

SURVIVAL IN THE FACE OF SCARCITY: THE UNDOCUMENTED IMMIGRANT EXPERIENCE

Nathalie Martin*

In this Article, I attempt to build an empathy bridge between readers and a group of undocumented immigrants living in the American southwest, applying original qualitative research to scarcity theory. While the original empirical study discussed here was designed to bring out the financial realities of the participants, including their credit and banking habits, we uncovered some unrelated themes, including a general feeling among participants of being taken advantage of on the basis of immigration status, as well as an unwillingness to use the court system to right wrongs, even when there was a clear legal right to do so. We conclude that being undocumented has many predictable deleterious consequences, as well as some relatively unpredictable ones.

* Frederick M. Hart Chair in Consumer and Clinical Law, University of New Mexico School of Law. I thank the National Conference of Bankruptcy Judges and the University of New Mexico School of Law for their financial support; Julio Romero, Amanda Lavin, and Bridget Mullins for their assistance with data collection; and Joshua Alt, Ben Jacobs, Shane Maier, Luisa “Mabel” Arellanes-Serrano, and Jeffrey Dennison for their research assistance. I thank Sara Greene, Pamela Foohey, and Stewart Paley for reading earlier drafts; those who commented at the Law and Society Association’s annual meeting in May of 2015; and those who attended the symposium honoring the life and contributions of Jean Braucher. I am deeply grateful to my assistant Cheryl Burbank for her research, incredible organizational skills, and editorial assistance. I also thank the National Conference of Bankruptcy Judges, which funded this research, and my editor, Mitch Turbenson, for his fine editorial assistance.

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INTRODUCTION

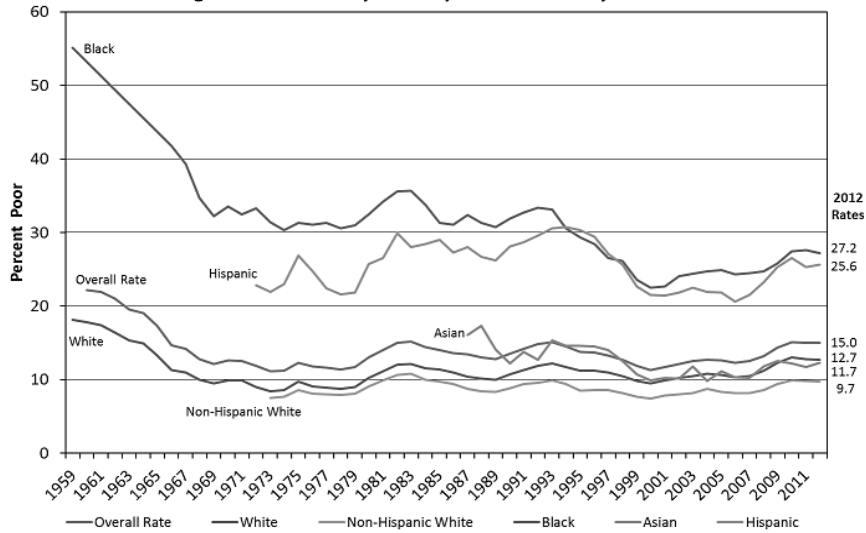
As most of us know, many Americans live with poverty or financial scarcity. There are pockets of poverty in every major city, in many suburbs, and in much of rural America. Children are particularly affected; they make up 24% of the general population, but 36% of individuals living in poverty.¹ Women and people of color tend to live in poverty more frequently than white men, and as a general

1. NAT'L POVERTY CTR., THE UNIV. OF MICH. GERALD R. FORD SCH. OF PUB. POLICY, *Poverty in the United States*, <http://www.npc.umich.edu/poverty> (last visited Jan. 18, 2016).

matter,² the South tends to be poorer than the North.³ Finally, poverty is far more common among foreign-born, noncitizens than the general U.S. population, with

2. INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.-MADISON, *Who Is Poor?*, <http://www.irp.wisc.edu/faqs/faq3.htm> (last visited Jan. 18, 2016) (“In 2012, the poverty rate for families was 11.8%, comprising 9.5 million families. Of all family groups, poverty is highest among those headed by single women. In 2012, 30.9% of all female-headed families (4.8 million families) were poor, compared to 6.3% of married-couple families (3.7 million families)). Minorities are more largely represented than white people among the poor:

Figure 1: U.S. Poverty Rates by Race or Ethnicity: 1959–2012



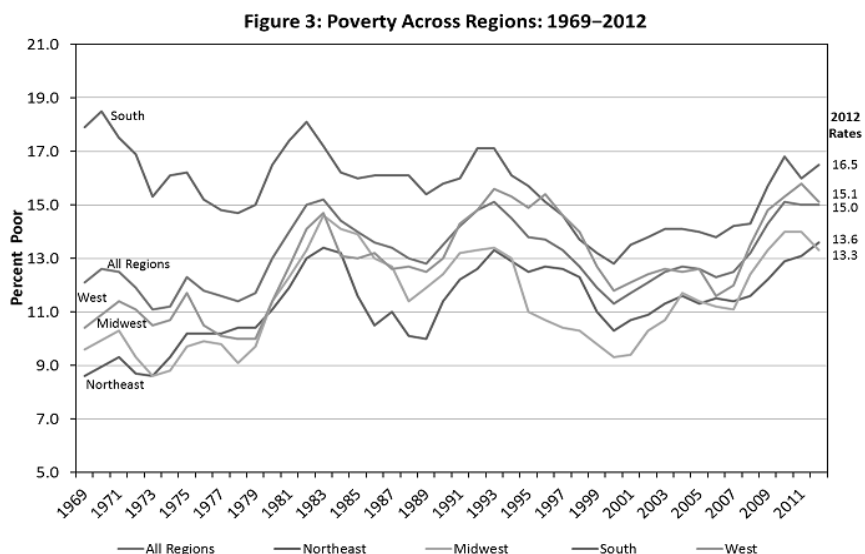
Source: U.S. Census Bureau, Historical Poverty Table 2; 2012 Census Report.
 Note: Black poverty rate data from 1960 to 1965 is not available. The line shown connects the 1959 rate of 55.1 percent to the 1966 rate of 41.8 percent and is included to represent the trend but not to imply specific numerical data.

Id.

3. *Id.* The poverty rate varies considerably across regions, and in the South in 2012, more than 19 million people were living in poverty, leading to a poverty rate of 16.5%, higher than any other region, as shown by this chart:

immigrants having a 26.7% poverty rate compared to an overall 14.5% national U.S. poverty rate.⁴

While most of us are familiar with the idea of poverty, few middle class people know how scarcity or poverty manifests itself in the lives of those with too little money, too little security, and too much uncertainty in life. This Article attempts to close that gap through original qualitative data. These data help us learn how scarcity is experienced by one demographic—namely undocumented persons living in a part of the U.S. Southwest that is generally known to be friendly to immigrants.⁵ Data collected by my research assistants and me show that this relative



Source: U.S. Census, Current Population Survey.

Id.

4. See NAT'L POVERTY CTR., *supra* note 1. "In 2013, the official poverty rate was 14.5%, down from 15.0% in 2012 . . . This was the first decrease in the poverty rate since 2006. In 2013, there were 45.3 million people in poverty." CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013, at 12 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

5. See, e.g., Barry Massey, *N.M. Voters More Immigrant-Friendly*, ALBUQUERQUE J. (Nov. 13, 2006), <http://www.abqjournal.com/news/state/apfriendly11-13-06.htm> (describing a poll in which 63% of New Mexicans who voted in the general election supported giving illegal immigrants working in the United States a chance at becoming legal residents, with only 57% of voters nationwide agreeing, and just 59% of Texans and 55% of Arizonans agreeing); Haeyoun Park, *Which States Make Life Easier or Harder for Illegal Immigrants*, N.Y. TIMES (Mar. 29, 2015), http://www.nytimes.com/interactive/2015/03/30/us/laws-affecting-unauthorized-immigrants.html?_r=0; Benjy Sarlin, *New Immigration Laws Split America in Two*, MSNBC (Dec. 30, 2013), <http://www.msnbc.com/hardball/new-immigration-laws-split-america-two> (discussing how New Mexico is one of a few states that provides driver's licenses to the undocumented). On the other hand, the economy in New Mexico is not as

friendliness or acceptance does not keep people from being taken advantage of, or lessen the blow that undocumented status creates.⁶

As background, in 2011 and 2012, a team of research assistants and I conducted a qualitative empirical study of the banking and credit habits of 50 undocumented immigrants in Albuquerque, New Mexico. This study used common quantitative and qualitative measures to identify the demographics for this population, and then recounted experiences that participants had with the banking and credit industry, as well as with less formal credit providers such as tandas⁷ and high-cost lenders—e.g., pawn shops, title loans, and payday loans. Some of the results of this study were recently recorded in *Giving Credit Where Credit Is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*.⁸

Our⁹ study involved hour-long interviews for which participants received \$50 in cash.¹⁰ A majority of the questions asked were related to banking or handling expenses. We offered a series of possible answers to choose from,¹¹ and then

friendly, given the state's poor job prospects and overall poverty. Uriel J. Garcia, *New Mexico Job Woes Send Immigrants Back to Arizona*, SANTA FE NEW MEXICAN (Nov. 27, 2013, 11:00 AM), http://www.santafenewmexican.com/news/local_news/new-mexico-job-woes-send-immigrants-back-to-arizona/article_998f9557-0a46-5aca-8975-60524f851073.html.

