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# Breaking the Law! Conditions for and Perception of Civil Disobedience by Democratic Citizens

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**Breaking the Law! Conditions for and Perception of Civil Disobedience  
by Democratic Citizens**

**Adam Stanley**

**Senior Thesis**

**Submitted in partial fulfillment of the graduation requirements  
of the Westover Honors Program**

**Westover Honors Program**

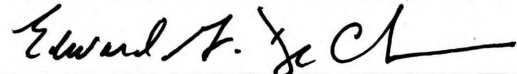
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## Table of Contents

<b>Abstract.....</b>	<b>i</b>
<b>Introduction.....</b>	<b>1</b>
<b>Literature Review.....</b>	<b>3</b>
<b>Hypothesis.....</b>	<b>15</b>
<b>Results.....</b>	<b>22</b>
<b>Case I .....</b>	<b>22</b>
<b>Case II.....</b>	<b>30</b>
<b>Case III.....</b>	<b>36</b>
<b>Analysis.....</b>	<b>41</b>
<b>Conclusion.....</b>	<b>45</b>
<b>Works Cited.....</b>	<b>54</b>

## **Abstract**

### **Breaking the Law! Conditions for and Perception of Civil Disobedience by Democratic Citizens**

This paper examines actions of civil disobedience and the laws relevant to those actions. Each case study was tested against an operational definition of civil disobedience to see if these actions could be considered a legitimate expression of civil disobedience. The legitimacy of the laws was assessed through the use of two competing legal philosophies of H. L. A. Hart and Ronald Dworkin. Then, the public's opinion of civil disobedience was measured through the use of polls and survey data. The results showed that the three cases did follow the guidelines of civil disobedience established by the literature, but the legal analysis split on many cases with Hart's legal positivism approving of the laws that Dworkin's moral dimension considered illegitimate. Also, the public opinion did not support the actions of civil disobedience in any of the three cases. It would seem that the public is more willing to support actions that are deemed legal than to support actions that are illegal but may be morally right.

### **Introduction of Research Question:**

It was a long and hard day for the working people of Montgomery, Alabama on December 1, 1955. It was that time of the day where people from all walks of life returned home to enjoy the remainder of their day spent working towards achieving the American dream. The mass-transit system for the city of Montgomery was getting crowded, and the white section of a segregated bus had filled. The driver, through accepted practice and authorized by the City Code of Montgomery, wanted seats from the black section to be vacated so that a white person would not be required to stand. All those people who were asked to give up their seats acquiesced except for one single African-American woman. She defied the order and was arrested for refusing to cede her seat to a white man. That woman was Rosa Parks and her act of civil disobedience has propelled her to national fame.

Civil disobedience, unlike violent forms of resistance of revolution or armed rebellion, is the practice of peacefully violating the law. One can find an abundance of examples throughout American history of this phenomenon. There was a time in the United States when women did not have suffrage, but peaceful protest and illegal voting brought women the legal right to vote. Civil disobedience continued in America during the 1950's and 1960's, the decades that saw the passing of landmark civil rights legislation to reduce discrimination against African-Americans. This campaign of civil disobedience brought figures such as Rosa Parks and Martin Luther King, Jr. to national attention. These individuals were arrested, in some cases, for these acts of civil disobedience, but that did not stop their drive to correct the inequality of the laws. Then there is the case of the Vietnam War protesters, from the late 1960's and early 1970's, who burned their draft cards. Finally, in 2004, San Francisco Mayor Gavin Newsom issued same-sex marriage licenses despite the laws of California. So when should the democratic citizen resort to acts of

civil disobedience to challenge the standing laws over more traditional methods of voicing their opinions for change such as communicating with their representatives, lobbying, or even voting?

The resistance to laws in societies does not reflect that these societies cannot maintain law and order, but rather that the laws governing the society may disgruntle certain populations because the laws might not be fair or they could be unjust. However, a claim that a law is unjust is subjective until an objective test can be constructed to judge the validity of the claim. Therefore, it is necessary to establish a framework of the criteria that makes laws legitimate within a given society, and this will be used to support the legitimacy of civil disobedience within society.

This research is intended to determine if a relationship exists between laws and the use of civil disobedience to enact change in those laws. It examines the use of civil disobedience as an unconventional form of resistance to laws that are perceived by a citizen or a group of citizens to be, and shown through legal analysis to be, illegitimate. In the modern republic, some would argue that there are many traditional means that citizens may use to voice their opinions about repealing or changing a law, but what if these legal channels of change are under the control of a despotic authority or, even worse, the majority tyranny that James Madison warned us about in “Federalist #10”? An example like the oppression of African-Americans in the United States and countless other accounts of tyranny proves that the dangers are a challenge even in the modern world, and we may have to look for means outside of these normal legal channels to perhaps find a legitimate solution to this problem. One of these unconventional solutions may lie in the use of civil disobedience as a tool by citizens of democratic societies to address potentially illegitimate laws. Is civil disobedience an appropriate response to illegitimate laws in a given society? The relationship between acts of civil disobedience and laws are best represented by the

following hypothesis: Acts of civil disobedience by citizens of democratic societies are more likely to be seen as legitimate when the laws being disobeyed are not legitimate and legal channels for legislative change are unavailable.

### **Literature Review:**

Civil disobedience has been an intriguing subject of much debate. Many people have written on this topic, and it was necessary to look at the literature written about civil disobedience from different times to see where similarities exist and where diversions have formed and to highlight any parallels or contradictory meanings. To define the broad term of Civil Disobedience into a working definition, I began by reading Elliot M. Zashin's definition of civil disobedience. He argues that six characteristics are critical to defining an act as civil disobedience: violation of a law; the question of whether the law is just; civil disobedience cannot be revolutionary, but must be public; it must be non-violent while educating society. First, "civil disobedience involves violation of a valid law or a public norm" (Zashin 1972, 110). William Sloane Coffin, Jr. agrees that a violation must occur. He offers two legitimate types of civil disobedience, and the first is testing the legitimacy of laws by breaking them. The first type would be associated with Martin Luther King Jr. and his belief that the supreme law of the land supported his ideals and he sought only to test that view (Coffin and Leibman 1972, 4). The other type of civil disobedience deals with a situation so horrible that citizens, on moral grounds, cannot sit by and idly watch injustices continue; this would be the case of protesting or avoiding Vietnam (Coffin and Leibman 1972, 5). Berel Lang also believes that a violation of the law must occur (Lang 1970, 156).

The next characteristic is the moral aspect of civil disobedience; there must be some argument from the citizens against an unjust or immoral law, otherwise one is simply saying that

illegally parking because it is convenient would also be included within this working definition. Catherine Valcke agrees with the notion of injustice and immorality being the reasons why someone could commit to civil disobedience in her article by arguing that civil disobedience can be utilized by citizens to help shape and pressure the government to amend laws to be in accordance with the laws of nature or at least to correct some injustice (Valcke 1994, 58). In fact, Ernest van den Haag argues that the first step in civil disobedience is deciding that laws are “morally intolerable” and then deciding if the actions and consequences of civil disobedience are “morally preferable” to that of the consequences under the law (Haag 1972, 28).

The third aspect is that practitioners of civil disobedience “by their self-limitations, attempt to communicate to authorities and public that they ought not to be regarded as revolutionaries. They are not acting in ways which compel a liberal-democratic regime to defend itself by means which violate its own norms” (Zashin 1972, 115). The very act of civil disobedience must be done in a way that will not dismantle the political system, but only change a certain aspect of its legal system; one should do this while taking into consideration the political system of which the person is still a functioning member. Valcke points out that “civil disobedience does not here constitute a challenge to officials’ authority” which would violate the rule of law (Valcke 1994, 58). One can see that it is not a matter of challenging directly the authority of the state, but rather the protest of specific laws. Hannah Arendt also argues that civil disobedience does not necessarily mean that an individual will start on a path of crime, because criminal disobedience to the state is not synonymous with civil disobedience; the former and the latter may break laws, but the former is only concerned with withering away the ability of the state to enforce its laws (Arendt 1972, 74). Those that commit acts of civil disobedience cannot want to dismantle the government or diminish its ability to enforce other legitimate standing



laws. Although this aspect is not as pronounced, it does appear in a great deal of literature and it should be considered central to a discussion on civil disobedience.

The next factor is based on the public nature of the dissidence. Civil disobedience must be public in order to send the message to the government of the protester's unhappiness. The person must distinguish himself from revolutionaries on this point by exposing himself and his actions to the society. This idea presented by Zashin is echoed throughout the literature. Maria Jose Falcon Y Tella comments on why civil disobedience must be public: "The point of the public nature of civil disobedience is to keep away any taint of suspicion concerning the morality of the act, while gaining for it symbolic value and the greatest possible audience" (Tella 2004, 56). Therefore, publicity for the act of civil disobedience is not only necessary to maintaining the integrity of the act, but it is directed towards the goal of change.

