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# Empathy and Approval Theoretics of Practice: The Integration of Progressive Thought and Action

Stephen Ellmann

*New York Law School*, [stephen.ellmann@nyls.edu](mailto:stephen.ellmann@nyls.edu)

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# Empathy and Approval

by

STEPHEN ELLMANN\*

Clinical legal educators, repulsed by styles of lawyering that submerge client perceptions and wishes under the weight of lawyer domination, have repeatedly endorsed the value of empathy. The essence of empathy, as David Binder, Paul Bergman, and Susan Price have characterized it, lies in the lawyer's conveying to the client the feeling that the client is being listened to, understood, and accepted—but not judged.<sup>1</sup> Empathy, they write, “is the real mortar of an attorney-client (indeed, *any*) relationship.”<sup>2</sup> Robert Bastress and Joseph Harbaugh agree; they call empathy “the sine qua non for effective interviewing and counseling.”<sup>3</sup> It is also a powerful tool for encouraging clients to trust and truly communicate with their lawyers,<sup>4</sup> and a central element of an essential lawyering technique, the process of “active listening.”<sup>5</sup>

Empathy is quite different from judgment, either negative *or* positive. Binder, Bergman, and Price illustrate this point by analyzing responses to the following statement by a client:

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\* Associate Professor of Law, Columbia Law School. B.A., Harvard College; J.D., Harvard Law School. I thank Apalla Chopra, Robert Dinerstein, Deborah Rhode and Nancy Rosenbloom for their helpful comments on this piece. I also appreciate the comments made by participants in the “Theoretics of Practice” conference, and I thank the organizers of the conference for the opportunity to present this Essay there.

1. See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 40, 53 (1991).

2. *Id.* at 53 (emphasis in original) (footnote omitted).

3. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 116 (1990). For an insightful review of this work and of BINDER ET AL., *supra* note 1, see Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 *UCLA L. REV.* 697 (1992) [hereinafter Dinerstein, *Clinical Texts*].

4. BINDER ET AL., *supra* note 1, at 40; BASTRESS & HARBAUGH, *supra* note 3, at 117. Thomas Shaffer and James Elkins also endorse the lawyer's showing “empathic regard for the client's feelings” in order to help establish “an open, reflective, supportive atmosphere in the [lawyer's] office, as soon as the client settles into it.” THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 76, 79-80 (2d ed. 1987).

5. See BINDER ET AL., *supra* note 1, at 53. Bastress & Harbaugh describe similar techniques, BASTRESS & HARBAUGH, *supra* note 3, at 116-26, 258-65.

When the promotion list came out, I was not on it. And I know I had been on the preliminary list. To see such blatant discrimination made me realize it was finally time to do something about it.<sup>6</sup>

One lawyer response to this expression of outrage is: "I don't blame you." But this is not an empathetic response, the authors explain, because the lawyer "has judged the appropriateness of the reaction."<sup>7</sup> In Bastress and Harbaugh's words, "Empathy is not sympathy, nor is it compassion, reassurance, or denial."<sup>8</sup> So, too, agreement with a client's feeling, Thomas Shaffer and James Elkins maintain, "is not the same at all" as acceptance of that feeling.<sup>9</sup> An empathetic response, rather, might be: "I can understand how upset you must have felt at that point."<sup>10</sup>

On closer examination, however, empathy does not seem quite as nonjudgmental as these distinctions might suggest. I have argued elsewhere that an element of approval may be present, or at least perceived, in empathy as David Binder and his colleagues describe it.<sup>11</sup> Bastress and Harbaugh make this connection even more plain. They emphasize the importance of the lawyer's feeling and communicating respect for her client, and they write that:

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6. BINDER ET AL., *supra* note 1, at 60.

7. *Id.*

8. BASTRESS & HARBAUGH, *supra* note 3, at 116.

9. SHAFFER & ELKINS, *supra* note 4, at 81. The example Shaffer and Elkins criticize is a particularly awkward one, in which a lawyer responds to a strong statement of grievance from the client by saying, simply, "Right." See *id.* at 79. Such a response might be an expression of agreement with the client's thinking, or it might only be a tepid acknowledgement of the fact that the client has these thoughts. Shaffer and Elkins' criticism, however, seems to extend broadly to lawyer responses that "impl[y] that client feelings are presented for agreement or disagreement by the lawyer." *Id.* at 81.

10. This example closely follows the phrasing of a response Binder, Bergman, and Price endorse. See BINDER ET AL., *supra* note 1, at 59-60. Interestingly, Shaffer and Elkins might argue that this response did not convey empathy, but only acceptance, and that an empathetic response would have brought "the lawyer's feelings into the interview," and shown that the lawyer "received and shared the feeling." SHAFFER & ELKINS, *supra* note 4, at 80. In contrast, Bastress and Harbaugh seem to see empathy as a somewhat cooler experience; they view "shar[ing] the client's values or feelings" as an element of "sympathy" rather than empathy, and characterize empathy as founded on a depth of understanding that entails "look[ing] at the case through the client's eyes." BASTRESS & HARBAUGH, *supra* note 3, at 116. They might criticize this response not for disengagement, but for vagueness—on the ground that so imprecise a reflection of what the client has said fails to communicate understanding and may "mean[] that the counselor is unable to put into words the meaning of what the client has expressed. Until the lawyer can do just that, any understanding the lawyer might have remains uncommunicated to the client." *Id.* at 124.

11. See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 738-39 (1987). This discussion focused in part on an example of empathy in DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 30 (1977); the same example, slightly revised, appears in BINDER ET AL., *supra* note 1, at 59-60.

You communicate respect through . . . accurate empathy; your understanding of the client's feelings and experiences necessarily implies that the client has acted, or reacted, in a way that is natural and appropriate. That is, the client's feelings and experiences are "understandable."<sup>12</sup>

It is hard to escape the conclusion that what is "natural and appropriate," and thus "understandable," is also "right."<sup>13</sup> The unsophisticated client is not likely to perceive his lawyer's respect as unrelated to his individual worth, although Bastress and Harbaugh characterize it as "unconditional and nonjudgmental."<sup>14</sup> This perception may be all the more unlikely given that Bastress and Harbaugh endorse unconditional and nonjudgmental regard only "[u]nless the client urges means or seeks ends that offend your values"<sup>15</sup>—which is to say only *conditionally*.

