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mittment of service. The way to insure both is not by arbitrary discrimination against any specific plan. Rather, the Bar should adopt an attitude of "watchfulness" whereby it would not automatically adjudge group legal plans as unauthorized practice of law, but would allow their existence until proven harmful. This, in effect, would be giving the test developed by the Supreme Court official recognition in the *Code*. More importantly, it would give the Bar a flexibility now unfortunately lacking. If the Bar really wishes to be an effective guardian of ethical standards, it should work closely in the development of such plans. It would be wise for the Bar to remember that these plans have a powerful ally in the Supreme Court.

The present *Code* is altruistic in its formulation of the problem. However, the worthy intentions evidenced in the ethical considerations are not borne out by the provisions of the disciplinary rules. In restricting group legal service plans, the Bar must have a more substantial justification for such an attitude than its contention that there is potential abuse inherent in such plans. Even if there was general agreement on this premise, there must still be provision for an adequate substitute by the profession. Disciplinary Rule 2-103-D, therefore, is an unrealistic and desirable rule. The Bar's position should be carefully re-evaluated.

NORMAN A. LEBLANC, JR.

NEW YORK ABORTION REFORM AND CONFLICTING MUNICIPAL REGULATIONS: A QUESTION OF HOME RULE

I. INTRODUCTION

Abortion and its array of associated problems have been the focus of intense controversy for at least the last decade. During the past three years, certain states have passed "liberalized" abortion statutes,[1] amending laws which have been in existence since before the Civil War. The New York State Abortion Law of 1828 served as the original model for other state abortion statutes,[2] and the law remained virtually unchanged until this year. The constant legislative debate on abortion reform in New York has been so unpredictable that the 1969 legislature rejected, by nine votes, an abortion reform bill which would be considered restrictive as compared to

1. "Liberalization" of the abortion laws during the period of 1967-69, meant that the states allowed abortions only if the woman would be in danger of death if the fetus was not terminated. Colorado, North Carolina, and California enacted such statutes in 1967; Georgia and Maryland in 1968; and Arkansas, Kansas, Delaware, Oregon and New Mexico followed in 1969. In 1970, Hawaii, Alaska, and New York passed laws which abolished practically all restrictions on abortions. D. CALLAHAN, ABORTION LAW, CHOICE AND MORALITY 140 (1970).

2. *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus* 1664-1968: *A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 445 (1968).

the one passed a year later.[3] The area is still engulfed in heated controversy; the issues ranging from the rights of the fetus, to the religious dogma of various churches, to the possibility of turning New York into an "abortion mill."[4]

The unfortunate part of this emotional discussion and public fervor is that it tends to hide the real issues underlying abortion reform. The original abortion statutes resulted from a fear for the life of the mother, not because the state wished to confer rights on an unborn child or acknowledge popular religious beliefs.[5] Abortion with the mother's consent, before quickening,[6] was simply not a crime at common law.[7] As the 1858 New Jersey Supreme Court said in upholding a conviction under that state's abortion statute, the purpose of the law was not to "prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."[8] Therefore, any examination of abortion must center around improvements in medical knowledge and technique, to discover whether it is safe to return the abortion decision back to the mother. The California Supreme Court, in the recent case of *People v. Belous*,[9] expressly noted that the purpose of the old abortion laws was a concern over the mother's health and concluded that this concern was no longer justified. Striking down the California abortion law, the court stated, "it is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child."[10] Abortion proponents suggest that the real danger to the health

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3. Summarily, the 1969 version of the abortion reform bill allowed abortions when there existed medical evidence that:
   a) the continuation of pregnancy would endanger the life of the woman.
   b) the child would be grossly malformed or would have mental or physical defects so as to be permanently unable to take care of himself.
   c) continuation of pregnancy would gravely endanger the life of the woman.
   d) pregnancy resulted from first degree rape or incest or the pregnancy occurred when the woman was 15 years old or less.
   e) pregnancy occurred while the woman was declared to be a mental incompetent.

N.Y. Times, Apr. 18, 1969, at 48, col. 4.

