OPENING REMARKS

WHO CARES WHAT CONGRESS THINKS? NOT JAMES MANN

THE MANN ACT'S *MARBURY* MOMENT

Ross E. Davies[†]

In *Caminetti v. United States*, the U.S. Supreme Court employed a severely puritanical approach — on the facts and on the law — to statutory interpretation.[1] Conversely, the opinion for the Court in *Caminetti* triggered an intriguingly indulgent legislative-judicial exchange about the role of the courts in statutory interpretation.

This little essay begins with a quick look at *Caminetti* and the statute it interpreted, proceeds through a similarly speedy examination of that indulgent post-decision exchange, and concludes with a few questions.

Caminetti was, basically, a successful federal prosecution of a man for engaging in an extramarital affair during which the licentious couple in question crossed state lines, from California to Nevada and back. Drew Caminetti's conviction was upheld by the Supreme Court. He paid a $1,500 fine and served about one third of an 18-month prison sentence.[2] (For the full story, read Professor David Langum's excellent book, *Crossing Over the Line*.)

Caminetti was also a near-caricature of the perpetual conflict between "plain meaning" enthusiasts (that is, jurists who tend to *resist* recourse to

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[†] Editor-in-chief, the *Green Bag*; professor of law, George Mason University. A shorter paper that overlaps a bit with this one appeared online long ago. It is still out there, though to get a look at it you will have to pay LexisNexis. *See* Ross E. Davies, *Historical Precedents: The Secret Meaning of Intent*, www.law.com/nationallawjournal/almID/1202475258747/ (Nov. 23, 2010).

[1] *Caminetti v. United States*, 242 U.S. 470 (1917).

[2] David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* 111, 138 (1994).

extrinsic sources when determining the meanings of words in a statute) and "legislative history" enthusiasts (that is, jurists who tend to *embrace* recourse to extrinsic sources when determining the meanings of words in a statute). In *Caminetti*, the "plain meaning" enthusiasts prevailed.

In his January 1917 opinion for the Court in *Caminetti*, Justice William R. Day spoke for a majority that leaned heavily on what it took to be the plain meaning of the words "immoral purpose" in the disturbingly named "White-slave traffic Act"[3] — also known as the "Mann Act," after its sponsor, Representative James R. Mann (R-IL).[4] At that time, the Mann Act provided that:

> any person who shall knowingly transport . . . any woman or girl for the purpose of prostitution or debauchery, *or for any other immoral purpose* . . . shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the direction of the court.[5]

According to Day — who was joined by Justices Oliver Wendell Holmes, Willis Van Devanter, Mahlon Pitney, and Louis Brandeis — those italicized words obviously meant that the Mann Act criminalized noncommercial, consensual, interstate extramarital affairs, as well as interstate sex-for-hire:

> To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress, for which Caminetti . . . [was] convicted; . . . would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.
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> While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order

[3] 36 Stat. 825, ch. 395, sec. 8 (June 25, 1910).

[4] *Mann, James Robert*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, bioguideretro.congress.gov/Home/MemberDetails?memIndex=m000104.

[5] 36 Stat. 825, ch. 395, sec. 2 (emphasis added).

> that a woman may be debauched, or become a mistress or a concubine from being the execution of purposes within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.[6]

Therefore, Day concluded, there was no need to look at any sources other than the Mann Act itself (and the commonsense expertise about "immoral purpose" in the minds of himself and Justices Holmes, Van Devanter, Pitney, and Brandeis, of course) to understand the meaning of the words "or for any other immoral purpose" in the Mann Act, nor any reason to doubt that those words made Caminetti's affair a crime:

> Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation . . . . But, as . . . has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source.[7]

Justice Joseph McKenna wrote the dissent, speaking for himself, Chief Justice Edward D. White, and Justice John H. Clarke. McKenna agreed that "[o]ur present concern is with the words 'any other immoral practice.'"[8] (The Mann Act referred repeatedly both to "immoral purpose" and to "immoral practice," sometimes in the same sentence, and both the majority and the dissent in *Caminetti* used the two terms interchangeably.[9]) But McKenna objected that the presence of the words "White-slave traffic act" in the text of the statute itself[10] made the meaning of the words "any other immoral practice [or purpose]" unclear in the context of the statute. So, should the words "any other immoral practice [or purpose]" be given the "comprehensive" meaning the majority preferred, or instead the "limited" meaning preferred by the dissenters? Turning to the Mann Act's legislative