This Essay argues that the positive judgment latent in empathy need not always remain so veiled. On the contrary, clients often need, and lawyers sometimes should be able to offer, a more wholehearted confirmation of client feelings. This positive judgment and endorsement of part or all of the client's world view I call *approval*. The functions of such explicit approval are somewhat different from, and potentially inconsistent with, those of empathy. Although lawyers can effectively make use of both techniques, they are not interchangeable, and a recognition of approval's potential value not only adds a technique to lawyers' repertoire, but also requires lawyers to consider the difficult tradeoffs between these two powerful forms of communication with clients.<sup>16</sup> Part I of this Essay analyzes the functions that approval can serve. Then, in Part II I examine the tradeoffs its use may entail, and the ways that this

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12. BASTRESS & HARBAUGH, *supra* note 3, at 130.

13. Compare Ellmann, *supra* note 11, at 738.

14. BASTRESS & HARBAUGH, *supra* note 3, at 130. I made a similar point in discussing Binder and Price's explication of empathy in Ellmann, *supra* note 11, at 738-39.

15. BASTRESS & HARBAUGH, *supra* note 3, at 130.

16. Binder, Bergman, and Price are well aware of the power of approval, which they discuss under the rubric of "recognition." See BINDER ET AL., *supra* note 1, at 43. But at least in their initial discussion they focus on the role of recognition as an approving response to a client's quality of communication, rather than as a reaction to the value judgments implicit or explicit in what the client says. Thus, they offer the following comment as an example of recognition: "Your giving me that information is very helpful." *Id.*; but *cf. id.* at 283, 359 (suggesting that lawyer make clear she "recognizes" the legitimacy of a client's values—as a preface to urging him to reconsider them). Bastress and Harbaugh also endorse recognition, and explicitly identify the approval that goes into it. They urge lawyers, however, to be "very cautious . . . in . . . expressions of approval as they relate to the 'merits' of a client's problem." In their view, at least in general, "recognition should be confined to reinforcement of the client's cooperation with [the lawyer] or of general character traits." BASTRESS & HARBAUGH, *supra* note 3, at 189. For an instance of what may be slightly more specific approval, however, see *id.* at 171 (lawyer expressing agreement with client's perception of co-workers' harassing behavior as "offensive").

technique can and should be integrated into sound client-centered lawyering. Finally, in the concluding section, I will set the consideration of approval as a technique in the broader context of understanding the nature of the lawyer-client relationship.

### I. The Functions of Approval

If approval (and empathy) are powerful forces, it is because they provide clients with something that clients need or want. To understand the role of approval, therefore, we need to examine its operation in light of what clients are likely to want, or need, from their lawyers.<sup>17</sup> The perspective I offer on what clients seek from their lawyers is not meant to be radical; on the contrary, I hope to demonstrate that a largely commonsensical understanding of clients' needs confirms the potential impact of lawyers' approval. The features that clients seek in their lawyers, I suggest, include loyalty, respect, warmth, advice, and understanding. These are elements that tend to enhance the efficacy of the lawyer's performance on the client's behalf, and that also speak to the inescapable personal needs at play in any human encounter, however ostensibly goal directed it may be. Approval can contribute to the client's confidence on each of these scores.

#### A. Loyalty

Approval functions, first of all, to assure the client of the lawyer's loyalty. Loyalty is a central concern of all clients. To be sure, some clients take it for granted. A businesswoman negotiating a transaction, for example, may simply and reasonably assume that the corporate lawyer she has retained is committed to achieving her objectives. But even this client should not, and probably does not, blindly assume that any lawyer she hires will be loyal to her interests. Instead, she is able to have the confidence she does only because she has taken steps to insure that it is well placed: she has, perhaps, chosen a firm with a reputation for probity, or she has looked for a lawyer known to be sympathetic to businesspeople's concerns. If, on the other hand, she were a union leader in the process of collective bargaining, she would have gone to a union-side labor law firm, rather than a firm known for its representation of management. Moreover, she is paying a handsome fee for her lawyer's fidelity, and she has the resources to sue the lawyer if her expectations are disap-

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17. Although this analysis focuses on approval's impact on clients, we will see that the communication of approval can also serve the lawyer's purposes; it can not only strengthen her relationships with her clients, but also provide her with an occasion to express her own feelings and thus vindicate her own autonomy. See *infra* note 28.

pointed. Even with all this, such a client may be reassured by her lawyer's explicitly and "repeatedly convey[ing] a desire to help," as Binder, Bergman, and Price recommend.<sup>18</sup>

Many clients, however, are not so sure of their lawyer's good faith—sometimes for good reason. What benefits lawyers may not benefit clients, and the various checks on lawyers' temptation to pursue their own goals at their clients' expense are far from impermeable.<sup>19</sup> Clients who fear disloyalty will naturally be interested in their lawyers' views of their activities. They will suspect, after all, that the intensity of many lawyers' work is affected by whether the lawyers believe in the cause for which they are working. The rules of legal ethics seek to insure that lawyers are not personally identified with the causes they advocate, in order to guarantee that lawyers' disagreement with those causes does not undermine their zealotry<sup>20</sup>—but clients may legitimately worry that their lawyers are not capable of such complete compartmentalization of their own feelings.

In short, clients have good grounds for wanting to know how their lawyers feel about them and about their aspirations. Often lawyers seek to satisfy this concern by developing a reputation that implies assurances of loyalty. As noted earlier, clients may respond to such reputations by seeking out lawyers whose general orientation fits their own. But loyalty is not always implicit or presumed. A victim of discrimination, particularly when speaking with a lawyer of different race, gender, or culture, may be quite unsure of the lawyer's values. If, for example, the client

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18. BINDER ET AL., *supra* note 1, at 22. The authors observe that "[o]ur experience is that explicit, and sometimes repeated, affirmations of a desire to help [are] enormously reassuring to many clients. This is especially true for new clients, who have had little opportunity to assess your personal commitment, or for clients who have had previous negative experiences with other lawyers." *Id.* at 22 n.22.