4. N.Y. Times, Apr. 12, 1970, at 47, col. 1. Members of the state legislature who lost the latest abortion fight still vow to place amended restrictions on the newly passed law.

5. Means, *supra* note 2, at 413.

6. While the definition of quickening has varied historically, it is currently considered that part of the fetal development which occurs sometime between the sixteenth and twentieth week of gestation. The exact moment of quickening varies from woman to woman, pregnancy to pregnancy.

7. Means, *supra* note 2, at 428.

8. State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

9. 71 Cal. 2d 944, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

10. *Id.* at 965, 458 P.2d at 200, 80 Cal. Rptr. at 360. *But see* United States v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C. 1969), where the court stated, "While there have been many advances in medical technique since 1901, there is nothing before the Court which establishes that abortions may be safely and hygienically performed at various stages of pregnancy except under medical direction."

of the mother no longer results from medical deficiencies, but from the law itself. By making a relatively safe operation criminal, women are being forced to endure the risks and dangers associated with the unprofessional abortionist in order to free themselves of an unwanted fetus.[11]

In consideration of this contemporary outlook, New York has enacted an abortion reform bill which is both brief and to the point:

> 3. Justifiable abortional act. An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortion act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician acting under a reasonable belief that such act is necessary to preserve her life, or within twenty-four weeks from the commencement of her pregnancy.[12]

The statute's brevity points toward a specific legislative intent. As Assemblyman Peter Berle, one of the sponsors of the abortion reform bill in the Assembly, has stated:

> [O]ne of the most important things that we felt we were doing when we brought the legislation out in its current form was that we would be preserving freedom of choice and insuring freedom of choice with respect to the individual herself.[13]

Apparently the legislators felt that any limitations on the right to an abortion would seriously curtail the individual's "freedom of choice" which medical advances seemed to justify.

The immediate response of the Department of Health of the City of New York to this virtually unrestricted legislation was the issuance of recommended guidelines concerning the performance of abortions.[14] After the City conducted hearings on the matter,[15] the recommendations were incorporated into the New York City Health Code, with violations carrying the penalty of a misdemeanor crime.[16] Generally these guidelines call for the performance of abortions:

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11. Means, *supra* note 2, at 504.

12. N.Y. PENAL LAW § 125.05 (McKinney Supp. 1970-71).

13. *Public Hearing on Proposed Amendment (Article 42—Abortion Services to New York City Health Code)*, New York City Board of Health 78 (1970).

14. These recommendations followed from a study conducted by the Obstetric Advisory Committee to the Commissioner of Health. *Recommended Standards for Performance of Abortions, Bureau of Maternity Services and Family Planning*, Dep't of Health of the City of New York, June, 1970 (mimeo).

15. *Public Hearing*, *supra* note 13, at 78.

16. N.Y.C. HEALTH CODE art. 42, § 42.09 (1970).

> —In a hospital—on an outpatient basis up to the 12th week of pregnancy, on an inpatient basis after 12 weeks.
> —In a clinic affiliated with a hospital, provided the traveling time from clinic to hospital is no more than 10 minutes, the maximum time allowable to transfer a patient in the event of an emergency. . . .
> —In an independent clinic, if it has a blood bank, a laboratory equipped to perform necessary tests, a skilled medical staff, proper anesthetic equipment and an operating room equipped for abdominal surgery.
>
> A physician's private office would qualify under the third category if it contained all the required equipment and personnel. Not many doctors are expected to so equip and staff their offices.[17]

In effect, the standards set down by the City Department of Health, make performance of an abortion possible only in licensed hospitals and extremely well-staffed clinics. Considering the fact that the state legislature defeated an amendment to the new law which contained many of the same restrictions on the performance of abortions,[18] the City Department justifies its recommendations on the grounds that there is a need to "provide public health standards of care in the performance of abortions, with proper regard for the health, safety and well-being of the patient."[19]

The purpose of this comment is to examine the validity of the New York City restrictions in light of the apparent intent of the state legislation to allow the performance of abortions solely as a matter of judgment between the patient and her physician. To explore this issue there are three fundamental legal requirements which the local legislation must fulfill: 1) it must be a valid exercise of municipal police power;[20] 2) it must not abridge any fundamental legal rights granted by the federal constitution;[21] 3) finally, it must not be inconsistent with any area of state legislation or be in an area in which the state has preempted local legislation.[22]