6. See *infra* notes 184–92 and accompanying text.

7. Anita Bernstein, *The Trouble with Regulating Microfinance*, 35 U. HAW. L. REV. 1, 39 (2013) (defining a tanda as “a credit association formed by individuals in small groups united by acquaintance and a degree of mutual trust”); see also Donald V. Kurtz & Margaret Showman, *The Tanda: A Rotating Credit Association in Mexico*, 17 ETHNOLOGY 65, 67–68 (1978); Nezua, *In Tough Economic Times, Will a Tanda Work for You?*, EL MACHETE (Aug. 4, 2009, 1:03 PM), <http://theunapologeticmexican.org/elmachete/2009/08/04/in-tough-economic-times-will-a-tanda-work-for-you/> (encouraging Mexican Americans who need cash to explore this tradition).

8. Nathalie Martin, *Giving Credit Where Credit Is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989 [hereinafter Martin, *Giving Credit*].

9. I use “our” here because so many talented research assistants worked on this project with me, along with wonderful and talented staff persons from the University of New Mexico School of Law.

10. All survey participants, who were obtained from two community locations in a primarily immigrant community, received \$50 to answer 60, 100% structured questions. By this I mean that participants could comment on most of their answers chosen from a list, but we did not ask follow-up questions.

11. For example, question two asked “If you had any unexpected expenses, which of the following did you do to pay for the expense? Please check all that apply.

- Take money out of savings
- Stop paying one or more bills
- Pay one or more bills late
- Cut down on spending
- Make do with less food for you or your family members
- Borrow from a friend or family member
- Other assistance from a friend or family member

allowed participants to comment at the end of most questions. These comments form the bulk of the qualitative data in the resulting dataset.¹² The net income of participants by category was as follows:

Reported Net Income Per Month	Percentage
Less than \$500	14%
Between \$500 and \$1,000	34%
Between \$1,000 and \$2,500	42%
Between \$2,500 and \$5,000	8%
Over \$5,000	2%
Total	100%

Almost by accident, some of the most interesting data collected had little to do with credit habits or banking. For example, we found that 74% of the participants could not afford to bear a \$100 unexpected expense should one arise.¹³ While we knew going in that our target population was strained financially, this level of scarcity was unexpected. Here, I explore this finding in the context of the social and legal milieu in which the undocumented live, as well as our findings about whether people feel taken advantage of based on immigration status. We further assessed whether undocumented immigrants would feel comfortable using the

-
- Borrow from a credit card or bank
 - Borrow from a payday lender, title lender, or pawn shop
 - Borrow from someone else in the community (prestamista)
 - Borrow from a group (tandas)
 - Get help from church or other religious center
 - Move in with a friend or family member
 - Get help from the government (Medicaid, food stamps, cash assistance)
 - Other _____”

12. In our survey sample of 50 people, 47 were Mexican nationals; 64% were women and 36% were men. Respondents were almost equally divided between those who lived with a spouse or partner and those who did not. Of the 23 who lived with a partner, all but one were actually married, as opposed to just living together, a much higher marriage rate than the overall population. “In 2011, the Pew Research Center found that 51% of Americans were married, compared to 72% in 1960. However, rates of cohabiting couples are rising—according to private research company Demographic Intelligence, less than half a million couples were cohabiting in 1960, compared to 7.5 million in 2010.” *Marriage Rate Declines To Historic Low, Study Finds*, HUFFINGTON POST (July 22, 2013, 2:28 PM), http://www.huffingtonpost.com/2013/07/22/marriage-rate_n_3625222.html [hereinafter *Marriage Rate Declines*]. Among the currently single people living without a partner in our study, three were separated or divorced, two were widowed, and the others had never been married. In terms of the time spent living in the United States, the range spanned 32 years to 2 years, with many participants being in the country because they were small children. In our sample, 72% of participants were working, while 28% were not. The most common forms of work were housekeeping (28%), construction (10%), other manual labor (8%), childcare, health care, sales, and management (2% each).

13. See Martin, *Giving Credit*, *supra* note 8, at 1035.

courts to address the legal rights they do have. The findings show a perfect storm: fear, few rights, and little confidence in the ability to assert rights people do have.

This Article proceeds in three parts. Part I describes the theory of scarcity and provides evidence of financial scarcity among our study participants. This evidence includes quotes that demonstrate the type of fixation on dollars and cents that can impair peace of mind and clear thinking, as well as examples of coping mechanisms used to combat scarcity. This Section also describes our incorrect assumptions in designing the study based on our misunderstanding of the financial and employment realities of our chosen demographic, as well as the interesting ways in which we, not subject to financial scarcity ourselves, misread how scarcity might manifest and be experienced.

Next, Part II describes the laws that affect scarcity for undocumented immigrants. In some cases, as with both immigration and weak consumer protection laws, these policies exacerbate scarcity. In others, such as employment laws, these protections should keep financial scarcity at bay by preventing an employer from taking advantage of a worker's undocumented status. We describe the laws in these contexts, noting how immigration laws preclude the undocumented from becoming employed in the United States, while federal and state employment laws allow the undocumented to get paid, like anyone else who works. These laws send mixed messages to the undocumented, many of whom do not seem to know that they have any rights at all. Section II.E then applies these laws to the comments of our participants relating to workplace protections. Overall, we find that, despite protective laws, people still feel taken advantage of due to their undocumented status, both in the context of employment and consumer credit use.¹⁴ We also describe a rather obvious, but often-overlooked reason why remedies among the poor can be hollow: Undocumented people are usually unwilling to use the courts to right these wrongs, even when there are laws available to protect them.

Lastly, Part III attempts, through word cloud analysis, to provide readers with a glimpse into the emotions and feelings experienced by people who are immersed in financial scarcity—feelings and experiences that text, quotes, or data charts cannot fully express. Thus, this Article adds to existing literature by providing original qualitative evidence of how undocumented immigrants in one community cope with scarcity and make use—or fail to make use—of the protections our legal system provides them.

This Article is dedicated to the memory of my close friend and colleague Jean Braucher. Jean would care about what is reported here because she understood that the protections provided to the weakest members of society reflect society's true commitment to protection at all. In the study sample discussed here, participants are poor because they are not allowed to work, face unique socio-legal impediments to building wealth, fear remedies and courts, and, in some cases, because they are

14. In the community in which the New Mexico data was collected, 40.3% of the population is white, 48.1% Hispanic, and 5.1% Native American; 22.0% of the population is bilingual in Spanish and English, indicating that Spanish is likely their first language. ALBUQUERQUE ECON. DEV., *Demographics*, <http://www.abq.org/Demographics.aspx> (last visited Jan. 18, 2016) [hereinafter ALBUQUERQUE ECON. DEV.].

unaware that a remedy exists at all. Not all undocumented persons live in scarcity. Some clearly do not.¹⁵ Our purpose here is simply to provide a glimpse into the lives of one community that lives with pervasive scarcity and describe that community's experiences in a way that more people can understand. Our hope is that people without knowledge of this population's living conditions can get a feel for how this life is experienced in financial terms and obtain a better understanding of how current laws exacerbate or relieve scarcity in undocumented communities.

I. THE SCIENCE AND REALITY OF FINANCIAL SCARCITY

In this Part, we review scarcity theory and apply the theory to the findings of our empirical study. Our study data are replete with examples of scarcity, including an inability of most participants to cover even a \$100 unexpected expense from current assets.

A. *Scarcity in Theory*

In their book *Scarcity*, Sendhil Mullainathan and Eldar Shafir discuss managing scarcity of all kinds.¹⁶ They define scarcity as having less than the necessary supply of any tangible or intangible good.¹⁷ For some it is money, for others it is time. Still others experience scarcity of love, attention, confidence, and so on.¹⁸

These authors studied scarcity in numerous contexts for many years, and found that scarcity causes us all harm to varying degrees and in a variety of ways. For all forms of scarcity—whether it is time, money, or confidence—we tend to fixate on the thing that is scarce and allow that issue to remain at the forefront of our minds.¹⁹ This attention can give us a “focus dividend.”²⁰ A great example is the incredible productivity you achieve when you are under a tight but still realistic deadline.

Scarcity has less favorable side effects as well. The uber-presence of scarcity in our “bandwidth”²¹ causes us to have tunnel vision and only see the immediate or most pressing needs, thereby overlooking things that are relatively important but still in the future.²² Mullainathan and Shafir call this a “tunnel tax.”²³

15. Kimbriell Kelly, *Swamped by Underwater Home*, WASH. POST (Jan. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/01/26/distressed-family-swamped-by-an-underwater-home>.

16. SENDHIL MULLAINATHAN & ELDAR SHAFIR, *SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH* 14 (2013).

17. *Id.* at 4.

18. *Id.* at 14.

19. *Id.* at 20.

20. A focus dividend is described as the benefit one gets whenever one has very little of something and has to perform on that little bit. *See id.* at 19–21, 24–27 (describing a chef who had little time to perform on Iron Chef and came up with her best recipe under pressure).

21. *Id.* at 13.

22. *Id.* at 35–38, 119–21.

23. *Id.*

Scarcity's most damaging side effect is that it uses up very precious bandwidth or mind space.²⁴ The things that distract us and occupy our minds interrupt our attention and impair cognitive function, including problem solving, information retention, and logic.²⁵ This interference literally interferes with the ability to maintain peace of mind.²⁶

When the scarce good is money, researchers have found that people in poverty or with deep financial problems cannot think clearly.²⁷ These people perform worse on tests in all levels of school, including college, they cannot concentrate at work, they yell at their children, and they exhibit other poor parenting skills.²⁸ They also suffer diminished self-control and cannot sleep—the ultimate scarcity tax.²⁹

In the context of time scarcity, which Mullainathan and Shafir examine specifically to help middle class people build empathy for poor people's experience with financial scarcity,³⁰ Mullainathan and Shafir provide a helpful hypothetical:

Imagine two students, Felix and Oscar. Felix spends a good amount of time on work due at the end of each week and turns in his assignments on time. He is busy but relaxed. Oscar, on the other hand, who is equally talented, and taking the same classes, is crunched for time. He is working more hours, feels harried, and rushes to turn in his assignments late every week. What makes Oscar so much busier? He is not taking more classes he is not a less productive person. Instead, Oscar is simply one step behind: he is working on last week's assignments. Unlike Felix, for whom the material is vivid because he just heard the lecture, Oscar takes extra time reminding himself what the class did last week, and trying to keep it apart from (yet not forget) this morning's lecture. Oscar works harder but gets no more work done.³¹

This same phenomenon occurs with people who are short on money. As a point of reference, our study shows that the vast majority of the people we interviewed were in a period of severe economic scarcity, with 74% reporting an inability to cover a \$100 emergency, should one occur.

