only become crystalized when the matter is finally resolved.

In either event, if advice-seeking behaviour was purely determined by economic rationale then one would expect that those in higher income brackets would seek legal advice at a greater rate. The reason for this is that one could conceptualize a tipping point where people would find legal advice to be economically rational and once that point is reached, the only barrier to seeking advice is the ability to afford it. For example, if seeking legal assistance for a problem would cost an individual a total of \$5,000, a rational person may not think it worthwhile to seek legal assistance unless it would assist them in obtaining a benefit valued at least at \$7,500.<sup>44</sup> If we assume that informal means of resolution fail at a comparable rate among all income groups, those in the higher income categories would be more capable of paying this hypothetical \$5,000. Thus the bar to seeking legal advice for a \$7,500 problem is simply the ability to afford the cost of legal services and any person with the resources to pay this amount would thus seek legal advice. This model would apply equally to legal needs that have serious non-monetary consequences. In non-pecuniary cases that have a huge impact on one's quality of life – for example problems involving custody of a child, deportation, or discrimination at the hands of police – people may be willing to pay any amount to resolve the issue. In these circumstances it would be expected that higher income groups would seek legal advice at a greater level. The Cost of Justice project survey, however, does not support this conclusion. In fact, the survey has found that the rate of those seeking legal assistance does not change significantly even when household income is considered.

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<sup>40</sup> Robert C Ellickson, "Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County" (1986) 38:3 *Stan L Rev* 623 at 686.

<sup>41</sup> Pleasence & Balmer, "Caught in the Middle", *supra* note 3 at 53.

<sup>42</sup> See generally D James Greiner & Cassandra Wolos Pattanayak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?" (2011) 121 *Yale Law J* 2118; D James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2012) 126 *Harv L Rev* 901 (these articles provide an interesting discussion on the affect of legal representation on certain civil legal problems within specific communities).

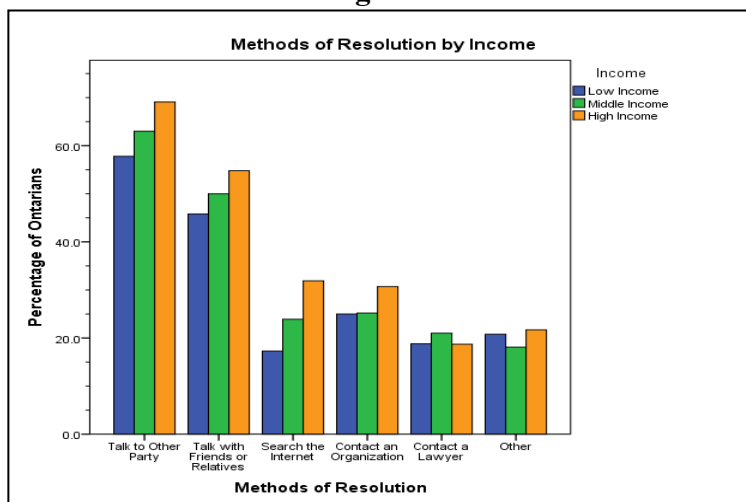
<sup>43</sup> Sandefur, "Money", *supra* note 20 at 231–232.

<sup>44</sup> These are hypothetical amounts and only used to illustrate an economic model of advice-seeking behaviour.

## B. Methods of Resolution by Income

Regardless of income, the majority of respondents still attempt to resolve their issue by talking to the other party directly.<sup>45</sup> Likewise almost half of respondents in each income category – low, middle, and high – will seek advice from family or friends.<sup>46</sup> In terms of contacting a lawyer, there was no statistically significant difference between income categories (see Figure 2).<sup>47</sup> Just as many low-income individuals contacted a lawyer as high-income individuals (18.8% and 18.7% respectively) and slightly more middle-income individuals contacted a lawyer (21.0%). This is particularly interesting as it suggests that the cost of legal representation is not the main determinant of seeking legal advice. In fact, the only method of resolution where there was a statistically significant difference among income categories was between the numbers of high-income individuals who searched for information on the internet (31.9%) versus the number of low-income individuals (17.3%); however, this was very weakly correlated.<sup>48</sup>

Figure 2



One may argue, however, that household income alone is not the greatest proxy for determining ability to pay for legal services and that there are other indicators of wealth. Yet when examining advice-seeking behaviour from the perspective of other indicators that may be associated with wealth – namely education

<sup>45</sup> Out of the 1,191 Ontario respondents, 982 reported their income, while 209 either refused or did not know. Out of the 630 Ontario respondents who reported having experienced one or more justiciable issues during the three-year reference period, 534 reported their income and 96 either refused or did not know.

