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Verdict

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[Joanna L. Grossman](#)

The Reality Show *Sister Wives*: Will Its Stars Prevail in Their Civil Rights Lawsuit?



Kody Brown, an unapologetic polygamist with four wives and sixteen children and step-children, is the star of a television show called *Sister Wives* (<http://tlc.discovery.com/tv/sister-wives>) (which airs on TLC, Sundays at 10 p.m.). The show has just finished its second season, which ended with news of the family's middle-of-the-night move across the Utah border to Nevada, to evade possible prosecution on bigamy charges by the Utah authorities. The family has hired a lawyer to challenge the constitutionality of Utah's criminal bigamy law.

In this column, I will consider the variations in state bigamy laws that make Nevada a safer home for the Browns than Utah was. I'll also evaluate the Browns' likelihood of success on their claim that Utah's law violates the federal constitution.

Meet the Browns: An Ordinary Family?

When *Sister Wives* first aired, Kody Brown had three "wives," twelve children, and a gestating thirteenth child. He sees polygamy as part of his religion: "I have adopted a faith that embraces that lifestyle."

Kody married his first wife, Meri, 21 years ago; his second, 18 years ago; his third, 17 years ago; and his fourth just last year. The first three marriages took place before a single child was born, so Kody's thirteen biological children have all been raised with three moms, all in the same house.

By the end of the first episode of the series, Kody was courting a fourth wife, Robyn, who has three children of her own. By the end of the first season, he had "married" her. The first three wives were consulted about the prospect of a new sister wife, as were all the children. All offered at least cautious support, although one wife, Christine, later admitted that she "freaked" that Kody and Robyn had sealed their engagement with a kiss. It was wrong, she felt, to kiss "a married man."

Within the family's Utah house, the first three wives each had their own "apartments," which were arrayed

around a common area. When Robyn joined the family, there wasn't room for another sub-family in the same house, so she moved into a nearby house with her three children.

The large family eats some meals as a unified group, but on most nights, Kody picks one family to dine with and one wife to sleep with. At times, the wives admit to feeling jealous of each other.

Why Polygamy?

Kody has explained the religious motivation for his polygamous lifestyle. He is a member of the Apostolic United Brethren, a break-off sect of Mormonism that is centered in Salt Lake City, Utah.

Although many Americans associate polygamy with mainstream Mormonism, the Church of Latter Day Saints abandoned polygamy as a part of official church doctrine in 1890. But several fundamentalist sects—including the FLDS sect that was targeted in a raid on the Learning for Zion ranch in Texas a few years back—continue to promote and practice polygamy. The Browns' legal complaint states that because of their faith, Kody and his wives “believe that only through celestial marriage can they ensure the salvation of their souls following death.”

In some ways, what is most remarkable about the show *Sister Wives* is how little happens in an episode. While many reality television shows traffic in high drama, the very point of *Sister Wives* seems to be to demonstrate that the Browns are ordinary in every way other than their polygamy. Thus a whole episode might be devoted to a birthday party or camping trip. The clear message of the show is that there is nothing inherently abnormal or destructive about polygamy.

As the second season progressed, there was some drama and suspense related to “the investigation,” as the Browns refer to it. Shortly after the first episode aired, the prosecutors in Lehi, Utah (where the Browns lived), launched an investigation into allegations of bigamy. The Utah Attorney General's Office announced its own investigation into the same charges.

Much of the second season shows the Browns grappling with the implications of taking their lifestyle to the airwaves. They stay inside for fear of being filmed by news crews waiting in front of the house. They get nervous when police cars drive by the house. They discuss how scary it is to be public, right before flying to New York for an appearance on NBC's *Today Show*.

And, eventually, Kody decides (with some measure of advice and consent from the sister wives, but with clear tension over Kody's role as ultimate decisionmaker) that the entire family must move to Nevada—where, as I explain below, the Browns' marital and living arrangements do not as clearly violate the law, as they do in Utah.

Are the Browns Guilty of Bigamy? It Depends.

The Browns' move was triggered by the fact that Utah law defines polygamy as a crime.

But it's important to note that Kody is only legally married to Meri, wife number one. With Christine, Janelle, and Robyn, Kody entered into “spiritual” marriages. For those “marriages,” there was no license, no state-sanctioned ceremony, and no recognized officiant. Presumably, there was some sort of religious ceremony to qualify each of the unions, in the minds of the parties, as a “spiritual marriage,” but the details have not been made public.

