The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart

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THE BOUNDS OF ZEAL IN CRIMINAL DEFENSE:
SOME THOUGHTS ON LYNNE STEWART

ABBE SMITH*

I. INTRODUCTION: THE PROSECUTION OF LYNNE STEWART

On April 9, 2002, a troop of armed FBI agents stormed the Brooklyn town house of sixty-two-year-old Lynne Stewart. A school librarian turned criminal lawyer, Stewart thought they had come for her life partner, longtime political activist Ralph Poynter. Flashing an arrest warrant, the agent in charge informed her otherwise, “We’re not here for him, we’re here for you.” As her neighbors looked on, Stewart was handcuffed and taken off to jail.

Indicted under a federal law that prohibits providing “material support or resources” to organizations designated by the Secretary of State as engaging in terrorist activity, Stewart suddenly found herself in the same position as many of those she represents. However, much more fanfare attended her arrest than that of most of her clients. Attorney General John Ashcroft himself flew to New York to announce Stewart’s twenty-four page indictment on two counts of lying to the government and two counts of aiding a terrorist

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2. Id.
3. Id.
4. Id.
organization. Suddenly, Stewart found herself facing substantial fines and up to fifteen years in federal prison for each count.

Six years before, at the urging of former Attorney General Ramsey Clark, Stewart had agreed to represent a blind Egyptian cleric accused of plotting to blow up various New York City landmarks, including bridges, tunnels, and the United Nations. Sheik Omar Abdel Rahman, an opponent of the Mubarak regime in Egypt, was said to be the spiritual leader of the worldwide jihad movement. The sheik fired his court-appointed lawyer a month before trial, and Clark wanted Stewart to take the case so that the "Arab world would [not] feel betrayed by their friends on the American left." Although Stewart was reluctant to take the case because it might hurt her law practice, she agreed to do so after she met the sheik and felt a bond with him.

Although she made her living mostly representing poor African-American and Latino men accused of street crime, Stewart had some experience in high profile criminal trials. In 1981 she represented David Gilbert, a former member of the Weather Underground accused of robbery and murder in connection with a Brinks holdup. In 1988 she represented Larry Davis, an African-American accused of

9. Id.
10. Id. at 42-44.
11. See Adam Gopnik, et al., The Talk of the Town, The Woman Behind the Sheikh, NEW YORKER, Jan. 23, 1995, at 28 (stating that Stweart and the sheik "‘hit it off almost immediately’").
12. See Packer, supra note 8, at 45 ("Most of her cases and clients are too obscure to count as political."). On the other hand, Stewart regards these more mundane criminal cases as political, too. Id. When reading Richard Wright’s Native Son recently, she exclaimed: "This is why I’m a criminal defense lawyer! It’s because he’s talking about these kids in the black community that have no voice, that can’t articulate, that are just so consumed by their own anger and frustration. And it hasn’t changed." Id. She says she was also drawn to criminal defense "‘because [she] could indulge [her] anti-authoritarian instincts.’" Gopnik, supra note 11, at 28.
trying to kill six New York City police officers. She worked with well-known radical lawyer William Kunstler on several cases. Before her law practice became strictly criminal defense, Stewart had a general law practice in which she represented the poor, battered women seeking orders of protection, and gays accused of violating sodomy laws. Before her arrest, the only time Stewart had gotten in trouble as a lawyer was when she refused to testify before a grand jury about the origin of an alleged drug-dealing client’s money in 1991. She maintained that this information was protected by the attorney-client privilege, and resisted the prosecutor for years before finally pleading guilty to contempt of court.

The sheik’s trial lasted for months. Stewart fought hard for her client, arguing that the sheik was a champion of the oppressed people of his native land who was framed by the government because of political and religious beliefs. By all accounts, she genuinely believed her client was wrongly accused and wept when the jury returned a guilty verdict. After the sheik’s conviction she continued to represent him on appeal, visiting him at the federal prisons where he was held.

Lynne Stewart’s conduct with regard to the special prison regulations under which her client was held formed the basis for her

15. See Gopnik, supra note 11. Although Stewart tried this case with William Kunstler, most credit Davis’s acquittal of the most serious charges on self-defense grounds to Stewart. See Leonard Levitt & Ellis Henican, Davis Gets 5-15-Year Sentence: Cops Irked by “Slap on the Wrist,” NEWSDAY, Dec. 16, 1988, at 4.


19. See id.

20. See id. Because the charge was a misdemeanor, Stewart was allowed to continue practicing law. Id.

21. See generally Joseph P. Fried, In Muslim Cleric’s Trial, a Radical Defender, N.Y. TIMES, June 28, 1995, at B1 (stating that the presentation of the prosecution’s case against the sheik lasted for five and a half months).

22. See id. (describing the sheik as a “spiritual and inspirational guide” who was being prosecuted for his speeches); see also Packer, supra note 8, at 44.

23. See CBS News: 60 Minutes (CBS television broadcast, May 5, 2002) [hereinafter 60 Minutes] (Lynne Stewart saying to Mike Wallace, “I believed, and I believe today, that he is wrongfully convicted”); see also Fried, supra note 21.

24. 60 Minutes, supra note 23.
indictment. Under these regulations, Rahman was prohibited from communicating with anyone outside the prison, and Stewart had to agree in writing not to convey any messages of a political nature from him to the outside world or otherwise communicate messages on his behalf. Stewart admits that two years prior to her indictment, she held a press conference and read Rahman’s political “advice” to followers in Egypt. When she did this, the Clinton administration had her sign another statement that she would abide by the prison rules prohibiting her from broadcasting messages for the sheik. No one tried to stop her from seeing her client, nor was Stewart threatened with either disciplinary or criminal charges.