19. See generally Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (examining lawyers' "silenc[ing] and displace[ment]" of clients' stories); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (arguing that the objectives of school desegregation lawyers diverged from those of many African-American parents); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC. REV., June 1967, at 15 (examining lawyers' disloyalty in the practice of criminal law); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (detailing instances of lawyers' lying to clients, generally in the pursuit of the lawyers' self-interest); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 87-99 (1979) (suggesting that neither "the market, legal regulation, [nor] systems of norms . . . effectively control[s] the [disloyal] behavior of lawyers").

20. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.4(e), 6.2 (comment) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(4), EC 2-27 (1982).

whose perception of discrimination was quoted earlier<sup>21</sup> is a black woman trying to get a sense of a white male lawyer, she may very much want reason to believe that the lawyer is not himself deeply tainted by race or gender prejudice.

Approval speaks directly to such a concern. The lawyer might say, for example:

I understand how upset you must have been to feel like you had been discriminated against. Discrimination is a terrible thing. I went to law school to learn how to use the law to fight it, and I hope I will be able to help you.

By expressing his agreement with the client's opposition to discrimination, this lawyer has given the client grounds to believe in his loyalty—not necessarily conclusive grounds, but at least reason to proceed further. Nonjudgmental empathetic regard may also suggest the lawyer's loyalty, by manifesting his capacity for understanding the client's feelings or by covertly delivering a message of approval.<sup>22</sup> But actual approval provides more direct assurance. Such directness is likely to be especially valuable in situations where the client has reason to be particularly concerned about her lawyer's loyalty: when she sees the lawyer as different from herself; when she sees the representation as calling for special sacrifice or struggle on the part of the lawyer; when she sees the matter as involving fundamental values; and perhaps when the lawyer calls on her to act in ways that go beyond her accustomed habits.<sup>23</sup> The greater the client's initial misgivings, the more valuable the direct assurance of approval may be. Not all clients will need approval, or even empathy, to

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21. See *supra* text accompanying note 6.

22. See *supra* text accompanying notes 11-15.

23. Lucie White describes a white organizer working in a black South African community that faced "forced removal" at the hands of the government. The organizer was deeply, but not domineeringly, involved with the community, and engaged in what White sees as a process of "challeng[ing] domination within the client's consciousness," Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 764, through a "dialogic process of reflection and action," *id.* at 761. This process calls for a frankness and humility that seem to entail the organizer's willingness to communicate approval and disapproval. As White puts it:

The organizer had studied Zulu language and culture, and sought in her work to help the villagers reclaim the knowledge that still remained from that culture. She urged them to judge the government's actions according to their traditional values, rather than its laws. At the same time, though, she was outspoken about what she regarded as the oppressive features of traditional Zulu culture and challenged the women in particular to take the lead in community life.

*Id.* at 744. For another extended illustration of a close political engagement between a lawyer and a disadvantaged client in which the lawyer's approval of her client's concerns is very evident, see Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989).

assure themselves of their lawyers' loyalty,<sup>24</sup> but for many—and particularly for many disadvantaged clients in politically charged contexts—approval may be an essential element in forging a strong lawyer-client relationship.

## B. Respect

Clients are likely to want their lawyers' respect. Respect can contribute to loyalty, and it can encourage empathy and understanding on the lawyer's part. An atmosphere of respect will also, in many circumstances, encourage clients to communicate more fully with their lawyers. In addition, those lawyers who hope that their own personal interactions with their clients will help empower those clients must be particularly concerned to demonstrate respect for them—for clients who do not experience this respect even from their ally, the lawyer, may be all the more

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24. In some contexts, lawyers may be unable to express any general approval of their clients. In criminal defense practice, for example, few lawyers are likely to feel, or wish to express, approval of the crimes their clients may have committed. Even here, though, lawyers may be able to express sincere approval (at least of the "I don't blame you" variety) when responding to their clients' anger at police conduct or to their desire to avoid imprisonment. Although the scope of empathy possible in such cases is also likely to be limited, Bastress and Harbaugh rightly suggest that lawyers in such situations "demonstrate to the client that [they] genuinely care about the client as a human being presently faced with a serious problem." BASTRESS & HARBAUGH, *supra* note 3, at 66.

Some criminal defense lawyers, however, may seek to win their clients' confidence less by any overt expression of empathy or approval than by convincing their clients of their willingness to fight for the clients regardless of what they have done. Tom Wolfe vividly illustrated one way to make this pitch in his portrayal of a criminal defense lawyer in *THE BONFIRE OF THE VANITIES* (Bantam ed. 1988). There Tommy Killian, a criminal defense lawyer, is refusing to do any further work for a client. The client says:

"You dun care."

"It ain't that I dun care, Irene. It's that I dun care anymore. You don't pay your bills. Don't look at me like that. You're on your own."

"But you gotta! What happens if they rearrest me?"

"You shoulda thoughta that, Irene. 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.' And I said, 'Irene, you know why I do this? I do it for money.'"

*Id.* at 382. Killian seems neither empathetic nor approving; what he promises clients is truly a hired gun (except that this scene ends with the client breaking into tears and the lawyer agreeing to represent her on a arraignment).

