

DIVIDING, CONQUERING -- AND RESISTING

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It is a pleasure to have the opportunity to reflect on Professor Hila Keren’s article, “*Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution.*” This extraordinary piece reads less like a law review article than an artfully crafted detective story, meticulously following the doctrinal and sociopolitical clues to answer such questions as, “whatever happened to collective legal action?” or “why has advent of arbitration, in fact, become a ‘revolution’?” With a masterful command of several related fields, Professor Keren weaves together a complex doctrinal account of this “revolution,” situates it in a larger sociopolitical context, and traces its corrosive emotional effects on those it dispossesses and isolates. Particularly riveting are her intertwined doctrinal narratives of the arbitration story and the “separation” story, and her description of neoliberalism not simply as an account of economic relations—fostered by actors as diverse as the Koch brothers, the Federalist Society, and burgeoning industry of self-improvement—as a vehicle for economizing and project-ifying the self.

But as a scholar of the emotions—and proponent, alongside Professor Keren, of analyzing their relations to the law—the final section of the article is the most compelling. In it, Professor Keren offers a vivid, illuminating account of the debilitating senses of isolation and helplessness that emerge when people are both deprived of justice and separated from those others with whom it might productively be sought. Her analysis features two strands that remain relatively rare, even in the extant literature of law and emotions. First, it details the way that emotions may be fostered or extinguished by legal rules: a focus on legal productivity that is still less frequent than it could be—or should be—in the legal academic literature.² Second, it shines a light on emotions that are experienced collectively, or relationally, as opposed to individually.³ Although collective emotions are a familiar focus in fields such as

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2. Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 616–17 (2020). See Kathryn Abrams and Hila Keren, *Who’s Afraid of Law and the Emotions*, 94 MINN. L. REV. 1997, 1999–2000 (2010) (arguing about the comparative rarity of this kind of work in law and emotions scholarship); see also Kathryn Abrams, *Seeking Emotional Goals with Legal Means*, 103 CALIF. L. REV. 1657, 1657–58 (2015).

3. Keren, *supra* note 2, at 622, 625.

sociology or political science,⁴ where the attributes of groups may be the subject, the individualism that infuses American law has left its mark on the legal analysis of emotions as well, creating a focus that is predominantly on the individual. So in both respects, Professor Keren offers something fresh and necessary by describing the ways that consumers suffering at the hands of corporations can affirm and empower each other, and the ways that such affective reciprocity can be painfully short-circuited when claimants are barred from collective legal remedies. Moreover, in the last pages of the article, drawing on the work of political theorist Professor Wendy Brown, Professor Keren offers the chilling suggestion that the feelings of powerlessness that result from this neoliberal legal regime may not be limited to the market realm, but may ultimately impede collective social and political self-assertion as well.⁵

As readers, the most immediate question for us is “what comes next?” How are we—as legal scholars, legal actors, or citizens—to respond to so sobering an account? There is little doubt that Professor Keren aims to press us, normatively, toward action, and notes at the outset:

This article seeks to forge a new path to reform by highlighting that the rich literature to date has paid little to no attention to several key questions related to the anti-collective heart of the arbitration revolution: What political powers facilitated the legal foreclosure of all paths to collective actions? What are the long-term emotional and social consequences of such a dramatic shift? Finally, which future reality may develop from these newly recognized consequences . . . The nuanced answers [this Article] provides create new grounds for evaluating the arbitration revolution and for resuming efforts to overturn it.⁶

Professor Brown offers a broader incitement toward this effort, noting that her new explanation of “how the arbitration revolution threatens democracy . . . should reignite efforts to reverse the revolution and give people back their freedom to act collectively.”⁷

That Professor Keren’s emphasis is primarily on sounding the alarm—or more precisely, on providing a refocused and more encompassing critique of the “revolution”—should not obscure this goal.

4. See generally Jeff Goodwin & James Jasper, *Emotions and Social Movements*, in HANDBOOK OF THE SOCIOLOGY OF EMOTIONS 611–35 (Jan E. Stets & Jonathan H. Turner eds., 2006) (analyzing research specifying the role of emotions in social movements and related forms of political actions).

5. Keren, *supra* note 2, at 637–38.

6. Keren, *supra* note 2, at 580–81.

7. *Id.* at 638.

Legal actors, as Professor Keren notes, have generated a wealth of proposals for change.⁸ The goal is to stimulate something in far shorter supply: the political will for what will surely be an epic struggle. Yet I wondered if, for some readers, the scope and detail of her indictment could be in tension with the action Professor Keren aims to instigate.

