FOUR

Civil Disobedience and Nuclear Protest

THIS DISCUSSION of civil disobedience was prepared for a conference on that subject organized by the Social Democratic Party of Germany in Bonn. The idea is a new one for most German audiences. They know that civil disobedience has been much canvassed in what they call the Anglo-American tradition; accordingly, I was asked to describe the shape the discussion has taken in Britain and the United States. Actually the history of the idea has been somewhat different in those two countries. The United States suffered a long series of political divisions that made the dilemmas of legality particularly acute. Slavery was the first issue to produce a philosophical literature, a national debate. Before the American Civil War, Congress enacted the Fugitive Slave Act, which made it a crime for Northerners to help escaped slaves avoid the slavecatchers; many people violated that law because their consciences would not permit them to obey it. Religious sects generated a second and rather different crisis of compliance. Jehovah's Witnesses, for example, are forbidden by their faith to salute a flag, and the laws of many states required schoolchildren to begin each day by saluting the American flag. The refusal of the Witnesses to obey this law provoked some of the most important Supreme Court decisions in our constitutional history, but their acts were first seen, and judged, as acts of civil disobedience.

Europeans are certainly familiar with the more recent occasions of disobedience in the United States. Martin Luther King, Jr., is honored throughout the world. He led a campaign of disobedience against the Jim Crow laws that perpetuated, against his race, the badges of slavery a century after the Civil War had been won. This civil rights movement flowed into and merged with a great river of protest against the American involvement in Vietnam. The war provoked some of the most violent chapters of civil disobedience in American history and much of the most interesting philosophical literature on that subject.

The English history of civil disobedience in recent times is slimmer. One thinks of Bertrand Russell in jail for pacifism and, behind that, of the suffragettes and the early days of the labor movement. But these did not provide any sustained national debate about the principles of civil disobedience; in any case, debates about principle are less common in Britain, less compatible with the temper of British life and politics. Just now, however, Britain, along with the rest of Western Europe and the United States as well, has a new occasion of civil disobedience in the vexed and frightening question whether American nuclear weapons should be deployed in Europe.

Much of the philosophical literature I just mentioned seems on the surface excessively terminological. Political philosophers have devoted a great deal of attention to the definition of civil disobedience, to the question of how it is different from other kinds of politically motivated criminal activity. These exercises are terminological only on the surface, however. They aim to discover differences in the moral quality of different kinds of acts in different kinds of situations. Distinctions are of the essence here; we will lose sight of them in the heat of practical decision and judgment unless they are etched in the theory through which we see the political world.

Civil disobedience, whatever further distinctions we might want to make within that general category, is very different from ordinary criminal activity motivated by selfishness or anger or cruelty or madness. It is also different—this is more easily overlooked—from the civil war that breaks out within a territory when one group challenges the legitimacy of the government or of the dimensions of the political community. Civil disobedience involves those who do not challenge authority in so fundamental a way. They do not think of themselves—and they do not ask others to think of them—as seeking any basic rupture or constitutional reorganization. They accept the fundamental legitimacy of both government and community; they act to acquit rather than to challenge their duty as citizens.

If we think of civil disobedience in that general way, abstracting from the further distinctions I am about to make, we can say something now we could not have said three decades ago: that Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community. Few Americans now either deplore or regret the civil rights and antiwar movements of the 1960s. People in the center as well as on the left of politics give the most famous occasions of civil disobedience a good press, at least in retrospect. They concede that these acts did engage the collective moral sense of the community. Civil disobedience is no longer a frightening idea in the United States.

WHAT KIND of theory of civil disobedience do we want? If we want it to be robust rather than empty, we must avoid a tempting shortcut. Civil disobedience is a feature of our political experience, not because some people are

virtuous and other wicked, or because some have a monopoly of wisdom and others of ignorance. But because we disagree, sometimes profoundly, in the way independent people with a lively sense of justice will disagree, about very serious issues of political morality and strategy. So a theory of civil disobedience is useless if it declares only that people are right to disobey laws or decisions that are wicked or stupid, that the rightness of the disobedience flows directly from the wrongness of the law. Almost everyone will agree that *if* a particular decision is very wicked, people should disobey it. But this agreement will be worthless in particular, concrete cases, because people will then disagree whether the law is that wicked, or wicked at all.

