



# Virginia State Crime Commission

Unintentionally Causing a Miscarriage

December 9, 2008

# Overview



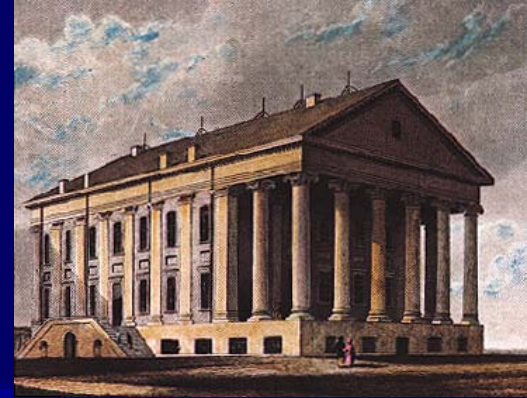
- House Bill 312
- Related Statutes under Virginia Law
- Analysis

# Study Request



- House Bill 312 (Amendment in the Nature of a Substitute) was passed by the House of Delegates, and was referred to the Senate Committee on Education and Health.
- The Committee continued the bill to 2009, and referred the subject matter of the bill to the Crime Commission for review.

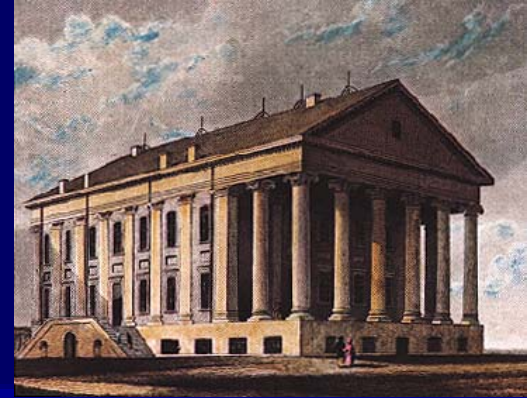
# House Bill 312



- House Bill 312 would create a new statute, Va. Code § 18.2-36.3, *Unintentionally causing miscarriage or stillbirth; penalty.*

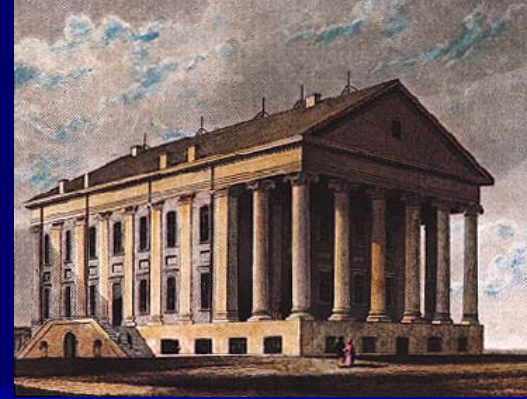
*Any person who, while engaged in conduct so gross, wanton, and culpable so as to show a reckless disregard for the life or safety of others, causes injury to another person who is pregnant and that injury results in a miscarriage or stillbirth, is guilty of a Class 5 felony.*

# Related Statutes



- Virginia already has a number of statutes that criminalize the intentional harming of a fetus.
- **Va. Code § 18.2-32.2. Killing a fetus; penalty.**
  - A. Any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another is guilty of a Class 2 felony.
  - B. Any person who unlawfully, willfully, deliberately and maliciously kills the fetus of another is guilty of a felony punishable by confinement in a state correctional facility for not less than five nor more than 40 years.

# Related Statutes



- **Va. Code § 18.2-71. Producing abortion or miscarriage, etc.; penalty.**
  - Except as provided in other sections of this article, if any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be guilty of a Class 4 felony.

# Related Statutes



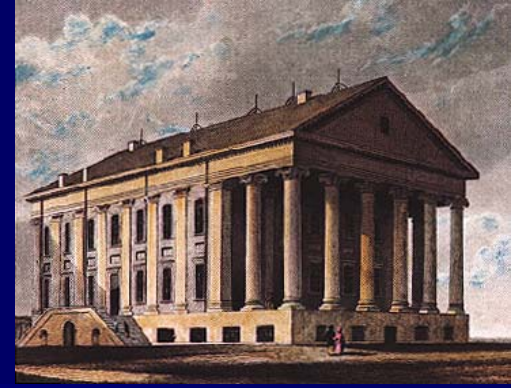
- **Va. Code § 18.2-51.2. Aggravated malicious wounding; penalty.**
  - B. If any person maliciously shoots, stabs, cuts or wounds any other woman who is pregnant, or by any other means causes bodily injury, with the intent to maim, disfigure, disable or kill the pregnant woman or to cause the involuntary termination of her pregnancy, he shall be guilty of a Class 2 felony if the victim is thereby severely injured and is caused to suffer permanent and significant physical impairment.
  - C. For purposes of this section, the involuntary termination of a woman's pregnancy shall be deemed a severe injury and a permanent and significant physical impairment.

