Civil Disobedience
Protest, Justification, and the Law

Tony Milligan
Civil Disobedience
To Suzanne, for showing me a gentler strength.
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CHAPTER ONE

The Occupy Movement

Civil disobedience has become an endangered concept. Or at least that was the case until a wave of mass non-violent dissent hit North Africa, parts of South-West Asia, Western Europe and North America during 2011, raising all sorts of issues about how to understand contemporary political unrest as well as bringing the legitimacy of economic and political institutions into question. Even at the time, an obvious case could be made for regarding a large number of the protests as civil disobedience, but some commentators were cautious about doing so. They raised concerns about the relevance of the very idea of “civil disobedience” to something so new and so radical. In the course of this book I will attempt to allay these fears and to show that claims of civil disobedience have a vital, forward-looking role to play. Moreover, they can defensibly be made about a wide range of actions including many of those carried out by participants in the Occupy Movement in America and Western Europe. This opening chapter will be given over to a narrative account of the latter. My undisguised determination to vindicate the relevance of civil disobedience may, however, raise some concerns about the narrative, about the possibility that it could be skewed to support my overall conclusion. Like all such narratives of dissent, it may be challenged in point of detail and interpretation. There is, after all, a gap that invariably opens up between protest on the ground and subsequent reportage. Nonetheless, what follows is an outline of events that should be recognizable to participants and recognizable also to the vastly larger number of sympathetic onlookers whose connection to events was primarily through the popular media. In places, it may also capture a sense of the excitement of the moment.
Zuccotti Park

Between May and December 2011 public squares in Europe, parks in the US and even the precincts of St Paul’s Cathedral in London were occupied. Demonstrations in some of the world’s major cities took place on a scale that had been unknown for decades. At its height, the international focal point for this movement was the Occupy Wall Street camp in Zuccotti Park, a 33,000 feet-square area of ground in Lower Manhattan that was once, appropriately, called Liberty Plaza. Located only a block away from the site of the former World Trade Center, Zuccotti is a highly symbolic space. Its occupation in September 2011, only a week after the anniversary of the 9/11 attacks, might have struck a more cautious or leadership-dominated movement as an unnecessary and provocative risk.

Zuccotti became the focal point by accident rather than design. The occupiers had considered elsewhere. There was talk about a small group trying to occupy the J. P. Morgan building, One Chase Manhattan Plaza, but the Park was more accessible, more public. At first the numbers were small; a couple of hundred protestors camped out by night and slightly larger numbers blocked traffic by day in an attempt to publicize their cause. The police responded with familiar tactics for urban control. Protestors were subjected to “kettling,” the forcible division of crowds into easily controllable groups followed by the immobilizing confinement of each group, often behind a wall of police officers wielding riot shields. Pepper spray, derived in part from capsicum chillies, was used to facilitate the process. Its use in civil disturbances is not unlike the herding of cattle as they are prodded to go first one way and then another. The impact of the spray can be both physical and moral. It disables individuals and can convince others that they face an overwhelming obstacle. Its use against the protestors in New York had the former impact but not always the latter.

Regularly used in the US since the early 1990s, the spray was first introduced as a way of applying non-lethal force in situations where immediate self-defense or the defense of others might be required. In practice, it has become a favored device of control, a ready multi-tasking solution in a can. It has been used with some regularity to force eco-protestors to unlock themselves from secured positions and, more controversially still, in combination with hoods and control chairs, against problem prisoners in correctional and custodial facilities. As a chemical agent, its use in warfare is illegal under international law. Within the US, state legislatures have differed about how it may reasonably be used. Protestors and legal counsel complain about the spray and some legislators accept that they have a point. If its use would be illegal on a battlefield, there is a question about why it should be considered legal on the streets.

Against the Occupy Wall Street protestors, video footage indicates that pepper spray was used in situations where there was clearly no threat, a
dangerously provocative practice given that the spray has been continuously linked to deaths both in and out of custody. When used at close range against any of America’s 18.7 million asthma sufferers, hospitalization is a likely outcome. But good respiratory health offers little protection. One week into the occupation at Zuccotti, the web-based dissemination of a video showing police officers spraying a group of apparently helpless and penned-in female demonstrators resulted in a surge of popular support. By the following week, the NYPD was having to deal with thousands of protestors rather than hundreds. At one point a fleet of buses was brought in to ferry successive batches of arrested demonstrators off the Brooklyn Bridge.

