been shown in the prosecution of offenders, it has been and continues to be the custom of the court, after conviction, to suspend the judgment and allow the convicted party to go free upon his simple promise that he will in the future obey the laws. Of the number convicted up to the 30th of June, 1886, but 7 have given the promise and accepted freedom.

"Seven days after assuming office in the Territory, on the 13th day of May, after consultation with Chief Justice Zane and District Attorney Dickson, they approving and concurring, I visited the penitentiary, where about fifty of those convicted under the law were imprisoned, and proposed to all who would promise to obey the laws in the future our united efforts to secure from the President their pardon. Not one of them availed himself of this tender, but sent me a respectfully worded communication, signed by all, declining to do so."

If the Governor, when he visited the penitentiary with the approval, be it observed, and the concurrence of the chief justice and the District attorney, put to a single convict who was there undergoing imprisonment because he had been convicted of bigamy in having married more than one wife, the question whether he would obey the law and not repeat that offense, I take leave to doubt whether he received a negative answer from a single one of them, or from the whole collectively. If, as a condition of receiving a pardon from the President, he put to them or any of them the question whether they would promise to obey the laws in the future, in the sense of accepting the construction given by the territorial courts to the section of the statute which punishes "cohabitation with more than one woman," without an effort to obtain a revision of that construction by the Supreme Court of the United States, I think it very likely that they one and all refused to comply with such a condition of obtaining a pardon. I read their formal reply to the Governor, and I know that this was what they understood was required of them, and I know, too, that they would not have been MEN if they had submitted to it. The fact that the chief justice and the district attorney concurred in the Governor's visit and his offer shows that although not present they were parties to this proceeding. They had nothing else to offer to the prisoners who had been convicted of unlawful cohabitation. To these persons, the requirement was that they should promise "to obey the laws" as they have been construed by the chief justice and his brethren; and while I shall not say that this construction is an "infamous" one, *I shall say that it is forced, artificial, unnatural and oppressive*; and that to require citizens of the United States, who happen to dwell in a Territory, to promise to obey the laws, when so construed, while the door of access to the Supreme Court of the United States is closed and kept closed against them, when the offense is a new one, when it is couched in one ambiguous word, and when the construction of the lower courts requires of them a renunciation of religious and moral duties, is a cruel proceeding. Torture by the rack, as a means of extorting a renunciation of religious beliefs, was once practised, and is justly held to have been "infamous." This was torture by physical pain. There may be a moral torture that should not less be condemned. When a man is in the penitentiary of a Territory, suffering imprisonment for an offence against the United States that is entirely new, to tell him that the condition on which he can have the President's pardon is that he shall promise to obey the laws as they are construed by a set of local judges, over whose decisions there is no appellate jurisdiction, and when obedience to the law, as so construed, requires him to renounce religious and moral duties to others who are dependent on him, is to subject him to a moral torture worse than any physical pain to which the human frame can be subjected. I say that the men who rejected this offer would not have been MEN if they had embraced it, and I honor them for their refusal. This, Mr. Secretary, is strong language. I proceed to its justification.

The Governor states that he saw and conversed with about 50 "of those convicted under the law," and that he proposed a certain condition to "all," namely, that they "would promise to obey the law in the future." He does not say of what particular offence these fifty persons had been convicted. The statute covers two offences: One is bigamy, or the having married more than one wife; the other is "cohabiting with more than one woman." They are distinct offences, separately punished. The one requires no special interpretation. A man is a bigamist who has married more than one woman. The other offence requires very careful judicial interpretation, for Congress has not defined it. It is described by the single word "cohabit," which means to live with in the same place or in the same tenement; but the territorial judges say that it means to associate with in any way or manner, no matter in what place.

Now, what was the state of things when Governor West visited the penitentiary? There were a few convicts who had been convicted of bigamy and sentenced for that offence. But the great majority had been convicted of unlawful "cohabitation;" and, of these, many, and notably "Apostle Snow," had been convicted upon a state of facts which showed that the whole association, or continuance of personal relations, between the man and all of his wives but one had, since the passage of the Edmunds act, been confined to looking after their support in sickness and in health, and caring for their children, without dwelling in the same house, or in some cases, in the same town.

