Strange Bedfellows

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What is it that stimulates such uproar in relation to the question of gay marriage? What is it about marriage that makes it explicitly sexual rather than just another type of social arrangement, i.e. friendship, associate, roommate, etc.? Is this question not redundant? What then, is the status of the political recognition of marriage if not a sanctioning of sexual partnership? What is the difference, if any, between marriage, domestic partnerships, civil unions, common law marriages, etc.? What are the concerns of power in this question? These are the questions that will direct the following inquiry.

Gay marriage is on the forefront of the current media playlist, and produces argument and vitriol wherever the topic is introduced. Yet at the same time, the media has been touting its acceptance of (or tolerance of, or indifference to) homosexuality for years. To be gay is to be hip even. The prudish condemnation of homosexuality per se is passé. And yet, it is with a gleeful eye that news anchors have purveyed scenes of small children enthusiastically attending anti-gay marriage marches and the homophobic commentary of high profile political actors. What is it that can account for this apparent disparity? As I see it, the platforms from and on which the question of gay marriage is projected and discussed are the religious, the political, and the secular/social. On each there is a disagreement, and no front is wholly united, and neither are any of the different platforms uniform, but each appeals to and rebuts the others. Thus a complex picture emerges of inner turmoil, outer piety, inner conscience and outer resentment. While each deserves its full allotment of ink in which to wallow, it is only the political where a decision can or will be reached, the social and religious being less bound to immediate resolution, and so the political will have to serve as the reference point for the other discussions.

Let us begin where we are then; what are the rights given to homosexual couples? How are they different than/the same as those given to heterosexuals? In California, the Family Code, or those laws governing familial relations, gives gays the right to a domestic partnership, which is “two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring” (Family Code § 297.a, hereafter FC). This definition recognizes the social bond between two people, but avoids the question of their sexual activity. Gays are, however, explicitly banned from marriage: “Marriage is a personal relation arising out of a civil contract between a man and a woman. . . .. Only marriage between a man and a woman is valid or recognized in California” (FC § 300, 308.5).

What is it about marriage then that is different from a domestic partnership? The rights and privileges are the same in each regarding familial duties, dissolution of the partnership, and responsibility as parents. Domestic partners are protected from discrimination in the same way as spouses, and even protected against a discrimination in relation to married couples: “No public agency in this state may discriminate against any person or couple on the ground that [they are] domestic partner[s] rather than spouses” (FC §297.5.h). Even referring to other areas of the law which deal with spouses, gender specific terms are to be substituted in the case of domestic partners! So I ask again: what is the difference between a domestic partnership and a marriage? First, there are a few technical but telling differences in the definitions of each. Marriage involves a “civil contract . . . to which the consent of the parties making that contract is necessary” (FC §300). Domestic partnership involves “an intimate and committed relationship of mutual caring” (FC §297.a). “Civil contract,” “intimate and committed relationship,” “consent,” “mutual caring.” What is it that the state of California finds necessary in mutual caring for gay couples where heterosexuals merely

1 “Intimate” in this context does not necessarily mean “carnal,” though we might be tempted to read that. “Intimate” here is in the sense one might say “an intimate friend,” or the oxymoronic “intimate acquaintance.”
2 And geriatrics, § 297.b.6.B allows opposite sexes to form a civil union provided one of them is over the age of 62, but we will return to this.
need consent to a contract? If the rights and obligations under either arrangement are equivalent, why the difference in definitions?

Before answering this question, I think it necessary to introduce two key concepts from theories of Michel Foucault: power and normalization. Power is very much the power we talk about when we say “power corrupts,” or someone “wields power.” It is a nebulous arrangement of influence and manipulation, but always manifests itself as a drive. For Foucault power is not directed by one person’s will so much as that will exposes the current drive of power. Power always seeks to increase itself by any means possible.

Power must be understood . . . as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens or reverses them . . . as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, [and] in the various social hegemonies (Foucault 92).

Quite a mouthful, which means to say that power isn’t controlled by the state, but the state is a location (Foucault says “locus”) of power. Power deploys whatever means it has at its disposal to increase itself: the police, WMDs, culture, religion, language, and in this case, sex.