II. Analysis Of Fundamental Legal Requirements

A. *Grant of Power*

The most fundamental issue in examining the validity of local legislation is whether the municipality has authority to legislate over the particular subject matter.[23] The source of all municipal legislative authority

17. N.Y. Times, June 26, 1970, at 24, col. 6.
18. *Public Hearing, supra* note 13, at 38.
19. N.Y.C. Health Code art. 42, Introductory Notes (1970).
20. *See* Hyman, *Home Rule in New York 1941-1965: Retrospect and Prospect,* 15 Buffalo L. Rev. 335, 348 (1965).
21. *Id.* at 352.
22. *Id.* at 354.
23. *Id.* at 348.

is either the state constitution[24] or a specific grant of power from the state legislature.[25] New York City, and all other municipal governments, receive a grant of power to regulate in matters of health through the New York State Constitution, which states that local government shall have the power to regulate "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein."[26] There is a further grant of power by the legislature which deals specifically with city regulations on matters of health. This grant is contained in the New York General City Law; it authorizes the cities:

> To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses.[27]

There is a strong presumption of constitutionality which accompanies municipal legislation, because of the general language used in the grants of power to municipal government.[28] Moreover, when the grant of power comes directly from the constitution, courts will view the local legislation with the same presumption of validity as they would state legislation.[29] This follows logically from the fact that state legislative power, like local governmental authority, results directly from the state constitution. In the absence of inconsistency with, or preemption by, state legislation, municipal legislation will be presumed a necessary and proper function of local government.

There are obvious restrictions on this affirmative grant of power. The municipal law must not be arbitrary or capricious,[30] and it must have a reasonably stated purpose which relates to the sought after effect.[31] The decision as to whether the legislation has a reasonable purpose and effect

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24. N.Y. CONST. art. 9, § 2.

25. *See* N.Y. MUN. HOME RULE LAW (McKinney 1969).

26. N.Y. CONST. art. 9, § 2(c)(2), 10.

27. N.Y. GEN. CITY LAW § 20(13) (McKinney 1968).

28. *E.g.*, People v. McGuire, 313 N.Y.S.2d 56, 58 (Long Beach City Ct. 1970), where the court upheld an ordinance prohibiting the use of surfboards on city beaches without a permit or license: "The presumption of constitutionality of a statute is a strong one, and in order to declare a law unconstitutional, its invalidity must be demonstrated beyond a reasonable doubt."

29. *See, e.g.*, Stracquadanio v. Dep't of Health, 285 N.Y. 93, 97, 32 N.E.2d 806, 808 (1941). *See also* Hyman, *supra* note 20, at 354.

30. Hill Packing Co. v. City of New York, 182 Misc. 742, 747, 49 N.Y.S.2d 773, 778 (Sup. Ct. 1944).

31. *E.g.*, Nicholas Herkimer Corp. v. Village of Herkimer, 34 App. Div. 2d 371, 373, 312 N.Y.S.2d 22, 24 (4th Dep't 1970), *quoting* Nebbia v. New York, 291 U.S. 502, 525 (1934). "However, the welfare of a community is best served only where laws are enacted which are '. . . not . . . unreasonable, arbitrary, or capricious, and . . . the means selected . . . have a real and substantial relationship to the object sought to be obtained.'"

depends on the facts of the case[32] and a balancing of them against the coinciding public policy.[33] In the present case it appears that the purpose of the law is concern for the mother's health,[34] and without further empirical evidence as to the effect of the legislation, it appears that the New York City abortion restrictions would fall within the initial presumption of validity.

