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For lay people the chief virtue of our Constitution is not in its distribution of power or in its guarantees of participation in governmental processes but in the protections it affords individual liberties, not least of which is freedom of conscience. Yet ratification of the Bill of Rights did not fix in stone the content of constitutional guarantees. Instead, it was left to the judiciary to interpret the simple phrases of the first eight amendments in concrete cases, illuminated by evidence of the framers' intent and changing social values. Perhaps no provision of the Bill of Rights better exemplifies this process of judicial interpretation than the First Amendment's free exercise clause.

Unfortunately for nineteenth-century Mormons, the seminal case interpreting the free exercise clause—*Reynolds vs. United States*—came early in the process. *Reynolds* upheld antipolygamy legislation against the Mormons' free exercise claims, effectively ending the Mormons' efforts to obey both the laws of God and the laws of man and stunting the growth of free exercise protections for generations. In the years since *Reynolds,* the Supreme Court has gradually evolved a more civil-libertarian view of the free exercise clause, balancing free exercise claims against the government's interest in regulating the particular conduct in question. But it has never completely abandoned *Reynolds* or its rationale, and in its most recent decisions the Court has shown signs that it may be retreating to an earlier, more restrictive view of First Amendment protections.

Early Judicial Attacks on Polygamy

Officially acknowledged as part of LDS church doctrine in 1852, polygamy soon became a national issue. But weak laws, tenuous federal control in Utah Territory, and national distraction with other issues prevented effective enforcement of the antipolygamy laws until the 1880s. Congress's first attempt to deal with polygamy was the Morrill Act.[1] It was not passed until 1862, ten years after the Church first announced its practice of polygamy, and then went largely unenforced for the next thirteen years. At least four reasons explain why the Mormons were left in relative peace for so long. First, when polygamy became an issue, the nation's energies were distracted by more pressing problems—the Civil War and Reconstruction. The fight

for national survival forced the Mormon problem to wait.[2] Second, the handful of federal officials in Utah during the 1860s did not believe they possessed the means to enforce compliance with the unpopular polygamy act. This attitude was not unfounded. In 1863 the mere rumor that Brigham Young was about to be arrested for polygamy provoked two thousand armed Mormons to assemble at his home to resist the arrest.[3] Third, the feeble federal control over Utah's population was matched by nearly as feeble control over the territorial government. The governor and supreme court justices were appointed by the President, but the territorial legislature and the bulk of the judiciary lay in Mormon hands. The legislature expanded the powers of the judiciary by giving Utah's probate courts general jurisdiction over all civil and criminal cases, allowing probate judges to draw up jury lists, and establishing a territorial marshal and attorney with powers paralleling those of their federal counterparts.[4] This rival Mormon-controlled judicial system, with powers concurrent with the federal judiciary, tended to frustrate enforcement of the antipolygamy laws. Finally, the prosecution of polygamy was delayed by defects in the statute itself. Polygamy under the Morrill Act was subject to a three-year statute of limitations, so polygamists who eluded prosecution for three years were free from peril. Furthermore, the Morrill Act required proof of multiple marriages, creating almost insuperable evidentiary problems.[5]

Because of these problems, the first attempts to prosecute polygamists were not brought under the Morrill Act at all. In 1871 one Thomas Hawkins was indicted for and convicted of having adulterous relations with his polygamous wife.[6] Indictments immediately followed against a number of leading Church officials (including Brigham Young) under a Utah statute prohibiting lewd and lascivious cohabitation.[7] By indicting the Church's leading figures, the government sought to set a vivid example for rank and file members, paralyze the Church's leadership, and cow the Mormon populace into submission to federal policy. During the proceedings against Brigham Young, Judge McKean, a rabid anti-Mormon, declared:

> While the case at the bar is called *'The People versus Brigham Young,* its other and real title is Federal Authority versus Polygamic Theocracy.' . . . The one government arrests the other in the person of its chief, and arraigns it at the bar. A system is on trial in the person of Brigham Young. Let all concerned keep this fact steadily in view; and let that government rule without a rival which shall prove to be in the right.[8]

Young's trial was thus meant to crush at one blow the practice of polygamy and the power of the church that rivaled federal authority. McKean's plan was not to be realized, however. In *Clinton vs. Englebrecht,* the United States Supreme Court ruled that in his efforts to purge juries of Mormons and secure the conviction of polygamists Judge McKean had

improperly ignored Utah's jury selection procedures.[9] As a result of the decision in *Englebrecht*, Hawkins's conviction for adultery was overturned, and the indictments against Young and the others were dismissed.[10] The prosecution of polygamy was thus halted until 1875 and the *Reynolds* case. Even after the *Reynolds* decision upheld the Morrill Act, that statute remained "constitutionally pure, but practically worthless," and only two Morrill Act cases ever reached the Supreme Court.[11]

The Reynolds Decision

George Reynolds was an English immigrant, private secretary to Brigham Young, and a polygamist.[12] In October 1874 he was indicted under the Morrill Act.[13] Church historians maintain that *Reynolds* began as a test case designed to determine the constitutionality of the anti-polygamy statute and that Reynolds volunteered to test the statute and cooperate in his prosecution in return for the government's agreement not to seek a harsh punishment in his case.[14] Non-Mormon historians assert that no deal was ever struck.[15] Reynolds was duly convicted of polygamy on the testimony of his polygamous wife, but the case swiftly became caught up in the sort of procedural pitfalls that had become commonplace in Utah's judicial system. On appeal to the Utah Supreme Court, Reynolds argued that the grand jury that had indicted him had been improperly constituted.[16] The jury had been selected in accordance with the newly enacted Poland Act, which had limited the power of the Mormon-controlled probate courts by changing the procedures for selecting juries but which had not changed the number of jurors required.[17] The trial court empaneled twenty-three grand jurors in accordance with federal practice. Utah law provided that a grand jury was to be composed of fifteen jurors. The Utah Supreme Court reversed Reynolds's conviction because the trial court had followed federal rather than territorial law in fixing the size of the grand jury.

In October 1875 Reynolds was again indicted for violating the Morrill Act. This time, in accordance with Utah law, the indictment was handed down by a grand jury of fifteen men, seven Mormons and eight non-Mormons.[18] However, Reynolds declined to cooperate with his own prosecution, and his polygamous wife could not be found to testify against him. The polygamous wife not being available, the trial court admitted her testimony from the previous trial into evidence.[19] Again, Reynolds was convicted and sentenced to two years' hard labor and a five hundred dollar fine. The Utah Supreme Court sustained his conviction.[20]

This time Reynolds argued that the trial court should have followed federal law in setting the size of the grand jury since he had been indicted under a federal statute. The Utah Supreme Court had little patience for this

change of tack and easily rejected the argument. Reynolds next argued that potential jurors had been questioned improperly about their personal attitudes toward polygamy. But the court held that persons who believed in or practiced polygamy could not be impartial jurors and thus could properly be excluded. (The court ruled that prospective jurors' invocation of the Fifth Amendment privilege against self-incrimination was equivalent to an admission of guilt and eviscerated that amendment's protection.) The admission of the testimony of Reynolds's polygamous wife at the first trial was likewise deemed proper.[21] Finally, the trial court's instruction to the jury that it "should consider what are to be the consequences to the innocent victims of this delusion" was held not to be prejudicial.[22] The court likened the instruction to a mere admonition that jurors should heed the law.

With but one avenue of appeal remaining, Reynolds turned to the United States Supreme Court.[23] The Supreme Court affirmed the territorial court's rejection of Reynolds's challenges to the grand jury's size, improprieties injury selection, admission of his polygamous wife's prior testimony, and prejudicial jury instruction. But the bulk of the Court's opinion was devoted to Reynolds's claim that the trial court improperly failed to instruct the jury that a finding that Reynolds engaged in polygamy as a result of a sincere religious conviction would justify his acquittal. Reynolds argued that the First Amendment's guarantee of the freedom of religion can excuse conduct that would otherwise be criminal. The Court's analysis of that issue made *Reynolds* a landmark case.

