

## **FOREWORD**

**Title:** *United States v. Gooding*: The Imperfect Indictment that Created the Perfect Defense for the Illegal Slave Trade

**Author:** Fernando D. Kirkman

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### **Abstract**

In *United States v. Gooding*, the Supreme Court quashed an indictment against John Gooding for engaging in international slave trading, a violation of the Slave Trade Act of 1818. The Slave Trade Act of 1818 modified the penalties for engaging in slave trading, and switched the burden of proof to the defendant, to disprove the presumption that the defendant had engaged in the slave trade. This article looks at how *United States v. Gooding* stands as a step backwards toward condoning and legitimizing the international slave trade. This paper also examines the moral relativism expressed in the United States' social and legal positions on both domestic and international slave trading, while exploring the uniqueness of Baltimore, Maryland's role in the domestic and international slave trade.

**Disciplines:** *Criminal Law, Evidence*

***UNITED STATES V. GOODING:***  
 THE IMPERFECT INDICTMENT THAT CREATED THE PERFECT  
 DEFENSE FOR THE ILLEGAL SLAVE TRADE

*Fernando D. Kirkman* \*

**INTRODUCTION**

Unfortunately, slavery is as American as apple pie.<sup>1</sup> The African slave trade was legal in the United States for nearly 200 years—from the 1620’s when African slaves began to arrive in the Dutch and British colonies until 1808 when the “Act Prohibiting Importation of Slaves of 1807” went into effect.<sup>2</sup> Racialized slavery was an integral element in the formation of the United States. The transatlantic slave trade, substantially contributed to sustaining the practice of enslaving Africans. Though America has benefited significantly from the transatlantic slave trade, by the late seventeen hundreds many Americans viewed the trading of slaves, as inhumane and morally reprehensible.<sup>3</sup> In response to the change in public opinion, Congress passed the Slave Trade Act of 1794 (“1794 Act”), which prohibited the use of any U.S. port or shipyard for the purpose of fitting out or building any ship to be used for the introduction of slaves.<sup>4</sup> Over the years, Congress built upon the 1794 Act by adding more penalties and enforcement mechanisms. In *United States v. Gooding*<sup>5</sup>, the Supreme Court

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\*J.D. Candidate, 2017, University of Maryland Francis King Carey School of Law. I am indebted to Professor Frederick Leiner, Professor Edward Papenfuse, and Professor Garrett Power, for their assistance with this paper. I would also like to thank Robert Ellis, Archivist at the National Archives in Washington, DC for assisting in finding materials used in this paper. Nevertheless, all opinions, errors, omissions, and conclusions in this comment are my own. Finally, I would like to thank my mother, and grandmother for their unwavering love and support.

The author transcribed approximately 65 pages of lower court papers, court record, affidavits, briefs, and opinions submitted to the United States Supreme Court in 1827. The author made minor adjustments regarding punctuation and spelling to modernize the text for today’s readers. While some of the documents in the lower court record are paginated, most lack pagination. For documents without pagination, the author has omitted a page number from the citation.

<sup>1</sup> CAMBRIDGE ADVANCED LEARNER’S DICTIONARY & THESAURUS (online ed. 2016) (considered very typical of the United States or of the people of the United States).

<sup>2</sup> See Engel Sluiter, *New Light on the "20 and Odd Negroes" Arriving in Virginia, August 1619*, 54 WM. & MARY Q. 395, 395 (1997); An Act of March 2, 2 Stat. 426 (1807).

<sup>3</sup> W.E. BURGHARDT DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA: 1638-1870*, at 80 (Dover Publications Inc. 1970) (1896).

<sup>4</sup> Act of Mar. 22, 1794, ch.11, 1 Stat. 347.

<sup>5</sup> 25 U.S. 460 (1827).

quashed an indictment against John Gooding for engaging in international slave trading, a violation of the Slave Trade Act of 1818 (“1818 Act”).<sup>6</sup> The 1818 Act modified the penalties for engaging in slave trading, and switched the burden of proof to the defendant, to disprove the presumption that the defendant had engaged in the international slave trade.<sup>7</sup> The United States’ attempts to work around the ‘1808 compromise’, and the Slave Trade Acts that followed were encouraging steps toward ending the racialized slavery of Africans, however *United States v. Gooding* stands as a step backwards toward condoning and legitimizing the international slave trade, because of the loophole *Gooding* created in enforcing the 1818 Act.<sup>8</sup> *Gooding* was a “dog whistle” to United States merchants who engaged in the slave trade that the Government would not be able to enforce the 1818 Act.<sup>9</sup> The Marshall Court’s ruling on the defective indictment in *United States v. Gooding* is historically significant because of the ruling’s impact, or lack thereof, on the international slave trade.<sup>10</sup> However, the Court’s ruling on the admissibility of hearsay evidence from a co-conspirator may be *Gooding*’s most enduring legacy.<sup>11</sup>

Legal scholars have often cited *United States v. Gooding* because of the holding’s impact on hearsay evidence. However, *Gooding* has received very little attention for its importance in United States’ legal history. This paper examines the legal, political, and social context at play in *United States v. Gooding*, and the 1818 Act. Part I of this paper examines the moral relativism expressed in the United States’ social and legal positions on both the domestic and international slave trade when the Court heard *Gooding*.<sup>12</sup> Part II explores the uniqueness of Baltimore, Maryland, where John Gooding did most of his business as a merchant, and the city’s role in the domestic and international slave trade.<sup>13</sup> Part III recounts and rationalizes the United States’ piecemeal approach that led to the 1818 Act, the statute at issue in *United States v. Gooding*.<sup>14</sup> Finally, Part IV analyzes *United States v. Gooding*’s long and short-term effects.<sup>15</sup>

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<sup>6</sup> Act of Apr. 20, 1818, ch. 91, 3 Stat 450 (1818).

<sup>7</sup> *Id.*

<sup>8</sup> *Infra* Part IV.

<sup>9</sup> *Infra* Part IV.

<sup>10</sup> *Infra* Part IV.

<sup>11</sup> *Infra* Part IV.

<sup>12</sup> *Infra* Part I.

<sup>13</sup> *Infra* Part II.

<sup>14</sup> *Infra* Part III.

<sup>15</sup> *Infra* Part IV.

## **PART I: THE TRANS-ATLANTIC SLAVE TRADE, PRIVATEERING, AND MORAL RELATIVISM**

*A. Ironically, the United States was against the international slave trade, while permitting slave trading domestically.*

By the early eighteenth century, public opinion began to shift on the transatlantic slave trade. Curiously, Americans took little issue with the practice of enslaving Africans solely because of their race, but opposed the transportation means and methods employed during the trans-Atlantic international slave trade.<sup>16</sup> During the transatlantic slave trade, Europeans traded goods to Africa, for kidnapped Africans; then the kidnapped Africans were sold into slavery in the United States, and other countries in North and South America, for raw materials, to later be used in Europe.<sup>17</sup> Millions of Africans were captured to be sold into slavery.<sup>18</sup>

The Middle passage was the leg of the journey where kidnapped Africans traveled to the Americas. This journey was brutal for the Africans kidnapped for sale into slavery and many died.<sup>19</sup> Conditions onboard ships were typically cramped; sickness was a significant problem, killing many of the enslaved and the crews of the slave ships as well, and shortages of food and drinking water were chronic.<sup>20</sup> Misjudgments in rations, weather problems, and slave resistance onboard ships could affect the length of the passage and the conditions of the people onboard. The psychological trauma of the Middle Passage was so harsh that an English surgeon in 1790 estimated that two-thirds of the deaths on the slave journey were due to a “mortal melancholy” similar to an involuntary suicide.<sup>21</sup> Additionally, the Middle Passage stripped the Africans of their ontology and identity;

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<sup>16</sup> Steven Deyle, *An “Abominable” New Trade: The Closing of the African Slave Trade and the Changing Patterns of U.S. Political Power*, 1808-60, 66 WM. & MARY Q. 833, 836 (2009) (Though some Deep South states reopened the trade after the war, the United States officially abolished the African slave trade on January 1, 1808. This event occasioned much celebration, and many Americans saw it as a great national humanitarian achievement).

<sup>17</sup> THOMAS HUGH, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440-1870*, at 293 (Simon and Schuster 1999).

<sup>18</sup> See Appendix II.

<sup>19</sup> Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INTL. L. REV. 883 (2004) (Many slaves died from fever, measles, and scurvy while aboard the slave-ships, before they even reached the shores of the West).

<sup>20</sup> Paul Lovejoy, *The “Middle Passage”: The Enforced Migration of Africans across the Atlantic* 1, 4 (2007), <http://bernard.pitzer.edu/~hfairchi/pdf/Blacks/MiddlePassage.pdf>

<sup>21</sup> *Id.*

because once they exited the ship, there were no longer a person, but rather a fungible commodity.

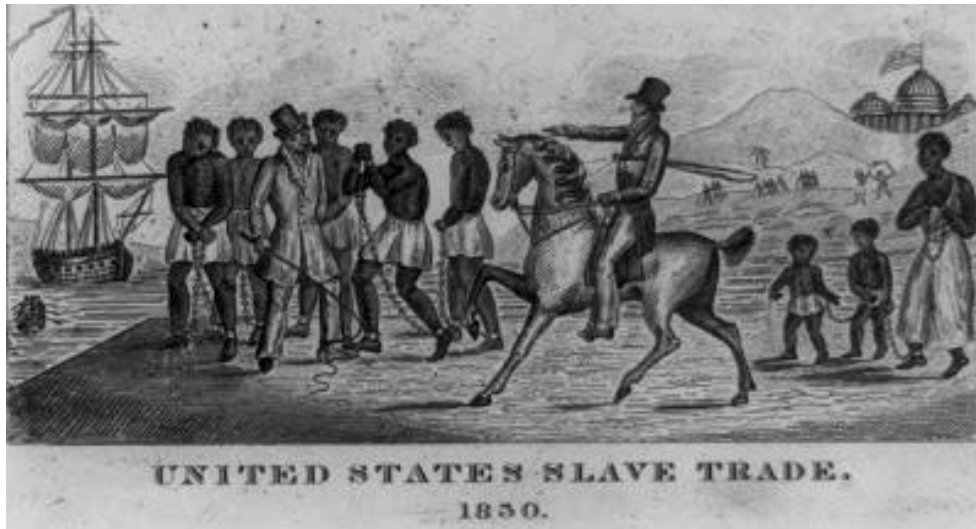


Figure 1: United States slave trade, 1830<sup>22</sup>

Ultimately, the United States banned the international slave trade, in part because of the moral concerns with the conditions in which Africans were imported into the United States.<sup>23</sup> The United States' nuanced opposition to the international slave trade is unintelligible. While Americans found the international slave trade morally reprehensible, the domestic slave trade thrived in the United States.<sup>24</sup> Alarming, the transportation conditions for Blacks domestically were just as deplorable as

<sup>22</sup> United States Slave trade 1830,

<http://www.loc.gov/pictures/resource/cph.3b36072/?co=app> (last visited Dec. 27, 2016).

<sup>23</sup> *Regulating the Trade*, THE SCHOMBURG CENTER FOR RESEARCH IN BLACK CULTURE [http://abolition.nypl.org/essays/us\\_constitution/4](http://abolition.nypl.org/essays/us_constitution/4) (last visited Dec. 26, 2016) (“In his annual message to Congress in December 1806, Thomas Jefferson, who had long opposed the trade (but not slavery itself) . . . took a moment in his address to “congratulate” his “fellow-citizens, on the approach of the period at which you may interpose your authority constitutionally to withdraw the citizens of the United States from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best interests of our country have long been eager to proscribe.”).

<sup>24</sup> DEYLE, *supra* note 16, at 834-35 (“After the American Revolution this internal trade became a major operation, annually transporting thousands of enslaved men and women from the Upper South to the Lower South. “Dwarfing the transatlantic slave trade that had carried Africans to the [North American] main-land”, this new intraregional slave trade became a “Second Middle Passage,” in Ira Berlin’s words. An even greater number of American slaves were sold locally from one owner to another”).

their international equivalents.<sup>25</sup> Embedded in these almost inherently contradictory positions lies a logical tension only a moral relativist stance could resolve; where one concludes that life time enslavement is acceptable, but it is unacceptable to subject someone to the harsh conditions of the Middle Passage during the transatlantic slave trade.

In Congress, sectionalism between politicians from the North and South also effected the United States' nuanced position on the international slave trade. For politicians representing states in the North, moral objections guided their calls to end the United States involvement in the international slave trade. During or immediately after the Revolutionary War, five states would either end slavery outright (Massachusetts and New Hampshire) or pass gradual abolition acts (Pennsylvania, Rhode Island, and Connecticut) that would lead to a relatively speedy end to slavery.<sup>26</sup> The North's politicians argued that slavery was inherently immoral and a violation of the principles fought for in the Revolutionary War, where America fought for its very own independence.<sup>27</sup> While moral concerns guided the North's objections, financial concerns bolstered the South's political support of slavery and the importing of Africans for slave labor; because the agriculturally centered Southern economy was dependent on the free labor provided by slaves.<sup>28</sup>

This sectionalism on the issue of the domestic slave trade, and the international slave trade was most apparent during the Constitutional Convention of 1787, and when Congress started to work on the Act Prohibiting the Importation of Slaves of 1807 ("1807 Act"). The Constitutional Convention convened to discuss national regulations of domestic and international commerce. Southern states' representatives were adamant that there be assurances that a strong federal government on commerce would not regulate the South's most precious commodity—free slave labor. During one debate, South Carolina's Pierce Butler said: "[t]he security the South[ern] States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do."<sup>29</sup> Butler's fear was one that many in the South shared,

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<sup>25</sup> *Id.* (In 1798 a Delaware Quaker named Warner Mifflin wrote a letter to President John Adams. After traveling through nearby Maryland, Mifflin was struck by "the abominable Trade carried on through that part of the Country, by Negroe-Drovers, buying Drove after Drove of the poor afflicted Blacks, like droves of Cattel for Market; carrying them into the Southern States for Speculation; regardless of the separation of nearest Connections & natural ties); *Also see infra* Part II.