B. *Constitutionally Protected Rights*

Once the legislation has been established as being derived from an affirmative grant of power, it is subject to examination at both the federal and state constitutional levels.[35] The enforcement of the legislation must not violate the constitutional protections of due process and equal protection, nor abridge any other fundamental legal right.[36] In the area under consideration, recent cases indicate the recognition of a newly emerging right to abortion.[37] In striking down the California abortion restrictions the state supreme court said:

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a right of privacy or liberty in matters related to marriage, family, and sex.[38]

When the state, or in our case, a municipality, then takes steps to regulate a fundamental legal right of an individual, it must do so in a fashion which does not violate the concept of liberty implicit in the due process and the equal protection clauses of the federal constitution.[39] It must serve a com-

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32. Streb v. City of Rochester, 32 Misc. 2d 29, 31, 222 N.Y.S.2d 813, 817 (Sup. Ct. 1961). In voiding restrictions on certain types of elevators, of which there was only one in the entire City of Rochester, the supreme court said, "the question as to whether an ordinance enacted under such power complies with the rule of reasonableness depends upon the facts and circumstances of the considered matter and the character of the ordinance."

33. City of Buffalo v. Linsman, 113 App. Div. 584, 98 N.Y.S. 737 (4th Dep't 1906). Where the City of Buffalo tried to restrict the sale of produce to certain hours, the court said: "We are unable to see how it was necessary or proper to insert this provision in the ordinance. The design was quite apparent — to benefit grocers and shopkeepers dealing in such articles as the peddlers sold." *Id.* at 585, 98 N.Y.S. at 738.

34. *Recommended Standards, supra* note 14. "Two basic considerations underlie these guidelines or recommended standards. First and foremost is [the] safety of the patient." *Id.* at 1.

35. Hyman, *supra* note 20, at 352-53.

36. *Id.* at 353.

37. People v. Belous, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969).

38. *Id.*

39. *E.g.*, Palko v. Connecticut, 302 U.S. 319, 324 (1937). While rejecting the appellant's theory that protection from double jeopardy is a fundamental legal right, the Court said: "In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty and thus through the Fourteenth Amendment become invalid against the states." *Id.*

pelling public interest without blatantly impinging upon the individual's constitutionally protected rights.[40]

In order to overcome the presumption of constitutionality of the municipal legislation,[41] it is necessary to show that there has been a substantial obstruction of the exercise of a fundamental legal right.[42] If the real effect of the New York City abortion restrictions, as a New York Times survey suggests, is to prevent some women from obtaining abortions,[43] then there may not be a sufficient public interest (*i.e.*, protection of the mother's health) to overcome this substantial interference with a woman's right to decide whether to bear children. After examining the effects of the first three weeks of operation of New York City's regulations, the Times concluded:

> [T]he road to a hospital abortion often included seeming endless delays, clerical errors, complicated procedures, high costs and gratuitous psychological trauma.
>
> Faced with such difficulties, many women—especially the poor, poorly educated, timid, embarassed, frightened and unaggressive—are finding hospital abortions *impossible to obtain.*[44]

If, with time, this initial survey proves to be a trend, it is doubtful in light of less than conclusive evidence as to the necessity of hospital abortions,[45] that the legislation could meet the basic constitutional standards to sustain its validity.

C. *Preemption and Inconsistency*

In granting powers to the municipalities, the New York State Constitution hardly gives "carte blanche" power to local governments to regu-

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40. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

41. *E.g.*, Railway Express Co. v. New York, 336 U.S. 106, 109 (1948). *See also* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955). "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought." *Id.*

42. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

43. N.Y. Times, Oct. 20, 1970, at 29, col. 1 (City ed.).

44. *Id.* (emphasis added).

45. Besides the passionate pleas both for and against the City abortion restrictions, the evidence given at the public hearing can be broken down into a debate between two theories of medical technique, and the end result is inconclusive at best. These include those who favor the restrictions because they fear the possibility of the danger of something going wrong: "The guidelines which you have promulgated, we believe, are sound. The suggestions that we are making are intended to assure the safety of the procedure for the patient. It is not compromised in any way." *Public Hearing, supra* note 13, at 32. Those doctors who speak with personal experience of new techniques say: "As a consequence of our research in the past year, we have terminated over 1,000 pregnancies without the need to dilate the cervix, without having to displace the uterus and without the use of anesthetics except in twenty per cent of the cases where a mild local was used.

