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Verdict

December 24, 2013

Joanna L. Grossman and Lawrence M. Friedman

Kody's Big Score in the Challenge to Polygamy Law



Kody Brown is the star (if that is the word) of *Sister Wives*, a television reality show. Kody has four “wives” and more than a dozen kids. He is legally married only to the first wife, but claims to be “spiritually married” to the other three. When the show began, they all lived in Lehi, Utah, in a specially designed polygamous house, with separate living quarters for each wife. They now live in Las Vegas, Nevada, where polygamous architecture is not as easy to come by, in adjacent houses around a cul-de-sac. Perhaps the only polygamist in town, Kody now jumps from house to house on a schedule, with his small overnight bag in tow.

The show, which has run four seasons so far, goes to great lengths to show a family life that in all other ways is quite ordinary, indeed, even dull (if a household with that many kids can ever be dull). (A more detailed look at the show and the build-up to the current ruling can be found [here](http://writ.news.findlaw.com/grossman/20101004.html) (<http://writ.news.findlaw.com/grossman/20101004.html>) and [here](http://verdict.justia.com/2011/07/18/the-reality-show-sister-wives) (<http://verdict.justia.com/2011/07/18/the-reality-show-sister-wives>).) The sister wives clean and cook and gossip and help each other out. All is well, as blissful and bourgeois as a Norman Rockwell painting, except for one small detail: the authorities in Utah have now cast their beady eyes on Kody’s household, which they consider a nest of serious crime.

Kody therefore took time off from his exhausting lifestyle to bring a lawsuit to protect his right to live as a polygamist. In 2011, the Brown family retained a lawyer and filed a lawsuit against their former home county in Utah, alleging that the anti-polygamy law was unconstitutional and could not be enforced against them. The federal district court that heard the case recently issued a ruling in the family’s favor. In this column, we will discuss the content and implications of this ruling, *Brown v. Buhman* (<http://law.justia.com/cases/federal/district-courts/utah/utdce/2:2011cv00652/81108/69>).

The Brown Family and Their Lawsuit

Kody and his entourage belong to the Apostolic United Brethren Church, which split off from the main body of the Mormon Church, which, in turn, abandoned polygamy as part of official church doctrine in 1890. The Brethren, however, believe in polygamy. Indeed, for members of the church “polygamy is a core religious practice.” For Kody, it is a core belief that “love should be multiplied, not divided.” Kody’s family, of course, is not alone. Experts estimate that there are some 40,000 individuals living in polygamous families in the United States today.

The brunt of the Brown family's lawsuit is an attack on one section of the Utah penal code, which makes it a crime when a married person "purports to marry another person *or cohabits* with another person." (Cohabitation, in this context, means living together in a sexual relationship.) The same law makes it a crime to purport to marry or cohabit with someone while knowing that that person already has a living spouse, thus enabling prosecution of a polygamist's wives, as well as of the polygamist himself. This law—the bigamy law—is what hangs over the head of Kody's family. But the section is also, Kody has claimed, a violation of the U.S. Constitution. And, according to the federal district judge who just ruled on the case, Kody is dead right.

The case was decided on summary judgment—a stage of a lawsuit at which the court finds there are no genuine disputes of facts between the parties, leaving only matters of law for the court to decide. And the legal question in this case was straightforward: Can Utah, consistent with the federal constitution, criminalize Kody's style of polygamy?

The ruling in Kody's favor rested on two basic conclusions: First, Utah's criminalization of mere cohabitation with a second person while married to a first is unconstitutional under both the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Due Process Clause, which has long been recognized to protect a somewhat amorphous right of privacy. And second, the court applied a narrowing interpretation of the "purport to marry" clause in order to save it from invalidation on constitutional grounds. Under the court's interpretation, one "purports to marry" only when one attempts to procure a marriage license or solemnize a marriage with the expectation that it will be legally recognized. Merely participating in spiritual or commitment ceremonies without any of the trappings of legal validity is not enough.

***Brown v. Buhman* and its Delicate Distinguishing of Precedent**

Utah's anti-polygamy law withstood a constitutional challenge in 2006. In *State v. Holm* (<http://law.justia.com/cases/utah/supreme-court/2006/holm051606.html>), the Utah Supreme Court, over a powerful dissent by Justice Christine Durham, ruled that the bigamy law applied to both state-sanctioned and non-state-sanctioned marriages. (That case involved a criminal conviction for sexual conduct with a minor, by a man who practiced a more sinister style of polygamy that involved marrying very young girls, including a set of sisters.) The court also held that the bigamy law, so construed, was valid under both the Utah and federal constitutions. While the federal district court in *Buhman* was not bound by the Utah court's interpretation of the federal constitution, it was bound by the court's view of its own state statute.

On the federal constitutionality of the law, the federal court conducted its own analysis—and reached the opposite conclusion.