We must accept a more difficult assignment. We must try to develop a theory of civil disobedience that can command agreement about what people should actually do, even in the face of substantive disagreement about the wisdom or justice of the law being disobeyed. But that means that we must be careful *not* to make the rightness of any decision about civil disobedience depend on which side is right in the underlying controversy. We must aim, that is, to make our judgments turn on the kinds of convictions each side has, rather than the soundness of these convictions. We might call a theory of that type a *working* theory of civil disobedience.

The key to our success lies in the following distinction. We must ask two different questions and insist on their independence. The first is this: What is the right thing for people to do *given* their convictions, that is, the right thing for people who believe that a political decision is wrong or immoral in a certain way? The second is: How should the government react if people do break the law when that is, given their convictions, the right thing to do, but the majority the government represents still thinks the law is sound? These questions have the formal structure we need to produce a robust theory, because people can, in principle, answer them the same way on any particular occasion even though they disagree about the merits of the underlying political controversy. Those in the majority can ask themselves, in the spirit of the first question, "What would be the right thing for us to do if we had their beliefs?" Those in the minority can ask, in the spirit of the second, "What would be the right thing for us to do if we had political power and the majority's beliefs?" So we can at least hope to find rough agreement about the best answers to these questions, even though we lack consensus about the substantive moral and strategic convictions in play.

WHEN WE TAKE up the first question—about the right thing for people to do who believe laws are wrong—everything depends on which general *type* of civil disobedience we have in mind. I have so far been speaking as if the famous acts of civil disobedience I mentioned all had the same motives and

circumstances. But they did not, and we must now notice the differences. Someone who believes it would be deeply wrong to deny help to an escaped slave who knocks at his door, and even worse to turn him over to the authorities, thinks the Fugitive Slave Act requires him to behave in an immoral way. His personal integrity, his conscience, forbids him to obey. Soldiers drafted to fight in a war they deem wicked are in the same position. I shall call civil disobedience by people in that circumstance "integrity-based."

Contrast the moral position of the blacks who broke the law in the civil rights movement, who sat at forbidden lunch counters seeking the privilege of eating greasy hamburgers next to people who hated them. It would miss the point to say they were there in deference to conscience, that they broke the law because they could not, with integrity, do what the law required. No one has a general moral duty to seek out and claim rights that he believes he has. They acted for a different reason: to oppose and reverse a program they believed unjust, a program of oppression by the majority of a minority.[1] Those in the civil rights movement who broke the law and many civilians who broke it protesting the war in Vietnam thought the majority was pursuing its own interests and goals unjustly because in disregard of the rights of others, the rights of a domestic minority in the case of the civil rights movement and of another nation in the case of the war. This is "justice-based" civil disobedience.

These first two kinds of civil disobedience involve, though in different ways, convictions of principle. There is a third kind which involves judgments of policy instead. People sometimes break the law not because they believe the program they oppose is immoral or unjust, in the ways described, but because they believe it very unwise, stupid, and dangerous for the majority as well as any minority. The recent protests against the deployment of American missiles in Europe, so far as they violated local law, were for the most part occasions of this third kind of civil disobedience, which I shall call "policy-based." If we tried to reconstruct the beliefs and attitudes of the women of Greenham Common in England, or of the people who occupied military bases in Germany, we would find that most—not all but most—did not believe that their government's decision to accept the missiles was the act of a majority seeking its own interest in violation of the rights of a minority or of another nation. They thought, rather, that the majority had made a tragically wrong choice from the common standpoint, from the standpoint of its own interests as much as those of anyone else.[2] They aim, not to force the majority to keep faith with principles of justice, but simply to come to its senses.

There is an obvious danger in any analytic distinction that rests, as this one does, on differences between states of mind. Any political movement or group will include people of very different beliefs and convictions. Nor will any one person's convictions necessarily fall neatly into a prearranged cate-

gory. Most of those who protested against the American war in Vietnam, for example, believed their government's policy was *both* unjust and stupid. Nevertheless, the distinction among types of civil disobedience (and the further distinctions I shall draw) are useful and important, because they allow us to ask hypothetical questions in something like the following way. We can try to identify the conditions under which acts of civil disobedience would be justified if the beliefs and motives of the actors were those associated with each type of disobedience, leaving as a further question whether the beliefs in play on a particular occasion might plausibly be thought to be or include beliefs of that sort.

