yond her reach, lest in his bounden ministration to their wants he shall see or speak for an instant with their natural nurse—the mother? To concede these things would be to impute to Congress the cruel absurdity of imposing a legal duty upon the citizen and then inflicting a penalty for the performance of that duty. Your Honors will not sustain such an inhuman construction.

No instruction equivalent to the fourth request, was given, but the jury was instructed as follows, and the plaintiff in error excepted:

"Of course the defendant might visit his children by the various women, he may make direction regarding their welfare, he may meet the women on terms of social equality, but if he associates with them as a husband with his wife he is guilty. The Edmunds law says there must be an end to the relationship previously existing between polygamists; it says that relationship must cease."

The fourth request asked the Court to say that the plaintiff in error might visit his wives. There is no answer to this request in the charge. The jury were told that he might visit the *children* but there was no charge of cohabiting with them. They were also told that he may "meet the women on terms of social equality." This implies nothing more than that both may be guests at a friend's house or may meet on the street or in any public place, and the term "meet" includes and would be understood to mean a casual meeting, and not an intentional one, while the term visit would mean an intentional going to see the very person visited; and it was to this view that the request was directed. What language could be more misleading and delusive than the expression: "If he associates with them as a husband with his wife he is guilty?"

What did the Court mean by that expression? Whenever Mr. Snow met either of his wives, whether at their homes, on the public street, at meeting or elsewhere, the association whatever it was, although in the presence of others and entirely innocent and proper in its character, was as husband and wife. I have had occasion to state to your Honors in former cases, the belief of my people with regard to the marriage relation. We believe that when once entered into and sanctioned by competent authority it becomes eternal in duration and cannot be dissolved by any human power. So that whatever association takes place between such parties it must be as husband and wife, and the jury, understanding this, must have adopted the view that under this astounding instruction the accused was guilty.

Fifth Request. "Having more than one wife and claiming and introducing more than one woman as wives do not constitute the offence charged. You must find, to justify a conviction, that he has lived with more than one within the time stated in the indictment."

The prosecution had given evidence that when Lorenzo Snow was under arrest in the U. S. Marshal's office, and three of the women were there under subpœna, he had introduced the three women as his wives; and the attention of the jury was nowhere called to the distinction between evidence of the status and the fact of cohabitation; and the ambiguous manner in which the jury was instructed tended to mislead them as to what constituted the offence and to induce them to give undue importance to the relation of the parties. I contend that the request is fair, meets the issue before the jury, and should have been given.

The only answer to the request is found in the clauses of the charge already quoted, that "the Edmunds law says there must be an end of the relationship previously existing between polygamists. It says that relationship must cease."

The giving of this instruction was gross error. The "Edmunds law," as construed by this Court, does not say that "there must be an end to the relationship previously existing between polygamists," nor that "that relationship must cease." But, on the contrary, this Court, in construing that statute, in the case of Murphy v. Ramsey, (114 U. S., 43,) expressly negatives that idea in the following language: "The crime and offence of bigamy or polygamy * * consists in the fact of unlawful marriage. * * Continuing to live in that state afterwards is not an offence, although cohabitation with more than one woman is."

This instruction left the jury to infer that there must be some measures taken to sever the "relationship," and that a man could not admit that the relationship of husband and wife existed without being guilty. Such is not the law. That law punishes the offence of polygamy and the offence of living with more than one woman as wives; and if the old relationship or status, as distinguished from some new affirmative offence is maintained, the polygamist cannot vote. In a prosecution for unlawful cohabitation, it is gross error to use language from which the jury must have understood that the maintenance of the relationship was the gist of the offence. This adopted the theory that the "holding out" as wives was the gist of the offence and virtually declared that the polygamous status itself was criminal.

Mr. Snow had admitted the relationship, and the jury undoubtedly understood from this part of the charge that upon such admission they were directed to convict.

When I say he had admitted the relationship I do not mean that he admitted the continuance of any polygamous practice or conduct, but the existence of that spiritual relation which had been entered into by them and which, according to their belief, still continued and will continue to exist, even in eternity, no matter whether they live together in this life as husband and wives or not. This is what he meant and all he meant by the admission that the women were his wives and that he had claimed them as such, and yet upon that admission and this instruction the jury found him guilty of unlawful cohabitation.