The shadow of *Reynolds v. United States* (<http://supreme.justia.com/cases/federal/us/98/145/case.html>) (1879) hung over the case of *Brown v. Buhman*; it was at the very heart of Utah's defense of its law. *Reynolds* was decided during the monumental battle between the federal government and the Mormon Church, or more accurately, against Mormon polygamy. Anti-Mormon opinion in those days had reached a kind of hysterical pitch; and the Supreme Court in *Reynolds* had no trouble upholding federal laws aimed at wiping out the practice. A religious body that allowed men to have sex with a whole clutch of women, and indeed considered it a positive duty (at least for the leadership) to do so, was simply too much for Victorian sensibilities to bear. Polygamy, said the *Reynolds* Court, was "odious;" it was "almost exclusively a feature of the life of Asiatic and of African people." It was a barbaric, horrifying practice. As another case put it, polygamy was contrary to the "spirit of Christianity" and to the "civilization which Christianity has produced in the Western world." *Reynolds*'s defense was freedom of religion. The Supreme Court would have none of this. One might as well justify human sacrifice, or the burning of widows, on such grounds.

That was then. But times have changed. What seemed obvious to the *Reynolds* court no longer seems quite so obvious. There is a more recent, more powerful shadow: the shadow of *Lawrence v. Texas* (<http://supreme.justia.com/cases/federal/us/539/558/case.html>) (2003). Our highest court, as we all know, has discovered, hidden in the text of the Bill of Rights, a mysterious right of "privacy." The modern Supreme Court has had a revelation, less apocalyptic perhaps than the revelations that have dramatically changed official Mormon doctrine, telling the U.S. Supreme Court's Justices (or at least five of them) that whatever consenting

adults choose to do with each other, sexually speaking, is under the sheltering wing of the Constitution.

Judge Clark Waddoups, in his long and erudite opinion in *Brown v. Buhman*, had a rather jaundiced opinion of the *Reynolds* case: It “is not, or should no longer be considered, good law.” Of course, the Supreme Court itself has never overruled the case. It still stands (more or less) for the vague proposition that a person can’t simply sidestep a legal rule by waving the flag of religion. That is, so long as the law is “neutral,” does not flow out of “religious animus” and is not “targeted at a specific religious group or practice.” (Waddoups also had a rather jaundiced opinion of the defense the case before him, noting that he was “intrigued by the sheer lack of response in Defendant’s filing to Plaintiffs’ seven detailed constitutional claims.”) The opinion in *Reynolds*, according to the *Brown* court, controls the analysis only of “straightforward polygamy or bigamy in which there is a claim to multiple simultaneous legal marriages.”

But the real crux of Kody’s challenge focused on the cohabitation clause—the provision that treats cohabitation with one person while married to another as a form of bigamy. The state had trouble justifying this clause. Utah, it turns out, is no different from the rest of the country: it is full of young couples who live together without bothering to get married. This, the state admitted, “goes on all the time.” Most, if not all, of these couples are violating Utah’s criminal ban on fornication—sex by an unmarried person—yet none are prosecuted. Nor are most of Utah’s adulterers prosecuted, although adultery remains a class B misdemeanor in the state. (The country’s remaining fornication bans are never enforced and are almost certainly unconstitutional under *Lawrence*; the remaining adultery bans have a better claim to validity, but here, too, there is no evidence that the state bothers to enforce this law).

In other words, even if these laws *could* be enforced, they in fact are not. None of the thousands of couples, young and old, who sleep unlicensed in the same bed, have any reason to fear the mighty arm of the state of Utah. Only polygamists are prosecuted. Utah admits this. A married man with a trophy mistress might want to hide this from his wife; yet he has no reason to expect the police to knock on the door of his love nest. And if one mistress is allowed, why not two, or three, or six? The alpha male (or female) is perfectly safe in Utah. But Kody and his wives Meri, Janelle, Christine, and Robyn are not. Nor was Tom Green, a polygamist who took every conceivable measure to provoke prosecution and found himself charged and convicted of polygamy. Green did legally marry each of his wives, through a ruse in which he would obtain a legal divorce shortly before the next legal marriage. He continued to cohabit with all of his ex-wives (many of whom were young and related to one another) each time he took a new wife. The Utah Supreme Court upheld his conviction under the cohabitation prong of the statute, but admitted that if the statute were applied more generally, to people who cohabit without getting a divorce from prior mates, it might be “problematic.”

This uneven use of the clause regarding cohabitation proved fatal to Utah’s defense. Obviously, the few prosecutions that take place arise out of religious “animus,” that is, they are directly solely against people like Kody. For Judge Waddoups, the “cohabitation” clause of the Utah code was clearly unconstitutional. It rested on nothing he could call a rational basis. It was in violation of the due process clause of the federal constitution. Yet, although the court did not identify a fundamental right to polygamy, or even a right to non-marital “religious cohabitation” (this is how the court refers to Kody’s style of polygamy), it nonetheless concluded that the Utah law could not survive substantive due process analysis. Because the state lacked a rational basis for criminalizing these relationships between people who were not married, it could not constitutionally deprive people like Kody of a right to engage in them. The court thus ordered the phrase “or cohabits with another person” to be stricken from the Utah law.

