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THE EFFECTIVENESS OF CUSTOMARY INTERNATIONAL LAW: STEPHEN LUSHINGTON AND THE *TRENT* AFFAIR

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William Holman Hunt, Stephen Lushington ©National Portrait Gallery, London
Dr. Stephen Lushington, who set the international law table in the *Trent* Affair.

INTRODUCTION

This essay is an empirical study of the actual influence or effectiveness of customary international law in foreign-affairs crises. In 1968, Professor Louis Henkin asserted "it is probably the case that almost all nations observe almost all principles of international law and almost all their obligations almost all the time."[1] Since that time, a number of capable theorists have explored his assertion.[2] Some have advanced a theory of constructivism in which foreign-policy actors internalize a conviction that international law principles are legitimate and should be followed.[3] Others endorse a rational-choice approach, which emphasizes a state's perceived self-interest.[4] The present essay examines the role that these two theories played in a specific foreign-affairs crisis.

International law theorists have distinguished between compliance and effectiveness.[5] Compliance refers to theories that explain why state action generally conforms to international law. These theories are like the hypotheses in our junior-high explorations of the beloved scientific method. In contrast, effectiveness is concerned with empirical causation. Does international law actually influence state action? Compliance theories are closely related to effectiveness, but they are theories and do not directly address the issue of effectiveness. They are hypotheses that need to be tested.

Whether international law actually affects decision-making begs for an empirical answer. The present essay provides a partial answer. Because questions of causation are inherently amoral, this essay addresses what happened—not what should have happened. The essay is a praxis and is written from the viewpoint of an American realist, with strong rational-

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1 LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed., 1979).

2 For an excellent survey, *see* Ingrid Wuerth, *Compliance*, in CONCEPTS FOR INTERNATIONAL LAW Ch. 8 (J. d'Aspremont & S. Singh eds., 2020). For a valuable and more detailed critical survey, *see* JUTTA BRUNNEE & STEPHEN TOOPE, LEGITIMACY AND LEGALITY IN INTERNATONAL LAW Ch. 3 (2010).

3 *See* Wuerth, *Compliance* at 121-22; BRUNNE & TOOPE Ch. 1.

4 *See* Wuerth, *Compliance* at 119-21.

5 *See Id*. at 117-18.

choice tendencies, but it illustrates how constructivism also plays a significant role.

In addition, the present essay presents a model for understanding the actual influence or effectiveness of international law in the resolution of foreign affairs crises. The model is based upon negotiation—but not negotiation between states. Rather the model looks to negotiation within a particular state's foreign-policy apparatus.

A few decades ago, there was a concerted effort to explore how international law affected the resolution of three specific and serious foreign-affairs crises.[6] The authors of these studies recognized that a precise measurement of the impact of international law is impossible. Thus, Professor Thomas Ehrlich, frankly noted, "My concern is less with how much law affects national decisions than with the ways in which they are affected."[7] A significant problem with these studies was that they were more or less based upon the public posturing of the states involved.[8]

If the data are available, the actual influence of international law may be studied fruitfully in terms of intra[not inter]governmental relations. The foreign policy apparatus of a particular state comprises a complex variety of human actors with different interests, values, and positions of power.[9] As a result, the actors must negotiate an approach to an external crisis, and international law may play an important role in these negotiations. This idea of intragovernmental negotiations is not intended to cast light upon the eventual negotiations between concerned states. Once formal negotiation between states commences, each state's legal position may become fixed, leaving little room for international law to play a significant role. States usually are reluctant to concede that they have acted unlawfully. In sharp contrast, viewing international law in the context of a state's confidential, internal deliberations makes the issues more focused and honest.

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6 ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (1974); ROBERT BOWIE, SUEZ 1956: INTERNAITONAL CRISIS AND THE ROLE OF LAW (1974); THOMAS EHRLICH, CYPRUS 1958-1967: INTERNATIONAL CRISES AND THE ROLE OF LAW (1974).

7 EHRLICH, CYPRUS at 5 & 117, *Accord*, Roger Fisher, "Forward," in BOWIE, SUEZ 1956, at vii.

8 Chayes' *Cuban Missile Crisis* was better because Chayes was the State Department's Legal Adviser during the crisis.

9 For an elaboration, see GRAHAM ALLISON & PHILIP ZELKOW, ESSENCE OF DECISION: EXPLORING THE CUBAN MISSILE CRISIS Ch. 3 (2d ed. 1999). *See also* CHAYES, CUBAN MISSILE CRISIS 101. Allison and Zelkow's otherwise valuable book does not consider the impact of international law. The phrase "international law" does not appear in the book's index.

Professor Henkin observed: "To judge the effectiveness of law one would have to examine…the operation of law on the working levels of foreign ministries."[10] Within a particular state, there may be significant differences of opinions regarding the proper resolution of a crisis. In the state's internal decision-making process, international law may play a significant role. Formulating the state's policy becomes a kind of internal negotiation in which international law may be used to advance or oppose particular policy positions.[11] At this level, international law becomes plastic and subject to meaningful discussion.

There is surprisingly scant general scholarship on the actual influence of law upon any form of negotiations in legal disputes. Everyone instinctively believes that law has some influence, but no one knows how or how much. Indeed, we probably cannot know how much. Negotiation is an art—not a science. The most insightful analysis of the problem appeared almost a century ago. In 1931 Professor Karl Llewellyn theorized "that the real major effect of law will be found not so much in [litigated] cases nor yet in those in which such intervention is consciously contemplated as a possibility, but rather in contributing to, strengthening, stiffening attitudes toward performance as what is to be expected and what is 'done.'"[12] Many years later, Professors Robert Mnookin and Lewis Kornhauser speculated that "parties bargain in the shadow of the law."[13] Under their theory, "the outcome that the law will impose if no agreement is reached gives each [party] certain bargaining chips—an endowment of sorts."[14]

There obviously is a major evidentiary problem in exploring a state's internal approach to a particular crisis. We simply do not know what

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10 LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed., 1979). It should be noted that he apparently was referring to subcabinet decision-making.

11 Robert Putnam noted the complexity of a state's executive branch or foreign-policy establishment and incorporated it in his two-level game theory. *See* R.D. Putnam, *Diplomacy and domestic politics: The logic of two-level games*, 42 INT'L ORG. 427 (1988). *See also* ALEXANDER NIKOLAEV, INTERNATIONAL NEGOTIATIONS: THEORY, PRACTICE, AND THE CONNECTION WITH DOMESTIC POLITICS (2007). Putnam used a two-level agent and principal model for his analysis. In the first level, the agent would negotiate an agreement with a foreign state. In the second level, the principal would decide whether to accept the agreement. Putnam understood that the "principal" is an extremely diversified group of political actors. In contrast to Putnam's second level, the present essay looks at internal, intragovernmental negotiations that precede or are contemporary with his first level.

12 Karl Llewellyn, *What Price Contract—An Essay in Perspective*, 40 YALE L. J. 704, 725 n. 47 (1931). This lengthy essay is like *Moby Dick*. It is long and meandering with passages of utter brilliance. Like Herman Melville, Llewellyn needed an editor.

13 *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L. J. 950 (1979).

14 *Id*. at 968. Unlike Professor Llewellyn, Professors Mnookin and Kornhouser theorized in the context of legal rules subject to enforcement by a court. Therefore, their insights do not perfectly transfer to international law disputes, which frequently are not subject to unilateral resolution by a third party.

actually happened: "The evidence is usually not available."[15] This almost inevitable ignorance significantly handicapped the 1974 explorations of specific crises.[16] All the internal details of how the states' foreign-policy establishment actually formed their positions were not available. The present essay uses a specific foreign-affairs crisis to analyze how international law actually affected one state's internal deliberations. Presumably this analysis is applicable in countless other situations in which, as a practical matter, empirical evidence is lacking.[17]

In 1861, during the *Trent* Affair,[18] the British government seriously considered going to war with the United States. It was "the closest approach to war between Britain and the United States [since] 1812."[19] The legal issues in the *Trent* Affair have no relevance today,[20] but the process by

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15 Louis Henkin, *Comment*, in EHRLICH, CYPRUS, at 129. If the evidence exists, it typically is embedded haphazardly in a vast and daunting morass of disorganized government records, newspaper articles, diaries, oral histories, and reminiscences. Moreover, some of the most important data may be classified. MICHAEL SCHARF & PAUL WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS. THE ROLE ON INTERNATIONAL LAW AND THE STATE DEPARTMENT, LEGAL ADVISER (2010).

16 *See* notes 6-8, *supra*, and accompanying text.

17 We know, for example, that international law played a role in the United-States internal negotiations involving the Cuban Missile Crisis. *See* CHAYES, CUBAN MISSILE CRISIS at 100-01. *See also* ALLISON & ZELKOW, ESSENCE OF DECISION (describing the internal negotiations without reference to international law).

18 There are two excellent general treatments of the Affair. *See* NORMAN FERRIS, THE *TRENT* AFFAIR: A DIPLOMATIC CRISIS (1977); GORDON WARREN, FOUNTAIN OF DISCONTENT: THE *TRENT* AFFAIR AND FREEDOM OF THE SEAS (1981).