The traditional definition of bigamy is having more than one husband or wife. So defined, bigamy has always been a crime in the United States. It was, and is, a crime in every state. It was also declared a federal crime in 1862 by the Morrill Act—aimed specifically at the Mormons—which was upheld in 1878 by the U.S. Supreme Court in *Reynolds v. United States* (<http://supreme.justia.com/us/98/145/case.html>) against a religious freedom challenge. Indeed, Utah's admission to statehood was conditioned on its prohibition of bigamy.

The anti-bigamy rules are enforced not only through the criminal law, but also through marriage law. Bigamous marriages are void per se. Thus, it isn't actually possible to have more than one legal husband or wife, because the second and subsequent attempts to marry result only in void and unrecognizable unions. But, as I noted

above, the very *attempt* to create such unions is itself a criminal act.

Under the traditional definition of bigamy, the Browns are not guilty, because there is only one legal marriage in the family. By opting for a “spiritual marriage” – which is, in effect, a non-marriage in the eyes of most states – Kody has skirted the traditional definition of bigamy, which revolves around the attempt to solemnize a second, *legal* marriage while still married to one’s still living and current wife.

Utah, however, defines bigamy more broadly than most states do. Under **section 76-7-101** (<http://law.justia.com/codes/utah/2011/title76/chapter7/section101.html>) of the Utah Criminal Code, a “person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person *or cohabits with another person.*” (Emphasis supplied.) Bigamy, under this same section, is a third-degree felony. (Cohabitation, here, means living together in a sexual relationship.)

Moreover, an opinion from the Utah Supreme Court includes religious ceremonies that are undertaken without a civil license as falling under the heading of “purporting to marry.”

Under Utah’s definition of bigamy, it seems clear that all five adults in the Brown family are guilty. Kody is guilty because he cohabits with other women while knowing he has a wife. And the wives are each guilty because they are cohabiting with Kody while knowing he has a wife.

Even Kody’s first, legal wife, Meri, is guilty, because she knows that Kody has other wives via (presumably) religious ceremonies, which count as marriages for this purpose in Utah, and she knows that she has a husband, and yet she still cohabits with Kody and the other wives.

Notably, the anchor marriage between Kody and Meri is what turns their lifestyle into a crime. If Kody and Meri had never married (or were to divorce), the family would have no problem at all with the bigamy law. All states allow a single man to maintain sexual relationships with several women at once, and/or to cohabit with several women at once.

Why Nevada Is a Safe Haven for the Browns

Utah’s definition of bigamy is broader than the one used in most states. (Colorado also uses a broad definition, in section 18-6-201 of its code, which provides: “Any married person who, while still married, marries or cohabits in this state with another commits bigamy.”)

In both Utah and Colorado, the statute is designed to preclude legal maneuvering by polygamists designed to evade anti-bigamy laws—whether it be substituting spiritual marriages for civil marriages after the first wedding, or divorcing each wife immediately before marrying the next one, while keeping them all in tow.

There are an estimated forty to fifty thousand practicing polygamists in the United States today. Most of them live in Utah, Colorado, or Arizona. One would be hard-pressed to find a polygamist in New York, and thus, the state has never been pushed into adopting an especially strong anti-bigamy law.

Nevada, like the vast majority of other states, utilizes a traditional definition of bigamy. Under **section 201.160** (<http://law.justia.com/codes/nevada/2010/title15/chapter201/nrs201-160.html>) of the Nevada Code, “Bigamy consists in the having of two wives or two husbands at one time, knowing that the former husband or wife is still alive.” Thus, Nevada is a safe haven for a family like the Browns, in which no one has two legal wives (or two legal husbands, for that matter).

Even if Nevada did include cohabitation while married in its definition of bigamy, the Browns’ real estate woes might provide a defense.

Because Nevada is not home to as many polygamists as other states, there were no houses, within the Browns’ family budget, that were big enough to fit all twenty-one of them. So they were last seen renting four separate houses in the same neighborhood, with Kody planning to move from house to house according to his usual schedule.

That arrangement raises an interesting question: Are regular, overnight visits with a sexual partner enough to constitute “cohabitation”? If so, then even repeat adulterers who get together very frequently when both of their spouses are out of town might be swept in by a broad anti-bigamy law.