Some readers may be concerned that this sociopolitical ship has already sailed: that the hold of neoliberalism on both our institutions and—in Margaret Thatcher’s ominous words—our “souls,”⁹ has rendered collective resistance not only unlikely to prevail, but unlikely even to emerge. In particular, I found myself thinking about our collective prognosis if it is not possible—in any foreseeable future—to revive opposition to the “arbitration revolution.” Should we share the perspective of the consumers Professor Keren describes, who see law as the “last best hope”¹⁰ for resisting the individualizing program of neoliberalism? Are other contexts that may enable or foster collectivity, if legal avenues remain foreclosed?

In the remainder of this comment, this Article argues that the human impetus to resist disempowerment through collectivity, as aptly described by Professor Keren, has not yet been extinguished by the relentless separation and individualization of neoliberalism. This impetus, denied a legal frame, may find other sites or settings in which solidarity may be forged and a sense of agency rekindled. Resistance fostered within these settings may or may not reshape the law, but it may produce other vital effects—on public opinion or political or institutional cultures. This Article offers two recent developments that reflect this pattern, in the face of legal efforts that also aim to “divide and conquer.”¹¹ This Article also reconsiders one of Professor Keren’s own examples as an indication of the same impetus finding a non-legal home. This Article concludes by urging legal scholars not only to become knowledgeable about law’s sociopolitical and ideological context—a goal exemplified by Professor Keren’s article—but to see law as a non-exclusive site for the cultivation of solidaristic, reciprocal emotions and resulting efforts at resistance that is valuably intertwined with other contexts in which this important work can be done.

The first example comes from my own research in the field of immigrant rights. For several years, I studied the emergence of an

8. *Id.* at 580.

9. *Id.* at 605.

10. *Id.* at 626 (citing empirical research by Stephen Meili).

11. Whether these legal efforts reflect neoliberalism influence in the strong sense evinced by Professor Keren’s example is not clear, although it is possible to argue that both reflect neoliberal features or logics.

undocumented immigrants' movement in Phoenix, Arizona: ground zero for state-based anti-immigrant efforts in the United States.¹² In the early 2000s, Arizona began a legal initiative known as “attrition through enforcement”. This regime of laws and law enforcement efforts was explicitly designed to make undocumented residents of Arizona sufficiently miserable that they would “self-deport” to their countries of origin.¹³ Fueled by a potent mix of xenophobic hostility and political and economic anxiety, this effort had the indirection and reliance on individual initiative that Professor Keren describes as a part of neoliberal logic. Its strategy was not pro-actively to remove immigrants (although there was some of that), but to make them subject to such systematic denial of opportunities and law enforcement surveillance so that they would “choose” to remove themselves.¹⁴ “Attrition through enforcement” also featured many legal efforts that would fit readily within the rubric of “divide and conquer” in three respects. First, it separated Latino immigrants from the language and history that united them through an “English only” ballot issue and a statute aimed ending Ethnic Studies in the public schools.¹⁵ Second, it separated undocumented immigrants from each other through statutorily authorized police surveillance that sent them deeper into hiding and invisibility.¹⁶ Finally, it separated undocumented immigrants from those allies who

12. KATHRYN ABRAMS, *OPEN HAND, CLOSED FIST* (forthcoming 2022). Discussions of some of these dimensions of undocumented organizing can also be found in accounts of the movement in other geographical contexts. *See, e.g.*, KEVIN ESCUDERO, *ORGANIZING WHILE UNDOCUMENTED* (2020) (citing San Francisco, Los Angeles, and Chicago as specific examples of epicenters of locations where undocumented youth organized); WALTER NICHOLLS, *THE DREAMERS* (2013) (documenting how the undocumented youth movement transformed immigrant rights in Los Angeles).

13. Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, Center for Immigration Studies Blog (Apr. 2006), <https://cis.org/Report/Attrition-Through-Enforcement> [https://perma.cc/7R5C-6F3P].

14. Some scholars have also argued that the lure of employment in the United States coupled with the unremitting precarity of conditions have the effect of producing an insecure and docile workforce, which Professor Keren describes as a neoliberal aspiration also implemented through the “divide and conquer” strategy. *See, e.g.*, Gerald Lopez, *Don't We Like Them Illegal*, 45 U.C. DAVIS L. REV. 1711, 1800–01 (2012).

15. *See* A.Z. Laws 2000, Init. Measure, Prop. 200, § 3; H.B. 2281, 49th Gen. Assemb., 2nd Reg. Sess. (Ariz. 2010).