The Court first attempted to decide what sense of the word *religion* fell within the ambit of the constitutional provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Finding no guide to the definition of the term *religion* in the Constitution itself, the Court turned to the writings of Madison and Jefferson, sources contemporary with the adoption of the First Amendment. The Court quoted from Jefferson to the effect that "religion is a matter which lies solely between man and his God; . . . the legislative powers of the government reach actions only, and not opinions."[24] Adopting this demarcation, the Court concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[25]

In arriving at the conclusion that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices,"[26] the Court grasped one-half of a profound dilemma posed by the First Amendment's protection of religion. The Court recognized that the First Amendment could not be read so broadly that any conduct asserted to be an exercise of religion would be immune from state regulation.[27] But the Court wrongly concluded that,

because not all religious conduct could reasonably be exempted from civil control, no religious conduct was protected by the First Amendment. By so concluding, the Court ignored the express terms of the Constitution, which protect the "free exercise" of religion.[28] Moreover, the Court overlooked the other side of the First Amendment dilemma. Religion is as much conduct as it is belief. The two cannot be disentangled. It is with regard to those religious practices offensive to the majority of a community that the issue of freedom of religion arises. In a democracy, laws are most certain to accord with the values of the majority's religion. It is the religious practice of unpopular minorities that are most likely to be restricted by the state and are thus most in need of protection. The free speech clause of the First Amendment fully protects freedom of belief. Thus, unless the free exercise clause protects at least some practices that are offensive to the majority, that provision is devoid of any practical content. Yet the *Reynolds* decision forecloses such an application of the First Amendment.

Having established the belief-conduct distinction and determined that the First Amendment was no bar to outlawing religiously inspired conduct, the Court next concluded that polygamy was sufficiently "subversive of good order" as to be properly made a crime. This second conclusion is also troublesome. As Linford notes, "the Court never quite explained *why* plural marriage was a threat to the public well-being."[29] Laurence Tribe suggests that *Reynolds* was wrongly decided because the Court overrode core personal rights of privacy and religious expression for the sake of diffuse social goals.[30] No victims of Reynolds's conduct were produced, it was conceded that polygamous sects might be well-ordered, and the Court never examined whether polygamy degraded women. Instead, the Court found subversion of the social order on the basis of an abstract syllogism that polygamy meant patriarchy, which meant despotism. To avoid this amorphous social evil, the Court invaded the right to religious freedom and limited the right to marry, a core element of personhood. In Tribe's words, "Few decisions better illustrate how amorphous goals may serve to mask religious persecution."[31] Nevertheless, Reynolds's conviction was unanimously affirmed.[32]

The Prosecution of Cohabitation under the Edmunds Act

Although the *Reynolds* decision was a saddening blow to the Mormons, the immediate impact of the decision was limited. Reynolds established that Congress had the power to punish polygamy, but the Morrill Act was a cumbersome weapon with which to do so. However, the period in which the Mormons would effectively resist Washington's mandate was rapidly ending. By 1880, the tone of congressional debate indicated that the government not only had the power to outlaw polygamy but also had the will

to act. The Mormons could no longer depend on isolation to ensure their neglect by Washington. Mining, commerce, migration, and the transcontinental railroad all brought the nation to Utah. While Utah was far enough from the seat of government that Congress's knowledge of Mormon society was mostly second-hand, garbled, and derived from biased sources, it was near enough to be a constant and growing irritation to a nation that was rapidly spanning the continent and that was now largely undistracted by more serious problems. In a sorry cycle, Congress began considering a series of more severe anti-Mormon bills, in reaction not so much to the offense of polygamy as to prior Mormon resistance. Because polygamy was supported by the Mormon church, attempts to stamp out polygamy became attacks on the institution of the Church and Mormons in general.

In 1882 Congress adopted the Edmunds Act, which gave federal officials an efficient weapon for the prosecution of polygamists.[33] It created the new offense of unlawful cohabitation (relieving prosecutors of the burden of proving polygamous marriages), allowed joinder of polygamy and cohabitation charges, and effectively eliminated all Mormons as jurors in polygamy cases. The new law proved an effective tool in the hands of the Church's opponents. Convictions of polygamists went from one in 1875 to 220 in 1887.[34] By 1893, after the Church had renounced polygamy and prosecutions largely ceased, there had been 1,004 convictions for unlawful cohabitation and thirty-one for polygamy.[35] The mere number of polygamy and cohabitation convictions, however, understates the impact of "the raid" on Mormon society. Not just any Mormon male was allowed to practice polygamy; only those who were morally worthy and financially able were permitted to take plural wives. Thus, by and large, the polygamists were also the Mormons' leaders.[36] The conviction and imprisonment of polygamists served, then, to paralyze Mormon society by removing its leadership. Moreover, many polygamists who were not convicted were forced to go into hiding or flee the United States.

The Offense Broadened

To simplify polygamy prosecution, the Edmunds Act provided that men who "cohabit with more than one woman" would be guilty of a misdemeanor.[37] The act, however, did not say what conduct constituted cohabitation, nor does the Congressional Record offer any evidence that Congress considered the question. The Mormons argued that the benchmark of "cohabitation" should be sexual intercourse. But such a definition of "cohabit" would have been undesirable in at least two respects. First, proving sexual intercourse would be difficult. If the Morrill Act had proven ineffective because of the difficulties entailed in proving the fact of marriage, the Edmunds Act would be even more useless if proof of cohabitation required proof of

intercourse. Second, to require Mormons to parade the details of their most intimate family life before the courts would be an unendurable invasion of privacy. But to accept less intimate evidence as establishing "cohabitation" could remove all standards for the determination of guilt.

The courts first confronted the issue of what constituted cohabitation in *United States vs. Cannon*.[38] Angus Cannon, president of the Salt Lake Stake, had married three wives prior to passage of the Edmund's Act.[39] Two of these wives, Clara and Amanda, lived with him in separate quarters in the same home. The third lived in a house nearby.[40] Cannon was indicted for cohabiting with Amanda and Clara after passage of the Edmunds Act. At trial, Cannon offered to prove that, after Congress had passed the Edmunds Act, he had told Clara, Amanda, and their families that he did not intend to violate the law and thereafter "did not occupy the rooms or bed of or have any sexual intercourse with" Clara but could not afford to provide a separate house for Clara and her family. The court excluded the evidence as irrelevant, and Cannon was convicted. Adhering to the Church's direction to fight polygamy prosecutions to the utmost, Cannon appealed to the Utah Supreme Court.[41] His main objections were that "all cohabitation which the law deals with is sexual cohabitation," of which he was innocent, and that his proffered evidence was wrongly excluded. The court, however, rejected this interpretation of the Edmunds Act. It concluded that Congress's intent was to eliminate problems attending proof of polygamous marriages and that "the pretense of marriage—the living, to all intents and purposes, so far as the public could see, as husband and wife—a holding out of that relationship to the world, were the evils sought to be eradicated."[42] Proof of sexual intercourse was not necessary to make out such an offense because the aim of the act was not "to punish mere sexual crimes."[43] Indeed, the court reasoned that to construe the statute as Cannon urged would render the cohabitation offense superfluous since other statutes already covered sexual offenses. The court concluded that "cohabitation" meant dwelling together and not sexual intercourse.[44] The United States Supreme Court affirmed the decision.[45] Adopting much of the reasoning of the Utah court, the Supreme Court concluded that cohabitation was established if Cannon "held [the two women] out to the world, by his language or conduct, or both, as his wives." Cannon's agreement to abstain from sexual relations with his plural wives was dismissed with the comment that "compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist . . . [are] not a lawful substitute for the monogamous family which alone the statute tolerates."[46]

On the whole, the judicial refusal to make sexual intercourse the test for cohabitation was sensible. It is now an axiomatic standard for the irreducible minimum of personal privacy that government has no power to

place spies in the bedroom.[47] By construing the Edmunds Act to avoid that nightmare, the judiciary at least spared the Mormons an intolerable indignity and assault on their rights.[48] The consequence, however, was that proving cohabitation became ridiculously easy for federal prosecutors. As one scholar concluded, "To be tried was, in effect, to be convicted."[49]

The law's directive to Mormon men to cease cohabitation meant, then, that they must abandon their plural wives. Wives who had been married decades before and who were now aged and infirm were to be abandoned.[50] Younger wives were often to be left to support and raise large families alone. Thus, the moral posture of courts enforcing the Edmunds Act was dramatically altered. No longer did courts command Mormons to abandon a life of presumed debauchery, since the sexual activities of polygamists were legally irrelevant. Instead, in the name of amorphous social policies, the Mormons were called on to ignore the moral obligations to support aging wives and raise innocent children.