The fifth aspect is one that is crucial in distinguishing an act of civil disobedience from other forms of dissidence. "Virtually all academic commentators consider nonviolence an essential characteristic of civil disobedience. Without it, disobedience cannot merit the qualifier "civil"" (Zashin 1972, 116). Coffin concurs that "when property is damaged, the political effectiveness becomes truly problematical" (Coffin and Liebman 1972, 5). However, this is a serious issue to consider, and probably one of the most controversial debates with civil disobedience. First, one must ask the question, what is meant by the term "violence"? "Violence is equated with the illegitimate use of physical 'force' applied to people or things with the intention (the volitional element) of causing harm" and we must also consider "psychological" violence, "including threats, indoctrination, brainwashing, and so on" (Tella 2004, 57). Thus far, the argument that civil disobedience must be non-violent has been forwarded, but there is another side to this argument forwarded by many authors. John P.

Diggins argues that violence can be used and the act can still be considered civil disobedience (Diggins 1992, 454). Similarly, Berel Lang's article operates under the premise that non-violence and civil disobedience may have an historical connection, but theoretically there is no necessary connection between nonviolence and civil disobedience (Lang 1970, 156). These are two of the same opinions drawn at two very different times, but they still argue that violence can be part of civil disobedience. A closer examination of Lang's article reveals that he would consider the idea of burning draft cards during the Vietnam War a violent form of civil disobedience. However, looking back at Tella's definition of violence it does not appear that the destruction of government property appears to be using any force or causing any physical harm, and Ernest van den Haag's book would also support the fact that civil disobedience could result in no physical injury (Haag, 1972, 22). By adopting the definition of violence given by Tella regarding the illegitimate use of force and the infliction of harm, it is necessary to say that non-violence must be a part of civil disobedience.

Finally, we must look toward purpose. The primary purpose of civil disobedience is to educate society about potential problems, and it is not meant to disturb any normal operations of society. This is not a prominent theme in most works on civil disobedience, but Zashin argues that it is necessary for an act to be a legitimate expression of civil disobedience.

To build the argument for the legitimacy of civil disobedience Zashin provides a very brief historical analysis of civil disobedience and the history of the role of the citizen in a democratic society. The development of "liberal constitutionalism" combines "the basic constitutional notion—that government should be limited—with the basic premise of democracy—that the individual is a legitimate participant in governmental affairs" and this "creates a legitimate role for the individual in checking government officials" (Zashin, 8-9). If

the citizen of a democratic society has a role in checking the government, then we must consider if civil disobedience can be an unconventional yet functional duty of the democratic citizen.

Zashin primarily uses the work of John Locke to support the view of the democratic citizen disobeying a law of the state. He uses Locke's view on the principle of consent, and the framework for Locke's argument of theoretical revolution. Then Zashin moves into some more recent authors and begins to synthesize a theory of his own from the ancient and recent authors to explain that "civil disobedience is functional and necessary if they [citizens] are to enjoy the benefits of liberal democracy; and civil disobedience is consistent with the kind of behavior a liberal democracy may legitimately expect of its citizens" (Zashin 1972, 101). His theory reconciles "the internal view of consent, that the individual's guide to political obligation must be his own conscience and judgment, with the external—what duties others think the individual should perform as a citizen"; at all times, the citizen must maintain some level of civility even when he can no longer find it in his conscience to obey the law or norm in question, and he must be willing to accept the consequences of his actions (Zashin 1972, 101).

What are the implications of the foregoing for the cases to be considered in my research? First, the theoretical conception of revolution in John Locke's Second Treatise of Government would not be considered a form of civil disobedience. If any arms are raised, if property both public and private is damaged, or if violence is threatened, then one has moved beyond the realm of civil disobedience. Therefore, armed rebellion, terrorist acts, or riots cannot be analyzed under the legal considerations for this study because these cases would not be considered civil disobedience. Another boundary of this study is the aspect of conventional and non-conventional means for the individual to express his concerns to the government. There are ways in which individuals are socialized to interact with their government, and these would be

the legal channels for change such as voting or crafting letters to representatives in government. Civil disobedience would be an unconventional method of voicing concerns about the government, and it should be used only when conventional methods are not effective in abrogating laws. This study is constrained by the type of resistance and the review of civil disobedience as an alternative to the conventional methods of change when they are not open for change. Now, one can look at some of the arguments over the societal cost and benefits of civil disobedience, and its appropriateness within society.

In Coffin and Liebman's book, there is a debate on the legitimacy of civil disobedience. Coffin looks at examples across history that he believes would be justifiable, from the apostles of Biblical accounts breaking multiple Jewish and Roman laws to the abolitionists defying the Fugitive Slave Act (Coffin and Leibman 1972, 2). He deduces from this that it is difficult to make the claim that law and justice are on the same level. Law does not command complete obedience from its citizens because justice should be of higher concern than law. Coffin comes to the conclusion that the benefits of civil disobedience for a society far outweigh the consequences of the mere adherence to unjust human law. We can now look at the objections to this view of civil disobedience and refute them to strengthen the purpose of this study.

Morris Leibman poses four main points for why he is against the use of civil disobedience. He argues that civil disobedience is incompatible with liberal democracies. Leibman also looks at the moral justification of civil disobedience and finds that in all cases this justification is subject to the passions of the individual, disputable and not resolvable. His next point is that civil disobedience can cause damage to society. Finally, he contends that justice can only be achieved through procedural and legal changes in society, and civil disobedience only reflects those parts of human nature that are base and will only lead to the downfall of society.

This is not a highly supported claim and Leibman's objections to civil disobedience are seriously weakened when we look at other authors who have responses to objections found in Leibman's arguments.

Cass Sunstein finds legitimate reasons for why laws should be broken and does not agree with Leibman's point that civil disobedience is not compatible with liberal democracy. It begins with the idea of "desuetude" in American and English law, or the "lapsing of an old law lacking current support and used, if at all, episodically and discriminatorily" (Sunstein 2003, 52).

Sunstein concludes that "when a law no longer reflects citizens' values, people are unlikely to obey it without a great deal of enforcement activity. And when a law is so inconsistent with the people's values that it cannot, in a democracy, be much enforced, it loses its legitimacy" (Sunstein, 53).

Ronald Dworkin in "Civil Disobedience" also disagrees with Leibman on the compatibility of civil disobedience with liberal democracies. However, he limits the scope by which citizens may utilize civil disobedience: "a citizen's allegiance is to the law, not to any particular person's view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires" (Dworkin 1977, 214). Leibman's point that moral justifications are subject to passions and therefore cannot be resolved may have some truth, but there is no reason that a legal justification does not exist; Dworkin provides an answer to this question. First, Dworkin raises an objection to the traditional argument that "if the law is valid, then a crime has been committed, and society must punish," but he feels that "this reasoning hides the crucial fact that the validity of the law may be doubtful" (Dworkin 1977, 208). This idea leads to the framework of a legal test for the legitimacy of laws by Dworkin. The legal justification for civil disobedience is the cornerstone

violate the rule of law. Those who practice civil disobedience are willing to accept punishment for their acts. "By appealing to the social contract, therefore, it seems possible to combine the rule of law with individual autonomy within one and the same political system" (Valcke 1994, 58).

Hobbes would argue that it is impossible for there to be no human will to control government. For Hobbes, laws alone are never able to hold society together without some authority to force the society together. However, Jean Hampton argues against Hobbes' claim. The argument looks at the ideas of democracy and the rule of law, and it shows that the modern democratic republic in its use of these two ideas is vastly different than the early democracies of history. Hampton argues against Hobbes' idea that all political societies are ruled by some arbitrary authoritative ruler and must not be a rule by law alone, and states that societies do not have to have a human will for it to be controlled, pointing to the writings of H. L. A. Hart (Hampton 1994, 13-15). Hampton suggests that, the possible solution is adding Hart's rules that govern how a society will change and who controls the political organs of the state is a way to allow society to be governed by laws while still having some element of human control associated with it. This would constitute what the essence of the modern democratic society is about. That human will is not the true leader of a political society, and the idea of the rule of law is alive and well in modern democracies despite the warnings of failure from Hobbes' view of society (Hampton 1994, 36-42).

Now we must construct the framework for analyzing the law within a given society. To start, the boundaries on the concept of law must be explored to decide whether the particular society is guided by the rule of law or by human will. The latter requires no need of any legal analysis since the law loses complete legitimacy in a system of government run by human will.

There are perhaps many ways to establish that a country is under control of the rule of law, but the criteria that Andrew Altman has established are sufficient to handle this problem. Altman argues that there are five principles by which government must operate to be a civil society. The first principle is that the “government must not act or operate above the law” (Altman 2001, 3). It is illogical to require society to follow rules when its own government deliberately violates the rules, or operates above the reach of the law, in general. However, there may be certain circumstances where a government could at times legitimately operate above the law. One must consider the power and use of executive prerogative as a necessary component for government to be effective. John Locke described prerogative as the power “to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it” (Locke 1690, 84). Locke, and I, think that the power is necessary because there is no conceivable way that the legislature could prescribe laws for every situation; there are some scenarios that cannot be imagined until they have actually occurred. It is in this broad area that it may require the government to operate above the law, but Altman’s statement is still valid if we take it as more of a general rule than an absolute principle.