Consider in that spirit the first type of civil disobedience, when the law requires people to do what their conscience absolutely forbids. Almost everyone would agree, I think, that people in this position do the right thing, given their convictions, if they break the law. Of course, violence and terrorism cannot be justified in this way. If someone's conscience will not let him obey some law, neither should it let him kill or harm innocent people. But it is hard to think of any other qualifications a working theory would have to recognize here. It could not, for example, add the further and tempting qualification that a citizen must have exhausted the normal political process so long as this offers any prospect of reversing the political decision he opposes. Integrity-based disobedience is typically a matter of urgency. The Northerner who is asked to hand over a slave to the slave-catcher, even the schoolchild asked once to salute the flag, suffers a final loss if he obeys, and it does not much help him if the law is reversed soon after. Another qualification is more plausible. A theory might insist that an actor must take consequences into account and not break the law if the likely result will be to make the situation not better but worse according to his own lights. But this consequentialist caution would be far from uncontroversial. Should someone kill innocent civilians in Vietnam or help return a slave to captivity just because, if he breaks the law instead, he will help produce a backlash that will kill more civilians and keep more people in slavery than if he had obeyed the law? Perhaps people have a moral privilege to refuse to do evil even when they know that as a result more evil will be done. This possibility is in fact now much discussed in moral philosophy.

Turn now, still with the first of our two main questions in mind, to justice-based disobedience like the civil rights movement and many of the civilian protests against the war in Vietnam. When are people right to break the law in order to protest political programs they believe unjust? We should begin, once again, by conceding that civil disobedience is at least sometimes justified in these circumstances. But our conditions will now be much more stringent. We would certainly insist on the condition we rejected for integrity-based disobedience. People must exhaust the normal political process, seeking to have the program they dislike reversed by constitutional means; they must not break the law until these normal political means no longer hold out hope of success. We would also insist on the further, consequentialist condition I said was problematic for integrity-based disobedience, which seems essential and straightforward now. Someone whose justification for breaking the law is, "But I'm doing it to reverse an immoral policy," has no good reply to the objection, "You're simply promoting that policy through what you do."

These two further conditions reflect an important difference between the first two types of disobedience. Integrity-based disobedience is defensive: it aims only that the actor not do something his conscience forbids. Justice-based disobedience is, in contrast, instrumental and strategic: it aims at an overall goal—the dismantling of an immoral political program. So consequentialist qualifications appear in our theory of the latter that are out of place in any theory of the former. And a new distinction becomes imperative. Justice-based disobedience might use two main strategies to achieve its political goals. We might call the first a persuasive strategy. It hopes to force the majority to listen to arguments against its program, in the expectation that the majority will then change its mind and disapprove that program. The second strategy, then, is nonpersuasive. It aims not to change the majority's mind, but to increase the cost of pursuing the program the majority still favors, in the hope that the majority will find the new cost unacceptably high. There are many different forms of nonpersuasive strategy—many different ways of putting up the price—and some of them are more attractive, when available, than others. A minority may put up the price, for example, by making the majority choose between abandoning the program and sending them to jail. If the majority has the normal sympathies of decent people, this nonpersuasive strategy may be effective. At the other extreme lie nonpersuasive strategies of intimidation, fear, and anxiety, and in between strategies of inconvenience and financial expense: tying up traffic or blocking imports or preventing official agencies or departments from functioning effectively or functioning at all.

Obviously, persuasive strategies improve the justification for justice-based disobedience. But they do so only when conditions are favorable for their success. Conditions were indeed favorable for the civil rights movement in the United States in the 1960s. The rhetoric of American politics had for some decades been freighted with the vocabulary of equality, and the Second World War had heightened the community's sense of the injustice of racial persecution. I do not deny that there was and remains much hypocrisy in that rhetoric and alleged commitment. But the hypocrisy itself provides a lever for persuasive strategies. The majority, even in the South, blushed when it was forced to look at its own laws. There was no possibility of a political majority saying, "Yes, that is what we're doing. We're treating one section of the community as inferior to ourselves." And then turning

aside from that with equanimity. Civil disobedience forced everyone to look at what the majority could no longer, for a variety of reasons, ignore. So minds were changed, and the sharpest evidence of the change is the fact that halfway through the battle the law became an ally of the movement rather than its enemy.