### DIFFICULTIES IN THE WAY OF THE PUBLIC FORMING SAFE OPINIONS.

No public question has arisen in my time on which the general public have so little means for forming safe opinions as they have on what is called the "Mormon question." To most persons the practice of polygamy is all that is supposed to be involved in this matter. Very few of the most intelligent people have any comprehension of the problem in statesmanship and jurisprudence which has come about in consequence of the omission of the Federal Government to deal with polygamy in the Territories at an earlier period, when the whole question was much more simple than it is now; when there were fewer persons to be affected, and when there had not come into existence many thousands of offspring of polygamous marriages, now constituting about one-fifth of the whole population of Utah. Very few people in the country at large understand the circumstances which have caused intelligent and virtuous women to enter into plural marriage, a connection that is just as voluntary as any other form of the marriage relation. The relation of plural wives to one husband is just as holy and innocent, according to the Mormon religious belief, as the relation of marriage between one woman and one man. No one can understand this peculiar moral phenomenon without referring to the religious belief of the people called Mormons, and no one can perceive the true limits to public interference with these relations without knowing what the religious belief of these people is, and how it originated. This is the first time that a public question has arisen since the adoption of the first amendment of the Federal Constitution, in which the meaning and operation of the religious liberty guaranteed by that amendment have come into legislative and judicial consideration. The question of slavery in the Territories of the United States, the vexatious question of our ante-bellum period, was a purely civil and political matter not complicated by the element of religious belief; for, although some of the defenders of African slavery undertook to justify it on what they deemed religious grounds, it was never necessary for the Federal Government to recognize that justification. It is far otherwise in regard to polygamy in the Territories as a form of the marriage relation; for although it is undoubtedly competent to the civil power to regulate the marriage relation wherever it has a plenary legislative authority, yet the institution of marriage, whether monogamous or polygamous, has in it a religious element, and by the accepted ideas of all persons professing in any form the Christian religion, this institution of marriage has a religious sanction. To the extent that the marriage relation is not recognized as having a religious sanction, to the extent that it is regarded as a mere civil contract, the bonds of matrimony are the more loosely assumed and the more readily dissolved; and although the civil power, in legislation, can deal with this social relation only or chiefly as one of a civil nature, yet it is always necessary to keep in view the fact that the parties who enter into this relation may, and for the most part do, recognize it as having a religious sanction and a religious origin. It may therefore happen, and in regard to these Mormons it has happened, that there is one domain of personal conduct in which the civil power can rightfully dictate what shall be prohibited because it is injurious to the welfare of society, while on the other hand there is a much wider domain of personal conduct in which there can be no interference by the civil power without trenching on the rights of conscience which are secured by an express constitutional provision. To draw the line between that individual conduct which the civil power may prohibit or punish, and that which it may not, is not attended with insuperable difficulties, but it has now become, in the case of these Mormons, imperatively necessary.