<sup>26</sup> Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 439 (2009).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 364 (Max Farrand ed.,

even though there was no strong Northern anti-slavery movement during the 1787 convention.<sup>30</sup> In the end, the North and South agreed to a compromise that delayed any ban on the importation of slaves until 1808.<sup>31</sup> In 1807, once again Northern and Southern states split over the issue of slavery.<sup>32</sup>

Moral argument drove the public debate on the international slave trade but economic motives undergird the United States' position. The slave trade had become less important to the Northern economy and the upper South (e.g. Maryland and Virginia) supported the ban on international slave trading because competed with their domestic efforts to sell slaves to the lower South.<sup>33</sup> The United States steps to ban the international slave trade, while the domestic trade flourished demonstrates that the country supported the ban for many reasons—some moral, others economic or even purely political. Regardless of the motivation, this moral relativism on the issue of the slave trade allowed for enslaved African to remain slaves, exclusively because of their race, until the county finally banned the racialized slavery.<sup>34</sup>

*B. Some privateers, who once were defenders of the United States in times of war, betrayed the country for the economic gains of participating in the slave trade.*<sup>35</sup>

During the War of 1812, privateers played a major role in helping America protect her interest at home and abroad by capturing warships as prizes that the privateers could later exchange for sizeable profits.<sup>36</sup> United

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1966) (1787).

<sup>30</sup> FINKELMAN, *supra* note 26, at 441.

<sup>31</sup> U.S. CONST. art. I, § 9, cl. 1. (“The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.”).

<sup>32</sup> *Infra* Part III.B.

<sup>33</sup> LOW COUNTRY DIGITAL HISTORY INITIATIVE Voyage of the Echo: *The Trials of an Illegal Trans-Atlantic Slave Ship; Historical Context: Abolishing the Trans-Atlantic Slave Trade*, <http://ldhi.library.cofc.edu/exhibits/show/voyage-of-the-echo-the-trials/historic-context--abolishing-t> (last visited: Dec. 21, 2016).

<sup>34</sup> U.S. CONST. amend. XIII.

<sup>35</sup> Frederick C. Leiner, *Yes Privateers Mattered*, NAVAL HIST. MAG., Apr. 2014 <http://www.usni.org/magazines/navalhistory/2014-03/yes-privateers-mattered> (Privateers were privately owned merchant ships that, in wartime, were armed by their owners and licensed by the government to attack the maritime trade of the enemy, privateers profited by the sale of ships and cargoes they captured).

<sup>36</sup> *Id.* (“Privateering was critical for the American war effort. In the three years of the War of 1812, U.S. Navy warships captured about 250 vessels, but American privateers took at least five times that number of British merchant vessels—at least 1,200, but

States privateering was born out of necessity. In 1812, the then young United States did not have a strong navy forcing the country to rely on privateers to help defend herself.<sup>37</sup> In a letter on August 4, 1812, the then former President Thomas Jefferson predicted that the Royal Navy would prevail over the United States Navy but “our privateers will eat out the vitals of their commerce.”<sup>38</sup> Once the War of 1812 ended privateers needed to make a living; and investors like John Gooding, were not willing to let United States’ law stop them from making a profit.<sup>39</sup> The Panic of 1819 also drove many investors in privateer ships to search for new ways to monetize their investments.<sup>40</sup> The Panic of 1819 turned greedy investors in privateer ships that engaged in the international slave trade to desperate businessman trying to avoid bankruptcy.<sup>41</sup>

After the War of 1812, the United States’ demand for privateers decreased, and merchants who invested in the privateer ships turned to illegal methods to make money.<sup>42</sup> Some privateers turned to South America revolutions as a way to make money, which violated the United States Neutrality Acts<sup>43</sup>. Other privateers turned to participating in the international slave trade, which the United States banned in 1807, and had significantly regulated since 1794.<sup>44</sup> While the international slave trade was illegal in the United States and Great Britain, it was legal for ships

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probably as many as 2,000, although no one knows for sure. The privateers burned some of the British merchant ships they captured, ransomed others back to their owners, lost many to recapture by the British navy, and brought home prize ships and goods that sold for millions of dollars.”).

<sup>37</sup> *Id.* (When the United States went to war against Britain in June 1812, the U.S. Navy had about 15 warships in commission, including a squadron of three frigates and two sloops-of-war that sailed from New York within an hour of receiving word of the declaration of war).

<sup>38</sup> *Id.*

<sup>39</sup> See Appendix I.

<sup>40</sup> See generally MURRAY NEWTON ROTHBARD, *THE PANIC OF 1819: REACTIONS AND POLICIES* (1962) (noting that the Panic of 1819 was America’s first financial crisis).

<sup>41</sup> David Head, *A Different Kind of Maritime Predation: South American Privateering from Baltimore, 1816-1820*, 7(2) INT’L J. NAVAL HIST. (2008) (Mounting losses could not have come at a worse time for Baltimore investors. The Panic of 1819, caused in no small part by a scandal at the Maryland branch of the Second Bank of the United States, devastated the city’s merchant community).

<sup>42</sup> David Head, *Baltimore Seafarers, Privateering, and the South American Revolutions, 1816-1820*, 103 MD. HIST. MAG. 269, 270-71 (2008).

<sup>43</sup> HEAD, *supra* note 42, at 270-71; EDWARD K. KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* 116 (1992). (The Neutrality Act of 1794 made it illegal for an American to wage war against any country at peace with the United States. The act also forbid foreign war vessels to outfit in American waters and sets a three-mile territorial limit at sea).

<sup>44</sup> *Infra* Part III.B.



registered in Spain to engage in the trade, and United States privateers used this loophole to engage in the slave trade.<sup>45</sup> Specifically, Baltimore ships were coveted vessels for the illegal privateering missions and the illegal slave trade, because of their reputation as the fastest and most nimble ships on the sea.<sup>46</sup>

Congress attempted to legislate away United States privateers' involvement in the international slave trade.<sup>47</sup> However, privateers and their investors made so much money capturing, and enslaving people that the risk outweighed the reward, because the laws were ineffective and enforcement was lax.<sup>48</sup> In 1820, a Baltimore Clipper could carry on average 507 African slaves and make sixty seven thousand dollars per voyage.<sup>49</sup> A report in 1849 claimed that a Baltimore clipper made four hundred thousand dollars from eleven slave trading voyages over four years.<sup>50</sup> The *General Winder*, the ship at issue in *United States v. Gooding*, allegedly was carrying 290 Africans to sell into slavery when it docked in Cuba, a haul that would make John Gooding a significant amount of money.<sup>51</sup>

The risk to reward ratio for engaging in the international slave trade was skewed in favor of engaging in the illegal trade because enforcement was sparse. Caught and convicted slavers were often pardoned, and the only penalty suffered was the loss of the illegal captured Africans.<sup>52</sup> No slaver was sentenced to death for violating the United States slave trade laws until 1862.<sup>53</sup> Even in 1862, President Lincoln writes “a large number of respectable citizens have earnestly besought me to commute the said

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<sup>45</sup> HEAD, *supra* note 42.

<sup>46</sup> *Infra* Part II.

<sup>47</sup> *Infra* Part III.

<sup>48</sup> *Id.*

<sup>49</sup> Dinizulu Gene Tinnie, *The Slaving Brig Henriqueta and Her Evil Sisters: A Case Study in the 19th-Century Illegal Slave Trade to Brazil*, 93(4) J. AFRICAN AM. HIST. 509, 512 (2008); HEAD, *supra* note 42.

<sup>50</sup> Ralph Clayton, *Baltimore's African Slave Trade Connection*, BALTIMORE CHRON. & SENTINEL, Apr. 4, 2002, [http://baltimorechronicle.com/slaveship\\_apr02.shtml](http://baltimorechronicle.com/slaveship_apr02.shtml).

<sup>51</sup> *Infra* Part IV.B. (One of the Government's witnesses testified that Gooding told one of his creditors that he would pay him half of what he owned the creditor based on the profits of the Africans transport to Cuba to be in sold into slavery).

<sup>52</sup> W.E. BURGHARDT DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA: 1638-1870*, 128-30 (1896) (Noting that President Jefferson, Madison, Monroe, Adams, and Jackson all pardoned captured and convicted slavers).

<sup>53</sup> *Id.* at 123 (“A somewhat more sincere and determined effort to enforce the slave-trade laws now followed; and yet it is a significant fact that not until Lincoln's administration did a slave-trader suffer death for violating the laws of the United States.”); *Lincoln on the Execution of a Slave Trader*, 1862 THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <https://www.gilderlehrman.org/history-by-era/american-civil-war/resources/lincoln-execution-slave-trader-1862> (last visited Dec. 28, 2016).

sentence of the said Nathaniel Gordon<sup>54</sup> to a term of imprisonment for life”.<sup>55</sup> Additionally, the upfront cost of investing in privateering disincentivized investors, like John Gooding, from pulling out of the industry, and incentivized a morally vacuous focus on profits.<sup>56</sup> Privateers, also motivated by money, engaged in these missions to Africa to traffic slaves with little moral hesitation. This drive for money is what allowed privateers to fight for America’s freedom in the War of 1812, and take African’s freedom by capturing them for sale into slavery.

Moral apathy and greed influenced the means and methods used in transporting Africans being sold into slavery. The conditions on these ships were horrific, because the White slavers viewed the Africans as a commodity, similar to how one might view cattle. The amount of slaves a ship could carry directly affected the profitability of a voyage for a privateer.<sup>57</sup> Privateers would only tend to the basic needs of the captured African’s, and do the bare minimum to keep them alive to be sold into slavery. One witness on a slave ship noted, “human beings ... wedged together ... in low cells three feet high ... [t]he heat of these horrid places was so great, and the [smell] so offensive, that it was quite impossible to enter them.”<sup>58</sup> Moral apathy towards captured Africans was driven by dehumanization of the African captured into slavery. The quest to maximize the profitability of voyages drove that dehumanization.

U.S. Navy warships and Revenue Service cutters interdicted the slave trade.<sup>59</sup> Captured United States ships preparing for, or engaging in the

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<sup>54</sup> See *United States v. Gordon*, 25 F. Cas. 1364 (1861), *aff’d, ex parte United States v. Gordon*, 66 U.S. 503 (1862) (Nathaniel Gordon was the only slave trader ever hanged under the slave trade acts).

<sup>55</sup> *Lincoln on the Execution of a Slave Trader*, 1862 THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <https://www.gilderlehrman.org/history-by-era/american-civil-war/resources/lincoln-execution-slave-trader-1862> (last visited Dec. 28, 2016).

<sup>56</sup> HEAD, *supra* note 42 (“A fine, fully-equipped vessel with new sails and spars, a full complement of cannon, small arms, swords, and stink pots, and dozens of men who liked to eat and drink in between actions all made owning a privateer a capital intensive venture. In his study of War of 1812 privateering from Baltimore, Jerome Garitee estimates that the typical privateer in that conflict cost \$40,000 when fully equipped, armed, and provisioned... Few Baltimoreans, then, had the resources for privateering. In 1810, Garitee estimates, there were some 3,500 people among Baltimore’s 46,000 inhabitants with assets of at least \$4,000 and only some 400 people with assets of \$15,000 or more”).

<sup>57</sup> See note 203 and accompanying text.

<sup>58</sup> Rev. Robert Walsh, *Notices of Brazil in 1828 and 1829*, vol 2, 469-71 (London, 1830).

<sup>59</sup> See generally *The Plattsburgh*, 23 U.S. 133, 134 (1825); U.S. COAST GUARD HISTORICAL OVERVIEW, [https://www.uscg.mil/history/articles/h\\_USCGhistory.asp](https://www.uscg.mil/history/articles/h_USCGhistory.asp) (last visited Dec. 28, 2016) (“In 1794 cutters were charged with preventing the introduction of new slaves from Africa. By the Civil War, cutters captured numerous slavers and freed almost 500 slaves.”).

slave trade, were judicially condemned, and the ship was subject to forfeiture.<sup>60</sup> The United States legally had the authority to capture privateer ships engaged in the slave trade, but enforcement efforts by the United States were sporadic.<sup>61</sup> While the United States passed laws to eliminate the importation of slaves, it also was not willing to robustly enforce those laws.<sup>62</sup> Tragically, even when the United States did capture a ship sometimes it would be sent to a slave-holding state, and the captured Africans would still be illegally enslaved.<sup>63</sup> If the international slave trade was morally reprehensible than it seems irrational that the United States would not commit more resources to fighting the illegal slave trade in Africa. Or at the very least ensure that those Africans illegally captured did not become slaves once they arrived in the United States.<sup>64</sup>

## **PART II: BALTIMORE’S ROLE IN THE SLAVE TRADE AND UNITED STATES V. GOODING.**

### *A. Baltimore’s role in the slave trade*

Baltimore played a major role in both the national and international slave trade. Baltimore was a victim of its geography and topography because the city was centrally located and was known for having an excellent Harbor.<sup>65</sup> Surprisingly, Baltimore was a major hub for the domestic slave trade, but by 1810, the city also had one of the largest free African American populations in the United States.<sup>66</sup> Between 1790 and 1859, estimations suggest that one million slaves were “sold south” from

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<sup>60</sup> *Infra* Part III.