19 David Long, Book Review, 55 NEW ENG. Q. 309 (1982). Roundel Palmer, who was the British solicitor general during the Affair, later stated that, "if the United States Government had not yielded…this would certainly have been treated by us as a case for war." 2 ROUNDEL PALMER, MEMORIALS 389 (1896).

The modern idea of prospect theory supports the idea that Britain was close to going to war. Leaders are more "risk-acceptant…when they have a crises in which they are more likely to lose or have lost something that matters to them." Stein, *Psychological Explanations*, in HANDBOOK OF INTERNATIONAL RELATIONS 199 (2d ed., 2013). Fourteen years after the Affair, the British Foreign Minister recalled, "British honor was clearly assailed." 2 LORD JOHN RUSSELL, RECOLLECTIONS AND SUGGESTIONS 1813-1873, at 276 (1875).

20 The Affair involved prize law, a long-forgotten body of customary international law regulating international maritime warfare. *See* notes 97, 99-105, & 113-17, *infra*, and accompany text. The international law issue turned upon procedural—not substantive—limits to the recognized rule that a belligerent ship may stop and search a neutral ship. The whole concept seems whimsically (even naively) antiquated after the United States and Germany enthusiastically embraced unrestricted submarine warfare in World War II. *See* Michael Sturma, *Atrocities Conscience, and Unrestricted Submarine Warfare: U.S. Submarines during the Second World* War, 16 WAR IN HIST. 477 (2009); Nuremburg Trial Judgments: Karl Doenitz. For example, on one occasion a well-regarded "hero" of the US submarine fleet gained a perceived tactical advantage by ramming a civilian lifeboat and methodically machine-gunning surviving sailors in the water. S*ee* IAN TOLL, TWILIGHT OF THE GODS: WAR IN THE WESTERN PACIFIC, 1944-1945, at 319 (2020).

which the British cabinet addressed the problem provides enduring insights. Because the legal issues and the underlying political situation have no significant relevance to our society some century and a half later, we can concentrate entirely upon the process.

The story of the British cabinet's grappling with the crisis is particularly valuable because today's instant communication channels did not exist in 1861. There was no telephone, and even face-to-face discussions were impeded by the requirement of travel by horse and carriage. As a result, written communications within the British foreign-policy establishment necessarily were, to the best of the writer's ability, quite frank and accurate. Thus, there is a valuable cache of primary evidence.

I. COMPLIANCE AND EFFECTIVENESS

Some have advanced a theory of constructivism in which actors in foreign policy internalize their belief in the legitimacy of international law principles.[21] Constructivism parallels Karl Llewellyn's understanding.[22] The constructivism theory of internalization is essentially H.L.A. Hart's concept of the "internal aspect of rules."[23] By this concept, Hart meant that actors including public officials, may embrace a rule's legitimacy as a matter of personal belief: "For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility."[24]

In thinking about constructivism, we must guard against anthropomorphizing states. A state obviously is a legal fiction that is incapable of internalizing the legitimacy of international law. A state is merely a method of organizing human activity. Many of the human actors, especially the lawyers, in a state's foreign-policy apparatus may internalize respect for international law, but by and large the foreign-policy apparatus is not empowered to set important policy. The policy makers who are so empowered typically do not have the comprehensive experience necessary to internalize the legitimacy of international law. With few exceptions, the ultimate policy makers are at best gifted generalists with little or no

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21 *See*, Wuerth, *Compliance* at 121-22; BRUNNE & TOOPE Ch. 1.

22 *See* note 12, *supra*, and accompanying text.

23 H.L.A. HART, THE CONCEPT OF LAW 86 (1961). Jutta Brunnee and Stephen Toope are representative of constructivism theorists. See Wuerth, *Compliance* at 121 n 13. Rather than rely upon Hart, they turn to Lon Fuller's concept of fidelity, which is much the same thing as Hart's concept. BRUNNEE & TOOPE, LEGITIMACY Ch. 1 & 3 (2010). A rose by any other name smells as sweet. I am a realist and more or less a positivist, so I am cleaving to Hart.

24 HART, CONCEPT at 88.

international law experience. For example, no president of the United States in the last century has entered the presidency with significant international law experience. The same is true of many American secretaries of state and of defense.[25] In the *Trent* Affair, President Abraham Lincoln and United States Secretary of State William Seward were lawyers, but they had no international experience.

The problem with a pervasive lack of international law experience among the ultimate deciders of major policy does not, however, mean that internalization has no effect on major policy. Again, to use the United States as an example, the president typically relies upon foreign-policy advisers who may have internalized international law. Although these advisers cannot dictate policy, their advice can create a dynamic similar to what Professor Thomas Franck called "a pull to compliance."[26]

Rational choice is the most controversial approach to compliance.[27] This realist theory presents a kind of *post-hoc-propter-hoc* critique of Henkin's assertion. The theory posits that in many situations there is no causal link between international law and a state's compliance with international law. The realists assert that foreign-affairs actions are determined primarily by extralegal policy considerations and that the compliance with international law may be more or less coincidental.

In a sense, rational choice is a misnomer. Human beings are capable of rational thought, but we also are contrary creatures and frequently irrational.[28] Given our plight, there can be no universal or field theory to provide an accurate description or explanation of human

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25 Secretary of State Dean Acheson was a clear exception, but he was not a constructivist. *See, e.g., Remarks*, PROC. AM. SOC. INT'L L. 13-15 (1963) ("Principles, certainly not legal principles, do not decide concrete cases."); Dean Acheson, Morality, Moralism, and Diplomacy, 47 YALE REV. 481 (1958); Dean Acheson, *The Arrogance of International Lawyers*, 2 INT'L LAWYER 591 (1968).

26 THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 26 (1990). Professor Franck elaborated his idea of a pull to compliance on the basis of general theoretical considerations. The contrast between non- internalization by ultimate policymakers and internalization by advisers is consistent with his conclusion.

27 *See,* Wuerth, *Compliance* at 119-21.

28 *See* DAVID KAHNEMAN, THINKING, FAST AND SLOW (2013). For an excellent biographical description of Kahneman's and Amos Tversky's relentless assault on the conceit of human rationality, *see* MICHAEL LEWIS, THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS (2017). Human beings' inherent irrationality is well-known to international law theorists. *See e.g.*, ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF THE LAW 101 (1974); JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 7-8 (2005). *See also* Janice Stein, *Psychological Explanations of International Decisions Making and Collective Behavior,* HANDBOOK OF INTERNATIONAL RELATIONS 195-219 (2d ed., 2013) (closely related field of international relations).

interaction. Any system based upon rational human behavior is inherently flawed, which is not to say useless. This structural flaw means that the manner in which a person determines her state's self-interest cannot be assumed to be rational. Nor is it clear that a decision to follow or violate international law involves a rational choice.

Rational-choice theory is virtually synonymous with the concept of instrumentalism. While instrumentalism embraces a number of different ideas,[29] one aspect of the concept treats international law as simply a tool to be manipulated and twisted to further a state's extralegal policy concerns.[30]

Vladimir Putin's invasion of Ukraine is a contemporary example of rational choice. He violated international law because as a matter of "rational" choice, he decided that the invasion was in Russia's best interests.

The leading proponents of rational choice insofar as international law is concerned[31] are Professors Jack Goldsmith and Eric Posner.[32] They place great emphasis on the importance of a state's view of its own self-interest and suggest that in many situations state interest does and should trump international law.[33] They do not advance their idea as a complete and exclusive theory of compliance. Rather, they believe that rational choice is a very important (probably the most important) way of understanding the intersection of international law and foreign policy.

The rational-choice approach has its roots in American legal realism and our post-World War II, Cold-War experience.[34] To many, rational choice makes obvious sense.[35] There clearly are situations when international law has to give way to a state's extralegal interest.

For centuries, respected western (and surely nonwestern) leaders have exercised a prerogative power to act lawlessly when some important state interest is at stake.[36] At the beginning of World War II, Winston

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29 *See* Timothy Meyer, *Instrumentalism, in* CONCEPTS OF INTERNATIONAL LAW at 468-89.

30 *Id*. at 467-80.

31 Rational choice also plays a significant role in the field of international relations. *See* Duncan Snidad, "Rational Choice and International Relations," in INTERNATIONAL RELATIONS ch. 4.

32 *See* Wuerth, *Compliance* at 119-21.

33 JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Jack Goldsmith & Eric Posner, *RESPONSE: The New International Law Scholarship*, 463, GA. J. INT'L & COMP. L. 463 (2006); Jack Goldsmith & Eric Posner, *The Limits of International Law Fifteen Years Later* (2021). They also emphasize a state's relative power, but this idea can be folded into a state's self-interest calculus in a particular crisis.

34 *See* Wuerth, *Compliance* 120.

35 Being a child of the post-World War II, Cold War era, the present author is a firm realist and believer in rational choice. Nevertheless, there can be no field theory of any aspect of human endeavor. *See* note 28, *supra*, and accompanying text. Rational choice should be viewed as a valuable but not exclusive theory. *See* BRUNNE & TOOPE at 90.

36 *See* EXTRA-LEGAL POWER AND LEGITIMACY (C. Fatovic & B. Kleinerman eds., 2013).