Moreover, a mindset of scarcity perpetuates scarcity.³² Scientists and psychologists have found that poverty itself causes a large cognitive load, or bandwidth tax, which reduces the prospect of success in many contexts.³³ Researchers, therefore, conclude that poverty causes failure in many life experiences

24. *Id.* at 157.

25. *Id.* at 157–59.

26. *See id.* at 159–60.

27. *Id.* at 157.

28. *Id.* at 65, 157–60.

29. *Id.* at 157–60.

30. *Id.* at 150.

31. *Id.* at 125.

32. *Id.* at 144.

33. *Id.* at 155–59 (including contexts such as parenting, school, and employment).

seemingly unrelated to financial problems.³⁴ In any case, poverty surely does not make one *more* likely to succeed. Mullainathan and Shafir have found that the primary reason poverty leads to more poverty is that there is no slack in many low-income people's budgets, meaning there are no extra funds to cover a new "emergency."³⁵ Thus, every bump in the road causes a dire need for cash, now in even less supply.³⁶

B. Scarcity in Practice

This Section describes our study and the resulting data, and relates it to the scarcity theory described above.

1. Study Methodology

After obtaining Institutional Review Board approval and testing our questions on a few pre-participants, we took data from two "convenience samples" in Albuquerque, New Mexico's South Valley, a primarily immigrant community: (1) parents of a South Valley charter high school, and (2) a medical clinic that serves a largely undocumented clientele. We collected data from August 2011 to September 2012. Native Spanish speakers or bilingual persons conducted interviews in Spanish and the interview transcripts were then translated into English.

Only people without a social security number or a legal right to be in the United States could participate in the survey. Our questionnaire contained 60 questions that allowed participants to pick answers from a list of choices or to insert their own answer. The questionnaire began with questions about demographic information, including race, income, age, education level, employment information, and marital status. The next set of questions addressed general financial information, such as income, savings, debt load, monthly bills, and bank account status. Next, we asked participants which forms of borrowing they had used (home mortgage, car loan, catalog, loan shark, credit card, rent-to-own, payday loan, relative or friend). For each borrowing method employed, we asked participants about their experience with the method. In addition, we asked what financial coping mechanisms the individuals turned to first in the event of a sudden financial crisis. We then asked if participants felt taken advantage of because they did not have a social security number and whether they would feel comfortable seeking redress through the court system.

2. The Focus Dividend in Practice: Precision in Dollars and Cents

The type of monetary scarcity described in the prior Subsection makes people fixate on small costs and become hyper-aware of prices in general.³⁷ This reality is reflected in the results of our study. The level of detail reported in the financial experiences of the people we interviewed was more exact—to the penny—

34. *Id.* at 150–61 (using examples of higher medical noncompliance, poor parenting, failure to weed fields to improve yield, poor academic performance, and decreased job performance as examples of times in which poverty impairs performance).

35. *Id.* at 135–37.

36. *Id.*

37. *Id.* at 94–95, 101–04.

than anything I have seen elsewhere. Below are a few examples of dollar amounts people reported in their interviews without having any notes in front of them:

I went in to [x lender] and told them I wanted to pay off my account, but they spoke fast to me and confused me and ultimately did not allow me to pay off the loan that day. They avoided letting me pay off the entire loan even though that was what I wanted to do. They only let me pay \$112, even though the balance was \$531.21.³⁸

[The loan] was a good experience. I have direct deposit so I qualified. They lent me \$34.³⁹

We were paying \$249.38 a month and had a payment plan of 72 months. The APR rate was fixed at 19.99%.⁴⁰

On our home, we have paid \$32,000 and we owe 58,000.⁴¹

We paid \$260 a month for those tires.⁴²

[The loan] is too high [sic] interest. Last month I paid \$250, and \$2 went to principal.⁴³

When I had a credit card, we didn't pay the bill for 8 months. We had a \$300 limit, but ended up paying \$612 and closing [the account]. I used an [individual taxpayer identification number] to apply.⁴⁴

A constant focus on money can be taxing on the brain, creating a cycle of psychological impediments that leads to greater fixation on dollars and cents than seen in other research I have done.⁴⁵ This makes sense. Anyone who has ever been

38. Interview no. 21. *Editor's Note: Due to the proprietary nature of the survey data, the interviews cited in this Article were not available for verification or publication. We rely on the author's representations of all statements and data.

39. Interview no. 22.

40. Interview no. 18.

41. Interview no. 30.

42. Interview no. 36.

43. Interview no. 47.

44. Interview no. 22. ITIN stands for Individual Taxpayer Identification Number.

These numbers are used by people without social security numbers, primarily for paying taxes, but also to get loans and to build credit. LATINO COOPERATIVA LATINO CREDIT UNION, *ITIN*, <http://latinoccu.org/personal/other-services/itin/> (last visited Jan. 18, 2016).

45. See Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563 (2010). Additionally, in May 2014, *Science* magazine devoted an entire issue to “The Science of Inequality”: 344 SCI. 773 (2014). See also Johannes Haushofer & Ernst Fehr, *On the Psychology of Poverty*, 344 SCI. 862 (2014) (finding that psychological mechanisms may spur a negative feedback loop in which poor individuals behave in ways that help keep them poor); Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCI. 976 (2013) (discussing research with sugar cane farmers and a laboratory study). A number of other studies have discussed poverty and its impact on brain development—the more “hard science” perspective. See, e.g., Nathalie E.

on a diet understands that fixating on exactly what to eat is far less useful than focusing on music, fashion, or exercise.

3. Evidence of Drastic Economic Scarcity

Turning to our data, 74% of those interviewed⁴⁶ said they could not cover a \$100 emergency if they had to. Virtually all respondents—98%—reported having trouble paying a bill in the past three years. Only slightly fewer—96%—reported having difficulty paying bills during the past year, showing that the problem is chronic or, at the least, has not improved for most participants.⁴⁷ Unplanned or unexpected expenses that participants had already withstood during the three years prior to the interviews included:

Unplanned or Unexpected Expenses Participants Experienced	Percentage*
Loss of job	33%
Loss of spouse	22%
Other family breakup	12%
Eviction or foreclosure	45%
Medical expenses	22%
Deportation or removal	14%
Arrest, incarceration, or expense	16%
*Some participants experienced multiple events.	

Holz et al., *The Long-Term Impact of Early Life Poverty on Orbitofrontal Cortex Volume in Adulthood: Results from a Prospective Study Over 25 Years*, 40 NEUROPSYCHOPHARMACOLOGY 996 (2015). One such study showed that poverty can predict preadolescents' engagement in risky behavior. See Alexandra Ursache & C. Cybele Raver, *Iowa Gambling Task Performance and Executive Function Predict Low-Income Urban Preadolescents' Risky Behaviors*, 79 PERSONALITY & INDIVIDUAL DIFFERENCES 1, 4 (2015).

46. For more study data, see Martin, *Giving Credit*, *supra* note 8. Respondents were almost equally divided between those who lived with a spouse or partner and those who did not. Of the 23 who lived with a partner, all but 1 were actually married as opposed to just living together, a much higher marriage rate than the overall population. See *Marriage Rate Declines*, *supra* note 12 (discussing the declining marriage rate). Among the currently single people living without a partner in our study, three were separated or divorced, two were widowed, and the others had never been married.

47. Compare our study result to two studies addressing the amount of money that Americans in general, who either have saved or would have cash on hand in case of an emergency, would have access to. One study by the PEW Charitable Trust found that “[m]ore than half of American households have less than one month of income available in readily accessible savings to use in case of an emergency.” See Ann Carrns, *The Dangerous State of Americans' Savings*, N.Y. TIMES, Jan. 30, 2015, at B4. In the second, a survey of the general American population revealed that 64% of Americans would not have \$1,000 available to cover an unexpected emergency. See Jessica Dickler, *Most Americans Can't Afford a \$1,000 Emergency Expense*, CNN MONEY (Aug. 11, 2011, 11:19 AM), http://money.cnn.com/2011/08/10/pf/emergency_fund/. In our study, 64.0% of participants said they would need to borrow money or take out a cash advance on a credit card to cover such an expense.

Participants felt that these unexpected expenses exacerbated the stress they faced in paying their basic expenses. Additional comments on the topic of scarcity, coping, and particular bills that need to be paid included:

It's always hard to find enough to pay the bills. Especially toward the end of the year it seems like.⁴⁸

It's just really hard to pay all the bills all the time. At the end of the month I often struggle to make ends meet.⁴⁹

When I went to hospital for depression my family incurred a lot of expenses that they haven't been able to pay off.⁵⁰

When we moved apartments, we didn't get our deposit back for a while so we couldn't pay the electric bill on time. Once we got our security deposit back we were able to pay the bill.⁵¹

Last time I had trouble was paying rent, I had to borrow from my sister.⁵²

My scholarship did not come in until much later so it was hard to buy books, pay rent, and buy gas for my car.⁵³

I lost my job and did not have any money in savings to buy anything—food, rent, gas.⁵⁴

My kids ask me for things, but I don't have the money to make them happy.⁵⁵

We only eat whatever we can get from the food pantries every month.⁵⁶

4. *Mitigating Unexpected Expenses*

People mitigate expenses in different ways, but some examples are set out in the chart below. Where the chart expresses a range of percentages, the first percentage represents methods participants used to mitigate unplanned or unexpected expenses in the past year. The second percentage represents means of mitigating expenses over the past three years.