### WHAT IS COHABITATION?

For example, in certain cases that came before the Supreme Court of the United States at its last term, under the statute known as the "Edmunds act," enacted by Congress in 1882, the highest appellate tribunal in the country was called upon to define the kind of conduct which the civil power can, and that which it cannot, punish with fine and imprisonment. The act of 1882, designed to amend an act passed in 1862—which earlier law made polygamy bigamy, and punished it as such—contained a further provision punishing any man who should "cohabit with more than one woman." No legislative definition of the word "cohabit" was given; it was left to judicial interpretation. Ordinarily, cohabitation of a man with more than one woman, in a penal statute, would be understood by lawyers and publicists as the dwelling together in a habit of sexual intercourse, or in the ordinary relations of husband and wife. But in Angus M. Cannon's case, which was the first one that came before the Supreme Court, it was held that the fact of sexual relations was not necessary to constitute the offense; that the offense was complete when a man dwelt under the same roof with two women whom he claimed to be his wives, ate at the separate table of each about one-third of the time, and had no other home or dwelling place; and that it was not necessary to inquire into the privacy of his sexual relations with either of them. Upon this construction of the word "cohabit," the conviction of Cannon was affirmed by Supreme Court of the United States last December, and a mandate was accordingly sent down to the territorial court directing its judgment to be carried out. But in April last, three cases of "Apostle Snow" came before the Supreme Court of the United States on writs of error. Snow had been convicted in the District Court of Utah on a state of facts very different from the facts in Cannon's case; the Supreme Court of the Territory had affirmed the conviction, and Snow was, and is now, serving out accumulated terms of imprisonment in the penitentiary imposed by the sentence. He is a man upwards of 70 years of age, of blameless life, in all respects a man of education and culture, and one of the first citizens of the Territory. It appeared in evidence that he had seven wives then living, to whom he had been married at different times in the course of the past forty years. Six of these marriages took place before the act of 1862 had made polygamy bigamy, and the seventh took place eleven years before the act of 1882 created the new offence of cohabitation with more than one woman. Before the act of 1882 went into operation, Mr. Snow had dwelt exclusively, in every sense of cohabitation, with his youngest wife and her children, in a separate house which he built for her; his other and older wives, some of them quite elderly women, lived in separate houses with the children of each of those who had children. Mr. Snow's whole association with any of his wives, excepting the youngest, consisted in occasional visits to them, always in the day-time and in the presence of any one else who happened to be in the house, continuing to support and care for them, and looking after the welfare of their children, whose father he was. This state of things continued through the whole of the several periods for which he was indicted in three separate indictments for unlawful cohabitation with more than one woman. He was convicted because he spoke of the other women as his "wives," when, according to his faith and theirs, he had married them for time and eternity, and because the territorial court, by a forced construction of the statute, instructed the jury, composed exclusively of "Gentiles," that they were to presume cohabitation although the fact might be that he had no sexual intercourse with any wife but the one in whose house he dwelt. It is manifest that this conviction under this artifical construction of the law could not take place without violating his religious freedom, because his whole conduct toward all the women evinced plainly that it was dictated by his religious belief in his eternal relation to them as one of religious and moral duty, and because it was clearly proved at the trial that in the sexual sense he had not cohabited with any wife but the youngest during the periods covered by the respective indictments.

When the extraordinary ruling of the territorial court came before the Supreme Court of the United States the judges were impressed by the fact that they had really to ask and answer the question whether the law required these men to renounce every possible relation to these women, whom they had married for time and eternity, before there was any law on the subject of polygamy or cohabitation, and to turn them and their children adrift upon the world. The enormity and cruelty of such a construction became apparent. But after Mr. Snow's cases had been argued and taken under advisement, a doubt arose among the judges whether they had appellate jurisdiction in this particular class of cases coming up from the Territories. The appellate jurisdiction has not been expressly and directly conferred by any one statute, but it was believed that it could be fairly made out by collating different statutes. The Government wished the Supreme Court to settle all the questions arising under the laws of 1862 and 1882, and therfore the Attorney-General raised no question of jurisdiction. Of course it was not the duty of Mr. Snow's counsel to raise that question. But, apparently because the Court perceived that they had made rulings in Angus M. Cannon's case which they ought to reconsider, and because they could not find that they had appellate jurisdiction, they dismissed the Snow cases for want of jurisdiction, recalled their mandate in the Cannon case, and dismissed that writ of error also for the same reason. This left the act of 1882 without any construction whatever by the supreme judicial authority, and left in the penitentiary some of the most considerable citizens of Utah under convictions obtained in the territorial court by a forced construction of a statute which created a new offense in a very peculiar state of things. This is a somewhat extraordinary situation of affairs; one that can only be remedied by an act of Congress giving appellate jurisdiction to the Supreme Court of the United States in this very peculiar class of cases which involve the question of "cohabitation."

