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Civil Resistance and the Law: Nonviolent Transitions to Democracy

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SYMPOSIUM

CIVIL RESISTANCE AND THE LAW: NONVIOLENT TRANSITIONS TO DEMOCRACY

INTRODUCTION

*Charles R. DiSalvo**

When Dean Joyce McConnell suggested that the *West Virginia Law Review* conduct its 2011 symposium on “Civil Resistance and the Law: Nonviolent Transitions to Democracy” did she have a crystal ball? How did she know that the uprising in Tunisia would lead to many more uprisings throughout the Middle East—to what is now popularly known as the Arab Spring?

While we may never know the source of her prescience, we do know something fundamentally important about the relationship between the character of any given revolution and the character of the government that emerges in the wake of that revolution. We know that the relationship is causal—and we know it, in large part, because of the timely work of Erica Chenoweth and Maria Stephan, co-authors of *Why Civil Resistance Works*.¹ As Dr. Chenoweth demonstrated in her keynote address at the symposium conducted on November 10, 2011 in Morgantown, revolutions that are conducted with nonviolence, as compared to those conducted with violence, have not only a significantly greater

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Professor DiSalvo was educated at St. John Fisher College (B.A., history), Claremont Graduate School (M.A., East Asian studies), and the University of Southern California (J.D), where he was a member of the *Southern California Law Review*. Upon his graduation from law school, he was awarded a Reginald Heber Smith Community Lawyer Fellowship to practice poverty law for the Appalachian Research and Defense Fund of Kentucky.

He came to West Virginia University after serving as a Bigelow Teaching Fellow at the University of Chicago Law School. In addition to teaching a course on civil disobedience and the law, he teaches courses on civil procedure, bioethics, and trial advocacy.

¹ See ERICA CHENOWETH & MARIA J. STEPHAN, *WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT* (2011).

chance of succeeding,² but also a significantly greater chance of establishing functioning democracies that persist over time.³ When a revolution is conducted with non-violence, the people are taught the way of nonviolence. When a revolution is conducted with violence, the people are taught the way of violence.⁴ Each has its consequences. In other words, trajectory matters. In Egypt, the revolution was predominantly nonviolent. The sorting out that is now occurring among power groups in the aftermath of the revolution has been, to this point, predominantly nonviolent. Contrast Egypt's situation with Libya. While there was some exercise of nonviolent power in Libya, the revolution was achieved principally with violence. It is not surprising, then, that the post-revolution struggle for power in Libya has been marred by violence.⁵

Three of the authors contributing to this symposium issue of the Law Review appear to recognize the dynamic Dr. Chenoweth described—but each has something quite different to say about it. Professor James Friedberg takes us behind the unique arrangement Spanish society made with itself in the post-Franco period, saying that “Spain successfully achieved its democratic transition in the 1970s and 1980s under a public amnesia toward the dictatorship it was leaving behind.”⁶ The peaceful agreement of Spaniards to forget and not discuss the injustice that existed under Franco was instrumental in forming the nonviolent character of the transition from Franco to democracy. According to Professor Friedberg, because the arrangement suppressed differences rather than accentuating them, Spain was able to make a peaceful transition to democracy. To what extent then is the Spanish model, as explicated by Professor Friedberg, replicable by other societies emerging from dictatorships? Is the Spanish approach universally useful, regardless of culture or country?

Standing in stark contrast with the Spanish approach of creating a peaceful transition by submerging differences is the post-revolution use of truth and reconciliation commissions in South Africa and elsewhere. Is this open approach—publicly naming the sins of the past while simultaneously forgiving them—better for society in the long run than the closed Spanish approach? Is this even a question worth debating among revolutionaries or is the choice of approach, in fact, completely settled and driven by context and circumstance? The reader will have these questions in mind when contemplating James McCarty's Article on truth and reconciliation commissions. Tellingly, Mr.

² *Id.* at 7.

³ *Id.* at 213.