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[6] *Caminetti*, 242 U.S. at 486.
[7] *Id*. at 490.
[8] *Id*. at 496.
[9] Which is odd, isn't it, since "purpose" and "practice" are not interchangeable. Plainly.
[10] 36 Stat. 825, ch. 395, sec. 8.

history — the "[r]eports to Congress" the majority had declined to consider — McKenna discovered some evidence, including a telling line by the sponsor of the legislation:

> The author of the bill was Mr. Mann, and in reporting it from the House Committee on Interstate and Foreign Commerce he declared for the Committee that it was not the purpose of the bill to interfere with or usurp in any way the police power of the States, and further . . . that the sections of the act had been "so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution."[11]

On the basis of that report and other "highly persuasive" commentary from the legislature and the executive,[12] McKenna concluded:

> In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims.[13]

This was not enough for the majority of Justices, though, because it was not even relevant, the text of the statute being plain on its face.

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On January 29, 1917, a few days after the *Caminetti* decision was handed down, Mann himself wrote a note (facsimile on next page) to Day:[14]

> My dear Mr. Justice Day:—
>
> I hope it is entirely proper for me to congratulate you upon your opinion and the decision of the Supreme Court in the white slave cases. While I have never thought that the writer of that Act was the one best qualified to construe the meaning of the Act and hence have refrained from any expression of opinion concerning my intent and thought when I wrote the language of the white slave law, yet you have construed the law the way I intended when

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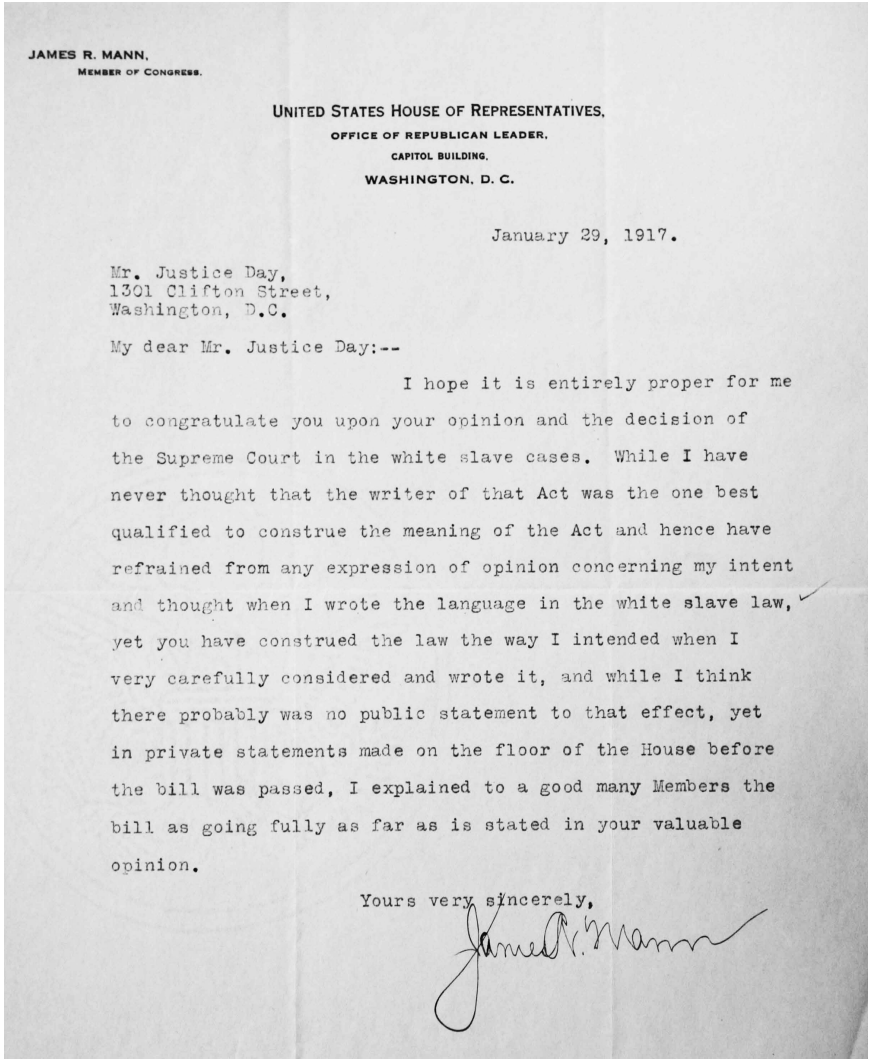
[11] *Caminetti*, 242 U.S. at 497-98 (McKenna, J., dissenting) (quoting House Report No. 47, 61st Cong., 2d sess., pp. 9, 10).

