

UNEQUAL INEQUALITY

The Role of Race and Income in the U.S. Civil Justice Crisis

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(Full Report Forthcoming)

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Americans' perceptions about the availability of legal aid, or more accurately, the information and experiences informing these perceptions, are not shared uniformly across the population. Findings indicate that wealthy people, and white people more often assume the over-availability of free legal services.¹ However, even Americans with a clear understanding of available services may have trouble identifying what makes a problem distinctly 'legal' in nature: a threshold question when deciding whether to pursue assistance in the first place.²

People-centered justice leaders agree that since most justiciable problems do not make it to court, remaining reliant on top-down, administrative statistics is insufficient to capture individuals' direct experience and perceptions of their legal needs, and their preferred means of problem resolution.³ Legal needs surveys help provide this essential perspective.

The notion of justice as guaranteed equally across sociodemographics is a necessary precondition for adequate access to justice to be fully realized in the United States.⁴ But equality under the law is made tenuous by facially neutral policies and programming that disparately impact already vulnerable groups.

The past decade illuminated the deficit of sociodemographic information that segments the experiences, perceptions and needs of vulnerable groups as distinct from the general population. Despite the increased recognition of the need to disaggregate legal needs surveys and studies by income, race, gender, age, and disability, among other factors,⁵ there is a surprising lack of U.S. surveys that do so.

This is disturbing, because "justiciable problems are not randomly distributed across populations. They disproportionately affect disadvantaged groups, and can create and exacerbate disadvantage."⁶ The following sections depict a condensed roundup of findings and knowledges gaps with respect to racial and ethnic disaggregation in legal needs surveys. These findings are a reminder to propel state bar associations and national institutions to avoid reproducing work that ignores international calls for data disaggregation.

A. U.S. LEGAL NEEDS SURVEYS: VALUE-ADDED IN MEASURING ACCESS TO JUSTICE

The most comprehensive, publicly available collection of national and sub-national legal needs surveys is maintained by the World Justice Project⁷ in their Atlas of Legal Needs Surveys.⁸ WJP found in their own 2018 survey, designed in consultation with OECD and OSJI, that Americans, like most people worldwide, do not primarily turn to lawyers and courts for assistance with their legal problems.⁹ In many ways, legal empowerment initiatives are both a catalyst and a responsive reification of these findings.

Given their preponderance, U.S. state surveys are essential to ascertaining a clearer picture of unmet legal need in America.

The Atlas of Legal Needs, United States entry reflects a total of 55 legal needs surveys

<i>5 of the 53 surveys were national in scope</i>	LSC (polled 2017 and 2021) IAALS and HiiL (polled 2020) WJP (polled 2018) ABA (polled 1993)
<i>48 of the 53 surveys were conducted on the state level</i>	At the state level, many of the surveys were developed in tandem between the National Center for State Courts (NCSC), a project of Department of Justice's 'Justice of All initiative'. The earliest entry in the Atlas of Legal Needs is from 1991.

The surveys' understandable lack of uniformity limits the possibility of comprehensive, side-by-side comparisons.¹⁰ Given these restrictions, we de-emphasized survey 'results' in favor of casting a discerning eye on the nature of the information gathered and analyzed, with particular emphasis on responses that were disaggregated by race and ethnicity.

Our analysis yielded the following general conclusions:

- Income data was commonly gathered and analyzed.
- Less than half of surveys analyzed race and ethnicity data in any meaningful way.
- Most surveys failed to collect or analyze data that pertained to *pro se* litigation, and only one survey analyzed *pro se* litigation along racial and ethnic lines.

