GOOD BEHAVIOR BOND(AGE): METHODS OF CONTROL FROM ANTEBELLUM VIRGINIA

The good behavior bond was a legal device which, at English common law, was used to monitor those of poor character or "ill fame." Historically, the bond granted broad discretion to justices of the peace to determine who posed a threat to the safety or moral norms of the community. When implemented in the US, where slavery was a defining influence on the laws of the states, the bond for good behavior took a new dimension. It became a powerful tool for monitoring the behavior and controlling the movement of free Black people in the antebellum South. In Virginia particularly, the bond for good behavior was employed to address the fears of white property-owners as the free Black population of the state increased. Ultimately, this legacy of the good behavior requirement is reflected in current Virginia law, which grants judges broad discretion to determine what constitutes "good behavior" for an individual released on a suspended sentence.

The goal of this essay is twofold. First, it uncovers a pattern in the antebellum South of requiring free Black people to comport with an arbitrary standard of good behavior, aimed at preserving the status quo of American slavery. Second, it draws attention to a unique aspect of Virginia law which retains techniques that were devised to control the behavior and movements of formerly enslaved people. It seeks to expand the historical analysis of the good behavior requirement, which suggests an explanation for Virginia's unique approach to revocation of suspended sentences.

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INTRODUCTION

The bond for good behavior was historically used to monitor poor or undesirable people and exercise control over their behavior.[1] At common law, it was used by justices of the peace (JPs) to bind individuals deemed to be of poor character, and to prevent future crimes from being committed by those of "ill fame." Based on the Act of 1361, orders to JPs were often stated, simply, as a command to "keep the peace and be of good behavior,"[2] a phrase connotating nearly unlimited discretion. The hallmark of this legal device was the broad authority granted to JPs to determine who was of poor character, often based on a judgment that a certain individual was likely to commit some future crime. While historians have noted the ways in which this device was used disproportionately against migrants and the poor in English counties, there has been little study of the way the bond for good behavior translated to practice in the United States, particularly against formerly enslaved people in the antebellum period.

In the United States in the early nineteenth century, the bond for good behavior was harnessed to monitor the conduct and movement of formerly enslaved people during the tumultuous years leading up to the Civil War.[3] Its qualities as a capacious and discretionary legal mechanism meant it was particularly well-suited to address concerns about maintaining American slavery in the face of slave rebellions and a growing population of emancipated people. Gradual emancipation raised fears about the conduct of formerly enslaved people, and the bond for good behavior proved to be a useful tool for ensuring compliance from free Black people in the South.

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[1] Marie-Eve Sylvestre et al., RED ZONES: CRIMINAL LAW AND THE TERRITORIAL GOVERNANCE OF MARGINALIZED PEOPLE 39 (2019).
[2] Justices of the Peace Act, 1361 (https://www.legislation.gov.uk/aep/Edw3/34/1).
[3] *See* A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. Rev. 1268 (1993).

This was particularly true in Virginia, where the Removal Act required good behavior of any free Black person who wished to reside in the state, the alternatives to which were re-enslavement or exile.[4] In previously unstudied legislative petitions, formerly enslaved people made requests to the legislature to remain in the communities where they had spent their entire lives. The good behavior bond was both the means for a free Black person to demonstrate their commitment to abide by the law, as well as the measure for whether or not the General Assembly would grant the request to remain in Virginia. This period in American history, as demonstrated in legislative records from Virginia, marked an expansion in the terms and uses of the bond for good behavior which would continue to permeate the law post-Emancipation.

After Civil War-era laws were repealed, the bond for good behavior continued to serve as a discretionary tool for policing conduct. It emerged again and again in Virginia law, creating notable historical continuity between the antebellum good behavior laws and modern statutes. This good behavior requirement, although no longer explicitly codified, is the antecedent to modern good behavior conditions of suspended release.[5] The sentence condition essentially requires a person convicted of a criminal offense to remain of "good behavior" for the duration of the term of her suspended sentence.[6] The broadened conception of the bond that was adopted in the antebellum period is resonant with Virginia's current law regarding the level of discretion that judges are granted to determine what constitutes good behavior. In Virginia, unlike every other state in the country, judges have the discretion to revoke suspended sentences for what they deem to be "bad" behavior, regardless of whether or not that behavior constitutes a crime.[7] This unique area of Virginia law, viewed in the broader context of Virginia history stretching back to

[4] *Id*.
[5] Sylvestre, *supra* note 1.
[6] *See Marshall v. Commonwealth*, 202 Va. 217, 116 S.E.2d 270, 220 (1960).
[7] 58 A.L.R.3d 1156 (1974); *Holden v. Commonwealth*, 26 Va. App. 403, 409, 494 S.E.2d 892, 895 (1998).

the 1830s, reveals a pattern in which the state has used the good behavior requirement as a tool of oppression.

In part I, I will explain the common law origin of the bond for good behavior, highlighting its broad, discretionary nature. In part II, I will reconstruct the historical moment in which Southern states began to conceive of the bond as a means of controlling the conduct and movement of free Black people. I will focus on Virginia legislative records, demonstrating that the good behavior bond was well-equipped to address the fears of white property-owners in the wake of slave rebellions and growing concerns about the number of free Black people living in Virginia communities. In part III, I will explain the ways in which reflections of this regime remain in the current Virginia Code. I will follow the good behavior requirement through its various iterations from the repeal of antebellum-era laws to civil rights era statutes, through to current Virginia law. Drawing on a history of broad discretion and often discriminatory uses, I will argue that current good behavior requirements are a vestige of slavery. Pursuant to Va. Code § 19.2-306, judges in Virginia have more discretion than judges in any other state to determine what sort of conduct comports with "good behavior" for individuals serving suspended sentences. I will argue that Virginia uniquely overuses the good behavior condition as a result of the broad conception of the good behavior bond that emerged in the early nineteenth century to address an ever-growing population of free Black people living in the state. In conclusion, I will assert that while the good behavior condition was historically used to hyper-monitor marginalized people, there is a unique history in the state of Virginia that is deeply intertwined with American slavery. As a result of that history, Virginia's legislature and courts have continued to use the good behavior condition excessively.

PART I: COMMON LAW ORIGINS

The good behavior bond, which is the precedent for modern laws which require individuals to be of good behavior,[8] is one of the oldest legal mechanisms in the common law.[9] It originated with the establishment of the justices of the peace (JPs) in 1361,[10] when justices were given authority "to take all of them that be [not] of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people."[11] A peace bond, or surety for good behavior, was a sum of money which a person was required to guarantee in advance, and which he forfeited if he performed some forbidden act.[12] Importantly, it was not necessary for an accused person to be criminally convicted, accused, or subject to any formal court proceeding before the bond could be imposed. A JP could require a peace bond of any person subject to his jurisdiction, whenever he thought necessary.[13] In this role, the justice of the peace served a preventative function, requiring good behavior of those who posed a threat to the peace of the community.

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[8] Sylvestre, *supra* note 1; *see also* H.F. DeL, *"Preventative Justice". Bonds to Keep the Peace and for Good Behavior*, 88, University of Pennsylvania Law Review and American Law Register 331, 332 (1940); F. W. Grinnell, *Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System*, Vol. II Massachusetts Law Quarterly 591, 599 (1917) (discussing the common law good behavior requirement as precedent for probation); Timasheff & HeinOnline Legal Classics, PROBATION IN CONTEMPORARY LAW: A CENTENNIAL SURVEY (1941) (explaining that
"the common law institution of the recognizances for keeping the peace and for good behavior was naturally used by the judges in order to make [the practice of suspending sentences and placing criminal defendants on probation] more efficient").

[9] J. P. (John Percy) Eddy, JUSTICE OF THE PEACE 2 (1963).