[12] Plus a purposivist "*Holy Trinity*" argument that is not relevant here. *See Caminetti*, 242 U.S. at 499-503 (McKenna, J., dissenting) (discussing *Holy Trinity Church v. United States*, 143 U.S. 457 (1892)).

[13] *Caminetti*, 242 U.S. at 498 (McKenna, J., dissenting).

[14] Letter from James R. Mann to William R. Day, Jan. 29, 1917, in Papers of William R. Day, Library of Congress, Manuscript Division, box 32.



JAMES R. MANN,
MEMBER OF CONGRESS.

UNITED STATES HOUSE OF REPRESENTATIVES,
OFFICE OF REPUBLICAN LEADER,
CAPITOL BUILDING,
WASHINGTON, D. C.

January 29, 1917.

Mr. Justice Day,
1301 Clifton Street,
Washington, D.C.

My dear Mr. Justice Day:--

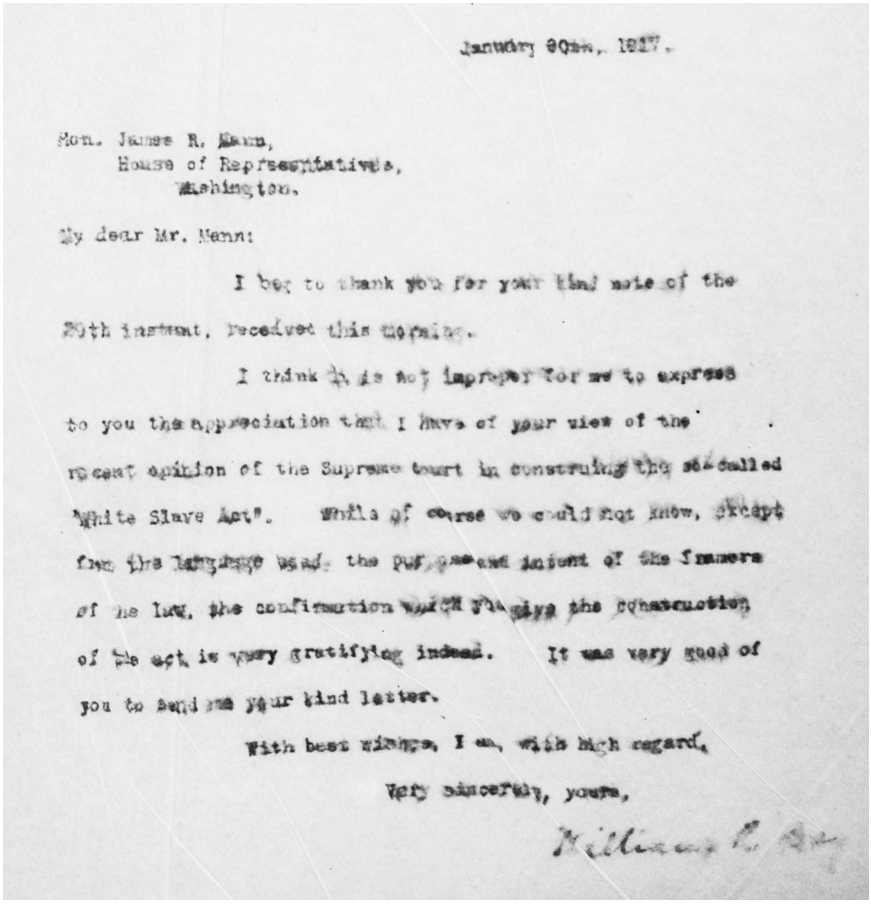
I hope it is entirely proper for me to congratulate you upon your opinion and the decision of the Supreme Court in the white slave cases. While I have never thought that the writer of that Act was the one best qualified to construe the meaning of the Act and hence have refrained from any expression of opinion concerning my intent and thought when I wrote the language in the white slave law, yet you have construed the law the way I intended when I very carefully considered and wrote it, and while I think there probably was no public statement to that effect, yet in private statements made on the floor of the House before the bill was passed, I explained to a good many Members the bill as going fully as far as is stated in your valuable opinion.