In a somewhat similar vein, F. Lee Bailey recounts an incident in which a "mafioso . . . wanted to control his defense—a decision Bailey didn't care for. 'I told him that I'm an ex-Marine and that it wouldn't bother me to put a bullet between his eyes and eat spaghetti off his face.' The client backed off." Stephanie B. Goldberg, *On Trial in Foley Square*, A.B.A. J., Jan. 1, 1988, at 42, 45, *quoted in* BASTRESS & HARBAUGH, *supra* note 3, at 320 n.5. Bailey's client may have weighed the unpleasantness of Bailey's attitude toward him against the aggressiveness he could expect such a lawyer to display toward the other side, and decided that his unpleasant lawyer was just what he needed.

convinced that they lack the capacity to act for themselves. These instrumental concerns aside, people enjoy being respected; they do not usually relish repeated, and perhaps intimate, interactions with those from whom they feel contempt.<sup>25</sup>

Empathy may convey respect. It certainly conveys an absence of disrespect, and for many disadvantaged clients even this attitude from a professional may be an unusual and welcome experience. Clients may also perceive an implicit respectful message in the fact that they are not being judged—a signal that the empathetic listener claims no superiority over the speaker and, in acknowledgement of their common humanity, does not judge, but rather offers “unconditional positive regard.”<sup>26</sup>

Yet it seems possible that clients will pick up another, more disturbing message instead. As clients know very well, lawyers are people and therefore have values. When a lawyer responds to a client's expression of his or her beliefs in a way that avoids offering the lawyer's own beliefs on the matter, the client is likely to notice the withholding. Some clients may take this as a sign of the lawyer's self-denying focus on the client's well-being, a sign of the lawyer's welcome subservience, or as the implicit expression of respect suggested in the previous paragraph. Other clients, particularly those who start out at a status disadvantage vis-à-vis their lawyers, may interpret the lawyer's withholding as a form of superiority and, perhaps, disagreement. This reaction must be particularly likely when the client actually asks the lawyer whether she agrees with his beliefs and the lawyer avoids answering.<sup>27</sup> The client may also take

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25. Bastress and Harbaugh consider respect “a basic ingredient of the helping relationship.” BASTRESS & HARBAUGH, *supra* note 3, at 130.

26. The phrase “unconditional positive regard” is Carl Rogers'. See, e.g., CARL ROGERS, *A Client-Centered/Person-Centered Approach to Therapy*, reprinted in THE CARL ROGERS READER 135, 136 (Howard Kirschenbaum & Valerie Land Henderson eds., 1989).

27. A similar potential exists when a professional avoids giving a client personal information about the professional's own life. A client who is describing the problems he faces as a parent, for example, may ask his lawyer if the lawyer has had similar problems. A lawyer who avoided answering this question could easily be perceived as keeping his distance from the client. Bastress and Harbaugh argue for the use of “lawyer self-disclosure” in part on similar grounds. BASTRESS & HARBAUGH, *supra* note 3, at 267-68. Bastress and Harbaugh describe self-disclosure as a sharing of the lawyer's “experiences and feelings.” *Id.* at 267. As such, self-disclosure may not directly express approval (or disapproval) of the client's feelings and values, cf. Dinerstein, *Clinical Texts*, *supra*, note 3, at 710-11 n.40 (arguing that Bastress and Harbaugh are chiefly concerned here with lawyers' sharing experiences rather than values)—although this technique may well shade into at least implicit approval. Bastress and Harbaugh also endorse lawyers' frank discussion with their clients of those moral issues on which they differ. BASTRESS & HARBAUGH, *supra* note 3, at 130; see also *id.* at 334-38 (quoting Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97, 112-13, 117-19, 125-27 (1985)). Though a discussion of differences might imply the existence of elements of agreement, and clarifying the area of disagreement might even require

the lawyer's withholding or avoidance as a form of falsehood, and so lose confidence in the lawyer's "genuineness," an essential basis of lawyer-client trust.<sup>28</sup>

Approval offers the lawyer a straightforward way of demonstrating respect. Since we so often respect those with whom we agree, the lawyer who expresses her agreement with her client's values, aspirations, or perceptions is suggesting her respect as well. This respect, moreover, is in a sense more conventional and less grudging than the respect embodied in empathy. Rather than saying that no one is entitled to judge another, or that everyone is entitled to respect simply because of his or her humanity—propositions many of us probably do not entirely accept—the lawyer who expresses approval can be taken as saying: "We are entitled to judge each other, and I judge you positively."<sup>29</sup> At the same time, the

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overt identification of areas of agreement, in the passages just cited the authors do not explicitly endorse any expression of agreement—or, in other words, approval—on the part of the lawyer. Indeed, their general position, as already noted, is that lawyers should exercise great caution in the use of approval. *See supra* note 16. It seems fair to say that Bastress and Harbaugh offer more express support for expressions of disagreement with client values than for expressions of concurrence with them, yet surely disagreement is quite comparable to approval in its capacity to constrain a client's ability to make his own decisions. Perhaps, however, Bastress and Harbaugh would respond that, although both forms of lawyer response are risky, expressions of disagreement on moral grounds serve a more valuable purpose (namely, avoiding immoral conduct) than do statements of approval. This Essay suggests, however, that approval also can serve important functions in a client-centered practice of law.

28. Bastress and Harbaugh consider genuineness, like respect, to be a fundamental element of a helping relationship. BASTRESS & HARBAUGH, *supra* note 3, at 109, 126-28.

The lawyer's genuineness, of course, is not only good for the client. Many lawyers also will want to express their beliefs as part of, or in the course of, their work. One reason for doing so is to urge the client to accept the lawyer's moral perspective. Indeed, there now seems to be considerable agreement in clinical literature that some measure of intervention along these lines is proper and desirable. *See BINDER ET AL.*, *supra* note 1, at 282-84, 358-59; BASTRESS & HARBAUGH, *supra* note 3, at 130, 334-38; SHAFFER & ELKINS, *supra* note 4, at 290-319. *But cf.* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 561-70 (1990) (pointing to the risk of clients' being compelled to adopt their lawyers' moral views, and urging that lawyers' advice-giving be very carefully circumscribed). A second reason is simply to be able to be oneself. A lawyer who deeply opposed racial discrimination, regularly represented its victims, and yet felt obliged not to express to her clients her own opposition to discrimination, would be truncating her presentation of herself. If her doing so served the client, such a limitation on her autonomy might well be justified, but this Essay's thesis is that lawyers' self-expression can promote, rather than undercut, effective lawyer-client relationships.