The government also alleges that during prison visits Stewart enabled the sheik to get his message out to followers through a court-approved Arabic translator, who has also been indicted. The government’s evidence consists of tape recordings of those

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25. See id.
26. See id.
27. See id.

WALLACE: The sheik wanted her to issue a press release telling his followers in Egypt that they had his permission to end their cease-fire with the Egyptian government, had his permission to resume their attacks.

But Stewart told us the message was merely political advice, not a military order.

STEWART: To me, it was not saying, “Take out the guns and mow them down.” It was more like an advisory—this is what I’m thinking about. Politically, more than it was a call to arms. He hasn’t been in Egypt since ’89. He’s hardly got his finger on the pulse of military operations.

I knew that there was a possibility that the government would cut me off from him for releasing this statement. But he had told me he wanted this statement to get out to his people.

WALLACE: So, in effect, you made a mistake.

STEWART: It’s a mistake, but is it an indictable offense? Is this materially aiding a terrorist organization?

WALLACE: Ashcroft obviously thinks that it is.

STEWART: Well, we’ll see what a jury thinks.

Id.

28. Id.
29. Id.
30. Id. Although the translator’s case has generated far less publicity, he also denies any wrongdoing in this case. See Mark Hamblett, New York Defender Charged with Supporting Terrorism, RECORDER (New York), Apr. 10, 2002, at 3 (noting Mohammed Yousry’s not guilty plea).
conversations. Stewart has denied this charge, and as the contents of the tape recordings have not yet been made public, it is impossible to assess the weight or credibility of the evidence.

Stewart’s indictment was disturbing to defense lawyers and civil libertarians. Stanford Law Professor Deborah Rhode voiced the concerns of many in an op-ed in the *New York Times*:

> America’s civil liberties depend on counsel willing to assert them. John Adams, who reported losing half his practice after defending British officers charged in the Boston Massacre, considered that case “one of the best pieces of service that I ever rendered for my country.” If the indictment against Ms. Stewart signals a broader trend to crack down not just on terrorists but on those courageous enough to represent them, we are all at risk.

Those who knew Stewart were stunned. Stewart did not have a reputation as either a kook or a loose cannon. Notwithstanding her leftist politics, Stewart was known as a “nuts-and-bolts attorney who was always courteous in court.” Many thought highly of her legal skills. As one lawyer who tried cases with her put it: “[S]he was a brilliant courtroom advocate . . . . She’s the bravest and strongest advocate for the downtrodden.”

The reporters who covered Stewart’s indictment also seemed surprised. Noting that she is a grandmother, and describing her as

31. *60 Minutes*, supranote 23.
32. See id.
35. Id.
36. Id.
37. See Steven Lubet, *There’s a Difference Between Defense, Assist*, CHI. SUN-TIMES, May 1, 2002, at 45 (“By all accounts, Lynne Stewart is a tough, smart, determined lawyer, dedicated to providing first-rate defense for unpopular clients.”); see also Stephen J. Singer, *Defense Attorneys Walk a Thin Line*, NEWSDAY, Apr. 18, 2002, at A43 (“Lynne Stewart is exactly the kind of gutsy lawyer who would step up to the plate and accept the assignment to take on this kind of client. Like it or not, the judicial system needs such people if we are to continue to be a nation of law.”).
38. Powell, supranote 34 (quoting Ronald L. Kuby).
39. See id. (describing Stewart as “[s]hort and roundish, a grandmother who often has a New York Mets cap perched atop her head”); Baum, supranote 1 (referring to Stewart
“matronly looking,”40 “plump,”41 and somewhat unkempt,42 they noted that “Lynne Stewart does not fit the stereotype of a radical attorney.”43

As a defense lawyer who shares Stewart’s commitment to zealous advocacy on behalf of the downtrodden,44 I was struck by her prosecution. What caused Lynne Stewart, after more than two decades of defense lawyering in the best tradition of the legal profession to cross the line?45 Holding aside the political climate of the

as “plump” and “grandmotherly”); Post, supra note 17 (noting that “[p]ictures of [Stewart’s] seven multiethnic grandchildren adorn her office ... ”).

40. Sheryl McCarthy, Her Case for Larry Davis Her Client’s Victory, Says Defense Attorney Lynne Stewart, Was for “The Voiceless People Who Never Get a Decent Shake,” NEWSDAY, Dec. 15, 1988, at 3; see also Hamill, supra note 16 (referring to Stewart as the “gray-haired, chubby scourge of the Republic”).

41. Baum, supra note 1.

42. See Post, supra note 17 (“Her now-gray hair lays flat on her head and falls to her ears. Her bangs are stringy. She is soft in body and has soft eyes. Her expansion watchband is askew, the watch a $10 knockoff bought on Canal Street.”).

43. Powell, supra note 34 (radical lawyer Ronald Kuby noting that Stewart’s courtroom demeanor was more like “your kindergarten teacher” than fiery radical); see also Post, supra note 17 (“[F]rom all appearances, Stewart, who now lives in Brooklyn, is anything but a rebel.”). Indeed, some of the physical descriptions of Lynne Stewart are so unsparing, so unkind, I began to think I would rather be indicted than described in this fashion. See, e.g., Packer, supra note 8, at 44.

Physically, Lynne Stewart suggests a cheerful and profound self-neglect. In press photographs she resembles Ma Kettle. Her hair, gray and lank, seems to have expired on her head. She dresses for court like a Sicilian widow in sensible shoes, hobbling side to side from excess weight and a recent courtroom fall. Friends have to remind her to cut her hair, which she did after pleading “emphatically not guilty” while the camera fixed her in their unpitying sights.

Id. Some journalists were a little kinder. One described her as having a “cherubic face, a raspy voice, and an engaging smile.” Gopnik, supra note 11, at 28.