Yours very sincerely,

James R. Mann

I very carefully considered and wrote it, and while I think there probably was no public statement to that effect, yet in private statements made on the floor of the House before the bill was passed, I explained to a good many Members the bill was going fully as far as is stated in your valuable opinion.

Yours very sincerely,
James R. Mann



January 20th, 1917.

Hon. James R. Mann,
House of Representatives,
Washington.

My dear Mr. Mann:

I beg to thank you for your kind note of the 20th instant, received this morning.

I think it is not improper for me to express to you the appreciation that I have of your view of the recent opinion of the Supreme Court in construing the so-called "White Slave Act". While of course we could not know, except from the language used, the purpose and intent of the framers of the law, the confirmation which you give the construction of the act is very gratifying indeed. It was very good of you to send me your kind letter.

With best wishes, I am, with high regard,

Very sincerely, yours,

William H. Taft

In other words, the lines the dissent had quoted from Mann's congressional report on the Mann Act — that "the sections of the act had been 'so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution'"[15] — were a lie. Mann had told the public that his law was directed at commercial sex, but what he really intended — and what he secretly told his colleagues in Congress who would decide whether to enact the law or not — was something else: criminalization of both commercial and non-commercial

[15] *Caminetti*, 242 U.S. at 498 (McKenna, J., dissenting) (quoting House Report No. 47, 61st Cong., 2d sess., pp. 9, 10).

immoral sex. Just what the majority had said was plain from the text of the statute.

Justice Day expressed his pleasure the next day, in a note (facsimile on previous page) to Mann:[16]

> My dear Mr. Mann:
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> I beg to thank you for your kind note of the 29th instant, received this morning.
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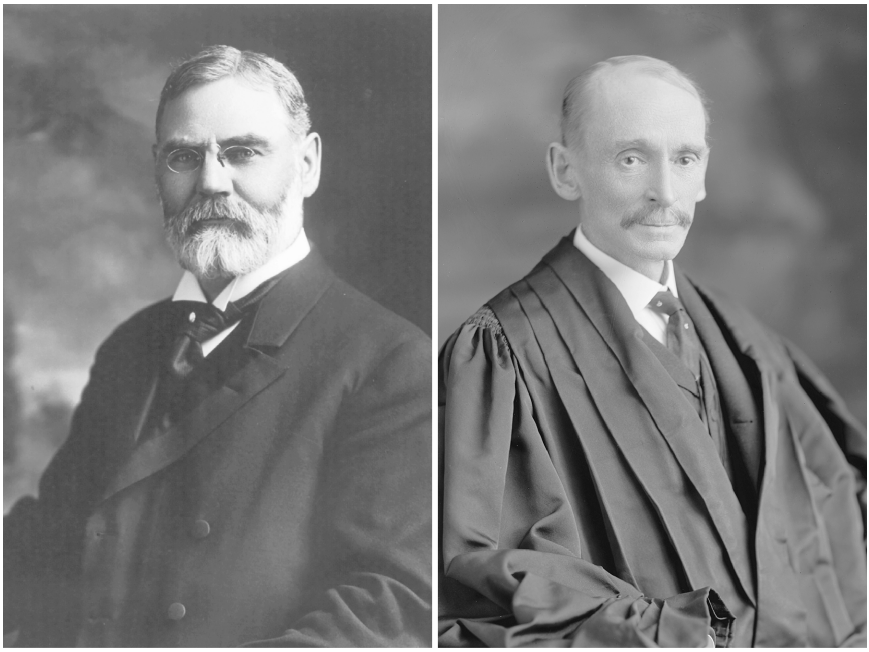
> I think it is not improper for me to express to you the appreciation that I have of your view of the recent opinion of the Supreme Court in construing the so-called "White Slave Act". While of course we could not know, except from the language used, the purpose and intent of the framers of the law, the confirmation which you give the construction of the act is very gratifying indeed. It was very good of you to send me your kind letter.
>
> With best wishes, I am, with high regard,
> Very sincerely yours,
> William R. Day