Churchill urged the illegal mining of then neutral Norwegian waters to prevent Germany from obtaining iron ore. He believed, "We have a right, and, indeed, we are bound in duty to abrogate for a space some of the conventions of the very law we seek to consolidate and reaffirm."[37] In the United States, Presidents Thomas Jefferson, Abraham Lincoln, and Franklin Roosevelt have done the same.[38] Constructivists agree that there may be extreme situations in which international law should be violated.[39]

Of course, action in an extreme—even desperate—situation hardly establishes a general theory of conduct. As a practical matter, rational choice should be viewed as just one valuable insight into or facet of the compliance problem but not as an exhaustive or exclusive theory. If a policy maker or adviser actually has internalized the legitimacy of international law, it beggars the imagination to believe that this internalization would not impact the officer's decision-making.

II. THE *TRENT* AFFAIR

Dr. Stephen Lushington[40], judge of the British High Court of Admiralty, played a significant role in the formulation of Great Britain's approach to the *Trent* Affair. He was a highly regarded member of Britain's political society. Lushington was the second son of a baronet who was the chairman of the British East India Company. He entered Eton, accompanied by his nurse, when he was six years old.[41] Then at 15, he matriculated at Christ Church, Oxford. He was a pretty teenager,[42] quite athletic,[43] and

37 Winston Churchill, War Cabinet Memorandum, Dec. 16, 1939, *reprinted* in 1 CHURCHILL WAR PAPERS 522-24 (M. Gilbert ed., 1993). *See* 6 MARTIN GILBERT, WINSTON S. CHURCHILL: FINEST HOUR 1939-1941, at 104-06 (1983); MICHAEL WALZER, JUST AND UNJUST WARS 242-50 (4th ed. 2006).

38 *See* William Casto, *Serving a Lawless President*, 72 MERCER L. REV. 860-62, 869-79 (2021). Lincoln faced an existential threat. Neither Jefferson nor Roosevelt dealt with such a serious situation.

39 *See, e.g*., BRUNNEE & TOOPE at 93.

40 For an excellent biography, *see* S.M. WADDAMS, LAW, POLITICS AND THE CHURCH OF ENGLAND: THE CAREER OF STEPHEN LUSHINGTON (1992). This biography is wonderfully supplemented by DAVID TAYLOR, THE REMARKABLE LUSHINGTON FAMILY: REFORMERS, PRE-RAPHAELITES, POSITVISTS, AND THE BLOOMSBURY GROUP Ch. 1-5 (2020).

41 [Vernon Lushington], "Recollections of our immediate Ancestors", 7, nd, Lushington Papers, 7854/10/5, Surrey History Centre. He suffered an eye injury "at the hands of one of the boys" and completed his precollegiate education with a private tutor. Id.

42 A family story had him dressing as a lady, attending a fancy-dress ball, and receiving three offers of marriage. TAYLOR, REMARKABLE LUSHINGTON 13.

43 He played in many major cricket matches representing Surrey. *Id.*

excelled academically.[44] Oxford graduated him with a BA in 1802, an MA in 1806, a BCL in 1807, and a DCL in 1808.[45]

Lushington entered Parliament in 1806 and served there with some lapses until 1838.[46] He was quite principled[47] and was a liberal reformer. On a political spectrum, he fell somewhere between a Whig and a radical reformer.[48] He seems to have empathized with the plight of people with low social status who were subject to abuse by the more powerful. He sought to eliminate capital punishment and opposed corporal punishment, even in the military.[49] He was also "deeply interested" in reforming "the Juvenile Criminal law" and in the passage of "the Chimney Sweeping Act."[50] In matters of religion, he was a firm Church-of-England man but pushed latitudinarianism to its logical limits.[51] In a speech to Parliament, he took the Lockean position[52] that "[o]n all matters of religion a man must decide for himself…he [Lushington] had no right to impose his opinions on another."[53] He supported granting full civil rights to Dissenting Protestants, Catholics, and Jews.

In Parliament, he spoke often and effectively in a loud, "clear and shrill" voice, with a speech impediment.[54] Lushington's speeches were practical. He did not indulge in "general declamation" and instead "put the most obvious arguments in favor of the view he takes of a subject, in their

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44 The Dean said he "was the best Greek scholar in the College." [Lushington], Recollections at 7.

45 WADDAMS, *supra* note 40, at 1.

46 For a dry, blow-by-blow description, *see* R.G. THORNE, THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1790-1820 (R.G. Thorne ed., 1986), www.historyofparliamentonline.org [https://perma.cc/ZYX2-9VFS]; Terry Jenkins, THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS *1820-1832* (D.R. Fisher ed., 2009), www.historyofparliamentonline.org [https://perma.cc/SN8U-LPQN].

47 At age 24, he entered parliament under the patronage of the Lord of Suffield but refused to change his support of antislavery and Catholic emancipation. *See* JENKINS, *supra* note 46. The Lord then forced him to resign.

48 WADDAMS, *supra* note 40, at 24.

49 *Id.* at 27-31.

50 "Recollections" at 9. The Chimney Sweeping Act outlawed the employment of boys under the age of 21 in the murderous job of chimney sweeping. Chimney Sweepers and Chimneys Regulation Act, 1840, 3 & 4 Vict. c. 85 §2 (UK). For his early opposition to this vile practice, see STEPHEN LUSHINGTON, The Speech of Dr. Lushington, in Support of the Bill for the Better Regulation of Chimney-sweepers and Their Apprentices, and for Preventing the Employment of Boys in Climbing Chimnies (1818).

51 As an advocate in an 1832 case, he defended the Indian practice of *sati* on the basis of freedom of religion. WADDAMS, *supra* note 40, at 8 & n. 61.

52 John Locke, A Letter Concerning Toleration 29-66 (William Popple trans., 1689).

53 WADDAMS, *supra* note 40, at 250 (quoting Lushington's speech).

54 He evidently suffered from rhotacism and could not pronounce the letter "r". JAMES GRANT, RANDOM RECOLLECTIONS OF THE HOUSE OF COMMONS, FROM THE YEAR 1830 TO THE CLOSE OF 1835, INCLUDING PERSONAL SKETCHES OF THE LEADING MEMBERS OF ALL PARTIES BY ONE OF NO PARTY, 256 (4th ed. 1836).

clearest light."[55] His speeches were "always argumentative and forcible."[56] He "dress[ed] plainly but not slovenly."[57]

Slavery was Lushington's principal target for reform.[58] In 1831, when he was a 49-year-old member of Parliament, he saw the elimination of slavery as "the principal object of my life."[59] When Parliament finally and completely outlawed slavery, the leading abolitionists in the Commons immediately converged on Lushington's London house to celebrate. They began "calling out at the pitch of their voices 'They are free, They are free.'"[60]

All the while he served in Parliament, Lushington was a member of Doctor's Commons,[61] and he conducted an active civil-law practice in the admiralty and ecclesiastical courts.[62] By a quirk of history, the latter courts' primary jurisdictions were matrimonial disputes and the probate of wills. His most famous cases as an advocate were the negotiation and arbitration of Lord and Lady Byron's separation[63] and the Parliamentary divorce proceedings between Queen Caroline and King George IV.[64] He also practiced civil law in the admiralty courts. In 1838, he left Parliament to become the judge of the High Court of Admiralty, where he served for 29 years until 1867. Because England was at peace for most of his admiralty tenure, Lushington is "long forgotten."[65] Roundell Palmer, who was solicitor general during the *Trent* Affair and later became Lord Chancellor and 1st Earl of Selbourne, remembered him as "the most conversant of all our Judges with maritime law."[66]

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55 *Id.* at 255.

56 *Id.*

57 *Id.* at 257.

58 *See* WADDAMS, *supra* note 40, at 62-99; *see also,* D. ELTIS, *Dr. Stephen Lushington and the Campaign to Abolish Slavery in the British Empire*, 1 J. CARIBB. HIST. 41 (1970).

59 WADDAMS, *supra* note 40, at 91 (quoting Lushington). He spoke in favor of the act that abolished the slave trade in 1807 and lost his seat for doing so. *Id.* at 63; s*ee also* JENKINS, *supra* note 46. In 1824, he led the parliamentary fight to eliminate the intercolonial slave trade. WADDAMS, *supra* note 40, at 3-4.

60 "Recollections" at 12.

61 Doctors' Commons was a society of civil law (i.e., not common law) lawyers who practiced in the Admiralty and Ecclesiastical courts. *See* GEORGE DREWRY SQUIBB, DOCTORS' COMMONS A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW (1977).

62 WADDAMS *supra* note 40, at 4-7.

63 *Id.* at 100-34.

64 *Id.* at 135-59.

65 HENRY J. BOURGUIGNON, SIR WILLIAM SCOTT, LORD STOWELL: JUDGE OF THE HIGH COURT OF ADMIRALTY, 1798-1828, 50 (1987).

66 2 ROUNDELL PALMER, MEMORIALS 395 (London, MacMillan & Co. 1896).