Despite resource limitations, omitting race and ethnicity data risks operating in a closed universe mistaken for a complete picture of Americans' lived experience of civil justice.¹¹

B. LEGAL NEEDS SURVEYS: GENERAL POPULATION CONCLUSIONS

Findings from national legal needs surveys suggest Americans' difficulty identifying legal problems may deter their pursuit of assistance,¹² especially assistance provided by lawyers.¹³ Americans suffer high legal problem prevalence.¹⁴ Their pursuit of legal advice is unbundled into various sectors,¹⁵ and financial restraints compound access issues.¹⁶ They suffer multiple serious negative consequences of legal problems, and the likelihood of problem resolution is often attached to income.¹⁷

Legal empowerment buttresses legal literacy by making information and advice more accessible: legal information will be made available in the places Americans are the most comfortable looking for it. While appointed civil counsel in basic needs cases is demonstrated to have a positive impact on the litigation's outcome for vulnerable parties,¹⁸ litigation may never occur for many who do not recognize their issues as justiciable, or feel unseen by administrative processes.

Overall, findings show that Americans were more likely to seek advisers when they considered their problems to be serious. National surveys evaluate seriousness somewhat differently, but all assessments were based on respondent's *perception* of the problem's seriousness rather than evaluation by external metrics.¹⁹ Low-income respondents in LSC's 2021 survey sought professional help only 19% of the time, but that number rose to 25% when respondents perceived the problem as serious.²⁰

Of the *minority* of IAALS and WJP respondents at mixed incomes *who sought help of any kind from an individual adviser*,²¹ only 29% of IAALS respondents reported seeking help from an attorney, and 38% of WJP respondents sought the help of a legal professional²². These surveys reported similar findings for respondents seeking help from family and friends (45% IAALS, and 49% WJP). Respondents indicated they found the assistance they received from family and friends "very helpful", while acknowledging that the nature of the help they sought very often pertained to "emotional support"—which lawyers are not typically well-situated to provide.

C. NATIONAL LEGAL NEEDS SURVEYS: THE EFFECT OF RACE AND ETHNICITY ON CIVIL JUSTICE PERCEPTIONS AND EXPERIENCES

Overall, the 2021 Hiil and IAALS study was the only contemporary national legal needs survey to disaggregate by race. Key findings are reproduced below, indicating that race and ethnicity had a correspondence, or correlation with legal problem frequency and seriousness, advice seeking behavior, and overall resources and abilities to solve legal problems.

Problem Frequency

White people had the lowest incidence of legal problems at 64% of surveyed respondents. Multiracial people the highest at 74%, and Black Americans at 71%.²³

Stress and Emotional Burden

Based on survey respondent reporting, the most negatively impactful justice journeys that Americans experienced were those involving employment, domestic violence, family problems, and problems with public benefits.²⁴ These problems were suffered disproportionately by non-white and multi-racial populations.²⁵

Problem Type and Seriousness

Given that all groups ranked their legal problems as at least somewhat serious¹—when problems ranged from traffic violations to housing and financial crises—it is possible respondents' subjective perception of seriousness is relative to their individual and cultural experience. Despite the inherently incalculable, subjective nature of individual suffering, it seems fair to posit that threats to basic needs and wellbeing pose more serious threats than neighbor disputes. Consequently, divergence between different racial and ethnic groups may exceed reported parameters, and needs to be further probed. Findings reflect:

- White Americans, and those identifying as 'Other' (non-Hispanic) were most likely to experience consumer, personal injury and property damage, and neighbor problems.²⁶
- The legal problems most commonly experienced by Black Americans were the most distinctive among all racial groups. Black Americans are more likely to experience civil legal problems that pertain to housing, employment, and personal finances. Survey responses indicated that Black Americans reported that their legal problems affected them in ways that were more severe than any other race.²⁷
- Black Americans are the only group for which consumer problems were not among the top three problem types encountered.²⁸

Problem Resolution

Americans' ability to solve their legal problems "depended on their gender, income, age, race, ethnicity, and living environment."²⁹ Vulnerable sociodemographics overall were "not only less successful in reaching resolution than their counterparts—they were also more likely to report their problem remained ongoing or had been abandoned."³⁰

- White and "Other/Non-Hispanic" Americans resolved their legal problems at higher rates (50% and 52% respectively) than other demographic groups. Multiracial people had the lowest problem resolution rate, at 41%.³¹
- Black and Hispanic Americans reported their *most serious* legal problem remained ongoing more often (in 27% of instances) than other racial and ethnic groups.³² This points to the divergence in legal problem seriousness faced by different racial and ethnic groups, as well as other potential setbacks or disadvantages Black and Hispanic Americans face when attempting to resolve their problems.

