punishing the new offense by fine and imprisonment, as penalties entirely distinct from those inflicted for bigamy or plural marriage. Under this new provision, a man who had married two or more women, but who had ceased to live with all of them but one, in the sexual relation of husband and wife, might be convicted of and punished for the unlawful "cohabitation with more than one woman," according to the construction that should be given to this one word "cohabit."

If Utah were a State, its inhabitants might reasonably be required to submit to the interpretation of their own laws by their own tribunals. But Utah is not a State. It is a Territory of the United States. The inhabitants do not make the judges, and they did not make the laws in question. To deny to them all means of having the rulings of the local judges on acts of Congress revised by the Supreme Court of the United States, when those rulings affect their dearest civil and religious rights, is neither reasonable, polite, humane or just.

It is a very remarkable circumstance that Congress should have created a new offense by a statute designed to apply to a very peculiar and unprecedented condition of social and domestic relations without any legislative definition of the offence. When new legislation is resorted to in regard to crimes that have long had a settled meaning, such as burglary, theft, arson, forgery, and the like, it may well be left to judicial interpretation to determine in particular cases whether the facts proved in evidence constitute the crime. But when it is intended to make an entirely new crime or misdemeanor, to give no legislative definition of it, and to discribe it by a single word which admits of different meanings, is certainly very extraordinary. In the so-called "Edmunds act," the meaning of the word "cohabitation" or "cohabit" was left entirely to judicial interpretation; and the consequence has been that in the territorial courts of Utah this word has received an interpretation so strained, artificial, and arbitrary, that prosecutions under this section of the statute have become persecutions, and men have been convicted and punished for conduct that was not only innocent, but was of such a nature that a man would have been guilty of the greatest moral wrong if he had omitted or neglected to do the very things for which he has been sent to the penitentiary. But this is not the worst of it, for by omitting to provide for the appellate jurisdiction of the Supreme Court of the United States, in cases arising under this 3d section of the Edmunds act, Congress left the persons who might be convicted in the territorial courts without any possible means of testing the correctness of their rulings by the judgment of the highest tribunal in the land. Nothing could be more cruel in operation, considering all the circumstances, although it was doubtless an unintentional oversight. I am far from imputing to Congress any deliberate indifference to the dictates of justice in the cases of the unfortunate Mormons who had to determine what they should do with their wives and children, and who, do whatever they might, would be exposed to forced and arbitrary constructions of the law by the final rulings of the territorial courts. But it is none the less my duty to point out this omission and to urge that it be remedied without further delay.

But now it is necessary for me to explain how it has come about that citizens of Utah, of irreproachable lives, many of whom are the most considerable and the most worthy inhabitants of the Territory, men to whom the Territory largely owes its prosperity, men perfectly loyal to the Federal Government and honestly meaning to obey its laws, are now undergoing punishment in the penitentiary because they would not violate their convictions of religious and moral duty. Let it be distinctly understood that these men are not undergoing punishment as bigamists. They have not been prosecuted and convicted for having married more than one wife. They have been prosecuted and convicted for the separate offence which consists in *cohabiting* with more than one woman; and they are suffering punishment as felons upon a judicial interpretation of this offence which is perfectly arbitrary and unnatural without any means of procuring a revision of that ruling in the highest branch of the Federal judiciary. By this forced construction of the statute they are punished for acting according to their convictions of religious and moral duty; a result which Congress could not have intended, or which, if it was intended, Congress could not constitutionally effect.

Let no one say that I am undertaking a defence of polygamy. Let no one say that I am disposed to set up religious beliefs or individual convictions of the law of God against the law of the land. There is, I repeat, but one measure of the civil obligations of men in civil society, whatever may be their religious beliefs. To obey the requirements imposed by the authority of the legislative power is the first duty of the citizen, and nothing but a successful revolution which overthrows the authority can absolve him from that duty. But under our system of government that authority is not an unlimited one; and one of the most important of its limitations is that which forbids Congress from making any law prohibiting the free exercise of religion. The construction given to the 3d section of the Edmunds act by the territorial courts of Utah makes it violate directly and palpably the first amendment of the Constitution.