# Related Statutes (Summary)



- In summary, under existing law, if a person, other than the mother, intentionally kills a fetus, outside of a lawful abortion, he is guilty of:
  - a Class 2 felony if the act is done maliciously and with premeditation, or
  - a felony carrying from 5 to 40 years if the act is done maliciously without premeditation.
- If the person is charged under the aggravated malicious wounding statute, he is guilty of a Class 2 felony. Under this statute, the defendant does NOT have to know the woman was pregnant.
- If the person does the killing unlawfully, but without malice, then he is guilty of a Class 4 felony under the illegal abortion statute.

# Analysis



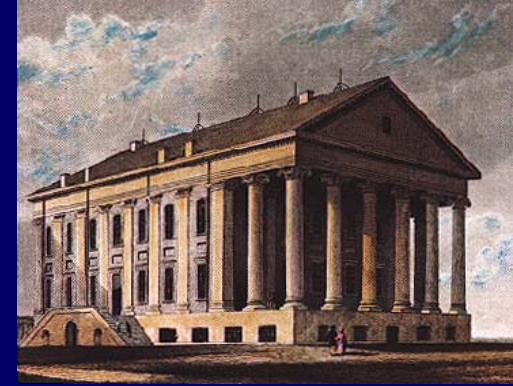
- House Bill 312 appears to be different from existing statutes in that it does not require either malice or specific intent as an element of the crime.
- However, the Court of Appeals has held that a malicious wounding or bodily injury charge does not require a direct finding of specific intent.

# Analysis



- The intent can be inferred from circumstances where the defendant's conduct is such that he "must have known...[it] could result in severe bodily harm or death. Such conduct was inherently dangerous and imposed grave risk to anyone in the vicinity." Shimhue v. Commonwealth, Rec. No. 1736-97-2, (Ct. App. June 30, 1998) (unpublished).
- In Shimhue, the defendant wanted to frighten his girlfriend into leaving his apartment. He fired a gun at the floor; the neighbor living in the apartment below was wounded. The defendant was found guilty of malicious wounding.

# Analysis



- A similar result was reached in David v. Commonwealth, 2 Va. App. 1 (1986), where the defendant, wishing to frighten a group of men, fired a gun at the pavement in front of them.
- A bullet ricocheted into the foot of one of the men; the defendant was found guilty of unlawful wounding.
- In these cases, the Court of Appeals cited approvingly the rule elucidated in Essex v. Commonwealth, 228 Va. 273, 281 (1984), that malice can be inferred from conduct “likely to cause death or great bodily harm, willfully or purposefully undertaken.”

# Analysis



- This standard is almost identical to the proposed statutory language in House Bill 312, "conduct so gross, wanton, and culpable so as to show a reckless disregard for the life or safety of others...."
- Under existing law, if a person carries out an intentional act, with a reckless disregard for the safety of others, and the result is a miscarriage, he can be found guilty of a Class 2 felony, even if he never subjectively intended to cause any harm to the mother or the fetus.

# Analysis



- The only additional behavior House Bill 312 would criminalize would be grossly reckless behavior, resulting in a miscarriage, where the defendant did not intentionally carry out the specific act of recklessness.
- Example: Driving at a high rate of speed, through a town, and the steering unexpectedly goes out, plunging the car onto a sidewalk.
- Under existing law, the driver would likely be found guilty of involuntary manslaughter, a Class 5 felony, if a pedestrian were killed.

# Analysis



- House Bill 312 would allow an equivalent penalty to manslaughter, in this example, if the result was not the death of a pedestrian, but a miscarriage brought on either by impact, or through the sudden shock of seeing the car spinning out of control.
- While the bill specifies that there must be an injury to the mother, it does not state that such injury must be physical in nature.

# Analysis



- There is no general felony statute in Virginia that criminalizes bodily injury that results from reckless or wanton conduct.
- If the egregiousness of the behavior is not sufficient to infer malice, or support a conviction under the malicious/unlawful bodily injury statute, then the defendant is only guilty of simple battery, a Class 1 misdemeanor.
- Under House Bill 312, though, such behavior would result in a felony conviction if a miscarriage resulted.

# Discussion