<sup>46</sup> This paper categorizes low income as those households that reported earning up to \$39,999 per annum (n=111); middle income as those reporting that they earned \$40,000 to \$99,999 per annum (n=240); and high income as those reporting that they earned \$100,000 or more per annum (n=183). Recognizing that categorizing income into three simple brackets – low, middle and high – is a somewhat subjective exercise, this paper looked to Statistics Canada's low income cut-off and the financial eligibility thresholds for legal aid certificates for assistance in basing these categories on some objective measure of income.

<sup>47</sup> Where  $p < 0.05$  (the significance level used for all tests in this paper is 5%).

<sup>48</sup>  $r = .071$ ,  $n = 475$ ,  $p = .071$

and employment status – one finds that there is little difference between rates of seeking formal legal assistance. In terms of education, not a single category of education level displayed a statistically significant difference in how Ontarians resolved their problems.<sup>49</sup> For example, of those with less than high school education, 19.4% contacted a lawyer, whereas 17.6% of those with a bachelor's degree and 25.3% of those with a master's or doctorate did so. In terms of the most common informal method of resolution, 58.3% of those with less than high school education sought to talk to the other party directly whereas 73.2% of those with a bachelor's degree and 73.4% of those with a masters or doctorate degree talked to the other side directly. However, again there was no statistical significance. Therefore education level, like income, is not correlated with the rate at which Ontarians will seek formal legal assistance. Similarly, the employment status of Ontarians did not affect method of resolution. Regardless of employment – working, working part-time (including students and retired persons), or not working – the majority of respondents still attempted to resolve their issue by talking to the other party directly.<sup>50</sup> The next most common method of resolution for all categories was talking to friends or relatives. More people working full-time contacted a lawyer (19.0%) than those working part-time or not working (15.8% and 16.2% respectively), however, there was no statistical significance in this difference, again suggesting that employment status, like income, is not a determinant of advice-seeking behaviour.

The fact that income category is not a determinant of advice-seeking behaviour supports Kritzer's observation that empirical studies have consistently shown that income has a very small influence on the decision of whether to retain a lawyer.<sup>51</sup> Analyzing legal needs studies from seven different countries, including Canada, Kritzer questions whether the unaffordability of legal services should be the primary concern of access to justice literature. He notes that included in the decision to hire a lawyer is an analysis of whether one may benefit from the lawyer given the seriousness of the type of problem experienced.<sup>52</sup> Implicit in this analysis is the fact that high-quality legal assistance is not guaranteed when hiring a lawyer and that a lawyer may not actually produce the desired benefits.<sup>53</sup> Thus the decision not to hire a lawyer may be more dependent on the type of problem experienced rather than issues of affordability.

Pleasance and Balmer, however, suggest that part of the reason that various studies suggest income is not a factor in advice-seeking behaviour may be because these studies do not take into account the availability of legal aid in some jurisdictions.<sup>54</sup> Examining a legal needs survey conducted in England and Wales in 2010, the authors found that those people who were just beyond the threshold of eligibility for legal aid were the least likely to obtain lawyer assistance in resolving those problems where legal aid was most available.<sup>55</sup> This resulted in a "J-curve" wherein those in the lower income categories who qualified for legal assistance and those in the higher income categories sought legal assistance at a higher rate than

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<sup>49</sup> The six categories of education were: less than high school (n=40); high school (n=104); post high school (no diploma or degree) (n=84); college or technical school (n=154); bachelor's degree (n=159); masters or doctorate degree (n=87); and unknown or refused to answer (n=2).

<sup>50</sup> Working (n=361); working part-time (n=64); not working (n=197); and unknown or refused to answer (n=8).

<sup>51</sup> Kritzer, *supra* note 17 at 878; See also Rebecca Sandefur, "What We Know and Need to Know About the Legal Needs of the Public" (2016) 67 S C Law Rev 443.

<sup>52</sup> Kritzer, *supra* note 17 at 902.

<sup>53</sup> See e.g. Greiner & Pattanayak, *supra* note 42.

<sup>54</sup> Pleasance & Balmer, "Caught in the Middle", *supra* note 3 at 38.

