

ABORTION ON TRIAL: THE PRO-LIFE MOVEMENT AND  
THE EDELIN MANSLAUGHTER CASE, 1973-1975

Jennifer M. Donnally

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Approved By:

Jacquelyn Dowd Hall

Crystal Feimster

Kathy Rudy

## **ABSTRACT**

JENNIFER DONNALLY: *Abortion On Trial: The Pro-Life Movement and the Edelin Manslaughter Case, 1973 to 1975*  
(Under the direction of Jacquelyn Hall)

On February 15, 1975 an all-white, mostly Catholic working-class jury in Boston convicted Kenneth C. Edelin, a black physician, of manslaughter for taking the life of a fetus during a legal abortion he performed in 1973. A political alliance between the local pro-life movement, the Roman Catholic Church, and anti-busing movement in Boston brought about the secret investigation that led to the trial while the testimony of a group of pro-life physicians who made scientific claims concerning the legal personhood of the fetus enabled the jury to convict Edelin. The Edelin manslaughter case and the local politics surrounding abortion in the years immediately after *Roe v. Wade* are vital for comprehending how the pro-life movement situated itself to become a major political force in the last quarter of the twentieth century.

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## CHAPTER 1

Pushing up against the doors of Courtroom 906 in downtown Boston, a crowd of medical professionals, law students, political activists and bystanders gathered to hear the jury announce its verdict in the Edelin manslaughter trial. The prosecution accused Dr. Kenneth C. Edelin, a black obstetrician and gynecologist, of taking the life of a twenty-four to twenty-eight-week old viable fetus it argued was born alive during a legal abortion he had performed on October 3, 1973. Edelin claimed he had aborted a twenty-one-to-twenty-two-week-old non-viable fetus that he declared dead after checking for signs of life following the procedure. Just ten months prior to the abortion in the landmark *Roe v. Wade* decision, the U.S. Supreme Court had legalized most abortions, restricting abortions only after the point of viability at twenty-four weeks when a fetus is capable of independent life.<sup>1</sup> The verdict

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<sup>1</sup> In the January 23, 1973 *Roe v. Wade* and *Doe v. Bolton* decisions, the U.S. Supreme Court acknowledged the right of a woman to terminate an unwanted pregnancy. The decisions held that a state had no compelling reason to infringe upon a woman's right to privacy or the patient-doctor relationship during the first trimester of her pregnancy. In the second trimester, the state had the right to intervene in a pregnancy that threatened a woman's physical life and/or mental health. Only in the third trimester, after the point of viability at twenty-four weeks gestation, when a fetus becomes "potentially able to live outside the mother's womb, albeit with artificial aid," did the state's compelling interest in the potential life of the fetus take precedence over a woman's right to choose an abortion. See *Abortion Decisions of the United States Supreme Court*, ed. Maureen Harrison and Steve Gilbert (Beverly Hills, California: Excellent Books, 1993), 25, 29.

would be the top story across national news programs that night and headline the next morning's Sunday newspapers.<sup>2</sup>

The anticipation in the courtroom intensified as the defense and prosecution teams entered, rising to a fever pitch as the jury foreman stood to announce the verdict. "GUILTY!" The courtroom erupted in shock, disbelief, joy and sorrow. Half of the journalists at the press table left the room to report the verdict while the other half sat with mouths agape. Edelin later recalled, "Like a jolt of electricity to my ears, the words burst through my brain, down my spine, through my arms, hands, and fingers and into the table." His lawyer, William P. Homans, shook with anger and rage. Shouts of "Injustice!" "That nigger's guilty as sin!" and "He is guilty of sin" reverberated off the courtroom walls. One of the jury alternates rushed out of the courtroom in tears. Incredulous, the judge called the room to order and polled the jury. Not a single jury member changed his or her vote. They found Kenneth Edelin guilty of manslaughter for taking the life of "Baby Boy Roe."<sup>3</sup> After dismissing the jurors without so much as a thank you for their service, the judge sent them into the echoing marble hall of Suffolk County Courthouse and a wall of flashing cameras and shouting journalists.<sup>4</sup>

The Edelin conviction mystified journalists, legal scholars, and political activists because they had not accounted for the strength of the grassroots pro-life movement in

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<sup>2</sup> Pam Lowry introduction of Kenneth Edelin, featured speaker at 1976 NARAL conference, T-147, NARAL Collection, Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, Massachusetts.

<sup>3</sup> I have chosen the pronouns "he," "him," or "his" to refer to the fetus because the gender of the fetus was male, and the press, jury and prosecution frequently referred to the fetus as a male subject. To refer to the fetus as an "it" does not acknowledge how people were thinking about and discussing the gendered fetus during the trial.

<sup>4</sup> Kenneth C. Edelin, *Broken Justice: A True Story of Race, Sex, and Revenge in a Boston Courtroom* (Ramsey, NJ: PondViewPress, 2007), 330-331.

Boston.<sup>5</sup> Due to the efforts of the Roman Catholic Archdiocese of Boston and a decade-old pro-life movement in Massachusetts, the all-white, working-class, mostly Catholic jury was predisposed to consider any fetus a person whether viable or not and therefore to see Edelin as guilty of manslaughter prior to the trial. By 1974, pro-life activists had gained the support of local politicians who then linked the movement's reaction to the legalization of abortion to larger racial and class conflicts over school desegregation, marking the emergence of a powerful right-wing faction in Boston. The Roman Catholic Church's sympathetic support was crucial to the local movement as it helped recruit new members and coalesce political support at the local level. Simultaneously, the religious movement assumed a secular face by mobilizing a national network of pro-life doctors and lawyers who made scientific and legal claims concerning the legal personhood of the fetus. Overlooked by historians, the Edelin case and the local politics surrounding abortion in the years immediately after *Roe* are crucial for understanding how the pro-life movement positioned itself to become a major political force in the last quarter of the twentieth century.

Most of the rich history on abortion in America has focused on studying the period of criminal abortion prior to the *Roe v. Wade* decision.<sup>6</sup> Linda Gordon's *The Moral Property of*

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<sup>5</sup> I refer to activists and groups who oppose the liberalization of criminal abortion laws and seek to increase state regulation of abortion as "pro-lifers" except in quotes where authors refer to these groups with other names because these groups self-identified as 'pro-lifers' at the time. Similarly, I refer to activists who defended a women's right to abortion as "pro-choice" except in quotes where authors refer to these groups with other names. The labels of both movements reflect larger rhetorical and ideological issues advocated by the activists and are by no means meant to be descriptive.

<sup>6</sup> For histories of abortion during the criminal era see Nanette J. Davis, *From Crime to Choice: The Transformation of Abortion in America* (Westport, Connecticut: Greenwood Press, 1985), Jane Hurst, "Abortion in Good Faith: The History of Abortion in the Catholic Church," *Conscience* (March/April 1991), James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* (Oxford: Oxford University Press, 1978), Rosalind Pollack Petchesky, *Abortion and*

*Women: A History of Birth Control Politics in America*, David Garrow's *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, and Ricki Sollinger's *Abortion Wars: A Half Century of Struggle* illuminate abortion politics post 1973, but they focus mainly on the national rather than the local level, which is where the movement's real strength was.<sup>7</sup> Moreover, these studies pay little attention to the Edelin case, or to the racial politics in which it was embedded, or to the division over the meanings of abortion in the medical community.<sup>8</sup> While sociologist Kristen Luker and anthropologist Faye Ginsburg have shown that the strength of the pro-life movement resided at the local level in case studies of California and North Dakota, and sociologist Carol Joffe has explored the divisions in the medical community post-*Roe*, to date no academic trained historians have examined the rise of the grassroots pro-life movement in America.<sup>9</sup>

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*Woman's Choice: the State, Sexuality and Reproductive Freedom* (Boston: Northeastern University Press, 1984), Leslie J. Reagan, *When Abortion was a Crime* (Berkeley, California: University of California Press, 1997), Johanna Schoen, *Choice and Coercion* (Chapel Hill: University of North Carolina Press, 2005), Rickie Solinger, *Pregnancy and Power: A Short History of Reproductive Politics in America*, (New York: New York University Press, 2005).

<sup>7</sup> See "Liberty and Sexuality since *Roe v. Wade*" in David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley: University of California Press, 1994), 600-704, and "Abortion, the mother controversy" in Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America* (Urbana and Chicago: University of Illinois Press, 2002), 295-320, Rickie Solinger, ed. *Abortion Wars: A Half Century of Struggle, 1950-2000* (Berkeley: University of California Press, 1998).

<sup>8</sup> For scholarship on the Edelin trial see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley: University of California Press, 1994), 617-618; Marvin Olasky, *The Press and Abortion, 1838-1988* (Hillsdale, New Jersey: Lawrence Erlbaum Associates, Publishers, 1988); and Steven Maynard-Moody, *The Dilemma of the Fetus: Fetal Research, Medical Progress, and Moral Politics* (New York: St. Martin's Press, 1995).