The judicial interpretation of the Edmunds Act simply failed to provide the Mormons with any guidance as to how far obligations toward plural wives and children could be honored without violating the Edmunds Act.[51] Polygamous Mormons were thus presented with a difficult decision: morally they were obligated to associate with their polygamous families to the extent necessary to provide for their welfare, but because the boundaries of legally permissible conduct had been left undefined any contact potentially left polygamists open to prosecution. The facts of *Cannon* indicate that Cannon had genuinely attempted to comply with the law. Yet after the court decisions, it remained unclear what he might have done differently to have avoided violating the law. It is a constitutional maxim that the terms of the law must be sufficiently clear that citizens may order their conduct in conformity with it.[52] As construed by the courts, the offense of cohabitation was not so much one of conduct as of appearance. Of course, the Mormons could not comply with a statute that made their conduct largely irrelevant and considered only what they appeared to be, or were reputed to be, doing. To make matters worse, under subsequent decisions Mormons could not even avoid prosecution by keeping the connections with their plural families discrete. A polygamist was required to "separate himself entirely from his polygamous women."[53]

As the pace of polygamy prosecutions accelerated, the thought occurred to some eager prosecutor that the cohabitation statute would be more fearsome if every defendant faced not one cohabitation charge but many. Such would be the case if each year, month, or day that a man cohabited illegally could be the basis of a separate offense. Periods of cohabitation could thus be divided into units as small as the prosecutor wished, allowing him to tailor the potential punishment to be meted out to individual defendants solely at his discretion.

A judicial test of this theory was attempted in the case of Lorenzo Snow. Snow was charged with cohabitation in three separate indictments, each one charging the same offense with the same women, only for different years. In separate trials, Snow was convicted on each indictment and given the maximum sentence for each conviction. Thus, by segregating the charges against Snow, the prosecution was able to triple his punishment. The Utah Supreme Court affirmed the convictions.[54] The only justification it advanced for allowing the prosecution to segregate offenses according to time was a single Massachusetts case, *Commonwealth vs. Connors*, which held that the maintenance of a tenement for the sale of illegal liquor could be the basis for separate convictions based on different periods of time.[55] The United States Supreme Court dismissed Snow's appeal on the ground that it did not have jurisdiction to hear it, since Snow did not question the validity of the statute but only its application.[56] The Utah Supreme Court's decision dramatically raised the stakes in polygamy prosecutions by making the penalty for cohabitation convictions far more severe. Moreover, no one knew how far the principle would be extended. Since the basis for segregation was arbitrary, in theory unlimited segregation was possible. With sufficient segregation, cohabitation could become punishable by lifetime imprisonment.

With the principle of segregation having been approved by the Utah Supreme Court and the possibility of further review seemingly precluded by the United States Supreme Court's decision in *Snow*, federal prosecutors swiftly began expanding their use of the segregation of offenses, testing how far the principle could be pushed. In *United States vs. Groesbeck*, the prosecution cut in half the period of each offense, charging the defendant with two counts of cohabitation, one for each of two six-month periods. Unlike the *Snow* case, the trial of the two charges was consolidated. On appeal, the Utah Supreme Court sustained both these innovations.[57] The court dismissed the argument that a single trial of the defendant on both charges allowed the jury improperly to consider Groesbeck's first conviction in determining his guilt on the second charge. The court noted that consolidation of offenses into a single trial saved the state the burden and expenses, and the defendant the harassment, of multiple litigation. In justifying the segregation of offenses, the court reasoned that to allow Groesbeck to be charged with only one count of cohabitation for his period of continuous cohabitation would be unfair. Such a rule could allow more serious offenders to be treated more leniently than lesser offenders. For example, a polygamist who ceased cohabiting with his wives a year after the Edmunds Act was adopted but renewed cohabitation after a year would be liable for two charges of cohabitation, whereas someone who cohabited with his wives throughout the same period would face only one charge. Similarly, a rule that allowed only one charge of cohabitation to be raised,

however long the period of cohabitation had been, provided polygamists with no incentive to conform to the law, for an individual's liability was not increased by his continuing to cohabit nor limited by his ceasing to do so.

The court's reasoning is flawed at several points. First, under the segregation rule there was no necessary relation between the length of an offender's offense and the number of charges raised against him. Because the basis of segregation was inherently arbitrary, any offense, no matter how long or short its duration, could be divided into as many separate offenses as was desired. Snow, for example, had engaged in polygamy for a period of forty years and was charged with three offenses. Groesbeck, on the other hand, was assigned two-thirds the punishment given Snow, for a period of cohabitation of one year. Conversely, if cohabitation were treated as a continuous offense, under the principles governing the treatment of continuous offenses, lapses in cohabitation would not necessarily require separate offenses.

Meanwhile, Lorenzo Snow had served his first six-month sentence. He then applied to the United States Supreme Court for a writ of habeas corpus, claiming that his further detention was unlawful since the two remaining sentences were the result of an unlawful segregation of a single offense. As before, the government contended that the Court lacked jurisdiction, but this time the Court held that it had jurisdiction:

> Not only had the court which tried [Snow] no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on *habeas corpus,* when the sentence on more than one of the convictions is sought to be enforced.[58]

The Court's opinion constituted a mild but clear rebuke to Utah's judicial officers for attempting to impose so patently offensive a device as the segregation of offenses. Cohabitation was, the Court stated, "inherently, a continuous offence, having duration; and not an offence consisting of an isolated act."[59] Indeed, as the courts had defined cohabitation, it was an offense of reputation and appearance that made the identification of individual acts of cohabiting all but impossible. Any division of the offense into separate charges must be "wholly arbitrary," leaving open to as many or as few divisions as the prosecution chose to make. It is to prevent such arbitrary conduct that the law provides that inherently continuous offenses can be committed only once before prosecution. In short, the Court swiftly demolished the legal reasoning of the Utah Supreme Court in adopting the segregation principle.

Utah courts grudgingly bowed to the Supreme Court's decision but implied that cohabitation offenses might still be divided where there had been some breaks in the periods of cohabitation or where an accused had more than two wives.[60]

Even after *In re Snow*, courts could still impose multiple punishments for what was in reality but one offense. The Edmunds Act specifically allowed polygamy and cohabitation charges to be combined.[61] Because the definitions of the offenses were different, a man could be convicted of marrying a polygamous wife and then convicted again for living with her.[62] The Supreme Court set limits on the combination of different offenses in *Hans Nielsen*.[63] Nielsen was indicted for adultery and cohabitation. Both charges were directed at his conduct with his polygamous wife, Caroline. Nielsen pleaded guilty to the charge of cohabitation and was sentenced to three months imprisonment. When arraigned on the adultery charge, Nielsen claimed his conviction for cohabitation barred his further prosecution. After serving his sentence for cohabitation, Nielsen was tried and convicted for adultery and sentenced to an additional 125 days' imprisonment. The United States Supreme Court granted Nielsen's petition for a writ of habeas corpus.

In real terms, Nielsen's convictions for both cohabitation and adultery were manifestly improper, for he was being punished for but one offense—having a polygamous wife. Legally, though, the elements of the offenses differed, so convictions for both offenses on the basis of the same activity appeared permissible. The Court managed to arrive at a sensible result. It reasoned that proof that Nielsen and Caroline lived together as husband and wife carried with it the assumption of intercourse that was the essential element of the adultery charge. Thus, when Nielsen was convicted of cohabitation, he was convicted of all the elements of adultery and could not be separately punished for that offense. With *Hans Nielsen*, attempts to make the polygamy laws more savage by piling offenses together or fractioning a single act into many separate offenses ceased.

The Evidence of Cohabitation

The Edmunds Act prosecutions saw a distortion of the rules of evidence, in part due to the same vindictive spirit that animated the harsh application of the polygamy laws, but in part the result of that same vagueness and emphasis on appearance that afflicted the substantive provisions of the Edmunds Act. Since the offense of cohabitation consisted of appearing to consort with two or more women, proof that the accused had married either or both women was not necessary. On the other hand, so long as a man cohabited with only one woman, he would seem to be in compliance with the law, regardless of whether that woman was the man's lawful wife. Thus, a polygamist seemingly could abandon his legally recognized wife, live exclusively with a later plural wife, and not be guilty of cohabitation. However, a construction of the Edmunds Act that allowed a polygamist to retain whichever one of his wives he wished so long as he retained only one was, of course, not well received by the courts.[64] The judicial solution to

this problem was a presumption, first announced in *United States vs. Snow,* that a man cohabited with his legal wife.[65]