[10] *Id*. at 4.

[11] *Id*. at 5 (explaining that "the statute…envisage[d] [binding over persons not of good fame in the case of [those] who appeared to be threatening the peace, although they had not actually broken it, and the punishment of those who had in fact done so").

[12] Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 174 175 (1976).

[13] *Id*.

Justices of the peace also had the authority to arrest, indict and imprison those who violated the law.[14] The authority to adjudicate criminal offenses, in addition to the authority to bind individuals who had not yet committed a crime to "good behavior," was a result of the justice's dual role as judge and police officer.[15] In its earliest form, the justice of the peace was the king's representative who served a peace-keeping role, in addition to his responsibilities as judge presiding over criminal offenses.[16] Therefore, the justice of the peace was not limited to intervening once a crime had been committed, but also had the authority to preempt criminal activity by issuing a bond for good behavior. This was described by Blackstone as "preventive justice."[17] It was one of the hallmarks of the English common law, something several historians have described as a key difference between the evolution of the rule of law in England versus other legal systems.[18] The essential authority for issuing and enforcing good behavior bonds was the broad discretion granted to justices of the peace to bind individuals they deemed to be of poor character.[19] Historians have demonstrated that this discretion was most often directed at migrants, and poor or undesirable people in the community.[20]

[14]Eddy, *supra* note 9 at 4 (citing the first commission of the peace under the Justices of the Peace Act, 1361).
[15] Frank Milton, IN SOME AUTHORITY: THE ENGLISH MAGISTRACY 15 (1959) (arguing that the wording of the Act of 1361 makes this "double function clear; the Justices were given power to 'pursue, arrest, take and chastise offenders' –the first three proceedings being clearly a matter for the police, and the last named for the courts").
[16] *Id.*
[17] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *249.
[18] Thomas Sir Skyrme, HISTORY OF THE JUSTICES OF THE PEACE 33 (2nd ed. 1994) (asserting that the commission of the justice of the peace is one of the most "unique and distinctive features of the English Constitution"); *See also* Frederic William Maitland & Fisher, H. A. L. (Herbert Albert Laurens), THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 470 (1911) (claiming that the commission of the peace is "perhaps the most distinctively English part of our governmental organization").
[19] Justices of the Peace Act, 1361 (giving justices of the peace authority to bind individuals "not of good fame").
[20] Sylvestre, *supra* note 1, at 17 (explaining that "recognizances did not apply to everyone; the governing class typically used them to control the poor and migrants coming into town…legal actors have throughout the history of the English common law used the criminal process to create and enforce territories, directly governing [marginalized] people's use of spaces").

A. Early History

The history of preventive justice in English common law predates the Magna Carta.[21] The practice of assigning officials to monitor behavior on behalf of the king[22] was officially recognized by Parliament in 1327, when laymen were assigned as "Keepers of the Peace" in an act which provided that "For the better keeping and maintenance of the peace the King will, that in every county good men and lawful, which be no maintainers of evil or barators [exciters of quarrels] in the country, shall be assigned to keep the peace."[23] In 1361, the statute which mandated the transition from "Keeper of the Peace" to "Justice of the Peace" was enacted by Parliament.[24] The terms which outlined the justices' of the peace jurisdiction, authority to adjudicate offenses, and power to take securities for good behavior were set out in the Justices of the Peace Act.[25] In pertinent part, the Act mandated

> First, that in every County of England shall be assigned for the keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have power to restrain Offenders, Rioters, and all other Barators [exciters of quarrels], and to pursue, arrest, take, and chastise them according their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their *Discretions* and good Advisement…*and to take of*

[21] Eddy, *supra* note 4, at 2. ("In 1195, Richard I appointed knights in each shire to make all males over sixteen give security to keep the peace. He was thus resorting to an old Anglo-Saxon practice to guard against crimes being committed while he was fighting his wars overseas.")
[22] Milton, *supra* note 4 (describing this as the founding of a rudimentary police system, albeit with more authority and discretion to administer the criminal law than one would think of police officers having today).
[23] Act 1, Edward III, Statute 2, Chapter 16 of act of Parliament in 1327.
[24] Eddy, *supra* note 4, at 3. (crediting this transition to the pressures created by unruly soldiers returning from war following the Hundred Years War as well as unrest caused by the Black Death).
[25] Justices of the Peace Act, *supra* note 12.

> *them all that be [not] of good Fame*, where they shall be found, sufficient Surety and Mainprise [the old process of delivering a person to sureties] of their *good behavior* towards the King and his People, and the other to duly Punish. (emphasis added).[26]

Justices of the Peace were also given authority to "hear and determine at the King's Suit all Manner of Felonies and Trespasses…according to the Laws and Customs."[27] The Act gave Justices of the Peace a twofold role; first, the authority to take action against those they deemed to be of bad character before they had broken the law, and second, the power to punish those who had actually violated the law.[28]

B. Implications of the Dual Role of Justices of the Peace

The fact that justices of the peace were responsible for both peace-keeping functions and adjudicatory functions is crucial to understanding the significance of the good behavior bond, both its historical use and its application in more modern statutes. In its earliest stages, the justice of the peace served as an officer tasked with monitoring the behavior of citizens of the county, as well as a judge determining punishment for violations of the law. J.P. Eddy has described this twofold role as " 'to pursue, arrest, take' –the part of police officers – 'and [to] chastise' –the part of judicial officers.[29] The length and breadth of the statute[30] reveals the way in which justice of the peace became a catch-all position tasked with maintaining peace and enforcing the law.

[26] *Id*.
[27] *Id*.
[28] Milton, *supra* note 4.
[29] Eddy, *supra* note 4 at 5.
[30] Justices of the Peace Act, *supra* note 12. *See also*, Milton, *supra* note 8 at 16-17 (describing the breadth of the justices' of the peace role as governing "almost every daily action of the ordinary citizen").

Consisting of twenty-two items, the statute outlined a multitude of duties assigned to justices of the peace which would ultimately make them "general factotum[s] of the State."[31] Frank Milton has similarly described this dual authority, and emphasizes that at the time the justice of the peace was established there was no clear distinction between the functions of police and law courts.[32] He underlines that binding people to good behavior was a precautionary and preventative measure, and therefore a matter for police, rather than a judicial act.[33]

Understanding the dual nature of the justice's role explains why, at common law, quasi-judicial officers were allowed to confront behavior before any criminal conduct had occurred. The good behavior bond was a prophylactic measure meant to ensure peace and obedience from citizens of the county. Because of the good behavior bond's root in a common law tradition that was concerned with activity that was perhaps undesirable but not necessarily criminal, it had the potential to address conduct that was typically outside the realm of the courts today.[34] In England, this had the effect of granting justices of the peace the authority to hyper-monitor the behavior of certain individuals, particular migrants and the poor.[35] The use of this legal mechanism would continue to be defined by its impact on marginalized groups as it evolved over time in various common law jurisdictions.

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[31] Eddy, *supra* note 4 at 5.
[32] Milton, *supra* note 8 at 15.
[33] *Id*.
[34] Joel B. Samaha, *The Recognizance in Elizabethan Law Enforcement*, Vol 25, No. 3 The American Journal of Legal History 189 (1981) (confirming that the recognizance for good behavior "demonstrate[s] how vast was the legal power of public officials to prevent threats to public order occurring substantially prior to the time when such threats turned into actual disorder").
[35] Sylvestre, *supra* note 1 at 19; *see also* Milton, *supra* note 8 at 17 ("When the enclosures of land in the sixteenth century caused a new unemployment problem, and the frightened doggerel about 'the beggars coming to town' was heard for the first time, stern laws concerning vagrancy, vagabondage and the impotent poor were passed – to be enforced, naturally by the [justices of the peace]").