A powerful pro-life movement already existed in Boston and Massachusetts prior to the *Roe* decision in 1973. Starting in 1967, the Roman Catholic Archdiocese of Boston newspaper, *The Pilot*, had published articles and editorials arguing against abortion reform and repeal of criminal abortion statutes. Testifying at a 1970 public hearing attended by 500 citizens, Catholic theologians, doctors and priests encouraged Massachusetts' representatives to stop any measures to reform or to repeal the state criminal abortion statute. This led to a 184-32 House vote against the abortion reform legislation. Catholic support of the pro-life movement continued to build and by 1972, a National Catholic News Services poll concluded that the activities of grassroots right-to-life groups were the top Catholic newsmakers nationally. Then in 1973, the Roman Catholic Archdiocese of Boston publicized all the activities of the newly formed Massachusetts Citizens for Life, including marches, lobbying efforts and petition drives. Formed in 1972, Massachusetts Citizens for Life received its government charter a week before *Roe*. Organized as the political wing of the educational Value of Life Committee, which a group of pro-life doctors established in 1970, Massachusetts Citizens for Life combined the grassroots mobilization capabilities of the

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<sup>9</sup> See Faye Ginsburg, *Contested Lives: The Abortion Debate in an American Community* (Berkeley: University of California Press, 1989); Kristen Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984); and Carole Joffe, *Doctors of Conscience: The Struggle to Provide Abortion before and after Roe v. Wade* (Boston: Beacon Press, 1995). For other scholarship on abortion after *Roe* see Craig, Barbara Hinkson Craig and David M. O'Brien, *Abortion and American Politics* (Chatham, New Jersey, Chatham House Publishers, Inc, 1993), Linda Gordon and Allen Hunter, "Sex, Family, and the New Right: Anti-Feminism as a Political Force," *Radical America* 11-12 (November 1977-February 1978): 9-25. Jane Hurst, "Abortion in Good Faith: The History of Abortion in the Catholic Church," *Conscience*, (March/April 1991), James Kelly, "Toward Complexity: The Right to Life Movement," in *Research in the Social Scientific Study of Religion*, vol 1 (New York: JAI Press, 1989), Rosalind Pollack Petchesky, *Abortion and Woman's Choice: the State, Sexuality and Reproductive Freedom* (Boston: Northeastern University Press, 1984), Kathy Rudy, *Beyond Pro-Choice and Pro-Life* (Boston: Beacon Press, 1996), Suzanne Staggenborg, *The Pro-Choice Movement: Organization and Activism in the Abortion Conflict* (New York and Oxford: Oxford University Press, 1991).

Catholic Church with the leadership of a religiously diverse coalition of physicians and lawyers that legitimated the pro-life movement as a secular political movement.<sup>10</sup>

Two weeks after *Roe*, local pro-life leader Thomas M. Connelly, Jr. initiated the secret investigation that resulted in the Edelin trial. Connelly was a single, white, thirty-five-year-old Catholic man who had dropped out of Vermont Medical School in his third year because of his pro-life convictions in the 1960s. In 1970, he quit his job and moved in with his parents to become a full-time pro-life lobbyist at the state level. In the days after the *Roe* decision, he petitioned politicians at Boston City Hall and used friendly nurses and doctors at Boston City Hospital to conduct a secret investigation of abortion practices. By January 1973, Connelly already knew the names of doctors who had performed abortions along with the number of procedures and fetal tissue experiments occurring at Boston City Hospital.<sup>11</sup>

One of the first names to enter Connelly's secret investigation was Kenneth C. Edelin, a black doctor. Born in 1939, Edelin grew up in segregated Washington D.C., the beloved youngest of four siblings. He escaped the city streets to attend Stockbridge School, an integrated boarding school in the Northeast, on a full scholarship and later received a B.S. from Columbia University in 1961. He then went on to attend Meharry Medical College in Nashville, Tennessee. Meharry was the only private medical school for blacks in the country and educated black doctors and nurses when public and private universities refused to do so.

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<sup>10</sup> "Legislators Uphold Right to Life Law" *The Pilot*, Boston, Mass, March 28, 1970, 1; Jerry Filteau. "Right to Life' Story Tops News. *The Pilot*, Boston, Mass, January 12, 1973, 13; Mildred Jefferson interview by Jennifer Donnally, Massachusetts Citizens for Life Headquarters, Boston, Massachusetts, October 22, 2007, audio file and written transcript.

<sup>11</sup> Alan H. Sheehan. "Boston City Hospital Fetus case: research at stake" *Boston Sunday Globe*, June 2, 1974, 52; John Kifner, "Abortion Foe Cites Role," *The New York Times*, February 17, 1975, 41.

After graduating with his medical degree in 1967, Edelin served as a physician in the United States Air Force and upon completion of his tour of duty in 1971, received a prestigious residency in obstetrics and gynecology at Boston City Hospital.<sup>12</sup> He was a rising star at the hospital and came to the attention of Connelly, because in 1973, he was also one of two doctors who did abortions.<sup>13</sup>

No one at Boston City Hospital made abortion procedures easy after *Roe*; finding nurses, anesthesiologists and scrub techs to assist in abortion operations was far more difficult than finding medical professionals who openly worked to oppose abortion procedures in the hospital. While Connelly's contacts remained anonymous, he gained information that could only have come from employees of the hospital. Edelin overcame the difficulties to offer abortions due to his fervent belief "that poor, black women should have that choice, too."<sup>14</sup> At the age of twelve, Edelin watched his mother die of breast cancer and vowed to become a doctor to help women like his mother. He personally experienced the complications of unwanted pregnancies when two of his girlfriends became pregnant in the 1960s. One had an illegal abortion, paid for by Edelin, and the other was a false alarm. She had a late menstrual cycle. According to Edelin, his dedication to a woman's right to choose to terminate her pregnancy was second only to his devotion to poor black women.<sup>15</sup>

Connelly and other pro-life activists targeted Boston City Hospital in the weeks after *Roe* for two reasons. First, the poor minority women who made up a substantial number of Boston City Hospital patients were least able to fight for their reproductive rights. They

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<sup>12</sup> Edelin, *Broken Justice*, 1-3 and 244-245.

<sup>13</sup> "New Attack on Abortion," *Time*, 27 May, 1974.

<sup>14</sup> Edelin, *Broken Justice*, 33.

<sup>15</sup> Edelin, *Broken Justice*, 26-31.

depended heavily on publicly funded health care programs and the aid offered by physician researchers from Harvard, Tufts, and Boston University medical schools that paid for otherwise expensive procedures. Thus, poor minority women were subject to public policy decisions that financially well off middle-class women were not.<sup>16</sup> Second, by targeting abortion polices at a public hospital, pro-life activists hoped to shut down one of the city's largest abortion services and to stop ongoing studies by prominent medical researchers that involved aborted fetuses.

Research using aborted fetuses had occurred during the illegal abortion era and, at the time of *Roe*, four Boston City Hospital doctors were conducting government-sponsored research on the effects of various drugs on fetal development in the second trimester. They administered the drugs to women prior to the abortion and then examined the effects of the drugs on the fetuses afterwards. Edelin, who had performed the research abortions during his residency at the hospital between 1971 and 1974, recalled that, "The anti-abortion forces didn't just stumble onto this case. They had been watching me for two years."<sup>17</sup> When the four Boston City Hospital doctors published their findings on the effects of Erythromycin and Clindamycin drugs on pregnant women and fetuses in the June 1973 *New England Journal of Medicine*, they sparked the abortion controversy that led directly to the Edelin manslaughter case.

Aware of the research since January 1973, Thomas Connelly called a press conference when the article came out and claimed that city officials were "dragging their

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<sup>16</sup> For additional information on poor minority women's access to abortion after *Roe* see Ricki Sollinger, *Pregnancy and Power: A short history of Reproductive Politics in America* (New York and London: New York University Press, 2005), 219.