Buoyed by the combination of illegal protest and the largely peaceful occupation of public spaces, the movement spread nationally and internationally. By the end of October, a month after Occupy Wall Street protestors first moved into Zuccotti, there were an estimated 2,300 occupied zones in 2,000 cities worldwide. Protest camps of small, medium and large scale sprang up like mushrooms, varying in size from a handful of tents, hastily set up by eco-activists or anarchists, through to small tent-villages with performers and family groups. The larger camps resembled the outlying areas of a music festival and the atmosphere was, at times, similarly carnivalesque. With the crowds came the pickpockets and the petty criminals, then the sociologists and anthropologists keen to study the social composition and attitudes of the movement. In London, matters were on a smaller scale. The focal point was a tent village set up just below the steps of St Paul’s Cathedral in London. The protest camp was, nonetheless, given daily television coverage while church authorities argued over the respective merits of having the protestors removed by force or washing their hands and passing on the decision to Westminster City Council.

Then came the reaction. An international process of clearance began at the end of October with the forcible removal of the tents in Victoria Park, Ontario. A brief pause followed to avoid the potential flashpoint of Guy Fawkes night, then the curfews and forcible clearances resumed. Some of the camps were able to mount legal challenges, and some were too small to be dealt with in the first wave of removals. But key sites such as Zuccotti and Oakland were cleared, amid scuffles, arrests, attempted reoccupation and the ongoing use of pepper spray to control the predominantly non-violent but now clearly angry protestors. A striking feature of the movement, from the outset, was this ability to remain largely (but not exclusively) non-violent. Yet the participants in the Occupy Movement also exhibited a strong degree of ideological continuity with the anti-capitalist protestors who had forcibly taken over the streets of Seattle a decade earlier. Both established ground-level assemblies, institutions of direct democracy which were then contrasted with a hierarchical and compromised state-run democracy. Both involved an avoidance of formal leadership, a rejection of
the idea that movements need charismatic figureheads who can enter into negotiations on their behalf.

The shifting balance of political forces

A variety of reasons may be offered to explain why the protests happened and why they took the form that they did in spite of the fact that many of those involved may not have been opposed to violence as a point of principle. One obvious influence that shaped the character of the Occupy Movement was the Arab Spring, the initially successful and similarly non-violent movement which had started in Tunisia in December 2010 with the self-immolation of a jobless student. Mohamed Bouazizi set himself on fire after police tried to seize the vegetable cart that he was using to make a living. The sheer injustice of the act, and its surrounding circumstances, propelled him towards an act that carried echoes of more distant protests but which mirrored similar expressions of sheer despair in India and China over the preceding decade. The high point of the ensuing Arab protests came with the overthrow of dictatorships in Tunisia and Egypt by means of what looked like non-violent civil disobedience on a truly massive scale. What the Arab Spring seemed to show many commentators, against expectations to the contrary, was that protest without violence towards others could work in the face of apparently overwhelming and authoritarian state power. The point was made forcefully in the midst of these uprisings by the Burmese pro-democracy campaigner Aung San Suu Kyi when delivering her Reith Lectures for the BBC: “Gandhi’s teachings on non-violent civil resistance and the way in which he had put his theories into practice have become part of the working manual of those who would change authoritarian administrations through peaceful means. I was attracted to the way of non-violence, but not on moral grounds, as some believe. Only on practical political grounds.”

A movement attracted to non-violence on such practical grounds could find room for admiration of Gandhi, Martin Luther King and, in England, Guy Fawkes. “V” masks became popular publicity symbols for the protests. Drawn from the film of the same name in which the anarchist anti-hero manages, with a little help from his friends, to blow up the Houses of Parliament, the masks featured regularly in the English newspapers. Ineffective at hiding identity, they helped to emphasize the anonymity and anti-authoritarianism of the many and the standing of the protests as carnivals of dissent. The wearing of a mask or the very act of sitting down and occupying space along with a body of others had become a radical act of defiance.