<sup>55</sup> *Ibid* at 49-50.

those in the middle income categories who did not qualify for legal aid. It is suggested that part of the reason for this is that those in the high-income categories have sufficient resources to retain lawyers independently, whereas those in the middle income categories who neither qualify for legal assistance nor have independent resources to afford a lawyer are left to fend for themselves. Given that Legal Aid Ontario bases its assistance on strict financial eligibility requirements, one may expect a similar finding in Ontario. In Ontario the financial eligibility requirements are so stringent that only the most impoverished of individuals qualify for funding from Legal Aid Ontario. For example, the income cut-off for non-contribution aid – where the recipient is not required to partially contribute to the cost of legal services – as of April 2016 ranged from \$12,863 per annum for an individual living alone to \$31,817 per annum for a family of five or more.<sup>56</sup> The income cut-off for those who entered into a contribution agreement was not much higher ranging from \$14,888 per annum for an individual living alone to \$40,447 per annum for a family of five or more.<sup>57</sup> This means that many individuals that Statistics Canada classifies as low-income do not qualify for legal aid services.<sup>58</sup> Given that publicly funded legal assistance is therefore not available to most people, it is not surprising that a majority of respondents who sought legal assistance contacted private legal assistance (77.0%).<sup>59</sup> In contrast, only 14% of those who sought legal assistance turned to publicly funded legal assistance, either from a free legal clinic (7.0%), from a legal aid certificate (4.0%), or from a telephone legal aid service (3.0%). While the percentage of those who sought public legal assistance may actually be higher given that 8.0% of Ontarians who sought legal advice stated they did not know where they received their legal advice from, the fact remains that more than three-quarters of Ontarians who sought legal advice did so from private legal representation.

Where legal aid eligibility is almost a non-factor, one may expect to see fewer lower- and middle-income individuals contacting a lawyer, with the rate of contacting a lawyer increasing in the high-income category as the ability to afford legal services also rises. This, however, is not the case as the data shows that individuals from all income categories seek legal assistance at a fairly constant rate with middle-income Ontarians – who neither qualify for funding nor have comparable resources as high-income individuals – seeking assistance at a slightly higher rate than the other two income categories. Thus we return to Kritzer's observation that problem type may be more determinative of advice-seeking behaviour. The next section of this paper will examine the Cost of Justice survey findings in regards to problem type in more detail.

### C. Methods of Resolution by Problem Type

Many studies have concluded that problem type is an indicator of whether an individual will seek legal advice.<sup>60</sup> This appears to be the situation in Ontario. When comparing the rate of seeking legal assistance

<sup>56</sup> Legal Aid Ontario, Financial Eligibility Test for Legal Aid Certificates, online: Legal Aid Ontario <<http://www.legalaid.on.ca/en/publications/downloads/Certificate-Financial-Eligibility-Criteria.pdf>>.

<sup>57</sup> Ibid.

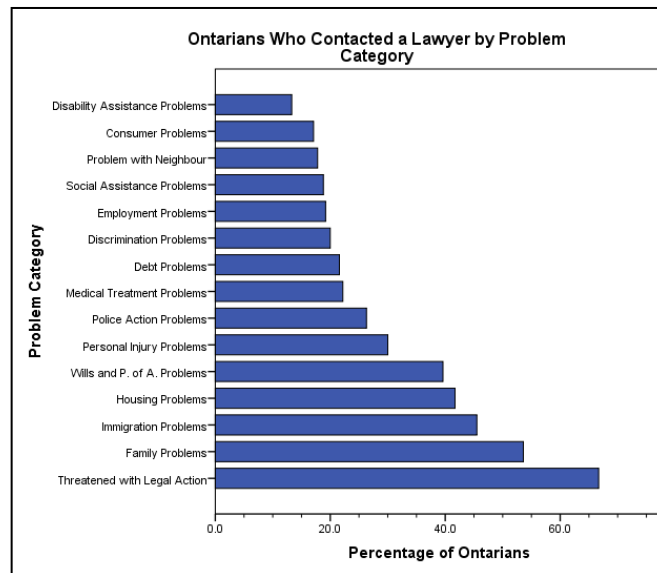
<sup>58</sup> Statistics Canada, *Table 2: Low Income Cut-Offs (1992 Base) Before Tax*, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75f0002m/2012002/tbl/tbl02-eng.htm>>.

<sup>59</sup> Of the 562 respondents who were asked about resolution, 100 stated they sought legal advice.