It would seem to be a very plain proposition that when a statute, dealing with marital relations and making polygamous unions bigamy, creates a separate offense of cohabitation with more than one woman, it must have meant to denounce the conduct of a man who lives with more than one woman in sexual intercourse. Cohabitation of a man with two women, or the dwelling in the same house with two women without sexual intercourse with either of them, could not be reasonably held to be an offense in determining the meaning of a penal statute, for without the fact of sexual intercourse there could be nothing to punish. Thousands of men in all communities dwell under the same roof with more than one woman, necessarily and innocently. But the 3rd section of the "Edmunds act" has been very strangely construed. It has been held that cohabitation does not mean the dwelling in the same tenement with more than one woman; that it does not mean the living in sexual intercourse with more than one woman; but that it means every kind of association, although limited to acts of mere kindness and to pecuniary support, provided the women have at some time been united in marriage with the man who is prosecuted.

According to the construction of the territorial courts, a man may live in the same house with two or more strumpets, and may have sexual intercourse with all of them; yet, he is not indictable for unlawful "cohabitation" under the 3d section of the "Edmunds act." That section is held to have reserved all its terrors for the man who has been united in holy wedlock with more than one woman, according to a system of religious belief that extends the relation through all eternity; and if, in the belief that he owes to them certain duties in this life, he continues to care for their welfare, although they no longer stand to him in any but the moral and spiritual relation in which they all believe, he must go to the penitentiary. This is the most exquisite *reductio ad absurdum* that I have met with in my juridical studies.

Let it be supposed that a conscientious and religious man had innocently married a woman who was within the prohibited degrees of consanguinity, and that the fact had not been discovered until after children had been born. The marriage would be invalid; the children would be illegitimate; perhaps they would be offspring of an incestuous connection. Will any one undertake to say that that man owed no duties to that woman and to his unfortunate children? Would a law that should consign him to the penitentiary, not because he had married the woman, but because he continued to provide for her and her children after the marriage had been found to be invalid, be anything but a barbarous enactment? Would not a court, which should so interpret the doubtful language of a statute as to punish that man for discharging a plain duty of moral obligation, be justly amenable to censure for having made a forced and unreasonable construction?

Take another illustration: Illicit sexual intercourse is an offense against the law; the offspring of such intercourse are bastards. Nevertheless, does a man owe no duties to a woman who has been his mistress, and to an illegitimate child that she may have borne him? And if he discharges that duty to the mother and to the child, according to the dictates of his conscience, is he to be sent to the penitentiary?

Let a corresponding question be put in relation to the Mormon husbands of plural wives whom they married before there was any law in Utah prohibiting such marriages. No incestuous, no illicit, no immoral stain rests upon the original connection. It was purely voluntary. Now add the further element that, according to the religious belief of all the parties, the marriages are entered into for time and for eternity, constituting a religious bond of never-ending obligation. The marriages become civilly void by a subsequent statute, and the husband is made liable to punishment for bigamy. He is not prosecuted for the bigamy, but he is prosecuted for "cohabiting" with more than one woman, when the whole "cohabitation" consisted solely in discharging towards the women duties of plain religious and moral obligation. It is difficult to write or to think of such outrageous perversions of justice and preserve one's equanimity.

GOVERNOR WEST'S MILITANT RECOMMENDATION DEMOLISHED.

I now pass to one of Governor West's recommendations, which I have read with astonishment. He calls for an army in the following paragraphs of of his report:

"I know of no armed organization for the purpose of opposing the lawful authorities or resisting the enforcement of the laws, nor do I believe any such now exists. The process out of the courts is met with no physical resistance, and society is peaceable, and no outbreaks have occurred since I came to the Territory. It is true, however, that a large majority of the people stoutly and stubbornly affirm, publicly and privately, that the enforcement of certain laws is destructive of their rights as free men, an assault upon their religion, and an invasion of the sanctity of their homes. The minority, with equal vigor and openness, proclaim that the practices of these people are immoral; that they are disloyal to the Government, and that their attitude of defiance to the laws interferes with the advancement and prosperity of the Territory, and inflicts injury upon all of its interests.