By the summer of 2011 the idea that mass non-violent protest could succeed where violence was likely to fail had become widespread. It
matched well with the anti-violent ethos of at least some established radical political activists whose staple protests for almost a decade had involved opposition to the wars in Iraq and Afghanistan. While Aung San Suu Kyi’s lectures may not have been heard by anyone other than the usual listeners, she voiced a wider and growing belief that non-violent protest might not be a fundamental moral requirement, but that it could nonetheless deliver results as it had done in South Africa in the last days of apartheid. Perhaps it could not do so always or everywhere, but sometimes and especially at the present historical juncture. To an extent, the balance of political forces had swung protestors in favor of this idea. But, as with the Arab Spring, the immediate triggering factor which had led to the emergence of the Occupy Movement was economic. It took an international debt crisis and ensuing austerity measures to spark mass protest in the West. The same economic problems still retained the capacity to spark off a more violent response. Economic crisis and austerity had already triggered large and violent demonstrations in Iceland in 2009 and rioting in France during the summer of 2010. During 2011, peaceful protest and violent dissent were both features of the political landscape.

The key flashpoint in the French case was not, as it had been during the riots of 1968, issues that focused directly upon the young. The flashpoint was pensions, a soft target for a quick money grab by the State. In July 2010 the French government had announced their decision to push through a two-year increase in the retirement age and an increase in the pension contributions of state employees from 7.8 per cent to around 10.5 per cent of gross pay. Within weeks, workers at major oil refineries had struck over the issue. By October, roughly a third of the petrol stations in France had run dry. On 19 October a demonstration in support of the strikers spilled over into rioting in Paris. To the north of the city, a group of rioters advanced en masse, singing the Marseillaise before breaking through a police blockade to take control of the main access route to Charles De Gaulle airport. Rioting followed to the south, in Lyon. As the focus of action shifted away from the refineries, the protesters managed to close access to the airports at Clermont Ferrand to the south, Nantes to the west and Nice in the far south-east. The geographical spread was considerable.

At an international level, rioting driven by austerity measures rumbled on through 2010 and into 2011, notably in Greece, a country that had been effectively bankrupted by the debt crisis. Even in England, where violent protest had been at a low level for decades, there was an outbreak of rioting. In August, at the tail-end of the long summer of 2011, urban unrest broke out in London and then some of the cities of the Midlands and the North West following the shooting of a black youth by the police. The incident was not entirely isolated. Long-standing accusations of institutionalized police racism had, in the past, been coupled with similar incidents, albeit on an intermittent basis. The London Riots of 2011 began with a peaceful
but angry blockade of a local police station in protest over the shooting. Following some questionable police decision-making, the demonstration turned violent. Extensive rioting followed. For the best part of a week, the English police were unable to do little more than contain its geographical spread. Restricted media coverage, with small segments of TV footage being repeated continuously on loops, also failed to prevent the spread of information over the internet as rioters used Twitter and a variety of online social networks to co-ordinate their actions. Government insistence that the disturbances were gang-related and not social discontent were dismissed by the international press and given little support by the subsequent Ministry of Justice breakdown of the social composition of arrested rioters. Harsh sentences followed.

While the potential for violence was continually present, and present on an international scale, events took a different and more non-violent turn in Spain. As in France and Greece, the focus of the protest was over austerity, and again online social networking sites played a crucial role. Spanish “indignants” used social networking sites to organize defiance of a temporary ban upon protests in Madrid. The regional and municipal elections were due and, until over, there were to be no large public mobilizations. All such mobilizations would be illegal. The ban proved ineffective, perhaps even provocative. The mass turnout on 15 May, the day of defiance, was the spark for protests which, according to Spain’s public broadcasting company Corporación de Radio y Televisión Española, involved more than 6.5 million Spaniards at some level or another. With national unemployment sitting above 20 per cent for adults and rising to double that figure for sections of the country’s younger generation, the defiance of the ban in Madrid gave cohesion to a much larger wave of dissent.