16. S.B. 1070, 49th Gen. Assemb., 2nd Reg. Sess. (Ariz. 2010) (authorizing state and local law enforcement officers to demand documents from anyone they “reasonably suspected” of being present without authorization in the course of any legal stop).

might assist them by imposing penalties for the aiding, harboring, and transporting of undocumented state residents.¹⁷

These laws had their intended effects of pressing many immigrants deeper into self-seclusion and isolation—even from each other. Yet a group of the very immigrants that were targeted began to resist these oppressive and isolating laws.¹⁸ Adults, newly fearful of police encounters, used cellphones to film police “saturation patrols” of immigrant neighborhoods and to communicate warnings about law enforcement in the vicinity.¹⁹ Youth struggling to fund their education at Arizona colleges began to share stories, exchange advice, and provide mutual support.²⁰ Gradually, this intra-group solidarity found expression in public forms of resistance: immigrants and allies marched against SB 1070; a group of middle-aged, undocumented women organized a public vigil that lasted 100 days; undocumented youth joined national campaigns to support the DREAM Act.²¹ These efforts have not yet produced durable legal change particularly at the national level.²² And where immigrant activists have turned to the Constitution and the courts as vehicles for protecting their communities, undocumented participants—even in the class actions that have occasionally resulted²³—have not always viewed the litigation or its outcomes as a

17. *Id.* (providing as a part of SB 1070 a provision colloquially known as the “grandfather” provision because it could impose penalties on family members for transporting or harboring their own undocumented relatives).

18. *Civil and Human Rights Groups File Lawsuit, Plan March against Arizona’s S.B. 1070*, IMMIGRATION RIGHTS NEWS (May 26, 2010), <https://civilrights.org/2010/05/26/civil-and-human-rights-groups-file-lawsuit-plan-march-against-arizonas-s-b-1070/> [https://perma.cc/9XJVD6YN].

19. Nik Theodore, *Policing Borders: Unauthorized Immigration and the Pernicious Politics of Attrition*, 38 SOCIAL JUSTICE 90, 101 (2011).

20. The Impact of SB 1070 on Arizona’s Youth (Sept. 2011) <https://law.arizona.edu/impact-sb-1070-arizonas-youth> [https://perma.cc/38C8-L3XH]

21. Patty Arteaga & Nancy Bercaw, *How young, undocumented organizers fought to bring DACA into existence*, Stories of Freedom & Justice (July, 24, 2020) <https://americanhistory.si.edu/blog/how-young-undocumented-organizers-fought-bring-daca-existence> [https://perma.cc/TRZ8-LRDY].

22. Both comprehensive immigration reform, which could have produced a path to citizenship for 11 million undocumented immigrants, and the DREAM Act, which would have had similar effects for a smaller number of immigrant youth, were passed in one house and voted down in the other during the Obama Administration. Pressure from the nationwide youth movement did persuade President Obama to enact DACA, which suspends deportation for a period of two years and provides work permits to youth brought to the United States as children. But it has been under constant siege since the beginning of the Trump administration.

23. *See generally* Arizona Dream Act Coal. v. Brewer, 945 F. Supp. 2d 1049 (D. Ariz. 2013) (denying a preliminary injunction) *rev’d*, Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053 (9th Cir. 2014) (granting a preliminary injunction). *See also* Arizona Dream Act Coal. v. Brewer, 81 F. Supp. 3d 795 (D. Ariz. 2015) (permanent injunction). *Puente v. Arpaio*, 76 F. Supp.

source of empowerment or agency.²⁴ Yet in the many informal and, ultimately, organizational sites at which immigrants have found each other, they have fostered solidaristic emotions and developed the capacity for resistant collective action. Their efforts have challenged stigma with new, participatory images of undocumented immigrants, changed the dynamics of local elections by persuading Latino citizens to vote on their behalf, and made their communities safer by exposing and contesting law enforcement excesses.

The other example comes from the area of gender violence and the recent mobilizations under the banner of #MeToo. The women in the entertainment, music, and publishing industries, who brought these dynamics to public attention,²⁵ were denied recourse for their injuries and separated from each other, sometimes by the same legal strategies that Professor Keren describes. Those preyed upon were often aspirants, not yet part of a workplace that might provide them with legal protections; those who had been victimized were often isolated by their shame about the conduct they had suffered, and by misogynistic reprisals that punished those who spoke up.²⁶ Those targeted were further separated, from each other and from public view, by legal expedients, including arbitration agreements,²⁷ imposed on those with specific employment relationships

3d. 833 (D. Ariz. 2015) (granting a preliminary injunction), *rev'd* Puente v. Arpaio, 821 F.3d 1098 (9th Cir. 2016) (vacating preliminary injunction and remanding); Puente v. Arpaio, No. CV-14-01356-PH-DGC, 2017 WL 1133012, *1, 17 (D. Ariz. Mar. 27, 2017) (granting a narrower permanent injunction).