C. Broad Discretion and Marginalization

Built into the Justice of the Peace Act was a broad grant of authority for justices to use discretion regarding who ought to be bound to good behavior, and what sort of conduct constituted a violation of the bond.[36] The capacious purpose of the justices' role required as much.[37] This discretion resulted in "judicial actors [whose role was to monitor] marginalized people's behavior…over extended periods of time."[38] Historically, the good behavior bond was not necessarily limited in scope or duration, meaning there was no limiting principle for how long an individual could be monitored under a bond for good behavior, or for why it could be revoked. This "obviously made the bond susceptible to the grossest forms of abuse."[39] It was employed to control a broad range of activities, and was often used as a means to supervise and regulate the lives of persons considered undesirable or dangerous to the community.[40] In practice, "undesirable and dangerous" were terms used to define those previously convicted of crimes, strangers, and the poor.[41] As one historian concludes, the good behavior bond reveals that Tudor law was used as a weapon of the rich and powerful to control the poor and the weak.[42]

The practice of requiring bonds for good behavior was no less discriminatory when it was applied in the emerging legal system of the United States.[43] In early American history, it was

[36] Justices of the Peace Act, *supra* note 12 ("And according to that which to them shall seem best to do by their *Discretions* and good Advisement") (emphasis added)).
[37] Sylvestre, *supra* note 1 at 40 (demonstrating that "recognizances [to be of good behavior] were extremely flexible and versatile legal instruments. They rarely appeared in law treatises or guidebooks and relied instead on the discretionary powers of the justices of the peace").
[38] *Id*. at 11.
[39] *Id*. at 200.
[40] *Id*.
[41] *Id*. at 201.
[42] *Id*. at 204.
[43] *See* H.F. DeL, *"Preventative Justice". Bonds to Keep the Peace and for Good Behavior*, 88, University of Pennsylvania Law Review and American Law Register 331, 346 (1940) (claiming that "whatever effectiveness a bond may have is in inverse proportion to the wealth of the prospective offender. The [good behavior bond]

sometimes used to "encourage undesirable persons to leave [the state]."[44] For example, Peter Goodrich identifies an instance in 1739 when "two prisoners incarcerated for inability to pay fines were released and pay under bond to leave the province immediately."[45] As in England, the bond for good behavior was used in the United States to govern specific groups throughout history, namely those convicted of crimes and the poor. In the antebellum South, it would become a particularly useful tool for monitoring the behavior of free black people, who were of particular concern to white property owners during the years leading up to the Civil War. And to foreshadow the regime outlined in Part III, the bond for good behavior would become an integral piece of precedent for post-conviction supervision that emerged in the twentieth century.[46]

PART II: IN THE CONTEXT OF AMERICAN SLAVERY

At common law, the good behavior bond was a device used at the discretion of justices of the peace to monitor those deemed to be of poor character, or at risk of committing a future crime. Historically, the discretion to require a good behavior bond was disproportionately used to monitor and control the undesirable or poor in the community.[47] That aspect of the good behavior bond took a new dimension when it was implemented in the US, where American slavery was a defining influence on the laws and practices of the states. It became a powerful tool of the state to control the behavior of free Black people, particularly in the South.

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proceedings are most effective against the impoverished offender – the very one who is unable to protect himself from their harshness").

[44] Peter Goodrich, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS (1990), at 182.

[45] *Id*.

[46] Sylvestre, *supra* note 1 at 13 (arguing that such conditions of release are striking examples of how law, time, and space can contribute to create powerful techniques of regulation and governance directed at marginalized people").

[47] *Id*.

Understanding the ways in which the bond for good behavior was intertwined with efforts to maintain control of formerly enslaved people during the antebellum period is crucial to understanding its significance in the US context.

A survey of practices in southern states reveals widespread use of the good behavior bond in monitoring the lives of formerly enslaved people.[48] Virginia records provide a particularly clear case study of the ways in which good behavior bonds were used to monitor free Black people, as revealed in legislative petitions and acts of the General Assembly.[49] In Virginia, the ever-growing population of free blacks residing in the state, and increased concern about their behavior prompted by slave rebellions in the South, resulted in a dramatic expansion of good behavior bond use in the early nineteenth century. Bonds were not only used more often during this period, but the good behavior requirement itself were untethered from any standard defining what constituted the difference between "good" and "bad" behavior. This left incredible discretion for justices of the peace to police conduct, from criminal violations to deficiencies in deportment.[50] In the early 1800s, the bond for good behavior morphed into a device for broad and indefinite monitoring of the actions and movements of formerly enslaved people residing in Virginia.

[48] This was also true in other areas colonized by the English. Adriana Chira tells the story of an enslaved African woman in Latin America owned by Maria Merced Boza and Joaquin Rabaliaba, who was freed on the condition of payments in services and good behavior. While practices in the United States are particularly demonstrative of the ways in which good behavior was required of formerly enslaved people, the requirement was a characteristic of areas colonized by the English more broadly. Adriana Chira, *Freedom with Local Bonds: Custom and Manumission in the Age of Emancipation* 126 The American Historical Review 949 (2021).

[49] The Virginia legislature codified the procedure for petitions to remain in the state in 1837; the state required free Black people wishing to stay in Virginia to "be of good character: peaceable, orderly, and industrious." Act of Mar. 22, 1837, ch. 70, s 1, 1836 Va. Acts 47.

[50] Act of Mar. 19, 1839, ch. 278, s. 1, 1839 Va. Acts.

A. Background: Traditional Use and Expansion

In the United States in the eighteenth and early nineteenth century, good behavior bonds was used to bind those who had committed a crime or were suspected of committing a crime to good behavior, typically for a twelve month period from the date of the offense or while a criminal defendant was awaiting a hearing.[51] Most laws proscribing a good behavior period dealt with crimes of moral turpitude, such as prostitution, bastardy or excessive drinking.[52] The good behavior requirement was codified in certain statutes to indicate which crimes had the potential to corrupt the morals of the community.[53] In the hands of magistrates and justices of the peace, it was used to indicate which individuals were suspected of dangerous or illegal activity, an intentionally amorphous category designed to give enforcers broad discretion to bind individuals of "ill fame."[54] In this context, the good behavior bond was used to maintain the peace and

[51] *See* William Waller Hening. *Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature* 131 (1779); John G. Aikin. *Digest of the Laws of the State of Alabama: Containing All the Statutes of a Public and General Nature, in Force at the Close of the Session of the General Assembly, in January 1833*; *see also* H.F. DeL *supra* note 3 at 345.

[52] A paradigmatic example of good behavior bond legislation stipulated "Justices of the peace may bind over to the good behavior all those that be not of good fame, wherever they may be found. Under which general words, a man may be bound to his good behavior for causes of scandal against morality, as well as against the peace; --as for haunting bawdy houses with women of bad fame, or for keeping such women in his own house, or for words in abuse of the officers of justice in the execution of their office; all night-walkers; eaves-droppers; such as keep suspicious company, or are reputed to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards, whoremasters; the putative fathers of bastards; cheats; idle vagabonds, and other persons whose misbehavior may reasonable bring them within the general words, 'persons not of good fame,' –an expression that leaves much to be determined by the discretion of the magistrate himself: but if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one." Howell Cobb, *Compilation of the Penal Code of the State of Georgia, with the Forms of Bills of Indictment Necessary in Prosecutions under It and the Rules of Practice* 5 (1850); *see also* John G. Aikin, *Digest of the Laws of the State of Alabama: Containing All the Statutes of a Public and General Nature, in Force at the Close of the Session of the General Assembly, in January 1833* (2), at 438; William Waller Hening. *Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature* 145 (1779).