The second principle states that “government should maintain civil order and peace mainly through a system of general and authoritative rules” that have sanctions clearly defined with them if they are broken (Altman 2001, 4). This affirms that certain actions will be unlawful, and it defines what punishment shall be delivered upon breaking the law. The third principle requires that these rules be public, clear and concise in meaning, “in force for a reasonable period of time,” impartial and not applied retroactively, they should not be impossible to comply with, and they must not violate any other rules that exist in that society (Altman 2001, 7). The fourth principle is that a society must allow individuals to defend themselves if they are

accused of violating the law. The previous four principles are all considered the “principles of legality” that make the distinction between a “constitutional government” and one that is controlled arbitrarily (Altman 2001, 6). The fifth principle only states that the people should be the ones to establish and follow their own government (Altman 2001, 7). If a country operates within these parameters then it would be controlled under the rule of law, and then the laws of society can be studied by a legal analysis and legitimacy can be established. But first an existing legal analysis that studies legitimacy must be found that can be used in the context of this research.

Therefore, the next step is to gain a broader understanding of what makes laws within society legitimate. There are two competing legal philosophies that can provide the framework for answering this question. H. L. A. Hart outlines an interesting argument based on Legal Positivist thought, where laws are made simply by humans and there is not a relevant connection between laws and morality in a given society. Another legal philosophy is Ronald Dworkin’s view of a Natural Law Theorem, where laws must have some moral standard or underlying principle contained within that system of government to be legitimate.

The purpose of using these two dramatically different systems is to view any particular law from different legal perspectives. If two competing legal philosophies can agree that a law is invalid, then that makes the conclusions about the law more compelling. However, the differences between these two theories may lead to fundamentally different conclusions about whether or not a law is invalid, and then one must consider which philosophy holds the greatest merit for judging laws, and why it is to be preferred.

Hart argues that an effective legal system requires the fusion of what he deems primary and secondary rules. The primary rules of any society are the laws by which the society is



governed, and the secondary rules limit what can be a law. The primary rules must be in accordance with the secondary rules in order to be legitimate in society (Hart 1961). Hart states that there are three secondary rules that laws must conform to. The first are the “rules of recognition” which “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts” (Hart 1961). This is merely meant to show that there must be a source to which citizens can go to see if a law does in fact exist because it has passed the standards the society has placed on what is to be a valid piece of legislation. The next secondary rule deals with the “rules of change” which “empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules” (Hart 1961). The final secondary rule is that of the “rules of adjudication” which empowers “individuals (chosen by society) to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken” (Hart 1961). Any primary rule that cannot comply with the secondary rules a society has set would be considered illegitimate. In the American system of government we can apply this legal system when we consider the Constitution as the ultimate “rule of recognition,” the Supreme Court and other inferior courts as fulfilling the “rules of adjudication,” and ability in our system of government to pass new laws and repeal old ones parallel to the “rules of change.” Therefore, a law is valid as long as the society can change laws, handle judicial affairs, and the law does not violate any existing rules about passing legislation in that society. This is a possible construction of a legal system that one could use to show the difference between legitimate and illegitimate laws of a given society, but it is certainly not the only one.

Ronald Dworkin approaches the legal system in a very different way. He criticizes certain aspects of Hart's conception of a legal system. Dworkin feels that there is a better way to explain the reasons for considering laws legitimate than Hart's philosophy. Dworkin outlines considerations outside of the code of law to determine legitimacy. He refers to these outside considerations as "principles" or the "standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality" (Dworkin 1977, 22). He contends that in weighing judicial decisions we must consider the written law and the moral principles that are part of our society, and, through discretion, choose the best principle and apply it to the case at hand. This method must be employed carefully as Dworkin leaves room for a lot of discretion in his interpretation of what makes a law legitimate in society. Dworkin's philosophy adds a moral dimension to the considerations of the legitimacy of laws. It is not enough to read and simply apply laws as they stand, but, according to Dworkin, one must look to principles of a particular society to guide decisions as well.

These are certainly two prominent theories of legal systems and either should be sufficient to begin arguing the basis for the legitimacy of laws. It will be interesting to see if the laws will be legitimate after I analyze the laws using each of the legal philosophies; this will help to provide the justification for the use of civil disobedience, or to see if the basic legal positivist thought will be similar to a natural law theorist in its response to a particular moral dimension.

### **Hypothesis**

Since a basis has been established for the definition of civil disobedience, the functionality of civil disobedience in society, and two methods of studying laws in a society guided by the rule of law; one must look at how they are related. The relationship between acts

of civil disobedience and the laws is best represented by the following hypothesis: Acts of civil disobedience by democratic citizens are more likely to be seen as legitimate by the public when the laws being disobeyed are not legitimate and the legal channels for legislative change are unavailable. When a citizen feels a law has overstepped some principle of fairness or equality and the citizen cannot utilize the legal channels for change, then the democratic citizen must be able to use some unconventional methods to protest the law. However, a democratic citizen invoking civil disobedience when that person has not even attempted to utilize the channels of legislative change would not be seen as a valid case of civil disobedience. This distinction can be examined in the real world using case studies, and one can apply both legal philosophies to test the legitimacy of the laws and review the availability of legal channels of change in the case studies.

This research design focuses on three cases: the Martin Luther King, Jr. case in the late 1950's and 1960's America, the burning of the draft cards during the late 1960's and early 1970's in the midst of the Vietnam War, and the case of San Francisco Mayor Gavin Newsom validating same-sex marriage licenses in February 2004. I chose these case studies as prominent acts of dissidence in modern American history. Because these case studies have occurred in the latter part of the 20<sup>th</sup> century and the early 21<sup>st</sup> century, the greater access to information will give a more complete view of the entire situation. It also represents a good cross section of events in modern American history. Most importantly, I felt that these events appeared to be acts of civil disobedience, given the knowledge of the definition of civil disobedience I would be using, and I wished to study only acts of civil disobedience so that a full analysis of the case study could be done. Martin Luther King, Jr.'s arrest led to his writing his "Letter From Birmingham Jail" which outlines for the world his rationale of the legitimacy of the civil rights movement. I chose

the Vietnam case because it occurred in a time where government policies were being questioned on a moral basis, and the idea of publicly burning a draft card would be an interesting alleged case of civil disobedience since it involves the destruction of government property. The last case is a very recent example; since the topic of same-sex marriage is still a current issue I thought it would be good to have a subject that is still being talked about along with those from the past.

I choose the case study design to allow these incidents to be studied in depth through individual cases to assess whether the actions are civil disobedience, whether the law was legitimate given the context of the rule of law in that society and in congruence with the legal philosophies of H. L. A. Hart and Ronald Dworkin, and what state the legal channels of change were in at the time of the incident.

As previously noted, Zashin argues that civil disobedience includes six distinct features. Many of these six were confirmed through various other sources. Actions by citizens must fulfill all six criteria set out by Zashin to make clear that civil disobedience can be an acceptable action taken by the democratic citizen. The absence of these characteristics blurs the distinction between other forms of societal dissidence and civil disobedience. Therefore, to qualify as an act of civil disobedience:

An act must involve breaking a law, there must be a question of the justice or morality of the law, the individual has the obligation to show that they are not going to act in a way that makes them revolutionaries, the act must be a public violation, it must be non-violent by nature, and it must educate society as to reasons for the act of civil disobedience (Zashin 1972, 110-116).

Each criterion was determined through a checklist for each case, and any act that failed to meet all the criterion cannot be considered an act of civil disobedience.

Another variable is the legitimacy of laws. Hart's legal positivism requires that a primary rule of obligation, or the laws and norms of society in this case, pass the three secondary rules of any given society. The "rule of recognition" merely states that there must be a definitive source that can affirm whether a law was passed through proper procedures and whether it violates any legal restrictions set forth by that society (Hart 1961). In the American system of government, the U.S. Constitution would be an example, because it prescribes the way in which a law must be passed to be valid by requiring a majority vote in both houses and the signature of the President of the United States. For a law to be legitimate in the Hart checklist it must be passed according to the rules set forth by that particular society. The laws must not violate any restrictions placed upon those laws by society such as the U.S. Constitution and its subsequent amendments that place restrictions on the government. To prove this, a study of the political system of each society is required to find out how laws get passed, what restrictions the legislative branch has placed upon itself, and a judgment as to whether a law has violated the recognition rule can then be made. Due to the system of federalism in the United States, a state law must be viewed on both the federal and the state level by examining the state constitution and limits on the passing of laws in the particular state in question.

