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Curbing the Power of Our Prosecutors

Massachusetts had the distinction of being the only state in the Union with enough discrimination to reject Richard Nixon's bid for re-election in 1972, but in 1975 its capital, Boston, is rapidly compromising the state's liberal reputation.

The country is still shocked by the trial and conviction of a young black doctor on charges of manslaughter, growing out of a legal abortion he performed at Boston City Hospital. It is like something out of the Middle Ages.

Boston has been the recent site of the North's most violent and determined resistance to court-ordered bus-ing for the purposes of school desegre-gation. It is a painful development for a city that is a center for higher educa-tion, and a city that has been called the Athens of America.

In the medieval abortion case, how-ever, the real culprit is not the city but, as is so often the case in miscar-riages of justice, an ambitious district attorney who has made personal polit-ical capital out of indicting, trying and convicting a physician who was simply doing his medical duty.

Boston has no monopoly on these je-gal demagogues, for in the last few years they have been responsible for indefensible prosecutions in all sec-tions of the country. As a whole series of sordid cases shows, American prose-cutors remain laws unto themselves. Even the President of the United

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States operates under greater re-straints.

Few believe that the Boston convic-tion of Dr. Kenneth Edelin will weather appeal to the higher courts, but meanwhile a grievous wrong has been committed against the defendant, the medical profession and the judicial system itself. It is a glaring example of ex post facto criminal justice.

Dr. Edelin's "crime" was to abort the 20- to 24-week pregnancy of an 18-year-old woman. He performed a hyster-otomy, which requires a Caesarean section to remove the fetus. The physician was doing nothing different than thousands of other doctors have been doing all over the United States, including Boston, since the Supreme Court made abortion legal several years ago.

Without warning, however, the Bos-ton district attorney, Newman Flana-gan, changed Dr. Edelin with man-slaughter—of murdering a fetus dur-

ing a legal operation by failing to take all possible steps to bring the fetus to life and keep it alive. In short, the prosecutor alleged a crime that hadn't existed before he invented it. What doctor would be safe if this conviction were upheld?

Millions of Americans may differ in their feelings about terminating preg-nancies, but who can applaud such a crude attempt to undermine and cir-cumvent the Supreme Court's legaliza-tion of abortion? And where is this go-ing to end?

Next on the Boston prosecutor's list are four doctors who are charged with violating an 1814 law against grave-robbing. They are accused of perform-ing unauthorized autopsies to do medi-cal research on aborted and dead fe-tuses—a common practice which hith-erto had never been questioned.

Dr. Edelin's conviction exposed him to 20 years in prison, but the trial judge has just sentenced him to one

year's probation. The judge obviously was troubled by the case, but why did he ever let it go to the jury, some of whose members are now publicly ex-pressing misgivings about their own verdict?

It can only be hoped that this case will arouse new interest in efforts to curb the prosecutorial power in the United States. A former attorney gen-eral, the late Robert Jackson, once said, "A prosecutor has more control over life, liberty and reputation than any other person in America. . . . He stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."

A more recent attorney general, Ramsey Clark, says, "The free-will as-pect of the prosecutor should be re-duced to the minimum." He approv-ingly quotes the legal scholar, Herbert Packard, as saying that "discretion by definition is lawlessness."

Nevertheless, it remains difficult to reach a consensus on reform. Clark's personal suggestion is that the attor-neys general of each state should have the power to review the performance of the county district attorneys and that the U.S. attorney general should, in turn, review the state officials. Al-most anything would be better than the present unrestrained free-wheeling of publicity-hunting prosecutors hell-bent on advancing their political ca-reers.