[53] Howell Cobb, *Compilation of the Penal Code of the State of Georgia, with the Forms of Bills of Indictment Necessary in Prosecutions under It and the Rules of Practice* 5 (1850) (addressing "scandals against morality").

[54] Howell Cobb, *Compilation of the Penal Code of the State of Georgia, with the Forms of Bills of Indictment Necessary in Prosecutions under It and the Rules of Practice* 5 (1850) (confirming that the expression "persons not of good fame" leaves much to be determined by discretion).

applied primarily to white Americans, particularly the poor or "immoral."[55] It had the potential to regulate broad categories of conduct, and was designed to accommodate discretion in enforcement to protect the peace and safety of the community. Because of its discretionary quality, the bond was particularly well-suited to address mounting concerns about the movement and actions of free Black people in the antebellum South.

Records from across Southern states in the antebellum period reveal the evolution of the good behavior bond as a method of monitoring formerly enslaved people.[56] By the late eighteenth century, many southern states had empowered slaveholders to emancipate their slaves by petition or will.[57] With an ever-growing population of free Black people living in Southern communities, [58] legislatures were tasked with addressing their constituents' fears concerning the perceived threat they posed to white property-owners – a fear that reached its peak in the 1830s, kindled by slave uprisings in the South.[59] The good behavior bond became the legal device to address these concerns, and when the legislature began imposing good behavior requirements on

[55] Howell Cobb, *Compilation of the Penal Code of the State of Georgia, with the Forms of Bills of Indictment Necessary in Prosecutions under It and the Rules of Practice* 5 (1850).
[56] While widespread in the South particularly, this practice was not limited to Southern states. In New York, for example, "a 1730 'Act for the more Effectual preventing and punishing the Conspiracy and Insurrection of Negroes and other slaves' required free slaves to post a bond to the government to guarantee that they would not participate in slave uprisings and that they would not become a burden on the city where they lived." *Posting bond for manumission of a slave, May 5, 1757* (Gilder Lehrman Collection) https://www.gilderlehrman.org/history-resources/spotlight-primary-source/bond-manumission-slave-1757.
[57] Benjamin Joseph Klebaner, *American Manumission Laws and the Responsibility for Supporting Slaves*, 63 THE VA MAG. OF HIST. AND BIOGRAPHY 443, 443-444 (1955); *See also* Ch. XXI, 11 Laws of Va. 39 (Hening 1823) (enacted 1782).
[58] In 1782 Virginia allowed masters to voluntarily free adult slaves. In 1780 Virginia had about 2,000 free black people; by 1810 that number had increased to over 30,000, as thousands of individual masters took advantage of this law to manumit their slaves. In this period the free black population in Virginia grew faster than either the white population or the slave population. The free black population in the state in 1830 was about 47,000. In the rest of the South, there was a similar burst of manumissions during the Revolutionary period. For example, South Carolina's free black population went from 1,800 in 1790 to over 4,500 by 1810. *See* Ira Berlin, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 1974; John Hope Franklin, THE FREE NEGRO IN NORTH CAROLINA, 1790–1860 1995.
[59] Ira Berlin, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 188 (1974).

formerly enslaved people, it harnessed the bond's broadest capacity for discretionary authority.[60] What had typically been limited in scope and duration, albeit with room for discretion regarding enforcement, began attaching to free Black people for indefinite periods of time, and without reference to any limiting principles regarding what constituted "good behavior."[61] The early nineteenth century therefore marked an expansion not only in the number of individuals subjected to the good behavior bond, but in the discretion granted to justices of the peace to revoke the bond. Notably, in this context the bond governed both criminal and non-criminal behavior, as well as deficiencies in character or deportment.[62] To address growing concerns regarding the number of free Black people in the South, legislatures began to condition manumission, residency in the state, and freedom itself on an undefined notion of "good behavior."

Laws designed to control the behavior of free Black people in this way generally had two features: the first was a requirement that formerly enslaved people vacate the state within a certain timeframe after they had been freed, and the second, that they remain of good behavior during the interim period between their manumission and departure from the state.[63] The good behavior bond became the primary mechanism for enforcing the provisions of these laws. And

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[60] *See* Constitutional Rights Foundation, https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html (last visited Jan. 6, 2023) (recounting South Carolina's code which reflected the white obsession with controlling former slaves. It banned black people from possessing most firearms, making or selling liquor, and coming into the state without first posting a bond for "good behavior."); North Carolina Revised Code No. 105, Slaves and Free Persons of Color – An Act Concerning Slaves and Free Persons of Color 1830 Chapter 9, Section 4 (stipulating that once emancipated, a bond ensuring "honest and correct demeanor" must be put forward for as long as the formerly enslaved person resides in the state); Act of Mar. 22, 1837, ch. 70, s 1, 1836 Va. Acts 47; Ohio History Central, https://ohiohistorycentral.org/w/Black_Laws_of_1807 (last visited Feb. 24, 2023) (explaining that the Ohio legislature passed a series of laws intended to discourage African American migration to the state, including a law that required Black people to find at least two people who would guarantee a five hundred dollar bond for good behavior).

[61] *Id.*

[62] Act of Mar. 19, 1839, ch. 278, s. 1, 1839 Va. Acts (mandating that Eliza Purdie and Louise Hardy, free persons of colour, will be in violation of their bond for good behavior if they fail to be of general good conduct and deportment *or* are convicted of a criminal offense while residing in the commonwealth).

[63] *See* Act of Mar. 22, 1837, ch. 70, s 1, 1836 Va. Acts 47.

unlike its common law use, in this context Black people were often required to find white members of the community to post the good behavior bond on their behalf.[64] In some cases, slaveowners were required to post the good behavior bond in advance of manumitting their slaves, and in others formerly enslaved people were required to find white community members willing to sign a petition in support of their promise to remain of good behavior.[65] Generally, freedom depended on whether a free Black person had support from white members of his community, financial or otherwise.

Additionally, in the rare case of exemptions granted for certain formerly enslaved people to remain in the state indefinitely, the good behavior bond became the means for deciding when and for how long a free Black person was allowed to remain in the state once the statutory period had passed.[66] In the 1830s, the good behavior bond, which had historically been used to regulate the behavior of poor or undesirable people in the community, assumed a new significance in the context of American slavery. When applied to free Black people, the good behavior bond was limited in neither scope nor duration.[67] It became a catch-all provision that enabled legislatures and justices of the peace to hyper-monitor formerly enslaved people in the South.

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[64] *See Posting bond for manumission of a slave, May 5, 1757* (Gilder Lehrman Collection) https://www.gilderlehrman.org/history-resources/spotlight-primary-source/bond-manumission-slave-1757.
[65] *See* Candace Robins and Shadrack: Petition (Feb. 09, 1841) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917819353005756); Rebecca Watson: Petition (Feb. 12, 1850).
[66] *See* Act of Mar. 19, 1839, *supra* note 54.
[67] Cobb, *supra* note 52.

B. Virginia Case Study

Virginia provides a particularly powerful example of the ways in which the good behavior bond evolved over time to address the concerns of southern slaveholders. In Virginia, like other states, the good behavior bond had traditionally been used to bind certain individuals who presented a particular risk to the safety or moral standards of the community.[68] But by the 1830s, it had transformed into a legal mechanism that could be applied for indefinite periods of time, with no language delineating what kind of behavior might constitute a breach. Aspects of the good behavior bond that had been true since its inception in 1361, particularly the breadth of conduct it regulated and the discretion it granted to enforcers, were amplified to make it an ideal tool for monitoring and controlling free Black people's behavior and movements.