The change rule established by Hart only requires that a society be able to introduce new legislation and get rid of the old laws in society that are outdated or no longer necessary, which is a point that Sunstein makes when he discussed the idea of "desuetude." This aspect of Hart is not related to a particular law, but it does require that the society the law was passed in must have steps to create new laws and remove old laws. A simple analysis of the legislative functions of the society would affirm or deny the existence of this change rule, and in the American example, the U. S. Constitution and any state constitution outlines the powers of the

legislative body to enact new legislation. The adjudication rule is similar to the change rule in that it applies directly to society as a whole. This rule requires that there be some authority to make a distinction as to when laws have been broken, and to test this we can analyze a particular society to study the judicial power through the federal and state constitutions. If the secondary rules have been checked off, a determination as to whether a law is legitimate or illegitimate can be made. After analyzing each case with Hart's conception of legal philosophy, this study turns its attention towards Dworkin.

The Dworkian legal philosophy regarding the legitimacy of laws is more difficult to measure in operational terms. Dworkin considers the written law and the recognition rule similarly to Hart, but expands this to view the underlying principles that exist within a particular society. So deciding the legitimacy of the law for Dworkin relies heavily on principles that best fit a particular case. For example, in the United States these underlying principles would be found in the Declaration of Independence and the U.S. Constitution. Equality and liberty are important principles found in the Declaration of Independence, but the U.S. Constitution contains principles such as the separation of powers and federalism. So the weight of any these principles combined with the recognition rule must be used to make determinations about the validity of particular laws in the American system, according to Dworkin.

Analyzing the legal channels of change was difficult because it is hard to make an overlapping generalization about how one might operationalize how open the legal channels of change. However, what can be done is to show how the system applies to a particular case, then make a deduction as to how it might apply in general to the American system of government. The legal channels of change for the American system lie in the legislative/executive and judicial branches. The Martin Luther King, Jr. case would require me to look at the legislative proposals

regarding equal rights and a chronology of when pieces were introduced leading up to the incident of civil disobedience, how they were treated on the floor in debate by the senators and representatives, and what the decisions were regarding the pieces of proposed legislation. As seen in Table 1, a scale from one to four was used to measure the openness of legal channels of change. A one would mean that no legislation on the issue reached the floor, two would mean that some reached the floor with defeat, three would mean that some reached the floor with strong debate but passed with Presidential approval, and four would mean that legislation passed with Presidential approval with little or no opposition. This was done through looking at the legislatures on both the national and state level, if applicable, for each case and analyzing the course of proposed legislation or the lack thereof.

<b>Table 1. Coding Scheme for the Legal Channels of Change</b>	
<b>Federal and State Legislature</b>	
1	No legislation on the issue reached the floor
2	Some reached the floor with defeat
3	Some reached the floor with opposition and passed
4	Legislation passed with Executive Approval with little or no opposition
<b>Federal and State Judiciary</b>	
1	The issue has not been brought before the court
2	The issue was heard before the court with unfavorable outcome
3	The issue was heard before the court with favorable outcome

In cases where the legal avenue for change was not the legislative but the judicial branch, I looked at the judicial cases pertaining to that subject matter and the decisions rendered leading to the incident. In Table 1, the scale is from one to three where one is where no cases have been heard, two is where cases have been heard with unfavorable decisions for the democratic citizen, and three is given where cases have been heard with favorable decisions for the democratic

citizens. These scales helped to measure the degree to which the government is open to debate the issue, or demonstrate that it is completely shut off to discussing a contentious issue.

This study also measured the public's perceptions of the legitimacy of civil disobedience. To measure public perception, polls and surveys on the issue before and after the incident were found to gauge the support for the actions of civil disobedience. If a majority of people supported the actions from a number of sources then there might be some positive correlation between public perception of civil disobedience in the polls and the actual public perception in that case. There are now working definitions for the variables, and the focus on the data collection and the timeline for the study must be discussed.

As I mentioned earlier, I am concerned about studying when the democratic citizen can legitimately engage in acts of civil disobedience to disobey the laws of a given society. What is unique about my study, based on the research that I have conducted, is that the justification for civil disobedience does not only focus on the validity of the actions of the person, but also on the legitimacy of the laws in question. The other arguments for why civil disobedience is necessary are centered on moral considerations, but just because something is morally right does not legally make it right. It seems that an impasse would be reached between the two sides of a moral debate because they tend to have no viable solution; I realize that this is not the case for all, but it can be made for many moral debates. Dworkin considers morality as a founding principle inherent in society to be analyzed along with the written word of the law, which is quite different than merely a moral consideration of civil disobedience.

This approach will take an existing legal philosophy from both Hart and Dworkin and then apply these legal philosophies to existing laws or norms to determine whether or not the law is illegitimate. Now because the philosophies differ, discrepancy may appear as to what laws



would be deemed legitimate. Upon finding the illegitimacy of laws, many would say that there are many legal channels of change within societies like the United States, but in the American legal system the best way to create a case or controversy before the law is to break it to test its legitimacy, and there is no guarantee that the legislature will be open to reform particular area of the law. I will be arguing that based on these legal philosophies adopted, and the parameters that have been defined regarding civil disobedience, one can then better assess the legitimacy of civil disobedience as a useful function to society, and can look at the perceptions of its use. This would show that civil disobedience must be part of any republic that concerns itself with individual rights, and that civil disobedience involves even more intense citizen participation in the government than voting in elections.

### **Results:**

#### **Case I: Martin Luther King Jr. and Civil Rights**

At the Zion Hill Baptist Church in Birmingham, Alabama at around 2:00 P.M on Good Friday, April 12, 1963, Martin Luther King, Jr. had finally arrived to meet the others who joined him in his march for equality. The day is symbolic for the Christian faith since it is associated with “marching and suffering” (Bass 2001, 110-111). The crowd began marching down Sixth Avenue, lined with many of spectators watching and supporting the march. For the first part of the walk it was simply a beautiful spring day. The police were out in full force and had blocked off automobile traffic from entering the route of the march: “eighty police officers were on the scene, including forty-eight patrolmen on three- and two-wheel motorcycles; at least a dozen plain-clothes detectives and special detail men; and scores of other officers” (Bass 2001, 112). Everything was going smoothly until the marchers reached the intersection of Sixth Avenue and Seventeenth Street, where they met a roadblock set by the police and placed in the route. They

changed the course of their march and proceeded down Seventeenth Street. It was then that the police intervened and arrested King along with others and transported them to the jail at 501 Sixth Avenue. However, no violence occurred during this process (Bass 2001, 112-113). Because Dr. King was protesting without a license, the police were planning all along to arrest him and the protesters. At some point during his stay in jail, King was presented with a newspaper that contained the response of eight white clergymen attacking the civil rights movement and protest. King was interested in responding to these clergymen through the medium of a published letter, and “began writing his response under ‘somewhat constricting’ conditions—writing around the margins of the newspaper in which the white ministers’ statement appeared” (Bass 2001, 117).

Now one must look at whether Dr. King’s actions can be considered an act of civil disobedience. First, one must consider whether a law has been violated, and Dr. King stated that “I have been arrested on a charge of parading without a permit” (King 1963). Second, one has to consider the legitimacy of the laws. Dr. King states “an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First Amendment privilege of peaceful assembly and protest” (King 1963). This statement has general application to many of Alabama’s segregation or so called “Jim Crow” laws. Thirdly, one has to consider whether the actions of Dr. King can be construed as revolutionary or aimed at destabilizing the current government. Dr. King disavows this and shows due reverence to the standing political system. Dr. King and the other prominent civil rights leaders planned for a “direct action” program to begin as a result of broken promises by the merchants of Birmingham to remove racial signs, but “Birmingham’s mayoralty election was coming up in March, and we speedily decided to

postpone action until after election day...so that the demonstrations could not be used to cloud the issues” (King 1963).

The fourth consideration is whether the action was public. The march was conducted in the afternoon on a public street. The fifth consideration is whether the action is non-violent. This was obviously a peaceful protest. When the police came to arrest them “King, Abernathy, and many of the other marchers immediately dropped to their knees on the sidewalk and bowed their heads in prayer” (Bass 2001, 113). Dr. King supported the non-violent approach: “I have earnestly opposed violent tension, but there is a type of constructive, non-violent tension which is necessary for growth” (King 1963). The final point that I considered was whether education of the society was fostered by Dr. King’s actions. On this point the “Letter from Birmingham Jail” seeks to educate society about the “Negro” and his “unjust plight” and how “injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured” (King 1963). Since this case fulfills all six requirements it is a legitimate expression of civil disobedience.

Dr. King was protesting the Alabama segregation laws and we must look at the legitimacy of these laws as well. The main principle of the protest was equality, but to use Hart there must be a focus towards a specific law. Therefore, I choose a law an Alabama segregation law from that era and will apply that because Dr. King was marching against the Alabama segregation laws in general. Section 10, Chapter 6 of the Code of the City of Montgomery in 1952 stated:

Every person operating a bus line in the city shall provide equal but separate accommodations for white people and Negroes on his buses by requiring the employees in charge thereof to assign passenger seats on the vehicles under their charge in such a manner as to separate the white people from the Negroes, where there are both white and Negro passengers on the same car; provided, however, that Negro nurses having charge of white children, sick or infirm white persons,

may be assigned seats among white people. Nothing in this section shall be construed prohibiting the operators of such bus lines from separating the races by means of separate vehicles if they see fit (Walton 1989, 5).