29. Even those who do feel a respect based solely on shared humanity may well have a different, additional respect for those men and women whom they see as having not only humanity but also virtue. Clients, moreover, may relish the sense that they merit the latter, more particularized, connection. William Simon maintains that there is "ample psychological evidence that people need and are fulfilled by the kind of concrete, normatively conditioned relationships which the ideal of 'unconditional positive regard' repudiates." William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 518-19 (1980)

lawyer signals her common humanity with her client by responding to his views with views of her own, by engaging him rather than distancing him.<sup>30</sup> It is possible, of course, to express approval so condescendingly that the message sent is one of contempt rather than admiration.<sup>31</sup> Yet approval still seems a potentially more direct path than empathy for conveying the lawyer's respect to her client.

### C. Warmth

Clients are also likely to look for warmth from their lawyers.<sup>32</sup> For the client, the lawyer's warm feelings are a further guarantee of her loyalty and can be a source of emotional sustenance, particularly for those clients whose legal problems are as painful as they are complex. A client bolstered by a sense of emotional bonding may be better able to face the difficulties of a legally arduous situation. Such a client may be more responsive to the lawyer's advice, and while this possibility opens the door to manipulation, it also offers the hope that good advice, which would have been discounted by a more reserved client, will now be taken seriously.

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[hereinafter Simon, *A New Legal Formalism*]. To Simon's mind, "Unconditional positive regard—an ostensibly personal regard which has nothing to do with the specific ends and qualities of either the person regarding or the person regarded—is a kind of intimate, smiling indifference which is dispensed indiscriminately." *Id.* at 514.

30. Since engagement can be a sign of respect, it seems likely that even disagreement with a client's views can convey respect. Thus, "disapproval," as well as approval, may be a vehicle for showing respect. For an example, see *supra* note 23. Using disapproval for this purpose, however, is particularly difficult because often the disrespect present or perceived in any negative evaluation may sound louder than the respect suggested by the willingness to engage.

31. *Cf. supra* note 9.

32. Some clients, even in difficult legal situations, may not place much weight on their lawyers' personal warmth. These clients may be more interested in their lawyers' ferocity and skill, and may endure, or even welcome, abrasive treatment from their lawyer as a signal of what is in store for their adversaries. Compare the examples of lawyers' conduct in note 24 *supra*. I suspect, however, that even clients who look forward to their opponents' suffering at the hands of their lawyers would still prefer to see some signs of warmth toward themselves.

It is also likely that clients' responses to lawyers' warmth are influenced by the gender of both parties. For example, if women tend to be more concerned than men with establishing connections between themselves and others, then women clients may be more responsive to signs of warmth than are men. Men, on the other hand, may be more concerned with issues of status and control, and might take overt warmth as condescension rather than support. *See generally* DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 23-48 (1990); *cf.* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 25-39 (1982); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988). Men and women clients might also be particularly sensitive, positively or negatively, to signs of warmth from lawyers of the opposite sex.

Surely it requires little argument to demonstrate that approval can contribute significantly to the warmth of the lawyer-client relationship.<sup>33</sup> Since we tend to like those with whom we agree, those who receive our approval can readily and reasonably infer our affection. This is not to deny that empathy too can fuel a warm relationship; clients who perceive that they have been empathetically heard and understood may well assume that they also are liked.<sup>34</sup> Perhaps, indeed, it is impossible fully to understand another without feeling some bond to that other person. The bond forged by empathy, however, may be more impersonal than the ordinary ties of affection between people, for a bond based on "unconditional positive regard," like a religious love of all mankind, seems largely indifferent to the individual characteristics of particular men and women. By contrast, approval is part of the cement of ordinary human relations.

#### D. Advice

Whether lawyers should give their clients advice—that is, whether they should express opinions about what their clients ought to do—has been a matter of considerable debate.<sup>35</sup> A number of commentators, however, now agree that some measure of advice is consistent with a client-centered practice.<sup>36</sup> My own view is that lawyers should in some circumstances give advice to their clients, either because the client is not (in the lawyer's judgment) properly assessing his own best interests or because the client is not giving proper weight (again, in the lawyer's judg-

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33. Again, however, gender may sharply affect the impact of approval. Consider, for example, the suggestion by Shaffer and Elkins that expressing agreement with a client's feelings "implies that client feelings are presented for agreement or disagreement by the lawyer." SHAFER & ELKINS, *supra* note 4, at 81. The discussion in Bastress and Harbaugh also contains hints that the authors see statements of sympathy or reassurance as prone to be superficial or condescending, though these writers do appear to accept that sympathy can be a valuable part of a lawyer's response to a client. See BASTRESS & HARBAUGH, *supra* note 3, at 116, 125-26, 168, 223, 229. Deborah Tannen suggests that men are predisposed to experience sympathy as a form of one-upmanship—"I'm superior to you, and look down on you sympathetically"—while women tend to engage in conversations that are, in Tannen's words, "negotiations for closeness in which people try to seek and give confirmation and support, and to reach consensus." TANNEN, *supra* note 32, at 24-25.

34. I linked "non-judgmental acceptance" with clients' perception of affection and approval in Ellmann, *supra* note 11, at 739.

35. In their first examination of client-centered counseling, Binder and Price generally discouraged lawyers from giving such advice. Compare BINDER & PRICE, *supra* note 11, at 166, 186-87, 198-99, with Ellmann, *supra* note 11, at 744-78 (critiquing the recommendations of Binder and Price, and suggesting the value of viewing clients as fully competent people for whom lawyers' advice is a source of assistance rather than domination). The Binder, Bergman, and Price volume reflects, however, that the authors' view has changed. See BINDER ET AL., *supra* note 1, at xxii.