These statistics, and others, form the basis of our thinking that if people of color, and particularly African Americans experience higher incidence of civil issues, and have unmet legal needs that overlap or involve basic needs, they might be disparately impacted, and particularly disadvantaged by the unavailability of community resources, affordable counsel and *pro se* litigation support.

Faith in 'Fairness' and Advice Seeking Behavior

LSC's 2017 iteration of their legal needs study identified race as a factor that effected institutional trust, but the study did not disaggregate by race.³³

The IAALS survey found that Hispanic Americans pursued legal advice more often than people from any other racial or ethnic background, at around 69%. Black Americans followed at 64%.³⁴ The remaining population ranged

¹ Respondents ranked problem severity was evaluated on a ten-point scale. Of common legal problems, traffic/parking ordinance ranked a 3.5, and domestic violence, the most serious problem, at a 7.5. These net numbers were compiled from a range of incomes and race, and may alter with further disaggregation. Hague Institute for Innovation of Law (HiIL) & Institute for the Advancement of the American Legal System (IAALS), University of Denver (2021) Justice Needs and Satisfaction in the United States of America: Legal Problems in Daily Life, at 41. Available at <https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf>

between 59%-62%.³⁵ Since a legal problem's seriousness tends to increase the likelihood that an individual will seek advice, it follows that white and Asian Americans would seek advice less frequently than other groups given the nature of their most common legal problems. However, this same logic notably fails to explain why Black and Multiracial Americans do not rank as top advice seekers. In her study of Cambridge public housing residents' approach to legal problems, Sarah Sternberg-Greene, noted a racial disparity in advice seeking: "indeed, roughly three-quarters of the poor do not seek legal help when they experience a civil justice problem...inaction is even more pronounced among poor blacks."³⁶

Conflating the Civil and Criminal Systems

Regardless of their race, most Americans likely also unknowingly suffer the fallout from their propensity to conflate criminal and civil justice systems.² Given that 99% of cases filed in the civil system, this perception may be damaging. It is unsurprising that those with categorically worse experiences with criminal justice would be more distrustful of civil legal services and systems.

For many, it is experience with the criminal justice system that informs perceptions of the civil system, possibly deterring those with justiciable problems from pursuing available free legal assistance. Civil attorneys working *pro bono*, or for legal service providers may be mistaken or conflated with the criminal justice systems' public defenders, who are notoriously overburdened and under-resourced, and consequently, less available to their clients.³⁷

Statistics reflecting people of color's disproportionate prosecution are widely circulated, reliable, and staggering,³ but whether people of color receive different treatment by the civil justice system, and have different perceptions of the system's fairness, is critically understudied. Contemporary findings imply a pernicious disparity: a 2019 Pew Research Center survey found that nearly 9 in 10 Black adults say Black Americans are treated less fairly than their white counterparts in the criminal justice system. Only about 61% of white adults agreed.³⁸

WHAT WE SHOULD BE ASKING

Given the prevalence of problem clustering,³⁹ if non-white Americans are disproportionately prosecuted, do they also bear a disproportionate burden of civil issues?

If people of color are disproportionately burdened with civil legal issues, while also being concerned about legal service providers reliability, do many of their legal needs go unaddressed? Are people of color less likely to pursue their legal needs, because of negative experience with the criminal justice system?

D. STATE LEGAL NEEDS SURVEYS

The following chart demonstrates how the 48 state legal needs surveys disaggregated their data by race and ethnicity, and questions about *pro se* litigation. Overall, while 42% of studies collected and analyzed race and ethnicity data, fewer analyzed respondent's inclination to represent themselves *pro se*.