Sometimes, however, persuasive strategies offer no great prospect of success because conditions are far from favorable, as in, perhaps, South Africa. When, if ever, are nonpersuasive strategies justified in justice-based disobedience? It goes too far, I think, to say they never are. The following carefully guarded statement seems better: If someone believes that a particular official program is deeply unjust, if the political process offers no realistic hope of reversing that program soon, if there is no possibility of effective persuasive civil disobedience, if nonviolent nonpersuasive techniques are available that hold out a reasonable prospect of success, if these techniques do not threaten to be counterproductive, then that person does the right thing, given his convictions, to use those nonpersuasive means. This may strike some readers as excessively weak; but each of the qualifications I listed seems necessary.

I come finally to policy-based civil disobedience: when the actors seek to reverse a policy because they think it dangerously unwise. They believe the policy they oppose is a bad policy for everyone, not just for some minority; they think they know what is in the majority's own interest, as well as their own, better than the majority knows. Once again we can distinguish persuasive from nonpersuasive strategies in this new context. Persuasive strategies aim to convince the majority that its decision, about its own best interests, is wrong, and so to disfavor the program it formerly favored. Nonpersuasive strategies aim rather to increase the price the majority must pay for a program it continues to favor.

The distinction between persuasive and nonpersuasive strategies is even more important in the case of policy-based than justice-based disobedience, because it seems problematic that nonpersuasive strategies could ever be justified in a working theory of the former. In order to see why, we must notice a standing problem for any form of civil disobedience. Most people accept that the principle of majority rule is essential to democracy; I mean the principle that once the law is settled, by the verdict of the majority's representatives, it must be obeyed by the minority as well. Civil disobedience, in all its various forms and strategies, has a stormy and complex relationship with majority rule. It does not reject the principle entirely, as a radical revolutionary might; civil disobedients remain democrats at heart. But it claims a qualification or exception of some kind, and we might contrast and judge the different types and strategies of disobedience in combination, by asking what kind of exception each claims, and whether it is consistent to demand that exception and still claim general allegiance to the principle as a whole.

Persuasive strategies, whether they figure in justice-based or policy-based disobedience, have a considerable advantage here. For someone whose goal is to persuade the majority to change its mind, by accepting arguments he believes are sound arguments, plainly does not challenge the principle of majority rule in any fundamental way. He accepts that in the end the majority's will must be done and asks only, by way of qualification or annex to this principle, that the majority be forced to consider arguments that might change its mind even when it seems initially unwilling to do so. Nonpersuasive strategies lack this explanation, and that is why, particularly in a democracy, they are always inferior from a moral point of view. But when nonpersuasive strategies are used, subject to the conditions I listed, in justice-based disobedience, they can at least appeal to a standing and well-understood exception to the majority-rule principle, not only in the United States but in Germany and many other countries as well. I mean the exception assumed by the constitutional power of judges to hold acts of the majority's representatives void when, in the judge's view, these decisions outrage the principles of justice embedded in the Constitution. That power assumes that the majority has no right to act unjustly, to abuse the power it holds by serving its own interests at the expense of a minority's rights. I do not claim that judicial review by a constitutional court is a kind of nonpersuasive civil disobedience. But only that judicial review rests on a qualification to the principle of majority rule—the qualification that the majority can be forced to be just, against its will—to which nonpersuasive strategies might also appeal in order to explain why their challenge to majority rule is different from outright rejection of it.

Policy-based disobedience cannot make that appeal, because the standing qualification I just named does not extend to matters of policy. Once it is conceded that the question is only one of the common interest—that no question of distinct majority and minority interests arises—the conventional reason for constraining a majority gives way, and only very dubious candidates apply for its place. Someone who hopes not to persuade the majority to his point of view by forcing it to attend to his arguments, but rather to make it pay so heavily for its policy that it will give way without having been convinced, must appeal to some form of elitism or paternalism to justify what he does. And any appeal of *that* form does seem to strike at the roots of the principle of majority rule, to attack its foundations rather than simply to call for an elaboration or qualification of it. If that principle means anything, it means that the majority rather than some minority must in the end have the power to decide what is in their common interest.