<sup>17</sup> John O'Keefe. "Edelin gives a talk but no funny stories" *Boston Globe*, January 13, 1975, 9.

feet” in declaring their opposition to abortion and halting research on aborted fetuses in Boston. Massachusetts Citizens for Life joined Connelly in the fight to reform abortion practices at Boston City Hospital by July, demanding an investigation into how the twenty-two-week-old fetuses used in the research “died” and whether proper death certificates had been filed by the city. A Catholic nun in South Boston organized a citywide letter writing campaign, bringing the article to the attention of state representative Raymond L. Flynn, who forwarded the article and a letter to city council member Albert “Dapper” O’Neil in August.<sup>18</sup>

Though Flynn and O’Neil were concerned about abortion practices at Boston City Hospital, they were also well aware that an abortion investigation could boost their political careers. O’Neil was seeking re-election to the Boston City Council while Flynn was a rookie representative looking to make a name for himself by championing a cause. Massachusetts Citizens for Life found a particularly valuable friend in Flynn, who not only wrote to Albert O’Neil urging action but also co-authored the Massachusetts legislation cutting off Medicaid funds for abortions and stopping all medical research using aborted fetuses. In Flynn’s letter to O’Neil, he recommended that Boston “hold public hearings with a view toward drafting suitable criminal abortion legislation for the City of Boston and model legislation for the

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<sup>18</sup> Alan H. Sheehan, “Boston City Hospital Fetus case: research at stake,” *Boston Sunday Globe*, June 2, 1974, 1, 52.

entire Commonwealth.”<sup>19</sup> O’Neil responded and was eager to lead the pro-life struggle at the local level.<sup>20</sup>

To tap into pro-life political support, O’Neil called a Committee on Public Health and Hospitals hearing to review abortion practices at Boston City Hospital on September 18, 1973, a little over a week before the city primaries. Stacking the testimony, O’Neil contacted the Roman Catholic Archdiocese of Boston, Massachusetts Citizens for Life and other pro-life organizations, but failed to notify pro-choice organizations like Massachusetts Organization to Repeal Abortion Laws. In the hearing room, pro-life activists listened to prominent pro-life doctors and priests from the Archdiocese of Boston testify on the evils of abortion in Boston and America. One monsignor stated, “We cannot allow the Boston City Hospital and its staff to succumb to the pressures posited by some expectant mothers and certain social reformers,” who “turn[ed] their back on the hallowed history and tradition of this great municipal institution and violate[d] the sacrosanct ideals, goals and objectives of medicine and good hospital care.”<sup>21</sup> Though those supporting the pro-life movement held a wide range of beliefs and anxieties, the monsignor and other presenters argued that a fetus was a person from conception on and thus the federal government should recognize and protect the fetus’ right to life over and above the right of a women to terminate a pregnancy.

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<sup>19</sup> William A. Nolen, *Baby in a Bottle: An Investigative Review of the Edelin Case and its larger meanings for the controversy over Abortion Reform* (New York: Coward, McCann, and Geoghegan, Inc., 1978), 33.

<sup>20</sup> Connie Paige, *The Right to Lifers: Who They are, How they operate, Where they get their money*, (New York: Summit Books, 1983), 15.

<sup>21</sup> “Respect for Life Urged for Boston City Hospital.” *The Pilot*, September 28, 1973, 7.

The monsignor then attacked abortion services as a breach of the local community's values and the tradition of Boston City Hospital as a city institution.

A handful of pro-choice activists and hospital administrators, who managed to appear at the public hearing despite the lack of notice argued that women had a fundamental right to choose to terminate a pregnancy under the Constitutional guarantee of privacy. The final witness at the hearing, a black nurse from the Boston Family Planning Project, defended a woman's right to choose and stated, "I don't think that we should have been discussing whether or not abortion is right. It is the law . . . . It is not your prerogative to decide whether a woman has the right to have an abortion."<sup>22</sup> The pro-life majority at the hearings disagreed. Their efforts had brought about the hearing to undermine *Roe* by framing the debate in terms of fetal personhood, halting medical research on aborted fetuses, and lobbying politicians to do whatever was possible within the legal confines of *Roe* to limit women's access to abortions in Boston.

The next day O'Neil personally handed his report on the public hearing to Assistant District Attorney Newman Flanagan, who had set his heart on the district attorney's job. Like Flynn and O'Neil, Flanagan understood that an abortion case would further his political ambitions. Unaware of the September 18 public hearing, O'Neil had already assigned one of his legal interns to find loopholes in *Roe* so that he could try an abortion case in an election year. The intern, along with many astute legal scholars across the United States, discovered that the Supreme Court never defined a doctor's responsibility to a fetus born alive in the course of a legal abortion. When O'Neil contacted Flanagan concerning the findings from the September 18 hearing, Flanagan jumped at the opportunity to take on what could be a high

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<sup>22</sup> Edelin, *Broken Justice*, 78.

profile case involving abortion. By November, Flanagan had opened a secret investigation into abortion practices at Boston City Hospital. Dapper O'Neil's strategically placed Public Health Committee hearing had also paid off. He placed second in the city council elections on November 6, 1973.<sup>23</sup>

On September 21, three days after the city hearing, a black seventeen-year-old student called "Alice Roe" visited Boston City Hospital late in the afternoon seeking an abortion.<sup>24</sup> After speaking to a physician, she agreed to participate in his research study on the impact of drugs on fetuses in the womb. Despite her insistence that she had conceived eighteen weeks beforehand, the physician concluded that she was twenty-one to twenty-two weeks pregnant. He scheduled her saline abortion for October 2, 1973, with Edelin. On the morning of her scheduled abortion, Dr. Enrique Giminez, a first year resident from Mexico City, examined Alice. The summer before, Giminez's girlfriend had left him for the recently separated Edelin. The incident strained the professional relationship between Giminez and Edelin and that relationship was further tested when Edelin became chief resident in 1974 and thus, Giminez's boss. After examining Alice, Giminez estimated the pregnancy to be at twenty-four weeks, introducing the possibility that the fetus was viable according to *Roe*. He did not communicate his estimation to Edelin, who believed that she was twenty-one to twenty-two weeks pregnant.<sup>25</sup>

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<sup>23</sup> Alan H. Sheehan. "Boston City Hospital Fetus case: research at stake" *Boston Sunday Globe*, June 2, 1974, 1, 52; Ronald P. Formisano, *Boston Against Busing: Race, Class and Ethnicity in the 1960s and 1970s* (Chapel Hill: University of North Carolina Press, 1991), 60.

<sup>24</sup> The prosecution and defense assigned the pseudonym "Alice Roe" to the seventeen-year-old women to protect her privacy. Today, her identity is still unknown.

<sup>25</sup> Alan Sheehan. "Patient in Edelin case believed 17-23 weeks pregnant, court told." *The Boston Evening Globe*, January 13, 1975, 5; Edelin, *Broken Justice*, 62.

Due to complications, Edelin could not perform a saline abortion and scheduled Alice Roe for an abortion by hysterotomy on October 3. Giminez, who refused to perform abortions, asked Edelin for permission to watch the procedure, and Edelin agreed. Edelin completed the hysterotomy by making an incision into Alice's uterus large enough to extract the fetus and placenta.<sup>26</sup> He recorded the aborted male fetus to be twenty-two-weeks old in the medical records and sent him to the City Morgue without either a birth or death certificate. As chief resident, Edelin was often too busy to finish paperwork in a timely fashion, and he was particularly hesitant to take the time to file a birth and death certificate for an abortion in which the intent was to end the potential life of a fetus. Unable to bury the fetus due to the absence of birth and death certificates, employees of the morgue preserved the fetus in a bottle of formaline solution.<sup>27</sup>

Shortly afterward, rumors of "babies in bottles" reached Thomas Connelly through his network of pro-life doctors at Boston City Hospital. He tipped off the district attorney's office through anonymous phone calls to Newman Flanagan. When a city investigator arrived at the morgue in December, he found the preserved fetus of the October 3 operation and named the fetus "Baby Boy Roe." He launched a criminal investigation into Edelin's actions during the abortion. By February, Flanagan believed the investigation had collected

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<sup>26</sup> A hysterotomy involves cutting an opening into the uterus or womb large enough to insert fingers or a hand, after which the surgeon separates the placenta from the inside of the uterus. Finally the surgeon separates the amniotic sac containing the fetus by drawing or squeezing it out through the surgical cut. See Alan Sheehan. "Mother as 24 weeks pregnant, Edelin jury told." *Boston Evening Globe*, 16 Jan 1975, p. 1, 4.

enough evidence from hospital records and testimony from twenty-one hospital personnel to charge and convict Edelin of manslaughter.<sup>28</sup>

Unaware of the criminal investigation into his behavior, Kenneth Edelin testified about his involvement in research-related abortions at Boston City Hospital in front of a Grand Jury on February 14, 1974. The forty-five minute testimony was grueling, particularly when Edelin finally recognized he might be the subject in a criminal investigation. Before he left the courtroom, a member of Flanagan's team informed him that, "if you don't have [a lawyer], I advise you to get one."<sup>29</sup> Unable to fathom what crime he could have committed, Edelin consulted his divorce lawyer. His lawyer reassured him that *Roe* protected him and other hospital staff told him "It would all blow over."<sup>30</sup> Edelin put the grand jury testimony in the back of his mind and went on with his responsibilities as chief resident. He planned to finish his residency by the summer and looked for jobs in the South so that he could help black communities in need of healthcare.<sup>31</sup>

In April of 1974, Flanagan argued to a grand jury that Edelin had committed manslaughter by taking the life of "Baby Boy Roe." He claimed that Edelin had successfully performed an abortion protected under *Roe* when he separated the fetus from the placenta but then proceeded to kill a viable twenty-four to twenty-eight-week-old baby. According to

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<sup>28</sup> John Kifner, "Abortion Foe Cites Role," Special to *The New York Times*, 17 Feb, 1975, 41; Joseph M. Harvey, "Historic Trial of Boston City Hospital doctor starts tomorrow" *The Boston Globe*, January 5, 1975, 1.

<sup>29</sup> Edelin, *Broken Justice*, 93.

<sup>30</sup> Philip Weiss. "Edelin Anticipated Indictment After Grand Jury Appearance." *Harvard Crimson*, January 7, 1975.

<sup>31</sup> Edelin, *Broken Justice*, 94.

