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HOUSE JOINT RESOLUTION NO. 588

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Recognizing that Virginia law has never permitted the prosecution of an individual for abortion for using legal contraception.

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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 making the use of certain methods of contraception unlawful; 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,* no individual has been prosecuted in Virginia under any prohibition against abortion for utilizing any form of contraception approved by the U.S. Food and Drug Administration (FDA); and

WHEREAS, Dr. Abraham Stone, the medical director of the Margaret Sanger Research Bureau, acknowledged at an International Planned Parenthood Conference in 1952 that "the mechanical and chemical methods currently employed, or any biologic method that would prevent ovulation or fertilization merely prevent life from beginning . . . . Measures designed to prevent implantation fall into a different category. Here there is a question of destroying a life already begun." Abraham Stone, MD, *Research in Contraception: A Review and Preview*, Report of the Proceedings of the Third International Conference of Planned Parenthood (Nov. 24-29, 1952); and

WHEREAS, Enovid was the first hormonal birth control pill approved by the FDA. The manufacturer, G. D. Searle and Company, began marketing Enovid as a contraceptive in 1960. A 1954 Searle memo suggested that chemicals that achieve their anti-fertility effect only through interrupting ovulation would not be acceptable: "I believe the only acceptable compound would be one which does not interfere with the cycle or ovulation but which might prevent either fertilization or possible implantation." Memo to Dr. Drill from Dr. Saunders, re: "Effects of Drugs on Mating in Rats," Dec. 9, 1954; and

WHEREAS, following this lead, Brent Boving, a Swedish fertility researcher, suggested a linguistic finesse to avoid moral objections to some contraceptives at a 1959 Planned Parenthood-Population Council Symposium: "Whether eventual control of implantation can be reserved the social advantage of being considered to prevent conception rather than to destroy an established pregnancy could depend on something so simple as a prudent habit of speech." Brent Boving, *Implantation Mechanisms*, in C. G. Hartman, ed., *Mechanisms Concerned with Conception* (New York: Pargamon Press, 1963, p. 386); and

WHEREAS, a 1963 U.S. Department of Health, Education and Welfare reproductive survey noted: "All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor constitute, in the strict sense, procedures for inducing abortion. Administration of such compounds whose mechanism of action is of this character to man as either an investigative procedure or as a practical birth control technique poses technical legal questions that have not yet been resolved." U.S. Department of Health, Education and Welfare, Public Health Service, Pub. 1066 (Washington, D.C.: GPO, 1963, p. 27); and

WHEREAS, the American College of Obstetrics and Gynecology in 1965 "repositioned" scientific terms by redefining pregnancy from what was universally understood to commence with conception or fertilization, i.e., the union of sperm and ovum, to an obfuscation, namely, that, "CONCEPTION is the implantation of a fertilized ovum." *ACOG Terminology Bulletin* No. 1 (Chicago 1965); and

WHEREAS, in 1969, Dr. Philip Corfman, director of the Center for Population Research at the National Institute of Child Health and Human Development of the National Institutes of Health, testified regarding the metabolic effects of the birth control pill at a U.S. Senate hearing on pill labeling: "The second major anti-fertility action of oral contraceptives is on the endometrium. The progestogen acts as an anti-estrogen, causing alterations in endometrial glands, and, like progesterone, a pseudodecidual reaction. Both of these effects serve to make the endometrium unable to support implantation." *Competitive Problems in the Drug Industry, 1969: Hearings on Oral Contraceptives Before the Select Comm. on Small Business Subcomm. on Monopoly*, 91st Cong. 7056-57 (Statement of Dr. Philip Corfman, director of the Center for Population Research at the National Institute of Child Health and Human Development of the National Institutes of Health); and

WHEREAS, Dr. Charles C. Edwards, acting Commissioner of the FDA, wrote in a 1970 "deal doctor" letter to physicians regarding labeling of the birth control pill as follows: "Combination Oral Contraceptives: The mechanism of action is inhibition of ovulation . . . . Changes in . . . cervical mucus and endometrium may be contributory mechanisms."; and