A similar state statute existed in a 1947 Alabama state codes, and separate busing had been in the law since 1900 (Thornton 2002, 42-45).

Since this law is a local ordinance and localities are only given power by their particular states, one must begin by looking at the Alabama State Constitution to see if it passes Hart's "rule of recognition." Section 63 of the Constitution of Alabama states that:

Every bill shall be read on three different days in each house, and no bill shall become a law, unless on its final passage it be read at length, and the vote be taken by yeas and nays, the names of the members voting for and against the same be entered upon the journals, and a majority of each house be recorded thereon as voting in its favor, except as otherwise provided in this Constitution (Constitution of Alabama).

Therefore in each house of the legislature of Alabama legislation must pass by a majority and then it must be signed by the Governor in order to become law. Now, clearly the statute passed through these procedures before it was entered into official records as a statute. However, there may be some other provisions of this state constitution that would invalidate the passing of the law. One might find it interesting to know that in section 1 of this state's constitution it states that "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness," and this seems to contrast with the statute, at least in principle; however, it does not pose a serious enough challenge to merit this law failing the "rule of recognition" on the state level because this is not a clause with any procedural equality attached to it. It lies in the realm of substantive equality, which is good in principle, but cannot be enforced just by the wording of this section.

However, on the federal level of analysis, the Bill of Rights, which at this point had in some degree been incorporated and applied to the states courtesy of the 14<sup>th</sup> amendment to the

United States Constitution, might pose a much greater problem for the legitimacy of this statute. The idea of “equal protection” being incorporated to apply to the states in the U.S. Constitution is not helpful for Hart. There is a difference between substantive equal protection and procedural equal protection. Reading the 14<sup>th</sup> amendment in the way that Hart would look at it, there is no room for substantive equal protection since it reaches for principles within the amendment that are not explicitly included. The “rule of change” and the “rule of adjudication” can easily be answered by analyzing the system of change and adjudication of matters under the U.S. Constitution. Article III of the Constitution establishes the Supreme Court and all inferior courts which can make authoritative decision on matters of whether a law has been violated or not. Article V provides ways to amend the Constitution, and Congress can pass new laws to replace aging ones. Therefore, this shows that the change and adjudication rules are valid, so the transportation segregation law is a legitimate law in the United States under the Hart analysis.

The Dworkin analysis found a failure at the state level, from the incompatibility of principles with the law of society. This issue comes down to the principle of state rights versus that of equal access. The problem is that Section 1 of the Constitution of Alabama affirms the equality of all men and even African Americans should be considered citizens of the United States at this time in principle. So despite the “rule of recognition” on the state level, the principles that underlie this society do not match up with the purpose of the law as stated and thus it is to be considered an illegitimate law under the Dworkin analysis. In summary, Hart would find the law to illegitimate and the Dworkonian analysis found it to be illegitimate.

<b>Table 2. Chronology of Events for Determining the Legal Channels of Change in the Martin Luther King Case</b>	
	<b>Federal</b>
1954-1955	Brown v. Board of Education I and II (1954, 1955)
1957	Civil Rights Act of 1957

1960	Civil Rights Act of 1960
1964	Civil Rights Act of 1964
1964	Heart of Atlanta Motel Inc. v. United States
<b>State</b>	
Alabama Segregation Laws	

## **Channels of Change**

### **I. State**

One also has to examine the legal channels of change not only on the judicial and legislative area, but also break it down into a federal and state analysis. This is seen in Table 2. For the state legislature of Alabama during the era from 1955-1963, I have assigned a one for their openness on the issue of civil rights. I was not able to find any positive civil rights legislation and even found that pro-segregation legislation was being considered. Thus, it is safe to say that a one is appropriate.

On the state judicial level, there are also no signs of positive civil rights decisions being made and in fact the police power of the state was using the courts to issue injunctions that were meant to prohibit marches. It was Dr. King's failure to heed the injunction that got him sent to the Birmingham Jail in the first place (Bass 2001, 107). This is why a one must be given to the judiciary on the state level. So the state level has received a one for both legislative and judicial branches.

### **II. Federal**

The federal politics at the time paint a brighter picture of civil rights legislation than the states. In the legislative area, there was the Civil Rights Act of 1957 which instituted the "right of a citizen to go to court for injunctions to protect his voting rights," allowed the Attorney General to "seek injunction against obstruction or deprivation of those rights," and added a Civil

Rights Commission to the Department of Justice that was given the power to subpoena information for the President and Congress regarding any violations (Congressional Quarterly Almanac 1965, 536). A subsequent legislative proposition on voting rights was passed in 1960, but the Civil Rights Act of 1964 dealt with broader issues of civil rights more than just merely voting. However, despite some legislation passed in 1957 and 1960 on voting rights and the landmark 1964 Act it is important to know that “between 1943 and 1964, only one bill was passed by either house; two others were killed by Senate filibuster. Other propositions met burial earlier in legislative process” (Bureau of National Affairs, 1964, 18). Under these considerations, the legislature has received a three since pieces of legislation were passed but there was opposition to the legislation.

The judiciary was active on this issue. Some obvious cases whose decisions came out around this incident of civil disobedience were *Brown v. Board of Education I* (1954) and *Brown v. Board of Education II* (1955) which were landmark cases for starting the process of school desegregation. There is also the case *Heart of Atlanta Motel Inc. v. United States* (1964) which established that Congress could use the Commerce Clause of the enumerated powers granted under Article 1 of the U.S. Constitution to prevent racial discrimination in public accommodation. It is safe to give a three to the judiciary at this time for civil rights as it seems to be a very open forum for change and discussion on civil rights.

The final question for this case study concerns public perceptions of these acts of civil disobedience. In 1961, there was a Gallup Poll done in the South. It asked respondents “Do you think the day will ever come in the South where whites and Negroes will be going to the same school, eating in the same restaurants, and generally sharing the same public accommodations?” The results were intriguing with 76% responding ‘yes’ and only 19% responding ‘no’ with the

remaining 5% responding with an “uncertain” (Gallup 1972, 1705). To get a feel for public perceptions of the attitude on desegregation versus segregation around the time of the incident, there was a 1964 study recorded in the American Social Attitudes Data Sourcebook: 1947-1978. The question that was asked of respondents was “in general, are you in favor of desegregation, strict desegregation, or something in between?” (Converse et al. 1964, 60). The mean turned out to be a 3.18 which, on the scale of 5 being desegregation and 1 being strict segregation, puts the mean right around something in between with 31.5% favoring desegregation, 44.1% looking for something in between desegregation and segregation and 22.8% wanting strict segregation (Converse et al. 1964, 60). The mean for white only participants was around a 3.0 while the mean for the black participants was a 4.4 which was closer to desegregation. Almost 72.8% of black respondents chose desegregation and 16.6% chose something in between, with only 5.6% that favored segregation (Converse et al. 1964, 61).

Another interesting question asked in 1964 was:

Some say that the civil rights people have been trying to push too fast. Others feel they have not pushed fast enough. How about you: Do you think that civil rights leaders are trying to push too fast, are going too slowly, or are moving about the right speed? (Converse et al. 1964, 82).

With a 5 being too fast and a 1 being too slow, the mean for the whole population was 4.24, which means that most people thought it was too fast. 63.9% of respondents believed that it was going too fast, 24.7% thought it was on track, and 5.4% thought it was too slow (Converse et al. 1964, 82). The average means for whites turned out to be 4.4 which is close to too fast and the black respondents were at a 2.6 which places them at around just the right pace (Converse et al. 1964, 83).

A less academic survey done by the Gallup Poll in 1963 between June 21-26 asked respondents “do you think mass demonstrations by Negroes are more likely to help or more likely



to hurt the Negro's cause for racial equality?" 60% of respondents thought that it would more likely hurt and 27% thought that it would help. However, there is no racial breakdown for this poll; this does hurt the claim of this survey, but it just helps shed some light on the opinions about civil disobedience (Gallup 1972, 1828). In April of 1968, another poll asked "Do you think the Johnson Administration is pushing integration too far or not fast enough?" 39% felt it was too fast, 25% felt progress was right, and 21% felt it was not going fast enough (Gallup 1972, 2112). This is similar to an earlier question raised about the speed of integration, but do keep in mind that the addition of the Johnson administration makes this a different question. There is a difference between asking if civil rights people have been moving too fast and asking if the President's administration is moving too fast on the same issue. So generally on the topic of desegregation there is a large middle ground when one looks at the population as a whole, and on the topic of civil disobedience one can see from the polls that it was not generally favored by the population as helpful to these racial issues.