Flanagan, a physician completed an abortion when the fetus was no longer dependent on the life system of the mother, and therefore an abortion did not necessarily result in the termination of the potential life of the fetus. Giminez, who witnessed the surgery, testified in front of the same grand jury that Edelin delayed extracting the fetus and stood with his hand in the uterus for three to five minutes, doing nothing as if waiting for the fetus to die. Flanagan argued that Edelin's delay in removing the living child from the mother's womb caused the "Baby Boy" to die from lack of oxygen and constituted manslaughter.<sup>32</sup>

On April 11, 1974, Edelin received a phone call in the midst of a department meeting: "This is Newman Flanagan. I'm calling to tell you that the grand jury has indicted you for manslaughter." Edelin was shocked. He had no idea that anyone could interpret his actions during Alice Roe's abortion as criminal. When he got home, he sat for a long time with his elbows on his knees and his head in his hands wondering "How could this happen?" He was still unaware of the strength of the pro-life movement or its involvement in the investigation.<sup>33</sup>

Over the next six days, Edelin found a lawyer and met with the leaders of Boston's black community to set up a legal defense fund. He lost his right to practice medicine in Massachusetts and his job at Boston City Hospital, though regained both after allies in the medical community lobbied the State Medical Board on his behalf. He resolved to fight the charges with everything he had. On April 17, 1974, Edelin entered a plea of not guilty in a courtroom packed with supporters from Massachusetts Organization to Repeal Abortion

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<sup>32</sup> Commonwealths' Memorandum of Law Opposing the Defendant's Motion to Dismiss the Indictment, Commonwealth v. Kenneth Edelin, Superior Court No 81823, *The Edelin Trial*, 19-23.

<sup>33</sup> Edelin, *Broken Justice*, 92-95.

Laws, Planned Parenthood League of Massachusetts, the National Association for the Advancement of Colored People and medical staff from Boston City Hospital.<sup>34</sup>

The pro-life movement's political momentum accelerated with the indictment of Edelin, and by the end of April, the Massachusetts House Committee on Judiciary Affairs had moved to pass legislation that dealt explicitly with legal issues introduced by the Edelin investigation and indictment. The proposed legislation limited women's access to abortions by requiring parental consent of minors and spousal consent, prohibited research on fetal tissue and criminalized abortions after the twenty-fourth week of pregnancy except in medical emergencies. The legislation also required doctors to "take all reasonable steps . . . to preserve the life and health of the aborted fetus."<sup>35</sup> By August, the state senate and house had passed the new abortion statute and overruled the Republican governor's veto, making Massachusetts one of fourteen states to pass new criminal abortion statutes in response to *Roe*. The proposed legislation introduced the possibility that the abortion Edelin performed on a minor with a pregnancy could be considered criminal in the future.<sup>36</sup>

After the April indictment, local and national journalists pondered whether a similar investigation could have occurred in an American city that was not seventy-five percent Catholic. The *New York Times* reported on April 21 that liberal communities in Boston were

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<sup>34</sup> "Doctor Pleads Not Guilty in Boston Abortion Case" *New York Times*, Apr 18, 1974, 16.

<sup>35</sup> Nils J. Burzelius. "Edelin trial semantics crucial." *The Boston Sunday Globe*, Jan 12, 1975, 29 and 34.

<sup>36</sup> Robert Reinhold, "Boston vs. the Doctors: Strange Case," *New York Times*, 21 Apr 1974, 223; Jennifer Netzer, "Abortions: A Miscarriage of Justice," *The Harvard Crimson*, September 28, 1974.

furious that Edelin was being made into a political scapegoat.<sup>37</sup> By June, a reporter from *The Boston Globe* revealed the role Massachusetts Citizens for Life, and especially Thomas Connelly, had played in bringing about the secret investigation and indictment. In the same article, Flanagan denied the press' initial criticisms of the political motivations behind the trial stating, "It's a sad commentary that anyone would believe that a doctor was charged with manslaughter for the furtherance of political aims."<sup>38</sup> The prosecution never acknowledged the involvement of pro-life activists and politicians in the investigation.

By October 9, 1974, the defense filed an affidavit in the Boston Superior Court requesting the dismissal of the charges against Edelin because it found that the victim in question, the fetus, was never a person under Massachusetts's law. It argued that a fetus had to be fully expelled from the mother's body to be born alive and become a person protected by the state. Furthermore, when Edelin performed the abortion in October 1973, no Massachusetts law existed to restrict abortion past the point of viability. Thus, even if the fetus was able to live independent of the mother with artificial aid, Edelin's actions were legal at the time he did them. Judge McGuire dismissed the appeal without an explanation. A lay jury from Boston, not a legislature, judge or medical professional association, would try Edelin in a highly technical trial involving medical terminology and procedures.

Because an all-white jury tried Edelin, a black doctor, the Boston school desegregation crisis of 1974 and 1975 profoundly shaped the outcome of the trial. Two months after Edelin's April indictment, a federal court ordered Boston schools to

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<sup>37</sup> Robert Reinhold. "Boston vs. the Doctors: Strange Case." *New York Times*, April 21, 1974, 223.

<sup>38</sup> Alan H. Sheehan. "Boston City Hospital Fetus case: research at stake" *Boston Sunday Globe*, June 2, 1974, 52.

desegregate. Busing of students to schools in other neighborhoods began on September 12, 1974, despite massive anti-busing protest rallies attended by thousands of white ethnics the weekend prior to the first day of school. Irish, Polish, and Italian white ethnic neighborhoods “shared an impulse to stop time, to resist change, and to hold fast to an ideal of society as it has been before the upheavals of the 1960s.”<sup>39</sup> They sought to defend their neighborhoods from the advancement of blacks due to the Civil Rights Movement by championing what they considered local community values. In a 1976 survey of South Boston residents, the heart of the white anti-busing movement and home to two jurors in the Edelin trial, thirteen percent admitted to engaging in expressive and violent protests such as throwing stones at buses filled with black students, while five surveys taken between October 1973 and July 1975 in six Boston neighborhoods found that eighty-six to ninety-one percent of those surveyed opposed the federal court order to desegregate the schools.<sup>40</sup>

In the midst of the busing crisis, the Roman Catholic Archdiocese of Boston became one of the few stabilizing institutions, and it encouraged politicians to use abortion as a unifying issue in 1973 and 1974. A 1974 defense-funded survey of potential jurors in Boston found that over fifteen percent believed abortion was always wrong while fifty-seven percent believed it was wrong to perform abortions after the twentieth week of pregnancy.<sup>41</sup> The mix could hardly be more potent: Edelin was a black doctor on trial for killing a twenty to

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<sup>39</sup> Ronald P. Formisano, *Boston Against Busing: Race, Class and Ethnicity in the 1960s and 1970s* (Chapel Hill: University of North Carolina Press, 1991), 109.

<sup>40</sup> Formisano, 11, 75, 109 and 114; Alan Lupo, *Liberty's Chosen Home: The Politics of Violence in Boston* (Boston: Beacon Press, 1988), 16.

<sup>41</sup> Testimony of Irwin Harrison, *Commonwealth vs. Kenneth Edelin*, Suffolk SS. Superior Court No. 81823, vol.1, 32. Harvard Law Library, Harvard University, Cambridge, Massachusetts.

twenty-eight-week-old fetus during an abortion in a city ruled by a white Catholic majority that opposed legalized abortion and resented the recent economic and social gains of blacks. His chances for a fair trial by unprejudiced jurors were slim at best.

The same politicians who supported the pro-life cause championed the anti-busing cause. An unapologetic racist, Dapper O’Neil stood in front of a high school during his 1973 re-election campaign and stated, “I’m not going to stand by and let those niggers take over this school.” Raymond Flynn argued that South Bostonians “must stick together” and resist busing so that “No one will beat us.”<sup>42</sup> One *New York Times* reporter noted that Boston was becoming “a hotbed of right wing reaction” due to the “pervasive connection” between the pro-life and anti-busing movements at the local level when citizens resisted “rapid social change demanded at the national level.”<sup>43</sup> Acting both out of moral convictions and for their own electoral benefit, ambitious politicians like Flynn and O’Neill encouraged the resentment of white ethnics and forged the alliance between the pro-life and anti-busing movements in Boston.

Many doctors were outraged that the Boston politicians could target a doctor to further their political careers. One doctor characterized Edelin as a “sacrificial victim of the continuing bitter strife between pro-abortion and anti-abortion forces.”<sup>44</sup> Even more infuriating to doctors was the potential significance of the Edelin case. If a jury convicted Edelin for a crime he did not know he had committed, it set a dangerous legal precedent for

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<sup>42</sup> Ronald P. Formisano, 60, 112.

<sup>43</sup> William Safire. “What’s With Boston?” *New York Times*, Mar 10, 1975, 29.