Lushington was an intellectual who made Ockham Park, his country home in Surrey, "a center for many well-known literary and artistic people."[67] As befitted an influential member Britain's political class, Ockham Park had "ten principal bedchambers and dressing rooms, lady's boudoir, and fifteen servants' bedrooms."[68] In addition, there were "spacious grounds…with grotto, temples and summer house, large orangery, and capital walled kitchen garden."[69]

Given Lushington's fervent, life-long opposition to slavery, we may assume that he supported the Union cause against the Confederacy. But we do not have to assume. In 1862, less than a year after the *Trent* Affair, the pre-Raphaelite painter, William Holman Hunt, stayed at Ockham Park to paint Lushington's portrait, which is reproduced on the first page of the present essay.[70] The first night of Hunt's visit and after dressing for dinner, the family convened and "one of the sons asked me [Hunt] what line I took on the question of war between North and South in America."[71] Hunt responded I had better confess at once that I am on the unpopular side, I must avow that all arguments I hear for the Southern cause have no weight with me.[72] "Well done," the son exclaimed, "we are all Northerners here."[73]

A. THE JAMES ADGER

In November 1861, the British Cabinet sought Lushington's advice on an important international law issue. The prior month, two Confederate diplomats, James Mason and John Slidell, had slipped through the Union blockade on a blockade runner. They landed in Cuba and later boarded a British mail ship, the *Trent*.[74] Their destination was Europe where they would serve as diplomatic envoys to Great Britain and France. U.S. Navy Secretary Gideon Wells immediately dispatched an obsolescent wooden paddle wheeler, the *James Adger,* across the Atlantic to take the blockade runner as a prize and seize the envoys.[75] The British Cabinet was concerned that the *James Adger* would stop the mail ship and seize the emissaries.

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67 DAVID TAYLOR, THE REMARKABLE LUSHINGTON FAMILY 46 (2020). *Id.*

68 The Morning Post, 1845, quoted in TAYLOR, REMARKABLE LUSHINGTON FAMILY 39.

69 *Id*.

70 *See supra* Lushington Portrait, p. 1,.

71 2 W. HOLMAN HUNT, PRE-RAPHAELITISM AND THE PRE-RAPHAELITE BROTHERHOOD 219 (1906).

72 *Id.*

73 *Id.*

74 *See* FERRIS, *supra* note 18, at 7-9, 19.

75 *See* FERRIS, *supra* note 18 at 9.

The *James Adger* made landfall in England at Falmouth on Nov. 2 and proceeded to Southampton for coal.[76] John Marchand, the ship's captain, was quite thirsty after the Atlantic crossing and apparently proceeded to become "gloriously drunk".[77] While he was in his cups, he bragged about his special mission to capture the envoys, and his self-important brags quickly reached London.

In London, Lord John Russell, who was Foreign Secretary, told Edmund Hammond, Permanent Under Secretary of State for Foreign Affairs, to ask the Law Officers for a legal opinion on the matter.[78] In particular, Russell asked whether the Union paddle wheeler "might cause the West Indian mail-steamer to bring-to, might board her, examine her papers…[and] seize and carry away Messrs. Mason and Slidell in person."[79] Russell wrote Hammond on Saturday, November 9. The next Monday, Viscount Palmerston, who was prime minister, called a Tuesday meeting of relevant cabinet officials to determine what was to be done.

On the morning of Tuesday, November 11, Palmerston convened the meeting at the Treasury Building on Downing Street to consider the *James Adger* problem. In attendance were Palmerston, the Lord Chancellor, the Home Secretary, the First Lord of the Admiralty, and Edmund Hammond who substituted for Lord Russell.[80] The group sat around a table and informally discussed the matter.[81] Palmerston entered the meeting thinking that the Royal Navy should take strong action to defend the mail ship. He disdained and distrusted the United States. He believed that "nations and especially republican nations or nations in which the masses influence or

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76 Adams Diary, Nov. 3, 1861. Charles Francis Adams, Sr., *Diary of Charles Francis Adams, 1861* (Nov. 3, 1861), *in* THE CIVIL WAR DIARIES UNVERIFIED TRANSCRIPTS, MASSACHUSETTS HISTORY SOCIETY FOUNDED 1791 (http://www.masshist.org/publications/cfa-civil-war/view?id=DCA61d307).

77 Adams Diary, Nov. 12, 1861. Charles Francis Adams, Sr., *Diary of Charles Francis Adams, 1861* (Nov. 12, 1861), *in* THE CIVIL WAR DIARIES UNVERIFIED TRANSCRIPTS, MASSACHUSETTS HISTORY SOCIETY FOUNDED 1791 (https://www.masshist.org/publications/cfa-civil-war/index.php/view/DCA61d316). The British surmised that Captain Marchand had come to seize Slidell and Mason. One morning in South Hampton, Marchand "got drunk on brandy…& by his noisy talk admitted as much as would corroborate" this suspicion. 22 THE JOURNAL OF BENJAMIN MORAN 1857-1865 905 (Sarah Agnes Wallace & Frances Elma Gillespie eds., 1949) (Moran was assistant secretary of the American legation). A subsequent Law Officers' Report noted that "private information has been received" on the matter. LAW OFFICERS' REPORT (Nov. 12, 1861), *reprinted in* 3 MCNAIR, INTERNATIONAL LAW OPINIONS. 276 (1956).

78 WARREN, *supra* note 18, at 95-96.

79 Letter from Edmund Hammond to Law Officers (Nov. 9, 1861), *in* 3 INTERNATIONAL LAW OPINIONS at 276.

80 Russell had a severe cold. WARREN, *supra* note 18, at 96.

81 Edmund Hammond to Lord Russell, Nov. 11, 1861, Hammond Papers, FO 391/7, pp. 81-82.

direct the destinies of the country are swayed much more by passion than by interest."[82] Accordingly, "the only security for continued Peace with men [referring to Lincoln and Seward] who have no sense of Honor and who are swayed by the Passions of irresponsible Masses…consists in being Strong by sea on their coasts.'"[83] In the specific context of the *Trent* Affair, Foreign Secretary Russell agreed with Palmerston's assessment. He told Palmerston in private the "United States' Government are very dangerous people to run away from."[84]

Lushington also attended.[85] He was 80 years old at the time, but he was a quite vigorous octogenarian. In repose, his portrait shows a figure of austere gravitas:[86] "When silent, his visage settled into a mask, almost grim." But when he spoke, he "was stirred up to extraordinary vivacity."[87] In a letter written three years prior, Holman Hunt described Lushington as "a dear old fellow—as clear and quick in wit as the youngest man in the company, and with the gravest possible judgment in all his remarks and manners."[88] Technically, the Lord Chancellor outranked him, but Lushington dominated the Cabinet's Tuesday legal discussion. After all, he was "the most conversant of all…[the British] Judges with maritime law."[89]

The meeting took all morning. Palmerston especially wanted to know if the Royal Navy could interfere with a federal cruiser's actions against a British mail ship "beyond the limits of the United Kingdom."[90] A strong case could be made that the American paddle wheeler could lawfully stop, search a British ship, and seize the Confederate envoys. Given Lushington's firm support of the Union, it comes as no surprise that he emphatically pushed this position.[91] He "put the most obvious arguments in

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82 JASPER RIDLEY, LORD PALMERSTON 554 (1970) (quoting Palmerston).

83 *Id*. at 551 (quoting Palmerston). *See also*, DAVID BROWN, PALMERSTON: A BIOGRAPHY 451 (2010) (a similar statement by Palmerston).

84 LORD JOHN RUSSELL, RECOLLECTIONS AND SUGGESTIONS 315 (2nd ed. 1875).

85 The British government had a long and well-known practice of seeking advisory opinions from its admiralty judges. In 1793, Thomas Jefferson noted that, "[i]n England you know such questions are referred regularly to the judge of Admiralty." Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 653 (J. Catanzariti ed. 1995).

86 *See supra* p.1.

87 HUNT *supra* note 71, at 220-21.

88 Letter from W. Holman Hunt to Thomas Combe (28 Sept. 1862), *quoted in* WADDAMS *supra* note 40, at 2.

89 *See supra* note 66 and accompanying text.

90 Edmund Hammond to Queen's Advocate Sir John Harding, Nov. 9, 1861, …. (labeled "Pressing").

91 Two years later, Lushington again demonstrated his support for the North. In early 1863, a union cruiser seized a British ship, *Peterhoff*, which was bound for Matamoros, Mexico. *See generally*

favor [of his position] in their clearest light."[92] Hammond reported that "Dr. Lushington" had given "it so decidedly as his opinion, that looking to our own doctrine and practice, it was out of question to attempt to protect the packet in any way beyond British waters from the interference of the American cruisers, that the point was at once decided in that sense."[93] Lord Chancellor Bethell apparently deferred to Lushington as did the Law Officers[94] who arrived later in the morning.[95]

Having determined that under international law the *James Adger* was authorized to stop the mail ship, board it, and remove the envoys, the group decided not "to do more than order the *Phaeton* frigate to drop down the Yarmouth Roads and watch the [*James Adger*] within our three-mile limit…to prevent her" from taking the *Trent* within that limit.[96]

STUART BERNATH, *SQUALL ACROSS THE ATLANTIC*: *THE PETEROFF EPISODE*, 34 J. S. HIST. 382 (1968). Although the *Peterhoff* was bound for a neutral port, the Union believed that her cargo of contraband was intended to be transferred from Matamoros across the Rio Grande to Brownsville, Texas. As part of the seizure, an issue arose whether the Union could open mail bags "sealed with Her [Britannic] Majesty's seals." MCNAIR, Law Officers' Report (April 25, 1863), *supra* note 77, at271. At a cabinet meeting called to consider the issue, Roundell Palmer, one of the Law Officers, presented a paper in which he maintained that the mail bags' seals could not be broken. PALMER *supra* note 19, at395. Lord Kingsdown, who was a member of the Judicial Committee of the Privy Council, and Lushington also attended the cabinet meeting. They "shook their heads at" Palmer's presentation. The cabinet "wisely determined to use caution in dealing with the question." *Id*. at 398. The Law Officers then formally advised that the law on the matter was unclear. MCNAIR, Law Officers' Report (April 25, 1863), *supra* note 77, at 271. The upshot was that the issue of mail bag seals was resolved by a pragmatic agreement between Great Britain and the United States. PALMER *supra* note 19, at 398-99.