<sup>61</sup> W.E. BURGHARDT DUBOIS, *supra* note 52, at 125 (“The first United States cruise arrives on the African Coast in March 1820 and remained a “few weeks;” that since then four others had in two years made five visits in all; but “since the middle of last November, the commencement of the healthy season on that coast, no vessel has been, nor as your committee is informed, is, under orders for the service.”).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (“Again, it is asserted that “when vessels engaged in the slave trade have been detained by the American cruisers, and sent into the slave-holding states, there appears at once a difficulty in securing the freedom to these captives which the laws of the United States have decreed for them.”).

<sup>64</sup> *Id.*

<sup>65</sup> Richard Clayton, *A Bitter Inner Harbor Legacy: The Slave Trade*, BALT. SUN, July 12, 2000, [articles.baltimoresun.com/2000-07-12/news/0007120236\\_1\\_slave-pens-pratt-street-slave-trade](http://articles.baltimoresun.com/2000-07-12/news/0007120236_1_slave-pens-pratt-street-slave-trade) (Interstate traders in the domestic coast slave trade found Baltimore's excellent harbor, central location and position in the midst of a developing "selling market" attractive incentives in which to build their slave pens and base their operations near the bustling port).

<sup>66</sup> *See generally* RALPH CLAYTON, CASH FOR BLOOD: THE BALTIMORE TO NEW ORLEANS DOMESTIC SLAVE TRADE (Heritage Books Inc. 2002).

Maryland and Virginia in the domestic slave trade, with no regard to family ties.<sup>67</sup> The domestic slave trade was legal, and it was common for slaves “sold south” from Baltimore to be sent to southern ports; like New Orleans for sale, because there was a higher demand for free slave labor in the South.<sup>68</sup> Baltimore was a ‘sellers’ market for slave traders because it relied less on slave labor than it had pre-Revolution, which meant more people were willing to sell their slaves.<sup>69</sup> Benjamin Lundy, an abolitionist and Quaker, in 1825 described Baltimore wharves as being like “the coast of Africa... hardened freebooters and traffickers of human flesh, who have so long disgraced human nature by their infamous and ‘piratical’ practices.”<sup>70</sup> Downtown Baltimore had many slave pens used to temporarily house enslaved Black people.<sup>71</sup> Enslaved Blacks were put in slave pens when there slave owners visited Baltimore, or when the Black person was being sold by an owner who felt the enslaved Black person had a propensity to run.<sup>72</sup>

One of Baltimore’s most successful slavers was Austin Woolfolk. Woolfolk operated one of the largest, and most lucrative slave trade operations in the country out of Baltimore.<sup>73</sup> Woolfolk relied on catch phrases like “Cash for Negroes” in newspaper ads to build his slave trading empire.<sup>74</sup> Woolfolk focused on the legal domestic slave trade routes and dominated the market. For example in May June and July of 1825, Woolfolk was responsible for seventy percent of the domestic slave trade in Baltimore.<sup>75</sup> Woolfolk also was one of the first slave traders to use slave pens in Baltimore.<sup>76</sup> Woolfolk’s strangle hold on the legal domestic slave trade in Baltimore may explain why some merchants, like Gooding, would

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<sup>67</sup> Scot Shane, *The Secret History of City Slave Trade*, BALT. SUN, June 20, 1999, articles.baltimoresun.com/1999-06-20/topic/9906220293\_1\_slave-trade-buy-slaves-slaves-were-sold.

<sup>68</sup> CLAYTON, *supra* note 66.

<sup>69</sup> CALVIN SCHERMERHORN, *THE BUSINESS OF SLAVERY AND THE RISE OF AMERICAN CAPITALISM, 1815-1860*, 33-68 (Yale University Press, 2015).

<sup>70</sup> *Id.*

<sup>71</sup> Richard Clayton, *A Bitter Inner Harbor Legacy: The Slave Trade*, BALT. SUN, July 12, 2000, articles.baltimoresun.com/2000-07-12/news/0007120236\_1\_slave-pens-pratt-street-slave-trade.

<sup>72</sup> Scot Shane, *The Secret History of City Slave Trade*, BALT. SUN, June 20, 1999, articles.baltimoresun.com/1999-06-20/topic/9906220293\_1\_slave-trade-buy-slaves-slaves-were-sold.

<sup>73</sup> SCHERMERHORN, *supra* note 69, at 33-68.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> CLAYTON, *supra* note 71 (“One of the first major pens was built behind a white frame house near the corner of Cove and Pratt streets, near the intersection of what is today Martin Luther King Jr. Boulevard. The pen belonged to Tennessee native Austin Woolfolk, whose reign in Baltimore ran from 1818 to 1841.”).

pursue the illegal international route. At the very least Baltimore's robust domestic slave trade, market provided moral cover for merchants like John Gooding.<sup>77</sup>



**Figure 2: The slave pen near the corner of Cove (Martin Luther King Jr. Boulevard) and Pratt streets.**<sup>78</sup>

John Gooding<sup>79</sup>, Woolfork, and others maintained a very active slave trade market, but that was not the city's only claim to fame with respect to the slave trade. Many recognized the Port of Baltimore as the best place to build a ship for the illegal international slave trade. Baltimore-built ships sailed from the Port of Baltimore, taking part in the illegal international slave trade, as late as 1861.<sup>80</sup> The illegality of the international slave trade after 1808 makes it difficult to determine, with certainty, how many ships were built, or left the port of Baltimore to engage in the international slave trade. However, based on the regularity in which

<sup>77</sup> See Appendix I.

<sup>78</sup> CLAYTON, *supra* note 71.

<sup>79</sup> *Id.*

<sup>80</sup> W.E. BURGHARDT DUBOIS, *supra* note 52, at 298 (Noting that a ship called the *Storm King*, from Baltimore, brought 650 slaves to Cuba).

Baltimore ships were captured it seems clear that Baltimore ships played a significant role in facilitating the illegal trade.<sup>81</sup>

Baltimore ships had a reputation for being fast lightweight ships that could travel between ten to twelve knots, compared to merchant ships that would only travel five knots.<sup>82</sup> A fast ship meant a quicker voyage and a quick get away from ships patrolling the seas for illegal slave ships. In 1835, well after the United States outlawed the production of slave ships in United States ports, a British Commissioner at Sierra Leone complained “the vessels now building at Baltimore for the slave trade [were] of the fastest-sailing model which their skill and ingenuity could devise.”<sup>83</sup> An 1840’s report found that fifty two percent of the slave vessels captured in the spring and summer of 1839 were Baltimore built.<sup>84</sup> Baltimore ships were so commonly captured in the illegal slave trade that one reporter, who could not determine where a seized ship originated, simply wrote that he assumed “[i]t was probably Baltimore built”.<sup>85</sup>

Ships suspected of being built for the international slave trade, risked forfeiture under the 1807 Act.<sup>86</sup> Yet, Baltimore’s shipbuilders, lured by potential high profits, continued building vessels used to kidnap Africans for sale into slavery decades past that date suggesting that the reward was worth the risk. For example, in December 1839, the Government seized the *Ann* in Fell Point (located in Baltimore) because they suspected that the ship was being fitted to engage in the African Slave Trade.<sup>87</sup> Cunning merchants built their ships in Baltimore and retrofitted them else where, which is precisely what the indictment in *United States v. Gooding* suggested John Gooding did with the *General Winder*.<sup>88</sup>

### *B. Baltimore’s response to Gooding’s indictment*

Gooding’s prosecution and trial received considerable publicity; with some Baltimore lawyers going so far as to lobby President John Quincy Adams to abort the trial.<sup>89</sup> Adam’s recounted that there was a petition from

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<sup>81</sup> *Id.*

<sup>82</sup> JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 4 (Oxford University Press, 2011).

<sup>83</sup> LEONARDO MARQUES, *THE UNITED STATES AND THE TRANSATLANTIC SLAVE TRADE TO THE AMERICAS, 1776-1867* (Yale University Press, 2016).

<sup>84</sup> Ralph Clayton, *Baltimore’s African Slave Trade Connection*, *BALT. CHRON. & SENTINEL*, Apr. 4, 2002, [http://baltimorechronicle.com/slaveship\\_apr02.shtml](http://baltimorechronicle.com/slaveship_apr02.shtml).

<sup>85</sup> *Id.*

<sup>86</sup> *Infra* Part III.B.

<sup>87</sup> CLAYTON, *supra* note 84.

<sup>88</sup> *Id.*

<sup>89</sup> PETER GRAHAM FISH, *FEDERAL JUSTICE IN THE MID-ATLANTIC SOUTH: UNITED*

Gooding himself requesting that a *[nolle] prosequi* be entered, which was supported by “respectable citizens of Baltimore”, because of Gooding’s contributions during the War of 1812 as a financier of privateering ships.<sup>90</sup> Many Baltimoreans expressed sympathy for Gooding because they believed he only engaged in the international slave trade to support his family and stave off bankruptcy.<sup>91</sup> Tragically and ironically, that same sympathy was not extended to the people that Gooding sold into slavery.

President Adams recounted several attempts by prominent Baltimoreans to persuade him to discontinue the prosecution of Gooding. Mr. Wilson, one of Gooding’s attorneys, attempted to convince Adams to intervene on behalf of Gooding, because he believed that the witnesses for the trial were going to provide false testimony against Gooding.<sup>92</sup> Jonathan D. Meredith, a respected attorney in Baltimore and legal consultant for both the Bank of Baltimore and the local branch of the Bank of the United States, requested that Adams discontinue the prosecution of Gooding by again reminding Adams that Gooding “was a warm patriot in the late war with Great Brittan.”<sup>93</sup> Adams also noted that General Leakin, who eventually became the mayor of Baltimore City, pled for executive intervention on behalf of Gooding.<sup>94</sup> Even members of Congress wanted Adams to end the prosecution.<sup>95</sup>

Despite immense pressure, Adams refused to interfere with the prosecution of Gooding. Adams did not stop the prosecution in part, because there were people also petitioning Adams not to interfere, though he does not document who these people are in his memoirs.<sup>96</sup> Personally, Adams believed “the Executive should not arrest the arm of the law” and

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STATES COURTS FROM MARYLAND TO THE CAROLINAS, 1789-1835 288 (2002).

<sup>90</sup> Charles Francis Adams ed., *7 Memoirs of John Quincy Adams: 1795-1848*, at 305 (Philadelphia: J.B Lippincott & Co., 1875) (emphasis added).

<sup>91</sup> *Id.* at 372 (“He has a large and helpless family, and, when going to wreck and ruin, speculated in the slave-trade to save himself, was detected, and is under prosecution.”).

<sup>92</sup> *Id.* at 377.

<sup>93</sup> *Id.* at 372.

<sup>94</sup> Charles Francis Adams ed., *7 Memoirs of John Quincy Adams: 1795-1848*, at 372 (Philadelphia: J.B Lippincott & Co., 1875); *Sheppard C. Leakin (1790-1867)*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES) [msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/012400/012471/html/12471bio.html](http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/012400/012471/html/12471bio.html) (Last visited Jan, 30, 2017).

<sup>95</sup> *Id.* at 372.

<sup>96</sup> *Id.* (“The sympathies of many worthy persons in Baltimore have thus been enlisted in his favor, and they petitioned me to arrest the prosecution against him. . . But I have also received remonstrances against any interposition in his behalf, and I intimated to these gentlemen the great objections there would be to any Executive interference to rescue the accused from trial.”).

that a jury was in the best position to determine if Gooding was guilty.<sup>97</sup> Noticeably, no one who pled for Adams to step in on Gooding's behalf suggested that Gooding was innocent. Many prominent Baltimoreans knew that Gooding was guilty of illegally engaging in the slave trade, yet still believed that he should not be punished.

### **PART III: THE PIECEMEAL ROAD TO THE SLAVE TRADE ACT OF 1818**

Racialized slavery of African Americans was a common and legal practice until the Thirteenth Amendment prohibited slavery in 1865, well after the United States formally prohibited its involvement in the international slave trade in 1807.<sup>98</sup> In *United States v. Gooding*, the Supreme Court examines if John Gooding specifically violated the 1818 Act, based on the Government's indictment.<sup>99</sup> However, the 1818 Act is one of many acts in the late seventeenth hundreds, and early eighteen centuries that the United States Congress passed to limit, and eventually restrict United States' citizen involvement in the international slave trade.<sup>100</sup> The United States Constitution, which prohibited a ban on the slave trade until 1808, hamstrung the 1794 Act, and the other acts that followed, until Congress could regulate the trade.

*A. The regulatory path to significantly limiting the United States' involvement in the slave trade ultimately proved ineffective and plagued with loopholes.*

The 1818 Act is a progeny of Congress' first attempt to limit the United States involvement in the international slave trade, the Slave Trade Act of 1794.<sup>101</sup> The 1794 Act, signed by the first president of the United States George Washington, was the country's first attempt to constitutionally limit the United States involvement in the international slave trade.<sup>102</sup> The 1794 Act focused exclusively on vessels engaged in the international slave trade, and prohibited the use of United States shipyards

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<sup>97</sup> *Id.* at 377.

<sup>98</sup> Slavery remained legal in the United States until the ratification of the Thirteenth Amendment in 1865. *See* U.S. CONST. amend. XIII § 1; An Act of March 2, 1807, 2 Stat. 426 (1807).

<sup>99</sup> 25 U.S. 460, 461 (1827) ("This is the case of an indictment against Gooding for being engaged in the slave trade, contrary to the prohibitions of the act of Congress of the 20th of April, 1818.").

<sup>100</sup> *Supra* Part III.B.