The second concept, normalization, is another big word for what we commonly call conformity. Except that in Foucault, this conformity is more than just tagging along with the latest fashion, it is something that forms our core values, determines our goals and our dreams, directs our activities, and undermines our freedom. Normalization is one of the tools power uses to increase itself. Essentially, it is the process where we measure our success, happiness, health, freedom, etc. in relation to a norm. This norm is one formulated by power so that the closer one is to the norm, the more they partake in power. Norms are inherently related in a capitalist system to productivity, and especially to productivity of the worker, which in terms of a norm is treated as a body, One body is much the same as another, in that they all have the potential to perform a certain task, given the proper training and motivation. One of the most important qualities of a high productivity, low maintenance work force is docility and ease of control. Power is therefore concerned with providing for the health and satisfaction of the worker, and also with ensuring the rearing of “normal” children to replace a dying workforce. So normalization refers to the process of creating a docile, motivated, effective workforce in service of the increase of power.

This brings me back to the marriage question. What is the California legislature’s stake in defining marriage as between a man and a woman while at the same time, allowing the properties of the definition of marriage to slip into domestic partnership? In a word: children. Or to be more specific, the production of children. Over 2/3 of the Family code covering the rights and obligations of married couples is devoted to the relationship between parents and their children. Children are the assumed or desired product of a marriage bed. Power has deemed it most effective for a potentially productive couple to be bound together by a civil contract which requires them to raise a child in a certain way. Gay couples have no means of reproduction on their own. It is then, in the interests of power to promote as a norm the civil union of fertile couples where children (a replacement for the parent) are likely to be produced. A normal (read “preferential”) relationship in the eyes of the state is a relationship where docile parents go out to work, and come home to rear their replacements. A marriage.

But wait, domestic partners are bound by the same privileges and responsibilities regarding the children of either partner, as well as in the case of adopted children. Doesn’t this dethrone the productive value of marriage? Why then does power still (apparently) prefer married couples to partnered if both will have to raise their children in the same way? Won’t both couples replace themselves? Doesn’t a gay couple adopting a kid take some of the load off the welfare system and child services, allowing those agencies to utilize their power more effectively? What’s sex got to do, got to do with it?

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3 Which are the same for gay couples regarding the child(ren) of either partner.
The legal equivalence of marriage and domestic partnership does in fact question their real difference, and this is where power confronts two divergent deployments of its means. The first deployment is that of human quality. In a democratic, free market economy, a primary motivation for worker participation and productivity is the recognition of the individual as possibility. “The American Dream.” “Land of Opportunity.” “Rags to Riches.” All of which are, in the vast majority of cases, false. The deployment of the individual requires that power acknowledge to value of every individual, and allow each to participate in the system of production equally. Here power cannot differentiate between individuals based on sex, color, creed, sexual orientation, etc., without discounting the productivity their recognition has allowed.

The second deployment is that of the Christian morality and work ethic. Due to the predominance of Christians in this country, it has been, and continues to be in the interest of power to recognize as legitimate those demands of the Christian culture which do not directly negate the self augmentation of power (i.e. poverty, humility, openness). Power has found the elements of chastity, (real or pretended), duty, and heterosexual monogamy to be in its interest, and has used them as means.

Power faces a quandary. It can explicitly devalue neither its celebration of the (docile) individual, nor its concessions to religious suggestions without jeopardizing the gains it has made through their utilization. At the same time, it still desires to regulate sexuality so as to encourage mating and progeny, as well as to limit the religious influences that run counter to efficient domestication and production. Homosexuality must be tolerated as a manifestation of individuality to the degree that it does not undermine power, and deference must be given to religion insofar as it complements the drive of power (religion, like government, is just another locus of power). This is precisely what all the hubbub is about. On one side, religious (or, more generally, moral) outrage concerns power’s consideration of revaluing marriage; on the other, liberal individualists cry out that heterosexual-only marriage violates the dignity of the individual.