92 *See supra* note 55 and accompanying text.

93 Hammond to Russell, Nov. 11, 1861, Hammond Papers, FO 391/7 at 82.

94 The Law Officers was a formal group composed of the Queen's Advocate, who was a civil-law expert and a member of Doctors' Commons; the Attorney General; and the Solicitor General. The group was the Crown's primary source of advice on important international law issues. 1 LORD MCNAIR, INTERNATIONAL LAW OPINIONS xvii-xviii (1956); PALMER *supra* note 19, at 337-78 (a good description of the three men who served as Law Officers during the *Trent* Affair).

95 FERRIS, *supra* note 18, at 13-14. Gordon Warren wrote that Lord Chancellor Bethell took the leading role in the legal discussions. WARREN, *supra* note 18, at 96-97. Warren's reading of the conference should be dismissed. Bethell was an equity lawyer with scant experience in admiralty law. *See* "Bethell, Richard, first Baron Westbury," in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY. Although Bethell was extremely intelligent, arrogant, and had immense self-respect for his abilities, *id*., he undoubtedly knew that he was not an expert in the international law regulating maritime activities. Neither of the two sources that Warren cites supports his conclusion in any way. Moreover, Hammond's letter to Lord Russell, *see* note 93, *supra*, and accompanying text, noted that the group was guided by "Dr. Lushington's" advice.

96 Palmerston to Hammond, Nov. 11, 1861, *quoted in* WARREN, *supra* note 18, at 97-98. The *Phaeton* vastly outgunned the *James Adger*. *Compare* HMS Phaeton (1848) (50 guns), The Victorian Navy, www.pdavis, n1 *with* USS James Adger (9 guns), www.navsource.org.www.pdavis. (last visited Oct. 16, 2022) www.navsource.org/archives/09/86/86683.htm (last visited Oct. 16, 2022).

Because Palmerston wanted to prevent the Union ship from stopping a British ship, he received Lushington's advice with "great annoyance."[97] Later that same day, he wrote the editor of *The Times* of London that "*much to my regret*…according to the principles of international law laid down in our courts by Lord Stowell, and practiced and enforced by us, a belligerent has a right to…stop the West Indian packet."[98] The American cruiser could then "search her, and if the southern men…were found on board, either take them out, or seize the packet and carry her back to New York for trial."[99]

Lushington's advice that international law was on the side of the North was not welcome. Most of the English ruling class (with some significant exceptions) on balance favored the South.[100] Within the government, Prime Minister Palmerston was sympathetic to the South but attempted to steer a middle course of neutrality.[101]

Lushington apparently based his advice on two separate, well known sets of precedent. As a matter of prize law, an American frigate could stop, search a neutral ship, and as Palmerston noted "seize and carry her back to New York for a trial."[102] In addition, the notorious British practice of impressment allowed an American frigate to stop a neutral ship and simply "carry them [the emissaries] out."[103] Some fifty years earlier during the Napoleonic Wars, the Royal Navy had a chronic shortage of sailors and would frequently stop neutral American ships and impress American sailors into the Royal Navy on the pretext that the sailors were British subjects.

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97 RIDLEY PALMESTON at 552.

98 Lord Palmerston to J.T. Delane, Nov. 11, 1861 (emphasis added), *reprinted in* 2 ARTHUR DASENT, JOHN THADEUS DELANE, EDITOR OF "THE TIMES," HIS LIFE AND CORRESPONDENCE 36 (1908).

99 *Id.* When the Law Officers' opinions regarding the *Trent* Affair, *see infra* notes 104-07 and accompanying text, were first made available to the public almost a century later, Professor James Baxter carefully studied the opinions and noted that the November 12 opinion was contrary to Palmerston's November 11 letter. Baxter concluded that Palmerston had misunderstood Lushington's advice. James Baxter, *The British Government and Neutral Rights, 1861-1865*, 34 AM. HIST. REV. 9, 15-16 (1928). Because Lushington's advice was based in significant part on the practice of impressment, *see infra* note 103 and accompanying text. Baxter's conclusion should be disregarded. *See* WARREN, *supra* note 18, at 98-99. The Law Officers' two November opinions ignored the well-known precedent of impressment.

100 *See* Joseph Hernon, *British Sympathies in the American Civil War: A Reconsideration*, 33 J. SO. HIST. 356 (1967). *Accord. supra* notes 71-73 and accompanying text (support for North is "the unpopular side"). In a letter to a friend, British Solicitor General Roundel Palmer wrote that the "bearing of the upper class (Conservatives and Liberals alike) to the side of the South is so strong, that but for the apparently opposite bearing of the intelligent industrial population, there would be some of the government being driven, or drifting of its own accord, into [an] enormous mistake." Roundell Palmer to Arthur Gordon, Jan. 8, 1863, reprinted in PALMER, *supra* note 91, at 437-39.

101 DAVID BROWN, PALMERSTON: A BIOGRAPHY 451-52 (2010) ("instinct to back the South"); JASPER RIDLEY, LORD PALMERSTON 549-55 (1970) ("sympathies were with the South").

102 *See supra* note 99 and accompanying text.

103 *See id.* Palmerston's biographers assumed that Lushington based his Tuesday morning advice on the practice of impressment. BROWN, *supra* note 101, at 452; RIDLEY, *supra* note 101, at 552.

Now the shoe was on the other foot. The British believed that the United States Navy was going to stop a neutral British ship and seize United States citizens.

Having deferred to Lushington's forceful presentation, the Law Officers returned to their offices, finished their opinion, and submitted it to Lord Russell the next day.[104] They essentially agreed with Lushington. Relying upon prize law, they advised that the *James Adger* could lawfully "put a prize-crew on board the West India steamer and carry her off to a port in the Unites States for judication by a Prize Court there."[105] There was, however, a clever aspect to the Law Officers' advice. They insisted that as a matter of prize law, the Americans "would have no right to remove Messrs. Mason and Slidwell, and carry them off as prisoners, leaving the ship to pursue her voyage."[106] This advice makes sense, in terms of prize law, but under the embarrassing precedent of impressment, the Americans clearly could seize the emissaries on the spot. The Officers dealt with impressment by simply ignoring it—pretending that it did not exist. The Officers' new advice, turned out to be "a more satisfactory answer" to the government.[107]

Lushington may have based his prize law advice in part on two opinions by Lord Stowell, who is considered the greatest admiralty judge in English history.[108] The *Atlanta*[109] and the *Caroline* were cases involving the Royal Navy's seizure of neutral ships bearing enemy dispatches. In the *Caroline*, Lord Stowell wrote "*you may stop the Ambassador of your enemy on his passage*."[110] Lushington might have dismissed this clear language as a *dictum*,[111] but he evidently did not.

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104 Law Officer's Report (Nov. 12, 1861), *in* 3 INT'L LAW OPS. 276.

105 *Id*. at 277.

106 *Id.* The *James Adger* "might, however, and in our opinion ought, under the circumstances, toput on shore, at some convenient port, passengers and their baggage, not being contraband of war." *Id*. at 277-78.

107 RIDLEY, *supra* note 101, at 553 (discussing the Law Officers' subsequent November 30 opinion).

108 *See* BOURGUIGON, *supra* note 65.

109 4 Robinson 441 (Adm. 1808).

110 4 Robinson 461, 468 (Adm. 1809) (emphasis in original).

111 In an earlier case, Lushington had dismissed one of Lord Stowell's opinions as dicta. *See* WADDAMS, *supra* note 40, at 227. Supporters of the Cabinet's position dismissed the Lord Stowell's language as a dictum. *See, e.g*., Robert Phillimore, *The Seizure of the Southern Envoys*, 12 REV.SATURDAY REV. POL. LITERATURE SCI. AND ART 578, 579 (1861); *See* Letter from Duke of Argyll to Charles Francis Adams (Jan. 25, 1862), *reprinted in* Charles Francis Adams Jr., *The Trent*

While the British cabinet was worried over the *James Adger*, they did not know that another Union warship had already seized the Confederate emissaries.[112] On November 8, three days before the Tuesday cabinet meeting, Captain Charles Wilkes of the modern screw-frigate *San Jacinto* fired two warning shots across the bow of a British mail ship, the *Trent*. Wilkes' crew then boarded the *Trent*, seized the emissaries, and took them back to the *San Jacinto*. Wilkes allowed the *Trent* to continue her cruise but carried his prisoners back to the United States.