48. Interview no. 13. This series of quotes also appears in Martin, *Giving Credit*, *supra* note 8, at 1035–36.

49. Interview no. 14.

50. Interview no. 16.

51. Interview no. 19.

52. Interview no. 22.

53. Interview no. 25.

54. Interview no. 27.

55. Interview no. 33.

56. Interview no. 3.

Ways Participants Mitigated Expenses	Percentage ⁵⁷
Take money out of savings	20–24%
Stop paying one or more creditors	26%
Paying one or more bills late	30–32%
Cut spending	34–42%
Make do with less food	30–32%
Borrow from friend or family	24–28%
Other assistance from friend or family	8–20%
Borrow from a credit card or bank	6%
Borrow from a payday lender/title lender/pawn shop	12–16%
Borrow from a community group or tanda	8%
Borrow from a prestamista ⁵⁸	2–8%
Help from church	10%
Move in with family member or friend	6%
Government assistance—food stamps or cash assistance	20–22%
Other	6–10%

Participants' comments highlight the scarcity of resources available to mitigate these unexpected expenses. Comments dealing with unexpected expenses included:

I borrowed from a girlfriend. That year I didn't have work. She didn't charge interest.⁵⁹

We applied for [Women, Infants, and Children benefits].⁶⁰

I had to wait until I had the money to pay to [sic] for the things I needed. I waited about two weeks.⁶¹

I simply pay the interest on my accounts now.⁶²

To pay the rent in the trailer park where I live, sometimes I pay rent late because I can't get the money in time. This happened to me recently and I paid after the 5th of the month, and I was charged \$28 extra.⁶³

57. Participants were permitted to choose more than one.

58. Prestamistas are lenders, pawn brokers, or, in colloquial terms, loan sharks. *Prestamista*, REVERSO, <http://dictionary.reverso.net/spanishenglish/prestamista> (last visited Jan. 18, 2016).

59. Interview no. 30.

60. Interview nos. 31, 39.

61. Interview no. 31.

62. Interview no. 24.

63. Interview no. 32.

During some hard months we had to move out of our place and move in with a friend because we could not afford the rent.⁶⁴

Many people said they would just need to find more work or alternative ways of raising funds if they were faced with unexpected expenses:

I would probably start selling cardboard and recycle or pawn my sofas.⁶⁵

Fund raise. I really like to bake so I would bake a cake or something and try to sell it.⁶⁶

If I had to pay \$100 dollars tomorrow or my daughter would be taken out of school, I would do anything I possibly could to come up with that money. I would call everyone I know and ask them if I could clean their house for them—I would definitely find a way to get the money.⁶⁷

Would do whatever I could to make money—get small part-time jobs, pick up extra house cleaning jobs. Husband would also work extra doing whatever possible. I began going door to door to sell beauty products and husband moved outside Albuquerque to find a job.⁶⁸

Some participants said they would sell their things,⁶⁹ and others said they would pawn things or ask a friend.⁷⁰ Some participants reported more creative solutions to deal with scarcity and unplanned expenses. For example, one woman with an individual taxpayer identification number (“ITIN”) claimed her grandchildren and then split the refunds with her children.⁷¹ Another woman collected recyclables as a way to make emergency money.⁷²

5. Preferred Options for Borrowing

When considering attitudes about what type of borrowing was best, many participants thought borrowing from family was favorable. They felt their families could be trusted and would not charge interest on the loan. “We think it’s better to not go outside to borrow money and just keep it in family.”⁷³ Those who refused to borrow from family did so because of the damage this borrowing had caused or might cause to the family relationships. Others had families who were in the same

64. Interview no. 3.

65. Interview no. 10.

66. Interview no. 16.

67. Interview no. 17.

68. *Id.*

69. Interview no. 28 (“In the past I sold my furniture and my TV.”).

70. Interview nos. 29 (“I would either go to a pawn shop or ask a friend.”), 23 (“I would have to pawn my computer.”), 10 (“I would pawn my sofas.”), 3 (“[I]n the past, we had to pawn our TV and a voice recorder.”).

71. Interview no. 2.

72. Interview no. 19.

73. Interview no. 16.

financial situation as the survey responder and had nothing extra to lend.⁷⁴ One comment favorable to borrowing money from family cited privacy as the main reason. People view borrowing through tandas⁷⁵ as a mixed bag—however, a slightly more positive experience than negative.⁷⁶ Issues with borrowing from tandas included the need to have a stable income and a responsible or reliable borrowing or lending group. People who had good experiences thought tandas were a good way to save.

Remarkably, only three survey responders said they would try to negotiate payment with the person to whom they owed money. Comments included the following: “I would borrow it or try to negotiate to see if I could pay it later.”⁷⁷ “I would go talk to them and see if I could work out a payment plan.”⁷⁸ “I would try to work out a deal with whoever I owe the money to.”⁷⁹ When faced with an unexpected expense, the vast majority of participants saw only two options: work more or spend less.

A fair number of participants said they relied on the kindness of acquaintances when facing monetary shortages. For example, one participant borrowed money for gas from one of his or her children’s teachers to get to a funeral in Arizona.⁸⁰ Teachers, of course, are neither family nor friends. They are public servants who have social proximity to immigrant families and may act as gatekeepers for acculturation of immigrant children. Reliance on acquaintances is all the more remarkable because immigrant families often have few American acquaintances from whom they can borrow money. One participant’s landlord, a church member, was flexible with rent and occasionally helped with electricity and gas bills. Another participant’s former employer gave him a truck so he could use it to collect recyclables.⁸¹ All three examples reflect relationships that are somewhat contractual in nature: teacher–student, landlord–tenant, employer–employee.

74. “When asked how they would *feel* about borrowing money from friends and family members, 30% of participants reported feeling uncomfortable, 32% embarrassed, 14% relieved, 6% proud, and 8% none of the above. The rest [10%] did not answer at all.” Martin, *Giving Credit*, *supra* note 8, at 1038 (emphasis added). The majority had borrowed at least some money from family or friends in response to financial scarcity. Borrowing from family and friends was overwhelmingly viewed as the best alternative, particularly compared to bank loans and payday loans. Reasons included no interest and flexibility in repaying the loan. *Giving Credit* discusses at length all of the sources of borrowing—including bank loans, credit cards, payday loans, prestamista loans, and loans from family and friends—experienced by our sample study, as well as people’s attitudes about these forms of borrowing, both in general and compared to one another. *Id.* at 1027–33.

75. See Bernstein, *supra* note 7, at 39.

76. Fifteen participants viewed borrowing from tandas as a positive experience, and ten found it to be a negative experience. Nine participants registered the experience as a neutral one. *Id.*

77. Interview no. 32.

78. Interview no. 45.

79. Interview no. 47.

80. Interview no. 2.

81. Interview no. 31. It is not clear from the comment whether the employer was an immigrant or a citizen, Hispanic or not. Regardless, it was a remarkable gesture.

6. Conclusions About Scarcity in Practice: Survey Insights and Lessons

In gathering this scarcity data, we asked a series of nuanced questions about how a participant would cope with an unplanned emergency, or an unexpected expense compared to an expected one. We further asked how participants reacted to unexpected income loss versus expected income loss. For example, question two of the questionnaire asked: “If you had any unexpected expenses, which of the following [coping techniques] did you do to pay for the expense? Please check all that apply.” Question four asked if you have experienced any of these “unexpected” events, “which (if any) of the following [coping techniques] did you do to help make ends meet?” Finally, in question six, we asked, “[W]ithin the past three years, which of the following have you done to help pay for your monthly expenses (such as groceries, rent, utilities, childcare etc.)?”

We initially intended to use these questions to separate the financial techniques used to ward off emergencies from techniques used to pay regular bills. However, we then decided to use the data to divide people’s general ability to meet their financial expenses into three groups: (1) those who never had enough money to meet their monthly expenses, and thus could not or would not borrow because they knew they had little chance of being able to pay anything back; (2) those who could meet their expenses and could borrow for an emergency; and (3) those who had savings to cover an unexpected expense.

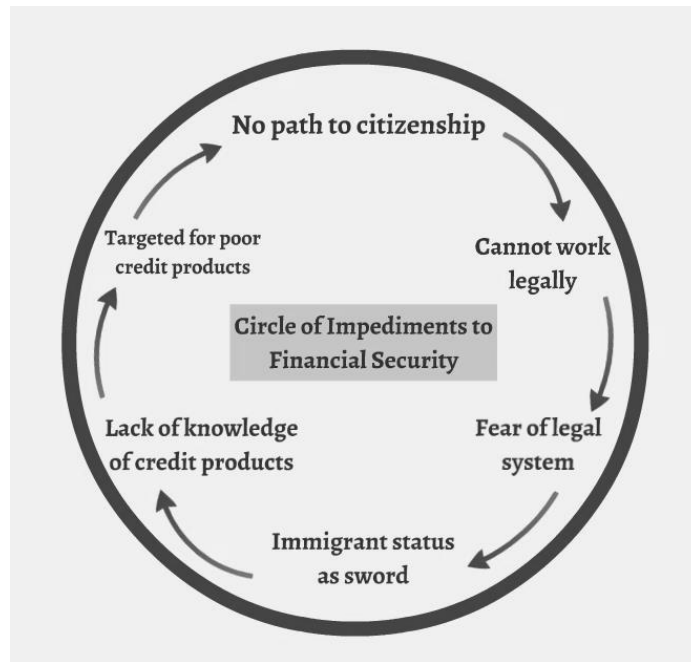
Some of the finer distinctions between these three groups turned out to be meaningless in the context of our participants’ financial experiences. People had so little money that this type of categorization was ultimately insignificant. Moreover, our survey failed to accurately categorize life events that were predictable or expected versus those that were unpredictable or unexpected. This survey failure was incredibly interesting, however, because it led to a valuable, if not obvious, finding in the study. We had incorrectly characterized job loss as one of the unexpected events that can lead to scarcity when in reality people in this cohort expect to lose their jobs frequently. At the end of the day, it made little sense to try to tease out whether certain coping strategies for economic scarcity would vary depending on whether the added expense was expected or unexpected. In other words, expenses were just expenses. Making ends meet was so difficult that even the unexpected was expected, as would necessarily be true of anyone who expected he or she could lose one’s job at any time on any given day. Budgeting under the circumstances just doesn’t work, nor is it possible to know what to expect. Thus, the distinctions we attempted to carefully make in terms of expected versus unexpected expenses, simply made little sense in the context of extreme economic scarcity.