WHEREAS, Dr. Corfman testified at a 1975 congressional hearing on a proposed constitutional amendment relating to abortion that "We all agree that IUDs [intrauterine devices] prevent implantation. The confusion resides around what other effects they may have." *Abortion, 1975: Hearings on S.J. Res. 6, 10, 11, and 91 Before the Senate Comm. on the Judiciary,* 94th Cong. 623 (Statement of Dr. Philip Corfman, director of the Center for Population Research at the National Institute of Child Health and Human Development of the National Institutes of Health); and

WHEREAS, the Chicago-Kent Law Review noted the following: "There is no reported case specifically deciding whether the use of pre-implantation means of fertility control violates abortion statutes containing an express requirement of pregnancy. . . . The question of whether the use of these pre-implantation means would violate the abortion laws has never been decided." Sybil Meloy, *Pre-Implantation Fertility Control and the Abortion Law*, 41 Chicago-Kent Law Review 191, 205

(1964); and

WHEREAS, the Chicago-Kent Law Review article was cited by the Planned Parenthood Federation of America and the American Association of Planned Parenthood Physicians in their amicus brief filed in *Roe* for the Planned Parenthood Federation of America and the Association of Planned Parenthood Physicians as support for the following: "Moreover, states through their criminal laws have neither equated abortion with murder nor made any effort to outlaw the use of the intrauterine device which may in fact function to prevent implantation after fertilization has occurred."; and

WHEREAS, Dr. Richard Sosnowski, head of the Southern Association of Obstetricians and Gynecologists, suggested that moral obfuscation was behind the changes in contraceptive terminology: "I do not deem it excellent to play semantic gymnastics in a profession . . . . It is equally troubling to me that, with no scientific evidence to validate the change, the definition of conception as the successful spermatic penetration of an ovum was redefined as the implantation of a fertilized ovum. It appears to me that the only reason for this was the dilemma produced by the possibility that the intrauterine contraceptive device might function as an abortifacient." Richard Sosnowksi, *The Pursuit of Excellence: Have We Apprehended and Comprehended it?* 150 American Journal of Obstetrics 115 (1984); and

WHEREAS, Planned Parenthood's Harriet Pilpel acknowledged in 1976 congressional testimony against a proposed constitutional amendment relating to abortion as follows: "Since it is not possible scientifically . . . to determine either when fertilization or implantation occurs . . . it would be impossible in cases of early pregnancies to know when and whether it was being violated." *Abortion, 1976: Hearings on Proposed Constitutional Amendments on Abortion Before the House Comm. on the Judiciary*, 94th Cong. 92 (Statement of Harriet Pilpel); and

WHEREAS, Notre Dame University Law Professor Charles Rice, who is on record as opposing all direct abortion without exceptions, has stated: "Early abortifacients are beyond the effective reach of the law. It will usually be impossible to prove that life was terminated in an early abortion; prosecution for abortion therefore would be practically impossible. . . . Since 'contraceptive' drugs are licensed for legitimate uses, it is practically impossible to prevent their use for abortion. The legal obliteration of the distinction between contraception and abortion has put chemical abortion beyond the practical reach of the law." Charles Rice, *The Winning Side* (Mishawaka, Indiana: St. Brendan's Institute, 1999, p. 73); and

WHEREAS, from 1960 to 1973 birth control pills and IUDs were legal while abortion was largely illegal. Planned Parenthood, the American College of Obstetricians and Gynecologists, NARAL Pro-Choice America, the American Medical Association Abortionists, and others supporting legal abortion cannot point to even one instance of a criminal prosecution for violating abortion laws by any woman for using contraception anywhere in the entire United States in this period; and

WHEREAS, the U.S. Supreme Court recognized that individuals have a constitutional right to use contraception in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), both of which were decided prior to the decision in *Roe;* 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 an individual for abortion for using legal contraception.