The United States viewed the emissaries as contraband of war.[113] As the Affair progressed, however, the emissaries' status as contraband became a side issue. The British rested their international law analysis on Wilkes' failure to send the *Trent* to America for adjudication by an American prize court. That court would have determined whether the emissaries were contraband.

News of Wilkes' action reached London on November 27, and the British press went crazy. *The Times* published a letter from the *Trent's* purser complaining about the Yankees' "meanness and cowardly bullying."[114] When the marines advanced, Slidell's daughter "a noble girl…with flashing eyes and quivering lips, threw herself in the doorway of her father's cabin." She was determined to defend her father "with her life." The marines advanced "with bayonets pointed at this poor defenseless girl," but she was spared when her father surrendered himself. Newspapers throughout England were shocked and outraged by this barbaric conduct.[115]

When American Ambassador[116] Charles Francis Adams first learned about the seizure of the emissaries, he was under the impression that the Law Officers had advised earlier that month that a seizure would be permitted under international law. This was, indeed, Dr Lushington's advice

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Affair, 45 PROC. MASS. HIST. SOC'Y 35, 137-38 (1912). Argyll was a cabinet member. Phillimore was a respected attorney who advised the cabinet on the *Trent* Affair. *See infra* notes 129-35 and accompanying text. For the provenance of the Phillimore article, see Robert Phillimore Diary, (Dec. 10, 1861), *in* ROBERT PHILLIMORE PAPERS. Letter from William Gladstone to Robert Phillimore (Dec. 10, 1861,), *in* ROBERT PHILLIMORE PAPERS ("your argument in S[aturday] R[eview] excellent"). In Phillimore's diary entry, he refers to himself as "Robert". He frequently used the third person to describe himself. For example, with reference to an important November 29, 1861 cabinet meeting, which he attended, *see infra* notes 129-35 and accompanying text, he noted that "Robert was summoned to the Cabinet yesterday on the American question." Robert Phillimore Diary, *supra*.

112 Captain Charles Wilkes of the USS San Jacinto seized the Confederate emissaries on November 8, the day before the *James-Adger* cabinet meeting, but the news did not reach London until November 27. FERRIS, TRENT AFFAIR 21 & 44.; FERRIS, *supra* note 18, at 18-28.

113 *See* WARREN, *supra* note 18, at 183.

114 TIMES (London), Nov. 28, 1861, *quoted in* FERRIS, *supra* note 18, at 46.

115 FERRIS, *supra* note 18, at 46-48.

116 Technically, Adams was a minister rather than an ambassador. He was a respected member of the United States ruling class [elite], whose grandfather and father had served as president.

and what Palmerston had told *The Times*. On November 29, however, after the British press went crazy, Adams assumed that the government would order the Law Officers to change their opinion. Adams wrote in his diary that "[t]he law officers of the crown are to give another opinion this day, which looks as if the government wanted to have a different one."[117]

The Law Officers quickly reconsidered their *James Adger* report and reiterated their previous advice. The earlier report was based upon a hypothetical question, but now the Officers had an actual case with more or less concrete facts. Repeating their earlier analysis, they seized upon the technicality that Capitan Wilkes removed the enjoys without first dispatching the *Trent* to the United States for condemnation by a prize court. They advised that Wilkes' action "was illegal and unjustifiable by international law."[118] The Law Officers cited the *Caroline* case[119] but made no mention of the opinion's embarrassing statement that a belligerent could stop an enemy ambassador on his passage.[120] The Officers dealt with this troubling passage by ignoring its existence. Likewise, they continued to make not mention of the impressment precedent.

Lushington's advice on prize law "provided a legal structure for considering the controversy."[121] To maneuver around the advice, the government had to discredit it,[122] find a loophole, or ignore it. They could not discredit his advice because he was an acknowledged expert, and his advice clearly was correct. The Law Officers agreed that a belligerent's right to stop and search was irrefutable.[123] Their agreement, in effect, limited them to arguments consistent with Lushington's overall construct. Working within this framework, they found a tiny procedural loophole.

A central tenet of prize law was to establish the takers' clear title to property that they had unilaterally seized. Naval officers and privateers were entitled to a significant share, which could be enormous, of the ships and

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117 Adams Diary (Nov. 29, 1861.), *in Charles Francis Adams, Sr.: The Civil War Diaries (Unverified Transcriptions)*, MASS. HIST. SOC'Y (2015), https://www.masshist.org/publications/cfa-civil-war/index.php/view/DCA61d333. The next day Adams noted that the "law Offices of the crown have modified their opinion as I supposed." Adams Diary (Nov. 30, 1861), *in Charles Francis Adams, Sr.: The Civil War Diaries (Unverified Transcriptions)*, MASS. HIST. SOC'Y (2015), https://www.masshist.org/publications/cfa-civil-war/index.php/view/DCA61d334.

118 3 INT'L LAW OPS., *supra* note 77, at 278-79.

119 *Id.* at 278 n1.

120 *See supra* note 110 and accompanying text.

121 EHRLICH, *supra* note 6, at 119.

122 In private, Solicitor General Palmer said that he thought "Dr. Lushington [was] too old." Robert Phillimore Diary, *supra* note 111, *quoting* Palmer. *See supra* note 111.

123 *See* Law Officers' Report, *supra* note 77, at 227-78.

cargos they seized. In Jane Austen's *Persuasion*, Captain Wentworth had "the good luck…to fall in with the very French frigate [he] wanted" and became independently wealthy.[124] After a seizure, the prize court's subsequent judgment established title and greatly facilitated the property's sale. To establish this clear title, it was essential to take a prize to the taker's country for adjudication by an admiralty court. The requirement applied to the taking of neutral vessels carrying contraband, and the Law Officers seized on this loophole. Of course, the Confederate emissaries were not property to be sold after a prize court established title. Therefore, title was not relevant.

The Law Officers' opinion demonstrates another way in which Lushington tied his government's hands. They had to work within his amply supported advice that belligerents were entitled to stop and search. Therefore, their only option was to raise a technical, procedural objection that Captain Wilkes had failed to send the *Trent* to the United States for adjudication. If Wilkes had done so, the ship's voyage, the mail, and her other passengers would have been subjected to a most lengthy and inconvenient delay. Perhaps an American prize court would have condemned the *Trent* and her cargo, which included $1,500,000 in specie.[125] In essence, Wilkes prevented this delay and inconvenience by allowing the ship to continue her voyage. He actually did the British and everyone else but the emissaries a great favor.

At the time, everyone recognized the practical weakness of the Law Officers' opinion. In effect, the British were saying that Wilkes' action was an outrage because he failed to seize the ship and send her to America. Ambassador Adams wrote his eldest son, "to say that Captain Wilkes committed an outrage because he did not commit two [is] about as sound a proposition in morals as it is in logic."[126] Fifty years later, his son remembered that the argument was "recognized all through as a solemn farce."[127] Shortly after the two countries settled the crisis, the Duke of Argyll (who, as Lord Privy Seal, was a member of the Cabinet) conceded that it was a "narrow and technical ground [;] a very minor objection."[128]

124JANE AUSTEN, PERSUASION ch. 8 (1817).

125WARREN, *supra* note 18, at 16.

126 Letter from Charles Francis Adams to Charles Francis Adams, Jr., Jan. 3, 1862, *quoted in* FERRIS, *supra* note 18, at 164.

127 ADAMS JR., *supra* note 111, at 59.

128 Letter from Duke of Argyll to Charles Francis Adams (, Jan. 25, 1862),, *reprinted in* Proc. of the Mass. Hist. Soc'y: The Adams Jr., *Trent Affair*, Nov., 1861, at 137-38 (Mass. Hist. Soc'y, Third Series, vol. 45, 1911) (1911).

On November 29, a Friday, the Cabinet met to set policy on the *Trent* Affair, but this time they did not ask for Lushington's advice. Instead, Dr. Robert Phillimore attended. He was a highly respected expert on international law.[129] More significantly, he "was an intimate friend, and a most devoted follower of [William] Gladstone,"[130] who was the Chancellor of the Exchequer and later prime minister. In anticipation of the meeting, Gladstone dined with Phillimore two days earlier and privately conferred with him the morning of the Friday meeting.[131] He again conferred with Phillimore the next Monday.[132]

Gladstone was reputedly one of the more anti-northern members of the cabinet.[133] He and his friend, Phillimore, were working hand in glove on the *Trent* Affair. Before the late November cabinet meeting, Phillimore expressed private outrage at the seizure of Mason and Slidell. He condemned the seizure as "a foolish brutal illegal act."[134] In a private meeting two days before the November 29 Cabinet Meeting, he said that the seizure of the envoys was a "great indignation—a great outrage."[135] Phillimore fully supported the Law Officers' report.

In addition to the Law Officers' Reports and Lord Stowell's opinions, there was, of course, the elephant in the room. What to do about the precedent of impressment. In 1861, the British were well-aware of this notorious practice. As soon as word of Wilkes' action reached London, *The Times* roundly condemned the action but adverted to the impressment problem.[136] The British were hard pressed to distinguish the practice of

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129 *See* Norman Doe, Phillimore, "*Phillimore,* Sir Robert Joseph, *baronet*, *in* OXFORD DICTIONARY OF NAT'L BIOGRAPHY (2004).