45. I am not addressing the allegation that Stewart willfully allowed illicit communications to pass from the sheik to the translator to his followers in this paper. In addition to denying these charges, Stewart is, of course, presumed innocent. I am
times, did Stewart’s approach to lawyering—whether in political or not terribly political cases—lead to her demise? Is her approach to lawyering different from most of the bar?

In this paper I will discuss the conduct that led to Stewart’s prosecution and her approach to lawyering generally. I will examine whether her view of zeal and devotion is at odds with the prevailing ethics and ethos of defense lawyering, and, if not, what went wrong. I will also explore the question of boundaries in lawyering generally.

46. This is not easy to do under the circumstances of this case. See, e.g., David Cole, *Fight Terrorism Fairly*, N.Y. TIMES, Oct. 19, 2002, at A17.

The Antiterrorism and Effective Death Penalty Act, passed in 1996, makes it a crime to provide “material support” to any group designated as “terrorist”—without regard to whether the support was actually intended to further terrorist activity.

This law, rarely invoked before Sept. 11, is now the cornerstone of the Justice Department’s domestic war on terrorism.

Id.


Zeal has long been and remains an ethical mandate for lawyers. See ABA MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1996) (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of law.”). But see ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY R. 1.3 cmt. 1 (1996) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized by a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.”).


II. THE ETHICS OF ADVOCACY

When I was invited to speak at this symposium, I was told it would address the ethics of advocacy, which I regard as somewhat broader than the ethics of litigation. I thought perhaps the symposium was held to belatedly mark the fiftieth anniversary of Charles Curtis's classic article of the same name.49 I was pleased with this thought as I have long been an admirer of Curtis's candid depiction of the lawyer's role in an adversary system.50 As Curtis has his detractors,51 I imagined there might be some disagreement about his view of the proper bounds of zeal and looked forward to some heated exchanges. Unfortunately, I was wrong about both the title of the symposium—which was changed somewhere along the way—and about Charles Curtis having anything to do with it.

Nonetheless, Curtis seems a good place to start—though I am going to digress for a moment and follow Professor Rhode into a discussion of John Adams, because so few people know about Adams's dual role as patriot and rebel defender.

The future second President of the United States was thirty-four years old when what would later be called the Boston Massacre occurred. It was a cold night in Boston on March 5, 1770. On a snowy square, a group of men and boys were taunting the lone British sentry who was posted in front of the Custom House.52 Somewhere, a church bell began to ring, and crowds began pouring into the streets, brandishing sticks and clubs.53 As several hundred angry colonialists converged at the Custom House, the guard was joined by eight British soldiers with loaded muskets.54 Shouting and cursing, the crowd began to bombard the Redcoats with snow balls, pieces of ice, shells, and stones.55 Five men were killed when soldiers suddenly opened fire.56

49. See Curtis, supra note 47.
50. For a similar approach, and one which has sparked similar controversy, see MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); see also FREEDMAN & SMITH, supra note 47.
51. See Barbara Babcock, Defending the Guilty, 32 CLEV. ST. L. REV. 175, 175 (1983) (noting that Curtis's article has generated "outrage and disparagement").
52. DAVID McCULLOUGH, JOHN ADAMS 65 (2001).
53. Id.
54. Id.
55. Id.
56. Id.
There was an enormous outcry against the killings, and the soldiers and their captain were arrested and charged with murder.\textsuperscript{57} When no one else would take the case, John Adams readily agreed to represent the accused.\textsuperscript{58} Adams believed that "no man in a free country should be denied the right to counsel and a fair trial" and that "the case was of the utmost importance."\textsuperscript{59} Adams stated, "'If by supporting the rights of mankind, and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or of ignorance, equally fatal, his blessings and years of transport will be sufficient consolation to me for the contempt of all mankind.'"\textsuperscript{60}

Adams understood the costs of representing the British soldiers, but felt that "[a]s a lawyer, his duty was clear."\textsuperscript{61} He knew "[t]hat he would be hazarding his hard-earned reputation and, in his words, 'incurring a clamor and popular suspicions and prejudices' against him."\textsuperscript{62} Although Adams had been involved in other high profile cases,\textsuperscript{63} he had never before placed himself on the side of the despised. His defense of the Redcoats was seen as almost traitorous.\textsuperscript{64}

In separate trials, Adams succeeded in obtaining acquittals for the captain and six of the eight soldiers.\textsuperscript{65} In doing so, he not only put the victims on trial by calling them an unruly mob,\textsuperscript{66} he also put the

\textsuperscript{57}. See id. at 65–66 (calling the killings a "'bloody butchery,'" Samuel Adams and many others saw the incident as one more example of British tyranny).
\textsuperscript{58}. Id. at 66.
\textsuperscript{59}. Id.
\textsuperscript{60}. Id. at 66–67 (quoting Cesare, Marchese di Beccaria).
\textsuperscript{61}. Id. at 66.
\textsuperscript{62}. Id.
\textsuperscript{63}. Id. ("Only the year before, in 1769, Adams had defended four American sailors charged with killing a British naval officer who had boarded their ship with a press gang to grab them for the British navy."). Adams obtained an acquittal on the grounds of self-defense. Id. The difference between that case and that of the British soldiers was that the public was on his side in the former, as most people were strongly opposed to the practice of impressment. Id.
\textsuperscript{64}. See id. Adams was rumored to have been bribed to take the case. Id. In fact, he was paid a tiny retainer and nothing more. Id.
\textsuperscript{65}. Id. at 66, 68. Two soldiers were convicted of manslaughter and were branded on their thumbs. Id. at 68.
\textsuperscript{66}. Id. at 67. Adams was not above using racism and prejudice to make his case. He referred to the victims as a "motley rabble of saucy boys, Negroes and mulattoes, Irish teagues and outlandish jacktars. And why should we scruple to call such a people a mob, I can't conceive, unless the name is too respectable for them." Id. For the ethics of
government on trial as well. He spoke out against the practice of quartering soldiers in town, which gave rise to the mob in the first place.