What about the rest of the Utah law? Can it be a crime to “purport” to marry, if you are already married? One issue here was the meaning of the clause. If a person enters into a religious ceremony that the state clearly does not recognize—as Kody did—is that “purporting” to marry? In the *Holm* case, which we mentioned above, the Utah Supreme Court said yes. As that court read the statute, Kody had indeed committed a crime. Kody “purported to marry” his gaggle of wives, when he entered into a formal (religious) ceremony, binding him to wives two, three, and four. But Judge Waddoups rejected this reading of the statute, despite acknowledging at the outset that the Utah Supreme Court is the final arbiter of Utah law. If the core of the bigamy law was to be saved, constitutionally speaking, it had to be given, in line with the dissent in the Utah case, a narrower meaning.

Judge Waddoups's reading cuts down the statute considerable. It applies, strictly speaking, only to ordinary, old-fashioned bigamy. Old-fashioned bigamy is essentially fraud. Wife number two does not know about wife number one; the bigamist lies to her, and lies to his first wife; this bigamist does "purport" to marry, by claiming that his (second) marriage is legal, when it is not. This situation has almost nothing in common with the situation of Kody and the "sister wives." Kody and his wives never "purported" anything. They never claimed to be legally married. They have always known that the state does not recognize anything but marriage number one. They accept this (as they have to). They think of themselves as married in the eyes of God; but God is not the Utah penal code.

Judge Waddoup's decision makes a lot of sense, legally and socially. It is not particularly surprising. In fact, we more or less predicted this result in [a column \(http://writ.news.findlaw.com/grossman/20101004.html\)](http://writ.news.findlaw.com/grossman/20101004.html) that we wrote three years ago. Of course, this is a district court decision; the case might be appealed. Perhaps it will be. Life and law can always fool you; but if you had to bet, the best bet would be that the decision is going to stand. Even if the case gets reversed, Utah is unlikely to make trouble for Kody and the sister wives, if they chose to move back to that state (they don't seem as happy in Nevada). Thus the chance that a prison cell will interrupt Kody's active sex life is vanishingly small.

The Women of Polygamy

Judge Waddoup wrote a long and erudite opinion, covering doctrine, the social and legal history of polygamy, and a number of other subjects. The opinion says little or nothing, in contrast, about the women in Kody Brown's life—his co-plaintiffs—or about women altogether. One has to wonder: Is Kody's family typical of polygamous families in general? Apparently, the answer is "Yes and No." There are, it seems, many similar families, in Utah and neighboring states. But among the splinter groups practicing polygamy, there are some that are far less benign. In some of them, young girls are dragooned into early marriage with older men; the big men of the sect have whole harems of wives, while scores of less lucky or less well-placed young men are shut out of the market for marriage, or even forced out of the community.

Polygamy, said the Supreme Court in *Reynolds*, over 130 years ago, is offensive because it leads to "patriarchy." Modern readers may find that line a bit ironic. At the time, women did not vote or hold office. The Civil Rights Act was decades in the future. Men ruled the roost. All this has changed significantly in our times. Women have held high offices, have run giant corporations, and a woman President is not unthinkable. Premarital sex no longer "ruins" a woman's chances. Indeed, this is an age of sexual permissiveness, even sexual equality. Yet these very forces validate, in *Brown v. Buhman*, precisely the form of "patriarchy" that *Reynolds* decried. On "Sister Wives," we see a household of women dominated by a single man. Not a bad man, not a violent man; but a man nonetheless, and a man who is very much the head of the household, the Alpha male. It is a household that believes in patriarchy; and practices it as part of its faith.

What makes the case and the situation palatable in modern America is simply its rarity. Only a tiny sliver of the population follows Kody's religion. Most men (we hope) would find his lifestyle intolerable (and much too expensive). And most women would slam the door in the face of any man who asked her to join his harem. Feminists believe in choice. A woman can join the police force, or the Army, or go to medical school; or, if she wishes, stay home and bake cookies. Or—again, if she wishes—aspire to be Kody's fifth wife. Luckily, almost nobody would volunteer for that role.

Conclusion

Although this ruling may seem to be a watershed moment—the legalization of religious polygamy that has haunted Utah since the beginning of its statehood—it may have relatively little impact on the practice of polygamy. The tens of thousands of individuals living in polygamous families were doing so despite the law, which was, in any event, very slackly enforced. They can now live more openly, but their existence was not a secret. Even Kody Brown was not a secret polygamist before he opened up his life in front of a camera crew. (To the contrary, the Utah authorities testified that they knew of him and his plural marriages before *Sister Wives* first aired.) And there are relatively few people outside of these enclaves who desire to have multiple spouses.

Perhaps the more striking change in Utah will come from another judicial ruling, issued just a week later. In *Kitchen v. Herbert* (<http://dockets.justia.com/docket/utah/utdce/2:2013cv00217/88320>), a federal judge struck down Utah's anti-same-sex marriage law, passed in 2004 amid a nationwide wave of such laws, as a violation of federal constitutional guarantees of equal protection and due process. Marriages licenses began to issue almost immediately to same-sex couples in Utah. As one gay Utah man **tweeted** (<https://twitter.com/jsethanderson/status/414156285559336960>) along with a photo: "Me and my new husband!! My polygamous Mormon great grandparents would be so proud!"



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