The lessons here are critical—we, as researchers, thought we understood how study participants lived and experienced life, but we have a great deal to learn about the economic struggles of those different from ourselves. Sometimes our life experiences are different enough that we misread situations entirely. These mistakes themselves are valuable in teaching us how much we still have to learn.

II. EXPLAINING SCARCITY IN SOCIO-LEGAL TERMS

Having now seen specific examples of scarcity and the resulting coping strategies, it is helpful to look at how the law helps or hurts those that are

undocumented. Understanding the reasons for this scarcity requires background in three socio-legal realities that create the perfect storm: (1) strict immigration laws; (2) the ability of other persons to use an undocumented person's immigration status as a sword; and (3) a lenient and rather ineffective consumer protection scheme. These laws and conditions create a circle of increased scarcity (referred to below as the "Circle of Impediments to Financial Security") for undocumented persons.



A. Immigration Laws and the Inability to Make a Living

Immigration laws over the past several decades have made it difficult to become a U.S. citizen or even a permanent resident.⁸² Currently, at least 11 million people live in the United States without a legal right to do so.⁸³ President Obama's recent reforms provide residency to those who have entered illegally, but do not offer them a path to citizenship.⁸⁴ Previously, there was no path to permanent

82. William Booth, *One Nation, Indivisible: Is It History?*, WASH. POST, Feb. 22, 1998, at A1. Eventually, national origin quotas were adopted to ensure that the stream of immigrants reflected the current population mix. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02[3] (2015) (ebook) (outlining the origins of the U.S. immigration quota system).

83. Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 67 (2009); Karen Tumulty, *Illegal Immigrants Could Receive Social Security, Medicare Under Obama Action*, WASH. POST (Nov. 25, 2014), http://www.washingtonpost.com/politics/illegal-immigrants-could-receive-social-security-medicare-under-obama-action/2014/11/25/571caefe-74d4-11e4-bd1b-03009bd3e984_story.html.

84. Tumulty, *supra* note 83.

residency, meaning that most of those who entered illegally have remained undocumented for life.⁸⁵ Our study data demonstrate how people can be in the United States for decades without making any progress toward residency. For example, three participants had been in the United States for over 30 years.⁸⁶

Only undocumented persons were eligible to participate in our study, so no participant fit into any of the following categories: naturalized or full U.S. citizens, lawful permanent residents,⁸⁷ lawful temporary residents,⁸⁸ temporary protected status immigrants, or refugees.⁸⁹ Unless a person is born in the United States, or is born elsewhere with one citizen parent,⁹⁰ becoming a citizen requires first lawfully entering into the United States, and then becoming a permanent legal resident.⁹¹ Thereafter, a person must reside in the United States continuously for five years before citizenship is awarded.⁹²

Once a person enters the United States illegally, it is illegal for that person to work in the United States. Thus, immigration laws in the United States are largely enforced through statutes that make it illegal for employers to hire undocumented workers.⁹³ For example, the Immigration Reform and Control Act of 1986 (“IRCA”) prohibits employers from knowingly hiring “unauthorized” immigrants and requires them “to verify the work authorization of all job applicants by examining certain documents, such as birth certificates, passports, and social security cards.”⁹⁴ A job applicant cannot be hired if he or she is unable to present the required documentation.⁹⁵ “It is also a crime under IRCA for an undocumented person to use

85. *See id.*

86. Interview nos. 1, 24, 42.

87. ECON. SERVS. ADMIN., WASH. STATE DEP’T OF SOC. & HUMAN SERVS., *Definitions*, <https://www.dshs.wa.gov/esa/citizenship-and-alien-status-requirements-all-programs/definitions> (last visited Jan. 18, 2016).

88. *Id.*

89. David P. Weber, *Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 766 n.13 (2009), (citing JEFFREY S. PASSEL & D’VERA COHN, *TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW 1* (2008) (noting that there were approximately 11.9 million undocumented immigrants living in the U.S. in 2008, which at the time was approximately 4% of the U.S. population).

90. *U.S. Citizenship & Naturalization Overview*, FINDLAW, <http://immigration.findlaw.com/citizenship/u-s-citizenship-naturalization-overview.html> (last visited Jan. 18, 2016). The United States recognizes citizenship through two fundamental principles: *jus soli* (right of birthplace), and *jus sanguinis* (right of blood). *Id.* “Under *jus soli*, a person receives American citizenship by virtue of being born in the United States. By contrast, *jus sanguinis* confers citizenship on those born to at least one U.S. citizen anywhere in the world.” *Id.*

91. *Id.*

92. *Id.* This period is reduced to three years for spouses of U.S. citizens. During this three or five year “probationary” period, the spouse must be physically present in the country at least 50% of the time. *Id.*

93. *See* Martin, *Giving Credit*, *supra* note 8, at 998.

94. *Id.* (citing Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.)).

95. *Id.*

or attempt to use ‘any forged, counterfeit, altered, or falsely made document’ or ‘any document lawfully issued to or with respect to a person other than the possessor’ for purposes of obtaining employment in the United States.”⁹⁶ Violation of IRCA can result in fines, incarceration, or deportation for the alien offender.⁹⁷ Additionally, employers can be charged large civil monetary penalties and even be criminally sanctioned for knowingly hiring unauthorized aliens.⁹⁸

These laws make it difficult for undocumented people to support themselves and their families.⁹⁹ Many simply cannot survive financially because they are unable to make a steady living—i.e., they can be dismissed at any time, have a limited number of places to obtain work, and are often unwilling or unable to pursue legal remedies.

B. Status as Sword

My prior article, *Credit Where Credit is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, describes many situations in which nonimmigrant Americans have used undocumented status as a sword to keep the undocumented from pursuing their basic rights, such as the right to not be defrauded, to have their contractual rights recognized, and so on.¹⁰⁰ In one situation, a woman renting a home from an undocumented person ended up reporting the undocumented landlord to the FBI, the local media, the state attorney general’s office, the governor’s office, and United States Immigration and Customs Enforcement (“ICE”), all to avoid being evicted for nonpayment of rent.¹⁰¹ She later reported feeling just fine about the removal proceedings of her landlord.¹⁰² Using undocumented status as a sword in employment contexts is even more common than in commercial or consumer law contexts.¹⁰³ As has been documented by other scholars,¹⁰⁴ and as demonstrated in our study data,¹⁰⁵ it is common for employers to hire undocumented workers and then fail to pay them according to state and federal law, or fail to pay them at all.¹⁰⁶ This deeply exacerbates the vicious cycle of poverty and financial distress mentioned above.

96. *Id.* (citing Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.)).

97. *Id.*

98. *Id.*

99. *See id.*

100. *Id.*

101. David P. Weber, *(Unfair) Advantage: Damocles’ Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 MARQ. L. REV. 613, 616–17 (2010).

102. *Id.*

103. *See id.* at 619–20.

104. *See, e.g.*, Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 988, 999 (2008); Julien Ross, *Fair Day’s Pay: The Problem of Unpaid Workers in Central Texas*, 25 IMMIGR. & NAT’LITY L. REV. 409, 411–12 (2004).

105. *See infra* notes 143–65 and accompanying text.

106. *Id.*

C. The Undocumented and Consumer Credit: Theory and Practice

The American consumer credit system is not particularly protective of any consumer,¹⁰⁷ but this is particularly true for undocumented consumers. Generally, people do not know their rights and are afraid to invoke them.¹⁰⁸ Additionally, credit costs more for the poor, and even more if the credit card holder is a woman, a person of color, or both.¹⁰⁹

Professor Amy Schmitz has written extensively on race, gender, consumer protection, and the squeaky wheel.¹¹⁰ The squeaky wheel gets the oil, as the old adage goes,¹¹¹ and in the context of consumer credit, this means that those who complain get better consumer credit terms than those who remain quiet. Professor Schmitz has found that wealthy people lodge more complaints about products and services than poor people, and get better deals as a result.¹¹² Similarly, Professor Rebecca Sandefur found that middle class parents model a sense of entitlement regarding fair rules and procedures, satisfactory explanations of consequences, and customization to their unique needs.¹¹³ These habits are not equally present among

107. See Mark E. Budnitz, *The Development of Consumer Protection Law, The Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1186–88 (2010).

108. See *infra* notes 184–92 and accompanying text.

109. Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 180 (2013); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 299 (2012).

110. Schmitz, *supra* note 109, at 280. As Professor Schmitz explains:

Most have heard the adage: “The squeaky wheel gets the grease.” This refers to the notion that the “squeaky wheels”—who are proactive in pursuing their needs and complaints—are most likely to get the assistance, remedies, and other benefits they seek. However, those who remain silent usually do not learn about or receive the same benefits. Furthermore, the individuals with the requisite resources to pursue their interests are often those who already enjoy disproportionate power due to social or economic status.