⁴ The language Chenoweth and Stephan use to account for the success of nonviolence is the language of participation. Their argument is that campaigns of nonviolence offer an opportunity for more people to participate than violent campaigns and that this higher participation rate has multiple effects that lead to ultimate success. *Id.* at 10.

⁵ *Amnesty: Libyan militias torture Gadhafi loyalists, uproot rival communities*, WASH. POST, Feb. 15, 2012.

⁶ James J. Friedberg, *The Wane in Spain (of Universal Jurisdiction): Spain's Forgetful Democratic Transition and the Prosecution of Tyrants*, 114 W. VA. L. REV. 825, 827–28 (2012).

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McCarty emphasizes the point that commissions “can be, and sometimes are, the legal-political extension of the nonviolent arm of a revolutionary social change movement” and that they become “one way that the values and commitments that undergird nonviolent social change movements, and those values and commitments that undergird democratic practice, become institutionalized in a newly formed democratic society.”

Professor John Kang’s piece, in which he compares the lives of Martin Luther King and Malcolm X and their quite different approaches to the struggle for African-American rights, suggests that the causal relationship exists not only at a societal level, but on a very personal level, as well. Where, he asks, are the charismatic leaders in the Middle East who will articulate the philosophy on which the Arab Spring rests? Professor Kang urges us to look for such leaders to emerge from loving and socially-conscious families. Such families—of which of Martin Luther King’s family was one—are nurseries for nonviolence. Just as democratic governments arise most naturally from nonviolent revolutions, nonviolent leaders emerge most naturally from families that stress love, cooperation, and understanding. To what extent, then, does the success of a nonviolent revolution depend upon leaders raised in such environments? Can a nonviolent movement succeed in establishing a democracy without them? Or is this concern of no moment because such leaders are a natural and inevitable part of every nonviolent movement?

Our fourth symposium author places a great deal less faith in the trajectory dynamic and may even be said to reject it. Professor Donald Kochan does not appear to be satisfied with the statistical likelihood that a nonviolent revolution will result in a democratic government. Rather his concern is with what he describes as the “chaos” that often emerges in the wake of “decentralized, unorganized, unsophisticated” nonviolent revolutions.⁷ Professor Kochan sees no easy path for democracy here. In such settings, he theorizes, societies are vulnerable to falling under “radical tyrannical or authoritarian control.”⁸ The novel and nonviolent remedy Professor Kochan advocates is that the West rush into the power vacuum left by nonviolent revolution and fill the public square with the works of Western liberalism, translated into the appropriate native language.

Is Professor Kochan correct to hold his concern? What does the historical record say about the frequency with which tyrannical regimes follow upon nonviolent revolutions? Is the current struggle in some Middle Eastern countries between fundamentalist Islamists and secular Islamists and others proof of the legitimacy of Professor’s Kochan’s concern? Would following Professor Kochan’s advice have a material effect on contests of this nature?

Whether or not Professor Kochan has the same view of the trajectory dynamic as our other authors, perhaps they might all agree that the advent of

⁷ Donald J. Kochan, *You Say You Want a (Nonviolent) Revolution, Well Then What? Translating Western Thought, Strategic Ideological Cooptation, and Institution Building for Freedom for Governments Emerging Out of Peaceful Chaos*, 114 W. VA. L. REV. 897, 897–98 (2012).

⁸ *Id.* at 897.

democratic regimes following upon nonviolent revolutions is neither fully inevitable nor easy. Srdja Popovic, one of the key players in Serbia's removal of the dictator Slobadan Milosevich from office, has said that one of the key ingredients needed for successful revolution, in addition to nonviolence and unity, is planning.⁹

Srdja Popovic would likely agree that the same ingredient is needed for the subsequent establishment of democracies. In doing the hard work of planning, nonviolent activists currently engaged in the struggle for democracy would be well-served to look to this issue of the *West Virginia Law Review* for a discussion of some of the very issues they will be facing in the days ahead.

⁹ Srdja Popovic, *How to topple a dictator*, TED (Dec. 2011), http://www.ted.com/talks/srdja_popovic_how_to_topple_a_dictator.html.