"Obviously, there is little comparison with this method to the typical hospital abortion." *Id.* at 154-55.

late their own affairs.[46] While article nine of the New York State Constitution grants municipalities the right to pass laws relating to the "property, affairs or government of such local government,"[47] it also goes on to limit the scope of this legislation:

> [E]very local government shall have power to adopt and amend local laws not *inconsistent with* the provisions of this constitution *or any general law relating* to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent *that the legislature shall restrict* the adoption of such a local law relating to other than the property, affairs or government of such local government.[48]

Therefore, even if the local law is in pursuance of an affirmative grant of power under the state constitution or another state law, it might still be invalid because, in effect, state legislation has preempted the entire area,[49] or the local legislation is inconsistent with the existing state legislation.[50]

The origins of these limitations on the constitutional grant to local power date back to 1924; this limitation has subsequently prefaced every affirmative grant of power to municipalities.[51] While each constitutional convention seems willing to grant more power to the municipality, this phrase has always served to limit a liberal judicial interpretation.[52] In effect, the courts have "narrowly construed grants of local legislative power and have been quick to find valid state laws which have the effect of preempting the field in which a locality has attempted to legislate."[53]

There is a great deal of difficulty in distinguishing between preemption and inconsistency. The former seems to be determined by the quantity of state legislation in an area, and whether the state has "enacted a comprehensive program as reflected in statutory law to protect the safety, morals, health and general welfare of all the citizens of the State. . . ."[54] The inconsistency argument centers around whether the local law is in some way

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46. Such power has been attributed to both the constitution and the courts. "Throughout the history of constitutional home rule there runs a thread of consistency — the phenomenon of continued effort by cities to obtain constitutional protection against legislative abuse, crowned by apparent success in obtaining constitutional guarantees and presently set at naught by judicial interpretation of imprecise constitutional language." Richland, *Constitutional City Home Rule in New York,* 54 COLUM. L. REV. 311, 315 (1954).

47. N.Y. CONST. art. 9, § 2(c)(2).

48. *Id.* (emphasis added).

49. Richland, *Property, Affairs and Government,* Proceedings Municipal Law Seminar, in NEW YORK STATE OFFICE FOR LOCAL GOVERNMENT 35, 37 (1963).

50. N.Y. CONST. art. 9, § 2(c)(2).

51. Hyman, *supra* note 20, at 355.

52. Richland, *supra* note 46, at 315.

53. Richland, *supra* note 49, at 37.

54. Hepper v. Town of Hillsdale, 63 Misc. 2d 447, 449, 311 N.Y.S.2d 739, 741 (Sup. Ct. 1970).

contrary to the purpose and effect of state legislation.[55] While the municipality is certainly free to regulate, it must confine itself to follow the general intent of the legislature, except where it can show that "there is a real distinction between the city and other parts of the state."[56] The difficulty arises when one tries to visualize the court holding local legislation, which is in complete harmony with the state law, void because of preemption. Unless there is an obvious effort by the state to control the subject matter, the distinction is very tenuous.[57]

A recent analogue to the New York City abortion restrictions serves to illustrate the difficulty in making distinctions between preemption and inconsistency; it is exemplary of the court's traditional handling of problems which develop in this area. In *Heppar v. Town of Hillsdale,*[58] the Supreme Court of Columbia County, New York, invalidated a town ordinance which made it a misdemeanor to treat a drug addict. While conceding that the municipalities had a "loosely defined power"[59] to regulate matters of this kind, the court went on to say:

> Of course, municipalities and other political subdivisions of the state may not exercise the police power in such a way as to conflict with organic laws of statewide application.[60]

There were enough statutes designed to produce a comprehensive state program, and therefore the area was *preempted*[61] by the state "and all ordinances of political subdivisions *in conflict* with that general law must fall."[62] The court found that the state had made addict rehabilitation a state concern, thus a municipality was not allowed to act to the contrary. While the court claimed that the state had preempted the area, implying that no municipal legislation was necessary, it found it necessary to qualify the preemption in terms of inconsistency with state law.[63]

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55. S.H. Kress & Co. v. Dep't of Health, 258 App. Div. 780, 15 N.Y.S.2d 722, *rev'd,* 283 N.Y. 55, 59, 27 N.E.2d 431, 432 (1940).