36. See *supra* note 28.

ment) to relevant moral considerations. When the lawyer gives this advice and is careful not to prevent her client from making his own choice, she enhances his autonomy rather than undermines it.<sup>37</sup>

In this process approval is an essential, albeit perilous, corollary to the advice itself. Suppose, for example, that a lawyer expresses to her client the view that a course of action the client has in mind is not morally appropriate. Obviously, she is also expressing her view that another course of action *is* appropriate.<sup>38</sup> If the client accepts the lawyer's recommendation, the lawyer presumably considers the client's new decision morally correct. It would be very odd for the lawyer not to say so! A client whose lawyer declined to express approval at this point would have good reason to wonder why the lawyer was so blatantly "hiding the ball." Such a client might take the lawyer's attitude as arrogant and alienating. Alternatively, the client might read the lawyer's behavior as dissembling, and so conclude that some other option, as yet unrevealed, is the one the lawyer really considers desirable. That suspicion might prompt further efforts to divine the lawyer's thinking. At the least, it might sap the client's confidence in his new decision, and since decision-making is often an ambivalent process, the absence of this confirmation might undermine the client's willingness to make the moral judgment that the lawyer endorses. In short, once the lawyer undertakes the responsibility of giving advice, she cannot follow it up with empathy alone.<sup>39</sup>

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37. In some circumstances the exigencies of legal practice can justify even advice-giving that is manipulative. See generally Ellmann, *supra* note 11, at 761-78.

38. Lawyers need not be this indirect when they give advice. Rather, they may simply urge their view of what would be proper conduct, perhaps using the "altruistic appeals" which Binder and his colleagues appear to endorse as one element of client counseling. See BINDER ET AL., *supra* note 1, at 43, 359. A lawyer who gives such explicit advice has essentially announced in advance what the client needs to do to win her approval.

It might be argued that lawyers can express their own moral views, even views differing from those held by their clients, without in the process judging the clients. Thus Shaffer and Elkins, despite their repeated emphasis on the debilitating effects of lawyers' presuming to judge their clients, call for the lawyer to express her "moral view of her client's behavior." SHAFER & ELKINS, *supra* note 4, at 290. They envision "a conversation between lawyer and client in which the moral feelings, arguments, and principles of *both of us* are sought, learned about, listened to, and accepted as resources." *Id.* at 297 (emphasis in original). There is much to be said for this ideal of dialogue, in which the participants neither exalt nor condemn each other. But it would be a mistake, I think, to understand this dialogue as one in which the expression of "approval" is inappropriate. On the contrary, a lawyer who means to express fully her moral view of her client's behavior must sometimes express approval as well as disapproval; what makes this moral dialogue a desirable ideal is not the absence of such expressions, but the fact that they can be offered without overbearing the other.

39. It is particularly difficult to imagine lawyers withholding their views in the context of the intense lawyer-client engagements envisioned by some scholars who seek ways to use law

## E. Understanding

A central goal and constitutive element of empathy is understanding. Paradoxically, however, clients have reason to question the understanding of a lawyer who does not approve of them. Our own self-understanding is not, after all, value free. When we explain our actions to ourselves, we tend to believe that we behaved as we did for reasons which, at least to some extent, were valid. If another person assessed our behavior in a way that suggested she saw no force in our reasons, we would say she did not understand our life; had she understood, she would have seen at least some measure of validity in our thinking. For example, a lawyer who gave no indication that she recognized the legitimacy of the outrage her client, an African-American woman, felt when encountering discrimination might be viewed by her client as unable to understand the situation of African-American women in this society. To the client, such a lawyer "just doesn't get it," and the client is likely to look for another lawyer who does.

The attack on objectivity in much contemporary legal writing<sup>40</sup> also points to the importance of approval. Empathetic lawyering aspires to a vision of lawyers capable of overcoming their own limitations of perspective so as to see or feel the world as other persons do, despite the differences of race, gender, class, culture, or simply identity that divide us from each other. The experiences and perspectives of the powerful, however, are not the same as those of the powerless. To cross the gap—and to be perceived by one's client as having crossed it—the lawyer generally needs more than just intellectual curiosity. She needs some sympathetic identification with those from whom her experience might otherwise separate her.<sup>41</sup> Some lawyers may be able to find such identification in their profound recognition of a shared humanity, but many lawyers may not feel so universal or so strong a sense of fellowship.<sup>42</sup> Lawyers of the

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as a weapon against social subordination. *See supra* note 23. Such standoffishness might also be especially jarring to those clients, such as many women, who place great value on connections between themselves and those with whom they interact.

40. *See, e.g.,* Martha Minow, *The Supreme Court, 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 31-57 (1987); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

41. This may not always be the case. A powerful client may confidently expect his lawyer to make all necessary efforts to understand the client's situation, simply because the lawyer is so dependent on the client's approval and fees. Even powerful clients, however, may find it reassuring to think that their lawyers' interest grows out of more than just dependence.

42. Bastress and Harbaugh reprint excerpts of an article in which Bastress utilizes the psychological theory of Abraham Maslow to argue that self-actualized people, who are the most psychologically healthy human beings, "give a certain quantum of respect to any human being just because he is a human individual." BASTRESS & HARBAUGH, *supra* note 3, at 313

latter sort may need to feel some measure of approval for their clients in order to begin to cross the cultural obstacles to understanding. Clients, in turn, may need some sign of this sentiment to believe they are being understood.

All this could be accepted, and yet it might be argued that communicating empathy alone suffices to demonstrate understanding. Often this is likely to be so. Indeed, approval is no substitute for empathy as a way to express understanding. Empathetic comments focus on the client's perceptions, restating and helping illuminate them for the client as well as the lawyer. This careful attention to what is being said is essential to achieving, and probably to demonstrating, understanding. But empathy is not only a matter of visible attentiveness. Instead, empathy is also meant to convey to the client that he "has acted, or reacted, in a way that is natural and appropriate."<sup>43</sup> As I have already argued, this message verges on approval<sup>44</sup> and conveys the sense that the lawyer finds a measure of validity in the client's actions. If the empathetic listener demonstrates her understanding, in part, by sending this message of validation, explicit expressions of approval can serve the same purpose by unambiguously conveying those sentiments a lawyer shares with her client. In some situations, moreover, the somewhat muted approval latent in empathy may not be enough to convince a client of the lawyer's capacity for understanding.<sup>45</sup> It is possible that whenever clients are particularly on edge about their lawyer's loyalty,<sup>46</sup> they will also be particularly on edge about their lawyer's ability to understand them. Thus not only loyalty

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(quoting Bastress, *supra* note 27, at 119-25). Perhaps this is so. But certain features of Bastress' description of self-actualized people seem to embody an equation of maturity with detachment that many women and parents, among others, might question. For example, "self-actualizing people are not dependent for their main satisfactions on the real world, or other people" and they "make use of solitude and privacy to a much greater degree than the average person" (though they also have "deeper and more profound interpersonal relations than do other adults"). *Id.* I do not think we know yet whether a sense of common humanity, strong enough to fuel real understanding of people with whom we deeply disagree, is really an integral element of psychological health.