<sup>44</sup> Dr. F.J. Ingelfinger, “The Edelin Trial Fiasco,” *The New England Journal of Medicine*, March 27, 1975, p. 697.

all doctors. Physicians also understood that the medical definitions of viability, birth, abortion, and person that the trial sought to clarify would govern medical practice and research for years to come. Few wanted to risk their careers to do something a state could later consider criminal even if the research was vital to medical advancements in obstetrics and gynecology or if desperate women continued to demand late term abortions. One doctor summarized the medical profession's vested interest in the trial when he commented that most doctors, regardless of their personal beliefs on abortion, "worried that if he [Edelin] were convicted, it would represent one more intrusion of the legal profession into the work of doctors."<sup>45</sup>

Concerned doctors from Tufts and Harvard Medical School not only donated money to the Kenneth Edelin Legal Defense Fund, they also led a national fundraising effort. On October 27, 1974, 125 well-known doctors placed their names in a *New York Times* advertisement condemning the indictment. They declared their support for Edelin and urged readers to donate to the Kenneth Edelin Legal Defense Fund. The advertisement stated, "our colleague is being harassed for medical practice consonant with the recent Supreme Court decision . . . What is at stake is not only Dr. Edelin's reputation and his ability to pursue the practice of medicine, but also the freedom of every physician."<sup>46</sup> The advertisement was a success and led to a \$10,000 contribution from Sunnen Products Company, a manufacturer of contraceptives in St. Louis, as well as thousands of small donations from across the country. Women who had illegal abortions and friends of women who died from illegal abortions wrote personal letters to Edelin, recounting their pain and encouraging him to fight the

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<sup>45</sup> William A Nolen, *The Baby in a Bottle*, 10.

<sup>46</sup> *New York Times* Ad, October 27, 1974.

manslaughter charges. In the weeks leading up to the trial, the expressions of support from women across the country strengthened Edelin's resolve.<sup>47</sup>

On January 6, 1975, a crowd of bystanders and reporters began what would become a daily ritual when a hundred spectators crowded into Suffolk County Courtroom 906. Members of the crowd included Thomas Connelly, the pro-life activist who started the investigation; Pamela Lowery, the President of Massachusetts Organization to Repeal Abortion Laws; Boston City Hospital staff and a diverse crowd of women, many of whom supported Edelin. One twenty-eight-year-old woman who was grateful for the abortion she had, showed up every day because she believed she "owed it to Dr. Edelin to be [there]." Others came for the spectacle. A retired man wanted to see what the press hyped as a "courtroom battle between two skilled and flamboyant veterans." Like many Bostonians, he knew defense attorney William B. Homans as the tall and lanky bohemian Harvard Law graduate and civil rights advocate who defended difficult cases of minorities and the poor. He also knew Newman A. Flanagan's reputation as a tough Irish prosecutor whose wit and flare for courtroom theatrics made him "capable of charming a Catholic jury into convicting a nun." The Edelin trial promised to be a "great show."<sup>48</sup>

Judge McGuire, a sixty-three-year-old Catholic University graduate and Boston University School of Law alum, called the court to order shortly after 10:00 a.m. Immediately, Homans motioned to dismiss the Edelin case before going to trial, arguing that the Suffolk County Superior Court selection of two men for every woman in drawing the jury

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<sup>47</sup> Edelin, *Broken Justice*, 127.

<sup>48</sup> Connie Paige, *The Right to Lifers*, 18; Maria Karagianis, "The Dispassionate, the committed, the curious crowd courtroom for landmark abortion case." *The Boston Globe*, February 9, 1975, 1, 34; and Edelin, *Broken Justice*, 144.

pool violated the fifth amendment of the U.S. Constitution and the guarantee of a trial by an impartial jury of peers. Without offering a reason, McGuire denied the defense's motion to dismiss the indictment. He summoned the 150 members of the jury pool and began the difficult three-day jury selection process by questioning potential jurors of their views on abortion. Of the sixteen selected jury members, four expressed no opinion on abortion while one thought physicians performed too many abortions, two believed the Supreme Court decision was fair even though they personally objected, two said abortions were morally acceptable only when the pregnancy threatened the health of the mother, and five said they had not made up their minds whether abortion should be legal or not. All sixteen jurors agreed that even if they had an opinion, they would be able to rule impartially according to the law and the court's instructions.<sup>49</sup>

At the end of the three-day selection, the backgrounds of the sixteen remaining jurors revealed larger power disparities in Boston. Reflecting the city's Roman Catholic majority, eleven of the sixteen jurors identified themselves as Roman Catholic and one of the remaining five was married to a Roman Catholic. The discriminatory selection process yielded a jury of three women compared to thirteen men. Because Flanagan used one of his six preemptory challenges to keep the only black person the judge declared impartial off the jury, all jurors were white. Of the sixteen jurors, six came from the racially charged neighborhoods of Dorchester and South Boston while seven jury members had school-aged children and a personal investment in school desegregation. Ranging from a bartender,

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<sup>49</sup> "Principal figures in abortion Trial," *The Boston Globe*, January 5, 1975, 2; Questions to Prospective Jurors, Commonwealth v. Kenneth Edelin, Suffolk SS. Superior Court No. 81823, Harvard Law Library, Harvard University, Cambridge, Massachusetts; Edelin, *Broken Justice*, 155-158.

housewife, ship builder, custodian, mechanic and engineer, most jurors belonged to the white ethnic working class. None had completed college.<sup>50</sup>

Despite of or because of the racial make up of the jury, Edelin and Homans agreed not to play the “race card” during the trial.<sup>51</sup> A self-identified black doctor with fair skin, many people misidentified Edelin’s race. Mildred Jefferson, a star witness for the prosecution, believed Edelin’s “overall comportment was just another Latino.”<sup>52</sup> During the initial investigation, Newman Flanagan assumed Edelin was Jewish. Rumor had it that when Flanagan learned that Edelin was black, he said, “Oh. Shit.”<sup>53</sup> He had not calculated that Edelin could become a symbol of oppression for blacks in Boston in 1975 amidst the busing crisis. As for Homans, he believed he had enough evidence to exonerate the manslaughter charges without taking into account how Edelin’s racial identity would or would not prejudice the jury. Though the press reported on the trial as if everyone knew Edelin was a black doctor, it was never clear whether the jury knew. As a result, race was never explicitly discussed during the trial, masking the implications of a trial of a black doctor in an abortion case in Boston in 1975.

Edelin also chose to protect Alice Roe, the seventeen-year-old black student who had the abortion. Despite the advice of his attorneys who wanted Alice to testify on his behalf and to speak about abortion as the personal decision of a woman, Edelin refused. When

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<sup>50</sup> Edelin, *Broken Justice*, 154 and 329.

<sup>51</sup> In his memoir, Edelin does not reflect on how the racial identities of the jury members influenced the decision not to acknowledge his race during the trial.

<sup>52</sup> Mildred Jefferson Interview by Jennifer Donnally, Massachusetts Citizens for Life Headquarters, October 22, 2007.

<sup>53</sup> Edelin, *Broken Justice*, 328.

Edelin agreed to perform Alice's abortion, he promised her and her mother that he would not divulge her identity to anyone, including her obstinate father who did not even know she was pregnant. In the illegal abortion era, male state officials often penalized women for having abortions through humiliating interrogations about sexual matters and the threat of publicly exposing their abortions.<sup>54</sup> Similarly, if Alice testified, "her privacy would be invaded, her identity known, and her anonymity destroyed."<sup>55</sup> Within the first week of the trial, the defense took measures to protect Alice Roe's identity, striking her name from the court records and instructing all witnesses who interacted with her to use the pseudonym while testifying.

Though her age and familial situation made the decision understandable, the choice to protect Alice silenced the voice of the woman who chose the abortion. Consequently, the defense and prosecution did not debate the meanings of choice and reproductive rights but concentrated entirely on medical and legal definitions of birth, person, viability, and abortion. The trial, moreover, isolated and distorted these medical definitions because, "questions of fetal personhood are inseparable from a woman's personhood" and are not "meaningful without reference to each other."<sup>56</sup> Reporters and attorneys focused on the personhood of the fetus without discussing Alice Roe's personhood, thus failing to place the trial in the larger framework of reproductive rights and woman's autonomy. Within the first week of the 1975 trial for instance, *The Boston Globe* headlines cried "Definition of fetus is issue in Edelin

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<sup>54</sup> Leslie Reagan, *When Abortion was a Crime*, 114.

<sup>55</sup> Edelin, *Broken Justice*, 243.

<sup>56</sup> Steven Maynard Moody, *The Dilemma of the Fetus* (New York: St. Martin's Press, 1995), 69.

trial,” and “Edelin trial trying to define birth” while the *New York Times* noted “Abortion Trial’s Crucial Issue: When does life begin?”<sup>57</sup> The media coverage of the trial encouraged the pro-life strategy of making the fetus a public presence and therefore unintentionally or intentionally favored a pro-life agenda.