To comply with the law, Lorenzo Snow had set each of his older wives up in a separate household and refrained from almost all contact with them. He lived solely with his last wife, who still had infant children to raise. Nevertheless, he was convicted of cohabitation. The Utah Supreme Court upheld the conviction, not because he was cohabiting with more than one wife, but because he was with the wrong wife. The court reasoned that the Edmunds Act was intended, like prior acts, to protect the institution of monogamous marriage and should be liberally construed to achieve that intent. To adopt a construction of the act that allowed a polygamist to choose freely between his legal and his plural wives was clearly offensive to the act's spirit. Thus, the court presumed that a man cohabited with his lawful wife. At first this was offered as a rebuttable presumption, justified by society's policy of encouraging marital fidelity and by common experience as a factual generalization. The *Snow* court still appeared to require at least some evidence of actual cohabitation. Clever polygamists were able to get around the presumption by demonstrating that in their case it was incorrect. Thus, courts very quickly deemphasized the factual rationale for the presumption and instead emphasized its legal and social policy rationale. As they did, the strength of the presumption increased, and the extent to which it could be refuted by contrary evidence diminished.[66]

Finally, in 1888 the Utah Supreme Court so diluted the amount of evidence required to render the presumption of cohabitation with a legal wife conclusive that, in effect, the presumption became a conclusive presumption of law. In *United States vs. Harris,* the court approved jury instructions to the effect that if "the legal wife of the defendant lives in the same vicinity with him, bearing his name, in a household maintained in part by him; that is . . . absolutely and conclusively cohabitation with his legal wife."[67] Under such a standard, it seemed unlikely that any polygamist could insulate himself from all contact with his lawful wife sufficiently to avoid a finding of cohabitation. Certainly, the presumption of cohabitation created a strong disincentive for polygamists to attempt to support and care for the women they had married. Conversely, *Harris* provided some measure of relief to polygamists. If cohabitation with one's lawful wife was strongly presumed, "when you come to cohabitation with the illegal wife, then the presumptions are all against it."[68]

The presumption of cohabitation effectively shifted the burden of proof in criminal trials. In essence, a polygamist was presumed guilty of cohabitation unless he could prove his innocence.

The ease of the prosecutor's task in proving cohabitation was further enhanced by judicial rulings on the type of evidence that could be admitted

to establish cohabitation. In *United States vs. Snow,* the court, noting the strong legislative policy of stamping out all vestiges and appearances of polygamy, concluded that to achieve Congress's goal loose evidentiary standards were required:

> In these polygamic relations there never is and cannot be that intimate association, and habitual attention given by the man to the various women, as exist between a husband and his wife in the monogamic state. Consequently, in the very nature of things, the proof of cohabitation cannot be made as clear as in the case of a monogamic marriage, simply because the facts of which proof is to be made do not as abundantly exist.[69]

Circumstantial evidence, such as "language, and conduct, and appearances, and expressions," could serve as evidence of cohabitation.[70] The fact that a man was seen watering his horses at a plural wife's well or taking her provisions suggested an unlawful cohabitation.[71] A birthday party given for an aging polygamist and attended by his plural families similarly indicated cohabitation.[72] The net of circumstantial evidence was spread even wider to include evidence of reputation.[73] A few cautionary voices, however, were raised. The Arizona Supreme Court warned that evidence of reputation "standing alone, would amount to nothing in such a case," but in conjunction with "all the other proof and circumstances," reputation could be considered by a jury.[74] The Idaho Supreme Court went further and excluded evidence of reputation altogether: "To assume the guilt without proof of the acts would be manifestly improper."[75]

Similarly, evidence that the defendant had fled to avoid arrest was deemed admissible as circumstantial evidence of guilt.[76] For example, in *Snow* it was held that "the jury, in ascertaining whether the appellant was guilty or not, had the right to take into consideration his concealment at the time of arrest, and also the manner of concealment."[77]

If a defendant's guilt could be established by a presumption that he cohabited with his wives, lawful and polygamous, prosecutors first had to prove that the defendant had married those women. The same reasons that made the Morrill Act nearly useless also made it difficult to prove a marriage sufficiently to raise a presumption of cohabitation. Consequently, courts lowered evidentiary standards, allowing marriages to be proved by circumstantial evidence: "Proof that two parties have treated each other as husband and wife, have lived together as such, and have held each other out to the world as such, is sufficient to enable a court or jury to find that at some previous time the parties did, as a fact, consent to be married."[78] In effect, then, the offenses of polygamy and cohabitation became identical in terms of the proof required for each; each could be proven by evidence that a couple associated so as to appear to be married. Statements by a defendant that a woman was his wife, made out of court and before any charges

had been made against him, could be introduced at trial to prove his marriage[79] or to prove cohabitation.[80] For example, in *United States vs. Smith* the defendant was convicted on testimony that he had "said 'we' or 'they' (not positive which) 'would never give [polygamy] up; that the law against it was unconstitutional; and that he had just as good a right to decide on it as the supreme court.'"[81] Thus, a rash criticism of Supreme Court decisions was transformed into an admission of guilt of cohabitation.

Finally, cohabitation trials raised the issue of what time periods of cohabitation could be shown to establish the offense. Conduct of a defendant before enactment of the Edmunds Act in 1882 did not constitute an offense and therefore should have been irrelevant in cohabitation cases. But courts admitted evidence of such conduct on two theories. The first rested on certain presumptions: If a lawful relationship was formed, then subsequently made unlawful, the law would presume that the parties had terminated the relationship unless the contrary was proved.[82] But polygamy had been unlawful, the court pointed out, since the Morrill Act in 1862 and for more than a generation under common law in the Territory. If an individual entered into an unlawful relationship at any point in time, the law would presume that the relationship continued, in the absence of evidence that it had ceased.[83]

The other rationale for allowing evidence of a defendant's prior conduct was less ambitious. Just as in a murder case, evidence of how the defendant behaved toward and felt about the victim before the murder might be admitted, evidence of how the defendant regarded his plural wives before 1882 could be admitted to show how he regarded them at the time of the offense.[84] Evidence of prior conduct was admissible, not to show liability but "merely to illustrate and explain the evidence as to what took place during the time laid in the indictment."[85] A defendant's cohabitation prior to passage of the Edmunds Act was evidence of his propensity to violate the law and of his evil intentions. As such, the evidence could be thrown in, along with all the other circumstantial evidence, for the jury's consideration.[86] However, while evidence of prior conduct, as in a murder trial, may be admitted to establish the defendant's motive or knowledge, the evidence of prior conduct admitted in the polygamy trials was not evidence of cohabitation, precisely the offense charged. Such evidence could only have prejudiced or confused a jury, making it likely that a defendant would be improperly convicted on the basis of his prior conduct or that the jury would improperly conclude that because the defendant had previously cohabited he must have been guilty of cohabitation as charged.

In loosening the rules of evidence to serve Congress's policy of ensuring the punishment of polygamy, the courts undermined the elemental bases of judicial procedure and due process of law. The most basic assumptions

that an accused is presumed innocent and must be found guilty beyond a reasonable doubt by competent evidence were sapped of all strength. The courts were indeed accurate when they identified cohabitation as an offense of appearance or reputation, for under such evidentiary standards an accused's actual conduct seemed largely irrelevant. Mormons widely reputed to be polygamists, through the use of strings of presumptions and the testimony of what people thought their marital relations to be, could be quickly convicted whatever they tried to do.

Witnesses to Cohabitation

To convict Mormon men of polygamy offenses, certainly no more effective and knowledgeable witnesses could be found than their wives. Two obstacles, however, appeared to bar use of this pool of witnesses. First, many—if not most—Mormon wives were unwilling to testify against their husbands. Second, even if they were willing to testify, at common law a person could not testify against his or her spouse. Polygamy prosecutions raised perplexing problems. For example, did this spousal disability apply to illegal, polygamous wives? If so, what if it could not be determined which was the lawful and which were the plural wives? The issues were first confronted in *United States vs. Miles,* the only other Morrill Act case to reach the United States Supreme Court besides *Reynolds*.[87]

From the evidence at trial, it appeared that John Miles had married three women on the same day. Because Miles was charged with bigamy, under the Morrill Act, it was necessary to prove his marriages to the three women, and therein lay the difficulty, for the marriage ceremony was shrouded in secrecy. Miles's wife Caroline, however, was willing to testify against him.[88] Miles conceded his marriage to Caroline but denied his marriage to his first wife. Caroline's testimony was essential to the state's case, but if Caroline was Miles's lawful wife under the common law rule her testimony was inadmissible. But her testimony helped establish that at the time Miles married her he already had a lawful wife. And if Miles had a wife when he married Caroline, his marriage to her was invalid, and she was a competent witness.

The trial court resolved this perplexing question by throwing the whole matter to the jury. Caroline was allowed to testify. At the end of the trial, the jury was instructed that only if they found that Miles was already married when he married Caroline could they then consider Caroline's testimony in determining whether Miles was guilty of bigamy. The instruction, of course, was useless because tautological. In determining whether Caroline's testimony on the issue of Miles's guilt was admissible, the jury necessarily had to determine the issue of his guilt.