The only ground on which the state power can reconcile its diametrically opposed obligations is on the grounds of the separation of church and state. Marriage is, after all, a fundamentally religious institution. Whatever it has become as an institutionalized civil union, the primary recognition of marriage is its validation in a religious ceremony. It is for this reason that when the Family Code describes the solemnization of marriage, that is, its cultural, familial, and communal ceremony of recognition, there is no particular religion of preference. Religion, as it relates to the state, is encompassed by the term “church.” As the law reads, the consent to marry as a man and a woman is “followed by the issuance of a license and solemnization” to be performed by “a priest, minister or rabbi of any religious denomination” or any of a series of judges or magistrates (FC §300, 400). At the same time, “no particular form for the ceremony of marriage is required for the solemnization,” nor shall any marriage “be invalidated for want of conformity to the requirements of any religious sect” (FC §420). As regards the solemnization of marriage, it may be performed under any religious guise. The religious tradition enforcing a solemnization is, to the state, irrelevant. At the same time, of course, no religious denomination is obliged to solemnize the marriage of any particular couple; typically, the state solemnizes only those types of relations that fit its particular requirements. Thus the laws of a state are similarly irrelevant to the tradition and practices of a religion.

What then is the part of power, and the state, in a marriage? It seems to me that such power has two functions; the first is to issue licenses, which allows the state to screen applicants according to the interests of power (i.e. for venereal diseases, degree of relation, genetic disorders, etc.) and so attempt to ensure, e.g., a healthy population. The second function is related to the first in its economic orientation, though more explicitly. A married couple forms a unit of production in which stability and efficacy are a general expectation. Their combined economic input, along with their cohabitation, result in an economic plus. The state has a role and a stake in ensuring that those relationships with a significant economic balance contribute to and do not detract

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4 And I think the demand for gay marriage is actually a demand for social recognition and validation rather than for a change in tax-filing status.
contribute to and do not detract from the overall economy of power. Thus it issues a license.

But what does this have to do with homosexual couples? Don’t they, under the rules of a domestic partnership share the same economic burden as married couples? Aren’t their rights and responsibilities to the state equivalent? Even in the question of children, a gay couple is indistinguishable from its hetero counterpart in the eyes of the law. While as far as power is concerned, we have already established that they cannot produce offspring, they can adopt and may have children from other relationships. In either case those children are treated without regard to the sex of the responsible adults. It would appear then, that sexuality, along with religion, is irrelevant in the concern of the state. It would also seem that the state, aside from mandating a solemnization ceremony, takes no other part in marriage than the issuance of a license. It follows then, that the only place where sexuality becomes a relevant issue is in the particular religious creed of the solemnizing party.

I hope I have established a few things with my argument: first, that domestic partnerships and marriages differ only in their definitions and eligibilities; second, that the state has no relevant interest in the sexual or religious orientation of couples under its control, but only an economic interest; and third, that power must decide the question of gay marriage on a political field marked by the separation of church and state. I also hope my argument serves to point toward a potential solution, namely the relegation of the term “marriage” to the religious realm, and its subsequent elimination from legal and political terminology. If at first this seems to avoid, rather than solve the problem, let me put it this way: the issue of sexuality is essentially a religious or moral issue rather than a political one. Rather than ask the legal and political arena to serve as polemical staging ground for a religious claim, power and the state ought to realize their interests lie elsewhere, and that through the separation of church and state, it may allow the various religious faiths to interpret homosexuality in their own way, and at the same time, reinforce power’s celebration of the individual. In the political realm, homo and hetero sexuality are no more than indicators of individual variation. Gay marriage and hetero marriage therefore ought to occupy the same place, as do black and white marriages, or interfaith marriages. “Marriage” bears no difference other than nominal to “domestic partnership.” Domestic partnership, or civil union then is the proper realm of the politico-juridical, and marriage is properly religious. By explicitly separating the terms, marriage retains its standing as a socially validating relationship without great affront to religious claims, while power maintains its economic interest in the domestic lives of the citizens.

References:


5 Actually, I view this in very much the same way as the emergence of civil rights. Have the political declare neutrality, and the religious sector will sort itself out.