In summary, the Dr. King case passed all the requirements for civil disobedience. Under the Hart analysis of legitimacy, the Alabama pro-segregation statute has passed, while it failed under the Dworkin analysis. The state legislature and the state judiciary received a one for their lack of openness to legal change in handling the issue of civil rights, but the federal legislature earned a three of four for their generous openness to legal change. The federal judiciary earned a three of three for its openness they expressed during this time on the issue of civil rights. However, there was a distinct lack of public support for the actions of Dr. King and the other civil rights leaders of the time, but there does seem to be a shift in public opinion after the incident towards pro-civil rights.

### **Case II: Vietnam Draft Card Burning**

The next case study is draft card burning during the Vietnam War. This war continued with the draft system that had been in place since the Korean War, with only minor changes made. The draft was meant to bolster the number of soldiers of the current volunteer army in order to help fight the war. However, the case study was centered around the actions of David O' Brien, John Phillips, David Reed, and David Benson on the morning of March 31, 1966 on the steps of a South Boston District Courthouse. These people were all members on the Committee for Non-Violent Action. They found themselves in front of the courthouse for other acts of civil resistance to the draft. A large crowd had grown outside of the courtroom: as their intentions had been leaked to the local media, it had drawn a crowd of people who disgruntled with what they were about to do. As David Reed began to burn his draft card he announced to the world that "I am a pacifist. I do what I believe as an individual" and "I believe in the law but when the law violates my conscience..." however, he was never able to finish his statement before the crowd that had gathered had rushed the group and pummeled them into submission (Foley 2003, 19-20). The unfortunate thing about the incident is despite the apparent assault and battery of the draft card burners by the crowd "the police at last arrived as the melee wound down, but they arrested no one" (Foley 2003, 21).

This was an important event in the timeline of draft card burning, but was it an act of civil disobedience? First one has to consider if an actual law was broken by burning the draft cards. "Congress responded (to draft card burning) by making the act punishable by five years in prison" (Baskir and Strauss 1978, 65). Therefore, the burning of their cards did break the law. The second thing that must be considered is whether there is some question to the legitimacy of a law. Besides the rhetoric of David Reed before he was attacked, a number of "Resisters and their supporters acted on the premise that when the nation's government sets illegal or immoral

policy, citizens are obligated to disagree with those policies, to disobey them if necessary, and to accept the legally prescribed punishment” (Foley 2003, 13). This provides a basis that there is a qualm as to the legitimacy of the draft laws. The third thing that one has to consider is whether these actions were considered to be revolutionary. Given that David Reed and his associates spoke about the conscience, his belief in pacifism, and his respect for the law, one cannot make the assumption that this act of civil disobedience was meant to uproot the standing civil order.

The fourth item deals with the publicity of the act. This is proven through the public actions on the steps of the courthouse with the surrounding crowd and the event in 1965 when “forty demonstrators protested the Dominican Republic intervention by burning their cards in front of a Berkeley draft board” (Baskir and Strauss 1978, 65). The fifth item has to do with the notion of non-violent action. Based on the idea that “violence is equated with the illegitimate use of physical “force” applied to people or things with the intention (the volitional element) of causing harm,” or “psychological” violence, “including threats, indoctrination, brainwashing, and so on” (Tella 2004, 57), one cannot consider the actual burning of cards to be violent action. Even if the cards are government property there is no intent to cause harm, at least of a physical nature, to the government or individuals. Therefore, this action passes the non-violent test of civil disobedience. The last consideration examines the education of the community. We see this in the rhetoric of John Phillips during his trial over the draft card burning:

He found the Selective Service System intolerable because it sought “to coerce a man to do the bidding of his state, under threat of punishment should he refuse.” In a truly free society, he argued, “individuals will act from a genuine desire to attain a better life for their fellows, not from an acceptance of standards imposed by the government” (Foley 2003, 43).

Therefore, one must accept this as a statement meant to inform and educate the public about why he was committing these actions. The reason for most people burning the draft cards seems to be

educating the public to the dangers of Vietnam and the unfairness of the draft system, and this would make these actions pass all six requirements of civil disobedience.

One must now examine the federal level because the draft laws exist only on that level. The Hart analysis must begin with the “rule of recognition”, and Article 1, Section 7 of the U.S. Constitution prescribes that a bill must pass both houses and be signed by the President. This was the case with the Selective Service Act of 1940 and all subsequent passages of the draft. The 1940 Act passed both houses with decisive majorities and on September 16, 1940 was signed into law in a time of peace by President Roosevelt (O’Sullivan and Meckler 1974, 157-158). The draft was instituted in 1951 with a more regular schedule than had been seen in the past; “the induction authority of the president would be renewable every four years, but the draft system would continue indefinitely” (O’Sullivan and Meckler 1974, 163). Therefore it passes this simple requirement. However, some concerns have been raised about the draft conflicting with the Thirteenth Amendment. Supreme Court jurisprudence has already answered such questions for the time being with *Butler v. Perry* (1916) ruling that the draft does not constitute involuntary servitude. So the “rule of recognition” is upheld for this case. The “rules of change” and the “rules of adjudication” have not changed since the Dr. King case, so there is no analysis needed. Therefore, the draft laws pass Hart’s analysis.

Dworkin’s analysis builds off the “rule of recognition” from the Hart analysis, but there is a principle that must be assessed. But which principle best fits society and does the law and “rule of recognition” fit with this principle? If safety, national security, and nationalism are the dominant principles, then this law would be fine; however, what about liberty and equality? If the latter principles are most important, then one must consider this law to be illegitimate. The founding principles of this country which make up the latter concerns do not seem to be

congruent with the application of the draft being unequal in terms of women. Although the Court has looked at the unequal gender application in *Rostker v. Goldberg* (1981) and upheld it, this will only be beneficial to the Hart analysis, and we can still hold the principles against the law for our own analysis. One must also contend with the fact that the law forces a person against their will to possibly go against the dictates of their conscience. The founding principles, as opposed to the ones espoused in the Preamble to the U.S. Constitution regarding the common defense and domestic tranquility, should possess a higher order. These principles are the foundations of why American society exists today, and they are the principles that must fit society when they are called into question. This is why I think equality must be the dominant founding principle and the visible signs of unequal application make this law illegitimate under the Dworkonian analysis.

<b>Table 3. Chronology of Events for Determining the Legal Channels of Change in the Vietnam Draft Card Burning Case</b>	
<b>Federal</b>	
1940	Selective Service Act
1951	Reinstatement of the Draft (4-year renewals)
1966	United States v. O'Brien

The legal channels of change on the federal level are closed. A chronology of events is listed in Table 3. As discussed earlier, the draft law is up for adoption on a four year basis as of 1951, and a law was passed that prohibited burning the draft card. With this evidence and the lack of any legislation that favored the draft card burners, the federal legislature was given a one for its passage of bills counter to the aims of the draft card burners with decisive majorities. The judicial channel was closed since it had already decided on the issue of the draft long ago. In *United States v. O'Brien* (1966), the court refused to accept the fact that draft card burning could

be protected under the First Amendment's right to free speech. Therefore, a two is appropriate for the judicial system at this time.

The public opinion data that exist comes from the Gallup Poll. In a survey from October 8-13, 1964, the question was asked "Do you think the time has come when this country should do away with the draft and depend upon professional military forces made up of volunteers, or do you think the draft should be continued?" Respondents answered with 63% wishing to continue the draft, 23% percent wishing it would be made of volunteers, and 14% percent with no opinion on the matter (Gallup 1972, 1911). In 1966, the question was asked "Do you think the present draft system is fair, or not" to which respondents answered with 43% thinking it was fair, 38% stating it was not fair, and 19% with no opinion (Gallup 1972, 2016). Finally, a question was asked on April 17-19, 1970, asking "If a young man refuses to be drafted, which one of these things do you think should be done?" (Gallup 1972, 2249-2250). Respondents answered with 40% of adults and 21% of students wanting to make him serve a combat role, 26% of adults and 41% of students wished for him to work on special civilian projects at home. Also, 17% of adults and 7% of students felt that jail was an appropriate response, and 8% of adults and 29% of students did not wish to see any penalty imposed (Gallup 1972, 2249-2250). The actions of the draft card burners do not seem to have swayed public opinion in their favor, at least for the immediate future. There was not a whole lot of data for the draft card burners' actions but what we have gives a broader look at the draft and the punishment for those that defy the draft.

In summary, the Vietnam case passed all the requirements for civil disobedience. The Hart analysis of the legitimacy of the draft laws shows that the law is valid, but the laws have again failed the Dworkin analysis which means that two competing legal philosophies disagree

about the legitimacy of the law. The federal legislature earned a one of four for their lack of openness to legal change while the federal judiciary earned a two of three for the moderate openness they expressed during this time on the issue of the draft. There was also a distinct lack of public support for the actions of O' Brien and his friends in the burning of their draft cards.