Adams paid a price for his zealous defense of the Redcoats. He was pilloried in the press and his practice suffered. Still, over time, even his critics came to admire his “fierce integrity” and his role in the case probably did “increase his public standing, making him in the long run more respected than ever.” Later in life, Adams described the case as “the most exhausting case he ever undertook,” but he also considered it “one of the most gallant, generous, manly, and disinterested actions of [his] whole life.”

I share this story about John Adams not only because of the obvious parallels to the circumstances of Lynne Stewart’s defense of the Sheik, but also because Adams seems to be a proponent of the same sort of lawyering that Charles Curtis espouses.

Curtis, a Boston Brahmin like Adams, believed in advocacy. Like Adams, and more importantly Lord Brougham before him, Curtis believed:

“[A]n advocate, by the sacred duty which he owes his client, knows in the discharges of that office but one person in the world—that client and no other.... Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client’s protection.”


67. See McCULLOUGH, supra note 52, at 67.
68. See id.
69. Id. at 68.
70. Id.
71. Id.
72. Interestingly, neither of them have much in common with Stewart, who was raised in modest circumstances in Queens, New York, and attended Queens College and Rutgers University Law School. See Packer, supra note 8, at 44; Gopnik, supra note 11, at 28. Both Adams and Curtis attended Harvard. See McCULLOUGH, supra note 52, at 35; Babcock, supra note 51, at 176.
73. Curtis, supra note 47, at 4 (quoting Lord Brougham in the divorce proceedings of
Curtis describes Brougham's famous argument before the House of Lords as "the classic statement of the loyalty which a lawyer owes to his client . . . ."74 Brougham's statement was not simply a defense of advocacy, it was part of his defense strategy. It was meant to be a "menace."75 He said what he said to warn King George that if he pressed the divorce against Queen Caroline he should be prepared to forfeit the crown if need be, for Brougham would not pull his punches.76 It mattered not that the country might be in chaos; he would serve his client.

Curtis does not mince words when he describes what it means to be an advocate. Not only does an advocate owe a higher duty of care to the client than to anyone else—indeed, "[t]he more good faith and devotion the lawyer owes to his client, the less he owes to others when he is acting for his client"77—but an advocate must treat outsiders as "barbarians and enemies."78 Curtis does not apologize for his approach to advocacy; to the contrary, he finds virtue in it. He says it "goes back a long way" to the time of the Greeks.79

Curtis understands, as Adams recognized, that this kind of advocacy does not lead to great popularity: "You devote yourself to the interests of another at the peril of yourself. . . . Men will do for others what they are not willing to do for themselves—nobler as well as ignoble things."80

Curtis describes some of the ignoble things that an advocate must do, no matter how improper or immoral these things seem to others.81 He says that "knavery,"82 and "insincerity,"83 are simply part of

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74. Id.
75. Id. (quoting Brougham reflecting upon his earlier speech).
76. See id.
77. Id. at 5–6.
78. Id. at 5.
79. See id. ("It is the pre-platonic ethics which Socrates had disposed of at the very outset of the Republic; that is that justice consists of doing good to your friends and harm to your enemies.").
80. Id. at 6.
81. See id. at 3–23.
82. Id. at 20 ("There's no reason why a lawyer . . . should not recognize the knavery that is part of his vocation." (quoting Montaigne)).
83. Id. at 9.
lawyering, and we should be honest about this.\textsuperscript{84} Curtis puts it plainly: lawyers are “required to be disingenuous.”\textsuperscript{85} Curtis explains that, in court, lawyers must regularly make statements and take positions they do not believe in.\textsuperscript{86} However, lawyers may also be deceitful out of court. For example, when a police officer shows up at a lawyer’s office demanding to know where the lawyer’s client is, “[o]f course he lies.”\textsuperscript{87} Curtis is impatient with a less forthright depiction of lawyers’ work: “I don’t see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client.”\textsuperscript{88}

The reason that lawyers may and, indeed, must engage in this conduct\textsuperscript{89} is because of the lawyer’s “sacred duty” to the client.\textsuperscript{90} This duty is one of singular devotion; the lawyer is devoted to the client and the client only.\textsuperscript{91} Though the relationship is a professional one, it is nonetheless “intimate.”\textsuperscript{92} Curtis likens the relationship between lawyer and client to that between spouses, between parent and child, and between dear friends.\textsuperscript{93}

All of which brings us back to Lynne Stewart. She was clearly a devoted, zealous advocate.\textsuperscript{94} She approached the defense of her

\begin{itemize}
\item \textsuperscript{84} See id. \textsuperscript{85} Id. \textsuperscript{86} Id. \textsuperscript{87} Id. at 8. \textsuperscript{88} Id. at 9. \textsuperscript{89} See id. at 8–9; see also ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996) (“What a defense attorney 'may' do, he must do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client's best interest—even if the attorney finds the step personally distasteful.”); cf. Post, supra note 17 (“'When you take a case, you have to be able to give it 100 percent.'” (quoting Stewart)).
\item \textsuperscript{90} Curtis, supra note 47, at 4.
\item \textsuperscript{91} See id. at 3 (“[The lawyer’s] loyalty runs to his client. He has no other master.”).
\item \textsuperscript{92} Id. at 8 (“The relation between a lawyer and his client is one of the intimate relations.”).
\item \textsuperscript{93} See id. at 8–9 (noting that just as “[y]ou would lie for your wife... [or] your child... [or] others with whom you are intimate enough, close enough to lie for,” you would lie for a client).
\item \textsuperscript{94} In Curtis’s essay, he cites ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 15. See id. at 4–5 (referring to the “entire devotion to the interest of the client, [and] warm zeal in the maintenance and defense of his rights”). In fact, the language Curtis points to is taken from George Sharswood's influential essay on lawyer's ethics—something Curtis apparently did not know. Id. at 5 n.5 (the editors of Curtis’s article pointed to GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 78–79
controversial client with a single-mindedness that would have made Lord Brougham, John Adams, George Sharswood,95 and Charles Curtis proud.96 But somewhere along the way, she apparently crossed a line.97 I would like to determine how that happened.