56. *Id. See also* People v. Lewis, 295 N.Y. 42, 50, 64 N.E.2d 702, 704 (1945), where the court said: "The differences between the State law and the local law are not of such a character as to render one inconsistent with the other. The local law supplements the state law by providing heavier penalties for black-market transactions in New York City of the gravest consequence to the property, safety and health of its crowded population, dependent upon thousands of small shopkeepers from whom the daily necessities must be purchased."

57. In Hepper v. Town of Hillsdale, 63 Misc. 2d 447, 311 N.Y.S.2d 739 (Sup. Ct. 1970), the court held that in light of all the state legislation encouraging rehabilitation of drug addicts, the municipality was preempted from entering the area. However, this applies only to legislation in *conflict* with state law. Presumably the qualification of preemption is inconsistency.

58. 63 Misc. 2d 447, 311 N.Y.S.2d 739 (Sup. Ct. 1970).

59. *Id.* at 449, 311 N.Y.S.2d at 741.

60. *Id.*

61. *Id.*

62. *Id.* (emphasis added).

63. *Id.*

In the abortion situation, New York City has regulated the scope of state legislation. There does not appear to be sufficient state legislation, both in quantity and scope, to conclude that the state has preempted the entire area of abortion regulation.[64] The authors of the state abortion reform law intended to have abortions treated "the same as any other medical act."[65] Presumably the state intended the municipalities to have some freedom to regulate abortions in order to effectuate the abortion right in light of the needs of the local area. However, this does not mean that New York City has authority to pass legislation which would be inconsistent with the intent of the legislature. Assemblyman Leichter, one of the authors of the state abortion reform law, stated at the hearings conducted by the City Health Department:

> There is no need for the regulations which have been proposed, or for any regulations dealing with abortions as distinguished from other medical practices. You will be circumscribing and limiting a law which was purposely unlimited and, in my opinion, you are countervening the intent of the legislature.[66]

Whether or not Assemblyman Leichter's opinion will have practical consequences will depend, to a great extent, upon the ultimate effect of the the New York City abortion restrictions. Early results have pointed towards a corruption of state legislative intent. In many cases women are being forced, because of the long delays in obtaining abortion appointments in hospitals, to forego having an abortion during the first twelve weeks, and instead they must undergo the more costly and *more dangerous* operation associated with later fetal development.[67] Even more distressing is the fact that there is little evidence to show that the new state abortion law has done anything to solve the problem of the illegal abortionist: "As many women as ever are being admitted to city hospitals after botched, presumably unprofessional, abortions."[68] It appears that instead of going through the extra expense, the bureaucratic impersonalization and the delay associated with abortions in the city hospitals, women are still willing to subject themselves to the risks of illegal abortions.

In light of the fact that courts traditionally have been willing to broadly construe the doctrines of inconsistency and preemption,[69] the Department of Health of the City of New York might have a difficult time

64. Compare the legislation in this area with minimum wage standards; (*see* Wholesale Laundry Board of Trades Inc. v. City of New York, 17 App. Div. 2d 327, 234 N.Y.S.2d 862 (1st Dep't), *aff'd*, 12 N.Y.2d 998, 239 N.Y.S.2d 128 (1962)); and, the laws of drug addict rehabilitation; (*See* Hepper v. Town of Hillsdale, 63 Misc. 2d 447, 311 N.Y.S.2d 739 (Sup. Ct. 1970)).

65. *Public Hearing, supra* note 13, at 37.

66. *Id.* at 39.

67. N.Y. Times, June 26, 1970, at 29, col. 1.

68. *Id.*

69. Richland, *supra* note 49, at 37.

sustaining the validity of its legislation. The state legislature passed a law over the objections of many people; it clearly spoke out in the area; in fact, it rejected an amendment to the present law very much similar to the one passed by New York City.[70] There is no compelling distinction to be made between the actual performance of an abortion in New York City and anywhere else in the state.[71] If we rigidly define preemption in terms of legislative intent, it would be logical to conclude that the state has preempted this area from a restriction on the abortion right. If the municipality wishes to regulate abortions, it must do so in a way which will affirmatively effectuate the right, rather that restrict it, for restrictions have been preempted by the state.[72] The effects of the New York City regulations are directly at variance with the purpose of the state abortion reform bill. While the law was passed to protect the mother's health, the regulations seem to have forced many women who are unable to fight the system to go back to the neighborhood abortionist.

