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HOUSE JOINT RESOLUTION NO. 589

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Recognizing that Virginia law consistently acknowledged that an unborn child was a person prior to the U.S. Supreme Court's decision in Roe v. Wade regardless of how abortion was punished under the law.

Patron—Marshall, R.G.

Referred to Committee on Rules

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, the Supreme Court of Virginia has recognized that Virginia's prohibition on abortion was an offense against the unborn child, holding in *Anderson v. Commonwealth*, 190 Va. 665, 673 (1950), that the crime of abortion is committed "against the mother as well as against the child";

WHEREAS, in general, the legislative determination of the type of punishment appropriate for the taking of a human life depends on a number of factors, and not the fact that a human being died or was intentionally killed. Professor Robert Byrn of Fordham Law School testified before a U.S. Senate Judiciary subcommittee in 1975 as follows: "The law recognizes 'degrees of evil' and a state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment (Skinner v. Oklahoma, 316 U.S. 535, 540, [1942]) . . . . Killing an unborn child may, in legislative judgment, involve less personal malice than killing a child after birth, and a legislature may choose to downgrade the punishment accordingly." *Abortion, 1976: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary,* 94th Cong. 111 (1976) (Statement of Professor Robert Byrn, Fordham Law School). Professor Byrn cited the differential punishments New York State imposed from murder to manslaughter according to the degree of duress: "The legislative judgment to downgrade the crime from the highest degree of homicide is not grounded in any finding that the victims or class of victims are less than human persons . . . . It has not been unusual to downgrade certain homicide offenses because of the empathy which the jury predictably feels for the plight of the offender. . . . Given the pressures that surround the decision to abort, a legislature may determine that a jury would typically be unwilling to convict the offender of the highest degree of homicide. . . . Legislatures may decide that . . . some intentional homicides be punished more severely than others . . . even though the victims are all Constitutional persons and the offenders are all equally malicious." *Id.* at 112; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the General Assembly recognize that Virginia law consistently acknowledged that an unborn child was a person prior to the U.S. Supreme Court's decision in *Roe v. Wade* regardless of how abortion was punished under the law.