"It follows necessarily that the people here, with a bitterness of feeling, are divided as they are nowhere else in the country. The division is clear, distinct and palpable.

"The causes of division, in language not distinguished for its mildness, are constantly, earnestly, and vehemently discussed through the press, in the houses of worship, court-houses, hotels, business places, on the streets, and in the social circle, engendering an intense feeling of bitterness. The vigorous enforcement of the unpopular laws against the people in the majority, with a prospect of further stringent legislation, does not tend to soothe or make them more amiable. Under the favorable conditions existing for such a result, an outbreak of violence might be easily provoked.

"There is no militia here to appeal to, as there is in other well-ordered States, to suppress violence, maintain order, and enforce the law. Even with authority conferred to organize a militia force, I am of the opinion that with the feeling existing here a better reliance for the preservation of the public peace would be found in regular troops.

"The statement of the situation makes apparent the need that may arise at any time for the prompt use of a strong, well-disciplined, and efficient military force to aid the civil power. I would recommend that such a force of United States troops be placed and kept in garrison in this Territory, and that such laws may be passed as will make them as promptly available to the civil authorities here in suppressing violence, quelling disorder, and aiding in the execution of the process of the courts as if they were the militia of the Territory. The exhibition of the strength of the arm of power will often obviate the necessity for its use."

I have seen, in the course of my life, a law of the United States executed in a community where it was exceedingly unpopular, where four-fifths of the people believed it to be unconstitutional, and where many felt it to be an outrage upon their sense of duty to God and their fellow-men. That people could have been pronounced as "hostile to the laws" just as truly and rightfully as the Mormons can now be, and in my judgment far more correctly. Suppose that after the enactment of the Fugitive Slave Law in 1850, President Fillmore had stationed an army on Boston Common to aid the marshal in the enforcement of that law. Its guns would have been in full sight of a State Capitol, in which sat a Legislature known to be hostile to the execution of the obnoxious statute. There were multitudes of men ready to follow the lead of anybody in resisting the process of the Federal tribunals. Notwithstanding all this the President ordered no troops to Boston; the marshal executed process without the aid of the army, and all he asked was that the local authorities would preserve the peace of the streets, which was done by the State militia.

But Governor West says that Utah has no militia, or none that he dare organize or could rely upon. He therefore calls for a portion of the army to aid the civil authorities in the execution of process. But why is this necessary? He knows of no armed organization for the purpose of resisting the laws, and does not believe that any such now exists. He might have learned that non-resistance by physical force is one of the fundamental doctrines of the religious faith of the Mormons; that they put their trust in God and His providence, and not in the arm of flesh. This is the grand reason why he finds "society peaceable" in that Territory, and that "no outbreaks have occurred" since he went there. He will find it so to the end. Nevertheless he says, what is perfectly true, but it has become so unnecessarily because of the policy that has been pursued, that there is an inflamed state of feeling between the Mormon majority and the Gentile minority, and that, "under favorable conditions existing for such a result, an outbreak of violence may be easily provoked." I have no doubt of it; but the provocation will never come from the Mormons. A brutal deputy marshal can at any time provoke an outbreak of *individual* violence. Human nature cannot bear everything. Men cannot bear to have their wives and sisters and daughters treated as I have too much reason to believe Mormon women of Utah have been treated by Federal officials, or by men claiming to be such. These things, Mr. Secretary, deserve close scrutiny before an army is sent to Utah to prevent outbreaks of violence. With unaccountable stupidity and carelessness the British government suffered the religious prejudices of the native troops of India to be violated and shocked by an unnecessary requirement of discipline. The Sepoy rebellion was the consequence. Who gave that provocation? I allude to this incident because it teaches a great lesson; but at the same time I am persuaded that nothing whatever is needed to reconcile the whole Mormon population of Utah to a cheerful feeling towards this Government, but to open freely the avenue to the Supreme Court of the United States for every construction of the laws that affect their peace, and in the meantime to pursue towards them a policy, which, while it shall be firm, will also be humane. I cannot permit myself to doubt that it is the wish of the executive to pursue such a policy.

ANOTHER RECOMMENDATION CONSIDERED.