In addition to the multitude of reasons to disaggregate by race and ethnicity, we believe questions aimed at understanding respondents' experiences of *pro se* litigation are particularly relevant, because judges are found to be more responsive to arguments delivered by attorneys.⁴⁰

² Keeping in mind her small sample size, Sternberg-Greene speculated that 78 percent of Americans might share this erroneous belief. Sternberg-Greene quoted one woman from her survey, who, when asked about the difference between the criminal and civil justice systems, replied: "I'm not really sure. To me it's all law and courts and bad. Stay away from the law, that is my MO. It's good advice." Sternberg-Greene, S. (2016) "Race, Class, and Access to Civil Justice", *Iowa Law Review*, vol. 101. pp. 1234-1322, 1289. Available at https://scholarship.law.duke.edu/faculty_scholarship/3450/.

³ African-American adults are 5.9 times as likely to incarcerated than whites and Hispanics are 3.1 times as likely. The Sentencing Project, Report to the UN on Racial Disparities in the US Criminal Justice System, April 2018. Available at <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/>

Given that cases litigated *pro se* are less likely to find in favor of the vulnerable party,⁴¹ if a disproportionate number of *pro se* litigants are people of color, than these litigants may suffer outcomes that are less fair than white litigants. These outcomes do not stop at individual suffering and collateral hardships, they perpetuate the social and economic hardships historically suffered by non-white Americans.

Total Studies Where Race & Ethnicity Data was Collected and Meaningfully Analyzed	
20	

Studies Where Race & Ethnicity Data was Collected and Meaningfully Analyzed AND <i>Pro Se</i> Data was Collected, and WAS Meaningfully Analyzed	
8	<i>Pro Se</i> Data was Collected, but NOT Meaningfully Analyzed 3

Studies that Collected and Meaningfully Analyzed	
Race & Ethnicity Data	<i>Pro Se</i> Data
AND, analyzed <i>Pro Se</i> Data along Racial Lines	
1	

Studies Where Race & Ethnicity Data was Collected and NOT Meaningfully Analyzed	
8	

Studies Where Race & Ethnicity Data was Collected and NOT Meaningfully Analyzed AND	
<i>Pro Se</i> Data was Collected, and WAS Meaningfully Analyzed	<i>Pro Se</i> Data was Referenced or Collected, but NOT Meaningfully Analyzed
3	2

Studies Where <i>Pro Se</i> Data was Collected and Meaningfully Analyzed (absent any inclusion of race & ethnicity data)	
5	

Studies Where <i>Pro Se</i> Data was Referenced and NOT Meaningfully Analyzed (absent any inclusion of race & ethnicity data)	
4	

Studies that Neither Collected, Nor Analyzed	
Racial Data	<i>Pro Se</i> Data
10--11	

CONCLUSIONS

Despite many administrative, organizational and individualized efforts to end inequities in civil litigation, research and actual data surrounding racial and ethnic disparities in civil justice remains one of the most neglected issues in American access to justice advocacy. The fact that people of color may suffer disproportionately needs to infiltrate the popular consciousness, and assume a place on the national stage.

There is insufficient data to conclude, but enough to suspect that

Most Americans do not understand that they do not have a right to civil counsel.

Most Americans conflate the civil and criminal justice systems, which impacts their decision to pursue civil legal advice.

There are racial and ethnic disparities in *perceptions* of the civil justice system.

There are racial and ethnic disparities in *experiences* of the civil justice system.

Basic needs cases are disproportionately litigated by people of color.

Available data leads us to consider

Whether a disproportionate number of *pro se* basic needs litigants are racial and ethnic minorities?

Whether Americans would pursue a different course to problem resolution with increased legal awareness, and resources at their disposal?

The opportunity costs or benefits incurred by those with legal needs that involve justiciable claims, who either choose to, or refrain from, pursuing their 'day in court.'