<sup>101</sup> Act of Mar. 22, 1794, ch.11, 1 Stat. 347.

<sup>102</sup> *Id.*



to build or fit a ship with fitments, for the international slave trade.<sup>103</sup> The 1794 Act relied on two enforcement mechanisms. First the act required that all ships sailing from Africa “give bond with sufficient sureties, to the treasurer of the United States, that none of the natives of Africa, or any other foreign country or place, shall be taken on board... to be transported, or sold as slaves in any other foreign place, within nine months thereafter.”<sup>104</sup> This was an attempt to ensure that every ship was affirmatively aware of the law, and complied. Second, if one was found to be in violation of the act their ship could be confiscated by the United States, and any informant that provided information that led to the confiscation could collect half of the fines.<sup>105</sup> This incentivized “ship captains and mariners to monitor the activities of anyone they suspected of being involved in the illegal slave trade”.<sup>106</sup>

The 1794 Act had a limited effect on the United States’ overt participation in the international slave trade until 1800, when Georgia and South Carolina resumed their participation in the international slave trade, by accepting slaves from Africa.<sup>107</sup> South Carolina started to import slaves from Africa, in violation of the 1794 and 1800 Acts, between 1803 and 1807, which upset the federal government and the Northern states.<sup>108</sup> South Carolina found a ban impossible to enforce. Five hours after legalizing the importation of slaves, two British ships sailed into Charleston with slaves.<sup>109</sup> Until the 1807 Act went into effect in 1808, many still smuggled captured Africans into the United States to be sold as slaves.<sup>110</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> Act of Mar. 22, 1794, ch.11, 1 Stat. 347.

<sup>105</sup> Act of Mar. 22, 1794, ch.11, 1 Stat. 347.

<sup>106</sup> SCHOMBURG CENTER FOR RESEARCH IN BLACK CULTURE, *supra* note 23.

<sup>107</sup> *Id.* (Until 1800 none of the states had reopened the African trade, which had been effectively closed since the Revolution...After 1800, however, Georgia and South Carolina reopened their international slave trade, and in the next eight years, these two states would introduce about 100,000 new slaves from Africa).

<sup>108</sup> Patrick S. Brady, *The Slave Trade and Sectionalism in South Carolina, 1787-1808*, 38 J. SOUTHERN HIST. 601, 602 (1972) (Noting that “South Carolina waited until 1803 to resume the human traffic, thereby assuring herself a monopoly of the strictures of her sister states” who had either banned or prohibitively regulated the importation of foreign slaves).

<sup>109</sup> Matthew E. Mason, *Slavery Overshadowed: Congress Debates Prohibiting the Atlantic Slave Trade to the United States, 1806-1807*, 20 J. EARLY REPUBLIC 59, 62 (Spring 2000) (“South Carolina proscribed the foreign trade through a series of temporary acts beginning in 1787 but found enforcement to be nearly impossible and reopened its legal slave trade in 1803 at the urging of the governor. Five hours after the passage of this last bill, two large British ships sailed into Charleston harbor to supply-now legally-the insatiable demand for new slaves.”).

<sup>110</sup> *Id.*

In 1800, Congress passed the Slave Trade Act of 1800 (“1800 Act”), in an attempt to address a flaw in the 1794 Act.<sup>111</sup> While the 1794 Act was effective at regulating the vessels involved in the international slave trade, it did nothing to stop United States citizens from investing in the trade. The 1800 Act focused primarily on citizen involvement in the international slave trade. The 1800 Act made it unlawful for any citizen of the United States to invest in a vessel that participated in the international slave trade.<sup>112</sup> The penalty was “a sum of money equal to double the value of the right or property in such vessel.”<sup>113</sup> This meant that United States citizens could no longer invest in any vessel engaged in the slave trade, even if it was legally allowed on a non-U.S. ship by another country.<sup>114</sup> The 1800 Act further added to the restrictions imposed by the 1794 Act by prohibiting any United States citizen from residing or serving on any vessel that engaged in the international slave trade regardless of if the ship originated from a United States port.<sup>115</sup>

The United States’ final attempt to regulate the international slave trade was the Slave Trade Act of 1803 (“1803 Act”).<sup>116</sup> This final regulatory act attempted to address the actual import—people from Africa. The act again tinkered with the fines for violating the act, and clarified that “negro, mulatto, or other person of color” imported as indentured servants were considered slaves.<sup>117</sup> This 1803 Act demonstrates how nefarious and determined United States merchants were to continue to engage in the importation of slaves from Africa.

*B. The 1807 prohibition, and its amendments, were more robust, but equally as ineffective at dissuading United States merchants from engaging in the lucrative international slave trade.*

In 1807, with the end to the 1808 prohibition looming, Congress passed the 1807 Act, which prohibited any new slaves from being imported to the United States.<sup>118</sup> The new act definitively stated “it shall not be lawful to import or bring into the United States...from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose ... as a slave.”<sup>119</sup> The 1807 Act carried the

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<sup>111</sup> An Act of May 10, 1800, Ch.51, 2 Stat. 70 (1800).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> An Act of May 10, 1800, Ch.51, 2 Stat. 70 (1800).

<sup>115</sup> *Id.*

<sup>116</sup> Act of February 28, 1803, Ch 10, 2 Stat. 205 (1803).

<sup>117</sup> An Act of March 2, 1807, 2 Stat. 426 (1807).

<sup>118</sup> An Act of March 2, 1807, 2 Stat. 426 (1807).

<sup>119</sup> *Id.*

largest penalties to date of up to twenty thousand dollars for anyone found to be building or fitting a ship for the slave trade, up to ten thousand dollars, and a jail term of five to ten years for Americans found on a ship importing slaves.<sup>120</sup> Anyone who purchased an illegally imported slave would have to forfeit said slave, and pay an eight thousand dollar penalty for every illegally imported slave.<sup>121</sup> The 1807 Act also authorized the navy to interdict ships involved with the slave trade that were in United States ports or off the United States Coast.<sup>122</sup> The 1807 Act was the first act not confined by the 1808 compromise, making it naturally the United States Federal Government's most thorough rebuke of the international slave trade.

Congress started to take action on the 1807 Act on December 16, 1805 when Senator Row Bradley, a Democrat from Vermont introduced the bill; Barnabas Bidwell, a Congressman from Massachusetts, introduced a similar bill in February 1806.<sup>123</sup> Initially, the bill failed, because some Congressman raised doubts about the constitutionality of passing the bill before 1808, even if the bill did not take effect until January 1, 1808.<sup>124</sup> However, after President Thomas Jefferson assured Congress on December 2, 1806 that passing the bill, to take effect on January 1, 1808 was constitutional, Bradley gave notice that he planned to re-introduce his bill on December 3, 1806.<sup>125</sup>

Many Congressmen agreed with the bill in theory but disagreed with the details.<sup>126</sup> The debate on the bill was most contentious with respect to, what to do with people from Africa brought illegally to America, and what the penalty should be for violating the law.<sup>127</sup> The North and South were divided on what to do with the Africans brought illegally to America. Southern states were concerned with the idea of having free Africans in the South, which they thought risk confusion and a slave revolt, while Northern States were concerned that if the United States sold the illegally imported

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<sup>120</sup> *Id.*

<sup>121</sup> An Act of March 2, 1807, 2 Stat. 426 (1807).

<sup>122</sup> *Id.*

<sup>123</sup> Matthew E. Mason, *Slavery Overshadowed: Congress Debates Prohibiting the Atlantic Slave Trade to the United States, 1806-1807*, 20 J. EARLY REPUBLIC 59, 62-63 (Spring 2000).

<sup>124</sup> *Id.* at 63 ("Virginia's John Randolph and others raised doubts about the constitutionality of Congress passing such a bill before 1808, so the motion failed in this first session of the Ninth Congress.").

<sup>125</sup> *Id.*; Annals of Congress, Senate, 9th Congress, 2nd Session, 17-18 (Dec. 1806).

<sup>126</sup> *Id.* at 64 ("Benjamin Tallmadge of New York said it best: "Since I have had the honor of a seat in this House, I can scarcely recollect an instance in which the members seem so generally to agree in the principles of a bill, and yet differ so widely as to its details.").

<sup>127</sup> *Id.*

slaves than the United States would be participating in the slave trade.<sup>128</sup> Eventually Congress decided to side step the issue completely and let each state decide what to do with the captured illegally imported Africans.<sup>129</sup>

On the matter of the penalty, there was still a North/South divide but the divide centered more on issues of morality. Congressman John Simlie of Pennsylvania argued that the penalty for the crime of illegally importing slaves into the United States should be death, but many in the South believed that position was not practical, and argued the slavery is not morally reprehensible in the South and therefore should not warrant death.<sup>130</sup> The 1807 Act did not carry a penalty of death but penalties were severe.

In 1818, Congress passed a new act, amending the 1807 Act.<sup>131</sup> The 1818 Act passed with little debate by Congress.<sup>132</sup> The new law decreased the penalties for various offenses.<sup>133</sup> Section three and four of the 1818 Act lowered the penalty for violating the act to a fine between one and five thousand dollars, and a prison term between three and seven years.<sup>134</sup> The 1818 Act's penalties also now applied to everyone equally regardless of their role in the international slave trade.<sup>135</sup> Finally, the 1818 Act lowered the penalty for purchasing an imported slave to one thousand dollars and provided an exemption to the forfeiture clause of the act for "any regulation by any legislature of any state".<sup>136</sup> The penalties for violating the 1818 Act were significantly watered down, however the penalties were still significant; five thousand dollars in 1818 is the equivalent to over seventy eight thousand dollars in 2015.<sup>137</sup>

The 1818 Act was not a completely watered down version of the 1807 Act. The 1818 Act shifted the burden of proof from the plaintiff to the defendant to "prove that the negro or mulatto, or person of colour, which he or they shall be charged with have being brought into the United States, or with purchasing ... was brought into the United States at least five years previous to the commencement of the prosecution."<sup>138</sup> Under the new act, someone in possession of an African slave now had to prove how he acquired the slave. The "African-ness" of the enslaved individual would be

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<sup>128</sup> *Id.* at 65-66.

<sup>129</sup> An Act of March 2, 1807, 2 Stat. 426 (1807).

<sup>130</sup> Annals of Congress, 9th Cong., 2d sess., 236-42.

<sup>131</sup> Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818).

<sup>132</sup> W.E. BURGHARDT DUBOIS, *supra* note 52, at 118.

<sup>133</sup> Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *The Inflation Calculator*, <http://www.westegg.com/inflation/>.

<sup>138</sup> Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818).

prima facie evidence that the owner had to produce evidence to refute. While this shifting of the burden was the only real enhancement over the 1818 Act, even that came with a new statute of limitations provision, limiting prosecution under the act.

Putting the rationale or justifications aside, Congress attempted to close the African slave trade in the United States many times, and learned from the shortcomings of previous attempts to close the trade. With each piece of new legislation, Congress did move closer to ending the African slave trade.<sup>139</sup> By 1818, Congress had closed the trade to all but the most determined merchants who engaged in the African slave trade, like John Gooding a merchant from Baltimore, Maryland.

#### **PART IV: UNITED STATES V. GOODING AND ITS EFFECTS**

In *United States v. Gooding*,<sup>140</sup> the United States Supreme Court's ruling was substantively important, because of the Marshall Court's stance on the 1818 Act; and procedurally important because of the Marshall Court's ruling on the evidence issue presented at trial. The Government formally charged, John Gooding, the criminal defendant in the case, for violating the 1818 Act, however Gooding escaped charges because of an imperfect indictment.<sup>141</sup>

The Government's theory of the case, if true, shows how resolved Gooding was to profit from the international slave trade.<sup>142</sup> The Government first alleged that Gooding purchased the *General Winder*, while still under construction in the Port of Baltimore from William McElderry.<sup>143</sup> Next they alleged that Gooding paid to have the ship completed, and appointed Captain John Hill to supervise the process.<sup>144</sup> The Government further alleged that materials to fit the *General Winder* for the slave trade were shipped to the Port of Baltimore on another ship chartered

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<sup>139</sup> While the Slave Trade Act of 1818 did lower the penalties for the violating the 1807, the fines were still extreme for the time, and the act did put the burden of proof on the defendant to prove that they did not violate the act, which made it easier to prosecute those found to violate the act.

<sup>140</sup> 25 U.S. 460 (1827).

<sup>141</sup> *United States v. Gooding*, 25 U.S. 460 (1827).

<sup>142</sup> See Appendix I.

<sup>143</sup> Lower Court Records in Record Group 267, Records of the United States Supreme Court, Entry 21, Appellate Case Files, 1792-2013, Case File 1444, *United States v. Gooding*, National Archives Building, Washington D.C. [hereinafter LOWER COURT RECORD].