130 ROUNDELL PALMER & SOPHIA MATHILDA PALMER, MEMORIALS, vol. 2, 378 (1896) (Palmer was one of the three Law Officers in the *Trent* Affair.).

131 W. E. GLADSTONE, THE GLADSTONE DIARIES6 THE GLADSTONE DIARIES, vol. 6, 76-77 & 80 n. 1 (H. C. G. Matthew ed., 1978).

132 *Id.* at 77.

133 *See* Joseph Hernon, *British Sympathies in the American Civil War: A Reconsideration*, 33 J. SO. HIST. 356, 359-60, 364-67 (1967).

134 GLADSTONE, *supra* note 131 GLADSTONE DIARIES at 80 note 1, quoting Phillimore's Diary. His outrage presumably was based upon the *Trent's* purser's letter to *The Times*. *See* notes 114-15, *supra*, and accompanying text.

135 Phillimore Diary, Nov. 27, 1861. *See* note 111, *supra*.

136 GORDON H. WARREN, FOUNTAIN OF DISCONTENT: THE TRENT AFFAIR AND THE FREEDOM OF THE SEAS 106, (1981) (*quoting* [London] *Times*, Nov. 28, 1861).

impressment from the *Trent* case. In the Law Officers' second opinion, they again simply ignored the problem and made no mention of it.[137]

Lord Russell did not even try to distinguish impressment. He frankly told Ambassador Adams, "that there were many things in British policy 50 years ago that he would be very sorry to defend."[138] *The Times* said much the same thing: "We were fighting for existence [alluding to the Napoleonic Wars] and we did in those days what we should neither do, nor allow others to do, in these days."[139] Some thirty years later, one of the Law Officers frankly conceded that "all principle was against [impressment]; it was never revived after that war [of 1812]; and in 1861 there was no British statesman who was not to acknowledge that it was untenable."[140]

The best English international law analysis came from Robert Phillimore who participated in the November 29 Cabinet meeting. Almost two weeks later, he published a comprehensive essay in a respected periodical.[141] Solicitor General Palmer told Phillimore "how much he liked and admired his article."[142] Phillimore devoted much of his analysis to contraband and the requirement of a prize court adjudication. He echoed the Law Officers and agreed with the clearly established requirement of judicial review in prize cases.

Unlike the Law Officers, he grasped the nettle of impressment. He immediately conceded, "We are inclined to think that England was wrong [fifty years earlier] and America was right in this matter." As his introductory weasel words suggest, however, he was an advocate, and notwithstanding his concession, he could not resist trying to distinguish the impressment precedent. With a bald-faced lie, he explained that English

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137 Philip Anstie Smith, The Seizure of the Southern Commissioners, Considered with Reference to International Law, and to the Question of War or Peace (1862) (next year an English barrister explained the lawlessness of Wilkes' action without mentioning the problem of impressment). PHILIP SMITH, THE SEIZURE OF THE SOUTHERN COMMISSIONERS (1862).

138 BENJAMIN MORAN, THE JOURNAL OF BENJAMIN MORAN, 1857-1865, vol. 2, at 928 (U. Chi. Press, 1949); Charles Francis Adams to William Seward, Jan. 17, 1862, *reprinted in* COMPILATION 1178, 1180. (recounting Russell's words to Secretary Seward) (ORIGINAL SOURCE NOT FOUND: LETTER CORROBORATED AT: William H. Seward, *Mr. Seward to Lord Lyons*, N.Y. Times, Dec. 30, 1981; Letter from Russell's wife agreed. She wrote a dear friend, "I wish we had not done them [impressment] and suppose and hope we shall admit they were very wrong." Lady Russell to Lady Dunferline (Dec. 13, 1861), in LADY JOHN RUSSELL: A MEMOIR WITH SELECTIONS FROM HER DIARIES AND CORRESPONDENCE 194 (Desmond MacCarthy D. McCartly & A. ed., 1911) (Russell's wife agreed. She wrote a dear friend, "I wish we had not done them [deeds of impressment] and suppose and hope we shall admit they were very wrong.").

139 Warren, *supra* note 136, at 106 (*quoting* [London] *Times*, Nov. 28, 1861); *see also* Winfield Scott, "The American Difficulty," [London] The Times, Dec. 62, 1861 on 1.

140 2 PALMER & PALMER, *supra* note 130, at 390.

141 Sir Robert Phillimore, *The Seizure of the Southern Envoys*, 12 SATURDAY REV. OF POL., LITERATURE, SCI. & ART, *Seizure* at 578-80 (1861). *See Seizure, supra* note 111 at 578-80.

142 Phillimore Diary, Dec. 10, 1861.

frigate captains, with an unending thirst for seamen, did not stop American ships with impressment in mind. Rather, the English merely searched neutral American ships "for enemy's goods." In the process, the King's officers might find "accidently…deserters from her [sic] navy…and claimed the municipal right of bringing them back to the service from which they escaped."[143]

After the crisis was resolved, the Law Officers finally considered impressment and used a sleight of hand to distinguish the practice based upon a type of technical, pleading error. They construed the United States' defense of Captain Wilkes' action as based solely and exclusively upon a claim that Slidell and Mason were a kind of contraband. But they did note the problem of impressment and explained that the concept was irrelevant to the international law of contraband, which of course was true. Notwithstanding a British consensus that the practice of impressment was "untenable,"[144] the Law Officers defended the practice. They insisted that impressment was proper under "the clearly established right of every sovereign to the allegiance of his own subjects, especially in time of war."[145]

The Law Officers' final advice again ignored the international law issue. They asserted that the issue of impressment was a matter of British municipal law, but that was not the issue. In the case of impressment, the issue was whether as a matter of international law—not municipal law—British ships could stop, board, and seize sailors from neutral ships. Their advice was that in order to further an important state interest, a state could stop neutral vessels and remove its nationals. This, of course, is precisely what Captain Wilkes did. He took Slidell and Mason based upon their status as rebelling United States citizens. If Wilkes had dragooned the emissaries into becoming Union sailors, the precedent of impressment would have been precisely replicated.

The precedent of impressment was equally problematic for the United States. Fifty years earlier, the United States had vehemently

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143 *Seizure* at 580. To spread frosting on his lie, he blandly noted that impressment "was never claimed against passengers and civilians [i.e., nondeserters]."

144 *See* Moran, Seward, Russell, Warren, Scott, Palmer & Palmer, *supra* notes 138-40 and accompanying text.

145 Law Officers' Report, 3 INT'L L. OPS., *supra* note 77, at 279, 281. Similarly, William Harcourt argued, "In the instance of the impressment of seamen, Great Britain claimed to exercise, not a belligerent, but a municipal right; and it is needless to say that she did not regard her own sailors as contraband of war." WILLIAM V. HARCOURT, LETTERS BY HISTORICUS ON SOME QUESTIONS OF INTERNATIONAL LAW 197 (MacMillan, 1863). Harcourt was a lawyer and a member of the Liberal party. He subsequently was named Solicitor General in 1873 and Chancellor of the Exchequer in 1885.

protested impressment, and the practice was one of the causes of the War of 1812. Secretary of State Seward was acutely aware of the problem. He said, "If I decide [the *Trent* Affair] in favor of my own Government, I must disavow its most cherished principles, and reverse and forever abandon its most essential policy."[146]

Henry Adams, Ambassador Adams' son and private secretary, was in London as part of his education. He was irate at the prospect of using the impressment precedent. He wrote to his brother in America:

> Good God, what's got into you all? What do you mean by deserting now the great principles of our fathers; by returning to the vomit of that dog Great Britain? What do you mean by asserting now principles against which every Adams yet has protested and resisted? You're mad, all of you."[147]

In December and January, the United States and the United Kingdom settled the dispute. President Lincoln believed that the country should fight only "one war at a time."[148] Secretary Seward acknowledged that Wilkes' failure to seek a prize court adjudication was unlawful, and he told the British that the emissaries would be "cheerfully liberated."[149] Although Seward conceded that Wilkes' action was unlawful, he noted that if the stakes were higher, the United States would not abide by international law. "I have not forgotten," he wrote, "that if the safety of the Union required the detention of the captured persons, it would be the right and duty of this Government to detain them."[150] Lord Russell specifically noted and fully understood the lawlessness of this passage.[151]

Shortly after the Affair was settled, Ambassador Adams excoriated the British for their hypocrisy. In a letter to a friend, he wrote, "[w]hen it is was convenient to make a law on the ocean… Lord Stowell stood ready to sanction any and everything that the Ministerial policy of that day required

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146 William Mr. Seward to Lord Lyons (Dec. 26, 1861), *reprinted in* 7 JOHN MOORE, A DIGEST OF INTERNATIONAL LAW 629 (1906).

147 Henry Adams to Charles Francis Adams, Jr., Dec. 13, 1861, 1 LETTERS OF HENRY ADAMS 265.

148 ROBERT ZOELLICK, AMERICA IN THE WORLD: A HISTORY OF U.S. DIPLOMACY 70 & 484 n4 (2020) (quoting Lincoln).

149 Mr. Seward to Lord Lyons, Dec. 26, 1861, *reprinted in* COMPILATION 145.

150 *Id*. at 1145.