<sup>60</sup> See e.g. Jamie Baxter, Michael Trebilcock & Albert Yoon, "The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data" in Trebilcock, Duggan & Sossin, *supra*, note 4, 55 at 84; Genn, *supra* note 2 at 135; Kritzer, *supra* note 16; Pascoe Pleasence & Nigel J Balmer, "Horses for Courses? People's Characterisation of

in specific problem categories with the average rate among all legal problems, it is evident that those facing certain types of legal problems are more likely to seek lawyer assistance. For example the three most frequently experienced problem categories of debt, employment, and consumer problems all had a fairly low rate of contacting a lawyer (21.6%, 19.2%, and 17.1% respectively). In comparison, family, immigration, and housing had some of the highest percentages of respondents who contacted a lawyer (53.6%, 45.5%, and 41.7% respectively) and were all found to be correlated, albeit weakly, with whether the respondent would seek legal assistance.<sup>61</sup> Apart from these three problem types, the only other problem categories that were found to be correlated with contacting a lawyer were being threatened with legal action and wills and powers of attorney (66.7% and 39.6% respectively).<sup>62</sup>

Figure 3



While it may surprise some that income does not have a great impact on advice-seeking behaviour, it is rather intuitive that problem type does. The reason for this goes back to the cost-benefit analysis discussed by Kritzer, and to his observation that inherent to this analysis is one's assessment of how serious a legal problem is.<sup>63</sup> If failing to resolve a consumer issue simply means that one is stuck with a defective good, there may be little reason to seek formal legal advice that will cost more than the good itself. Conversely, if a problem is viewed as potentially being serious, where the consequence may be deportation, eviction, or the loss of custody of a child, then the cost of legal advice may be warranted. Thus, it is not surprising that those categories of legal problems that have the highest rate of seeking formal legal advice are also

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Justiciable Problems and the Use of Lawyers" in *Future of the Legal Services: Emerging Thinking* (London: Legal Services Board, 2010) 37 at 38.

<sup>61</sup>  $r = .310$ ,  $n = 558$ ,  $p = .000$  (family law problems);  $r = .102$ ,  $n = 558$ ,  $p = .016$  (immigration problems);  $r = .131$ ,  $n = 558$ ,  $p = .002$  (housing problems).

<sup>62</sup>  $r = .232$ ,  $n = 558$ ,  $p = .000$  (threatened with legal action);  $r = .173$ ,  $n = 558$ ,  $p = .000$  (wills and powers of attorney).

<sup>63</sup> Kritzer, *supra* note 17 at 900.

the ones that are often perceived as having some of the most serious consequences. Yet if seriousness of the problem alone determined behaviour, one may expect a binary wherein people sought legal assistance for serious problems, and sought informal methods of resolution for not-so-serious problems. However, the data shows that even within those categories that may be viewed as most serious, most people still do not seek legal advice. For example, more than half the people with immigration and housing problems did not speak to a lawyer. The reason, therefore, might not lie in the category of problem per se, but rather in how Ontarians understand the law and whether the problem is perceived as being properly situated in law.

#### **D. Methods of Resolution: Perception**

Of those Ontarians with legal problems, 56.6% stated that they understood how serious their problem was or could become when it first happened. However, understanding the seriousness of a problem is not directly equated with understanding the *legal* implications of the problem. I suggest that there is an important difference. While seriousness implies that an individual understands how the problem will impact their life, understanding legal implications means understanding that there are legal remedies available from formal institutions. For example, an individual who receives an eviction notice may recognize the implications to be quite serious, but may be unaware they can bring an application before a housing tribunal to have the eviction delayed or stayed. Thus, whereas just over half of Ontarians recognized the seriousness of their problem, only 33.5% of Ontarians with legal problems stated they were aware of any legal implications related to their problem. This finding is important as it sheds light on the fact that individuals do not perceive all legal problems as being legal in nature. Of further interest is the fact that this perception also affects how likely one is to seek legal advice. While there are no statistically significant correlations between methods of resolution and certain social capital factors such as income, education, or employment status, there is some correlation with the method of resolution and how the problem is perceived. The first area where there is some, albeit weak, correlation is with regard to how seriously the individual viewed their problem: of those who understood how serious their problem was, 22.4% contacted a lawyer compared with 13.2% of those who did not understand the seriousness of their problem.<sup>64</sup> Yet, there is a stronger correlation between those who contacted a lawyer and those who understood the legal implications of their problem. Of those who were aware of the legal implications of their problem, 31.1% contacted a lawyer whereas only 11.0% of those who were unaware of the legal implications contacted a lawyer.<sup>65</sup>