On January 10, 1975, the trial opened with the stark and jarring words of the indictment: “Kenneth Edelin on the third day of October in the year of our lord, 1973, did assault and beat a certain person, to wit a male child described to the said jurors as ‘baby boy’ and by such assault and beating did kill said person.”<sup>58</sup> In Edelin’s mind, there never was a “baby boy” or person. As he later told the press, “I had the same reaction you would have if someone was telling lies about you . . . I was angry.”<sup>59</sup> Shortly after the reading of the indictment, McGuire ruled that the prosecution and witnesses could not use the inflammatory words “baby boy, male child, suffocate, smother and murder” during the trial because they would unduly bias the jury even though the indictment included “baby boy.”<sup>60</sup> Despite the judge’s ruling and the defense’s numerous objections, Flanagan purposely used “baby boy” throughout his opening arguments to further his claim that the fetus was a person.

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<sup>57</sup> See “Definition of fetus is issue in Edelin Trial” *The Boston Globe*, 11 January 1975, p. 3 and Nils J. Burzelius “Edelin trial semantics crucial” *The Boston Sunday Globe*, 12 January 1975, p. 29, 34; Robert Reinhold, “Abortion Trial's Crucial Issue: When Does Life Begin?” *New York Times*, 12 Jan 1975, p. 34; Alan Sheehan. “Edelin trial trying to define birth.” *Boston Globe*, 20 Jan 1975, 1 and 4.

<sup>58</sup> Edelin, *Broken Justice*, 159.

<sup>59</sup> Bob Sales. “Edelin displays little emotion as opening statements made.” *The Boston Globe*, 11 Jan 1975, 6.

<sup>60</sup> Nils J. Burzelius. “Edelin trial semantics crucial.” *The Boston Sunday Globe*, Jan 12, 1975, p. 29.

The use of “baby” was just one of the strategies Flanagan employed to win over the predominantly Catholic all-white working class jury. Humbly asking the jury to excuse his mispronunciation of medical terminology throughout, he endeared himself to men and women who in all likelihood were encountering highly technical medical language for the first time. He also aligned himself with the jury by defining terms “for us people in the general public,” as opposed to medical experts. Throughout the trial, Flanagan combined emotional appeals on behalf of ‘baby boy Roe,’ witty comments aligning himself with a jury of *his* people, and a complex legal argument based on an intricate set of medical definitions.<sup>61</sup>

William B. Homans responded to Flanagan’s opening argument and style by offering competing definitions of medical terms backed by a different set of medical experts. Confident that the defense’s experts were better qualified than the prosecution’s, he asserted that, “physicians who are experienced and well-qualified and highly thought of in their professions” would “testify that the manner in which Dr. Edelin performed the hysterotomy for the purpose of the abortion was in accordance with sound medical practice.” Homans had recruited the physicians who wrote the textbooks both the prosecution and defense employed throughout to define medical terms to testify on behalf of Edelin along with other nationally known specialists.<sup>62</sup>

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<sup>61</sup> Opening Statement of Newman Flanagan, Commonwealth of Massachusetts v. Kenneth Edelin, Suffolk SS. Superior Court No. 81823, vol. 1, p. 17, 20, and 37. Harvard Law Library, Harvard University, Cambridge, Massachusetts.

<sup>62</sup> Opening Statement of William Homans, Commonwealth of Massachusetts v. Kenneth Edelin, Suffolk SS. Superior Court No. 81823, fifth day of trial, 33, 37-40, Harvard Law Library, Harvard University, Cambridge, Massachusetts.

The fact that both the prosecution and defense found medical experts willing to testify as to the meaning of person, birth, and abortion publicized a long-standing division in the medical community over the social and political implications of abortion. In the 1960s, medical interpretations of abortion became increasingly contingent as a coalition of pro-choice physicians sought to reform or to repeal state criminal abortion statutes. Their actions encouraged a group of physicians to form in opposition, marking the emergence of a small but powerful faction of pro-life doctors who interpreted criminal abortion statutes strictly. The pro-life physicians upheld increasingly stringent abortion regulations in pace with technological advances in prenatal care that lessened the threat of pregnancy to a mother's life, while pro-choice physicians expanded the purview of maternal health to include mental health to counteract the narrowing of access to legally sanctioned abortions. Unable to resolve the division by debating abortion in what they had perceived as a "technical" framework of maternal health, physicians increasingly turned to ethical frameworks concerning a doctor's obligations to patients, reproductive rights and the moral status of potential fetal life.<sup>63</sup>

The Supreme Court announced *Roe v. Wade* in the midst of these escalating state-level medical debates. In the late 1960s, pro-life and pro-choice physicians formed well-organized political interest and educational groups as California, Colorado, North Carolina, New York and Hawaii liberalized criminal abortion statutes. In Massachusetts, pro-life physicians, lawyers and scholars formed the Value of Life committee in 1970 after the American Medical Association (AMA) endorsed abortion reform by giving its stamp of

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<sup>63</sup> Kristen Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984), 71-76.

approval of physicians in states that had liberalized criminal abortion statutes. The AMA resolution represented a compromise aimed at stopping the growing division in the medical community and supported the medical practices of states that enforced strict criminal abortion statutes as well.<sup>64</sup> While many physicians hoped that *Roe* would resolve the medical debate over abortion, a Harris Poll conducted several weeks after the decision found that fifty-two percent of medical respondents favored the Supreme Court's decision, forty-one percent registered disagreement, and seven percent said they were unsure.<sup>65</sup>

Rather than disbanding, coalitions of pro-life and pro-choice physicians mobilized after *Roe*. Kenneth Edelin, for example, participated in a debate over abortion with Dr. Mildred Jefferson, the prosecution's first expert witness, at a conference of medical students in Boston in the winter of 1973. Afterwards, he decided never to debate a pro-life doctor again because he thought Jefferson's rigid position that life and personhood began at conception did not encourage dialogue. Jefferson went on to become a member of the board of the National Right to Life Committee in June of 1973 and was chairwoman of the board when the prosecution called her as the first witness on January 11, 1975.<sup>66</sup> Assistant District Attorney Newman A. Flanagan turned to the well-established national network of pro-life doctors that emerged in the debates in the 1960s for expert witnesses while William Homans looked to the network of pro-choice physicians.

Mildred Jefferson was the first black woman graduate of Harvard University Medical School and a colleague of Edelin's at Boston City Hospital where she worked as a general

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<sup>64</sup> Mildred Jefferson Interview by author.

<sup>65</sup> Garrow, 607.

<sup>66</sup> Mildred Jefferson by author; Edelin, *Broken Justice*, 49.

surgeon. Objecting to her testimony, William Homans argued that she was not a specialist in obstetrics and gynecology and was politically biased. Jefferson maintained, “I would have given the same testimony” had the defense invited her because Flanagan asked her “to explain and define the terms that would come up in the trial in a way that would be understandable to someone without a scientific background.”<sup>67</sup> The judge allowed Jefferson’s testimony on the assumption that she was able to separate her moral judgments and pro-life politics from testimony as to how the medical profession defined terms and good medical practice. Absent during the arguments over her status as an expert witness, the jury never knew about Jefferson’s political background and listened intently as she introduced them to medical discussions of abortion and how she defined fetal personhood, abortion and birth.

In addition to Jefferson, Flanagan called Fred Mecklenburg, Denis Cavanagh, and William T. O’Connell. Mecklenburg was an obstetrician and founding member of Minnesota Citizens Concerned for Life who knew Jefferson through his wife Marjorie, who was also a board member of the National Right to Life Committee. Cavanagh’s name appeared in an advertisement stating, “Abortion degrades women, our profession and our country” in his hometown newspaper, the *St. Louis Globe-Democrat*, on the day of his testimony. O’Connell was Flanagan’s next-door neighborhood and, like Jefferson, a current member of the Value of Life Committee.

Unaware of the identity of the witnesses until they were called, the defense relied on national networks of pro-choice organizations to submit evidence regarding the biases of the prosecution’s expert witnesses. Missouri NARAL wired the *St. Louis Globe-Democrat*

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<sup>67</sup> Mildred Jefferson Interview by author.

advertisement to Homans so that he could use it in the trial after the prosecution finished its line of questioning. Likewise, local Planned Parenthood and NARAL chapters submitted evidence of Mecklenburg's various speeches at pro-life fundraising events across the country. Despite the defense's best efforts to prove bias, McGuire allowed all the prosecution witnesses to testify as expert witnesses. Though the testimonies differed, all defined abortion as the taking of a potential life up to the twentieth week of pregnancy and argued that Alice Roe's abortion ended with the separation of the fetus from the placenta, at which point the fetus under question was a person in the process of being born.<sup>68</sup>

Giminez, the jealous rival who witnessed the procedure, then offered testimony that supported the claims of the nationally recognized pro-life doctors. He estimated the pregnancy to be at twenty-four weeks and therefore believed that the fetus was viable and could live apart from Alice Roe. Based on this belief, Giminez held that Edelin caused the fetus's death because he stood with his hand in the uterus for three to five minutes staring at the clock after he separated the placenta from the lining of the uterus. Giminez agreed with the medical assessment of the pro-life doctors: "Baby Boy Roe" was born in the uterus of the mother, became a baby, lived for at least a few seconds and died at some unknown time due to a lack of oxygen caused by Edelin's failure to remove the fetus quickly from the uterus.

