Sister Wives: An Illustration of Why Polygamy is, and Should be, Illegal

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From: Polygamy.Org, February 2014

The television show Sister Wives, with its one man, four women, and 16 children, has been touted as our chance to gaze upon the "reality" of polygamy. The Brown "family" has been presented as simply your ordinary family—one that just happens to need four sub-homes and an arrangement that permits the man to choose which woman and children to visit each night. This is not a show about casual sex or adultery. According to the family members themselves, it's a show about a single family.

The family was originally living in Utah, where what they are doing is illegal, and wouldn't you know it? Their extreme flouting of the law led to an investigation. Shocking. It reminds me of the Church of Marijuana, whose leaders and members seem surprised every time they are arrested for, yes, distributing and using marijuana.

The Browns are now suing Utah for making their behavior illegal and forcing them to move to Nevada. Essentially, their argument is that they have a right to be married however they choose.

As Joanna Grossman points out in her prior Justia column on the Brown family ,their lawsuit raises every constitutional argument conceivable—which is often a good measure of how unlikely it is that a litigant can win.

In short, the Brown family is grasping at straws. Professor Jonathan Turley is their lawyer. In this column, I'll argue that the Browns will not—and should not—win their case.

Polygamy Cases, Present and Past

Coincidentally, the Supreme Court of British Columbia, Canada, is currently considering whether polygamy is a constitutionally protected activity. The court held lengthy hearings, collected evidence and accepted expert reports (including two from me) on the topic, and also heard from active polygamists in BC.

The key point I made in my first expert report to the Canadian Supreme Court was that no court in the United States has ever held that the anti-polygamy laws violate the free exercise of religion, or any other constitutional principle, despite well over 100 court challenges.

My second expert report responded to Jonathan Turley's attempt to argue that polygamy is constitutionally protected because private consensual sex is constitutionally protected, as was held by the U.S. Supreme Court in Lawrence v Texas. I agree with Joanna Grossman that the argument is not strong. Nor are the free exercise arguments.

The first decision in the United States on the topic was Reynolds v. United States, in which the Supreme Court held that no man may be a law unto himself, and that each must be subject to the laws that govern all. Just as important, theReynolds Court described the long history behind the anti-polygamy laws across the United States:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offense against society. After the establishment of the ecclesiastical courts, and until the time of James I, it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offenses against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I (c. 11), the offense, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I, death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or polygamy be punished by the laws of this Commonwealth."

From that day to this we think it may safely be said that there never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guarantee of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or lesser extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. An exceptional colony of polygamists under and exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Anti-Polygamy Laws Represented a Universal Ban, and Did Not Target the Church of Latter-Day Saints

It is historical fact that the anti-polygamy laws in the United States have been universal from the start, as the Court explained. Every state outlawed polygamy, and Congress extended that prohibition to the Territories, including the Utah territory, where the Latter-Day Saints were practicing polygamy.

Thus, the misleading notion—popular even among some law professors—that somehow the LDS was being singled out by the polygamy prohibition is false history. In truth, they chose a practice that was universally condemned and then were subjected to the law that bound every other United States citizen.

It is critical that Americans understand that the laws against polygamy preceded the LDS's practices, and that the extension of the anti-polygamy laws to Utah were not created to oppress the LDS, but to oppress the practice. It just so happened that the LDS were the ones engaging in the universally and historically reviled practice.

Thus, when either Mormon-derived polygamists like the Browns, or Muslim-based polygamists, try to argue that anti-polygamy is a form of religious persecution, they (and we) need to be reminded that the anti-polygamy laws are neutral and generally applicable, rather than being targeted at any one group. Thus, they are not constitutionally suspect.

The Focus of Anti-Polygamy Laws Was Not Religion, but Patriarchal Oppression

The Supreme Court also noted that the "patriarchal" principle typically leads to oppression. The Browns and their Stepford Wife-like existence are a perfect example.

Here you have one man who has one family with four subparts and who holds all the power. Typically, he spends his evening with the family he chooses. It is obvious that there is an equation in the family: one man = four women (or five women, or 10 women) and he is the one who will choose how many women are his equal.

Part of the pathos of the Sister Wives show comes when patriarch Kody Brown introduces a new wife and mom to the "sisters." (Is anyone else as offended by the title of this show as I am, with its overtones of incest? Sisters have brothers; wives have husbands. It is just another marker of the women's troubling, second-class status.) For those who believe in gender equality, this arrangement should be seen as more than just television entertainment; it is a recipe for oppression, and a foot in the door for the patriarchal principle that unfairly ruled our world not so long ago.

No collection of individuals—even those with their own reality-television show, or a set of religious beliefs—has the power or right to define what marriage is. That is the obligation and power of the state legislature. When marriage is defined, it also determines a wide range of issues, including who is responsible for which children, who inherits from whom, and who owns what. These are crucial constitutive elements of our society that cannot be left to the whim of each individual.

Utah has declared polygamy illegal, and for good public-policy reasons. When practiced in a community, it leads to the necessity of each man looking to younger and younger women, and the abandonment of some of the boys to make the odds work for the men. Even if the Brown clan can make polygamy look banal, as opposed to outright evil, the structure has a sure tendency to suppress women, foreclose the full flowering of their potential, and make children defenseless.

How do I know? If you are charmed by the Brown family, despite the women's second-class status to their husband, you should make sure to tune in to the trial about to commence in Texas of FLDS prophet Warren Jeffs. He is already trying the FLDS's familiar tactic of accusing everyone around him of bias so as to deflect attention from his own crimes. What he has done to girls in the name of polygamy should be—and is—more than enough evidence to show why the Browns' bid to defeat Utah's anti-polygamy law is so wrongheaded.

Fortunately, there is also a backstop to Utah's defense of its statute. Utah had to agree, as a condition for statehood, to join all other states of the union in banning polygamy. It is in a provision of the state's very constitution. Thus, even if a Utah court were to hold the current version of the law unconstitutional, the State of Utah still could not permit such a marriage. And that result is a just one—for the reasons that led the states to impose on their newest member of the union such a condition is as valid today as it was then.

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