III. Conclusion

In the final analysis, New York City has attempted to restrict the newly emerging right of women to have abortions. The necessity for the city's limited control is said to be the same as the prohibitory control under the old state abortion law; that is, the health of women.[73] In an effort to insure the safety of the woman during the abortion operation, the city has imposed regulations which run directly contrary to the state legislation.[74] In considering abortion reform, the state specifically removed as many restrictions as possible from the operation;[75] it left the decision totally to the woman and her physician.

The problem which develops in applying the preemption-inconsistency doctrine is that we give credence to the denial of the theory of home rule: a theory championed by legal scholars.[76] In the case of abortion, however, we come very close to the test applied in a possible abridgement of federal constitutional rights. Therefore, the question of home-rule, as perceived in the abortion context, goes far beyond any simple application of preemption or inconsistency rationale.

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70. *Public Hearing, supra* note 13, at 79.

71. Even though it is recognized that the uniquity of New York City is distinguishable in certain other areas.

72. *See* Hepper v. Town of Hillsdale, 63 Misc. 2d 447, 449, 311 N.Y.S.2d 739, 741 (Sup. Ct. 1970).

73. *See* People v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1859); N.Y.C. Health Code art. 42, Introductory Notes (1970).

74. *Public Hearing, supra* note 13, at 38.

75. *Id.* at 78.

76. *See* Hyman, *supra* note 20, at 355; Richland, *supra* note 49, at 37.

The ideal, of course, would be to allow municipalities primary jurisdiction in matters concerning their own particular interest, without letting their sometime pedestrian concern destroy effective, progressive statewide legislation. Whether or not this can be effectuated remains ultimately in the hands of the courts. In light of the state constitutional limitation of "inconsistency,"[77] the courts must determine the basis for invalidating local legislation by weighing the advantages of both municipal and state control of the particular area. Without acceptance of this responsibility, the power will rest totally with the state, as it does now,[78] or totally with the municipality, as it would after constitutional revision. Neither one of these prospects seems particularly advantageous.

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THE NON-CONSENSUAL KILLING OF AN UNBORN INFANT: A CRIMINAL ACT?

I. INTRODUCTION

In *Keeler v. Superior Court,* the defendant, convinced that his wife was pregnant with another man's child, assaulted her exclaiming, "I'm going to stomp it out of you."[1] Proceeding to do just that, he repeatedly kicked the woman in the abdomen and killed the almost full-term fetus. In response to his resultant prosecution for murder, Keeler sought a writ of prohibition to stay prosecution on the ground that the fetus was not a human being within the meaning of the California homicide statute.[2]

The ensuing courtroom battles revolved around the question of when a fetus becomes a human being for purposes of the criminal law. Debate on this question is possessed of a long history and is indicative of a continuing inability to resolve the legal implications of the killing of an unborn child.

II. HISTORICAL FOUNDATIONS

A. *Pre-Common Law*

Certain primitive cultures determined whether a crime had been committed in respect to the killing of an unborn infant by considering the factors of convenience and necessity.[3] For example, a wife's fear that her

77. N.Y. CONST. art. 9, § 2(c)(2).

78. Comment, *Home Rule and the New York Constitution,* 66 COLUM. L. REV. 1145, 1149 (1966).

1. 2 Cal. 3d 619, —, 470 P.2d 617, 618, 87 Cal. Rptr. 481, 482 (1970).

2. *Id.* at —, 470 P.2d at 618, 87 Cal. Rptr. at 482.

3. For a complete history of primitive societies' treatment of the killing of an unborn infant, *see* Quay, *Justifiable Abortion — Medical and Legal Foundations,* 49 GEO. L.J. 395 (1961).