So nonpersuasive means used in policy-based disobedience seems the least likely to be justified in any general working theory. I said earlier that most of those who sit in and trespass to protest the deployment of nuclear missiles in Europe have motives that make their disobedience policy-based. It is therefore important to consider whether they can plausibly consider

the means they use to be persuasive means, and this in turn depends on whether conditions are sufficiently favorable for success of a persuasive strategy. The contrast between the civil rights movement and the antinuclear movement is in this respect reasonably sharp. It was obvious early in the civil rights movement that the sit-ins and other techniques of disobedience had persuasive force, because it was obvious that the issue was an issue of justice and that the movement had rhetorical tradition as well as justice on its side. It was only necessary to force enough people to look who would be ashamed to turn away. The questions of policy at the bottom of the nuclear controversy are, by contrast, signally complex. It is plainly not obvious, one way or the other, whether deployment of missiles in Europe is more likely to deter or provoke aggression, for example, or even what kind of an argument would be a good argument for either view. It is hard to see in these circumstances how discussion could be illuminated or debate strengthened by illegal acts. On the contrary, such acts seem likely to make the public at large pay *less* attention to the complex issues on which any intelligent view must be based, because it will think it has at least one simple and easy-to-understand reason for sticking with the policy its leaders have adopted: that any change in that policy would mean giving way to civil blackmail.

If this is right, those who now support trespass and other illegal acts as protest against nuclear policy must, if they are honest with themselves, concede that they have in mind a nonpersuasive strategy. They aim to raise the price of a policy they believe a tragic mistake, to make that price so high that the majority will yield, though this means surrendering to minority coercion. So they must face the question I said is highly problematic, whether a robust working theory could justify that kind of disobedience. It might be helpful to consider whether we would think nonpersuasive means proper as acts of disobedience protesting other, non-nuclear policies many people think gravely mistaken. Would nonpersuasive disobedience be justified against bad economic policy? The governments of the United States and Britain are now following economic policies that I think unwise because they will work against the general interest in the long as well as the short run. I also think, as it happens, that these economic policies are unjust; even if they were in the best interests of the majority, they would still be unfair to a minority that has rights against that majority. But I mean to set that further claim of injustice aside for this argument and assume only that many people like me think monetarist policy bad from everyone's point of view. Would the fact that we believed this justify illegal acts whose point was to impose so high a price, in inconvenience and insecurity, that the majority would abandon its economic policy, though it remained convinced that it was the best policy?

I think the answer is no. But of course the risks of bad nuclear strategy are

vastly greater than the risks of mistaken economic policy. Does the fact that so much more is at stake destroy the analogy? Jürgen Habermas has argued that political legitimacy is threatened when decisions of enormous consequence are taken though only something like a bare or thin majority supports the decision.[3] Can we justify nonpersuasive civil disobedience against the decision to accept the missiles by appealing to that principle? The difficulty is evident. For exactly the same principle would argue against government's deciding *not* to deploy the missiles. That is as much a decision as the decision to adopt them, and it appears from recent polls that it would not command even a bare majority much less the extraordinary majority Habermas' principle would require. The present controversy, in short, is symmetrical in a way that undermines the value of his principle. Those who oppose the missiles believe that deployment will cause irreparable harm because it threatens the very existence of the community. But that is exactly what people on the other side—and we are assuming that there are slightly more of these—would think about a decision not to deploy the missiles. They think that this decision would make nuclear war more likely, and threaten the existence of the community. So no government violates any principle of legitimacy in accepting missiles that it would not have violated by rejecting them.

We cannot be dogmatic that no argument, better than I have been able to construct, will be found for civil disobedience in these circumstances. We are justified only in the weaker conclusion that those who advocate this form of disobedience now have the burden of showing how a working theory could accept it. They may say that this challenge is irrelevant; that nice questions about which justifications could be accepted by all sides to a dispute become trivial when the world is about to end. There is wisdom in this impatience, no doubt, which I do not mean to deny. But once we abandon the project of this essay, once we make the rightness of what we do turn entirely on the soundness of what we think, we cannot expect honor or opportunity from those who think it is we who are naive and stupid.

I HAVE BEEN SPEAKING, so far, entirely about the first of the two main questions I distinguished at the outset. When do people who oppose a political decision do the right thing, given their convictions, to break the law? I shall be briefer about the second question. Suppose we are satisfied, by our consideration of the first question, that someone has done the right thing, given his convictions, in acting illegally. How should the government react to what he has done? We must avoid two crude mistakes. We must not say that if someone is justified, given what he thinks, in breaking the law, the government must never punish him. There is no contradiction, and often much sense, in deciding that someone should be punished in spite of the fact

that he did exactly what we, if we had his beliefs, would and should have done. But the opposite mistake is equally bad. We must not say that if someone has broken the law, for whatever reason and no matter how honorable his motives, he must always be punished because the law is the law. Lawyers, even very conservative lawyers, rarely repeat that mindless maxim any more, because they know that in most countries people known to have committed a crime are sometimes, and properly, not prosecuted. The idea of prosecutorial discretion—across a wide range of crimes and sensitive to a wide variety of reasons for not prosecuting—is a fixture of modern legal theory.

