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HOUSE JOINT RESOLUTION NO. 587

Offered January 11, 2017

Prefiled January 4, 2017

Recognizing that Virginia law has never permitted the prosecution of the mother of an aborted child for performing an abortion on herself.

Patron—Marshall, R.G.

Referred to Committee on Rules

WHEREAS, supporters of legal abortion claim that legislative measures that would enact laws challenging the status quo of abortion laws would have the legal effect of requiring the prosecution of a woman for a miscarriage or for performing an abortion on herself; and

WHEREAS, the original version of the Hippocratic Oath, the ethical lodestone of the medical profession, expressly forbade the performance of abortions. As quoted by the U.S. Supreme Court in *Roe v. Wade,* 410 U.S. 113, 131 (1973), the original Hippocratic Oath contained the following provision: "I will neither give a deadly drug to anybody if asked for it nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."; and

WHEREAS, at common law, it was a crime to procure an abortion after a woman had become quick with child. In his *Commentaries on the Laws of England,* Sir William Blackstone stated as follows: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemesnor." Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes* (Philadelphia: J. B. Lippincott Co., 1893, pp. 129-30); and

WHEREAS, Virginia enacted its first statute prohibiting abortion in 1848, Chapter 120 of the Acts of Assembly of 1847-1848, expanding upon the common law by making it a crime to cause an abortion regardless of whether the child had or had not reached the stage of quickening; and

WHEREAS, Virginia's first abortion statute provided as follows: "Any free person who shall administer to any pregnant woman any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months."; and

WHEREAS, the criminal penalty for the abortion of a quick child under Chapter 120 of the Acts of Assembly of 1847-1848 was identical to the criminal penalty for voluntary manslaughter; and

WHEREAS, in Chapter 187, § 8 of the Code of 1873, the distinction between abortion of a quick child and a child who was not quick was abandoned and any abortion was punishable by confinement in the penitentiary for not less than one nor more than five years, thus making the criminal penalty for any abortion identical to the criminal penalty for voluntary manslaughter; and

WHEREAS, in 1878, the upper range of the criminal penalty for abortion was increased to 10 years by Chapter 311 of the Acts of Assembly of 1877-1878; the upper range of the criminal penalty for voluntary manslaughter in 1878 remained at five years; and

WHEREAS, since 1878, and continuing to the present day, the crime of abortion of any unborn child has been subject to higher criminal penalties than voluntary manslaughter. Abortion is currently classified as a Class 4 felony under § 18.2-71 of the Code of Virginia, and voluntary manslaughter is currently classified as a Class 5 felony under § 18.2-35 of the Code of Virginia; and

WHEREAS, although exceptions have been added to Virginia's laws on abortion in the wake of the U.S. Supreme Court's decision in *Roe,* Virginia's current prohibition on abortion, § 18.2-71 of the Code of Virginia, is virtually identical to the version contained in Chapter 311 of the Acts of Assembly of 1877-1878; and

WHEREAS, Virginia's laws clearly recognized that an unborn child was a person as demonstrated by the fact that Virginia's first statute prohibiting abortion was included with the homicide crimes in the

chapter entitled "Of Offences Against the Lives and Persons of Individuals" and provided for penalties that were equivalent to the penalties for manslaughter; and

WHEREAS, despite the criminalization of abortion both at common law and under the laws of Virginia prior to the U.S. Supreme Court's decision in *Roe,* Virginia's laws have never made it a crime for a mother to undertake the performance of an abortion on herself and she is immune from prosecution; and

WHEREAS, the mother's immunity from prosecution has been described as follows: "Thus, regardless of whether a pregnant woman acts alone or with assistance in causing an abortion, she cannot be charged under a criminal abortion statute, which is specifically directed to prevent the conduct of persons other than the pregnant woman." 1 Am Jur 2d *Abortion and Birth Control* § 121; and

WHEREAS, the legal treatment of a woman who consented to an abortion in other states prior to the U.S. Supreme Court's decision in *Roe* was consistent with both the common law and Virginia law and there have been "only two cases where a woman was charged in any state with participating in her own abortion: one from Pennsylvania in 1911 and one from Texas in 1922" and, furthermore, "[t]here is no documented case since 1922 in which a woman has been charged in an abortion in the United States." Clarke D. Forsythe, *Why the States Did Not Prosecute Women for Abortion before Roe v. Wade,* Americans United for Life; and

WHEREAS, a review of abortion laws in all 50 states demonstrates that "no American court has ever upheld the conviction of a woman for self-abortion or consenting to an abortion and, with the exception of [the Pennsylvania case from 1911 and the Texas case from 1922], there is no record of a woman ever being charged with either offense as a principal or as an accessory." Paul B. Linton, *The Legal Status of Abortion in the States if Roe v. Wade is Overruled,* 23 Issues in Law & Medicine 3, 6 n. 15 (2007); now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the General Assembly recognize that Virginia law has never permitted the prosecution of the mother of an aborted child for performing an abortion on herself.