As in France, the Spanish government’s plans to raise the retirement age had already sparked both strikes and violent confrontations. But in Spain there was an added level of organization, outside of the usual but restricted channels of trade-union militancy, the far left and the mainstream political parties. An online and unaligned platform, Democracia Real YA, provided a co-ordinating point for individuals and for hundreds of smaller organizations. Endorsement by mainstream electoral parties was rejected. Two days before the 15 May protest, Democracia Real also arranged for the peaceful occupation of the central branch of the Banco Santander in Murcia. Rather than opting for a representation of their grievances by a leading figure, an agreed four-minute long statement was read out and then broadcast online. The focus of the statement was clear: the politicians and bankers who had led the country into its present crisis were branded as “criminals”; Murcia and Spain as a whole should not be left in their hands.

On the day, the 15 May demonstration in Madrid ended at the Puerta del Sol which became, from that point onwards, the effective center of operations. When a peaceful blockade of the Gran Via ended with police
truncheon attacks and the removal of protestors, the latter, buoyed by their clear numerical superiority, did not respond with rioting. In Barcelona, a smaller but still sizeable demonstration targeted the Plaça Catalunya, a large open area where several of the city’s main streets converge. Only where the numbers dipped significantly, as in Santiago de Compostella, did the day of protest end with the familiar round of small-scale attacks upon property by a uniformly dressed Black Bloc of anarchists.

Two days later, in Madrid, the police managed to clear the Puerta del Sol but only temporarily and with considerable force. In Barcelona, although initial protests had been smaller, the occupation was larger and a more cautious attempt by the police to clear the Plaça Catalunya was ineffective. As protests rumbled on over the following days, the public squares of Spain’s major cities were effectively taken out of the hands of the municipal authorities as occupation camps and popular assemblies were established. Within days the occupations had spread across a substantial part of the country, quickly becoming too large to shift without systematic police co-ordination, considerable force and political will. Overall, the Spanish protests achieved a level of overt and radical politicization that was altogether absent from the riots that were to occur in London later in the year. They were also, with some few exceptions, non-violent in spite of uneven policing as national and city-level authorities alternately tried to force, tolerate and then negotiate with a movement that seemed to lack any clear official leadership who might be worked upon and persuaded to comply. The sheer unexpectedness of a movement on this scale seemed to induce a temporary paralysis on the part of some sections of the State, an inability to deal with dissent or even to understand how so many different sections of society had suddenly managed to come together.

Addressing the crowd at the Plaça Catalunya during the second week of the protest, the sociologist Manuel Castells highlighted the absence of violence and the slowness of the authorities and the official media to acknowledge the unprecedented scale of events. “When the powers that be realize what is going on is serious (because for the moment they don’t believe this is serious), they will react. And they will react probably violently because there are too many interests at stake. That is why it is essential that this process be slow and profound to reconstruct democracy. It must also have non-violence as a fundamental principal, which is already expressed and put into practice.” A veteran of 1968, Castells went further than Aung San Suu Kyi’s claim that non-violence could have tactical advantages. He advanced it as a point of principle. But he also recognized that tactical issues were in play. There was a real danger that cohesive political militancy and the emerging institutions of protestor democracy might be dissipated in reactive confrontations with the police: “until the police come, there is not going to be violence. To the likely violence from the system, we should propose people use non-violence. To do this, a lot of
courage is needed, because to reply to violence with violence, is to respond from fear: you are attacked and you defend yourself. We will need to help people who would be so scared that [they] would become violent. We should help them to advance towards a superior level of courage, which requires one to overcome fear.”13 While there was no possibility of holding on indefinitely or of permanently stabilizing the institutions of direct, street-level democracy, the Spanish protesters held on long enough to shape and influence the occupation of Zuccotti Park.

Was this civil disobedience?