Sixth Request. "The law assumes the defendant innocent until he is proven guilty beyond a reasonable doubt, and his guilt or innocence is to be determined by you and what others or the public may have believed or had reason to believe from his manner of living is not the issue, but you are to say from the evidence whether or not he did in fact live with more than one woman as charged."

This request brought the Court squarely to the point whether cohabitation in fact with more than one woman was necessary or not, and he refused to tell the jury. Can any one doubt that the defendant was entitled to have this instruction given? It would seem strange that the necessity should arise for asking a court to tell the jury what the issue was which they were to try, and utterly incredible that, when asked to so charge, a court should refuse; but such a necessity certainly arose and such a refusal was positively made in this case.

The only answer to the instruction asked for justifies the request, and is as follows:

"If the conduct of the defendant has been such as to lead to the belief that the parties were living as husband and wife live, then the defendant is guilty."

Seventh Request. "The defendant was not required to give any notice, public or otherwise, of his manner of life or purpose, or whether he was or was not abstaining from cohabiting with more than one woman, and it is a sufficient defence if you find from the evidence that it is not shown beyond a reasonable doubt that he in fact did live or cohabit with more than one."

Eighth Request. "It is immaterial whether or not there was any change of conduct toward, or of relations with, his wives at the time of the passage of the Edmunds law, if at and prior to that time he was not violating the provisions of the act relating to cohabiting with more than one woman, and if in 1885 he has not so cohabited, he is innocent of the present charge, whether such innocence is the result of a change of relations, with his wives or the result of a maintenance of former relations."

These requests were material, in view of the evidence comparing the defendant's manner of living in 1885 with his manner of living during ten or more years, and the instruction permitting the jury to consider such evidence, and the declaration to the jury of what the Edmunds law says. And I most respectfully assert that the defendant was entitled to have each and all of the requests given. The refusal of the Court to instruct the jury as to the real issue and the misleading and erroneous instructions given undoubtedly led the jury to convict my client, not because he had lived or cohabited with more than one woman, but simply because he admitted that the women whom he had married for time and eternity were still his wives. Such gross errors certainly entitled him to a new trial, and the Court below erred in not granting it.

In each case judgment on the record is entered in three cases. I do not understand this practice, and it grossly injures the defendant. Each commitment requires his imprisonment eighteen months, and a satisfaction of one would not on its face be a satisfaction of the others.

If your honors please, I come now to the question of segregation which is raised by the pleas of former conviction interposed in two of these cases. Three indictments were found against Mr. Snow on the same day and by the same grand jury, for cohabiting with the same women in 1883, in 1884, and the eleven first months of 1885, respectively. The question is simply this: Where the alleged cohabitation has been continuous and at the same place and with the same women, can it be divided by an arbitrary division of the time into several offences?

The statute only prescribes one penalty for unlawful cohabitation, and as the offence in its very nature is continuous, consisting of a continuing act or series of acts, all amounting to the one thing termed cohabitation, it is necessarily the same offence until the continuity is broken by a prosecution, or by some marked act or cessation; and where the continuous act covers every day for a period of nearly three years, as shown by these indictments, the offence is one and indivisible. It is merely arbitrary to divide such a continuous act by years—it is just as susceptible to division by months, weeks, or even days—and such arbitrary division shows that there is no division in fact or in law, and that it can have no principle to support it.

So far as the books disclose, this is the first time that an attempt has ever been made to segregate the offense of cohabitation, a fact which is itself very significant, and will doubtless have its weight with the Court in determining this very important question. I say important, because, as I will show your Honors in the course of my argument, it resolves itself into the simple proposition, whether it is possible for the prosecutor and grand jury, by this novel procedure, to so change the punishment prescribed by law, that it may become life imprisonment for an offence to which the statute has attached, as the maximum penalty, six months imprisonment and three hundred dollars fine.

