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July 12, 2011: The Utah Bigamy Law Challenge

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Title: The Utah Bigamy Law Challenge

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7/12/2011—It is a little humorous to see academics who usually champion constitutionally protected sexual conduct scramble to distinguish the Utah bigamy statute that the Sister Wives family is about to challenge in federal court. It seems a little arbitrary to say that gay marriage is protected and for that matter adultery is protected but bigamy is not. Nevertheless, Cardozo law professor Marci Hamilton was up to the task, arguing on NPR that bigamy exploits women and children. Well maybe it does, but there are two problems with the Utah law. First, the law says nothing about exploitation. The crime is, according to news reports, holding oneself out as married “spiritually” to a person other than one’s spouse (Kody Brown, the husband, is legally married to only one of the “wives”). If there is a protected liberty interest in this man and these women living together in an unmarried state, how could there not be the same interest even if he is married to one of the women? There is also a free speech issue. The “crime” seems to turn not on what a person does but on what a person says. People living together are not guilty of any crime unless they “say” they are spiritually married. There is also a free exercise of religion issue, not in the right to live together or be married to more than one spouse, but rather in that only those who live together in accordance with the dictates of their religion seem to violate the law. There is also a standing issue. No one has been prosecuted or directly threatened with prosecution. So, a federal judge may rule that the challenge is not ripe.