Id.

111. *What Does the Squeaky Wheel Gets the Oil Mean?*, IDIOMEANINGS, <http://www.idiomeanings.com/idioms/the-squeaky-wheel-gets-the-oil/> (last visited Jan. 18, 2016) (stating that this proverb means that “people who complain the most will get what they want”).

112. Schmitz, *supra* note 109, at 283, 313.

113. Rebecca Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 116–17 (Pascoe Pleasence et al. eds., 2007). As Sandefur explains, many poor people’s problems are less institutionalized as legally soluble, meaning they cannot necessarily be remedied through the law. Poor people may lack resources, such as transportation, that would allow them to benefit from the remedy, and some problems result from the poverty itself, which the law does not rectify. *Id.* As Sandefur explains:

the poor, further disadvantaging the poor in financial matters compared to other classes.¹¹⁴ Finally, stereotypes and bias may affect how company representatives and customer service agents react to low-income, minority consumers. In fact, complaints or calls for assistance further reduce service and expectations for minorities—specifically women and people of color.¹¹⁵

Perhaps unsurprisingly, participants noticed disparities in debtor–creditor treatment because of their undocumented status. In response to the question, “[Do] you feel taken advantage of on the basis of your undocumented status?” they reported the following:

Without a social security number [“SSN”] you have to pay everything with cash while other people can pay with credit card or have store discounts.¹¹⁶

They never approve me for a loan simply for lack of SSN.¹¹⁷

When I bought my car, I feel like they charged me more because they knew how hard it was to qualify for credit or car loan [sic].¹¹⁸

We had a house 3 years ago but because we didn’t have a SSN the landlord charged us high rent.¹¹⁹

The real estate contract we used when we first moved to Albuquerque we felt was very unfair.¹²⁰

I felt taken advantage of at my bank because they charged me so many fees.¹²¹

The title loan charges too much knowing you don’t have SSN.¹²²

Many of the problems faced by low-income people are not of the sort that the law is presently designed to remedy. For example, through the legal remedy of evictions, landlords may deny shelter to tenants who can no longer pay their rents; poor people have no corresponding legal right to shelter. Through taking legal action or seeking legal advice, tenants facing eviction may be able to achieve a delay in their exit from shelter or a reduction in the back rent they owe, but they cannot achieve the kind of decisive resolution in their favor that is available to the landlord who moves to evict them.

Id. at 116 (citations omitted).

114. *Id.*

115. Freeman, *supra* note 109, at 168, 171, 179–89; Schmitz, *supra* note 109, at 296–98.

116. Interview no. 4.

117. Interview no. 48.

118. Interview no. 40.

119. Interview no. 41.

120. Interview no. 15.

121. Interview no. 19.

122. Interview no. 29.

Pawn shops [sic] and title loans take advantage as leverage to raise interest knowing that you don't have a SSN.¹²³

They charge you double or triple for being without a SSN.¹²⁴

Presbyterian Hospital wouldn't see my son for lack of a SSN.¹²⁵

Could have received better loans for scholarships for university.¹²⁶

These conditions create judicial and social scarcity, meaning undocumented immigrants face a real or perceived inability to enforce their rights when they are wronged.

Although many participants in the study seemed to be aware of their legal rights, they still received a fair amount of misinformation. For example, one woman reported:

When my husband and I first came to the U.S., somebody told us that to get an ID we had to [go to] the Mexican consulate. We were also told that we would need to present our social security numbers there. For several years we didn't go to the consulate because we were afraid we would get asked for our social security numbers, which we don't have.

Eventually we realized that you don't need a social security number to get help from the Mexican consulate. I realized how a ridiculous rumor affected my life. It made me realize how hard it is for undocumented immigrants to get access to correct information and be informed, because people are scared and don't trust [the system] enough to find out for themselves.¹²⁷

D. Laws Protecting Undocumented Workers: The Other Side of the Undocumented Employment Coin

Undocumented immigrants do have legal rights to be paid for their work. However, many workers are unaware of their rights and are uncomfortable pursuing those rights through the judicial system.¹²⁸

1. Federal Laws

According to federal law, undocumented workers are covered as employees under federal unfair labor practice and discrimination statutes, but courts limit the remedies available to them under these statutes. The Supreme Court held in *Sure-Tan, Inc. v. NLRB* that undocumented workers are covered employees under

123. Interview no. 11.
124. Interview no. 28.
125. Interview no. 33.
126. Interview no. 25.
127. Interview no. 17.
128. Weber, *supra* note 101, at 618–37.

the National Labor Relations Act,¹²⁹ but the Court restricts the make-whole remedies of back pay and reinstatement, or front pay in lieu of reinstatement.¹³⁰ Because *Sure-Tan* only considered undocumented workers who had left the country prior to making claims, lower courts have since disagreed on whether the holding applied to workers still in the United States.¹³¹

However, the Court in *Hoffman Plastic Compounds, Inc. v. NLRB* regarded this disagreement as moot,¹³² holding that the federal policy embodied in the federal Immigration Reform and Control Act (“IRCA”), passed two years after *Sure-Tan*, foreclosed the remedy of back pay to undocumented workers who have never been legally authorized to work in the United States.¹³³ Even though the *Hoffman Plastic* court foreclosed back pay, it held the employer accountable to national labor policy by issuing a cease-and-desist order with a requirement to post details of its unlawful conduct under threat-of-contempt proceedings.¹³⁴ Thus, undocumented workers may make claims under the National Labor Relations Act (“NLRA”), but remedies are limited and do not include back pay.

Remedial rights available to undocumented workers under federal employment discrimination laws vary by jurisdiction because the Supreme Court remains silent on the issue. Lower courts disagree about whether *Sure-Tan* and *Hoffman Plastic* apply in federal employment discrimination claims.¹³⁵ In other words, while the Supreme Court clearly foreclosed back pay as a remedy for

129. 467 U.S. 883, 891–92 (1984); see also Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law*, 77 *FORDHAM L. REV.* 113, 122 (2008) (discussing the status of undocumented workers as employees under the NLRA); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 *U. PA. J. LAB. & EMP. L.* 497, 501–03 (2004) (discussing coverage of undocumented workers under employment statutes generally and in reference to the *Sure-Tan* holding).

130. See *Sure-Tan*, 467 U.S. at 902–03; see also Senn, *supra* note 129, at 126 (discussing conditions the *Sure-Tan* Court placed on undocumented workers’ rights to traditional remedies under the NLRB); Wishnie, *supra* note 129, at 505 (discussing the restriction of make-whole remedies). The Court tolls any back-pay remedy during periods the undocumented worker is not legally entitled to live and work in the United States, and any reinstatement or front pay is contingent on the undocumented worker gaining legal entry into the country. See *Sure-Tan*, 467 U.S. at 902–03.

131. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 146–47 (2002); see also Senn, *supra* note 129, at 128; Wishnie, *supra* note 129, at 505–06.

132. See *Hoffman Plastic*, 535 U.S. at 146.

133. See *id.* at 140; see also Senn, *supra* note 129, at 130–31 (discussing the *Hoffman Plastic* holding); Wishnie, *supra* note 129, at 506–07 (emphasizing that the *Hoffman Plastic* majority focused on the employee’s criminal fraud in presenting false documents to his employer when it held that back pay would trench upon policies in IRCA).

134. See *Hoffman Plastic*, 535 U.S. at 152; see also Senn, *supra* note 129, at 134.

135. See Senn, *supra* note 129, at 142–55 (citing *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), as a case reflective of a remedial approach that forecloses no monetary remedies; *Renteria v. Italia Foods, Inc.*, No. 02-C-495, 2003 WL 21995190 (N.D. Ill. Aug. 21, 2003), as a case exemplifying the remedial approach that forecloses some monetary remedies; and *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (per curiam), as illustrating a rarer remedial approach foreclosing all monetary remedies).

undocumented workers making claims under the NLRA, there is disagreement among lower courts about whether back pay is foreclosed when undocumented workers make claims under federal discrimination laws, such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

Craig Robert Senn describes three approaches lower courts have used when considering what remedial rights are available to undocumented workers under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act.¹³⁶ First, the Ninth Circuit and federal district courts in Illinois and New York have held that the NLRA cases do not apply to federal employment discrimination cases and, therefore, no monetary remedies are foreclosed to undocumented workers.¹³⁷ Second, federal district courts in Illinois, Minnesota, New York, Oklahoma, and Texas, as well as the Equal Employment Opportunity Commission, have taken the approach that the NLRA cases do apply.¹³⁸ This approach interprets the NLRA cases as foreclosing monetary damages—like back pay and front pay—connected to wage-loss damages in jobs that an undocumented worker has no right to hold.¹³⁹ However, this approach allows undocumented workers to recover other monetary damages under federal discrimination laws, including compensatory damages, punitive damages, and attorneys' fees.¹⁴⁰

Finally, while agreeing with the second approach—that the NLRA cases do apply in the federal discrimination law context—some courts have adopted a third approach that forecloses all monetary damages by reasoning that legal employment is a prerequisite for both economic and noneconomic monetary damages.¹⁴¹ Senn discusses a New Jersey Superior Court case that applied the approach to a state employment discrimination law.¹⁴² Under federal discrimination laws, undocumented workers' remedial rights range from full to fully foreclosed.

2. State Laws

Employers are required to comply with state laws when hiring undocumented immigrants and cannot use an employee's undocumented status to defend against suits brought to enforce state wage and hour laws. There are also day laborer statutes that require that people hired for the day be paid daily with wages that do not drop below minimum wage, even after deducting commission, "equipment rentals," and so on.