The lasting impact of the Occupy Movement is as yet unclear; the dust has still to settle. But few movements have the lasting impact of the independence struggle led by Gandhi in India or the Civil Rights Movement associated with Martin Luther King in the United States. Nonetheless, the numbers involved in the protests of 2011 were greater and the connections to previous and iconic instances of dissent seemed, to at least some participants and observers, relatively clear. When touring America’s occupation sites in early November Jesse Jackson made an explicit link. “All of it is occupying for economic justice.” The fact that the core issues at stake were economic, rather than matters of racial, gender or national rights, was not in Jackson’s view a fundamental barrier to a comparison with the Civil Rights Movement. “Dr. King’s last act on earth was to come to Washington and to occupy the mall and put the focus on economic justice. He was willing to go to jail and engage in civil disobedience to keep that focus on.”14

However, by appealing not simply to protest but more specifically to civil disobedience, Jackson was rejecting an influential view of the latter, a view that it is, by definition, protest over fundamental liberties and not over economic matters. This is a view associated with the political philosopher John Rawls, an exclusion based upon the claim that “civil disobedience cannot be grounded solely upon group or self-interest.”15 Economic protest over austerity and inequality may smack too much of low motivation rather than the idealism that we have retrospectively come to associate with paradigmatic instances of civil disobedience. However, the reasons for excluding protests with an economic focus are inconclusive. Many protests over economic issues are, as Jesse Jackson indicated, protests over a specific form of injustice rather than a sheer lack of funds. And Jackson was absolutely right about King’s view on this matter. His final year was spent in an attempt to extend the Civil Rights protests into a Poor People’s Campaign for economic justice in the cities of the North (a campaign which split King and Jackson at the time).16
was the apparent economic injustice that was built into British rule, injustice that allowed Gandhi to help build a coalition spanning the poor and those who were wealthy but nonetheless economically disadvantaged by British rule.

However, there are other and perhaps better reasons to be cautious about claiming that the non-violent protests of 2011 involved civil disobedience on a mass scale. The protests were in large measure direct against the banks and against the interlocked cluster of financial interests on Wall Street. These are private institutions, albeit private institutions which are tied at a thousand points to the State. For Joseph Raz, the single most influential philosopher of law who tackles the subject of civil disobedience, such protest against private institutions is excluded. The target of civil disobedience has to be the State itself. Yet even if we were to buy into this highly restrictive claim, challenges to large private institutions such as banks, or logging companies (in the case of eco-protest), or pharmaceuticals corporations (in the case of animal rights activism) involves a dual challenge, to the private bodies and agents in question and to the State and the legislation which permits their unjust and damaging actions. This was similarly the case with Occupy Wall Street and with the Occupy Movement more generally. In this respect, the actions of protestors differed from those of militant trade unionists who often do engage in a more strictly economic struggle against private employers. Even though actions of the latter sort may be justified, they present a better case for the Raz exclusion because their political dimension may be slight. This is not a point against militant trade unionism, it is a point about the limits of economic struggle, limits pointed out by Lenin in well-known political text over a century ago.

It may also be worth noting that when, after some criticism, Jesse Jackson again associated the Occupy Movement with a paradigmatic civil disobedience movement, he did so more cautiously. Addressing the protestors outside St Paul’s Cathedral in London in December 2011, he downplayed the appeal to civil disobedience in favor of an appeal to the “occupier.” According to Jackson, Jesus, Gandhi, Martin Luther King and Nelson Mandela were all “occupiers.” His terminological shift, although slightly difficult to fit with the actions of the political figures in question, indicated sensitivity to the dangers of dragging a new movement backwards with ideas that had long since ceased to be associated with significant positive results. This may be a more plausible reason for caution about a classification of the Occupy Movement protests as instances of civil disobedience. It is at least a better reason than any appeal to the blanket Rawlsian refusal to accept that civil disobedience can focus upon economic issues or the related Razian claim that civil disobedience must target the State.

There may be further grounds for caution. Even if we take a comparatively minimal view of what civil disobedience involves, i.e. non-violent but principled law-breaking, it may be pointed out that from Spain to London,
and from San Francisco to Zuccotti Park, there was sporadic violence. Such violence, albeit at a low level, could hardly be avoided given the movement’s scale and diversity, not to mention its refusal to sanction any disciplining leadership. As at Seattle a decade earlier, there was also, from the beginning, the organized presence of anarchists who positively favored violent confrontation with the police but who were torn by conflicting impulses: a reluctance to separate themselves off from the mass of protestors and at the same time a commitment to the idea of transgressive violence as a way of breaking personal and political boundaries, a view which goes back to Bakunin and George Sorel.21