24. One of the more interesting threads identified in the research is that at least some undocumented activists did not appear to feel particularly empowered by their involvement in class action lawsuits against Arizona officials. Even those who were named plaintiffs sometimes described the lawsuits as a “lawyer’s thing” (Interview with CC, June 2016), which brought them benefits but didn’t reflect their own agency or resistance, and other activists lamented the fact that they had little control over the course of litigation (Interview with DR, September 2014), couldn’t use their signature tactics of political pressure (Interview with EA, April 2015), disliked lawyers picking and choosing among their stories (Interview with EA, April 2015), and found legal outcomes difficult to explain to community members (Interviews with EA, April 2015; DM, July 2014). My hypothesis is that because they were able to act on behalf of their communities with greater control, through social movement activity, they felt less of an urgent need for—and less patience with the lawyers’ mediation of legal action.

25. #MeToo: A Timeline of Events, CHI. TRIB., Feb. 24, 2021 <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlstory.html> [<https://perma.cc/XN9L-VBZM>].

26. For a compelling philosophical account of the disciplinary strategies of “misogyny” that form the enforcement arm of the larger system of patriarchy, see KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY, 7–8 (2017). For a keen journalistic account of the effects of such strategies, see Rebecca Traister, *The Toll of #MeToo*, THE CUT: N.Y. MAG., (Sept. 30, 2019), [the-cut.com/2019/09/the-toll-of-me-too.html](https://www.thecut.com/2019/09/the-toll-of-me-too.html) [<https://perma.cc/PA8C-E2EB>].

27. Tamra Wallace, *Nine Justices and #MeToo: How the Supreme Court Shaped the Future of Mandatory Arbitration and Sexual Harassment Claims*, 72 ME. L. REV. 417, 418–19 (2020).

and nondisclosure agreements (NDAs), pressed on those who sought legal compensation for their injuries.

Yet here too there was visible, effective resistance—fueled, in the first instance, by the innovative cultivation of online solidarity. It began with individuals who transformed the use of a hashtag into a sharing of stories that relieved the burden of shame, generated reciprocal feelings of empathy and understanding, and facilitated mutual support.²⁸ From these reciprocal emotions came feelings of empowerment that enabled collective resistance: first on social media, through circulated lists of perpetrators and shared strategies of self-defense, and then through mainstream media by demands on employers of and contractors with those accused of violation.²⁹ Here too, the trajectory into law is not yet complete: organizations such as Time’s Up have sought to fund litigation against perpetrators, and legislators have weighed new approaches to the problem,³⁰ without—as yet—yielding systematic change. However, two early victories have specifically addressed the dynamics of separation and isolation: one more generally and another in a specific employment context. State statutory efforts have sought to curtail the use of NDAs, enabling those victimized to share their stories with others who might provide solidarity and support, and preventing perpetrators from reoffending with new victims.³¹ And combatting a specific, physical instance of separation and isolation, hotel housekeepers, whose work in isolated settings close to perpetrator-guests creates distinctive risks, have mounted successful campaigns to obtain “panic buttons,” which can alert managers to an assault in progress.³²

Indeed, Professor Keren’s own work gives us another example in this vein. Her account of consumer websites, created to share knowledge and

28. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1148–49 (2019).

29. See generally JODI KANTOR & MEGAN TWOHEY, *SHE SAID* (2019) (investigating an account of one thread of this larger story, the growing revelations by actresses about the harassment and assaults perpetrated by producer Harvey Weinstein); Tarana Burke, *MeToo is a Movement, Not a Moment*, TED Talk, Nov. 2018, https://www.ted.com/talks/tarana_burke_me_too_is_a_movement_not_a_moment?language=en [<https://perma.cc/6MVW-3PVT>]; Rebecca Traister, *Your Reckoning. And Mine*, THE CUT: NEW YORK MAG. (Nov. 13, 2017), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html> [<https://perma.cc/A44V-KNA4>].

30. See, e.g., Section by Section #MeToo Congress Act, H.R. 4396, 115th Cong. (2017).

31. Stacy Perman, *#MeToo Law Restricts Use of Nondisclosure Agreements in Sexual Misconduct Cases*, L.A. TIMES (Dec. 31, 2018), <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html> [<https://perma.cc/Z4JP-EEN4>].