<sup>144</sup> *Id.* (While Gooding owned the ship, and under Captain Hill's supervision, Gooding paid for "three dozen brooms, eighteen scrapers, and two trumpets" to be put onto the *General Winder* while still in the Port of Baltimore).

by Gooding, the *Pocahontas*.<sup>145</sup> The *General Winder* left the Port of Baltimore for St. Thomas in the West Indies on August 21, 1824, with the *Pocahontas* following shortly thereafter in September.<sup>146</sup> Finally, Once both ships were in St. Thomas the Government believed the *General Winder* was retrofitted for, and employed to engage in the African Slave trade.<sup>147</sup>

The Government did not get to prosecute the case against Gooding because in a move typically reserved for a courtroom drama on television, Gooding's attorney, Roger B. Taney (who would later become the Chief Justice for the United States Supreme Court) argued in open court, in front of the jury, that the indictment was defective.<sup>148</sup> Taney further argued that the indictment should be quashed because the crimes Gooding was charged with were un-indictable offenses.<sup>149</sup> Interestingly, Taney had already unsuccessfully motion to quash the indictment in a pre-trial motion.<sup>150</sup> Since the motion to quash the indictment had already failed, it seems like Taney's revival of the issue was a ploy for the jury, and not an attempt to persuade the judges to rethink their ruling. The procedure for ruling on pre-trial motions during that time is unknown, and the lower court record does not cite which judge ruled on the motion. Therefore, it is unclear if one judge or both judges ruled on the first motion. However, both judges were listed as being present when the motion to quash was argued.<sup>151</sup> If only one judge ruled on the previously denied motion, Taney's revival of his argument that the indictment was defective may have been intentional to create the division of opinion between the judges. If this was Taney's strategy, it seems peculiar that the Court would contemplate a motion already ruled on earlier. However, in an equally rare move, District Court Judge Glenn, and Associate Supreme Court Justice Duvall decided to suspend the proceeding, dismiss the jury and file a certificate of division to the Supreme Court to resolve their division of opinion before they continued.<sup>152</sup>

*A. The lower court ruling and the insurmountable "division of opinion".*

The Circuit Court for the District of Maryland for the Fourth Circuit, in Baltimore City, sent the transcript of the proceedings in *United States v. Gooding* to the Supreme Court on December 8, 1826.<sup>153</sup> The transcript list

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Elias Glenn, the Judge for the District Court of Maryland at the time, and Supreme Court Associate Justice Gabriel Duvall, riding circuit, as presiding over the case.<sup>154</sup> Justice Duvall was born in Maryland, politically active, both locally and nationally, and served as Chief Justice to the Maryland General Court before becoming an Associate Justice to the Supreme Court.<sup>155</sup> Given Duvall's ties to Maryland it would make sense that he would be riding circuit in Baltimore.<sup>156</sup> Justice Duvall does not stand out for his work as an Associate Justice in the Supreme Court, in part, because of how Justice Marshall ran the court and authored the majority of the opinions.<sup>157</sup> However, Duvall often would ride circuit and preside in circuit court cases. Before Glenn sat on the bench, he was the U.S. Attorney for Maryland.<sup>158</sup> President James Monroe appointed Glenn to the U.S. District Court for the District of Maryland on December 16, 1824 and Glenn remained on the bench until April 1, 1836, when he resigned because of failing health.<sup>159</sup> In an interesting full circle moment, as Glenn was leaving the bench one of his last official acts as a judge was administering the oath to Roger B. Taney, the newly appointed Chief Justice of the U.S. Supreme Court.<sup>160</sup>

The record also listed Nathaniel Williams, the United States Attorney who prosecuted John Gooding, and Paul Bentalou, as a Marshal.<sup>161</sup> Williams was the United States Attorney for the District of Maryland from 1824 until 1841, so this was one of his earlier cases during his tenure.<sup>162</sup> Bentalou was the U.S. Marshall for the District of Maryland

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<sup>154</sup> *The Supreme Court of the United States and the Federal Judiciary*, FEDERAL JUDICIAL CENTER, [www.fjc.gov/history/home.nsf/page/courts\\_supreme.html](http://www.fjc.gov/history/home.nsf/page/courts_supreme.html) (The duties of circuit riding required the Supreme Court justices to spend most of their time traveling and prompted recurrent efforts to reduce or eliminate this responsibility... When Congress abolished the circuit courts in 1911, it finally made the justices' circuit duty optional).

<sup>155</sup> CHRISTOPHER L. TOMLINS, *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 476–77 (2005).

<sup>156</sup> Justice Duvall only served in the Fourth Circuit, which at the time consisted of Maryland and Delaware, when riding circuit during his tenure as a Supreme Court Justice.

<sup>157</sup> *See generally* ERNEST SUTHERLAND BATES, *THE STORY OF THE SUPREME COURT* 109 (Bobbs-Merrill, Indianapolis 1936) (asserting that Justice Duvall is “probably the most insignificant of all Supreme Court Judges); *but see generally* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983).

<sup>158</sup> Jennifer Hafner, *Elias Glenn (1769-1846)*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES) (2012), [msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/016200/016205/html/16205bio.html](http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/016200/016205/html/16205bio.html) (last Visited: Dec. 28, 2016).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> LOWER COURT RECORD, *supra* note 143.

<sup>162</sup> *Nathaniel F. Williams (1782-1864)*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES)

from 1817 until his death on September 26, 1826 from a fall in a warehouse.<sup>163</sup> Bentalou was alive when the proceedings began, but he was deceased before the lower court record was produced for the Supreme Court, so it is unclear why he was listed.<sup>164</sup>

The transcript of the record prepared for the Supreme Court summarizes the case presented to the grand jury as:

[I]nquiring for the body of the District of Maryland, upon their oaths do present John Gooding, Merchant of the City of Baltimore was interested in a vessel called the *General Winder*, which vessel left the Port of Baltimore some times on or about the month of September in the year 1824 and which vessel was and has been engaged in the African slave trade under some other name, and that the said John Gooding was interested in the traffic thus carried in violation of the laws of the United States in such case made in provide<sup>165</sup>

The grand jury was impaneled to hear the case during the Circuit Court's May term on May 12, 1826. As all grand juries of the time the panel consisted of all men, presumably white, with Tobias E. Stansbury, a veteran of the American Revolutionary War and the War of 1812, as the jury foremen.<sup>166</sup>

During the first day of the grand jury hearing in May 1826 William Parris, T.W. Hayes, John Patrick, Captain Michael Brown of the *Pocahontas*, William Ridgeway, Barney L. Lynch (the ship joiner at point), Emanuel Carr, Buck Hendricks, Rueben Rofs, Isaiah Maniker, and John Clean were listed as witness.<sup>167</sup> The record does not list what testimony each witness provided, but the Government seemed to have a solid case against Mr. Gooding for violating the 1818 Act. The Government had both a captain of one of the ships alleged to be involved in Gooding's violation, and a ship maker who may have fitted the *General Winder* set to testify

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msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001800/001824/html/01824bio.html (last visited Dec. 28, 2016).

<sup>163</sup> See *Col. Paul Bentalou*, FIND A GRAVE, www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=10434932 (last visited Dec. 28, 2016).

<sup>164</sup> *Id.*

<sup>165</sup> LOWER COURT RECORD, *supra* note 143.

<sup>166</sup> See *Gen. Tobias Emerson Stansbury*, FIND A GRAVE www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=148662374 (last visited Dec. 28, 2016).

<sup>167</sup> LOWER COURT RECORD, *supra* note 143.



during the hearing.<sup>168</sup> Captain Michael Brown, of the *Pocahontas*, could have provided testimony about what involvement Gooding had in preparing the *General Winder* with fitments for the slave trade, and how the *Pocahontas* was involved with Gooding's plot to engage in the international slave trade.<sup>169</sup> As a ship joiner is it unclear exactly what testimony Lynch could provide for the grand jury.<sup>170</sup> As a ship joiner by trade Lynch had worked on the design and interior of ships, so Lynch could provide expert testimony based on his experience as a ship joiner or he could provide direct testimony about the interior work he did for the *General Winder*.<sup>171</sup>

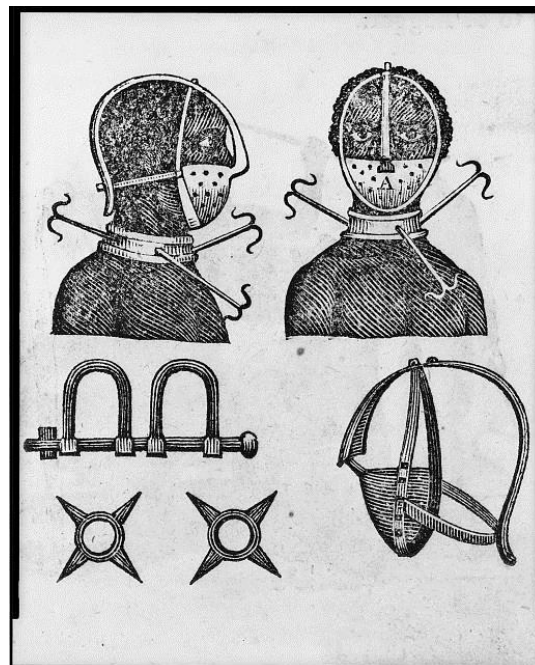


Figure 3: Iron mask, collar, leg shackles, and spurs used to restrict slaves<sup>172</sup>

Nathan Williams, representing the Government, laid out a thorough seven-count indictment against Gooding for violating the Slave Trade Act

<sup>168</sup> *Id.* (It is unclear what the witnesses were present were going to testify about during the Grand Jury hearing. The record does not reflect that either Brown or Lynch were going to testify against Gooding, however their presence at the grand jury hearing suggest that they may provide favorable testimony for the Government).

<sup>169</sup> See note 135 and accompanying text.

<sup>170</sup> LOWER COURT RECORD, *supra* note 143.

<sup>171</sup> MERRIAM-WEBSTER DICTIONARY 2016 (2016 ed.) <http://www.merriam-webster.com/dictionary/ship%20joiner> (a joiner who constructs the woodwork in a ship).

<sup>172</sup> Iron mask, collar, leg shackles, and spurs used to restrict slaves, <http://www.loc.gov/pictures/resource/cph.3a32403/> (last visited Dec. 27, 2016) (There is no record of exactly what fitments for the slave trade were applied to the *General Winder*).

of 1818. The Government presented a seven-count indictment to the grand jury alleged first that Gooding “fit out, for himself as owner, in the Port of Baltimore...the *General Winder* with the intent to employ the said vessel... in procuring Negros from... Africa to be transported... to the Island of Cuba... to be sold as slaves”.<sup>173</sup> Count two and three of the indictment charged that Gooding, as the owner of the *General Winder*, “did...send away from the Port of Baltimore...the *General Winder* with the intent to employ... the *General Winder* in procuring Negros from a foreign country”.<sup>174</sup> Moreover, that Gooding “did aid in fitting in the Port of Baltimore the *General Winder* with intent that said vessel should *be employed* in procuring Negros from a foreign country”.<sup>175</sup> Count four of the indictment focused more on Gooding’s ship, the *General Winder*’s direct involvement with the slave trade and alleged that Gooding did, “abet the taking on board, from one of the coast of Africa... divers Negros, two wit two hundred and ninety, not being inhabitants... either of the States or territories... for the purpose of selling such Negros as slaves”.<sup>176</sup> Count five and six alleged, that the *General Winder*, did “sail from the Port of Baltimore... the *General Winder*, with the intent that the said vessel... *should* be employed in the procuring of Negros from a foreign country... to be sold as slaves”; and that Gooding “did for himself as owner cause to be sent away from the port of Baltimore...the *General Winder* with intent that the vessel... *should* be employed in procuring Negros from a foreign country”.<sup>177</sup> The final count seemed to draw from the prior six counts of the indictment, and alleged that Gooding “for himself or for other persons as factors, fit out, equip, load[ed] or otherwise prepare... The *General Winder* in the Port of Baltimore... with intent that the said ship... *should* be employed in procuring Negros from a foreign country”.<sup>178</sup>

Gooding’s affidavit is where the Government’s case started to unravel. A team of lawyers including, Roger B. Taney, S. Heath, Charles Mitchell John Glenn Upton, and Mr. Wilson, represented Gooding.<sup>179</sup> William Writ, the Attorney General during Gooding’s trial, wrote Henry Clay noting that Gooding was represented by five of the “most eminent counsel at the bar” and “requested that other counsel be employed to assist

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<sup>173</sup> LOWER COURT RECORD, *supra* note 143.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (emphasis added).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> *Id.* (emphasis added).

<sup>179</sup> LOWER COURT RECORD, *supra* note 143; *see also* FISH, *supra* note 89, at 289 (Wilson is not listed on the lower court record however President John Quincy wrote in his memoir that Wilson visited him on behalf of Gooding as his attorney).

the district attorney.”<sup>180</sup> Through his team of lawyers Gooding denied the charges in an affidavit where he stated he:

[W]as not the owner of the *General Winder*, nor in anyway interested in the said vessel at the time *whilst she was engaged, or employed or prepared for or sent away, or equipped, loaded, or fitted out in any illegal trade or traffic*, and especially the slave trade from the Port of Baltimore, or any port in the United States...did not for himself as owner, nor for any other person or persons at time fit out, or send away, or cause to sail, or equip or load, or otherwise prepare said vessel or cause any of the said acts to be done, nor aid, nor abet the same with the intent to employ the said vessel in the slave trade or any other unlawful trade.<sup>181</sup>

Gooding did not take a definitive stance on the *General Winder's* involvement in the slave trade in his affidavit. Instead, Gooding argued that if the *General Winder* did participate in the slave trade he had no interest in the matter, and did not authorize the ship's involvement. Also embedded in Gooding's affidavit was the denial of any intent to engage in the illegal slave trade, a point that would eventually lead to the undoing of the indictment. Gooding denied all the charges in the indictment with respect to the “intent to employ”. Gooding's affidavit also did not address any allegations about the fitments for the slave trade he had shipped on the *Pocahontas*.

Gooding's argument that he was not “interested” in the *General Winder* seems difficult to prove because he did own the ship, and there is no proof that *Gooding* was not the owner and principal of the ship. Gooding goes further in his affidavit to affirmatively argue that:

The said vessel was built, equipped and fitted out in Baltimore as a lawful merchant vessel or ship, and employed and intended to be employed in a lawful trade and business, and was regularly fitted out or equip, prepared, loaded and cleared with a lawful and ordinary cargo for the West Indies and was in no way equipped as an African trading vessel in the port of

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<sup>180</sup> DWIGHT F. HENDERSON, CONGRESS, COURTS AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829, at 198 (1985).