It should come as no surprise that Day appreciated the kindness of Mann's note. Many people appreciate kindness. But Day's appreciation for the "confirmation which you give the construction of the act" is surprising. Learning that he and his colleagues had unknowingly served Mann's secret purpose — to make noncommercial, immoral sex a federal crime — should have been irrelevant to Day's view of his work as an interpreter of the plain meaning of the words of a statute. (It would have been nice, though, if Day had expressed a wish that in the future Mann would be honest in public about what he said in private about his purposes as a public servant.)

Why didn't Day instead thank Mann for the part of that note that did in fact vindicate Day's approach to statutory interpretation?

"I have never thought that the writer of that Act was the one best qualified to construe the meaning of the Act" — could have been written by Chief Justice John Marshall. Who knows? When he was writing to Day, Mann might even have been thinking about Marshall's most famous line, the one from his opinion for a unanimous Court in *Marbury v. Madison*: "It is

[16] Letter from William R. Day to James R. Mann, Jan. 30, 1917, in Papers of William R. Day, Library of Congress, Manuscript Division, box 4.



Illinoisan James Mann of the U.S. House of Representatives (left) and Ohioan William R. Day of the U.S. Supreme Court. Photographs courtesy of the Library of Congress, reproduction numbers LC-USZ62-55627 and LC-DIG-hec-16432.

emphatically the province and duty of the judicial department to say what the law is."[17] In his note to Day, Mann was engaging in a mighty bendy bit of legislative genuflection to the judiciary. According to Mann, all he and his congressional colleagues could do was draft and enact laws. They could not know the meaning of what they had done until after it was complete and in use and they were instructed by the judges.[18] Mann's confession — of what? incompetence? powerlessness? — was so complete that Day may have opted for silence about it because to speak out loud of such a submission would have been bad form.

[17] 5 U.S. 137, 177 (1803).

[18] Or perhaps Mann was a realist ahead of his time, foreshadowing the practical wisdom of Justices Robert H. Jackson ("We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., opinion concurring in result)) and William J. Brennan ("Five votes can do anything around here." James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* 54 (1995)).

But then again, why should Day have believed anything Mann put in that note? After all, Mann had shown he was not to be trusted on the subject of the Mann Act. It was his misrepresentation in a congressional report (the one quoted by McKenna in his dissent in *Caminetti*) that Mann was disclosing and correcting in his note to Day. Would it, in fact, have been in Day's best interest to disbelieve every word of Mann's note? The note would have been pointless if Mann had simply told the same story to the public (in a congressional report) that he told "in private" to "a good many Members" of Congress. And, by entering Mann's circle of deception — "we could not know . . . the purpose and intent of the framers," Day said in his note, but now Day did know of both the intention and the misrepresentation that concealed it — Day would become a silent partner in Mann's deception of the public. But only if he believed Mann's revelation in the note. Much better, perhaps, for Day to adhere to his belief in plain meaning and cordially, noncommittally indulge Mann.

But that bit of political-ethical intrigue pales in comparison to the intriguing question of what Mann's deception (of the public) and disclosure (to legislators) during the legislative process, followed later by disclosure (to a judge) might mean to "legislative history" enthusiasts. Is there such a thing as secret legislative history? If there is, and a secret is revealed post-enactment, may it be considered when settling the meaning of statutory language enacted in the shadow of that secret?[19] Imagine the amicus briefs if the Supreme Court, or even just a single Justice, answered that question "Yes"!

Alas, the answer probably will not come from any study Representative Mann's discreet congratulatory confession to Justice Day: the plain-or-not criminalization of "immoral practice [or purpose]" was amended out of the Mann Act by Congress long ago.[20]

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[19] *Cf. District of Columbia v. Heller*, 554 U.S. 570, 662 n.28 (2008) (Stevens, J., dissenting) (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part)).

[20] Public Law 99-628, 100 Stat. 3510 (Nov. 7, 1986); *see also* 18 U.S.C. § 2421 (as amended).