In 1782, Virginia passed legislation that allowed slave owners to emancipate their enslaved without seeking a special act from the General Assembly.[69] Between 1780 and 1810 the free black population of Virginia grew from 2,000 to 30,000.[70] In general, there was concern that free Black people posed a threat to orderly society, a concern that skyrocketed in the wake of revolts like Nat Turner's Rebellion.[71] It was against this backdrop that the Virginia legislature began debating methods for controlling the behavior of free Black people living in the state. The primary method they agreed on was predicating freedom on good character or behavior, codified in an 1837 amendment to "An Act Requiring The Removal of All Free Negroes" (the Removal Act).[72] In practice, the good behavior bond was the means for demonstrating that an individual

[68] *See* William Waller Hening. *Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature*.
[69] Ch. XXI, 11 Laws of Va. 39 (Hening 1823) (enacted 1782).
[70] Ira Berlin, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 46 (1974).
[71] *Id*. at 188.
[72] A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. Rev. 1268 (1993).

could be held to this standard.[73] For a free Black person living in Virginia, the consequence for violating the bond was eviction from the state or re-enslavement.[74] The good behavior bond became a means not only of controlling behavior, but a condition of freedom to live in the state of Virginia.[75]

The effect of this use of the good behavior bond is powerfully demonstrated by legislative petitions from the 1830s. These petitions were submitted by or on behalf of formerly enslaved people who wished to remain in Virginia beyond the statutory period set out in the Removal Act. The effect of this law, particularly the good behavior requirement, is perhaps best conveyed by the stories of those directly impacted by it.

Louise Hardy was an elderly Black woman who had been enslaved for more than 45 years, and had been manumitted by her enslaver, Nathl Pitt in his last will and testament.[76] Because she had gained her freedom, she was required by the Removal Act to leave Virginia within twelve months of her manumission. But for Louise Hardy, leaving the state was an extreme hardship – physically because of her age, and emotionally because her children and all of her old acquaintances lived in her County of Isle of Wight, Virginia neighborhood. In her petition, she writes that she would prefer to return to enslavement to "a good person" rather than leave the only place she had ever lived, and the only kinship network she had ever known.[77] To demonstrate her willingness to comply with the law, she offered to bind herself with a bond for

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[73] *See* Act of Mar. 19, 1839, ch. 278, s. 1, 1839 Va. Acts.
[74] Act of Mar. 22, 1837, ch. 70, s 2, 1836 Va. Acts 47 ("If after…revocation any such person shall remain within this commonwealth more than twelve months, he, she, or they so remaining, shall forfeit their right to freedom, and may be apprehended and sold in the manner prescribed by law in relation to slaves emancipated and remaining in the state more than one year").
[75] Higginbotham, *supra* note 62.
[76] Louis Hardy: Petition, Isle of Wight County (Jan. 28, 1839) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917816297705756).
[77] Dylan C. Penningroth, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROSPERITY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 89 (2003) (explaining the importance of kinship for safety, community, and the accumulation of property for enslaved people during the antebellum period).

good behavior. In an act passed March 19, 1839, the General Assembly granted Louise Hardy's request, contingent upon her securing the bond for her good behavior to guarantee her "general good conduct and deportment," in addition to the stipulation that permission to remain in Virginia would be revoked if she committed a criminal offence against the laws of the commonwealth.[78]

Henry and Frances Lewis were a free Black married couple, emancipated in 1806.[79] Under the Removal Act, they too were subject to removal from Virginia. In their petition, they requested the Assembly's "kind permission to [remain in the state]…being strongly attached to the people among whom they were born and raised." They emphasized the "correctness of their conduct heretofore in which…they [would] persevere with renewed zeal if their prayer be granted." Like Louise Hardy, they offered to enter a bond for good behavior as a guarantee of their good conduct and compliance with the law. Included in their petition were 51 signatures from white citizens of the Town of Falmouth, Virginia, where they lived, certifying their "orderly and peaceable character." On December 15, 1832, their petition was denied. While there is no record of the Lewises after this entry, it can be presumed based on the terms of the Removal Act that they were either re-enslaved or evicted from the state.

Jesse, Henry, Ruebin, Sally and Betsey had been enslaved by Thomas Norris until his death in 1815.[80] By the terms of his will, they were emancipated. In their petition, they described their choices as either to "quit their natal soil within a year…or to return to the State of bondage under an uncertain master, unless they be specially privileged and excepted from the operation of

[78] Act of Mar. 19, 1839, ch. 278, s. 1, 1839 Va. Acts.
[79] Henry and Frances Lewis: Petition, Stafford County (Dec. 10, 1832) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917821461305756).
[80] Norris, Jesse; Others (Free Negroes): Petition, Cumberland County (Dec. 18, 1815) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917813380905756).

the law by an Act of the General Assembly." They asked to be allowed to "continue to breath[e] their native air, at least, as long as they conduct themselves honestly, peaceably and orderly." To ensure their good conduct, they pledged to enter into a bond for their good behavior which, notably, they described as obviating future violations of the law "without banishing [them] from the soil where they drew their first breath." Their petition is not marked as granted or denied, but the absence of an act addressing their freedom implies that their request was rejected.

The stories of Louise Hardy, Henry and Frances Lewis, and Jesse, Henry, Ruebin, Sally and Betsey demonstrate how deeply consequential the decision whether or not to grant permission to remain in Virginia was to formerly enslaved people. It touched the most fundamental bonds of kinship, community and belonging. And while their petitions demonstrate the operation of good behavior bonds in relation to the freedom to live in Virginia, theirs are certainly not the only examples of the bond as a means of promising the sort of behavior that did not intimidate white Virginians.[81] By expanding the application and terms of the bond for good behavior in this way, the General Assembly crafted a tool with the potential to monitor the behavior of formerly enslaved people for the duration of their residency in Virginia or their lives, whichever was longer. This conception of the bond also regulated an exceptional range of behavior, from the explicitly illegal to the simply undesirable.[82] While the Removal Act were obviated post-Emancipation, this broad conception of the good behavior requirement was a step from which the Virginia legislature never retreated.

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[81] *See also* Candace Robins and Shadrack: Petition (Feb. 09, 1841) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917819353005756); Rebecca Watson: Petition (Feb. 12, 1850) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917818856105756); Clara: Petition (Dec. 12, 1832) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917821454405756); Inhabitants: Petition, Petersburg on Behalf of Jingo (Dec. 14, 1812) (https://lva.primo.exlibrisgroup.com/permalink/01LVA_INST/altrmk/alma9917819455205756).

[82] Higginbotham, *supra* note 62.

PART III: GOOD BEHAVIOR CONDITION OF SUSPENDED RELEASE, VIRGINIA CODE

One of the ways in which the common law bond for good behavior persists in current law is in the good behavior condition of suspended release.[83] It is a legal mechanism for monitoring the behavior of individuals who have been convicted of a criminal offense, and is closely related to probation and parole.[84] It is generally accepted that good behavior is required of individuals during the term of their suspended sentence, based on the notion that the court's purpose in suspending a sentence is to give defendants "an opportunity to repent and reform,"[85] which is rebuffed if they commit a crime during the suspended period. In the vast majority of states, a suspension may be revoked by the sentencing judge if an individual breaks the law during the term of her suspended sentence.[86] Virginia is unique, however, in that it is the only state that grants judges discretion to revoke suspended sentences based on violations of good behavior that do not also amount to violations of the law.[87] In other words, Virginia is the only state in the country that grants judges discretion to find violations of good behavior for conduct they deem "bad," regardless of whether or not that conduct constitutes a crime.