On appeal, the United States Supreme Court rejected the trial court's ingenious labor-saving device. It concluded that a defendant's witness-wife must be treated prima facie as his lawful wife: "as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it."[89] The principle behind this ruling was the old rule that a witness that is "*prima facie* incompetent" cannot give evidence "to establish his competency, and at the same time prove the issue."[90] The Court reached this ruling with apparent regret, for in doing so it recognized that it was disabling almost all witnesses to polygamous unions. However, the Court recommended two escapes from this predicament. First, eyewitnesses to a marriage were not necessary. Polygamous marriages could be proven like any other fact, by admissions of the defendant or by circumstantial evidence.[91] Second, if under existing laws it was too difficult to prove polygamy Congress could always change the law.[92] Because it was based on the testimony of an incompetent witness, Miles's conviction was reversed.

Miles did not end the issue of a wife's competency to testify against her husband. The general rule that a wife was not a competent witness against her husband was subject, under common law and the Utah statute, to several exceptions. A Utah statute, for example, provided that a wife could testify against her husband in a civil action by one spouse against the other or in a criminal action for a crime committed by one against the other.[93] In *United States vs. Bassett*, the Utah Supreme Court concluded that polygamy was, in fact, an offense by the husband against his lawful wife, "more injurious" to her than bodily injury. Thus, the rule of spousal disability did not apply, and the wife was a competent witness.[94]

Again, however, the United States Supreme Court rejected the territorial court's analysis.[95] First, the Court concluded that the Utah courts had applied the wrong statute. They had applied a statute found in Utah's code of civil procedure, which adopted the common law rule of spousal disability but expressly provided that the rule did not apply to criminal actions for offenses committed by one spouse against the other. A second, older statute, contained in Utah's criminal code, provided that a spouse might testify only in cases of "criminal violence" upon one spouse by the other. The Court concluded that although the section of the civil code was more recently adopted and would thus otherwise take priority, in fact the criminal code provision should have been applied because *Bassett* was a criminal case and polygamy could not rationally be construed as an act of criminal violence. Less technically, the Court concluded that even under the statute employed by the Utah courts, polygamy could not be properly viewed as an offense against the wife:

> Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the

> wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old familiar and just common law rule.[96]

Nearly seven years after the United States Supreme Court decision in *Miles* excluded the testimony of polygamous wives in polygamy trials, Congress, in the Edmunds-Tucker Act, provided that a wife was a competent witness in polygamy, bigamy, and cohabitation trials and required that records be kept of weddings in the territories.[97] These provisions still retained one restraint on spousal testimony, however; they provided only that a willing wife would be allowed to testify. The act specifically forbade attempts by the judiciary to compel wives to testify against their husbands. Utah's judges did not always follow the law, however. A number of Mormon women were required to testify against their husbands or face contempt charges.[98] The power of contempt could be a fearful weapon. On the basis of the most sketchy or nonexistent hearings, Mormon wives who refused to testify against their husbands could be sent to prison for indefinite periods.[99] In 1888 Representative Burnes read to the House of Representatives a report by a visitor to Utah's prison:

> I found in one cell (meaning a cell of the penitentiary in Utah) 10 by 13 1/2 feet, without a floor, six women, three of whom had babies under six months of age, who were incarcerated for contempt of court in refusing to acknowledge the paternity of their children. When I plead with them to answer the court and be released, they said: "If we do, there are many wives and children to suffer the loss of a father."[100]

Judicial use of the contempt power in the polygamy cases thus presented many Mormon families with a cruel dilemma. If the wife called as a witness submitted and testified, her husband would almost surely be convicted and imprisoned. If she refused, her husband might escape conviction, but the wife would be imprisoned. At least one Mormon husband, Rudger Clawson, directed his wife to testify at his trial after she had spent a night in the penitentiary for refusing to do so.[101]

In retrospect it is difficult to offer any explanation for this judicial conduct toward Mormon wives other than a spirit of vindictiveness. The polygamy laws, which were being vigorously enforced in the latter part of the 1880s, imposed ample punishment for the women who stubbornly clung to polygamy. The imposition of contempt sentences on wives who refused to testify introduced a sort of random sexual equality in the federal punishment of polygamy that was being imposed on Utah's Mormons. Courts had reduced the quantum of evidence required to establish polygamy or cohabitation to such a low level that in almost any case ample alternate sources of proof must have been available. So Utah's courts could not have believed that they needed to compel Mormon women to testify in order to convict their polygamous husbands. The cohabitation cases

produced heartrending stories of suffering and pathos. Men were forbidden to associate with their children or provide for their former wives. Women were denied care and association with former husbands. Moreover, the law, not limited to prohibiting future polygamous marriages, fell with all its severity upon people whose relationships had most often been established when the law did not unambiguously forbid them.

The Vitality of *Reynolds* Today

The legislative and judicial war on polygamy was ultimately successful. The Church officially abandoned the practice in 1890. However, the war was not without its casualties. The Court's decision in *Reynolds* was a good example of "a situation where the social import of the issue outstrips the political and legal resources of the time."[102] The Court's overly restrictive view of the free exercise clause virtually read it out of the Constitution for over sixty years.

Reynolds continues to be cited as binding precedent today.[103] But beginning in 1940, in *Cantwell vs. Connecticut,* the Court began to qualify the belief-action distinction that *Reynolds* had established and to redefine the scope of the free exercise clause.[104] The Cantwell family, Jehovah's Witnesses, had been going door-to-door playing an anti-Catholic recording. They were convicted of soliciting religious contributions without a state certificate and of breaking the peace. While maintaining the belief-action distinction, the *Cantwell* Court rejected the implication of *Reynolds* that religious conduct was completely outside the protection of the First Amendment. The Court stated that free exercise "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[105] Yet the Court recognized that the power to regulate religious conduct could not be so exercised as to infringe unduly upon the freedom of religious conscience. *Cantwell* required that statutes regulating religious conduct be "narrowly drawn" so as to punish only specific conduct that was a clear and present danger to the state.[106] The Court reversed the convictions.

In *Sherbert vs. Verner,* the Supreme Court followed *Cantwell's* lead and further solidified the protection of conduct under the free exercise clause.[107] Sherbert, a Seventh-Day Adventist, was discharged by her employer and was unable to obtain other employment because she would not work on Saturday. Her claim for state unemployment compensation was denied. The Court reversed, extending free exercise protection to a government's withholding of an economic benefit as opposed to the government's imposition of a direct burden on religious conscience.

Finally, in *Wisconsin vs. Yoder,* the Supreme Court abandoned the belief-action distinction for a test that balanced the competing interests

surrounding the free exercise clause.[108] In *Yoder,* Amish parents objected to the compulsory high school education of their children on the grounds that exposure to modern values and advanced education would destroy the insular society and simple life-style that were essential to the Amish religion.

In upholding the right of Amish children not to attend high school, the Court expressly rejected *Reynolds's* proposition that the First Amendment was concerned solely with matters of belief. Suggesting that matters of religious belief and conduct could not be meaningfully separated into watertight categories, the Court recognized that its subsequent decisions had "rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause."[109] To be sure, only conduct that is genuinely religious practice qualifies for First Amendment protection, but genuinely religious conduct must be afforded great deference by the state. For a law restricting religious conduct to stand, there must be an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[110] To determine whether a particular exercise is protected by the First Amendment, the Court balances the competing interests. Applying this test, the Court conceded that the state interest in universal education was compelling but concluded that compulsory education beyond the eighth grade was an infringement of the free exercise of the parents' religious beliefs.