Another of the Governor's recommendations is that the Constitution be so amended as to prohibit every State from ever establishing or allowing polygamy. This is the same project that has been proposed by the Judiciary Committee of the present House of Representatives. The Governor advocates it because, among other reasons, it would give notice to all emigrants who are Mormons that they can never, by becoming the majority of people in any State of this Union, establish polygamy in such State. There is no necessity whatever for such an Amendment, and its agitation would be entirely inexpedient. No State is likely to come under Mormon control. No State will ever be likely to admit anything but monogamy as a lawful relation. For purposes of notice to foreigners coming here from other countries, such an amendment of the Federal Constitution is wholly unnecessary. They know now that no State tolerates polygamy, and that the Federal Government does not now allow of it in the Territories. But the conclusive objection to the proposed amendment, aside from its being unnecessary, is that the regulation of the marriage relation is one of those things that belong in the mass of powers expressly reserved to the States by the 10th Amendment, and the amending power does not extend to the deprivation of any one of those powers, in the case of any State, without its consent, even although every State in the Union should adopt the Amendment excepting one that might refuse. There is not a State in the Union that would consent to surrender to Congress its power to regulate the domestic institution of marriage. Certainly no State ever should consent to do so.

I have now a very few observations to make upon the recent report of "the Utah Commission." This, I understand, is a body of Federal officers, appointed under the "Edmunds act," and charged with the duty of carrying out such disfranchisement of polygamists, bigamists, and men cohabiting with more than one woman, and women cohabiting with such men, as is directed by that act. I do not find that the law under which these officers were appointed makes it their duty to recommend legislation, but perhaps there may be something in their instructions which requires them to do so. Be this as it may, the importance and value of their recommendations are what I presume to be of chief consequence to the Secretary of the Interior, to the President, and to Congress. There is one thing very prominent in their report to which I desire to invite your special attention. They brand the Mormon population of Utah as "religious fanatics;" and they say that "the Government has to deal with a people who are wonderfully superstitious and fanatically devoted to their system of religion." This is put forward as a kind of motive for additional legislation, and as a reason for not expecting that polygamy will be suddenly or speedily exterminated.

Individuals who differ from each other on any subject of religion, may call each other "fanatics" if they are so disposed. But a government which undertakes to treat any portion of its subjects as "fanatics," or to shape its measures towards them on the assumption that they are "wonderfully superstitious," is on the *high road to religious persecution, and will sooner or* later end at that goal. If I had an opportunity to do so, I should like to ask the Hon. Commissioners to be good enough, as public officers or Government advisers, to define "fanaticism" and "superstition." I rather think that the effort would end in the sort of definition that makes "orthodoxy my doxy, and heterodoxy your doxy." I know of no attitude, tone, or assumption that can be adopted by the Government of the United States towards the religious beliefs of any persons who are subject to its authority, excepting to acknowledge their absolute and equal right to hold any religious opinions that they see fit to hold, subject only to the right of the civil power to control those actions which are forbidden by reason of the fact that the public welfare requires that they be not allowed. I imagine that a statute, directed against certain religionists, and assuming that they are "fanatics," would wear an aspect that most men of sense would consider ridiculous. If the prohibited conduct has its origin in a religious belief, we may punish the conduct because it is hurtful to society. But if we mingle with the enactment or the policy, the idea that the religious belief is a "fanaticism," we shall inevitably end in doing what we have no right to do.

The Commissioners recommend the enactment of laws which will "forbid the immigration of all aliens into the United States who are polygamists, or who uphold polygamy by their profession." The Governor, too, favors laws that "will put a stop to this immigration [of Mormons] until this people become submissive and recognize their responsibilities under the law." I can conceive of no way in which this can be done, excepting to pass a law stationing officers at our ports of entry, and authorizing them to interrogate every alien who shall offer to land, whether he or she holds that polygamy is a relation sanctioned by his or her religious belief. If the answer is an affirmative one, the immigrant must be turned back. Such a law, if it should be enacted, must at once be subjected to a judicial test of its constitutional validity.