As indicated above, problem type may be an indicator of whether someone will seek legal assistance, however, problem type does not in and of itself explain advice-seeking behaviour. The findings of the Cost of Justice survey suggest the underlying reason why many legal problem types have low rates of individuals seeking legal advice is because those individuals are unaware of the legal implications of their problems. Indeed, certain problem types – such as family and immigration – see a high percentage of individuals seeking out legal advice possibly because they are immediately understood not only to be more serious but also because their legal implications are more readily apparent. For example, an individual faced with losing custody of their children or being deported more readily identifies and understands the legal implications of the issue, in that they understand that the courts can provide a remedy, than an individual who may be denied overtime pay or who receives a call from a collection agent.

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<sup>64</sup>  $r = .118, n = 537, p = .006.$

<sup>65</sup>  $r = .248, n = 532, p = .000.$

Why Ontarians perceive only certain problems as possessing legal implications speaks to how Ontarians understand and perceive the law itself. Insight into this may be found in the works of legal consciousness theorists. Patricia Ewick and Susan Silbey, for example, asked 430 New Jerseyans about their experiences with legal problems and the law. Among the responses, the authors found three narratives that were commonly repeated, each of which “invokes a different set of normative claims, justifications, and values to express how the law ought to function.”<sup>66</sup> Interestingly, the authors state that individuals do not ascribe to a single view of the law, but often express differing or contradictory views depending on specific circumstances.<sup>67</sup> Similarly, Engel studied the legal behaviour of residents of a particular rural county in Illinois that had a low rate of personal injury claims.<sup>68</sup> In this study, Engel found that many within the community characterized personal injury claimants as greedy, quick to sue, and looking to get something for nothing.<sup>69</sup> These negative views, which reflect a value system that emphasizes self-sufficiency and personal responsibility, meant that some people within the community avoided bringing personal injury claims because they did not consider it an appropriate avenue for resolution.<sup>70</sup> Sandefur echoes and builds upon this finding when she suggests that there are two factors that shape this social construction of legality.<sup>71</sup> The first is the views and practices of the community that one belongs to and the second is the forums – whether formal or not – that are available to resolve a problem. Sandefur notes that in the United Kingdom there are numerous paths to justice beyond the formal legal institutions that provide solutions for handling civil justice problems and suggests that these paths to justice help shape how people resolve their problems and what they feel is appropriate.<sup>72</sup> Evidently, how individuals understand and interact with the law is a multifaceted issue that cannot be explained through survey data alone. However, the Cost of Justice survey does demonstrate that one’s choice to seek legal assistance is at least somewhat influenced by how clearly one understands the legal implications of the problem.

## V. CONCLUSION

The Cost of Justice survey found that Ontarians generally engage in informal self-help methods when trying to resolve their legal problems rather than seek formal legal advice. The inability to afford legal services, however, does not appear to be the primary reason for this given that respondents of all income levels sought legal assistance at comparatively the same rate. Yet when problems are examined by problem type, it is evident that certain categories of legal problems have a much higher rate of individuals seeking legal assistance. The reason for this likely has to do with how the problem is perceived. Generally, Ontarians do not perceive most of their problems as being legal in nature and thus it is not surprising that Ontarians do not seek legal advice for many types of problem. Yet when Ontarians do understand the legal implications of a problem they are more likely to seek legal advice. While acknowledging that the cost of

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<sup>66</sup> Patricia Ewick & Susan S Silbey, “Common Knowledge and Ideological Critique: The Significance of Knowing That the ‘Haves’ Come Out Ahead” (1999) 33 *Law Soc Rev* 1025 at 1028.

<sup>67</sup> *Ibid* at 1035.

<sup>68</sup> Engel, *supra* note 25.

<sup>69</sup> *Ibid* at 553, 558–559.

<sup>70</sup> *Ibid* at 560.

<sup>71</sup> Sandefur, “Money”, *supra* note 20 at 237–239.

<sup>72</sup> Rebecca L Sandefur, “The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy” (2009) 42 *Loy LA L Rev* 949 at 957–962.



legal services is an important consideration, these findings suggest that access to justice scholars should also consider issues beyond the ability to pay when looking to make meaningful and inclusive reforms to the justice system.