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[83] Sylvestre *supra* note 3 (citing several historians who find that the earliest forms of probation and suspended sentences go back to the use of bonds to keep the peace and be of good behavior).
[84] Virginia courts have held that although related to probation, good behavior is a condition of suspended sentences that exists alongside probation. Therefore, even a defendant who was not placed on probation would be subject to the good behavior requirement. *Marshall v. Commonwealth*, 202 Va. 217, 116 S.E.2d 270, 220 (1960).
[85] *Coffey v. Commonwealth*, 209 Va. 760, 167 S.E.2d 343, 346 (1969).
[86] 58 A.L.R.3d 1156 (1974) ("all jurisdictions appear in accord that a finding of failure of good behavior must be predicated upon competent evidence that the actor has committed a criminal act").
[87] *Marshall v. Commonwealth*, 202 Va. 217, 116 S.E.2d 270, 221 (1960) (holding that the conviction of a subsequent criminal offense is not essential to warrant a revocation of suspension). In this case, the defendant had been found not guilty of disposal of stolen property. Despite being found not guilty, his suspended sentence for a previous offense was revoked.

This broad conception of good behavior, viewed in light of Virginia's history of using the good behavior bond to hyper-monitor free Black people in the antebellum period, reveals a pattern. The Virginia General Assembly historically has legislated broad authority for the purpose of monitoring those of "ill fame," which due to the state's perpetuation of slavery, often focused on people of color. In the early nineteenth century, a formerly enslaved person's freedom depended on maintaining whatever conduct a justice of the peace deemed to be "good behavior." It is not a coincidence that today, in Virginia, a formerly convicted person's freedom from incarceration depends on maintaining whatever conduct a judge deems to be "good behavior."

A. History of the Law in Virginia

In Virginia, the good behavior requirement has existed in one form or another[88] throughout the state's history, from early statutes that addressed undesirable conduct, to antebellum laws controlling the behavior of free black people, to more modern laws policing the conduct of those considered "of ill fame" or at high risk for future misconduct. There is enormous historical continuity across various statutes in Virginia seeking to monitor the behavior of undesirable people.

What emerges from the various iterations of the good behavior requirement in Virginia is that the General Assembly retained its antebellum-era practices by codifying preventive justice

[88] I am embracing a theory of analysis developed by Professor Reva Siegel referred to as "preservation through transformation." Through this theory, she demonstrates how efforts to "dismantle an entrenched system of status regulation can produce changes in its constitutive rules and rhetoric, transforming the status regime without abolishing it." She argues that legal systems evolve as they are contested, meaning the laws on their face might change while their discriminatory force remains. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, STAN. L. REV. 1111 (1996).

statutes targeting those of "ill fame." For more than one hundred years after the Civil War, justices of the peace in Virginia had broad discretion to police undesirable or immoral conduct.[89] But at the height of the criminal procedure revolution, and in the wake of *Papachristou*, it became clear that the discretionary nature inherent in the "ill fame" statutes was constitutionally problematic.[90] Instead of repealing these laws entirely, however, the Assembly removed explicit references to "good behavior" and "ill fame" from the Virginia Code, and subsumed this authority in Virginia's judges.[91] The justice of the peace system was officially eliminated in 1975, but in its place judges were granted broad discretion to decide what conduct could be required of formerly incarcerated people.[92] By placing the authority to require good behavior in Virginia's judges, the General Assembly retained the spirit of laws that had historically policed those deemed to be particularly prone to undesirable behavior. Drawing on the broad discretion that characterized antebellum-era good behavior requirements, Virginia judges were given the authority to decide for themselves what constituted "good" behavior, and what sort of conduct deserved prolonged incarceration.[93] Beginning with the Removal Acts which were designed to govern free Black people in the state, and ending with current practices which retain the discretion to decide what constitutes good behavior, the law in Virginia has been consistent over time. The overarching theme of these laws is broad discretion used to marginalize undesirable people through the requirement that they comport with an arbitrary standard of good behavior.

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[89] *Code of Virginia: With the Declaration of Independence and Constitution of the United States; and the Declaration of Rights and Constitution of Virginia* (1849), at 755.
[90] REVISION OF TITLE 19.1 OF THE CODE OF VIRGINIA: REPORT OF THE VIRGINIA CODE COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, HOUSE DOCUMENT NO. 20 (1975), https://rga.lis.virginia.gov/Published/1975/HD20/PDF.
[91] Virginia Acts of Assembly, 1917, Vol. 1 Ch. 1-495 (Ch. 3, Art. 3).
[92] Va. Code §19.2-306(A).
[93] *Hamilton v. Commonwealth*, 217 Va. 325, 228 S.E.2d 557 (1976).

i. Early Statutes

In eighteenth century Virginia, the bond for good behavior appeared in statutes resonant with its common law precedent in England. It operated as a type of bail in statutes which required a defendant to post bond during the interim between being charged and tried for a crime.[94] For example, in a statute governing those accused of threatening to destroy tobacco plants, the accused could be required to post a bond for his good behavior until the next meeting of the court in his county, or otherwise be incarcerated until the hearing.[95] It also appeared in statutes regulating immoral conduct, like statutes restricting tippling houses.[96] A person suspected of operating a tippling house could be required to post a bond for good behavior for the term of one year, and if during that year he was found illegally selling alcohol, the good behavior bond was forfeited and the accused person was subject to imprisonment.[97] The bond was also used to regulate undesirable conduct, like laws punishing vagrants or those declared "vagabonds."[98] In these statutes, vagrants and vagabonds were required to give a bond for their good behavior and "for betaking him or herself to some lawful calling or honest Labour," the failure of which resulted in imprisonment.[99] These iterations of the good behavior bond were the baseline that had operated at the common law since the fourteenth century.[100] Justices of the peace had significant discretion to regulate behavior in relation to crimes defined by Virginia statutes.

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[94] Waverly K., Church Winfree, Randolph W. *Laws of Virginia; Being a Supplement to Hening's The Statutes at Large, 1700-1750 (1723)*, at 121.
[95] *Id*.
[96] William Waller Hening. *Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature* (1779), at 146.
[97] *Id*.
[98] Waverly, *supra* note 94 at 254.
[99] *Id*.
[100] Justices of the Peace Act, 1361 *supra* note 17.

ii. The Removal Acts

In the early nineteenth century, the Removal Acts, which required good behavior bonds as a condition for free black people to live in the state, were added to the baseline statutes that had existed for much of Virginia's history.[101] And while those statutes are defined in the previous section, it is important to situate them in the body of laws in Virginia which have required good behavior throughout the state's history. The Removal Acts expanded the number of people in Virginia who were regulated by bonds for good behavior, and were instrumental in the control of free black people in the early nineteenth century. In 1862, however, all manumission statutes in Virginia were abolished, including the Removal Acts.[102] While this marked an end to the explicit regulation of free black people by the good behavior bond, the spirit of the Act was retained in a law that was passed for the first time in 1849, and would remain in effect until the 1970s.

iii. "For Preventing the Commission of Crimes" and Parallels to Papachristou

In 1849, the Virginia Assembly passed Title 55, Chapter 201, titled "For Preventing the Commission of Crimes."[103] In this statute every judge in the state, and every justice and

[101] Act of Mar. 22, 1837, ch. 70, s 1, 1836 Va. Acts 47 *supra* note 60.
[102] Higginbotham, *supra* note 67 (explaining that the acts were repealed due to growing fears about the number of free black people in the state).
[103] *Code of Virginia: With the Declaration of Independence and Constitution of the United States; and the Declaration of Rights and Constitution of Virginia* (1849), at 755.

commissioner was named a "conservator of the peace," and given authority to require from persons "not of good fame" security for their good behavior.[104] Consistent with the common law bond for good behavior, under this statute conservators of the peace held a dual function as judge and law enforcement officer, and were granted broad discretion to determine who was not of good fame, and what constituted good behavior. The statute for preventing the commission of crimes remained on the books in Virginia until 1974,[105] but began to face serious criticism during the civil rights era, when other vague and discretionary laws drew the attention of civil rights activists and lawyers.[106] Challenges to the 1849 good behavior statute and its progeny are captured in *Fedele v. Commonwealth (1966)*[107], a case that bears striking similarities to *Papachristou,*[108] which would overturn vagrancy statutes as void for vagueness only six years later.

