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Paper 1

**Foucault And Love : The Same-Sex Challenge to The Legal Institution of Marriage**

The relationship between the legal institution of matrimony and the ever-changing ideology in which it resides (and, at times, departs from) has always been a contentious one. While "love" can transcend institutions and cultural discourse, the custody battles, inheritance discrepancies and judicial reviews regarding the criminality of same-sex love do not. The legal framework that governs litigiously-defendable contracts (along with a myriad of economic incentives) provides validity only to specific constituencies- ones that are defined according to an increasingly impervious divide between traditional and normal relationships and those deemed progressive or deviant.

However, the determinants which dictate who in society is embraced and protected by the law are often subject to an interpretation of the Constitution that is itself a manifestation of (local) communal will. For example, while the courts may be deemed as having *authority* over the legal definition of marriage, the *power* to affect this decision lies in a generally perceived shift in cultural ideology produced by the broad public outcry of the disempowered. After all, the recent breakdown of legal inhibitors disallowing the union of racially-divergent lovers was a phenomenon owing to the discontent and increasingly-potent politicization of African-Americans and other minority groups. In the interest of extending these victories in the quest for universal equality, it is an offered hope that the current debate over the constitutionality of same-sex marriage will take a similar path. But under who's authority, and with what power?

Michel Foucault, author of *"Discipline and Punish,"* would likely argue that the static oppressiveness of the institution of marriage is predicated on the pervasive power of

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the "norm," thereby rendering any attempt to legalize same-sex marriage immediately

defeated by the traditional/ protectionist preferences of the social majority. According to

Foucault, "normalization [has] become one of the great instruments of power"[1] of our time,

dictating not only *who* can marry, but also the roles afforded to each gender once union is

achieved.  While marriages exist as both a religious sacrament and a legal document, they are

also ceremonies which "mark the power relations in their very ordering."[2] As public displays

of familial-legality, weddings reinforce the strength (and stagnant nature) of structures not

only through the insistence on *ritual* (the hierarchies of groomsmen and bridesmaid, the offer

of a dowry, etc) but also by the active exclusion (punishment) of those who cannot revel in

the *rewards* of marriage. Authority, in this regard, is located in the interpretive role of the

courts, while power is wielded by the panoptic watchtowers of the church.

According to Foucault, systems and structures exist because there is a perceived

social need for them; religious institutions which base their opposition on a fundamentalist

reading of biblical text have been made to confront the apparent deterioration (and

vulnerability) of heterosexual marriage by rising divorce rates and the numbers of children

born out of wedlock. Transgression often makes the (crumbling) structure apparent, and it is

no surprise that religious conservatives are fighting to ensure that the *site* of family values on

which they have built their authority *and* power over the definition of *family* stays firm.

Recent events, however, have provided an intriguing challenge to both the

conservative definition of marriage and Foucault's notion of a static institution built on a

unidirectional panoptic flow of authorities having near-absolute power. Foucault's

*Panopticon* argues for a non-reciprocal exchange of power and observation (with regards to

marriage, this can be applied to the authoritarian dictation of the church that a legal union is

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[1] Foucault, Michael *"Discipline and Punish"* p. 184
[2] Foucault, Michael, p. 194

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strictly between a man and a woman). However, the "rogue" provision of marriage licenses to gay and lesbian couples by the mayors of San Fransisco and New Paltz, along with the state court decisions in New York and Massachusetts which deemed the prohibition of gay marriage as unconstitutional present challenges to the authority/power paradigm.

The aforementioned acts of civil-obedience show how those previously without power nor authority can work to challenge the institution by disregarding the panoptic flow of power. While power certainly precludes authority, and authority is frequently afforded to those with power, in the fight for civil rights, those with authority can be stripped of their power, and those that were once without power can dictate from where authority is derived. Even in the instance of the *Panopticon*, the oppressive surveillance of the central tower owes its existence to the complicity of those on which its gaze is trained. Similarly, the judges of the Supreme Court (on whose decision the fate of legal gay union will likely lie), in having no militia with which to enforce its judicial review, must rely on the compliance of the legal system (if not, the citizenry as a whole) for their decisions to affect change (or stasis).

In the struggle for the legal recognition of same-sex marriage, the flow of influence and power must also be cyclical. Acknowledging that while there will always be regulation and boundary to human expression, it is sometimes not a matter of destroying said boundaries, but re-drawing them to suit our ever-evolving humanity.

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