43. BASTRESS & HARBAUGH, *supra* note 3, at 130.

44. See *supra* text accompanying notes 11-15.

45. Suppose, for example, that a male lawyer meets with a woman who has been battered by her husband, in an attack that took place after similar incidents in which the police had been called but had refused to make arrests. The woman forcefully expresses her anger at the police inaction, and wants to sue. The lawyer might offer an empathetic response: "You feel betrayed by the way the police acted." So far, so good. If the lawyer, however, never went beyond indicating his understanding of how the client felt, at some point the client naturally might wonder how the lawyer felt about such police conduct. Perhaps she would even ask. Only approval—for example, a statement such as "I'm deeply concerned, like you, by this sort of police conduct"—would then speak to the client's doubts.

46. See *supra* text accompanying note 23.

but also understanding can be enhanced by a nonempathetic, approving response.

## II. The Effective Use of Approval

In light of the foregoing analysis, I suggest that approval can provide a binding force for attorney-client relationships that is different from, and in some respects stronger than, that generated by empathy. Approval, however, also has important drawbacks stemming from the explicit content of the approval message and from the process, and implicit content, of its communication—drawbacks empathy does not share. This section will first explore the nature of these costs and then examine the ways in which lawyers can minimize their severity.

Perhaps the most obvious danger is that the attorney's approval of sentiments her client has voiced may discourage the client from speaking frankly about aspects of his situation or thoughts that contradict the ideals he himself initially expressed and the lawyer initially approved.<sup>47</sup> Moreover, when approval works it intensifies the emotional ties between lawyer and client, and these new bonds may lead clients to overlook the mixed feelings that they actually have. The client may, for example, begin to identify with his lawyer, and so become reluctant to face the ways that he and the lawyer differ. These dangers exist even when the lawyer expresses approval sincerely, and with no intention of manipulating her client; used as a technique of deliberate manipulation, approval would be all the more troubling.

The process of communicating approval may also deliver unfortunate messages. These messages may be present in the following exchange:

Client: Nothing upsets me more than to feel like somebody's making a fool of me.

Lawyer: I completely agree.

Here the lawyer's expression of agreement may not succeed in conveying to the client that the lawyer really understands the client's feelings. The lawyer, after all, has not made any effort to put the client's feeling into words.<sup>48</sup> Moreover, the lawyer's injection of her views may divert the client from the expression of his sentiments into a discussion of the law-

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47. The very reason the client did not express his values fully at the outset may be that he doubted whether the lawyer would approve of all of them; the lawyer who offers approval of such a client's first expressions confirms the client's doubts about the lawyer's perspective.

48. See SHAFFER & ELKINS, *supra* note 4, at 78-81; cf. BASTRESS & HARBAUGH, *supra* note 3, at 124 (criticizing the statement "I understand how you feel" as "usually mean[ing] that the counselor is unable to put into words the meaning of what the client has expressed").

yer's experience.<sup>49</sup> The lawyer also may be signaling to the client that the client's feelings are going to be subject to the lawyer's evaluation; this time, the lawyer approves, but next time she may not, and every time the client may have to be on guard.<sup>50</sup> Even if the client is not intimidated by this prospect, he may easily be annoyed or put off by it. For her part, the lawyer who listens to her clients with a view toward judging them is likely to sacrifice understanding in her zeal to evaluate.<sup>51</sup>

Given these pitfalls, it might be tempting to eschew approval altogether, but I do not believe this option is realistic. I have already suggested that explicit approval is an inevitable accompaniment to explicit advice-giving. Even the lawyer who refrains from giving advice needs to build her clients' sense of the lawyer's loyalty, respect, warmth, and understanding. Approval is likely to be useful for all of these—and so useful, I suspect, that even when it is not explicitly voiced it is often perceived or inferred by those clients who come to trust their lawyers. Indeed, it appears that in some cases only explicit approval can fully convey these messages, and that empathy by itself cannot readily achieve the same positive impact on the attorney-client relationship.

We must look, therefore, for ways to express approval without inadvertently undermining our clients' capacity to speak and choose freely. Fortunately, there do appear to be several ways that we can modulate approval so as to diminish this risk. First, and probably most important, approval must be coordinated with empathy. Empathetic responses are more attentive to the nuances of client feeling than are approving comments, and less constraining in their impact on the client's freedom to speak. They provide a central and relatively risk-free path to lawyers' understanding of, and rapport with, clients. Clinical texts are therefore right to endorse the value of empathy. Especially in the early stages of a lawyer-client relationship, lawyers should make more use—probably much more use—of empathy than of approval. Simply by retaining this focus on the use of empathy, lawyers can mitigate many of the dangers

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49. This danger would have been much greater here if the lawyer had gone on to reminisce about some past occasion when she had been made to look foolish. Bastress and Harbaugh, in their thoughtful discussion and endorsement of "counselor self-disclosure," are careful to point out this danger. BASTRESS & HARBAUGH, *supra* note 3, at 269. They identify other risks as well, among them the possibility that the client may see the lawyer's injection of her experience as a sign that the lawyer is self-centered and not sufficiently concerned with the client's situation. *Id.* at 269-70.

50. See SHAFFER & ELKINS, *supra* note 4, at 81. They observe that "[f]rom the client's perspective evaluative communication seems to plug into all of those hidden feelings of guilt and worthlessness that each of us learned to feel in childhood." *Id.* at 276.

51. See SHAFFER & ELKINS, *supra* note 4, at 275 (quoting CARL ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS, AND THEORY (1951)).

generated by approval, such as inattention and the appearance or reality of arrogance.