### **Case III: Same Sex Marriage License in San Francisco California**

The same-sex marriage licenses case study occurred in February of 2004. Before that, California has had a progressive history with acknowledging the relationships of non-heterosexual couples. It began with a voter initiative in 1990 that changed the San Francisco administrative code so that "domestic partnerships" could be recognized, and in 2003, Assemblywoman Jackie Goldberg and Senator Carole Migden argued for "all state conferred rights of marriage" to be given to domestic partnerships with the exception of joint filing for state income tax and having earned income as "community property" for the couple (Pinello 2006, 73). On February 12, 2004, another step was taken towards allowing for same-sex marriage when San Francisco Mayor Gavin Newsom ordered the county clerk to begin issuing same-sex marriage licenses. This step was clearly out of bounds of the power of the mayor of San Francisco and put his position into jeopardy. There were 4, 037 licenses issued until March 11, when the California Supreme Court ordered a cease and desist to those actions, and subsequently voided those marriages in August, finding that the authorities of San Francisco had exceeded their authority against the California Family Code by issuing same-sex marriage licenses (Pinello 2006, 73-74). Issuing the licenses was a bold action taken in spite of standing law and is a prime candidate for consideration of its merit as an act of civil disobedience.

When considering the degree to which the action compares to the working definition of civil disobedience, one must look at the law that has been violated. In this case Section 300 of

the California Family Code states: “Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage” (California Family Code). A same-sex marriage violates this code, and constitutes the breaking of a law. However, this calls into question the validity of the law which speaks to the second part of civil disobedience. Mayor Gavin Newsom, as quoted by his chief of staff, stated “We (are) going to do this. Figure out how. I took this office with an oath to uphold the Constitution of the United States and the constitution of the state of California. I believe in those constitutions with their equal protection clauses” (Pinello 2006, 76). This points to a question of legitimacy over the guarantees of equal protection in both the United States and the state of California. The third consideration deals with whether the action was revolutionary. Newsom, in his earlier quote, talks about the oath to uphold his office of Mayor of the city of San Francisco. This does not seem to be the actions of revolution against the state of California. The fourth aspect of civil disobedience deals with the publicity of the act; this act was clearly public since “media coverage flooded the nation with images of the pairs waiting in line and then emerging with marriage licenses” (Pinello 2006, 85). Another aspect is that of non-violence. The act of issuing a license of marriage is clearly a non-violent action committed by Mayor Gavin Newsom. Finally, one has to consider whether the action was meant to educate the public about the reasons for the civil disobedience. The education aspect also derives from Mayor Newsom wishing to express his view that the equal protection clauses existent in both Constitution’s clauses were the reasons for issuing the licenses despite the California Family Code; this is an acceptable educational venture for society to analyze what value the equal protection clauses play. Therefore, this action meets all six criteria to constitute an act of civil disobedience.



Similar to the legal analysis of the Martin Luther King, Jr. case study, there must be a separate observation done on both the federal and state level for Hart. Article 4, Sections 8 and 10 of the California Constitution prescribe that a bill must pass the houses of legislature with a majority and have the Governor sign the bill to make it a law. Section 300 of the California Family Code and Section 308.5, which was newly amended by popular referendum in 2000 to declare that “Only marriage between a man and a woman is valid or recognized in California,” were clearly laws passed under the aforementioned guidelines. Now in the state example, one has to examine the clause in Article 1, Section 3 of the state constitution: “a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws.” However, this is, like in the Martin Luther King, Jr. case, in the realm of substantive equal protection and it cannot be considered under the Hart analysis. Therefore, the California Family Code is legitimate under Hart’s analysis for the state. A similar situation exists on the federal level and therefore passes the “rule of recognition” for Hart; there is no need to redo an analysis of the change and adjudication rule of Hart since it has already been done in the Vietnam case study and there are no changes in the American system of government that would allow these rules to fail.

Dworkin considers the “rule of recognition” of the previous Hart discussion. Since there is no founding principle that would support not allowing same-sex marriage, we must look to see if principles exist that support same-sex marriage. We know that the principle of equality was very important to the founding ideals of America, but equality does not seem to “fit” with not allowing same-sex marriages. Combining this with the statements of equal protection in both constitutions, and looking at the substantive equal protection and its reach towards the principle of equality, there can be no doubt that there is some issue with not allowing same-sex

marriage. The principle combined with the text of the constitution must steer this analysis towards stating that the law in question is illegitimate under Dworkin's theory. So under Hart, the law passes muster, but fails to pass under Dworkin on both a state and federal level.

<b>Table 4. Chronology of Events for Determining the Legal Channels of Change in the Same-Sex Marriage Case</b>	
	<b>Federal</b>
1996	Defense of Marriage Act
2003	Lawrence v. Texas
	<b>State</b>
2000	Family Code of the California Constitution
2003	Same-Sex couples given many of the same rights as married couples
2004	Lockyer v. City and County of San Francisco

### Channels of Change

#### I. Federal

The legal channels of change are interesting in this case, and must be also looked at from the perspective of both the state and federal levels, as shown in Table 4. In the federal legislature, there is really no legislation on the issue of gay marriage. All that is present is the Defense of Marriage Act of 1996:

No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws...the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife (Ball 2002, 65-66).

It was passed by a 85 – 14 vote in the Senate and passed by a 342 – 67 vote in the House, showing a deep support for traditional marriage on a federal level. Upon signing it, President Clinton announced that "we need to do things to strengthen the American family" (Ball 2002, 66). Since this is the only piece of legislation that was passed and it is certainly valid legislation

in American society, the federal legislature gets a one for the open channels of legal change. Now on the federal judiciary, *Lawrence v. Texas* (2003) struck down a Texas sodomy law because it infringed on liberties granted under the due process clause of the 14th Amendment to the U. S. Constitution, and this was a positive, but there have been no federal rulings on gay marriage, so a one must be given to the federal judiciary.

## **II. State**

In the state legislature, there was the change to the Family Code in 2000, but since then same-sex couples were given almost all the same rights as married couples in 2003. However, no legislative attempts have been made towards legalizing same-sex marriages in California by the legislature. It is necessary to assign a one for the fact that the main issue at hand is not allowing domestic partnerships but instead allowing same-sex marriages. The most notable action taken by that state judiciary was in a California Supreme Court case, *Lockyer v. City and County of San Francisco* (2004), which invalidated all the same-sex marriage licenses that had been granted under Mayor Gavin Newsom. Therefore, the state judiciary must be given a two.

Public perception of this act of civil disobedience is easier to measure since the action is the most recent of any of the case studies. To begin, a Gallup Poll of May 2002 asked “Would you favor or oppose a law that would allow homosexual couples to legally form civil unions giving them some of the legal rights of married couples” which resulted in 51 percent opposing the proposition and 46 percent approving of it (Newport 2002, 93). Then the Boston Globe Poll and the New Hampshire Survey Center conducted a survey involving 760 Americans on May 9, 2005. It appeared that 50% of respondents opposed mass recognition of same-sex marriages across the country, while 46% favored it; also, 50% opposed allowing gays and lesbians to marry while 37% approved and 11% remained neutral to the issue (Greenberger 2005). Another poll,

conducted by Angus Reid Global Scan in March of 2006 asked respondents “whether the state should recognize same-sex relationships, or merely consider them as roommates” (Schultz 2006). A tie of 32% for allowing them to marry, allowing civil unions or domestic partnerships, and not recognizing the relationship at all, but when only given two of the options 51% opposed same-sex marriage and 43% approved of same-sex marriage being available (Schultz 2006). So it seems to be a divisive issue in contemporary American thought.

Therefore, this case did pass all the requirements of civil disobedience. The law passed the Hart analysis but failed the Dworkin analysis. For openness, the federal legislature received a one of four for passing legislation contrary to the issue of same-sex marriage, and a one of three was given to the federal judiciary. On the state level, it received a one of four as well for its failure to address the issue, while the state judiciary receives a one of three. There was a slight majority that is opposed to same-sex marriage; the percentage opposed then drops when the idea of civil unions is introduced. It is not clear if public opinion supported the actions of Mayor Newsom, but what is clear is that the public opinion has not shifted as a result of Mayor Newsom’s actions.

### **Analysis:**

After crafting a working definition for civil disobedience and applying this definition to the case studies, I found that all the cases satisfied the requirements. This is important when looking at the purity of the actions of these people. An action that is subversive and meant to dismantle the government does not address the issue that the democratic citizen is trying to address. The purpose of civil disobedience is to operate in the public eye, and show the people what issues they are having problems with by breaking the law and accepting what consequences

may come as a result of those actions. In the Martin Luther King, Jr. case, the marches were against a system of discrimination, and the aim was to show the people and educate them to the inequality of racial segregation. For the Vietnam draft card burning case, there were individuals that stood together and burned the draft cards that they felt were based on a system of inequality and an imposition of their conscience. For the San Francisco case, one has a high city official breaking the laws of the state due to his oath to uphold the equal protection clause of his state and his country. All together these represent excellent examples of civil disobedience in contemporary American history.