In *Fedele*, defendant Jacquelin Fedele had been convicted on a warrant that charged her with being "a person of ill fame, to wit: a night prowler," for which she was found guilty and required to pay a bond for good behavior in the sum of $300. She had no previous criminal record, but was a married woman with two children, separated from her husband and had been arrested while parked in an alley with a "male companion." While the officer testified that he had not arrested Ms. Fedele because he suspected her of "committing an immoral act" with the man, but

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[104] *Code of Virginia: With the Declaration of Independence and Constitution of the United States; and the Declaration of Rights and Constitution of Virginia* (1849), at 755.
[105] REVISION OF TITLE 19.1 OF THE CODE OF VIRGINIA: REPORT OF THE VIRGINIA CODE COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, HOUSE DOCUMENT NO. 20 (1975), https://rga.lis.virginia.gov/Published/1975/HD20/PDF *infra* note 110.
[106] *E.g.* Risa Goluboff, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) (explaining the rise of the civil rights movement and how it related to legal challenges of vagrancy statutes due to their discretionary and discriminatory character).
[107] *Fedele v. Commonwealth*, 205 Va. 551, 138 S.E.2d 256 (1964).
[108] In *Papachristou*, two white females and two black males were arrested for "prowling by auto" while riding together in a car on the main thoroughfare in Jacksonville. The officers claimed the arrest was made because the defendants stopped near a used car lot which had been broken into several times. There was no evidence of any breaking and entering on the night the group was arrested. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), at 159.

was instead suspicious that she was planning to commit burglary, the lack of evidence in the case suggested the motive for the arrest was really that she was in a parked car with a man to whom she was not married.[109] Ms. Fedele brought two challenges to her conviction and bond for good behavior – first that there was no evidence she was a "person of ill fame," and second that the good behavior statute was so general and vague that it violated both state and federal constitutional guarantees of due process and equal protection of the laws.[110] In a move typical for courts at this time,[111] the Supreme Court of Appeals of Virginia engaged in a lengthy discussion of the evidence in the case, avoiding the constitutional question altogether. The court explained that Ms. Fedele had no criminal record, and no reputation for being a person of ill fame. The arresting officer's testimony itself foreclosed the conclusion that she was parked in the alley for the purpose of committing an immoral act. No burglarious tools had been found in the car, and no other indication of intent to break and enter was found at the scene. Because "no evidence had been presented that [Fedele] had a bad reputation"[112] and there was no showing of good cause to believe that she intended to commit burglary, the court reversed her conviction and bond for good behavior. Deciding the case on evidentiary grounds, the court avoided addressing her due process and equal protection claims.

Legal scholars in Virginia, however, recognized that Ms. Fedele's case fit in a broader category of convictions based on vague and discretionary statutes. In an article published by the Virginia Law Review in 1966, J. F. S. argued that the statute for preventing the commission of crimes was unconstitutionally vague because it required a bond for good behavior for "bad

[109] *Fedele v. Commonwealth*, at 261.
[110] *Id*. at 552.
[111] Goluboff, *supra* note 96 at 41 (pointing to the Supreme Court's failure to act when faced with constitutional challenges to vagrancy statutes, choosing instead to made decisions based on evidentiary grounds).
[112] *Fedele v. Commonwealth*, at 553.

reputation."[113] The author compared the Virginia statute to the law at issue in *Lanzette v. New Jersey*, in which the Supreme Court struck down a statute criminalizing "gangsters" because the term was undefinable and "so vague that men of common intelligence must necessarily guess at its meaning," violating the due process clause of the Fourteenth Amendment.[114] J. F. S. claimed that the phrase "not of good fame" was even less susceptible of concrete application than the term "gangster."[115] He concluded that it clearly offended due process to demand that a defendant post a bond for good behavior merely because he fell within "that undefinable class of persons 'not of good fame.'"[116] Citing *Commonwealth v. Franklin*, a Pennsylvania case dealing with a similar preventive justice statute, J. F. S. urged that the good behavior bond requirement was "fundamentally in conflict with any modern and enlightened view of individual civil rights" because "it [was] in reality an effective power to punish in virtually unrestrained form."[117] The court's analysis in *Fedele*, and Virginia scholars' reaction to it, was strikingly parallel to the vagrancy discussion simultaneously taking place in other jurisdictions.[118]

Unlike vagrancy challenges, however, the Supreme Court would not have an opportunity to hear a challenge of Virginia's good behavior bond statute. In 1972, the Supreme Court struck down vagrancy statutes as void for vagueness in *Papachristou.* In 1974, the Virginia legislature, realizing that it was only a matter of time before Virginia's statutes became the target of the "criminal procedure revolution,"[119] directed the Virginia Code Commission to make a study of the criminal laws of the state, including "whether sections should be deleted or added to the

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[113] J. F. S., *Peace and Behavior Bonds. Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914, 917 (1966).
[114] *Id*.
[115] *Id*.
[116] *Id*. at 920.
[117] *Id*. at 917.
[118] Goluboff, *supra* note 96.
[119] *E.g.* Craig Bradley, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993) (for a discussion of the criminal procedure revolution that took place under the Warren Court during the 1960s).

Code."[120] The Commission found that Va. Code Chapter 2 of Title 19.1, which described the conservators of the peace and their dual authority as "both police and judicial [officers]" with the power to issue warrants, make arrests, and require bonds for good behavior, was "in the opinion of the Commission…a combination of power [which] violate[d] constitutional concepts."[121] To remedy this perceived unconstitutionality, the Commission transferred the authority to issue warrants and hear cases for the purpose of requiring a good behavior bond solely to judges and magistrates. In 1975, the General Assembly officially abolished the justice of the peace system in Virginia. In its place, it vested the authority previously granted to justices of the peace in magistrates.[122] At this time, the term "good behavior" disappeared from the Virginia Code. However, it was implicitly preserved in the broad discretion granted to judges as a remnant of the power once held by justices of the peace.

This conferral of power coincided with a statute that had been passed by the Virginia Assembly in 1950[123], which gave judges statutory authority to, for any cause deemed sufficient, revoke a suspended sentence and cause an individual to be arrested and brought before the court. Virginia courts have interpreted this statute as a codification of the common law power to require good behavior of individuals who pose a risk for future misconduct.[124] In 1862 the Assembly repealed the Removal Acts but preserved the good behavior requirement in Title 55, Chapter 201, a statute "for preventing the commission of crimes." In 1975 the Assembly repealed the

[120] REVISION OF TITLE 19.1 OF THE CODE OF VIRGINIA: REPORT OF THE VIRGINIA CODE COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, HOUSE DOCUMENT NO. 20 (1975), https://rga.lis.virginia.gov/Published/1975/HD20/PDF.
[121] *Id*.
[122] Virginia Acts of Assembly, 1917, Vol. 1 Ch. 1-495 (Ch. 3, Art. 3).
[123] F. D. G. Ribble, *Constitutional Law*, 45 VA. L. REV. 1402 (1959), at 1415.
[124] *Holden v. Commonwealth*, 27 Va. App. 38, 497 S.E.2d 492 (1998) *see supra* note 122.

statute for preventing the commission of crimes, but preserved the good behavior requirement in Virginia Code §53-275, which is still in effect today[125].