But while we find no case directly in point, the principle we invoke has been applied in numerous cases which are analogous to this, and the reasoning of the courts in those cases is so cogent that we see no room for doubt as to the soundness of our position. In the case of Sturgis v. Spofford, (45 N. Y.,) the Court held that only one penalty could be recovered for several violations of a statute occurring before the suit was brought, and in speaking of the reason and policy of the law the Court uses the following pertinent language: "If the prosecution is promptly instituted for a single offence, it operates as a salutary warning to discontinue the practice or acts complained of, while delay may be regarded as an acquiescence in the right of the party to perform the act. * * * Under this rule the party prosecuted will have an opportunity to desist from doing the act complained of, and if he does not, he will knowingly incur all the hazard of repeated prosecutions."

In the case of Fisher v. N. Y. C. and H. R. R. R. Co., (46 N. Y.,) the same doctrine was held, and the court says: "But one penalty can be recovered upon the statute under consideration, for all acts committed prior to the commencement of the action. If after this it is again violated, another may be recovered in another action commenced thereafter, and so on as long as violations continue. This will not only tend at once to put a stop to the extortion when it is committed knowingly by the defendant, but where it is done under a mistake as to its rights, will give it notice that its right to charge the amount claimed is challenged, and will induce a cautious examination of the question, and an abandonment of the claim before a ruinous amount of penalties have been incurred."

If it be necessary that the Government should give a defendant notice, by commencing suit in each case, where the penalty is only $50, how much more imperative must be the rule in a case like this, where the penalty imposed may be both fine and imprisonment, and where the delay might cause the defendant to not only incur "a ruinous amount of penalties," in fines, but even to subject himself to imprisonment for life.

The Chief Justice. Your position is that they cannot divide up a continued cohabitation into parts?

Mr. Richards. Yes, sir.

The Chief Justice. Here they seem to have made only one arrest.

Mr. Richards. That is true. They waited until more than three years after the law was passed before commencing a prosecution, and then arrested the defendant and indicted him three times, on one examination of witnesses before the grand jury, for a continuous cohabitation extending back two years and eleven months. This is what we complain of, and we say there was but one offense, and should have been but one indictment and one prosecution.

The Chief Justice. They charged him with cohabitation with the same women in every case?

Mr. Richards Yes, sir; and introduced the same evidence to convict him in each case, using it three times and procuring three convictions.

Mr. Justice Miller. I understand that the indictment for the offense committed in 1885 was first tried, and the defendant convicted.

Mr. Richards. Yes, sir.

Mr. Justice Miller. And you pleaded that in bar of the others.

Mr. Richards. Yes, sir; and when two of the cases had been tried, we pleaded them both in bar of the third.

The Chief Justice. Your argument is to the effect that occasional cohabitations are liable to aggregate the punishment, while a continual cohabitation will curtail it?

Mr. Richards. I do not so understand it, sir. My position is this: The legislative power declares what shall constitute the offense and prescribes a penalty for committing it. Whenever the Government has information that the offence has been committed, it may prosecute, whether the cohabitation has continued a month or a year, but until it does prosecute there can be but one offence. After an indictment is found and the party has has notice, as the New York Court says, then if he repeat the offence he may be prosecuted again, and so on. But my contention is that the cohabitation being continuous, cannot be divided up and made to constitute several offences.

The Chief Justice: Does it appear on the record that this was a continued cohabitation?

Mr. Richards: It does. The indictments are all contained in the pleas of former conviction and, together, charge a continuous cohabitation coving every day between January 1st, 1883, and December 1st, 1885.

Referring again, your honors, to the authorities. In Mayor of New York v. Ordronan, (12 Johns.,) the doctrine we are here contending for is emphatically declared, and a decision by Lord Mansfield is quoted in support of it.

The Supreme Court of North Carolina in the case of State v. Commissioners, (2d Murphey,) denounced this procedure in the following terms: "Were such a doctrine tolerated, it is impossible to say where its consequences would end. * *

* This notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced."