NOTES

- ¹ Sandefur, R. (2019) "Access to What?", *Daedalus, Journal of the American Academy of Arts and Sciences*, vol. 148 (1), pp. 49-55, 51. Available at <https://www.amacad.org/daedalus/access-to-justice>; Sternberg-Greene, S. (2016) "Race, Class, and Access to Justice." *Iowa Law Review*, vol. 101. pp. 1234-1322.
- ² Sandefur (2019) "Access to What?", *supra* note 1 at 51. Sandefur, R. (2014) *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*. American Bar Foundation, University of Illinois at Urbana-Champaign at 14. Available at https://www.americanbarfoundation.org/wpcontent/uploads/2023/04/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf. See also Legal Services Corporation (2022) *The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans*. Prepared by Mary C. Slosar, Slosar Research, LLC., at 45, 49. Available at <https://justicegap.lsc.gov/the-report/>.
- ³ OECD/Open Society Foundations (2019), *Legal Needs Surveys and Access to Justice*, OECD Publishing, Paris. Available at <https://doi.org/10.1787/g2g9a36c-en>; Satterthwaite, M. and Dhital S. (2019) "Measuring Access to Justice: Transformation and Technicality in SDG 16.3", *Global Policy*, vol. 10 (S1), pp. 96-109. Available at <https://onlinelibrary.wiley.com/doi/full/10.1111/1758-5899.12597>.
- ⁴ Sternberg-Greene, S. (2016) "Race, Class, and Access to Justice." *Iowa Law Review*, vol. 101. pp. 1234-1322, at 1270. Available at https://scholarship.law.duke.edu/faculty_scholarship/3450/.
- ⁵ UN Resolution 70/1, adopted by the General Assembly on 25th September 2015 paragraph 74(g). Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.
- ⁶ OECD/OSJI (2019), *supra* note 3, at 11.
- ⁷ WJP is an industry leader in developing reliable indicators for measuring national access to justice, as a component of that nation's broader adherence to the rule of law. "Defining rule of law to capture its complexity in clear and coherent terms is one thing. Measuring it is something else, but is nonetheless a worthy goal, for anything worthwhile needs not only to be defined, but to be measured in order to know if progress is happening." Anderson, E. and Piccone T. (2019) "The Meaning, Measuring and Mattering of the Rule of Law." *DOJ Journal of Federal Law and Practice*. pp.103-124, at 107.
- ⁸ World Justice Project, *Atlas of Legal Needs Surveys*. Available at <https://worldjusticeproject.org/our-work/research-and-data/atlas-legal-needs-surveys>. [Accessed May 4, 2023].
- ⁹ World Justice Project (2019) *Global Insights on Access to Justice* at 108. Available at <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf>; OECD/OSJI (2019), *supra* note 3, at 35.
- ¹⁰ Satterthwaite, M. and Dhital S. (2019), *supra* note 3, at 104. See also, Coumarelos, C., Wei, Z. and Zhou, A. Z. (2006) *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of New South Wales, Sydney. Available at <http://www.lawfoundation.net.au/report/survey2006>.
- ¹¹ Satterthwaite, M. and Dhital S. (2019), *supra* note 3, at 100.
- ¹² LSC (2022), *supra* note 2, at 29.
- ¹³ LSC (2022), *supra* note 2 at 49; WJP (2019) *Global Insights on Access to Justice*, *supra* note 9, at 108; HiiL & IAALS (2021), *supra* note 14, at 164.
- ¹⁴ LSC (2022) *supra* note 2 at 18,32. Available at <https://justicegap.lsc.gov/the-report/>; World Justice Project, (2019) *Global Insights on Access to Justice*. p. 108. Available at <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf>; Hague Institute for Innovation of Law (HiiL) & Institute for the Advancement of the American Legal System, University of Denver (IAALS) (2021) *Justice Needs and Satisfaction in the United States of America: Legal Problems in Daily Life*, p 32. Available at <https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf>
- ¹⁵ HiiL & IAALS (2021), *supra* note 14, at 163-165.
- ¹⁶ LSC (2022) *supra* note 2 at 52.
- ¹⁷ HiiL & IAALS (2021), *supra* note 14, at 31.
- ¹⁸ Greiner, J., Wolos Pattanayak, C. and Hennessy, J. (2013), "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future", *Harvard Law Review*, vol. 126, pp. 901-989, 903. Available at <https://harvardlawreview.org/print/vol-126/the-limits-of-unbundled-legal-assistance-a-randomized-study-in-a-massachusetts-district-court-and-prospects-for-the-future/>. ; Office of Civil Justice, New York City Human Resources Administration (2020) *Universal Access to Legal Services, A Report on Year Three of Implementation in New York City*. Available at https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf (demonstrating the right to counsel initiative for NYC's tenant's considerable effect on minimizing evictions); Brito, T., Pate D., Gordon, D., Ward, A. (2016) "What We Know and Need to Know about Civil Gideon", *South Carolina Law Review*, vol. 67 pp. 223-243, 237. Available at <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=4161&context=sclr>.