New Mexico establishes a definition of employee that is silent on the question of undocumented workers, but lists several categories of workers that are

136. See Senn, *supra* note 129, at 134–55.

137. See *id.* at 142–45.

138. *Id.* at 146–50.

139. *Id.* at 148.

140. *Id.*

141. *Id.* at 151–55

142. *Id.* at 151–53 (citing *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004)).

not included in the definition of employee.¹⁴³ The undocumented are not among the stated exceptions, meaning the laws apply to them and they can sue for violations.¹⁴⁴ An employer who violates New Mexico's wage and hour laws may be charged with a misdemeanor and will likely be found liable for the unpaid wages plus interest, as well as a penalty of two times the unpaid wages, court costs, and reasonable attorney fees.¹⁴⁵ The court may also impose injunctive relief, including requiring the employer to post notice of any violations.¹⁴⁶

Though *Hoffman Plastic* foreclosed relief in the form of wages for work not performed, courts have not foreclosed the right of undocumented workers to recover wages for work already performed under the federal Fair Labor Standards Act ("FLSA") and state wage and hour laws.¹⁴⁷ Additionally, some scholars, executive agencies, and courts interpret *Hoffman Plastic* to not extend to other state employment and labor laws, which allows undocumented workers to recover lost earnings under workers compensation laws and tort actions.¹⁴⁸

New York and California passed legislation that affirmatively applies state wage and hour protections to undocumented workers.¹⁴⁹ Employers argue that courts should apply *Hoffman Plastic* broadly to foreclose monetary remedies outside the NLRA context and to make immigration status discoverable, but these arguments

143. N.M. STAT. ANN. § 50-4-21 (2008).

144. Categories of workers not considered employees include: workers in domestic service in a private home; students in primary or secondary school who work after school hours or on vacation; persons under eighteen who are not students and who have not graduated from secondary school; seasonal employees of a certified seasonal employer; and agricultural employees (if certain criteria is satisfied). *Id.* § 50-4-21(C). A person is excluded from being considered employed in agriculture if any of the following apply: the employer did not use more than "five hundred man-days of agricultural labor" the previous year and the employee is paid on a piece-rate basis, commutes from home to work on a daily basis, and was employed in agriculture less than 13 weeks the previous year; the employee is under 16, is paid on a piece-rate basis, and works with a parent or guardian; or the employee is principally engaged in livestock or milk production. *Id.*

145. *Id.* § 50-4-26(A), (C), (E).

146. *Id.* § 50-4-26(F). Nevertheless, in her study of wage and hour laws in the five states with the highest Latino populations, Brenda Valle found that "[o]f the five southwestern states, New Mexico is one of the weakest in providing adequate protections to agricultural workers." Brenda Valle, Note, *You Don't Have to Reinvent the Wheel: A Comparison of Wage and Hour Laws, Their Effects on the Latino Family, and What We Can Learn from Them*, 8 HASTINGS RACE & POVERTY L.J. 137, 150 (2011). Valle notes that, unlike California and Arizona, New Mexico has no statute specifically dealing with agricultural workers. *Id.*

147. See Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1370 (2009); Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL'Y 659, 661 (2012); Mohar Ray, Note, *Undocumented Asian American Workers and State Wage Laws in the Aftermath of Hoffman Plastic Compounds*, 13 ASIAN AM. L.J. 91, 92 (2006); Wishnie, *supra* note 129, at 509–10.

148. See Ray, *supra* note 147, at 103–06; Wishnie, *supra* note 129, at 513–15.

149. See Ray, *supra* note 147, at 107–08.

have had limited success.¹⁵⁰ Indeed, a recent empirical study analyzed 128 trial court decisions or first-level hearings where employers argued that *Hoffman Plastic* makes immigration status relevant and should foreclose a monetary remedy.¹⁵¹ This study included examination of 41 cases where the undocumented worker, or suspected undocumented worker, complained about pay under FLSA or state wage and hour laws.¹⁵² In cases involving complaints about pay, the plaintiff won 77.5% of the time, had a partial win 10% of the time, and lost 12.5% of the time.¹⁵³ Although the *Hoffman Plastic* holding leaves room for employers to argue that immigration status is relevant beyond the NLRA context, more often than not, courts decline to apply *Hoffman Plastic* when considering FLSA and state law protections.

Additionally, federal and state laws set minimum wages and overtime.¹⁵⁴ New Mexico's minimum wage, \$7.50 an hour, is \$0.25 higher than the federal minimum wage.¹⁵⁵ However, the law allows an agricultural employer that is "furnishing food, utilities, supplies, or housing" to deduct the reasonable value of those items from wages.¹⁵⁶ An employer may also pay an employee customarily receiving more than \$30 a month in tips a minimum wage of \$2.13 an hour.¹⁵⁷ Finally, if an employer requires an employee to work more than 40 hours in a seven-day period, the employer must pay time-and-one-half.¹⁵⁸

150. See Cunningham-Parmeter, *supra* note 147, at 1363–64, 1370; Garcia, *supra* note 147, at 661; Wishnie, *supra* note 129, at 515.

151. Michael H. LeRoy, *Remedies for Unlawful Alien Workers: One Law for the Native and for the Stranger Who Resides in Your Midst? An Empirical Perspective*, 28 GEO. IMMIGR. L.J. 623, 637 (2014).

152. *Id.* at 637–38.

153. *Id.* at 638. Also, undocumented workers have pursued relief for claims of forced labor, involuntary servitude, and trafficking under the Alien Tort Claims Act ("ATCA") and international law. Under the ATCA, aliens may sue in tort for violations of the Law of Nations or a treaty of the United States, including a treaty for slave-trading, involuntary servitude, forced labor, or trafficking. See Wishnie, *supra* note 129, at 521–22. International prohibitions on involuntary servitude, forced labor, and trafficking are more expansive than domestic analogues codified in the Thirteenth Amendment and in Reconstruction-era statutes. *Id.* at 523. Only a few claims have been made using this approach, and most arise from babysitters or housekeepers in private homes. *Id.* at 522. Though a brief search yielded no opinions on final outcomes of these claims, one plaintiff pursuing a claim under the ATCA did win a protective order barring inquiry into her immigration status. See *Topo v. Dhir*, 210 F.R.D. 76, 79 (S.D.N.Y. 2002) (holding that, although citizenship is relevant, immigration status is not relevant to an ATCA claim and that deterring a plaintiff from having her day in court by inquiring into an irrelevant matter is the kind of oppression discovery rules intend to prevent).

154. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2012)); N.M. STAT. ANN. § 50-4-22(A) (2008); see also Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411, 436 (2011) (summarizing minimum wage laws in all 50 states and the federal government).

155. N.M. STAT. ANN. § 50-4-22(A).

156. *Id.* § 50-4-22(B).

157. *Id.* § 50-4-22(C).

158. *Id.* § 50-4-22(D).

Finally, many states, including New Mexico, have day-laborer legislation that regulates “day labor service agenc[ies],” defined as entities “that provide[] day laborers to third party employers. . . .”¹⁵⁹ The New Mexico Day Laborer’s Act (the “Act”) requires day-labor service agencies to compensate laborers with “commonly accepted payment instruments that are payable in cash, on demand, at a financial institution.”¹⁶⁰ The agency must provide an itemized statement of any deductions from wages and those deductions, other than those required by federal or state law, cannot cause wages to fall below the federal minimum wage.¹⁶¹ The agency cannot restrict the right of the laborer to accept a position with a third-party employer.¹⁶² The Act also protects day laborers from check-cashing practices by agencies, including a \$2.00 cap on check-cashing fees.¹⁶³ An agency that fails to pay a laborer for hours worked is liable for those wages, as well as twice the value of those wages, court costs, and attorney fees.¹⁶⁴ A person who violates the Act may be guilty of a misdemeanor and, upon multiple offenses, subject to fines between \$250 and \$1,000.¹⁶⁵ In summary, employers who employ undocumented persons must follow state wage laws by paying their employees in the manner required by law, even if the employees are undocumented. If the employer fails to do so, the undocumented worker can sue for damages.

E. Employment Laws and the Undocumented in Real Life

Federal and state laws provide a strong set of remedies for employer malfeasance against all workers, including undocumented workers. In practice, however, these remedies may be hollow. Understandably, undocumented persons are sometimes unwilling to use or trust the court system, even where the law would protect their interests. We saw this distrust in our study.¹⁶⁶ We asked if participants would feel comfortable using the court system to right a wrong: 32% answered yes, 42% answered no, and 26% were unsure. The comments also suggested some would not sue to pursue a legal right. For example, one woman did not get her security deposit back, but declined to push the issue in court.¹⁶⁷

Other comments on this issue included:

159. See *id.* § 50-15-2. Among agencies exempt from the law are farm labor contractors and temporary agencies (if “advanced applications, a screening process and job interviews are required”). *Id.* § 50-15-3(A), (B); see also ARIZ. REV. STAT. ANN. § 23-552 (2001); FLA. STAT. § 448.23 (1995); TEX. LAB. CODE ANN. § 92.012 (West 2006).

160. N.M. STAT. ANN. § 50-15-4(A).

161. *Id.* § 50-15-4(B), (C).

162. *Id.* § 50-15-4(D).

163. *Id.* § 50-15-5.

164. *Id.* § 50-15-6.

165. *Id.* § 50-15-7.