<sup>181</sup> LOWER COURT RECORD, *supra* note 143.

Baltimore or elsewhere ...and was never engaged in the said business whilst this defendant and traverser was in any way interested in her, or acted as agent or other wise respecting the said vessel<sup>182</sup>

It is unclear what evidence Gooding would have presented demonstrating that the *General Winder* was never fitted for the slave trade. However, again Gooding makes a nuanced claim that he was never interested in the ship while, it was ever engaged in the slave trade, which seems to be difficult to prove at trial.

While the Government provided many witnesses to build their case, Gooding's affidavit only provided two, Mr. Jacob Waters and John Patrick.<sup>183</sup> Waters and Patrick were both agents at the Custom House at the Port of Baltimore that Gooding proffered would provide the "outward manifest" for the *General Winder* and the *Pocahontas*.<sup>184</sup> An outward manifest would provide information like the ships name and owner, the cargo, and the ports the ship is visiting.<sup>185</sup> If the witnesses Gooding provided could only speak to the outward manifest he provided than neither witness was very helpful, because an outward manifest did not rebut the Government's charge that the *General Winder* was used to transport slaves from Africa to Cuba.<sup>186</sup> At best, Waters and Patrick could only testify to what official papers Gooding filed with the customs house. While that evidence would corroborate Gooding's defense, it would not be compelling evidence to over come the Government's theory of the case. If Gooding participated in the illegal slave trade than he would have also submitted false paper work to get approval for his voyage. Moreover, the Government was already prepared to prove that Gooding was the mastermind behind the plan to fit the *General Winder* for the slave trade.<sup>187</sup>

While Waters and Patrick did not appear to be the best witnesses, they were excellent justifications to postpone Gooding's trial, because they both prepared the outward manifest for the *General Winder* and the *Pocahontas*, they both were out of the country, and the outward manifest to both ships were lost.<sup>188</sup> Gooding argued that they both were essential to his defense and would be present for the December term of the court, therefore

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See generally 19 C.F.R. § 4.63 (A modern version for the a law governing outward manifest).

<sup>186</sup> LOWER COURT RECORD, *supra* note 143.

<sup>187</sup> See note 142-47 and accompanying text.

<sup>188</sup> LOWER COURT RECORD, *supra* note 143.

the court granted Gooding's motion for a continuance, and the case was rescheduled for December 8, 1826.<sup>189</sup>

Gooding's motions are what brought the trial to a stand still. On December 19, 1826 when Williams presented and filed the indictment, Gooding entered a plea, before the jury was sworn in to hear the case.<sup>190</sup> However, on Saturday, December 23, 1826, Gooding withdrew his plea and filed a motion to quash the indictment.<sup>191</sup> The court denied the motion on December 26, and Gooding entered a plea of not guilty to the first six-counts of the indictment, and he challenged the seventh count.<sup>192</sup>

Gooding, represented by Roger Taney among others, made several arguments in the motion to quash the indictment.<sup>193</sup> First, Gooding argued that the 1818 Act for which he was being indicted "requires a special remedy pointed out and proscribed" that the indictment does not support.<sup>194</sup> This suggested that Gooding believed that he should only be forced to forfeit the ship under section two of the 1818 Act as the owner of the *General Winder*.<sup>195</sup> Second, in pleading before the court, Gooding argued that he is not guilty on the first six counts in the indictment, and not required to respond to the seventh count because it "wants form...charges all the offenses in the alternative... charges more than one offense in the same count... and...is in other respects unclear, informal, and insufficient."<sup>196</sup> The Government only argued that they could prove the seventh count, and noted that in not responding to the seventh count Gooding did not deny the charges.<sup>197</sup> The court sided with Gooding and quashed the seventh indictment<sup>198</sup>

The Court proceedings were again delayed over the evidence presented.<sup>199</sup> The Government presented evidence from an unnamed witness

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<sup>189</sup> *Id.*

<sup>190</sup> Records of the U.S. Circuit Court, Records of the Baltimore Division, including minutes, 1790-1911; dockets, 1790-1911, National Archives Building, Washington, DC. (The minutes do not specify what Gooding plead) [hereinafter LOWER COURT MINUTES].

<sup>191</sup> *Id.*

<sup>192</sup> See *supra* notes 148-51 and accompanying text.

<sup>193</sup> LOWER COURT RECORD, *supra* note 143 (The record does not separate the motions filed. However, the record does note that Gooding filed a motion to quash that was denied and he is again reviving the motion that was already denied).

<sup>194</sup> *Id.*

<sup>195</sup> Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818) (Specially § 2 of the Act applies to owners of ships built in the United States to engage in the international slave trade).

<sup>196</sup> Lower Court Records in Record Group 267, Records of the United States Supreme Court, Entry 21, Appellate Case Files, 1792-2013, Case File 1444, *United States v.*

*Gooding.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

who said he heard Gooding say that he successfully delivered two hundred and ninety slaves to Cuba.<sup>200</sup> Another unnamed witness said that he heard Gooding telling a creditor that he would pay half his debt once the *General Winder* arrived in Cuba.<sup>201</sup> Finally, on December 30, 1826 the Government offered testimony from Captain Peter L. Coit.<sup>202</sup> Captain Coit was the prosecution's star witness, because Coit's testimony could prove that Gooding knowingly employed the *General Winder* in the international slave trade. Coit alleged that Captain Hill offered him "seventy dollars per month and five dollars per head for every prime slave which should be brought to Cuba" to join him on as a crew member of the *General Winder*.<sup>203</sup> A skeptical Coit asked Captain Hill how he would pay the crew if there was a disaster and Hill replied "Uncle John".<sup>204</sup> Gooding objected to the admission of Coit's testimony.<sup>205</sup>

The division of opinion between Judge Glenn and Associate Justice Duvall initially was over whether Captain Coit's testimony was admissible.<sup>206</sup> The Circuit Court deliberated for four days before deciding that only the Supreme Court could resolve their division of opinion.<sup>207</sup> Even though Coit's testimony was the impetus for the division, the court enlarged the division of opinion to clarify issues with the indictment, even though those issues were addressed through motions the court already denied.<sup>208</sup> It is unclear where either Associate Justice Duvall or Judge Glenn disagreed on the seven issues enumerated in their division of opinion. The minutes for the Circuit Court of Maryland recorded the evidence issue with Coit's testimony but it does not list the other issues that would eventually come before the court.<sup>209</sup> Perhaps Associate Justice Duvall and District Court Judge Glenn did have a genuine issue with the evidence issue but they already addressed them with the indictment.<sup>210</sup> Given the transcript of the lower court proceeding, and the minutes it is fair to assume that there was no genuine division of opinion on the indictment, rather, the issues with the

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> LOWER COURTS MINUTES, *supra* note 190.

<sup>203</sup> LOWER COURT RECORD, *supra* note 143.

<sup>204</sup> *Id.* (Captain Hill and John Gooding are not related. It appears that Captain Hill was referring to Gooding as "Uncle John" because he did not want to use his full name. Captain Hill offered to pay Coit a base salary and commission so it is unclear why he would inquire about getting paid in the event of a disaster).

<sup>205</sup> *Id.* (The record does not note what Gooding objection was, but it most likely was an objection based on the inadmissible hearsay evidence).

<sup>206</sup> *Id.*

<sup>207</sup> LOWER COURTS MINUTES, *supra* note 190.

<sup>208</sup> LOWER COURT RECORD, *supra* note 143.

<sup>209</sup> LOWER COURTS MINUTES, *supra* note 190.

<sup>210</sup> LOWER COURT RECORD, *supra* note 143.

indictment were included with the certificate of division out of an abundance of caution.

*B. The Supreme Court's ruling and reprimand*

The case came before the Supreme Court during the January term shortly after they received the transcript.<sup>211</sup> The Supreme Court heard arguments from the Government, represented by William Writ, the United States Attorney General; Mr. Coxe; Roger Taney and Clarence Mitchell represented Gooding.<sup>212</sup> Oral argument for the case lasted three days with the first argument began on March 12, 1827 and the final argument concluded on March 14, 1827.<sup>213</sup>

In writing for the Supreme Court, Justice Joseph Story started his opinion by diminishing some of the issues that the Court was asked to resolve.<sup>214</sup> Story noted “[c]ases of real doubt and difficulty, or of extensive consequence as to principle and application, and furnishing matter for very grave deliberation ... appeal to this Court upon certificates of division”.<sup>215</sup> Justice Story’s prelude before addressing the substantive legal issues in *Gooding* reminded the lower courts about the role of the Supreme Court’s appellate review. Justice Story’s concern was that the Circuit Court for Maryland did not deliberate or make a judgment on some of the issues offered for appellate review, and instead asked the Supreme Court to resolve the issues like a court of original jurisdiction.<sup>216</sup> Story’s opinion suggested that the Supreme Court should not address flaws in the indictment, if a motion to quash the indictment would resolve the issue, specifically the first six counts of the indictment.<sup>217</sup> Story used *Gooding* to

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<sup>211</sup> Minutes from the Supreme Court January Term (Mar. 1827), National Archives D.C.

<sup>212</sup> *United States v. Gooding*, 25 U.S. 460, 461 (1827) (At the time the case was heard before the Supreme Court, William Wirt was the acting Attorney General for the United States).

<sup>213</sup> Minutes from the Supreme Court January Term (Mar. 1827), National Archives Washington D.C.

<sup>214</sup> *United States v. Gooding*, 25 U.S. 460, 461–68 (1827).

<sup>215</sup> *Id.* at 468.

<sup>216</sup> LOWER COURT RECORD, *supra* note 143 (The Circuit Court denied Gooding’s initial motion to quash the indictment. However, Gooding again motion the court to the quash seventh count of the indictment).

<sup>217</sup> *United States v. Gooding*, 25 U.S. 460, 68 (1827); *also see* LOWER COURT RECORD, *supra* note 143. (Gooding’s argument on his motion to quash may apply to all seven counts but the Circuit Court transcript suggest that Gooding only expressly attacks the seventh count and plead not guilty to the other 6 counts).

remind lower courts that the Supreme Court's appellate review should be used judiciously, and not wantonly.<sup>218</sup>

In dicta, Story also warned that allowing a criminal defendant an unchecked right to appeal to the Supreme Court rises to the level of "obstruction of justice", because he believed a division of opinion, under the Judiciary Act of 1802<sup>219</sup>, disrupted the Court by getting into matters the lower courts should have dealt with.<sup>220</sup> Story was concerned about the procedural and substantive effects of the division of opinion in *Gooding*. Procedurally, Story was worried that other criminal defendants may also use the same tactics that Taney used to create the division of opinion amongst the two judges. Substantively, Story believed Congress created the division of opinion processes so the Court could resolve substantive legal questions, not procedural issues that a lower court can address, like the indictment. Story's concerns were reasonable given the procedural history of this case.<sup>221</sup>

Justice Story first addressed the testimony of Captain Peter L. Coit against *Gooding*.<sup>222</sup> Justice Story, spoke for a unanimous court and declared that Coit's testimony was admissible against *Gooding*.<sup>223</sup> The Court was not persuaded by *Gooding*'s argument that since the case was a criminal matter the declarations made by Captain Hill, the agent and master of the *General Winder*, did not bind *Gooding*, the principal.<sup>224</sup> Story not only dismissed *Gooding*'s distinction between civil and criminal cases, but in dicta Story noted that even in criminal cases, "he who commands or procures a crime to be done, if it is done, is guilty of the crime and the act is his act".<sup>225</sup> While *Gooding* tried to focus more on the hearsay elements in Coit's testimony, Story instead highlighted how Coit's testimony was not just a detached declaration, but proof of a criminal conspiracy to profit off selling Africans

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<sup>218</sup> *United States v. Gooding*, 25 U.S. 460, 68 (1827).

<sup>219</sup> Act of Apr. 29, 1802, ch. 31, § 6 Stat. 156.

<sup>220</sup> *United States v. Gooding*, 25 U.S. 460, 461–68 (1827). ("We take this opportunity of expressing our anxiety, least, by too great indulgence to the wishes of counsel, questions of this sort should be frequently brought before this Court, and thus, in effect, an appeal in criminal cases become an ordinary proceeding to the manifest obstruction of public justice, and against the plain intendment of the acts of Congress.").

<sup>221</sup> *Supra* Part IV.A.

<sup>222</sup> *Id.* at 468.

<sup>223</sup> *Id.* at 468-70.

<sup>224</sup> *Id.*

<sup>225</sup> *United States v. Gooding*, 25 U.S. 460, (1827) (Story also noted, "This is so true that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial, but this is matter for the consideration of the jury, and not of legal competency).



into slavery that was financed by Gooding, and operated by Captain Hill.<sup>226</sup> In admitting, the evidence from Coit against Gooding Story also explained that the evidence is exempt from the hearsay rules because Captain Hill was acting within the boundaries of his agency relationship with Gooding when he asked Coit to join his crew, so Captain Hill's proposition bound Gooding.<sup>227</sup>

Next, the Court addressed issues raised in the certificate of division not argued in the Circuit Court regarding the particularities of when the Government could prosecute for violating the 1818 Act.<sup>228</sup> First, the Court addressed if the statute required the Government to prove that Gooding himself fit the ship with tools for the international slave trade. Story relied on the plain meaning of the 1818 Act, and common sense, to quickly dispose of this issue.<sup>229</sup> The 1818 Act made no mention of a requirement that the ship must be fitted solely by one person to prosecute.<sup>230</sup> Again, Story relied on agency theory, to explain the Court's rationale that "[i]f done by others under the command and direction of the owner, with his approbation and for his benefit, it is just as much in contemplation of law his own act as if done by himself." In the instant case, Gooding hired Captain Hill to supervise the fitting on the *General Winder*, and purchased all the fitments for the ship, including the illegal fitment for the international slave trade.<sup>231</sup>

Next, the Court addressed whether the statute required a ship to *completely* be fitted for the slave trade to violate the 1818 Act. The court reasoned that since "[t]he statute punishes the fitting out of a vessel with intent to employ her in the slave trade, however innocent the equipment may be, when designed for a lawful voyage."<sup>232</sup> The logic behind Story's

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<sup>226</sup> *Id.* at 469-70 ("The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise).