The testimony of Dr. George W. Curtis, the Suffolk County medical examiner, and Dr. John Ward of Pittsburgh's Mercy Hospital, confirmed Giminez's contentions. Curtis' autopsy on February 12, 1974 revealed that though most of the alveoli, or air sacs in the fetal lungs, were collapsed, some had expanded, indicating that the fetus inhaled and exhaled air

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<sup>68</sup> Connie Paige, *The Right to Lifers*, 23; Edelin, *Broken Justice*, 210-238; Kenneth Edelin, featured speaker at 1976 NARAL conference, T-147, NARAL Collection, Schlesinger Library, Radcliffe Institute, Harvard University.

into and out of the lung. During the cross-examination, Homans attempted to undermine Curtis' conclusion that respiration occurred by forcing Curtis to admit that intrauterine fetal respiration occurs when a fetus inhales and exhales amniotic fluid. Prosecution witness Dr. John Ward later disputed this argument, declaring that his microscopic examination of the fetal lung tissue proved that the lungs had been filled with air because the alveoli were not filled with fluid.<sup>69</sup>

To not only show that the fetus was viable but “that the “fetus is ‘alive,’ is ‘human like you or me,’” the prosecution submitted a picture of the aborted fetus during the testimony of Dr. Curtis. Flanagan insisted that the jury had to see the picture in order to understand that the fetus was not a “subject,” “specimen,” “blob,” or “bunch of mucous” but an “independent human being.”<sup>70</sup> Contending that the picture was not medical evidence since Curtis had shared everything the picture conveyed including the height, weight and size of the fetus, Homans objected to the photograph as inflammatory evidence. Arguing that, “the jury [did not] have the background, to be able to assess what they s[aw] in these photographs in light of the narrow, rather complex issues in the case,” Homans knew that once the jury saw the fetus as a baby, they would think of it as a baby. Though Judge McGuire acknowledged the defense's objections to the photograph, he allowed the prosecution to

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<sup>69</sup> Alan Sheehan, “Mother was 24 weeks pregnant, Edelin jury told,” *Boston Evening Globe*, 16 Jan 1975, 1 and 4; Diane White, “Edelin colleague supports contention of prosecution,” *The Boston Globe*, 17 Jan 1975, 1; Diane White, “Medical Examiner tells court fetus had ‘respiratory activity.’” *The Boston Globe*, January 24, 1975, 1 and 7; Joseph Harvey, “Doctor says oxygen lack killed fetus,” *Boston Evening Globe*, January 24, 1975, 1 and 6.

<sup>70</sup> Diane White, “Edelin trial arguments concluded; jury may get case today.” *The Boston Globe*, 14 February 1975, 7.

submit it as evidence. After seventeen days, sixteen witnesses and a controversial picture, the prosecution rested its case.

Edelin finally took the stand in his own defense on January 30, 1975. In addition to introducing a competing set of medical definitions, Edelin refocused the trial on the relationship between a physician and female patients seeking abortion. He testified that the intent of a physician performing an abortion was radically different than the intent of a physician overseeing a birth, concluding that a physician's actions during an abortion could not be compared to a physician's actions during a birth. Reiterating that the purpose of an abortion was to terminate a non-viable fetus' "potentiality for life," Edelin declared that the only obligation of care a physician had when performing an abortion was to the female patient, unless an aborted fetus visibly struggled for life outside the mother's body. In that hypothetical case, he would do all he could for the live aborted fetus, but Edelin repeated, in the abortion of October 3, 1973, the fetus was not viable and therefore not in the process of being born or a person at any point during the surgery. He added that he never had, nor would he ever, perform an abortion in a case involving what he considered a viable fetus at twenty-four-weeks-old.<sup>71</sup>

Homans then called the authors of the obstetrics textbooks cited by both the prosecution and defense and leading physicians throughout the trial. Dr. Kurt Benirschke of the University of California testified that he found no evidence of extra-uterine respiration after examining the fetal lung tissue, and he reasoned that the fetus's first breath occurred within the uterus, so the fetus probably inhaled amniotic fluid. Since Benirschke found no

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<sup>71</sup> Alan Sheehan and Seymour Linscott. "Edelin Testifies about abortion." *Boston Evening Globe*, 3 Feb 1975, 8.

evidence of air bubbles, he concluded that the fetus never breathed air, contradicting Ward and Curtis' testimony. Furthermore, Benirshcke validated the testimony of Dr. Frank Falico, who had weighed the aborted fetus after the abortion procedure in October. Falico found the fetus to weigh six hundred grams even though the autopsy written by Curtis, the prosecution witness, reported the fetus as weighing seven hundred grams. Benirshcke referenced one of his studies that found that fetuses on average gain seven percent of their body weight after being placed in a preservative solution. Since weight was a more reliable indicator of fetal age than the method that Giminez, Edelin, and other physicians of Boston City Hospital used in October 1973, arguments about the weight of the fetus at the time of death were crucial in establishing whether the fetus was viable or not.<sup>72</sup>

Because the prosecution and defense witnesses reflected the unresolved medical debate concerning a doctor's obligation to a patient and the moral status of a viable and/or non-viable fetus, Judge McGuire felt obligated to lecture the jury for an hour and forty-five minutes on the legal understandings of abortion-related terms before it deliberated on February 14.<sup>73</sup> McGuire refuted Flanagan's closing argument that a fetus becomes a person during the process of being born because he understood the Constitutional conception of person to be a postnatal being. McGuire therefore instructed the jury that since "a fetus is not a person, and not the subject of an indictment for manslaughter," the jury could only convict Edelin based on his actions after the fetus was expelled from the mother's body.<sup>74</sup> After

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<sup>72</sup> Alan Sheehan and Seymour Linscott. "Doctor denies fetus breathed outside mother." *Boston Evening Globe*, 7 February 1975, 1 and 8.

<sup>73</sup> Diane White, "Edelin case now in hands of jury," *The Boston Globe*, 15 February 1975, 1.

<sup>74</sup> *The Edelin Trial*, 59.

McQuire's charge overruled many of the key arguments presented by the prosecution throughout the trial, Edelin told reporters that he was "very optimistic and in a light frame of mind."<sup>75</sup>

Despite Edelin's confidence, eight jury members voted to convict him of manslaughter while four remained undecided in the first poll of the jury. As the jurors discussed the case, one juror reported, "We paid a lot of attention to that picture" because "none of us had ever seen a fetus before."<sup>76</sup> Political Scientist Rosalind Petchesky argues that the appearance of fetal images as medical documents in trials "both obscures and reinforces a coded set of messages that work as political signs and moral injunctions."<sup>77</sup> Whether aware or unaware of the underlying messages of a fetal image, a jury predisposed to oppose abortion looked to the photograph as the key piece of medical evidence in the trial and began to see the fetus as a human person despite the defense's and Judge McGuire's contention that the fetus, whether viable or not, was not a person under the law. Mildred Jefferson recalled that the picture "of this little dead baby boy, lying on his side with his hair long enough to curl" convicted Edelin because "you could not tell that jury this was not a little human being."<sup>78</sup> With the picture, the abortion itself became Edelin's crime, not what he had done during the course of the operation.

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<sup>75</sup> Joe Pilati, "Edelin says 'die was cast when jurors were picked,'" *The Boston Globe*, 17 Feb 1975, 32.

<sup>76</sup> William A. Nolen, *The Baby in a Bottle*, 206.

<sup>77</sup> Rosalind Pollack Petchesky, "Fetal Images: The Power of Visual Culture in the Politics of Reproduction," *Feminist Studies*, Vol. 13, No. 2. (Summer, 1987), 267.

<sup>78</sup> Interview with Mildred Jefferson by author.

After initial discussion, three of the four holdouts changed their votes so that the jury spent the remaining seven hours trying to convince one juror of Edelin's guilt. Nevertheless, many of the jurors felt they were not qualified to make a decision in the case and that the case was "beyond the scope of the jury" because following the medical testimonies of witnesses for days on end was difficult for non-specialists.<sup>79</sup> Liberty Ann Collin, one of the four not-guilty voters at the beginning of the deliberation, reflected that, "why you've got all these very learned men, these doctors, arguing between themselves about whether this baby was alive or not, it made it very difficult for us to decide who was right." So she relied upon her own experience as a mother of five to make her decision because she'd "had babies, and [she knew] at six months they're alive."<sup>80</sup> Jury members came to the consensus that Edelin was negligent and had not given the "baby enough of an opportunity" because he only checked for fetal signs of life for two to five seconds after extracting the fetus from the womb.<sup>81</sup> The other jurors eventually persuaded the one hold out that he was not taking the fetus into account as he should, convincing him to change his vote so that the jury found Edelin guilty of manslaughter even though Judge McGuire instructed them that negligence was not adequate grounds for conviction.

In finding Edelin guilty, the jury redefined the standard medical practice of hysterotomy as a late term abortion method as "wanton and reckless." As a direct result,

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<sup>79</sup> William A. Henry, "Lone holdout for acquittal tells how he changed his mind," *The Boston Globe*, February 17, 1973, 32.

<sup>80</sup> William A. Nolen, *The Baby in a Bottle*, 208 and Walter Robinson and Nick King, "Jurors say 'negligence' was basis," *Boston Sunday Globe*, 16 February 1973, 1, 2.