III. ON THE IMPORTANCE OF BOUNDARIES

Though Curtis believes in lawyers representing clients with "entire devotion," he also understands that "[t]he fact is, the 'entire devotion' is not entire."98 Curtis explains:

The full discharge of a lawyer's duty to his client requires him to withhold something. If a lawyer is entirely devoted to his client, his client receives something less than he has a right to expect. For, if a man devotes the whole of himself to another, he mutilates or diminishes himself, and the other receives the devotion of so much the less. This is no paradox, but a simple calculus of the spirit.99

What Curtis means is that if a lawyer is too devoted, if the lawyer gives too much of him or herself, if the lawyer fails to maintain a certain amount of distance, he or she will lose perspective.100 A lawyer

95. See SHARSWOOD, supra note 94, at 3–6. Sharswood was a judge on the Pennsylvania Supreme Court who played a significant role in the development of codified legal ethics in this country. See Judith L. Maute, Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Noblesse Oblige to Stated Expectations, 77 Tul. L. Rev. 91, 95–105 (2002).

96. See Anthony M. DeStefano, Attorney's Indictment Troubles Colleagues, Newsday, Apr. 10, 2002, at A43 (noting the "zeal and competence [Stewart] has shown in defense of unpopular clients").

97. I do not wish to convict Ms. Stewart before she is tried. She may well be found innocent of the charges against her. I am commenting only on the conduct to which she admits—holding a press conference and conveying a message to the sheik's followers.

98. Curtis, supra note 47, at 18.

99. Id.

100. See id. at 21 (noting the need for detachment and stating "[a] man who has devoted his life to taking on other people's troubles, would be swamped by them if he were to adopt them as his own"); see also Charles Ogletree, Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 Harv. L. Rev. 1239, 1243 (1993) (arguing that empathy is a sustaining motivations for public defenders); Abbe Smith, Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender (unpublished manuscript, on file with the South Texas Law Review) (arguing that too much empathy leads to burnout and bad judgment).
can get too close. And when that happens the lawyer is unable to give
the client the very thing the client needs most: the lawyer's sound,
dispassionate judgment.101

Lynne Stewart has a reputation for being a dedicated lawyer,
someone who is committed to and connected to her clients.102 She
exemplifies the idea of a "client-centered"103 lawyer—the lawyer who
is devoted to the client's liberty, autonomy, and "self-actualization."104
Stewart's devotion—her client centeredness—may have been
especially ardent in the case of the sheik, because she was so taken
with him. For the sheik, physical freedom took a back seat to political
determination and self-actualization. What the sheik wanted,
what he needed more than anything else, was to maintain his political

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101. See Curtis, supra note 47, at 18 (offering Louis Brandeis as an example of
someone who was both a passionate advocate and a judicious one).
102. See Hamill, supra note 16.
103. FREEDMAN & SMITH, supra note 47, at 127 (noting that "the ethic of trust and
confidence is client-centered"); Monroe H. Freedman, Ethical Ends and Ethical Means, 12
J. LEGAL EDUC. 55, 56 (1991) ("My view of lawyers' ethics is... client-centered,
emphasizing the lawyer's role in enhancing the client's autonomy as a free person in a free
society."). Monroe Freedman may have been the first scholar to articulate the theory of
client-centeredness. See Fred C. Zacharias, Reconciling Professionalism and Client
Interests, 6 WM. & MARY L. REV. 1303, 1319 (1995) ("Monroe Freedman led the
intellectual development of this theory, characterizing client orientation as a constitutional
guarantee and as an essential element in upholding the dignity of individuals."). For
materials on client-centered counseling see generally DAVID A. Binder & SUSAN C.
PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APProACH
(1977); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974);
Robert M. Bastress, Client Centered Counseling and Moral Accountability for Lawyers, 10
J. LEGAL PROF. 97 (1985). For thoughtful criticism of client-centered counseling, see
generally Robert D. Dinerstein, Clinical Texts and Contexts, 39 UCLA L. REV. 697 (1992);
Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 ARIZ.
104. Some have suggested that theories on client-centered counseling come from the
work of psychologist Carl Rogers. See, e.g., Bastress, supra note 103, at 100 n.7. For a
critical view of Rogers's focus on self-actualization and its impact on "moral
responsibility," see William H. Simon, Homo Psychologicus: Notes on a New Legal
voice, his clout. He wanted to pursue his ideological cause no matter what happened to his physical being.\textsuperscript{105} The time and energy Stewart spent on the sheik's appeal was probably of little importance to him, as he no doubt knew he would not prevail on appeal. His need of a lawyer, of Stewart, may have had more to do with friendship—having someone to talk to, having a confidante and a sympathetic ear—than with the provision of legal services.\textsuperscript{106}