When looking at the legitimacy of laws, the data is not as clear as determining whether an action could be considered an act of civil disobedience. Every case passed the Hart analysis. On the other hand, every case study failed to pass muster under the Dworkin test, and this is no doubt due to the idea that there is more to the legitimacy of laws than merely making sure they are passed under the proper rules and do not conflict with limiting restraints in society. For Hart, civil disobedience would surely be very limited because it is difficult for a citizen to utilize civil disobedience when a law is legitimate in society. However, I choose Dworkin's legal analysis because I knew one had to consider more than just making sure the law fit into the existing rules; there was much more at stake for the individuals protesting against these laws. Despite all the case studies passing the Hart philosophy, the idea of a breach of equal rights reaches deep within the principles that founded the United States. This causes people to really think about why it is important to compel individuals into service against their will, or denying the same benefits to people who choose to have a different lifestyle choice. This is why the Dworkin analysis was important to draw out this dichotomy and show that despite the fact that the text of the law fits

into the American government under the Hart philosophy, the principle behind the law does not fit as nicely.

<b>Table 5. An Analysis of the Legal Channels During the Eras of Various Acts of Civil Disobedience</b>		
<b>Martin Luther King Jr. Case (1955-1963)</b>		
	<b>Judicial Branch (1-3)</b>	<b>Legislative Branch (1-4)</b>
Positive State Actions on Civil Rights	1	1
Positive Federal Actions on Civil Right	3	3
<b>Draft Burning During the Vietnam War (1965-1970)</b>		
	<b>Judicial Branch (1-3)</b>	<b>Legislative Branch (1-4)</b>
Positive State Actions on Civil Rights	N/A	N/A
Positive Federal Actions on Civil Right	2	1
<b>Same-Sex Marriage in San-Francisco, California (2000-2004)</b>		
	<b>Judicial Branch (1-3)</b>	<b>Legislative Branch (1-4)</b>
Positive State Actions on Civil Rights	2	2
Positive Federal Actions on Civil Right	1	1

As Table 5 shows above, the legal channels of change were in many cases not open to change on the levels that needed the application the most. For the Martin Luther King, Jr. case, the state judiciary did not even want to consider implementing any integration policies and were closed to dealing with the issue of integration entirely. However, the federal judiciary was very open to dealing with the idea of integration and was well on its way to insuring that discrimination on the basis of race was no longer going to be the result of de jure segregation. However, in the midst of the Vietnam War, people feared all that seemed to be contrary to the norm, including socialism and the resistance to the draft, and the federal legislature was closed tight for looking at the repeal of the draft or even the restructuring of the draft. The judiciary was willing to take a look at the merits of those that would openly burn their cards in defiance of the Vietnam policies and the draft even though they ultimately decided against their cases. In the same-sex marriage case, it seems there is almost the opposite effect from what was seen in the Dr. King case. The federal legislature and judiciary have been very quiet on the topic of same-

sex marriage other than the 1996 Defense of Marriage Act and the proposed Federal Marriage Amendment in 2006, and the federal judiciary has not touched that issue, probably due in part that it is a state issue. It is the state level of California that has been more active on the situation. California has been a progressive state by giving same-sex couples the same rights as married couples, but it has not bridged the gap, and this is why it attained a 2 overall; the California Supreme Court was willing to hear the issue of the same-sex marriage licenses, but it did not rule favorably for the Mayor who broke state law to issue the licenses. Even the state was not open for discussion on the topic. So overall, the legal channels of change were either too far removed from the issue or closed to those that would seek remedy through legal change.

Public opinion for these events was not as favorable as I had originally thought. In the Dr. King case many respondents did not believe in desegregation and instead the overall population wished to have something in between segregation and desegregation. Almost 64% of respondents of the Gallup poll around the time of the incident thought the civil rights movement was in the direction of going too fast and hurt the causes they were actually fighting for. However, in 1968 there was a change and 46 percent felt that the Johnson administration was pushing civil rights through at either a good pace or it needed to go faster. So in that case, public opinion did not support the actions of civil disobedience outright, but there was a slight change in public opinion concerning civil rights after the incident had occurred. To some degree, the acts of civil disobedience might have had some impact on the change, but it is impossible to know the degree to which it was affected.

In the Vietnam case, there was a majority support of the draft with regards to fairness, and a willingness to force draft resisters into some type of service. Again, there was no support from the public for these actions. Even after the incident of civil disobedience, there was not a

budge towards support of the draft card burners. In this case it would seem that civil disobedience did not effect any change within the sphere of public opinion.

In the same-sex marriage case, there was a slight majority opposing same-sex marriage both before and after the incident, and a slight majority in California that opposed it when confronted with allowing same-sex marriage or not. However, there were no polls asking respondents whether they thought the actions of Mayor Gavin Newsom were legitimate. But public opinion for other issues related to same-sex marriage would not support the idea that people felt that his actions were legitimate, especially since the courts have invalidated his actions. So the same-sex marriage case showed no change of opinion yet as a result of civil disobedience.

### **Conclusion:**

I started with the hypothesis that acts of civil disobedience by democratic citizens are more likely to be seen as legitimate when the laws being disobeyed are not legitimate and the legal channels for legislative change are unavailable. This entailed really two questions: one is that of arguing that civil disobedience is acceptable to use when the laws are not legitimate and legal channels of change are closed, and the second deals explicitly with the idea that the public will support the action if laws are illegitimate and the legal channels of change are closed. Unfortunately, only the first part seems to be true, and only under Dworkin. I have been able to affirmatively show a law is illegitimate under at least one legal philosophy, and show that in all cases the appropriate legal channels of change were either closed or not effective for the issue in question. However, the public perception of these acts did not fully agree with the actions of civil disobedience despite the illegitimacy of laws and the degree to which the legal channels of change were closed or ineffective. I had even hoped that after the incident of civil disobedience



that it would have swayed public opinion, but this assumption was correct only for the Dr. King case study.

It is hard to say why the public would not support people engaging in civil disobedience against unjust laws. It seems that in most cases public opinion is parallel to that of Hart's opinion on the legitimacy of laws. Perhaps it is hard to think that breaking the law can be used as a tool to exact positive change in government. One might say that some people are not attuned to being able to look into another's point of view or to even assess questions of equality or justice. In fact, when one looks at the public opinions for the Dr. King case and the Vietnam case, I cannot help but wonder what those same people would say today when asked about the past. Would they stand by their answers, or would they backtrack in hindsight and come to a different conclusion about the situation because opinions have changed about the situation? Knowledge is a tool for the use of both the good and bad for it can bring truth and distort truth, but ignorance is the absence of knowledge altogether. I hope that by incorporating civil disobedience as an unconventional method of effecting change that the ignorance on issues could be banished and meaningful discussion can replace violent actions against that which is different.

Because the legal philosophies have disagreed about the legitimacy of the laws in each case, this brings us to a unique position. How does one determine if a law is legitimate when it can pass muster under one philosophy but fail the other one? This is not a problem for the faint of heart as it would be easy to say that if a human law is passed under the "secondary rules" fairly and it does not conflict with any other laws, then it should be legitimate. Is that the extent to what laws are, and is that where the debate must stop? I think not, and I argue that simply assessing the issue in terms of the text of the law misses a lot. There is more at stake in human laws than merely text; there are ideas, moral principles, and abstract constructs like liberty and

justice that one must consider. Humans have consciences and with them they can discuss questions of justice and equality and I think the inability to assess the law's ability to be cohesive to a society's principles is a fault of not only Hart, but of all the legal positivists. However, the other side is that one expands the principles too far and then the judiciary is legislating from the bench and the legitimacy of all laws may be called into question from these founding principles being incompatible with society.

With regards to the legal channels of change, I am not stating that civil disobedience is an appropriate response when those channels of change have not been exploited. Instead, one has to think of civil disobedience as the way to receive attention for an issue that needs to be addressed in the public eye. If an individual feels strongly about injustice being committed and no one will listen, then he must break a law and show the people that he is committed towards change and why that change is necessary. Civil disobedience is not interchangeable with writing to a senator, congressman, or mayor. It does not replace the civic duty to vote, but it requires that one at least make sure that these less obtrusive ways have failed or have been futile and that something more is needed. When these channels are closed and there is a law that can be scrutinized as being objectively illegitimate by a philosophy which takes more into account than merely the text of the law, one can begin to look at the functionality of these acts.

What useful functions does a legitimate act of civil disobedience serve for society as whole? Well it certainly opens up the opportunity for minority views to be expressed for public assessment. It also offers a check for the citizenry on the government. There was a time in the Senate when all it took was one man who disliked a bill for any reason to stand up and be heard. For as long as he could stand, he could speak on the merits of a bill, contemplate its implications for justice and equality, and argue why it makes for bad policy. Those times of an unstoppable

filibuster are now over, but they were an important tool for an individual of the senate to keep it in check and honest. The spirit of those actions still live within the confines of American society and show themselves in the actions of civil disobedience, when one person is able to stand up to the law, defy it, and accept his punishment. It is a valuable tool that has and can be beneficial to a democratic society: when used properly and with the right restraints it can effect positive change and create meaningful discussion and debate in society. Civil disobedience was rooted in the beginning of American society, and it will continue to thrive in this country that appreciates the rights of the individual over the rights of the state.

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