32. Press release, American Hotel and Lodging Association, “*Hotel Industry Announces Added Safety Measures for Employees; Builds on Layers of Security Procedures*,” AHLA.COM (Sept. 6, 2018), <https://www.ahla.com/press-release/hotel-industry-announces-added-safety-measures-employees-builds-layers-security> [<https://perma.cc/WJ8D-PWXS>].

mutual support, is offered primarily to document the potential empowerment that such consumers see in the possibility of class actions.³³ Yet the emergence of these sites themselves are evidence of the fact that mutual support and empowerment may be found in multiple contexts, and when a legal path proves unavailing, the desire for these social and emotional goods may prompt those victimized to seek other routes to coalescence.³⁴

While heeding the daunting dimensions of Professor Keren's warning, it is vital to remain alert to the openings that occur even within systematic dynamics and be ready to illuminate and theorize them when they occur. A model in this effort is Rebecca Solnit, a compelling commentator on resistance and collective possibilities, who captures this sense of often unexpected possibility with the term "hope."³⁵ Solnit's hope is not the wishfulness or positivism that we may colloquially associate with that term.³⁶ In the introduction to her landmark essay collection, *Hope in the Dark*, Solnit explains:

Hope is [] not a sunny, everything-is-getting-better narrative, although it may be a counter to the everything-is-getting-worse narrative. You could call it an account of complexities and uncertainties, with openings . . . Hope locates itself in the premises that we don't know what will happen and that in the spaciousness of uncertainty there is room to act. When you recognize uncertainty, you recognize that you may be able to influence the outcomes—you alone, or you in concert with a few dozen or several million others³⁷

But Solnit does more than simply assert this radical contingency. Solnit studies, in concrete and enlightening historical detail, specific instances in which collectivity, mutual support, and solidaristic emotions have emerged.³⁸ Her book, *A Paradise Built in Hell*,³⁹ for example, investigates solidarity and collective resilience in the context of natural

33. Keren, *supra* note 2 at 629.

34. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1149, 1174–75 (2019).

35. REBECCA SOLNIT, *HOPE IN THE DARK: UNTOLD HISTORIES, WILD POSSIBILITIES* (3rd edition, 2016).

36. *See generally* Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319 (2007) (analyzing hope by resisting this colloquial understanding of the term).

37. REBECCA SOLNIT, *HOPE IN THE DARK: UNTOLD HISTORIES, WILD POSSIBILITIES* (3rd ed. 2016).

38. *See generally* REBECCA SOLNIT, *A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER* (2009).

39. REBECCA SOLNIT, *A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER* (2009).

disasters. *Hope in the Dark* explores a series of movements and uprisings, large and small, that have emerged in a time (the late 20th and very early 21st centuries) marked by rapidly escalating inequality and unprecedented environmental destruction. Her goal in both is to learn more about how human beings react to particular kinds of challenges, and to distill lessons that might be usable—in some form—in surmounting future obstacles.

The message from Solnit's work, and from my own examples, is not that when a door closes, a window (predictably) opens, as the saying goes.⁴⁰ The experience of collectivity is far more contingent than that. The message is that those of us who aim to observe and theorize the possibilities of resistance, particularly in systems structured or dominated by oppressive dynamics, have to keep both (legal) doors and (other, perhaps movement based) windows in view: empowering affective currents may flow in many ways from one to the other, offering varied possibilities of which we might avail ourselves. Though legal rules may stifle the fuel of resistance, particularly in combination with broader sociopolitical currents, and though their effects on emotions may be well-documented and corrosive, we can have a law, or even a legal regime that divides and conquers, without extinguishing or foreclosing the shared emotions that can motivate change. These emotions, fostered by varied contexts of collectivity, can end by transforming law or by forging a path to change in which the law may not be primary.

I admire the title Professor Keren has chosen for her work: it turns an expression whose familiarity has numbed us to its meaning into a vivid description of a carefully engineered and poignantly disabling emotion state. Yet perhaps we can better capture her message with a slight change in tense: “dividing and conquering” would signal both the deeply menacing potential of neoliberalism and the unpredictable yet resurgent impulse toward collectivity and resistance.

40. This is a familiar saying with an uncertain provenance. One account ascribes the original quote (in somewhat altered form) to Alexander Graham Bell, who reportedly said: “when one door closes, another opens; but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us.” *When One Door Closes, A Window Opens*. NEW YOUR STATE OF MIND (Apr. 5, 2012), <http://newyourstateofmind.blogspot.com/2012/04/when-one-door-closes-window-opens.html> [<https://perma.cc/ACN7-Y5Z7>].