<sup>227</sup> *Id.* ("The fact of agency has been proved, either expressly or presumptively, the act of the agent, coextensive with the authority, is the act of the principal, whose mere instrument he is, and then, whatever the agent says within the scope of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself.").

<sup>228</sup> *Supra* Part IV.A. (If the arguments were made in the Circuit Court, they were not captured in the Circuit Court's transcript of the record for the Supreme Court).

<sup>229</sup> *Id.* at 471-72 ("It would be against the plain sense of the legislature, to interpret its language to mean that the act which it punishes, and which must or may be done by many in the ordinary course of business, shall only be punishable when the extraordinary fact occurs of its being done by one person.").

<sup>230</sup> Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818).

<sup>231</sup> *Supra* Part IV.A.

<sup>232</sup> *United States v. Gooding*, 25 U.S. 460, 472 (1827).

ruling suggested that contemplating the completeness of the fitments was not a necessary matter to resolve to prosecute under the 1818 Act.

Finally, the Court resolved the division of opinion concerning whether the statute required that Gooding be present when the Africans were captured and sold into slavery to “aid” and “abet”.<sup>233</sup> The Court holds that the statute uses the term “aid” and “abet” in a laymen sense of the words and means “in the common parlance, and import assistance, cooperation, and encouragement”.<sup>234</sup> Story gave no reason why he chose to use the layman meaning and even notes that he chose not to rely on the traditional criminal law meaning of “aid” and “abet”.<sup>235</sup>

The Court found that Coit’s testimony was admissible, and constructed the statute in favor of the prosecution, however Gooding still ultimately prevailed. The Court held that the indictment against Gooding was “fatally defective”, because of the wording in the original indictment.<sup>236</sup> Story held that the Court must “give effect to every word in every enactment if it can be done without violating the obvious intention of the legislature”. Additionally, Story held that the 1818 Act must be “constructed strictly” because it was a criminal statute.<sup>237</sup> Story specifically examined section two and three of the 1818 Act<sup>238</sup> and its use of the phrase “such ship or vessel”; and argued that the phrase referred to “a ship or vessel so built, fitted out, [etc.] in the United States or the word “such” in the statute would have no meaning.”<sup>239</sup> Story tried to rationalize his ruling by declaring that “[t]here is no certainty that the legislature meant to prohibit the sailing of any vessel on a slave voyage, which had not been built, fitted out, [etc.] within the jurisdiction of the United States.”<sup>240</sup>

Consequently, Story’s ruling meant to violate the 1818 Act the ship must be fitted in the United States with the intent to employ the vessel in the slave trade.<sup>241</sup> This interpretation made the indictment “fatally defective”

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<sup>233</sup> *Id.* at 475. (John Gooding remained in Baltimore, while Captain Hill traveled to St. Thomas, Africa, and Cuba to capture and sell Africans into slavery).

<sup>234</sup> *Id.* at 476.

<sup>235</sup> *Id.* at 476.

<sup>236</sup> *Id.* at 478.

<sup>237</sup> *Id.* at 477.

<sup>238</sup> Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818).

<sup>239</sup> *United States v. Gooding*, 25 U.S. 460, 472 (1827). (Story’s argument rested on his interpretation of the role the word “such” played in the statute. “The first point turns upon the interpretation of the words ‘such ship or vessel’ in each of these sections. To what do they refer? The only ship or vessel spoken of in either section is such as have been built, fitted out, & in some port or place of the United States. ‘Such ship or vessel’ must therefore refer to a ship or vessel so built, fitted out, as its antecedent, or the relative ‘such’ can have no meaning at all”).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 477-79.

because; Story found that the indictment did not aver that Gooding fitted the *General Winder* with fitments used in the slave trade in the United States.<sup>242</sup> Story argued that the legislature did not intend for the act to apply to foreign vessels fitted for the slave trade docked in the United States (intentionally or accidentally), therefore the legislature did not intend for the act to apply to ships fitted for the slave trade at foreign ports, because that would be outside of the legislature's jurisdiction.<sup>243</sup> Because of the defects in the indictment, the Court quashed the six-count indictment against Gooding.<sup>244</sup>

### C. *The Gooding retrial*

The Supreme Court quashed the original indictment because of its defects but Gooding was re-tried even though the Story's opinion does not formally remand the case back to the lower court.<sup>245</sup> Gooding was eventually re-tried on April 21, 1830.<sup>246</sup> The Government motioned for a continuance because of the absence of a material witness, which delayed the trial.<sup>247</sup> Gooding motioned that the prosecutor, who again was Nathaniel Williams, pick which count of the indictment he was going to prosecute and *nolle prosequi* the other count.<sup>248</sup> This time the trial went much smoother. Gooding simply pled not guilty, and based on the courts minutes the trial lasted until April 28, 1830.<sup>249</sup>

The jury found Gooding not guilty for his involvement with the illegal slave trade, even though many knew that Gooding illegally engaged in the slave trade.<sup>250</sup> Gooding's re-trial showed that no matter how robust the laws were against the trade a jury of Gooding's peers (white male property owners) were not willing to criminally convict a white man for illegally engaging in the slave trade. The Supreme Court's ruling on the first indictment could never change the mind of a jury pool that was disinterested in prosecuting a prominent Baltimorean like Gooding; or worse a jury pool that was did not think slavery was a criminal. However, Story's

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<sup>242</sup> *Id.* at 477-79.

<sup>243</sup> *Id.* at 477.

<sup>244</sup> *Id.* at 479 (That the opinions prayed for by the counsel for the defendant Gooding, in the first and sixth prayers, set forth in the record, were correct in law and ought to have been given by the court).

<sup>245</sup> FISH, *supra* note 89, at 289.

<sup>246</sup> LOWER COURTS MINUTES, *supra* note 190.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> LOWER COURTS MINUTES, *supra* note 190, *also see* FISH, *supra* note 89, at 289. ("The jurors duly acquitted the local notable, demonstrating the government's difficulty in securing convictions for a crime [fraught] with enforcement impediments such that even indictments were scarce").

construction of the 1818 Act made it easier for Gooding to escape prosecution.<sup>251</sup>

Wednesday 28th April 1830  
 The Court met according to adjournment  
 present The Honorable  
 Gabriel Duval one of the Associate Justices of the  
 Supreme Court of the United States  
 Messrs Glenn Price of Maryland District  
 Nathaniel Williams Esquire Attorney  
 Thomas Finley Esquire Marshal  
 Philip Moore Clerk  
 The United States Jury continues  
 John Gooding Verdict Not Guilty.

Figure 4: Minutes from the U.S. Circuit Court for the District of Maryland<sup>252</sup>

The Supreme Court's ruling on the indictment made a circumstantial case, even more difficult to prove, because of Story's holding on the intent element in the 1818 Act. In theory, the prosecution had a very strong case, but on paper, the case was never easy to win. The prosecution's best witness, Captain Coit, was propositioned by Captain Hill to engage in the illegal slave trade, which affects his credibility.<sup>253</sup> Captain Coit's relationship to the illegal slave trade was never interrogated and remains an unknown. Additionally, in the May 1826 term Captain Michael Brown, the captain for the *Pocahontas* was listed as a witness for the grand jury hearing, but in December after Gooding was granted a continuance Captain Brown, was listed as a witness in Gooding's defense.<sup>254</sup> Since Brown was set to testify for the defense he probably would have told the jury that the shipments on the *Pocahontas* were not fitments for the slave trade.<sup>255</sup> The prosecution presented no evidence about the type of fitments found on the *General Winder*, had no concrete proof that the *General Winder* transported two hundred ninety slaves from Africa, and could never place Gooding anywhere near the ship while it was involved in any illegal activity.<sup>256</sup>

The Supreme Court's holding that quashed the original indictment against Gooding made winning the case nearly impossible.<sup>257</sup> The

<sup>251</sup> See notes 241-4 and accompanying text.

<sup>252</sup> *Id.*

<sup>253</sup> *Supra* Part IV.A.

<sup>254</sup> LOWER COURTS MINUTES, *supra* note 190.

<sup>255</sup> LOWER COURT RECORD, *supra* note 143.

<sup>256</sup> *Supra* Part IV.A.

<sup>257</sup> *Supra* Part IV.A.

prosecution's theory was that the *General Winder* left the Port of Baltimore with fittings normally seen on ships engaged in lawful trade, and was later retrofitted for a voyage to Africa to capture people to be sold into slavery.<sup>258</sup> Story's reading of the statute meant that the prosecution would have to prove that Gooding fit the *General Winder* in the United States for the illegal international slave trade, at a United States port with the intent to engage in the international slave trade.<sup>259</sup> Even if the Government could prove that the *General Winder* was fit for the slave trade, it seems difficult to prove that a ship was not fitted for the legal domestic slave trade.<sup>260</sup> Story's interpretation of the Slave Trade Act created a large loophole for those who sought to engage in the slave trade. Furthermore, the Government's theory of the case was that Gooding fitted the *General Winder* in St. Thomas, outside the jurisdiction of legislatures, and their intent in passing the 1818 Act.<sup>261</sup> Gooding's plot to profit off capturing and trading African people into slavery, despite laws like the 1818 Act, exemplifies how despicable and determined merchants like John Gooding were to profit off the pain of others.<sup>262</sup>

The Supreme Court's ruling made it more challenging for the Government to win its case on the merits, but merit aside this case was always difficult to win. First, Gooding was a prominent well-respected Baltimore merchant, making it unlikely that a jury of his literal and legal peers would prosecute him.<sup>263</sup> Secondly, Baltimore was a pro-slave city, making it hard to find any jury that would criminally punish a white man for slavery.<sup>264</sup>

#### D. The effects of *United States v. Gooding*

The practical effect of the decision was that slave traders like Gooding were more emboldened to continue engaging in the international slave trade.<sup>265</sup> Also, post *Gooding* slave traders believed they had bonafide loop hole they could exploit in the 1818 Act that proved strong enough to survive Supreme Court scrutiny.<sup>266</sup> Those that opposed the slave trade were disappointed with the Supreme Court's ruling in *Gooding*, because no

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<sup>258</sup> *Supra* Part IV.A.

<sup>259</sup> *Supra* Part IV.A.

<sup>260</sup> *Supra* Part IV.A.

<sup>261</sup> See notes 142-47 and accompanying text.

<sup>262</sup> See Appendix I.

<sup>263</sup> See Appendix I; also see Part II.B.

<sup>264</sup> See Part II.A.

<sup>265</sup> GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 364-65 (1912).

<sup>266</sup> *Id.*

matter how strong Story's logic was to justify quashing the indictment it felt like Story was overly concerned with minor details in the indictment, at the expense of throwing out a strong case against a well known slave trader like Gooding. Those in favor of the slave trade were pleased with the opinion, but were more impressed with Roger Taney's legal acumen, because he managed to get an indictment against a well-known slave trader quashed.<sup>267</sup> Taney's success in *Gooding* was one of the reasons that President Andrew Jackson appointed Taney as the Attorney General of the United States and then nominated him as the Chief Justice of the Supreme Court of the United States.<sup>268</sup>

The holding and reasoning in *Gooding* has been cited in other cases involving the 1818 Act and the international slave trade generally. In *The Garonne*, similar to the reasoning in *Gooding*, the intent of the Slave Trade Act was the issue. The case was about a slave who went to France for several years with her owner and then returned to Louisiana on the *Fortune* and if the slave's return violated the 1818 Act.<sup>269</sup> Benjamin Franklin Butler, the United States Attorney General, relied on *United States v. Gooding* to argue that because the passenger manifest listed "these two negresses are slaves of Mr. Pecquet, and are sent to New Orleans by their master", that it sufficient evidence to prove that the two slaves entered the United States in violation of the 1818 Act.<sup>270</sup> Butler noted that in *Gooding* "it was decided, that the declarations of the master of a ship, in the transactions of the vessel, being a part of the *res gestoe*, are competent evidence of the voyage."<sup>271</sup> Chief Justice Roger Taney (who represented Gooding when facing similar charges) looked at the legislature's intent in passing the 1818 Act, and held that the act "cannot be properly applied to persons of color who are domiciled in the United States, and who are brought back to their place of residence, after a temporary absence."<sup>272</sup> As Story did only a decade earlier, Taney relied on what he thought was the legislature's intent to narrow the scope of the 1818 Act.

In *United States v. Morris* the Court examined the extraterritorial reach of the 1800 Act and if it was necessary to actually transport slaves to offend the statute.<sup>273</sup> Attorney General Henry D. Gilpin argued based on

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *The Garonne*, 36 U.S. 73, 77 (1837)

<sup>270</sup> *Id.* at 75.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 77.