Of course, it is a matter of speculation whether Reynolds would have been convicted had the Court used a *Yoder-type* balancing test. But had the government been required to show a compelling interest, it would have had to produce evidence of the social injury caused by polygamy. The evidence available today suggests that "Mormon polygamy neither caused or could cause the degradation of women and children or the subversion of democracy."[111] Even in the hard cases where the First Amendment has been invoked on behalf of unpopular religions and practices, such as *People vs. Woody,* modern courts have generally accorded substantial deference to religious values.[112] In *Woody,* a group of Navajos asserted that the First Amendment protected their use of the hallucinogen peyote as a part of their religious services. After a careful assessment of the use of peyote in the defendants' religious life, the California Supreme Court concluded that the state's interest in controlling drug use did not outweigh the claims of religious freedom. The so-called compelling state interest in protecting the Navajo from the deleterious effects of the drug was dismissed with the comment, "We know of no doctrine that the state, in its asserted omniscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive condition.'"[113]

The fair-minded and tolerant attitude toward strange and unpopular religions expressed by the court in *Woody* is perhaps as important a change from *Reynolds* as is the new judicial doctrine expressed in *Yoder.* The *Reynolds* Court directed much polemic against polygamy but made no attempt to assess the religious significance of polygamy to Mormon doctrine and society or to weigh that practice against the state's interests. The state interests invoked to justify its elimination appear untenable in light of the analysis in *Yoder* and *Woody.* The diffuse social interest in preventing patriarchal family structures to preserve democracy, based on sociological theories, is precisely the sort of general state interest that was rejected in *Yoder.* And the paternalistic state interest in freeing Mormon women from their supposed domination is precisely the sort of state interest that was rejected in *Woody.* Thus, the developments of the twentieth century have undermined the *Reynolds* rationale.

Nevertheless, the modern Court has at times shown signs of backtracking from the *Sherbert-Yoder* line of cases. The vitality of *Yoder* was questioned just ten years after *Yoder,* in *United States vs. Lee.*[114] Lee—like Yoder, an Amish—employed several other Amish. He objected on religious grounds to paying the social security tax imposed on employers. The Court purported to apply the *Yoder* balancing test but reached a different result from that in *Yoder.* In rejecting Lee's claim to an exemption from the law, the Court tried to distinguish *Yoder* on the grounds that a tax system could not function if exemptions were too easily granted on the basis of religious belief, whereas an educational system could presumably tolerate religious exemptions.[115] Justice Stevens, concurring in the judgment, found *Yoder* indistinguishable. The same religious interest was implicated in each case, and the state interest in *Yoder* was no less compelling than the federal interest in *Lee.* Justice Stevens argued that the Court's decisions rested on a different constitutional standard, namely, that a person who objects to a valid, neutral law of general applicability on religious grounds should have "an almost insurmountable burden" of demonstrating "that there is a unique reason for allowing him a special exemption." He found *Yoder* the "principal exception" to this rule. The majority's conclusion in *Lee,* he argued, suggested that the Court in fact placed a heavier burden on the party challenging the law than *Yoder* would warrant.[116]

Free exercise decisions since *Lee* give credence to Justice Stevens's interpretation of Supreme Court precedents and suggest that the Court is dissatisfied with the *Sherbert-Yoder* balancing test or at least to the relative weights of the individual and governmental interests involved. *Sherbert* and *Yoder* would suggest that "the thumb [should be] on the religious freedom side of the balance."[117] But while professing to apply the *Sherbert-Yoder* test, the modern Court has at times shown unusual deference to the

government's purported interests. As a result, the Court has reached some questionable results and has demonstrated an inconsistency in its free exercise jurisprudence that threatens to undermine the civil libertarian approach of the *Sherbert-Yoder* line of cases.

In *Jensen vs. Quaring,* the Court considered a free exercise challenge to Nebraska's requirement that drivers' licenses include a photograph of the licensee.[118] Mrs. Quaring objected to the requirement as it was applied to her on the grounds that her religious beliefs prohibited the use of her photograph. The state failed to provide any evidence that its interests would be harmed if it provided an exemption for those opposed to photographs on religious grounds, as *Yoder* would seem to require. In fact, the state provided some nonreligious exemptions.[119] Yet the Court barely upheld Mrs. Quaring's free exercise challenge, affirming by a four-to-four vote the Eighth Circuit's conclusion that Nebraska had to provide her a photoless driver's license.

The Court was faced with a similar question in *Bowen vs. Roy*.[120] The parents of a Native American brought an action challenging on First Amendment grounds the requirement that recipients of certain welfare benefits provide a social security number. The parents claimed that use of a social security number for their daughter would violate their religious beliefs. They sought and obtained in the lower court an injunction preventing the government from (1) making any use of their daughter's social security number, and (2) denying their daughter welfare benefits because of the parents' refusal to "furnish" her social security number to the state agency administering the welfare plan.[121]

When the case reached the Supreme Court, it generated five separate opinions. The Court, in an opinion by Chief Justice Burger, easily rejected the first provision of the injunction. The Court stated that the free exercise clause was meant to protect individuals from certain forms of governmental compulsion: "it does not afford an individual a fight to dictate the conduct of the Government's internal procedures." Eight justices agreed that once the government had the number it could use it as it wished in conducting "its own internal affairs."[122] Because the government already had the daughter's social security number and could use it however it saw fit, Justices Blackmun and Stevens saw no reason to reach the constitutional questions presented by the second part of the injunction. Six of the remaining justices, however, reached the issue of whether the government could withhold welfare benefits to someone who refused to furnish a social security number for religious reasons, with very different results.[123] The Chief Justice (joined by Justices Rehnquist and Powell) drew a distinction between "governmental compulsion and conditions relating to governmental benefits."[124] The Chief Justice expressly rejected a *Yoder*-type balancing test where

the challenged governmental action did not "inescapably compel conduct that some find objectionable for religious reasons."[125] In the absence of proof of a discriminatory intent, he would uphold a neutral and uniform requirement for governmental benefits if it was merely "a reasonable means of promoting a legitimate public interest."[126] Under that standard, the Chief Justice would have upheld the entire statutory scheme in *Roy.* On the other hand, Justice O'Connor (dissenting in part and joined by Justices Brennan and Marshall) found that the Chief Justice's proposed test had "no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." Justice O'Connor would have applied "our long line of precedents to hold that the Government must [accommodate] a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means."[127] Under this *Yoder* type of analysis, she would have upheld the second part of the injunction.[128]

Despite indications in *Lee* and *Roy* that at least some members of the Court were ready to abandon the *Sherbert-Yoder* balancing test, in *Hobbie vs. Unemployment Appeals Comm'n,* the first free exercise case to reach the Rehnquist Court, the Court strongly reaffirmed *Sherbert* (only Chief Justice Rehnquist dissented).[129] Ms. Hobbie, like Ms. Sherbert, was a Seventh-Day Adventist who was denied unemployment compensation when she lost her job for refusing to work on Saturdays. The state tried to distinguish *Sherbert* on the grounds that Hobbie had recently converted to her religion and expected her employer to accommodate this change, whereas Sherbert had not—a distinction, Justice Scalia suggested, that one would only make "if one did not like Sherbert to begin with."[130] The Court rejected the distinction, pointing out that it would "single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment."[131] The state also argued for the less rigorous free exercise test that Chief Justice Burger had suggested in *Roy,* but the Court firmly rejected the argument. The Court reaffirmed that, when the state denies an important benefit because of conduct mandated by religious belief, the denial "must be subjected to strict scrutiny and [can] be justified only by proof by the State of a compelling interest."[132]

The belief-conduct distinction of *Reynolds* has been jettisoned by later cases. Substantial protection of religious practice as well as belief is now accepted under the free exercise clause. Because belief has long been protected under the speech clause, this development is logical, historically correct, and beneficial to society. To avoid redundancy, the free exercise clause must be interpreted as protecting religious conduct as well as belief. Nevertheless, it would be unrealistic to expect a Supreme Court as socially conservative as this, or for that matter any Court likely to exist in the near

future, formally to overturn *Reynolds* and sanction the practice of polygamy.[133] (Nor, for that matter, would it be likely that the Mormon church would ever again enter into that practice even if the law permitted it.) What should be expected, however, is that the emergence of the free exercise clause as a vibrant base for civil libertarian protection of rights of conscience under *Sherbert and Yoder* will be strengthened and expanded. Any tendency toward erosion of the free-exercise protection should be stoutly resisted.

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1. Chap. 126, 1–3, 12 Slat. 501–2 (1862).

2. See Ray Jay Davis, "The Polygamous Prelude," *American Journal of Legal History* 6 (1962): 6. Having signed the Morrill Act, President Lincoln is reported to have told T. B. H. Stenhouse, "You go back and tell Brigham Young that if he will let me alone, I will let him alone" (quoted in Gustive O. Larson, *The "Americanization" of Utah for Statehood* [San Marino, Calif.: Huntington Library, 1971], 60 n. 61).

3. See B. H. Roberts, *A Comprehensive History of The Church of Jesus Christ of Latter-day Saints,* 6 vols. (Salt Lake City: Deseret News Press, 1930), 5:28–29. Conflict was avoided by the lodging of a friendly complaint against Young that was later dismissed when tempers had cooled.

4. 1851 Utah Laws 43, 30; ibid. at 56, 1–3.