<sup>81</sup> William A. Nolen, *Baby in a Bottle*, 206.

three days after the guilty verdict, Beth Israel Hospital and Boston City Hospital implemented new rules limiting late-term abortions and requiring doctors to have fetal lifesaving equipment in the operating room during abortions. Hospitals in Detroit and Los Angeles followed suit within the month. Arguing that the trial and verdict was a disgrace, *The Boston Globe* feared that the jury's decision would act as legislation that would govern medical practice and legislation in Massachusetts and influence national policies on abortion. An editorial in the *Pilot* affirmed this argument, stating that this case "should serve to remind the medical community that Dr. Edelin was not the only one on trial."<sup>82</sup> A letter to the editor of the *Bay State Banner*, a black newspaper in Boston, claimed that pro-life activists capitalized "on the explosively tense racial situation in Boston and a borderline abortion performed by a Black doctor on a Black teenager in an effort to achieve.... further restriction on legalized abortion."<sup>83</sup> Though never acknowledged during the trial, the issue of race surfaced after the trial when reporters and activists began to assess how the guilty verdict came about.<sup>84</sup>

Jury alternate Michael Ciano contended that Edelin's race biased some white jurors against him. He told reporters that, "there were quite a few [jury members] who made racial slangs, not against Edelin, but against black people in general," and that one juror said, "That

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<sup>82</sup> Editorial, *Pilot*, February 21, 1975, 4.

<sup>83</sup> Vernal G. Cave, M.D. "Letters to the Editor," *Bay State Banner*, April 3, 1975, 4.

<sup>84</sup> Steven Maynard Moody, *The Dilemma of the Fetus* (New York: St. Martin's Press, 1995), 67; "New abortion checks planned," *Boston Evening Globe*, 18 February 1975, 3; "Edelin and the law," *Boston Evening Globe*, 19 February 1975, 30.

black nigger's guilty as sin" after the final arguments.<sup>85</sup> The jury foreman denied Ciano's charges stating, "We didn't speak racial whatsoever. I didn't know that the doctor was black until last Saturday, after the verdict."<sup>86</sup> Several other jury members backed up the jury foreman's conclusion that they did not know that the light-skinned Edelin was black, or that, in any case, race had nothing to do with the verdict. The jury foreman further contended that if some jurors were racist, they would have found Edelin innocent because they certainly knew the fetus under question was black due to the photograph. Still, another juror member backed up Ciano's accusations that there were racial epithets, but he maintained that none of the epithets he heard were ever directed against Edelin or had anything to do with the trial.

The guilty verdict mobilized pro-choice and civil-rights activists in Boston and Massachusetts in the days, weeks, and months that followed afterwards. On February 17, just two days after the verdict, 1,500 women marched to the Massachusetts State House protesting the verdict with signs stating "Abortion is the issue" and chanting, "Not the Church, Not the State, Women must decide their fate." That evening local women's organizations held a candlelight vigil for Edelin, and a month later the National Organization of Women and the National Abortion Rights Action League sponsored a national protest in Boston titled, "Defend Edelin, Defend your rights." The Association of Professors of Gynecology and Obstetrics passed a resolution on February 18 stating that doctors "must guard against local jurisdiction or vocal minorities imposing their ethical position for medical care in family planning and abortion on those patients or doctors who do not hold those

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<sup>85</sup> Walter Robinson and Nick King, "Jurors say 'negligence' was basis" *The Boston Globe*, 2.

<sup>86</sup> Jerry Taylor. "Never heard racial slurs, juror says." *The Boston Globe*, February 18, 1978, 1.

positions.”<sup>87</sup> The guilty verdict succeeded in uniting pro-choice activists with an outraged segment of the medical community that not only defended the rights of the doctor-patient relationship and a women’s access to abortion, but also reprimanded the legal system of Boston for allowing a Catholic pro-life minority in American society to dictate national medical policies and practices. Others who protested against the verdict took more drastic action by calling three of the jurors’ and threatening violence against them, causing the jurors to seek police protection while relocating their families in the week after the trial.<sup>88</sup>

In a clear sign of his dismay over the jury’s verdict, on Tuesday, February 18, Judge McGuire sentenced Edelin to a year’s probation pending the appeal he expected Edelin to launch. Even if Edelin’s guilty verdict stood, he would not have to serve any jail time. A week after the trial, Edelin began a yearlong appeals process as he returned to the Obstetrics and Gynecology Department at Boston City Hospital.<sup>89</sup> A law professor from Harvard co-counseled the appeals process after Homans suffered a heart attack from the stress of the Edelin trial and its exacerbation of existing family problems. Every major pro-choice organization submitted an amicus curie. Nineteen months after the guilty verdict, on December 17, 1976, the Massachusetts Supreme Court overturned Edelin’s conviction in a six-five decision.<sup>90</sup> Pro-life activists viewed the Superior Court’s decision as a monumental event in the history of abortion in America. Mildred Jefferson recalled, “this was the first

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<sup>87</sup> Associated Press. “Gynecologists back court abortion OK” *The Boston Globe*, 18 February 1975, 8.

<sup>88</sup> John Kifner, “Women Rally for Doctor Convicted in Abortion,” *New York Times*, Feb 18, 1975, 27.

<sup>89</sup> “Edelin returns to work at City Hospital” *The Boston Globe*, February 20, 1975, 1.

<sup>90</sup> William A. Nolen, *The Baby in the Bottle*, 212-216.

time that I can recall that lawyers for the defense us[ed] *Roe v. Wade* and *Doe v. Bolton* to justify killing the child.”<sup>91</sup> Edelin, on the other hand, was overjoyed because he had been vindicated. By no means, however, did the decision fully right what he perceived as the injustice of the investigation and the resulting case in the first place. Thirty years later, he reflected, “although the broken justice has been repaired, the scar on my soul has never gone away.”<sup>92</sup>

In 1977, Raymond Flynn joined Dapper O’Neil on the Boston City Council, where they both attempted to pass a citywide ordinance requiring an exorbitantly high \$1,000 licensing fee for all abortion clinics. Flynn went on to become mayor of Boston in 1984, overcoming his anti-school desegregation past by emphasizing his pro-life stance, a value many blacks and whites championed in Boston.<sup>93</sup> In 1978, Newman Flanagan defeated the incumbent district attorney in a landslide at the polls. As district attorney, he dismissed the 1974 grave robbing charges he had filed against the four Boston City Hospital Doctors who published *The New England Journal of Medicine* Article that sparked the abortion controversy. The four doctor’s indictments accompanied Edelin’s manslaughter indictment and all were a result of the secret investigation initiated by Thomas Connelly. With the dismissal of the grave robbing charges, the secret investigation in abortion practices at Boston City Hospital also closed.

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<sup>91</sup> Mildred Jefferson Interview by Jennifer Donnally, October 22, 2007.

<sup>92</sup> Edelin, *Broken Justice*, 357.

<sup>93</sup> Formisano, *Boston Against Busing*, 196.

After the trial, Kenneth Edelin became a physician, civil rights advocate and pro-choice activist of international renown.<sup>94</sup> He chaired the Planned Parenthood Federation of America board of directors from 1989 to 1992 and served on both the New England and national boards of the Legal Defense and Education Fund of the National Association for the Advancement of Colored People. The Planned Parenthood Federation of America established an award in Edelin's name to honor people for leadership in reproductive health care and reproductive rights. In 2006, he retired as the Associate Dean of Students and Minority Affairs at Boston University Medical School.<sup>95</sup>

By forging alliances between the pro-life movement and anti-busing movement at the local level and focusing the abortion debate on fetal personhood, the Edelin case transformed medical practices and abortion politics in America in 1975. Within weeks of the *Roe v. Wade* decision in January 1973, pro-life activists had begun the secret investigation of Boston City Hospital that resulted in the Edelin trial. Within months, the pro-life movement flexed enough political muscle to encourage Raymond Flynn and Dapper O'Neil to link the grassroots pro-life movement with the anti-busing movement in a common sentiment championing neighborhood values in a reaction against social changes implemented at the federal level. When Newman Flanagan took over the case, he eagerly expanded interpretations of the existing Massachusetts manslaughter statute to prosecute Edelin, thereby setting a legal precedent that limited women's access to abortions nationally while fulfilling the campaign promises of local politicians. The trial highlighted a decades-old division in the medical community over the meaning and implications of abortion that made

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<sup>94</sup> Connie Paige, *The Right to Lifers*, 27.

<sup>95</sup> "Dr. Kenneth Edelin," 12 December 2007. <<http://www.dredelin.com>>.

it possible for a white ethnic jury from Boston to chose the set of medical definitions of abortion, birth, and fetal personhood offered by nationally known and politically active pro-life doctors when convicting Edelin. The local politics of the mostly Catholic, working-class Boston neighborhoods that instigated the trial between 1973 and 1975 brought about an alliance between the reactionary sentiments of white ethnics and a national network of pro-life physicians, fueling a powerful pro-life movement that was posed to become instrumental in American politics in the years to come.

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