The reasoning of the courts in these and other cases cited in our brief, would seem to place the matter beyond all controversy, were it not that in one single case, Commonwealth v. Connors, (116 Mass.,) the Supreme Court of Massachusetts held otherwise, and upon this case the counsel for government relies. Two indictments were found against the defendant on the same day for keeping a tenement for the illegal sale of liquors, and the court held that both indictments might stand, on the theory, as stated in Commonwealth vs. Robinson, (126 Mass.,) that the grand jury is vested with "a very large discretion in limiting the time within which a series of acts may be alleged as constituting a single offence."

It is difficult to understand by what process of reasoning the Court reached this conclusion, or to reconcile it with the elementary rules of law. That legislative power can only be exercised by competent legislative authority is well settled, and that no judicial or executive officer or body can usurp such functions, will not be denied; and yet, while the law should always be fixed and definite in its requirements, and never shifting or uncertain, it is contended that a grand jury may, at its pleasure, by making two or more presentments in a certain case, increase the penalty prescribed by law and so subvert the legislative will expressed in unmistakable terms. To adopt such a rule is to concede the power to a grand jury to make or modify the law in its most important and vital part. It cannot stand on principle, for, as the Supreme Court of Iowa says, in the case of State vs. Egglesht, (41 Iowa,) "he (the defendant) either committed one crime or he committed four. It is not competent for the State at its election, by the form of its indictment, to give to defendant's act the quality of one crime or of four at pleasure. The act partakes wholly of the one character or wholly of the other."

Now I most respectfully submit that this clear enunciation of a most important legal principle must be correct, and that the question involved is solely a question of law with which the grand jury can have nothing whatever to do.

When we come to consider the point as it has arisen in these cases, we see at once how utterly preposterous and unjust the theory of the prosecution is. Here the defendant was permitted, without any interference on the part of the Government, to keep up an alleged continuous cohabitation for nearly three years, and then he was indicted and convicted of three offences and sentenced to 18 months' imprisonment and to pay a fine of $900, when the law under which he was prosecuted fixed the maximum penalty for such an offence at six month's imprisonment and $300 fine. As I have shown, the division of time by years is merely arbitrary, and if the grand jury could legally find three indictments they could just as well have found thirty or 300. The adoption of this theory enables the prosecution to sit supinely by for a period of three years, without any effort to enforce the law, and then, with one fell swoop, come down upon an individual with prosecutions enough, for offences already committed, to render him liable to imprisonment for the remainder of his life, and to absorb in fines an immense fortune; because if a man can be indicted for each year he may be prosecuted for each month, or each week, or even for each day in the three years of limitation. If indicted for each month, the imprisonment would aggregate 18 years and the fines would amount to $10,800; while an indictment for each week would entail an imprisonment of 78 years and fines amounting to $46,800. When the calculation is extended into days the result is simply appalling, showing an imprisonment of 547 years and fines amounting to $328,500.

And this is by no means an idle speculation upon this point, for the very judge who tried these cases declared that there was no legal principle which would prevent this rule from being carried to the full extent which I have suggested.

Assistant District-Attorney Maury: Do the records disclose any such language as that?

Mr. Richards: No, sir, not in these cases; but it is a public historical fact to which I am entitled to refer.

I confidently submit that it is utterly impossible to believe that Congress ever intended to authorize, or permit, the perpetration of such an inhuman outrage in the name of justice.

In the second and third cases tried the Court charged the jury as follows:

"If you find beyond a reasonable doubt that the defendant had, during the year 1884, (in one case 1883,) a legal wife living in Brigham City, Box Elder County, Utah Territory, from whom he was undivorced, that he recognized her as his wife, held her out as such and contributed to her support as such wife, and that during the same year he lived in the same house with the woman Minnie, recognizing her as his wife, associated with her as such, and supported and held her out as a wife, then the offence of unlawful cohabitation is complete, and you will find the defendant guilty. The legal wife in this case is the woman whom the defendant first married."

In the case first tried, it appeared in evidence, that Adeline and Charlotte (who is now dead) were married to the defendant at the same time and that they were his first wives, and that Sarah was next married to him. Upon this state of facts the Supreme Court of Utah, in its opinion delivered by Chief Justice Zane, declared that Sarah was the lawful wife.