Is Utah’s Law Constitutional?

Despite its broad anti-bigamy law, Utah has a relatively lax enforcement history with respect to that law.

During the second half of the twentieth century, fairly open polygamous communities were simply ignored by Utah. But then Utah took a stand against Tom Green, a man with numerous wives, some related to one another and many of them young.

Green had provoked prosecutors by hitting the talk-show circuit to proclaim his right to a polygamous lifestyle. And the lifestyle he was defending evoked some of the primary concerns about polygamy—concerns about the exploitation of women and children. Green’s youngest wife was only 14 when they married and was pregnant at the time; Tom had once married her mother, too.

After a trial for criminal bigamy, during which Green had four pregnant wives, he was convicted in 2001 and sentenced to five years in prison.

The Browns, however, present a different face of polygamy. As their complaint points out, all of the women were over eighteen when they “married” Kody. The family seems to support all the children without relying on governmental assistance such as welfare. There seems to be no evidence of child abuse or neglect, or sexual exploitation of any of the women. And because there is only one civil marriage in the household, the family is not making any unusual demands on public or employer benefits.

Under these circumstances, can Utah constitutionally charge the Browns with a crime?

In their lawsuit, the Browns claim that Utah’s criminal bigamy law is unconstitutional to the extent it goes beyond punishing multiple, civil marriages.

They seem to have two impetuses for filing suit: First, the Utah authorities have stated that the investigation is still open and charges may yet be filed. Second, the Browns would like to move back to Utah, but “fear that they will be arrested and separated from their children if they do so.” (One of the sister wives recalls her own childhood during which her polygamous family was forced to separate into order to avoid prosecution.) In addition to not having found suitable housing in Nevada, they complain that there is not a sufficiently robust religious community for them to join there.

The complaint alleges that the Utah law violates the federal constitution on grounds of due process, equal protection, freedom of religion, freedom of association, and freedom of speech. I’ll focus on just one of those claims here, the one I believe is the most promising.

Does the Supreme Court’s *Lawrence v. Texas* Precedent Afford Protection for the Browns?

In 2003, the U.S. Supreme Court ruled, in *Lawrence v. Texas* (<http://supreme.justia.com/us/539/558/case.html>), that the constitutional right of privacy includes a right of adults to enter into consensual, intimate relationships without interference from the state. The statute at issue in *Lawrence* was a Texas law criminalizing same-sex sodomy. But the Court’s reasoning threw into question a wide variety of other laws criminalizing consensual sexual conduct.

In the wake of this ruling, state and lower federal courts struck down as unconstitutional laws banning fornication (sex by an unmarried person), banning cohabitation (living together in a sexual relationship), imposing more severe penalties for same-sex statutory rape than for the same opposite-sex crime, and so on.

But the scope of *Lawrence* is far from clear. The Court suggested that at least some laws policing sexual conduct were invalid, but it also went to great lengths to cabin its ruling by pointing out that the case at hand did not

involve minors, “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused,” “public conduct or prostitution,” or the question “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”

Can polygamy laws—especially the broad ones like Utah’s—survive a *Lawrence* challenge? That is the question presented by the Browns’ lawsuit.

If *Lawrence* countenances the right to engage in consensual sexual relationship without interference from the state, then why does the state have the power to criminalize cohabitation with additional women by a married man? Does the state have a sufficiently strong interest in protecting the first marriage (and/or any children that marriage produced) against the subsequent sexual interlopers?

The Utah Supreme Court has already ruled on this type of challenge to its bigamy law. In a 2006 case, *State v. Holm* (<http://law.justia.com/cases/utah/supreme-court/2006/holm051606.html>), the court upheld the state’s definition of bigamy against a federal constitutional challenge. The case provoked a strong partial dissent from Chief Justice Christine Durham, however. She urged that the cohabitation portion of the law was in clear violation of *Lawrence*. But the federal district court judge who will hear the Browns’ case will not be bound in any way by this ruling.

In sum, under the relevant law, the Browns do not by any means have a slam-dunk case. But they do present the most sympathetic possible case for the legalization of polygamy. Whether even that most sympathetic case can—or should—cause our courts to reconsider our longstanding prohibition against all forms of polygamy remains to be seen. Stay tuned.



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