5. Marriage records were not kept in Utah until 1887. Mormon weddings were often performed in temple ceremonies open only to faithful Mormons, so witnesses were scarce, and what witnesses there were often preferred to face contempt of court rather than reveal information related to temple ordinances (see Davis, "Polygamous Prelude," 10 n. 42). Moreover, under Utah law, a wife could not testify against her husband.

6. Orma Linford, "The Mormons and the Law: The Polygamy Cases," *Utah Law Review* 9 (1964): 308, 330. Adultery charges could be brought only by an accused's spouse. Hawkins's lawful wife was apparently unhappy at his having taken a plural wife and brought charges against him. Perhaps the prosecution proceeded against Hawkins under Utah's adultery law rather than the Morrill Act because his wife was willing to cooperate with the prosecution.

7. See Roberts, *Comprehensive History* 5:395.

8. *Deseret News,* 18 October 1871.

9. 80 U.S. (13 Wall.) 434 (1871).

10. Linford, "Mormons and the Law," 331.

11. Davis, "Polygamous Prelude," 9–10.

12. Ray Jay Davis, "Plural Marriage and Religious Freedom: The Impact of Reynolds vs. United States," *Arizona Law Review* 15 (1973): 287–88.

13. See Roberts, *Comprehensive History* 5:469.

14. See ibid.; Orson F. Whitney, *History of Utah,* 4 vols. (Salt Lake City: George Q. Cannon and Sons Co., 1892–1904), 3:46–47.

15. Robert J. Dwyer, *The Gentile Comes to Utah: A Study in Religious and Social Conflict (1862–1890)*, 2d ed. rev. (Salt Lake City: Western Epics, 1971), 112–13. That Mormon witnesses, including Reynolds's polygamous wife, willingly testified at Reynolds's first trial but refused to testify at his second trial suggests that the Mormons believed the government had broken an agreement to treat the case as a test.

16. United States vs. Reynolds, I Utah 226 (1875).

17. Chap. 469, 1–7, 18 Stat. 253–56 (1874).

18. Linford, "Mormons and the Law," 333.

19. P. Kurland and G. Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States* (Arlington: University Publications of America, 1975), 8:6.

20. United States vs. Reynolds, I Utah 319 (1876), *aff'd,* 98 U.S. 145 (1878).

21. The admission of testimony given at a prior trial under oath where that witness had been subject to cross-examination and was no longer available would also have been proper under the modern rules of evidence (see Federal Rules of Evidence 804 [b] [I]).

22. 1 Utah at 323.

23. Reynolds vs. United States, 98 U.S. 145 (1878).

24. Ibid., 164; see also *The Complete Jefferson,* ed. Saul K. Padover (Freeport, N.Y.: Books for Libraries Press, 1943), 518–19.

25. Ibid.

26. Ibid., 166.

27. "To permit this," the Court reasoned, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances" (ibid., 167). To illustrate this point, the Court produced a parade of horrors, examples of religiously inspired conduct that no civilized society could abide, such as human sacrifice.

28. In the face of this language, the Court's attempt to define constitutionally protected religion as belief is, as one constitutional scholar concludes, "peculiar" (Laurence H. Tribe, *American Constitutional Law* [Mineola, N.Y.: Foundation Press, 1978], 838 n. 1; see also Harrop A. Freeman, "A Remonstrance for Conscience," *University of Pennsylvania Law Review* 106 [1958]: 806, 826).

29. Linford, "*The* Mormons and the Law," 341.

30. Tribe, *American Constitutional Law,* 838 and n. 15.

31. Ibid., 854. But see Davis, "Plural Marriage," 305–6 (the state interest in prohibiting polygamy was at the time considered compelling, and no less restrictive alternative was available).

32. On a petition for rehearing, it was pointed out that Reynolds's sentence to hard labor had been improper because the statute provided only for imprisonment. The Court, therefore, reversed the lower court's judgment in this respect and remanded the case so that the district court could impose proper punishment (98 U.S. at 168–69). Reynolds was resentenced to two years in prison and was released five months early for good behavior. He was received as "living martyr" and ultimately became a General Authority of the Church (Davis, "Plural Marriage," 291 and n. 24).

33. Chap. 47, 1–9, 22 Stat. 30–32 (1882).

34. 19 Cong. Rec. 9231 (1888).

35. Leonard J. Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints, 1830–1900* (Cambridge: Harvard University Press, 1958), 359.

36. During this period, no General Authority and few bishops, stake presidents, or their counselors were monogamists (Leonard J. Arrington and Davis Bitton, *The Mormon Experience* [New York: Alfred A. Knopf, 1979], 204).

37. Section 3, 22 Stat. 30, 31 (1882).

38. 4 Utah 122, 7 P. 369 (Utah), *aff'd,* 116 U.S. 55 (1885), *vacated,* 118 U.S. 355 (1886).

39. Linford, "Mormons and the Law," 351.

40. 116 U.S. at 60–61, 65.

41. In May 1885 instructions came from the underground headquarters of the Church to defend every case "with all the zeal and energy possible" (see Larson, *Americanization,* 133–34).

42. 7 P. at 374, 381.

43. Ibid. at 381.

44. A companion case to *Cannon* reaffirmed that evidence of sexual conduct was irrelevant (United States vs. Musser, 4 Utah 153, 7 P. 389 [1885]). *Musser* was a stronger case for a finding of no cohabitation since the defendant had established each of his plural wives in a separate house. In sustaining Musser's conviction, the Utah court noted that one of Congress's purposes in passing the Edmunds Act was to reach prominent Church leaders who had escaped prosecution under the Morrill Act's three year statute of limitations (4 Utah at 157–58, 7 P. at 391).

45. 116 U.S. 74 (1885), *vacated,* 118 U.S. 355 (1886).

46. Ibid. at 71–72. Justices Field and Miller dissented, arguing that the prohibition of cohabitation should be interpreted to mean "unlawful habitual sexual intercourse." The dissent termed the majority's holding "a strained construction of a highly penal statute" (ibid. at 79–80).

47. See, for example, Griswold vs. Connecticut, 381 U.S. 479, 485–86 (1965).

48. Indeed, the Mormon prosecutions of the 1880s saw more than a few incidents of bedroom raids and window peeping without judicial approval of such conduct (see 17 Cong. Rec. 3137–38 [1886] citing instances of outrageous prosecutorial conduct).

49. Linford, "Mormons and the Law," 348.

50. Frequently, a polygamous wife would be "a homeless immigrant, a spinster, or the wife of a deceased relative with a family to support" (Arrington, *Great Basin Kingdom,* 239). Whatever polygamy's faults were, in destroying it the federal government also destroyed what had been an effective social welfare system (Arrington and Bitton, *Mormon Experience,* 200–201).

51. In *Musser,* Justice Powers tried to offer some general guidelines. He suggested that a polygamist with children by two or more wives could escape prosecution if he treated his polygamous families as if he had been divorced from those wives (7 P. at 399).

52. See, for example, Connally vs. General Constr. Co., 269 U.S. 385, 391 (1926). See, generally, Tribe, *American Constitutional* Law, 718 (an indefinite statute violates due process by not giving a person fair notice that his conduct is proscribed by law and by allowing law enforcement officials too much discretion, which they could exercise in an arbitrary and discriminatory manner).

53. United States vs. Peay, 5 Utah 263, 14 P. 342, 344 (1887).

54. 4 Utah 280, 295, 313, 9 P. 501, 686, 697, *appeals dismissed,* 118 U.S. 346 (1886).

55. 116 Mass. 35 (1874).

56. Snow vs. United States, 118 U.S. 346 (1886). Realizing that it had already decided one other cohabitation case, Cannon vs. United States, 116 U.S. 55 (1885), the Court vacated its decision in that case as having been issued without jurisdiction (118 U.S. 355 [1886]). Other courts continued to cite *Cannon* as an authoritative interpretation of the Edmunds Act, even though it no longer was binding precedent (see, for example, United States vs. Clark, 6 Utah 120, 125, 21 P. 463 [1889]; United States

vs. Kuntze, 2 Idaho 446, 21 P. 407 [1889];United States vs. Peay, 5 Utah 263, 14 P. 342, 345 [1887]).

57. 4 Utah 487, 11 P. 542 (1886).

58. *In re* Snow, 120 U.S. 274, 285 (1887).

59. Ibid., 281.

60. See United States vs. Eldredge, 5 Utah 161, 189, 13 P. 673, 680, 14 P. 42, 43 (1887), *appeals dismissed,* 145 U.S. 636 (1892).