<sup>273</sup> *United States v. Morris*, 39 U.S. 464, 475 (1840) ("The question in this case is, whether a vessel on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is 'employed or made use of' in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on

*Gooding* that even though the *General Winder* sailed from Baltimore with out any fitments for the slave trade the Court still held that the ship was fit out in Baltimore.<sup>274</sup> The Court ruled that similar to how the *General Winder* was fit in Baltimore based on *Gooding*'s alleged intent to engage in the slave trade, in *Morris* because the ship was in route to the African coast to kidnap Africans it was employed in the transportation of slaves.<sup>275</sup> In *Morris* similar to both *Gooding* and *Garonne* Taney looked at legislature intent because “the evident intention of the legislature ought not to be defeated by a forced and overstrict construction.”<sup>276</sup> However, unlike *Gooding* and *Garonne*, in *Morris* the Court constructed the statute to expand the scope of the word employ in the statute to mean “not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it.”<sup>277</sup>

Today the African slave trade, and all human trafficking, is illegal everywhere in the World.<sup>278</sup> Fortunately, the African slave trade and racialized slavery are now just dark chapters in American history, however part of the 1818 Act has survived in 18 U.S.C. § 1582.<sup>279</sup> § 1582 does not put a cap on the fine for violating the law, like the 1818 Act, but § 1582 still only carries a maximum penalty of only seven years.<sup>280</sup> However, based on the federal sentencing guidelines a person would face at minimum a forty-one years prison sentence if convicted of violating § 1582<sup>281</sup>. While the law is still current, often times the statute is only referenced as a comparison point for similar statutes.<sup>282</sup> While the 1818 Act is still relevant and good

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board?”).

<sup>274</sup> *Id.* at 469.

<sup>275</sup> *Id.* at 476 (“In like manner, the vessel in question was employed in the transportation of slaves, within the meaning of the act of Congress of May 10th, 1800, if she was sailing on her outward voyage to the African coast, in order to take them on board, to be transported to another foreign country.”).

<sup>276</sup> *Id.* at 475 (citing *United States v. Wiltberger*, 18 U.S. 76 (1820)).

<sup>277</sup> *Id.* at 475.

<sup>278</sup> James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking”*, 49 VA. J. INT’L L. 1, 1 (2008); see also Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1657 (2007) (England did not end slavery in its New World colonies until 1833).

<sup>279</sup> 18 U.S.C.A. § 1582 (West) (Whoever, whether as master, factor, or owner, builds, fits out, equips, loads, or otherwise prepares or sends away any vessel, in any port or place within the United States, or causes such vessel to sail from any such port or place, for the purpose of procuring any person from any foreign kingdom or country to be transported and held, sold, or otherwise disposed of as a slave, or held to service or labor, shall be fined under this title or imprisoned not more than seven years, or both).

<sup>280</sup> *Id.*

<sup>281</sup> See U.S.S.G. 2H4.1.

<sup>282</sup> See, e.g., *United States v. Rodriguez*, 841 F. Supp. 79, 83 (E.D.N.Y. 1994), *aff’d*, 53 F.3d 545 (2d Cir. 1995) (Comparing a criminal statute’s use of the word equip or

law in some respects the 1818 Act and its progeny, § 1582 are functionally obsolete.

*United States v. Gooding*'s greatest legacy is the holding impacts on criminal law.<sup>283</sup> In *Gooding*, the Court held the Government could introduce coconspirator statements from conspirators who did not testify.<sup>284</sup> However, Federal Rule of Evidence 801(d)(2)(E) has since superseded *Gooding*.<sup>285</sup> In *Gooding*, the Government wanted to use Captain Coit's testimony to tell the story about Gooding's criminal conspiracy to engage in the international slave trade.<sup>286</sup> Similarly today, federal prosecutors can use Federal Rule of Evidence 801(d)(2)(E) to allow witnesses to describe what coconspirators said or did in furtherance of their criminal activity. Today, the co-conspirator exception to hearsay, which was first articulated in *Gooding*, is settled law to the extent there is no conflict with Federal Rule of Evidence 801(d)(2)(E).<sup>287</sup> The Government lost in *United States v. Gooding* and Gooding was allowed to continue operating his criminal enterprise; however the coconspirator exemption articulated in *Gooding*, and further codified in Federal Rule of Evidence 801(d)(2)(E) significantly helps the Department of Justice prosecute parties involved in criminal conspiracies.<sup>288</sup>

## CONCLUSION

*United States v. Gooding* stands as a step backwards toward condoning and legitimizing the international slave trade. Some may argue *Gooding* sent a message to slavers who participated in the international slave trade that the Supreme Court supported the Slave Trade Act of 1818, even though Gooding escaped prosecution in part, because of the defective indictment.<sup>289</sup> If that was Story's intent, than like Gooding's indictment, the message was defective. Post *Gooding* slavers had another tool in their arsenal to escape prosecution or at best, that is what they believed.<sup>290</sup>

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equipped); *United States v. Shackney*, 333 F.2d 475, 481 (2d Cir. 1964) (comparing 18 U.S.C. § 1584, which was created in 1948 to ban the sale of a person into servitude to 18 U.S.C. §§ 1582 which "was a part of the series of enactments of the first quarter of the nineteenth century dealing with the African slave trade.").

<sup>283</sup> *United States v. Gooding*, 25 U.S. 460 (1827).

<sup>284</sup> *Id.* at 468-69.

<sup>285</sup> FED. R. EVID. 801(d) (In common law 801(d)(2)(E) is referred to an exception though it is exclusion under the federal rules).

<sup>286</sup> *Supra* Part IV.A.

<sup>287</sup> *Bourjaily v. United States*, 483 U.S. 171, 184 (1987) (holding that a coconspirator's statements made to an FBI informant that the Government had introduced during a preliminary inquiry was admissible).

<sup>288</sup> *United States v. Gooding*, 25 U.S. 460, 468-69 (1827); FED. R. EVID. 801(d).

<sup>289</sup> *Supra* Part IV.B.

<sup>290</sup> *Id.*



Additionally, Story's construction of the Slave trade Act of 1818 made it more difficult to prosecute slavers. Even though merchants who chose to ignore the law risked losing their investments and freedom there appeared to be no political will to fully prosecute merchants like Gooding for their involvement in the slave trade.<sup>291</sup>

*United States v. Gooding's* most enduring legacy was Story's ruling that Captain Coit's testimony was admissible hearsay because of the co-conspirator exception, and Story's emphasis that it was admissible because of the agency relationship between Captain Hill and Gooding.<sup>292</sup> One of *Gooding's* less appreciated legacies is how much *Gooding* did not affect the international slave trade. The *Gooding* decision did little to dissuade slavers from participating in the international slave trade—slavery proponents celebrated the decision.<sup>293</sup> John Gooding was never convicted for his involvement with the international slave trade.<sup>294</sup> If *Gooding* was not a step backwards towards condoning and legitimizing the international slave trade, it certainly was not an effective step toward ending the trade.

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<sup>291</sup> See notes 52-55 and accompanying text.

<sup>292</sup> *United States v. Gooding*, 25 U.S. 460, 468-70 (1827).

<sup>293</sup> MYERS, *supra* note 265, at 364-65.

<sup>294</sup> LOWER COURTS MINUTES, *supra* note 190 (The minutes note that on April 28, 1830 Gooding was found not guilty).

## APPENDIX I: JOHN GOODING

John Gooding was a wealthy Baltimore merchant and owner of Gooding & Co.<sup>295</sup> Gooding made his fortune investing in South American privateering.<sup>296</sup> During the War of 1812, Gooding collaborated with Thomas Hutchins to invest in eleven privateers, and made \$521,000.<sup>297</sup> One of Gooding's largest investments was the aptly named, *Mammoth*. Built in 1813 for forty thousand dollars, the *Mammoth* was the largest privateer schooner built in Baltimore.<sup>298</sup> Gooding was equally well known for his involvement in the illegal international slave trade. "He liked speculation better than legitimate business. He did not care about sending out slavers to the Coast of Africa, if he could double or treble his venture."<sup>299</sup>

Gooding lived a lavish life style. He owned a large home located at two Waterloo row, North Calvert Street in Baltimore, Maryland.<sup>300</sup> Homes on Waterloo Row sold for between ten to twelve thousand dollars when they were completed in 1819.<sup>301</sup> He also owned 300 acres of farmland in Maryland.<sup>302</sup> Gooding also owned the Timonium Estates, a hotel in Maryland that also featured an icehouse, mineral springs, stables, a jockey club and a racetrack.<sup>303</sup> However, like many merchants in Baltimore, Gooding was severely impacted by the Panic of 1819. He resorted to renting out his house in Baltimore, and was forced to sell his country house and farm to settle his debts to creditors.<sup>304</sup> By 1829, Gooding went insolvent.<sup>305</sup> Gooding died in 1839.<sup>306</sup>

It is unknown why Gooding chose to name his ship the *General Winder*. The proximate connection between Gooding and a General with the last name Winder would be William H. Winder, a general and veteran of the

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<sup>295</sup> David Head, *A Different Kind of Maritime Predation: South American Privateering from Baltimore, 1816-1820*, 7(2) INT'L J. NAVAL HIST. (2008).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> The Schooner *Mammoth* Logs, 1814 and The Schooner *Independencia del Sud*, November, 1817 – January, 1822.

<sup>299</sup> T.R. KNOX, THE OLD MERCHANTS OF NEW YORK CITY 122-23 (1885).

<sup>300</sup> MATCHETT'S BALTIMORE DIRECTORY, 125 (1829) ("Gooding John, merchant, 2 Waterloo row, N Calvert 125").

<sup>301</sup> Robert L. Alexander, *Baltimore Row Houses of the Early Nineteenth Century*, 16 AM. STUD. 70-71 (1975).

<sup>302</sup> David Head, *A Different Kind of Maritime Predation: South American Privateering from Baltimore, 1816-1820*, 7(2) INT'L J. NAVAL HIST. (2008).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> MYERS, *supra* note 265, at 364-65.

<sup>306</sup> BALT. SUN, Feb. 2, 1839.

War of 1812 that practice law in Baltimore, Maryland.<sup>307</sup> A large part of Winder's legal practice was representing merchants and captains.<sup>308</sup> Winder died in 1824 and the *General Winder* first set sail in 1824. Gooding purchased the *General Winder*, while it was still under construction, from William McElderry.<sup>309</sup> McElderry was a ship builder in the Port of Baltimore, and may have picked the name.<sup>310</sup>

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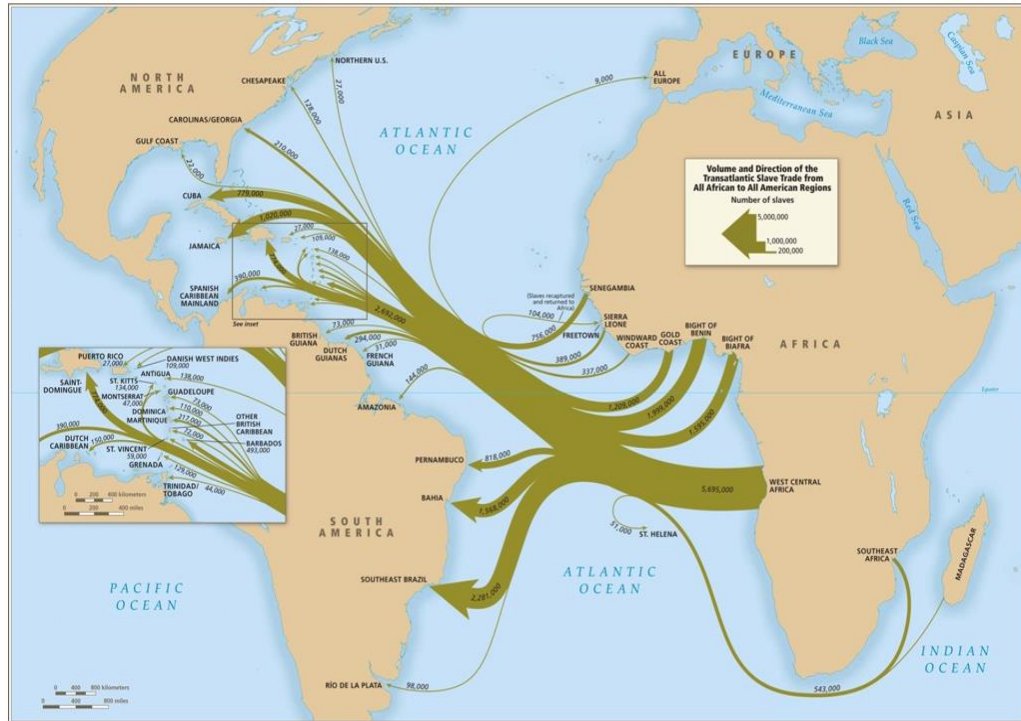
<sup>307</sup> FISH, *supra* note 89, at 288; *see also* RICHARDSON & BENNETT, BALTIMORE: PAST AND PRESENT WITH BIOGRAPHICAL SKETCHES OF ITS REPRESENTATIVE MEN 541-44 (1871)

<sup>308</sup> Fred Hopkins, *For Freedom and Profit: Baltimore Privateers in the Wars of South American Independence*, 17 THE NORTHERN MARINER (2008). (Hopkins also alleges that Winder participated as a covert investor in South American privateering).

<sup>309</sup> LOWER COURT RECORD, *supra* note 143.

<sup>310</sup> *Id.*

**APPENDIX II: A MAP VOLUME AND DIRECTION OF THE TRANS-ATLANTIC SLAVE TRADE FROM ALL AFRICAN TO ALL AMERICAN REGIONS\*\***



\*\* DAVID ELTIS & DAVID RICHARDSON, *ATLAS OF THE TRANSATLANTIC SLAVE TRADE* (New Haven, 2010) (This map summarizes and combines the many different paths by which captives left Africa and reached the Americas. While there were strong connections between particular embarkation and disembarkation regions, it was also the case that captives from any of the major regions of Africa could disembark in almost any of the major regions of the Americas.)