### POWER OF CONGRESS OVER THE TERRITORIES.

You, Mr. Secretary, will not be likely to misunderstand me; but, in order that others may not, I shall now refer to the memorable controversy which took place thirty years ago in regard to the legislative power of Congress over the Territories. In 1857 I took part in the re-argument of the Dred Scott case before the Supreme court of the United states. One of the specific questions on which a re-argument had been ordered by the Court related to the constitutional validity of the Missouri Compromise restriction which interdicted the existence of slavery in the whole of the possessions of the United States north of the parallel of 36 degrees 30 minutes. On the southern side of this question the contention was that, as all territory was the common property of the Union, a citizen of a slave holding State had the same right to take his slave property into a Territory, and hold it there as property so long as the country remained a Territory, that a citizen of a free State had to take any other kind of personal property into a Territory and hold it there as property during the same period. Against this contention it became my duty to maintain the two following propositions:

1st. That Congress has a plenary legislative power over all the relations of social and civil life in a Territory of the United States, and can allow or prohibit the existence within the Territory of any domestic institution or relation as it may see fit.

That Congress may discriminate between the kinds of property which it will allow or prohibit in a Territory.

This is now familiar and unquestioned constitutional law; but thirty years ago it was strenuously disputed, and few persons who were not in mature life at that time, or have not since studied the history of that exciting period of sectional controversy, are aware of the formidable difficulties which attended the true solution of this question. But it is now to be assumed as a fundamental truth which no one controverts, that so long as a Territory of the United States remains a Territory the relations of social and civil life therein are under the government of Congress; but that any legislation respecting them is to be controlled by those prohibitory clauses of the Constitution which limit the legislative power of Congress wherever it is exercised.

But now let it be supposed that, in addition to prohibiting the introduction of slave property into a Territory, Congress had gone a step further and had made it a penal offense, punishable by fine and imprisonment, for any inhabitant of a Territory to be interested in slave property in any State of the Union. It is at once obvious that such a law would have transcended the legislative power of Congress, because it would have encountered a personal right to hold in a slaveholding State a species of property then perfectly lawful in the limits of that State, and because the Constitution of the United States gives to Congress no legislative authority over the property of inhabitants of a Territory unless that property is itself within the Territory.

I have suggested this illustration of the limits of Congressional authority over the relations of social and civil life in a Territory, because, in the existing legislation of Congress on the subject of polygamy in a Territory of the United States, there is some analogy to the legislation which I have hypothetically assumed to have been adopted in regard to slavery. I shall presently point out how this analogy is important to be observed, because it takes us into the domain of religious liberty just as the supposed case of legislation respecting slavery would have taken us into the domain of civil liberty in the then condition of the Union.

Let it be remembered then, once for all, that I make no question of the power of Congress to prohibit in a Territory of the United States the social and civil relation known as polygamy, or plural marriage; and it makes no difference, in my view, whether those who contract plural marriage do so from a sense of religious obligation or conviction of a Divine permission, or from any other motive. But it is one thing for Congress to have a constitutional power to prohibit a relation, and another thing to apply that power in a way to transcend and violate the constitutional rights of individuals. It was perfectly competent to Congress to prohibit the holding of slave property in a Territory. It would have been entirely unconstitutional for Congress to pubish an inhabitant of a Territory for holding slave property in a State where such property was lawful. It is in my opinion perfectly constitutional for Congress to prohibit polygamous marriages in a Territory of the United States, and perfectly unconstitutional for it, in order to break up the institution or practice of polygamy, to apply punishments and penalties that violate the religious rights of individuals. This distinction is of the utmost importance, and I trust that it may be kept in view throughout all the criticisms that I shall make upon the existing legislation and the judicial interpretation that it has received in the territorial courts of Utah.