61. Section 4, 22 Stat. 30, 31 (1882).

62. For example, in Clawson vs. United States, 113 U.S. 143 (1885), the defendant was convicted of polygamy for marrying a second wife and sentenced to three and one-half years imprisonment and a five hundred dollar fine. He was also convicted of cohabiting with that wife and sentenced to six months and a three hundred dollar fine.

63. 131 U.S. 176 (1889).

64. The Utah Supreme Court suggested that if the act were to have that effect it should have been entitled "An act to enable a man to forsake his lawful wife, and fly to the arms of his concubine" (United States vs. Snow, 4 Utah 313, 9 P. 697, 701, *appeal dismissed,* 118 U.S. 346 [1886]).

65. 4 Utah 280, 9 P. 501, 504, *appeal dismissed,* 118 U.S. 346 (1886).

66. See, for example, United States vs. Snow, 4 Utah 295, 9 P. 686, 688, *appeal dismissed,* 118 U.S. 346 (1886); United States vs. Clark, 5 Utah 226, 14 P. 288, 291 (1887).

67. 5 Utah 436, 17 P. 75 (1888).

68. 17 P. at 76. Earlier, however, the court had suggested that both legal and illegal marriages raised presumptions of cohabitation (United States vs. Smith, 5 Utah 232, 14 P. 291 [1887]).

69. 4 Utah 295, 9 P. 686, 687, *appeal dismissed,* 118 U.S. 346 (1886).

70. United States vs. Musser, 4 Utah 153, 7 P. 389, 394 (1885).

71. United States vs. Harris, 5 Utah 436, 17 P. 75, 78 (1888).

72. United States vs. Snow, 4 Utah 295, 9 P. 686, 689, *appeal dismissed,* 118 U.S. 346 (1886).

73. See United States vs. Cannon, 116 U.S. 55, 74 (1885), *vacated,* 118 U.S. 355 (1886).

74. United States vs. Tenney, 2 Ariz. 29, 8 P. 295, 296–97, *aff'd,* 2 Ariz. 127, 11 P. 472 (1886).

75. United States vs. Langford, 2 Idaho 561, 21 P. 409, 409 (1889).

76. United States vs. Kuntze, 2 Idaho 480, 21 P. 407 (1889). By itself, however, the court warned, such evidence could not warrant a conviction (21 P. at 408).

77. 9 P. at 691.

78. United States vs. Simpson, 4 Utah 227, 229, 7 P. 257 (1885).

79. Ibid. at 228.

80. United States vs. Schow, 6 Utah 381, 24 P. 30 (1890).

81. 5 Utah 226, 14 P. 291, 292 (1887).

82. United States vs. Musser, 4 Utah 153, 7 P. 389, 396 (1885).

83. United States vs. Cannon, 4 Utah 122, 7 P. 369, 379, *aff'd,* 116 U.S. 55 (1885), *vacated,* 118 U.S. 355 (1886).

84. United States vs. Musser, 4 Utah 153, 7 P. 389, 395–96 (1885).

85. United States vs. Peay, 5 Utah 263, 267, 14 P. 342, 344 (1887). See also United States vs. Smith, 4 Utah 232, 273, 14 P. 291, 293 (1887),

86. United States vs. Musser, 4 Utah 153, 7 P. 389, 395–96 (1885). The reasoning of the court is almost directly antithetical to modern rules of evidence. Under modern rules, a defendant must be convicted on evidence that he committed the offense

charged, rather than on evidence of some general propensity to violate the law or on the basis of his prior conduct (see, for example, Federal Rules of Evidence 404, 609).

87. 103 U.S. 304 (1880), *rev'g,* 2 Utah 19.

88. Apparently Caroline had consented to enter the polygamous marriage only if Miles married her first. Church authorities, however directed Miles to marry the eldest woman first. When Caroline discovered, after the wedding, that Miles had already married one of the women, she angrily went to a United States marshal with her story (Linford, "Mormons and the Law," 342).

89. 103 U.S. at 315.

90. Ibid. at 314.

91. Ibid. at 311.

92. Ibid. at 315–16.

93. See United States vs. Bassett, 5 Utah 131, 13 P. 237, 240 (1887). *rev'd,* 137 U.S. 496 (1890).

94. For other early efforts by the Utah Supreme Court to deal with the problem of polygamous wives' testimony, see United States vs. Kershaw, 5 Utah 618, 19 P. 194 (1888); United States vs. Cutler, 5 Utah 608, 19P. 145 (1888) (reaffirming Bassett); and United States vs. White, 4 Utah 499, 11 P. 570 (1886).

95. 137 U.S. 496 (1890).

96. Ibid. at 506.

97. Sections 1, 9, 24 Stat. 635, 636 (1887).

98. Perhaps the most egregious case of judicial conduct in this regard was that of Belle Hams (*in re* Harris, 4 Utah 5, 5 P. 129 [1884]). Mrs. Harris and her infant son ultimately spent three and one-half months in prison for her refusal to testify before a grand jury investigating polygamy charges against her husband.

99. In 1886 Mormon women directed a petition to Congress calling the legislature's attention to the plight of Mormon wives and itemizing their victimization by Utah's judiciary (see 17 Cong. Rec. 3137–38 [1886]).

100. 19 Cong. Rec. 9231 (1888).

101. Larson, *Americanization,* 108.

102. Morton Keller Review of Charles Fairman, *Reconstruction and Reunion, 1864–88,* in *Harvard Law Review* 85 (1972): 1082, 1086 (referring to a different issue—municipal railroad bonding).

103. See, for example, Potter vs. Murray City, 585 F. Supp. 1126, 1134–35, 1141–42 (D. Utah 1984) (holding that the free-exercise clause did not prevent a city from dismissing a police officer who practiced polygamy), *aff'd as modified.* 760 F.2d 1065 (10th *Cir.), cert. denied,* 106 S. Ct. 145 (1985); 760 F.2d at 1069–70.

104. 310 U.S. 296 (1940).

105. Ibid. at 303–4.

106. Ibid. at 311.

107. 374 U.S. 398 (1963). See also Thomas vs. Review Board, 450 U.S. 707 (1981) (allowing unemployment compensation for a Jehovah's Witness who quit his job when he was required to make turrets for military tanks).

108. 406 U.S. 205 (1972).

109. Ibid. at 219–20.

110. Ibid. at 214. Compare *Tribe, American Constitutional Law,* 837 (suggesting that the Court's differentiation of belief and action should more properly be seen as an effort to articulate a "secular purpose requirement," a requirement that government regulation of religious activity be directed to some secular purpose).

111. Davis, "Plural Marriage," 301.

112. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

113. 394 P.2d at 818.

114. 455 U.S. 252 (1982).

115. Compare Stephen Pepper, "Taking the Free Exercise Clause Seriously," *BYU Law Review* (1986): 299, 325–26 (suggesting that the difference between *Yoder* and *Lee* may be the greater likelihood of fraudulent claims by those seeking to escape taxes than by those seeking to escape compulsory education).

116. See 455 U.S. at 262, 263 and n. 3 (Stevens, J., concurring).

117. Pepper, "Free Exercise Clause," 318.

118. 472 U.S. 478 (1985) (per curiam).

119. Quaring vs. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd sub nora.* Jensen vs. Quaring, 472 U.S. 478 (1985).

. 120106 S. Ct. 2147 (1986).

121. Originally Mr. Roy objected only to obtaining a social security number for his daughter. The state's use of social security numbers became an issue when it was discovered that Mr. Roy's daughter had in fact been issued a social security number (106 S. Ct. at 2150–51).

122. Ibid. at 2152.

123. Justice White, writing separately, dissented on the grounds that *Sherbert* and *Thomas vs. Review Board,* 450 U.S. 707 (1981), controlled the case (106 S. Ct. at 2169).

124. Ibid. at 2155.

125. Ibid.

126. Ibid. at 2156.

127. Ibid. at 2166.

128. In a second case decided in the Court's 1985 *Term—Goldman vs. Weinberger,* 106 S. Ct. 1310 (1986—the Court held that a serviceman who was also an Orthodox Jew and an ordained rabbi could constitutionally be prohibited from wearing a yarmulke while in duty and in uniform. The case may best be explained by its context and the Court's traditional deference to the military and its unique needs (see 106 S. Ct. at 1313 ["Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"]).

129. 107 S. Ct. 1046 (1987).

130. Hobbie, slip op. at 5.

131. Quoted in 55 U. S. L. W. 3461, 3462 (13 January 1987).

132. Hobbie, slip op. at 7.

133. Wisconsin vs. Yoder, 406 U.S. at 247 (Douglas, J., dissenting in part).