But there is no necessity for, or sense, or expediency in, attempting to check this immigration. While the Mormons who come here from abroad, naturally go to Utah, when they arrive there they know, and they have known before, that polygamy is prohibited there by law. They become a charge to nobody but those of their own faith who choose to aid them by well conducted systems of advancing a part of their travelling expenses. They are almost always thrifty and industrious people, capable very soon of taking care of themselves. They are people whose immigration it is not desirable to discourage for any reason but their religious faith; and when we once enter upon the policy of discriminating against the religious faith of immigrants who are of the same races as ourselves, where do our statesmen and legislators suppose that we shall stop?

THE POLICY RECOMMENDED BY MR. CURTIS.

I can conceive of a policy very different from that which has been followed of late, and is now proposed to be supplemented by still more stringent measures; and I will sketch one that would, as I believe, strongly tend to bring polygamy to an end.

1st. Men who married plural wives before there was any law prohibiting such unions, but who, since that law went into operation, have confined their sexual relations to one of their wives, should not be prosecuted or punished at all under that section of the statute which makes polygamy bigamy so long as they maintain with all of their wives but one, no other than the relation of protecting friends. Belief, or the profession of belief, in the eternity of the moral and spiritual tie is a perfectly unfit and improper matter to be interfered with by the civil power.

2d. Men who married plural wives after such unions were prohibited by law should be required, after conviction of bigamy, to give security that they will confine their sexual relation to one of their wives, and that woman should be registered as the admitted wife of that man.

3d. Neither of the above classes of men should be prosecuted or molested under the 3d section of the statute for unlawful cohabitation on account of any association with the plural wives that is not sexual, or on account of any recognition or profession of the religious and moral tie which the parties all believe to be for time and for eternity.

4th. In order to have the 3d section of the Edmunds act, in cases where convictions have been had under it, receive construction by the Supreme Court of the United States, provision for that purpose should be made at once by law.

5th. In order to carry out this policy, let there be detailed from the Department of Justice, some suitable person as special counsel to proceed to Utah under proper instructions, authorizing him to take charge of all prosecutions under the Edmunds act now pending, or that may be instituted for one year, with authority to direct the district attorney in such cases, and to supervise the administration of the law under the control of the Attorney-General.

The adoption of such a course as this would supersede all necessity for measures respecting the Mormon Church, or respecting immigration or the employment of a military force; and it would, aided by known differences of belief among the Mormons in *regard to plural marriage*, put an end to *polygamy in no very long time. For* it is beyond question that, while the older Mormons believe plural marriage to be a religious duty when circumstances favor it, the younger members of the denomination regard it as permitted but not required by the Divine law, and consequently very few of the younger men have married more than one wife. We have only to exercise a little patience and refrain from persecution, and we may look to see polygamy die a natural death at no very distant day. We do not need to modify the law that makes polygamy bigamy; and all that we have to do, in regard to "cohabitation," is to allow the Supreme Court to do what Congress has never done, to define the meaning of the word.

I beg, Mr. Secretary, to be explicitly understood, that, in making this suggestion of a better policy towards the Mormons of Utah, I express my own opinions only, without any prompting from any quarter. My voice may be the voice of one crying in the wilderness. I am conscious that I have very little power of any kind; still less have I any political influence. But while I have strength to utter my protest against the policy that has been for some time pursued I shall not cease to utter it. I look upon that policy, and the further measures that are proposed in the same direction, as a huge mistake. To me it seems very plain that we are preparing to have on our hands a problem quite as formidable as that which has long troubled the British government in Ireland, but for different reasons and on a smaller scale. The panacea of disfranchisement of the Mormon people of Utah, and the suggested project of abolishing the Territorial Legislature and governing the Territory by a Federal Commission, are kindred measures, tending directly to the establishment of a pro-consular system and the removal of every vestige of home rule. Such a system would doubtless afford magnificent opportunities for plunder; and this Government cannot expect to be so fortunate as not to have its powers wielded at times by men who will be quite capable of making the most of such opportunities, especially if the despoiling of the Mormon Church should be enacted into a law and made an example for other spoliations. Add to all this the presence of "a strong, well-disciplined, and efficient military force to aid the civil power," and the work of making our Ireland will be complete.

I am, Mr. Secretary, with great respect, your obedient servant,

GEO. TICKNOR CURTIS.