There is another distinction on which I must equally insist. The religious liberty that is guaranteed by the first amendment of the Constitution is not a liberty to do acts which the legislative authority deems injurious to the welfare of society, but it is a liberty to hold any religious opinions that the individual may see fit to hold, and to carry out those opinions in any conduct that does no harm to others. Upon this distinction it is no violation of religious liberty for Congress to enact that in a Territory of the United States monogamy alone shall be a lawful relation between the sexes notwithstanding the religious belief of the parties that polygamy is commanded or permitted by the Divine law. The legislative authority of civil government may make any conduct *malum prohibitum*, may prohibit any relation between individuals, provided that authority determines the conduct and relation to be against the public welfare. But, on the other hand, the civil authority can constitutionally interdict or punish no conduct and no relation between individuals which is both dictated by a sense of religious duty and is at the same time innocent in itself and in its consequences.

When the first amendment to the Constitution declared that—

CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION OR PROHIBITING THE FREE EXERCISE THEREOF;—

It meant to make two things constitutionally impossible: 1st. To make it impossible for Congress to establish any national religion, or any religion to be supported or upheld by the Federal authority; 2d. To make it impossible for Congress to prohibit the free exercise of religious beliefs. There is no difficulty whatever in determining the meaning of this last provision. The "free exercise" of religion comprehends the holding of any religious belief, and the doing of any act dictated by that belief which is in itself and its consequences innocent or praiseworthy. To prohibit the free exercise of religion is to make a law which prevents the individuals from carrying out in their lives those religious beliefs which dictate or lead to actions in no way injurious to society.

Perhaps it will be asked, why upon the concession that Congress may prohibit polygamy in a Territory, notwithstanding the religious belief of those who practise it that it is commanded or permitted by the Divine law, it is not equally competent to Congress to punish any kind of conduct that Congress may deem it necessary to suppress in order to put an end to polygamy? I propose to answer this question by examining the existing legislation on the subject of polygamy and cohabitation, and the judicial interpretation that has been given to it in the territorial courts of Utah.

### LEGISLATION ON POLYGAMY AND COHABITATION—JUDICIAL INTERPRETATION THEREOF.

It is to be remembered that from the time of the great exodus of the Mormons from Illinois and their settlement near the Great Salt Lake in 1847, carrying with them the practice of plural marriage, openly, and in full view of the people and Government of the United States, down to the year 1862, a tacit toleration was given to this feature of their civilization. This toleration was at first extended to it because of their remote situation in a region where it was not supposed that the civilization of the rest of the country would be affected by it, and where it was assumed they would form a community by themselves. I speak now of the toleration evinced by the absence of any legislation on the subject for a period of fifteen years, and by the relations that subsisted between these people and the Government and people of the United States during all that period. Not only did those of them who had contracted plural marriages before their emigration carry their plural wives with them and continue the relation after the settlement in Utah, but such marriages were greatly multiplied after the settlement, and the descendants of such marriages now form a large part of the Mormon population of the Territory. Moreover their leader, Brigham Young, the official head of their Church, a man known to the whole country as having many wives, was appointed by the Government of the United States, in 1850, governor of the Territory, and held that office for seven years. It was not until the year 1862 that Congress took any notice of the polygamy existing in Utah by any legislation whatever. In that year a statute was passed which made polygamy in any Territory bigamy, and punished it as such by fine and imprisonment. That this statute, in relation to marriages contracted before it was passed, was open to the objection that it was an *ex post facto* law, would seem to have admitted of no doubt among lawyers outside of Utah, but it has been considered that it was not liable to this objection. In Utah the Mormons believed from the first that this law was unconstitutional upon this and also upon another ground, namely, that as plural marriage was an article of their religious belief Congress could not constitutionally prohibit it. This was a mistake; but it was not until a later period that it was found to have been a mistake. It was a very honest and a very natural one, for these people had been for a long time sincere believers in a revelation which sanctioned plural marriage as a ecclesial relation, and they had seen a tacit toleration extended to their belief and their practice by the Government and the people of the United States for a period of fifteen years after they became subject to the paramount and exclusive legislative authority of Congress. Very few prosecutions for polygamy were instituted in Utah under the act of 1862.

But after the lapse of twenty years the law of 1862 was amended by the act of March 22, 1882, which has been called the "Edmunds act." This act re-enacted the provision of the act of 1862, which made polygamy bigamy, and it also created a new offense, described in its third section as "cohabitation with more than one woman,"

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