166. Weber, *supra* note 101, at 678; see also *infra* notes 167–76 and accompanying text.

167. Interview no. 8.

I don't feel comfortable going to court without residency or a SSN.¹⁶⁸

As an immigrant you are naturally scared to enter into the court. It would be the last resort to use.¹⁶⁹

No because I would be very scared the court would deport me.¹⁷⁰

I would be scared of a countersuit or deportation.¹⁷¹

My realtor has family tie[s] in politics or mafia so I would rather not do anything about.¹⁷²

I think it would be a waste of time for an immigrant to use the court system because we do not have the same rights and it would cost too much for what you are fighting for.¹⁷³

It is a waste of time to use the court system because they know I am an immigrant and don't care.¹⁷⁴

We didn't really feel like what the man who was selling us the house was doing was illegal. So I don't think the court could help us. It was more that we just didn't have any other options because we couldn't get a better deal or use a better way of borrowing because we don't have social security numbers.¹⁷⁵

I feel a bad turnout is better than a good court judgment. I don't trust the court system.¹⁷⁶

One respondent said he or she might feel comfortable using the court system, stating "I would only use the court system if I knew exactly what my rights were and how it was going to be—what would happen."¹⁷⁷ Those who said they would feel comfortable using the court system to right a wrong said:

I know that I have rights, and I wouldn't be afraid to enforce them in the courts. Before I had to leave Mexico I really wanted to be a lawyer.¹⁷⁸

It would be good to see if we can do something about getting paid more.¹⁷⁹

168. Interview nos. 10, 15, 22, 27, 28, 29, 40.

169. Interview no. 11.

170. Interview no. 28. This comment was made by many participants.

171. Interview no. 40.

172. Interview no. 8.

173. Interview no. 4.

174. Interview no. 10.

175. Interview no. 15.

176. Interview no. 50.

177. Interview no. 17.

178. Interview no. 2.

179. Interview no. 6.

I think the legal system in the United States helps everyone, regardless of financial or legal citizenship standing.¹⁸⁰

Yes, because the court is there to help you.¹⁸¹

It's not like they ask for your SSN. I know immigration isn't there.¹⁸²

[Not paying you for your work] is an abuse and the court system could help.¹⁸³

Much has been written on the negative impact an individual's undocumented status has on their ability to negotiate with employers and pursue their legal rights. In an attempt to contribute to existing literature, we asked participants if they had ever felt taken advantage of because they did not have a social security number. Responses were as follows: 68% said yes, 30% said no, and 2% did not answer. Remedies for violation of state labor laws include double or triple damages and legal fees,¹⁸⁴ yet abuses still persist. In response to whether participants ever felt taken advantage of at work because of immigration status, participants stated:

All the time. Because with our job they pay us whatever and whenever they want. Then they say, "if you don't like it, don't do it and don't get paid."¹⁸⁵

I get paid less or don't get paid.¹⁸⁶

They pay you more if you have a social security [number], so you constantly feel the pressure of bills. With that pressure you feel that your immigration status is on the line.¹⁸⁷

They don't pay you the same without a SSN.¹⁸⁸

Like at work, if the owner knows you don't have a SS[N] you get taken advantage of/abused.¹⁸⁹

One time I was fired from my work unjustly. And I was accused of falsifying my work hours.¹⁹⁰

I never get the shifts I want and I always feel like they can fire me at any minute.¹⁹¹

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180. Interview no. 45.
 181. Interview no. 46.
 182. Interview no. 23.
 183. Interview no. 47.
 184. *See supra* notes 138–39, 160–62 and accompanying text.
 185. Interview no. 47.
 186. Interview no. 23.
 187. Interview no. 5.
 188. Interview no. 35.
 189. Interview no. 32.
 190. Interview no. 30.
 191. Interview no. 49.

They do not give you a decent job if you do not have a social security number.¹⁹²

III. THE EMOTIONAL SIDE OF SCARCITY DEPICTED THROUGH WORD CLOUDS

The dataset left many unanswered questions because no individualized follow-up questions were asked. Although we chronicled comments on how undocumented immigrants cope with emergencies, whether they feel exploited because of status, and whether they would pursue judicial remedies to these problems, it is difficult to truly determine how survey participants think and feel. We can read the quotes provided here and look at the quantitative data our survey produced, but we cannot fully understand how undocumented immigrants experience scarcity, insecurity, and fear without employing other research methods.

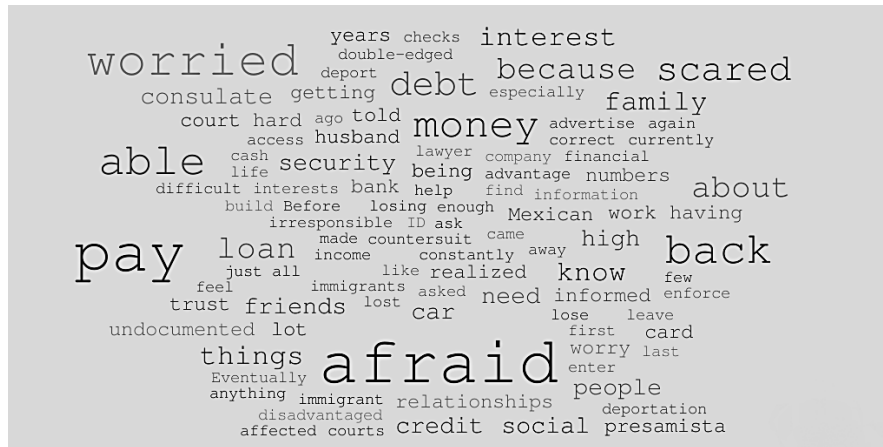
Although our survey produced interesting data, confounding factors—including the inability to follow up on interesting subject matter—made it desirable to view the dataset through an additional analytical tool. We decided to use a sociological visual aid called the word cloud, to further analyze our data. When used along with quotes and selected text, word clouds can identify trends and patterns in language that were obtained through open text survey responses, and capture common themes and relationships between words and concepts. These images identify themes that would otherwise be hidden, unclear, or difficult to see in a tabular format. Common words that might be overlooked when read are emphasized with larger text, and one can see the words surrounding concepts one wishes to explore. For our study, concepts like “scared,” “afraid,” “tired,” “mistake,” and “eventually,” were correlated with the words “deport” or “deportation.” Through these techniques, we were able to gain a more textured look at the day-to-day financial challenges our cohort of undocumented immigrants experience.

Fear was a common theme that participants expressed in our survey interviews. To determine what people feared most, we ran quotes that included the word “afraid” through word-cloud software.¹⁹³ The resulting word cloud features the word “afraid” in the biggest text and then arranges all other words that appear multiple times in the quotes. The more often a word appears in the quotes, the larger that word appears in the resulting word cloud. This cloud shows the words “loans,” “interest,” “paying,” “money,” and “debt” are most often used in conjunction with the word “afraid.” This is likely because our survey focused on financial scarcity and difficulty. The cloud also showed “afraid” was often connected to “friends” and “family” (perhaps because participants relied on friends and family when money fears arose),¹⁹⁴ “consulate,” and “deportation.”

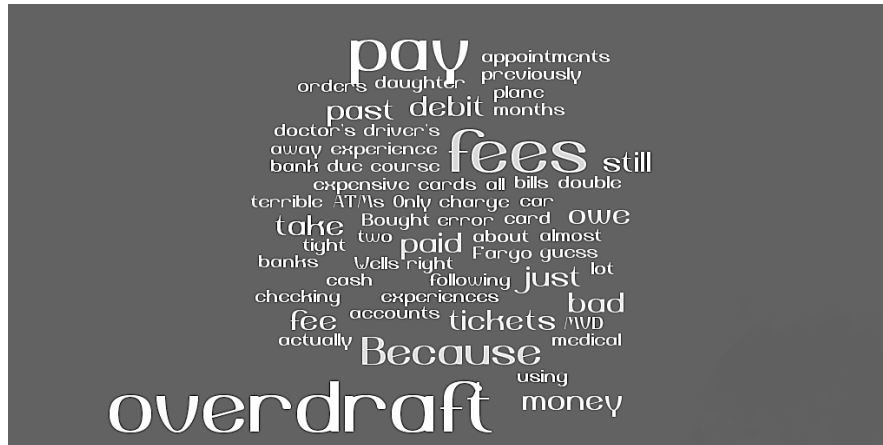
192. Interview no. 7.

193. Rebecca Sandefur provided the idea for this technique. The word-cloud software used was WORDITOUT, <http://www.worditout.com> (last visited Feb. 26, 2016).

194. See *supra* notes 73–74 and accompanying text.



Moreover, our survey asked about, but did not focus heavily on, bank overdrafts. A large number of quotes about overdrafts caused us to wonder if word-cloud software could help us see what the primary causes of overdrafts were. When running the word “overdraft” through word-cloud technology, we found expected words like “ATM,” “bank,” and “Wells Fargo” appeared frequently.¹⁹⁵ We also found words like “tickets,” “MVD,”¹⁹⁶ “plane,” “doctors,” “drivers,” “error,” “terrible,” “expensive,” and “tight” appeared often.



Finally, we did not ask any questions in our survey about deportation. Indeed, this is a topic we were careful to avoid because we had difficulty getting participants to talk to us at all, given their fears of being singled out for a study on undocumented immigrants. Nevertheless, many quotes from our survey included the concept of deportation and that word came up when we ran quotes including the word “afraid” through the word-cloud software. We then ran “deport” through the word-cloud software because of how frequently participants mentioned it in

195. Our study revealed that Wells Fargo and Bank of America were the primary providers of bank accounts to the undocumented in our market.

196. MVD stands for “Motor Vehicle Department.”

Overall, we find that the plight of undocumented workers is not just one of scarcity, but also of nuance and silence. Scarcity is a powerful force that steers the thinking of undocumented persons. Undocumented workers' lives are dictated by financial and work instability. Even with legal protections in place, undocumented workers are either afraid to pursue these protections or do not know protections exist. Furthermore, the concerns of this group are widely unknown to society as a whole. The study did not predict that job loss was a constant concern for this population because job stability is assumed. Undocumented workers are largely silent about their suffering for fear of their undocumented status being used as a sword against them. Only through further study and development of the law can we aid these workers in overcoming these significant obstacles.