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- ¹⁹ HiiL & IAALS (2021), *supra* note 14, at 41; LSC (2022) *supra* note 2 at 37.
- ²⁰ LSC (2022) *supra* note 2 at 44.
- ²¹ WJP finds that only 33% of respondents sought the help of an individual advisor, whether a legal professional or friend. IAALS found that 66% of respondents sought advice or assistance with their problem, but those who restricted their search to the internet were included in that number. See also, HiiL & IAALS (2021), *supra* note 14, at 32.
- ²² HiiL & IAALS (2021), *supra* note 14, at 41; World Justice Project, (2019) Global Insights on Access to Justice. p. 108. Available at <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf>
- ²³ HiiL & IAALS (2021), *supra* note 14, at 36.
- ²⁴ HiiL & IAALS (2021), *supra* note 14, at 80.
- ²⁵ HiiL & IAALS (2021), *supra* note 14, at 37.
- ²⁶ HiiL & IAALS (2021), *supra* note 14, at 37.
- ²⁷ HiiL & IAALS (2021), *supra* note 14, at 43.
- ²⁸ HiiL & IAALS (2021), *supra* note 14, at 37.
- ²⁹ HiiL & IAALS (2021), *supra* note 14, at 128.
- ³⁰ HiiL & IAALS (2021), *supra* note 14, at 128.
- ³¹ HiiL & IAALS (2021), *supra* note 14, at 52.
- ³² HiiL & IAALS (2021), *supra* note 14, at 93.
- ³³ Legal Services Corporation (2017) *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*. Prepared by NORC at the University of Chicago for Legal Services Corporation. Available at <https://lsclive.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74>
- ³⁴ HiiL & IAALS (2021), *supra* note 14, at 158.
- ³⁵ HiiL & IAALS (2021), *supra* note 14, at 158.
- ³⁶ Sternberg-Greene (2016), *supra* note 4, at 1234.
- ³⁷ Sternberg-Greene (2016), *supra* note 4, at 1290-98.
- ³⁸ Horowitz, J., Brown, A. Cox, K. "Race in American 2019", Pew Research Center <https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/#majorities-of-black-and-white-adults-say-blacks-are-treated-less-fairly-than-whites-in-dealing-with-police-and-by-the-criminal-justice-system>. [Accessed May 4, 2023]
- ³⁹ OECD/OSJI (2019), *supra* note 3, at 32; HiiL & IAALS (2021), *supra* note 14, at 135.
- ⁴⁰ Brito et al. (2016), *supra* note 18 at 237, citing Sandefur, R. (2010) "The Impact of Counsel: An Analysis of Empirical Evidence", *Seattle Journal for Social Justice*, vol. 9(1), pp. 51-85. Available at <https://digitalcommons.law.seattleu.edu/sjsj/vol9/iss1/3>;
- ⁴¹ Engler, R. (2010) "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed". *Fordham Urban Law Journal*, vol. 37, pp. 37-92, at 78. Available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2321&context=ulj> .