Still, how did Stewart go from being an exemplary client-centered lawyer, doing what she could do to legitimately advance her client's case and cause, to allegedly aiding him directly in his criminal activities?\textsuperscript{107} Although the line may be easy to discern after the fact, it may not have looked so clear to Stewart at the time.\textsuperscript{108} Defense lawyers often become intensely identified with clients, perhaps especially so when the client is a social or political pariah. When everyone else is against the client the lawyer "pumps up the volume" a bit. Add to this the criminal defender's tendency to flaunt authority,\textsuperscript{109} and you get defenders who are willing to break a rule here or there, especially when it comes to autocratic places like jails and prisons.\textsuperscript{110} Stewart may not have meant to further violence when she communicated her client's message; she may have seen herself as resisting overly harsh prison rules and asserting what she deemed to be her client's fundamental right of self-expression.\textsuperscript{111}

\begin{itemize}
\item[105.] Id.
\item[106.] See Phyllis Goldfarb, \textit{A Clinic Runs Through It}, 1 \textit{CLINICAL L. REV.} 65, 86 (1994) (discussing the representation of a client on death row for whom friendship was more important than legal advocacy); see also Charles Fried, \textit{The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation}, 85 \textit{YALE L.J.} 1060, 1088–89 (1976).
\item[107.] Again, I am only talking about the remarks Stewart made to the press on her client's behalf, which she does not deny.
\item[108.] See Singer, supra note 37 ("[W]hile you can be vociferous in the defense of justice to provide your client with a fair trial, you must avoid taking on the client's cause. Granted, this separation is hard for some of us to maintain.").
\item[109.] See Mary Halloran, \textit{Ode to a Criminal Defense Lawyer}, \textit{CAL. LAW.}, June 1998, at 96 (describing the public defender "personality"). Anti-authoritarianism seems to be part of that personality; see Gopnik, supra note 11, at 28 (noting Stewart's anti-authoritarian instincts).
\item[110.] See DeStefano, supra note 96 ("'We have all done things in violation of prison regulations, like bringing cigarettes to guys,' said one prominent Manhattan attorney.").
\item[111.] See id. ("'I don't believe she thought she was signing off on death warrants and passing out Holocaust decrees,' said the [prominent] attorney, who did not wish to be named. Rather, Stewart may have believed she was tweaking onerous prison rules.").
\end{itemize}
You have to get close to clients—no matter who the client is or what he or she is alleged to have done—in order to work with that client and fashion a defense. The longer a case goes on and the higher the stakes, the closer the lawyer sometimes gets. This is especially so if the lawyer likes the client, if he or she has any real feeling for the client. Stewart clearly got close to the sheik. She liked him. She may have gotten too close.

Stewart is not the first lawyer to have done so. Every defense lawyer in every jurisdiction has heard about someone who got in over his or her head, who became overly attached to a client and overstepped proper bounds. Janet Malcolm told one such story in her 1999 book, The Crime of Sheila McGough. In the book, Malcolm examines the fraudulent prosecution of solo criminal practitioner Sheila McGough, who, like Stewart, became a lawyer later in life. Though McGough was far from a radical, her story is an odd

112. See Singer, supra note 37 (“One of the conflicts inherent in [representing the despised] includes the need to establish some degree of rapport with even the most despicable clients if you are ever to provide them with a viable defense.”).

113. As defenders we may not love all our clients. However, we cannot help loving some. I have written about the exceptionally close, loving relationship I have with a client Patsy Kelly Jarrett. See Smith, Defending the Innocent, supra note 44, at 485–522. Although my relationship with this client is unique in some regards, the feelings I have for her are not. For example, I currently represent a seventeen-year-old boy accused of committing serious, violent crimes, including rape. Like many in his circumstances, his crimes are largely the result of his own troubled childhood. He is only beginning to make this connection for himself. In the course of representing this client—in the course of spending time with him, getting to know him, and coming to care for him—his crimes have faded from view. This is something that often happens to defenders: we see the client, not the crime. My client is a lonely, frightened, vulnerable youth who lights up when he sees me. I have to stop myself sometimes from expressing the love I know he feels for me, and which I cannot help but reciprocate. Feelings that come up in any relationship, even a professional one, can be powerful. It seems to me it is important to acknowledge the feelings in order to deal with them appropriately. The client is allowed to get carried away, but lawyers (and other professionals) must keep our wits about us. See generally IRVIN D. YALOM, MOMMA AND THE MEANING OF LIFE: TALES OF PSYCHOTHERAPY (1999) (offering stories from Yalom’s practice as a psychoanalyst).


115. See id. at 34–35 (noting that McGough had been an editor and administrator at the Carnegie Institute when, at age thirty-nine, she left her job to attend law school). It is interesting that both Stewart and McGough had previous non-law related careers, went to law school in their thirties, and soon after graduating, went into practice for themselves taking mostly court-appointed cases. See id.

116. See MALCOLM, supra note 114, at 35 (“Sheila wasn’t, and isn’t, a lefty. Since high school, she had worked for the local Republican organization, and she was well versed in the Right’s unsentimental rhetoric: she was ‘for law and order’ and ‘against the coddling of criminals.’”). Physically, she does not bear any resemblance to Lynne Stewart. See id. at 11.
precursor to Stewart's. At trial and throughout the book, McGough claims to have been both an unwitting pawn of a charming client who was also an experienced con artist, and a victim of vindictive prosecutors.\textsuperscript{117} Although she was a relatively inexperienced criminal defense lawyer, lack of experience alone could not account for McGough's failure to adequately distance herself from her client's unlawful activities. An otherwise careful person\textsuperscript{118} and lawyer—in some ways careful to a fault—McGough failed to see that she was giving herself over to her client in the name of zealous and devoted advocacy.\textsuperscript{119} Indeed, she allowed herself to be manipulated and used.\textsuperscript{120}

I have often thought that excessive devotion is a greater peril than excessive zeal on behalf of a client. When lawyers get too close to clients—when they become their client's "best friend,"\textsuperscript{121} their client's "family,"\textsuperscript{122} or worse, succumb to the "eros [that] finds its way into most lawyer-client relationships,"\textsuperscript{123}—things can go off-course. There need not be a clear breach of professional norms, like sleeping with a client, for lawyers to get too close.\textsuperscript{124}