151 Lord Russell told the British ambassador to Washington that "Mr. Seward does not here assert any right founded on international law, however, inconvenient or irritating to neutral nations." Lord Russell to Lord Lyons, Jan. 23, 1862, *reprinted in id*. 1185, 1190.

for the protection of England."[152] But fifty years later, the shoe was on the other foot. Adams continued, "[n]ow that it has pleased their [the former Ministry's] successors to erect themselves into neutrals,… the law officers of the Crown stand equally ready… to proclaim a bran-new doctrine, precisely suited to the purpose in hand."[153]

B. NEGOTIATING INTERNATIONAL LAW

When Dr. Lushington advised that the United States had an absolute right to stop, search the *Trent*, and remove the emissaries, the Cabinet immediately backed off any idea of having the Royal Navy escort the ship outside British waters and thereby avoided the possibility of interfering with the United States' rights under international law. They seem clearly to have internalized the legitimacy of international law. To be sure, there also were policy reasons for avoiding a confrontation on the high seas. At the same time, however, Palmerston did not like Dr. Lushington's advice, which suggests that he seriously considered involving the Royal Navy.[154]

International law played a significant role in the resolution of the *Trent* Affair. The clearest evidence of this was Palmerston's begrudging acceptance of Dr. Lushington's advice in early November. Even when the cabinet decided to take strong action in late November, the British were still hampered by international law. As a matter of international law, the British had to focus their protest on the failure to dispatch the *Trent* to America for prize court adjudication. This forced the British into the silly position that Captain Wilkes should have taken the entire ship to America at significant cost and inconvenience to the shipowner, the passengers, and the mail recipients. As Ambassador Adams quipped, the British seemed to object that their interest had not been more seriously injured.[155]

Although the British cleaved to their weak procedural argument, even that argument was not available against Dr. Lushington's advice that the impressment precedents allowed Captain Wilkes to remove the American citizens without submitting the matter to an American prize court. For two

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152 Charles Francis Adams to Richard Dana (, Feb. 6, 1862), *reprinted in* Adams Jr., THE TRENT AFFAIR, *supra* note 111, at 140-42.

153 *Id*.

154 In this regard, Palmerston had no qualms about a military confrontation with the *James Adger* in British waters. He dispatched the frigate *Phaeton* to escort the *Trent* once she reached British waters. *See* note 96, *supra*, and accompanying text.

155 *See* FERRIS, *supra* note 126 and accompanying text; *see also* Adams Jr., *supra* note 127 and accompanying text.

months, the Law Officers addressed this obvious precedent by ignoring it—by pretending that it did not exist.[156]

In truth, impressment presented an exquisite dilemma for both sides of the *Trent* Affair. In the end, the United States cleaved to its old principles and refused to urge the impressment precedent. This refusal to throw impressment in the British lion's face did not, however, impede America's view of its best interests. The United States finally decided as a matter of policy to surrender the emissaries. In contrast, the British Law Officers resolutely clung to the right of impressment.

The British cabinet in 1861 seemed clearly to have internalized international law, but perhaps the cabinet had more reverence for international law than we do today. If so, the lessons of the *Trent* Affair have diminished relevance in our modern age of *realpolitik* and instrumentalism. This romantic vision of international law in days of yore, however, should not be pushed too far.

Rational choice was alive and well in 1861. Ambassador Adams privately excoriated Britain's blatant instrumentalism as arrant hypocrisy. He believed that the Law Officers had received marching orders to opine that Wilkes' action was illegal. Rational choice in the *Trent* Affair also peeked out of Seward's lengthy memorandum, which settled the Affair. He noted that the United States would violate international law if a more significant national interest were at stake.[157]

Although rational choice probably played a role in the *Trent* Affair, it does not completely explain the British government's actions. The British clearly had internalized the legitimacy of international law. Lushington's advice was against Palmerston's wishes, but Palmerston begrudgingly accepted it. Moreover, Lushington's initial advice used international law to establish the legal framework for thinking about the problem and thereby imposed a significant limitation on the government's position. Following his advice, they had to concede that Captain Wilkes had a clear right to stop and search the *Trent* and to send her as a prize back to America.

III. CONCLUSION

Analyzing the influence of constructivism and rational choice in the *Trent* Affair is fraught with risk and doubt. Many, probably most, significant decisions that humans make involve a jumble of conflicting and consistent

156 Even when the Law Officers were forced to address impressment, they continued to ignore the practice's international law implications. *See supra* notes 144-46 and accompanying text.

157 *See supra* notes 151-52 and accompanying text.

conscious considerations. Moreover, unconscious influences lurk beneath the conscious surface. Given this chaos, how are we to divine the reason for an actor's conduct some century and a half after the fact?

When we explore the *Trent* Affair, all we have is the written communications of those involved and their reported actions. Long ago, a brilliant 19th century English writer and student of the human condition observed that, "Seldom, very seldom, does complete truth belong to any human disclosure; seldom can it happen that something is not a little disguised, or a little mistaken."[158]

The obstacles to attaining an accurate understanding of the *Trent* Affair are daunting, but that does not mean that we should abandon our quest. Notwithstanding the wisdom of Jane Austin's observation, the task of understanding another's—or even our own—actions is omnipresent in human interaction. Every day we seek to understand why another has acted. We know that judging the motivation and purpose of another is fraught with risk and doubt, and yet we routinely do so. Why is our seeking to understand the *Trent* Affair any different?

Before traveling back to the nineteenth century, we should recognize an affliction of law professors. Everyone who has ever taught law knows that the validity or truth of legal principles and facts are contingent. Each case that we discuss in class might turn out differently under a different law maker or fact finder. After a long career, a highly regarded law professor once concluded "that every proposition is arguable."[159] This valuable heuristic tool enables us to teach our students about the inherent ambiguity of life and of the law.

Any analysis of motivations and purposes in the *Trent* Affair could be attacked on the basis that an actor "arguably" had a different motive or purpose.[160] Speculation like this is reasonable but falls short of a significant critique. The mere arguable existence of a different motive cannot establish the actual significance of the motive. With good reason, law professors

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158 JANE AUSTEN, EMMA: A NOVEL IN THREE VOLUMES Ch. 49 (1815).

159 DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 192 (2007), (*quoting* Alex Beam, *Greed on Trial*, *in* LEGAL ETHICS: LAW STORIES 291 (Deborah L. Rhode & David Luban eds., 2005)).

160 For example, an immensely capable professor, whom I respect and admire, suggested to me that a government might comply with international law and accept a short-term loss in order to gain a future good. He notes, "in the hard cases, where short v. long term interest are clashing, and where the government is divided, it is hard to assess." To be sure, it may be hard to assess another's motives and purpose, but this is an enduring plight of the human condition. To paraphrase a comment by Sean Wilentz, if there is no evidence to support a plausible position—not "a letter or diary entry or newspaper article or pamphlet"—the plausible position collapses. *See* Sean Wilentz, *The Paradox of the American Revolution*, N.Y. REV. BOOKS, Jan. 13, 2022, at 7.

delight in confronting students with arguably different purposes, but the upshot is simply ambiguity. In the law and in life, we resolve conflicting arguable purposes by determining which is the more plausible. [161]

The *Trent* Affair illustrates how constructivism and rational choice can support and conflict with each other. In Lushington's case, the two theories operated hand in glove. He was a "Northerner"[162] and believed that Britain's best interest was to support the Union. At the same time, he believed that prize law and the precedent of impressment supported the Union cause. Similarly, Abraham Lincoln and Secretary Seward believed that the United States' best interest was to avoid war with Britain. Therefore, Seward readily conceded that the seizure of the emissaries violated international law.

The best empirical evidence for assessing the relative influence of constructivism and rational choice is found in situations in which the two theories are in conflict. Lord Palmerston on balance wanted the South to prevail and the United States to be splintered. More significantly, he believed that failure to take strong action against Yankee insults to British honour and prestige would invite further insults. Nevertheless, he begrudgingly accepted Lushington's advice and subordinated his view of Britain's best interests to international law. He did not dispatch a powerful frigate outside British waters to escort the *Trent*. Moreover, Lushington's advice forced the British to base their complaint on a silly[163] procedural quibble.

Secretary Seward's resolution of the crisis provides further insight into the relative importance of constructivism and rational choice. He believed that freeing the emissaries was in the United States' best interest, and he surrendered them in accordance with the dictates of international prize law. Like Lushington, he was in a happy situation in which best interests and international law fit hand in glove. At the same time, however, he frankly stated that if the two considerations did not coincide, he would choose self-interest over international law.

In truth, all the extant theories of compliance should be viewed as valuable yet disordered guides that help us to understand the problem. None are exclusive. All the theories can coexist. Within the same human being, internalization might trump policy desires, and policy desires might trump

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161 *See* William R. Casto, *Robert Jackson's Critique of Trump v. Hawaii*, 94 ST. JOHN'S L. REV. 335, 339-42 (2021).

162 *See* 2 W. HOLMAN HUNT, *supra* notes 71-73 and accompanying text.

163 *See* FERRIS, *supra* note 126 and accompanying text; *see also* Adams Jr., *supra* notes 127-28 and accompanying text 126-28.

internalization. In the house of international law are many mansions. There is ample room for all extant theories of compliance.