In the second and third cases it only appeared that Adeline was the first one married, and she was treated as the lawful wife in these cases, and so referred to in the foregoing instruction. It was undisputed that the defendant lived with Minnie, the last one married. There was no evidence that he had even seen Adeline in 1883 or in 1884, and no proof was offered of visits or any kind of association between them, and the instruction required nothing of the kind.

It will be remembered that the question to be determined by the jury was not—as might be inferred from the argument of opposing counsel "who was Mr. Snow's legal wife?" but the real question was, "Had he cohabited with more than one of his wives?" The Court by this instruction took the question entirely from the jury, as to cohabitation with one of the women, and told them, as a matter of law, that living in the same city with a legal wife and recognizing, holding out and supporting her as such, constituted cohabitation, without any proof that the accused had ever, during the period charged, seen his wife or been in her presence; and that too in the face of the wife's positive statement that he had not in any way lived with her during said period.

Mr. Justice Harlan: He admits that he claimed her as his wife?

Mr. Richards: Yes, sir.

Mr. Justice Harlan: And supported her as his wife?

Mr. Richards: Yes, sir.

Mr. Justice Harlan: Now, what additional fact is necessary to constitute cohabitation?

Mr. Richards. The fact that he lived with her.

Will it be contended that if Lorenzo Snow had lived in Brigham City during these three years and Adeline Snow had lived in Australia, and he had said "She is my wife, and I have claimed her as such all this time," that he would be guilty of cohabiting with her? If there is any difference in principle between such a case and that of my client I fail to see it.

In defining cohabitation, this Court has adopted the second definition of Worcester which is, in substance, the living together of a man and woman as husband and wife. The offence manifestly consists of the substantive act of living together, added to a status or relation of the parties, the result of a former act, which in the case of Adeline occurred over forty years ago. In respect to this status no new act is required. It may be maintained passively by merely not denying the marriage, or at most by an admission that the relation continues. Without the act of living together there is nothing to meet the substantial part of the defined offence. The Court, in this case, defined the offence to be living with one woman as a wife and having a legal wife living who was admitted to be a wife. The words of the law "cohabits with more than one woman" are wholly ignored. The status of one, and living with the other, are substituted for a living with both.

The act of Congress provides for three classes of cases. It prescribes punishment for contracting the polygamous relation; it punishes a maintenance of polygamous cohabitation where the relation has previously been contracted; and section 8 imposes disabilities for the maintenance of the relation or status. These three things are distinct. The instruction unites sections 3 and 8 to make an offence under section 3. It does not cover cohabitation with more than one woman, but cohabitation with one, and the existence of the status defined in section 8 with another; while section 3 requires not only the status, but the substantive act of cohabitation in that relation, "with more than one woman." The charge of the judge defines adultery or a living in adultery, while this Court has said that illicit sexual relations are not what is punishable under section 3, but that this section punishes the maintenance of two households or homes, and implies such an association as will constitute cohabitation. The words "as wives," or "under claim of a marriage relation," are held to be implied in section 3 in furtherance of the general purposes of the whole act. The instruction makes these implied words the substantive definition of the offence, and omits the word "cohabit" as part of the definition. The living with one, and being in a status defined by section 8 with the other, is thus by the charge made criminal under section 3.

This changes entirely the scope and effect of the law and makes it operate as if it read: "Any male person who cohabits with any other woman than his legal wife," whereas the statute now reads: "Any male person * * who cohabits with more than one woman." Under the plain letter of the law, no unlawful cohabitation can exist with one woman only. There must be an actual cohabitation "with more than one woman," to constitute the offence.

There is a further objection to the instruction. It makes the presumption of cohabitation with the lawful wife indisputable as a matter of law, and does not permit the jury to determine the fact, or permit the presumption to be rebutted by evidence. In these cases the whole evidence shows that the defendant had lived exclusively with his wife, Minnie, and the repute shown was to the same effect. Under this statute it being incumbent on the prosecution to show a cohabitation with more than one woman, as a matter of fact, and the presumption of innocence being one directly in the issue, it must prevail over other and more remote presumptions. In a certain class of cases there may be a presumption of cohabitation with the lawful wife, as, for example, where the paternity of a child is in question and the circumstances are such as to admit of the husband's having had sexual