When should the government stay its hand? Utilitarianism may be a poor general theory of justice, but it states an excellent necessary condition for just punishment. Nobody should ever be punished unless punishing him will do some good on the whole in the long run all things considered. Obviously that is not a sufficient condition for punishment. But it is a necessary condition, and it will sometimes condemn a decision to prosecute civil disobedience. I believe the German police made the right decision at Mitlangen, for example, when they ignored illegal acts of protest. It probably would have done more harm than good to arrest and prosecute the offenders.

Once we reject these two crude and mistaken claims—that it is always wrong to prosecute and always right to do so—we face a more difficult issue. Suppose it would do some good to punish someone who has broken the law out of conscience; suppose this would deter similar acts and so make life more peaceful and efficient for the majority. Could it nevertheless be proper not to punish him simply because his motives were better than the motives of other criminals? That suggestion sounds elitist to many people. But once we have answered our first question by acknowledging that someone does the right thing in breaking the law, given his conviction that the law is unjust, it seems inconsistent not also to acknowledge this as a reason that prosecutors may and should take into account in deciding whether to prosecute, even when the utilitarian test is met.[4] And as a reason for punishing someone more leniently who has been tried and convicted. It is a reason, that is, that can properly figure in the balance, along with the competing utilitarian reasons for punishing. These competing reasons may be very strong, and in that case they will outweigh the fact that the accused acted out of conscience. That is why it goes too far to say that people who do the right thing, given their convictions, should never be punished for doing it.

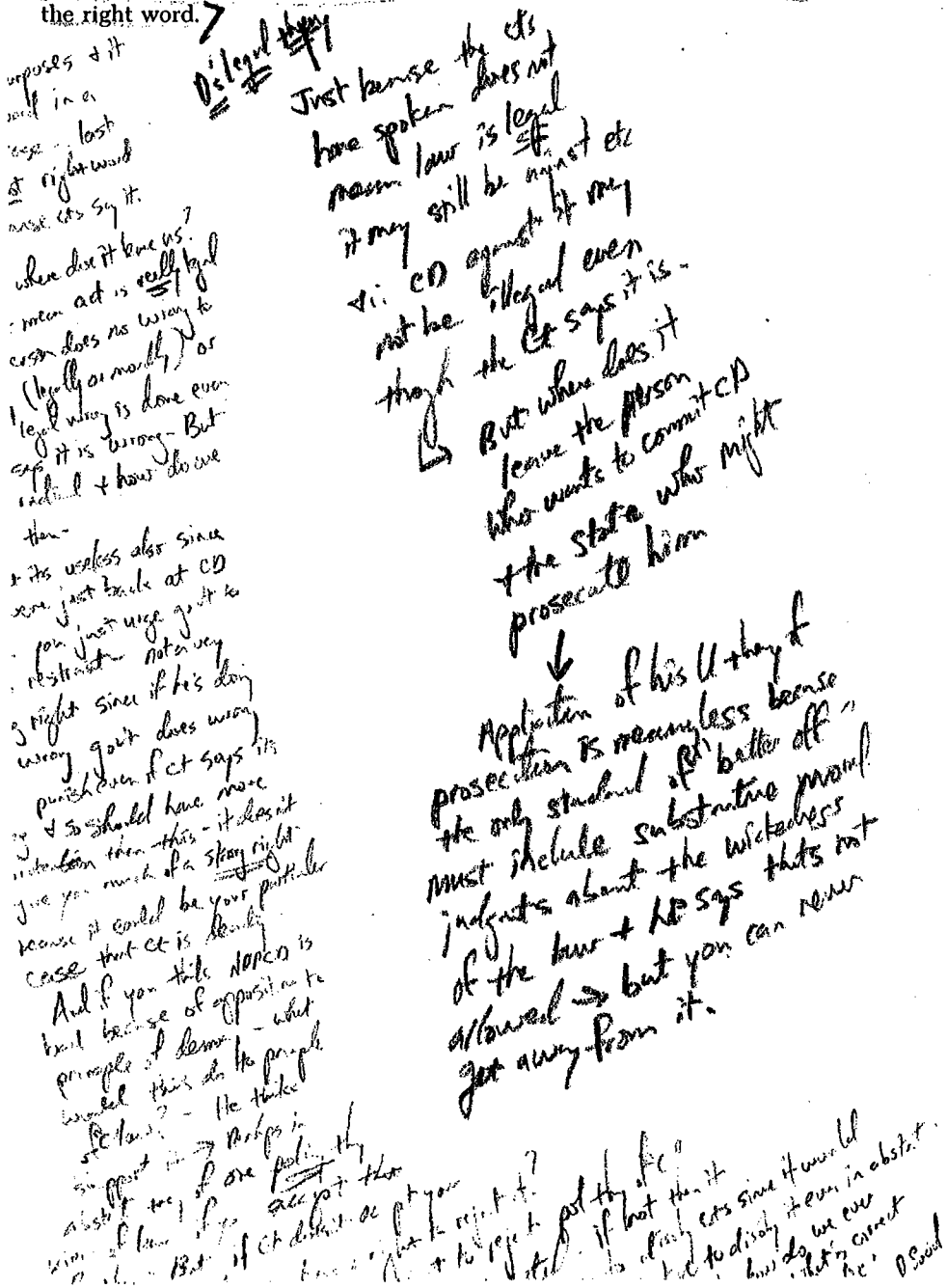
I have two final points. The first is the mirror image of the issue just discussed. Should people who act out of civil disobedience court punishment or even demand to be punished? My own view is very simple. I think Socrates was wrong in thinking that civil disobedience is incomplete, is in some way false, without punishment, without the actor presenting himself and