\textit{Id.}

\textsuperscript{117} See id. at 6.
\textsuperscript{118} See id. ("She is a woman of almost preternatural honesty and decency.").
\textsuperscript{119} See id. at 7–8.
\textsuperscript{121} Compare Ogletree, \textit{supra} note 100, at 1242–43 (arguing that empathy for and friendship with clients motivate criminal defenders) \textit{with} Smith, \textit{supra} note 102 (arguing that too much empathy and friendship is a bad thing for defenders); see also TOM WOLFE, \textit{The Bonfire of the Vanities} 382 (Bantam Book ed. 1988) ("What did I tell you the first time you walked into this office? I told you two things. I told you, 'Irene, I'm not gonna be your friend. I'm gonna be your lawyer. But I'm gonna do more for you than your friends.'").
\textsuperscript{122} See Fredric Dannen, \textit{Defending the Mafia}, THE NEW YORKER, Feb. 21, 1994, at 64 (examining the professional life of Gerald Shargel, a prominent criminal defense lawyer who represents alleged members of organized crime).
\textsuperscript{123} MALCOLM, \textit{supra} note 114, at 27.
\textsuperscript{124} See id. at 26–28 (discussing McGough's relationship with client Bob Bailes). Although, on the one hand, there was no actual romance between McGough and her
Excessive devotion to, interest in, and identification with clients can happen to lawyers who have perfectly good boundaries the rest of the time. There is this one client, this one case that gets under the lawyer's skin.\textsuperscript{125} Maybe the lawyer perceives the client to be a victim of a horrible injustice. Maybe the lawyer feels a real affinity for the client, something approaching love.\textsuperscript{126} Maybe the client or case is filling some sort of need in the lawyer that the lawyer isn't even aware of—a need for connection, for love, for meaning.\textsuperscript{127}

The problem is this line is especially hard to draw. Lawyers are bound to become attached to clients out of a sense of shared

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\textsuperscript{125} This phenomenon is not unique to lawyers and clients. See Malcolm, supra note 114, at 28 (journalist/author discussing her own relationship with the subjects about whom she writes). As Malcolm acknowledges,

I have felt and succumbed to the pull of another's simple human need for diversion (as the subject has felt and succumbed to the pull of mine) and allowed myself to stray from the straight and narrow of the work at hand. I have flirted and horsed around with subjects. I have enjoyed myself with them as they have enjoyed themselves with me.

\textit{Id.} On the other hand, Malcolm's relationship with McGough could not have been less enjoyable:

I don't know if I've ever had a more irritating subject. I know I have never before behaved so badly to a subject. I have never before interrupted, lost patience with, spoken so unpleasantly to a subject as I have to Sheila—to my shame and vexation afterward. I have never before dreaded calling a subject on the telephone as I have dreaded calling Sheila. To my simplest question she would give an answer of such relentless length and tediousness and uncomprehending irrelevance that I could almost have wept with impatience. I took notes of these phone calls, and among them I have found little cries of despair. One of them was: "Help, help! I'm trapped talking to Sheila. She won't stop. Save me."

\textit{Id.} Malcolm compensated for her constant irritation with McGough by taking "the journalist-subject relationship ... to a kind of absurdist level of professionalism and impersonality." \textit{Id.}

\textsuperscript{126} See Ogletree, supra note 100, at 1272.

My relationship with my clients approximated a true friendship. I did for my clients all that I would do for a friend. I took phone calls at all hours, helped clients find jobs, and even interceded in domestic conflicts. I attended my clients' weddings and their funerals.... Because I viewed my clients as friends, I did not merely feel justified in doing all I could do for them; I felt a strong desire to do so.

\textit{Id.}

humanity,\textsuperscript{128} and because the lawyer-client relationship is a relationship after all.\textsuperscript{129} Attachment is not a bad thing.\textsuperscript{130} The best defenders are often the most attached, the most connected to clients.\textsuperscript{131} From the outside, it may seem obvious where natural and appropriate attachment ends and boundary violations begin. From the inside, it is not always so easy.\textsuperscript{132}

I take a pragmatic approach to professional boundaries. I may feel a lot for some clients—I may want to move mountains on their behalf, and weep when I cannot do it—but I will not do anything to jeopardize my ability to practice law.\textsuperscript{133} I may offer a prisoner a piece of gum or candy in clear violation of prison rules, but I will not help him escape.\textsuperscript{134} I may arouse a prosecutor’s or judge’s ire because of

\begin{itemize}
\item \textsuperscript{128} See Babcock, \textit{supra} note 51, at 187 (noting that “we all share a common humanity with the accused”).
\item \textsuperscript{129} See Stephen Ellmann, \textit{The Ethic of Care as an Ethic for Lawyers}, 81 GEO. L.J. 2665, 2686 (1993) (“Lawyers and clients are thrown together by the client need that generates the relationship. From this more or less intimate encounter can come strong feelings, particularly from the client for his lawyer, on whom the client may be dependent for emotional sustenance and legal aid . . . .”). The lawyer can have strong feelings for the client too. See Silver, \textit{supra} note 127, at 261 (“The lawyer's devotion to the client's needs is not reciprocated by the client.”).
\item \textsuperscript{130} See generally Smith, \textit{Defending the Innocent}, \textit{supra} note 44 (discussing her representation of a client she has known since law school who has now spent more than twenty-five years in prison for a crime she did not commit).
\item \textsuperscript{131} See, e.g., Halloran, \textit{supra} note 109, at 96 (“I've known some [defenders] to drive 150 miles in a snowstorm after dark to the maximum security prison to visit a lifer who's lonely and unloved . . . . They'll sacrifice home, income . . . . to save a guilty person from the death penalty.”).
\item \textsuperscript{132} On the other hand, sometimes the line is clear. See TIM WINTON, \textit{DIRT MUSIC} 87 (First Scribner ed. 2001).
\item \textsuperscript{133} See Abbe Smith, \textit{The Difference in Criminal Defense and the Difference It Makes}, 11 WASH. U. J.L. & POL’Y 83, 90 (2002) (“My approach to the phrase ‘within the bounds of law’ is primarily pragmatic. I would not want to engage in conduct that would jeopardize my ability to practice law and serve clients . . . . Though mindful of the bounds of law, I . . . will test and challenge it.”) (internal citations omitted).
\item \textsuperscript{134} See Post, \textit{supra} note 17, at B6 (Stewart agreeing that there are lines she would not
impassioned advocacy—even going so far as to risk being cited for contempt—but I won’t risk my law license. Although I embrace a theory of lawyers’ ethics that has generated some controversy, I am scrupulous in my application of that theory. In other words, I do what I can to be beyond reproach.