If this was civil disobedience on a mass scale, it was also civil disobedience that did not presuppose any general commitment to pacifism or to the rejection of violence as a point of principle. Manuel Castells may have tried to make the shift from an appeal based upon tactical advantage to an appeal based upon principle, but overall the Occupy Movement could only be regarded as civil disobedience by virtue of being mostly or up to a point non-violent, or civil disobedience in spite of sporadic incidents where confrontation with the police took a familiar turn. Here we may wonder about whether it is best to focus upon the general pattern of events or upon the exceptions. Jesse Jackson focused upon the big picture and the overall mood. His critics, notably Alveda King (Martin Luther King’s niece), focused upon the exceptions. “I believe that Rev. Jackson is doing a disservice. My uncle, the whole civil rights movement, was founded in prayer, in crying out to God in a peaceful movement. And this Occupy movement is not peaceful.”22 The claim was echoed by Washington Police Chief, Cathy Lanier on the eve of the camp clearances: “Demonstrators have become increasingly confrontational and violent toward uninvolved bystanders and motorists. Demonstrators have also jeopardized the safety of their own children by using them in blockades.”23

Of course, we do not need to accept Lanier’s words at face value. And to some extent her two claims cut across each other. It is hardly likely that parents would involve their own children if the level of violence was both significant and rising. Although there have been occasional historic exceptions to this, most notably the Civil Rights Movement which, with King’s reluctant and then enthusiastic support, marched hundreds of schoolchildren into the streets, and from there straight to jail cells, when it ran out of adult activists.24 Even so, the continued presence of children at protests is generally an indication of a broadly unthreatening and family-friendly atmosphere. Similar claims about rising occupier violence were renewed following the November clearances which involved co-ordinated violence by the police. (Without such violence, the more determined protestors simply would not have moved.) On reflection, it may seem implausible that untrained protestors with varying backgrounds and differing commitments would have responded to the widespread use of kettling and pepper
spray by always refusing to be provoked. In response to the claims of rising violence, disputed and politically motivated though they may have been, some of the occupier assemblies did agree upon a requirement that participants make pledges of non-violence. And this may be taken as an indication that the charge was plausible enough to require rebutting.

It is at least arguable that what the critics of the movement were playing upon was no sudden reversion to a model of violent protest, but rather a discrepancy between an ideal of protest and the more complex and mixed reality that invariably exists on the ground. Alveda King did not just appeal to the Civil Rights Movement, but rather to an idealization of the latter, one that the Occupy Movement could not hope to match but one that also set aside, even ignored, significant aspects of how Civil Rights activists and supporters actually behaved. It is easy to forget that mobilization by the latter required co-operation between a variety of groups, some of whom were not committed to non-violence in the way that King was. And even for King’s own supporters, tolerance had its limits. Jackson’s account of King’s final act on the earth rather telescopes matters. His final political act was to return from Washington to Memphis in order to continue his support for a group of striking black dustmen who had been galvanized into action by low pay, poor safety standards and the death of two colleagues in the back of a garbage truck. King returned in spite of the unease of colleagues and in spite of the violence which had broken out at a march only days earlier (causing extensive property damage and leaving one 16-year-old protestor dead).25

Similarly, while leading a civil disobedience movement during the latter years of the struggle for Indian independence. Gandhi may have managed to secure a formal separation between official participants in satyagraha (non-violent spiritual protest) and the larger undisciplined crowds who supported them, but this formal separation did not alter the fact that there were scuffles, low-level violence and sometimes not-so-low-level violence wherever he went. This was the price of extensive popular mobilization.

More plausibly, we may pick up on Jesse Jackson’s concern in London about inappropriate labelling and question whether a claim of civil disobedience does justice to the Occupy Movement. Bernard Harcourt, a radically inclined professor of law at the University of Chicago, writing in the New York Times and sensitive to some of the same problems as Jesse Jackson, raised a more sympathetic objection to the classification, proposing instead that the Occupy Movement was an instance of “political disobedience.” According to Harcourt, civil disobedience involves—or rather involved (with a setting in the past tense)—breaking the laws enacted by some institution while accepting the authority of the institution. “Civil disobedience accepted the legitimacy of political institutions, but resisted the moral authority of resulting laws. Political disobedience, by contrast, resists the very way in which we are governed: it resists the structure of partisan