B. Common Law Principle Codified: Virginia Code §19.2-306(A)

In Virginia, the authority to bind an individual to good behavior following the suspension of their sentence is derived from Virginia Code Section 19.2-306(A), which gives the court authority to set the terms of suspension, and stipulates that "in any case in which the court has suspended the execution or imposition of sentence, the court may revoke the suspension of sentence *for any cause the court deems sufficient*."[126] It is in the phrase "for any cause the court deems sufficient" that the good behavior requirement is implied.[127] The statute draws on principles of the common law good behavior requirement, which is reflected in the broad discretion granted to judges regarding what conduct sufficiently warrants the revocation of a suspended sentence. As the Virginia Supreme Court has held, this is fundamentally a common law authority.[128]

C. Distinguishing Virginia from Other Jurisdictions

While reading a good behavior requirement implicitly into the terms of suspended sentences is common, reading the condition as a broad authority to monitor convicted individuals' "bad" behavior is not. As an article by the American Law Reports demonstrates,

[125] The current citation for this statute is Va. Code § 19.2-306.
[126] Va. Code §19.2-306(A).
[127] *Collins v. Commonwealth*, 269 Va. 141, 145 607 S.E.2d 719 (2005).
[128] *Fedele v. Commonwealth*, 205 Va. 551 (1964).

every state that has dealt with the question of whether or not a suspended sentence may be revoked for less than criminal activity has held in the negative.[129] That is, except for Virginia. In a line of cases that began with *Holden v. Commonwealth*, Virginia courts held that "good behavior is not limited to an avoidance of criminal activity."[130] For example, "iniquitous, but not necessarily illegal"[131] conduct is enough to justify a court's revocation of a suspended sentence. Or perhaps stated in its clearest form, "in order to revoke a suspended sentence for failure to maintain good behavior, the court must have before it evidence that the defendant has not been of good behavior."[132] This has become the default rule in Virginia courts, an approach that is markedly different from every other state. In justifying this broad discretion, Virginia courts have cited the broad statutory grant of authority regarding the revocation of suspended sentences.[133]

Perhaps here, as in the previous part, the impact of this interpretation of the Virginia law regulating suspended sentences is best told by the stories of those directly impacted by it.

Jerome Artis, Jr. received a partially suspended sentence in 1987. While he was incarcerated with the Department of Corrections, he incurred institutional infractions for which the court revoked the suspended portion of his sentence. He appealed, claiming that the revocation was based on matters that were only institutional infractions and did not amount to substantial misconduct, and that he did not have a fair warning that his actions could result in revocation. In affirming the revocation of Mr. Artis's suspended sentence, the Court of Appeals of Virginia, Richmond held that "an inmate who knowingly engages in misbehavior that

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[129] 58 A.L.R.3d 1156 (1974).
[130] *Holden v. Commonwealth*, 26 Va. App. 403, 409, 494 S.E.2d 892, 895 (1998).
[131] *Bryce v. Commonwealth,* 13 Va. App. 589, 591, 414 S.E.2d 417, 418 (1992); *Cottrell v. Commonwealth,* 12 Va. App. 570, 574, 405 S.E.2d 438, 441 (1991).
[132] *Hamilton v. Commonwealth*, 217 Va. 325, 228 S.E.2d 557 (1976).
[133] *Holden v. Commonwealth*, 27 Va. App. 38, 497 S.E.2d 492 (1998) (pointing to Va. Code § 19.2-306 and its predecessors, and stressing that a court may revoke a suspended sentence for 'any cause deemed by it sufficient').

constitutes an institutional infraction, regardless of whether it also constitutes a criminal offense…might be found to violate the good behavior term of his suspended sentence."[134] As a result, Jerome Artis spent four additional years incarcerated.

Phillip Mitchell was convicted in 1998 of embezzlement and grand larceny. He was sentenced to three ten-year terms, all of which were suspended. He was required to make restitution, which the court characterized as "showing that he was of good behavior."[135] In the months following the suspension of his sentences, Mitchell jumped around between jobs and was unable to make initial restitution payments. When asked by the court whether he had been making payments, Mitchell lied, stating that the victims had received their first check. Evidence was introduced that he had "pleaded with victims to work with him regarding the restitution payments," but to no avail. When the judge demanded to know why he had lied, Mitchell stated that he was buying time in hopes of "straightening it out" the next day. At the conclusion of this evidence, the trial court revoked Mr. Mitchell's suspended sentences. In upholding the trial court's decision, the Court of Appeals of Virginia cited *Cottrell* for the proposition that "deceit, untruthfulness and deception…are always grounds for revoking a suspended sentence."[136]

Virginia Code §19.2-306(A) and Virginia courts' interpretation of it represent the broadest conception of the good behavior requirement in the United States. Current good behavior conditions are not in direct historical continuity with their predecessors at common law, nor are they merely the same legal technology. But the bond for good behavior is the precedent for this regime, and the line drawn from the common law bond to more current conditions of good behavior runs through a legal regime that was designed to uphold slavery in the antebellum

[134] *Artis v. Commonwealth*, No. 0175-05-2, 2006 WL 536185 3 (Va. Ct. App. Mar. 7, 2006); see also *Kibler v. Commonwealth*, No. 0165-02-4, 2002 WL 31716717 (Va. Ct. App. Dec. 3, 2002) (demonstrating similar facts).
[135] *Mitchell v. Commonwealth*, No. 2313-98-1, 1999 WL 1134672 1 (Va. Ct. App. Nov. 16, 1999).
[136] *Mitchell v. Commonwealth* at 3.

South. Nowhere was this truer than in Virginia, a fact that continues to be reflected in the incredibly broad grant of discretion to Virginia judges to monitor the behavior of people subject to suspended sentences.

Conclusion

The bond for good behavior, in its earliest form, was designed to confer broad authority to maintain the peace and security of the community. It harnessed a broad discretionary power vested in the justice of the peace, enabling him to carry out his dual function as magistrate and police officer. Perhaps in part because of how broad the language of the Act establishing the justices of the peace was, and in part because of its discretionary quality, the bond for good behavior became a tool of marginalization. In England, it was disproportionately directed at the poor and the foreigner. Transferred to the American context in the seventeenth and eighteenth century, the bond for good behavior was resonant with its predecessor at common law. It was used to enforce the moral norms of the community, as well as to maintain the peace. During this early period of US history, the bond for good behavior rarely if ever applied to an individual for longer than twelve months, and operated in the context of terms delineating criminal activity.

The terms and uses of the bond for good behavior in the United States shifted in the early nineteenth century. It became instrumental in monitoring the behavior and controlling the movement of free Black people in the South. Traits that had been inherent in the bond since its inception at common law, like discretion and capaciousness, were exaggerated to address the fears of white property-owners facing gradual emancipation. During this period, the bond was limited in neither scope nor duration. What had traditionally been defined in terms of long lists of criminal activity, became an amorphous command to remain of good behavior, or demeanor,

or to demonstrate good character. What had typically been limited in duration to twelve months at the most, began attaching to free Black people indefinitely. The bond for good behavior became the mechanism for ensuring compliance from formerly enslaved people in the midst of a tumultuous moment in the South during the years leading up to the Civil War.

Virginia pioneered this new use of the good behavior bond, a fact that is reflected in more modern Virginia law. The broad conception of good behavior that was adopted in the antebellum period continued to shape the way in which the state conceived of the appropriate level of discretion to punish "bad" behavior. This appears most evidently in Virginia's law governing revocation of suspended sentences. Virginia is the only state in the country that condones revocation of suspended sentences for good behavior violations that do not amount to criminal violations. In adopting this conception of the good behavior requirement, Virginia law reflects the worst aspects of the common law bond, which operated as a tool of marginalization. In addition, the law is resonant with practices in the state during the antebellum period, which greatly expanded the terms of the good behavior condition to hyper-monitor the conduct of free Black people in the state. Identifying this use of the bond for good behavior in the early nineteenth century, and explaining the ways in which that concept sheds light on current practices, is a call to reckon with Virginia's history and reevaluate the current law.