This approach may not seem terribly principled. It may appear to be more about self-interest than client interest or the interests of the legal profession. If all I am saying is don’t get caught—or at least if you are caught make sure it is not a career-ending sort of offense—then Stewart’s conduct was perfectly acceptable when it occurred during the Clinton administration. Hers was a mistake in timing (and the outcome of the closest presidential election ever), not ethics. It is worth noting that, as of this writing, to my knowledge, Stewart has not been cited by the New York bar for any disciplinary violations. Instead, she has been charged under federal criminal law as essentially acting as her client’s accomplice.

The truth is zealous lawyers contemplate getting in a little trouble from time to time, though they do not expect to be criminally prosecuted. What defender has not on occasion violated a prison rule, passed on a communication they probably should not have passed on, attempted to soften an otherwise harsh criminal justice system? More importantly, what zealous, devoted defender refrains from speaking for clients simply because they are told not to?

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cross, including helping a client escape).

135. See Babcock, supra note 51, at 179.

136. See generally Louis S. Raveson, Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, Part One: The Conflict Between Advocacy and Contempt, 65 WASH. L. REV. 477 (1990) (proposing that being an appropriate advocate for your client may require you to impede the traditional search for truth, and this should be accepted by courts).

137. See FREEDMAN & SMITH, supra note 47, at vii.


139. See Lynda Richardson, Marijuana Should Be Legal, She Says. Pass It On, N.Y. TIMES, Nov. 20, 2002, at B2 (Ruth Liebesman, executive director of the New York City chapter of the National Organization for the Reform of Marijuana Laws (NORML), noting, “I have to have credibility as a criminal defense lawyer. I have to be above reproach.”).


141. See Hamill, supra note 16 (“That’s what defense attorneys do . . . . They speak for
I find it hard to believe that Stewart acted as she did to promote or carry out terrorism in the name of the suffering people of Egypt. Prior to agreeing to represent the sheik—about which Stewart initially had misgivings—there is no indication that Stewart knew anything about, much less passionately believed in the sheik's cause. There is no indication she had especially strong views about politics in the Middle East. The fact that Stewart has represented various American dissidents, or used a "political defense" in the Larry Davis trial, is a far cry from the allegation that she is in cahoots with her Islamic fundamentalist client to advance a violent crusade.

If Stewart—after weighing the risks of her conduct and deciding it was worth it in this particular context—simply misjudged the government's reaction, there is an explanation for this that may be "political" without involving any intent to "provide material assistance to a terrorist organization." Stewart's client was incarcerated under the harshest of circumstances—he was basically being held incommunicado—and Stewart no doubt felt this was both unjust and cruel. The only thing that mattered to the sheik was his voice. And yet it was unlikely at best that petitioning the court to change the conditions of his confinement would be productive. This coupled with the belief that the sheik had been wrongly convicted may have made Stewart want to stretch the bounds of advocacy on her client's behalf.

IV. CONCLUSION

It may be that I am more forgiving than most when it comes to lawyers who overstep the bounds of zeal. But, there is a serious political problem when the government goes after defense lawyers. Because there is a chilling effect on the entire bar, the government had better have an incontrovertible, ironclad case when it prosecutes you, whether you're accused of terrorism or shoplifting.

142. See Gopnik, supra note 11, at 28
143. See id.
144. See Levitt & Henican, supra note 15, at 4. Stewart essentially put the police on trial in the Davis case. See id.
146. See Post, supra note 17 ("I mean there are lines I would not cross for a client's best interests... but we are talking about America, and in America we're supposed to have a free marketplace of ideas." (quoting Stewart)).
147. See 60 Minutes, supra note 23.
148. See Post, supra note 17 ("[My] indictment... criminalizes what any good lawyer would do." (quoting Stewart)).
lawyers. This is especially so when the government prosecutes lawyers who represent unpopular clients.

In addition, just as I think it is better to be overzealous than underzealous,149 I think it is better to be "overdevoted" than the alternative. Too many lawyers do not care enough—they lack even the most basic respect for clients—resulting in dreadful representation.150 This is a serious problem in some indigent criminal defense settings.151 On the other hand, sometimes defenders simply lack the resources—or the control over caseload—to demonstrate the devotion they feel.152

Lynne Stewart will soon have her day in court. Perhaps her case will be over by the time this article goes to print. Although Stewart's case is a cautionary tale for lawyers—especially lawyers representing alleged terrorists in these troubled times—no matter the outcome, it will not finally resolve the difficult question of the bounds of advocacy in criminal defense.

149. See DERSHOWITZ, supra note 47, at 410 ("I have been accused several times of overzealousness. I confess my guilt. In a world full of underzealous, lazy, and incompetent defense lawyers, I am proud to be regarded as overzealous on behalf of my clients.").


151. See Abraham S. Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, 1 LAW & SOC'Y REV. 15, 18–28 (1967).