saying, "I have broken the law of our community; punish me." I see the appeal of that view, its dramatic appeal, but it seems to me mistaken and confused. It cannot be sound, for a start, when we are considering integrity-based disobedience. Someone who refused to aid slavecatchers or to fight a war he thinks immoral serves his purpose best when his act is covert and is never discovered. Punishment may of course be part of the strategy when disobedience is justice- or policy-based. Someone may wish to be punished, for example, because he is following the nonpersuasive strategy I mentioned, forcing the community to realize that it will have to jail people like him if it is to pursue the policy he believes wrong. But we should not confuse that instrumental argument for accepting punishment with any moral or conceptual requirement of submission to it. If an act of civil disobedience can achieve its point without punishment, then this is generally better for all concerned.

My final point is an important qualification to the argument as a whole. I have been assuming throughout this essay that the acts we all have in mind as acts of civil disobedience really are violations of the law of the pertinent jurisdiction properly understood. But it may turn out that on a more sophisticated and enlightened view of that law they are not. Habermas and others have stressed the ambiguity between legality and legitimacy, pointing out the ways in which these might be opposed ideas. In the United States and Germany, whose constitutions recognize abstract political rights as legal rights also, there will be an inevitable further area of ambiguity about what the law is. Several years ago I argued that the Constitution of the United States, properly understood, might actually sanction acts that were then generally considered acts in violation of law.[5] It would not surprise me if arguments of the same character were available about German law now, and I know that the constitutional lawyers of that country have considered the possibility. Nothing much will come of it, however, unless we are careful to notice one final distinction often overlooked in legal theory.

We must decide whether this argument, that acts considered acts of civil disobedience are actually protected by the Constitution, is still available once the courts have ruled that these acts are not, in their view, protected in that way. We are all too familiar with the aphorism that the law is what the courts say it is. But that might mean two very different things. It might mean that the courts are always right about what the law is, that their decisions create law so that, once the courts have interpreted the Constitution in a particular way, that is necessarily for the future the right way to interpret it. Or it might mean simply that we must obey decisions of the courts, at least generally, for practical reasons, though we reserve the right to argue that the law is not what they have said it is. The first view is that of legal positivism. I believe it is wrong, and in the end deeply corrupting of the

idea and rule of law. The argument I urge lawyers of Germany to take up, that the law properly understood might support what we call civil disobedience, can be an effective argument only when we reject this aspect of positivism and insist that, though the courts may have the last word in any particular case about what the law is, the last word is not for that reason alone the right word.



PART TWO

Law as Interpretation