Effective use of approval, however, requires much more than remembering to use empathy as well. When lawyers do use approval, they should work to minimize its pitfalls, and enhance its benefits, by attending to its content (what they express approval of), manner (how they express this approval), and timing (when they express it), and by taking into account the kinds of bonds and differences that exist between lawyers and clients. These categories certainly overlap, but it is helpful to separate them for purposes of discussion.

#### A. Content

The danger posed by the content of a message of approval is that the client may have feelings inconsistent with what the lawyer is approving. It follows that the way to minimize this risk is to avoid offering those expressions of approval that are more likely to override these as yet unstated client feelings. Specifically, the risk of constraining a client seems greater the more directly the lawyer's expressions of approval speak to the details of the client's situation. A law firm known for representing minority plaintiffs in discrimination cases, for example, no doubt is implicitly indicating its opposition to discrimination. An individual member of this firm might make this explicit, by telling the client early in the interview that "we'll be happy to discuss your case with you. As you know, we are always interested in taking cases that challenge this society's patterns of discrimination." This comment *does* encourage the client to present her case as an instance of discrimination (a pressure the client may already have felt). But it does *not* say, for instance, that the lawyer agrees that this particular client was the victim of discrimination, or that the lawyer feels that this particular client should fight this case to the bitter end—even if the client has just expressed such sentiments herself.

#### B. Manner

There are at least two ways in which the lawyer can limit the pressure imposed by her expressions of approval. First, the lawyer can offer approval in words and tones that are supportive rather than inflammatory. For instance, a client might tell the lawyer his ideas about what needs to be done and say, "Don't you think that's right?"; the lawyer

who responds, "I do," or even, "Yeah, I'm right with you,"<sup>52</sup> is offering a milder response than one who answers, "Yeah, that's the way to really fight!" So, too, a lawyer who says, "I agree with what you want to do, but are you sure that this will accomplish it?" is leaving more room for her client to reassess.

Second, as the answer just given reflects, the lawyer can explicitly remind her client of the aspects of their work that remain important apart from their shared values. The lawyer who speaks of her interest in taking discrimination cases might add, "Of course, we will need to discuss the details of your particular case carefully to see whether you have a claim that the courts will accept." Such a comment emphasizes that the lawyer needs to know the facts, even though she shares the client's apparent opposition to discrimination; it communicates this important message without overtly doubting (and perhaps implicitly "disapproving") the client's apparent belief that he has been the victim of discrimination. Reminding the client that "how we resolve this case is up to you and not up to me" also might help the client feel free to express qualifications about his beliefs that could otherwise be suppressed.

It might be objected that the restraints of content and manner just described come at a price—namely that they dilute the intensity of the lawyer's approval and so, presumably, tend to weaken the bond that approval might form. This may well be true. For two reasons, however, this possibility does not undercut the enterprise of employing approval as a building block in lawyer-client relations. First, the weakening of this bond may help to forge other ties between lawyer and client. Approval does not in itself demonstrate the lawyer's capacity to be hard-nosed and realistic about the client's chances, and actually may lead clients to suspect that their lawyers are too credulously or intemperately on their side. The lawyer-client bond is based on efficacy as well as emotion, and some sacrifice of the solidarity generated by approval may be needed to develop an effective *working* relationship. Second, the lawyer who initiates a relationship in a relatively detached fashion can build closer links, through more pointed expressions of approval, later on in the case. To examine this strategy further, we need to turn to the issue of timing.

### C. Timing

The danger of coercing or manipulating through over-enthusiastic approval exists at every stage of a lawyer-client relationship, but timing

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52. The question and a slightly different version of the "Yeah, I'm right with you" response appear in a lawyer-client dialogue in López, *supra* note 23, at 1678.

makes a difference to its gravity. The risk of misunderstanding or silencing a client may be most acute in the early phases of a lawyer-client relationship.<sup>53</sup> In this period, when lawyer and client scarcely know each other, it seems particularly easy for a lawyer who voices premature approval of some client sentiment to block the client from perceiving or admitting her own more complex, or perhaps less "attractive," sentiments.<sup>54</sup> Fortunately, at this stage it may also be relatively easy for the lawyer to temper her approval without fundamentally damaging her relationship with potential clients, precisely because clients—much as they may want reassurance about their lawyer at the start of their dealings with her—may also understand early restraint in the lawyer's expressions of approval as reflecting her possession of a proper measure of professional objectivity and distance.

Later in the relationship the lawyer may be able to offer more specific, or emphatic, approval without such grave risk. To be sure, the dangers of over-approval do not disappear even then, for a client who has developed trust and confidence in his lawyer may be particularly eager to receive that lawyer's approval, and thus become more vulnerable late in the relationship than early on. At these later stages, however, the lawyer has more data from which to gauge what the effects of her statements will be. She may be able to offer approval only in those areas where it will be most helpful—ideally, those in which the client's need for such endorsement is greatest and his potential ambivalence is least—for the lawyer may be in a position to identify those areas as a result of more empathetic interaction earlier in the lawyer-client relationship.<sup>55</sup> By the same token, she may come to sense the areas where the client has said less than all he feels, and take steps to encourage him to speak more

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53. Bastress and Harbaugh similarly emphasize the importance of timing in the use of "advanced empathy," which is the reflection of material that clients "have previously suppressed, either consciously or unconsciously." BASTRESS & HARBAUGH, *supra* note 3, at 264. Advanced empathy is delicate because it may hit sensitive issues, and because its effort to reflect what the client has *not* said may actually misread the client. Effective use of this technique, Bastress and Harbaugh say, "requires a well-established lawyer-client relationship." *Id.*

Premature use of approval may also make the lawyer seem (and be) judgmental and self-centered, a danger akin to the risks Bastress and Harbaugh see in the early use of another technique, counselor self-disclosure. They advise that "[d]uring the early stages of a relationship, counselor self-disclosure should be used sparingly." *Id.* at 271.

54. The lawyer's early expressions of enthusiasm may also undercut rapport with the client in the event that the client does succeed in voicing these hitherto suppressed views. If the client decides, on the basis of those views, to revise what he wants from the case, the lawyer may find herself even further out on a limb.

55. She may also have greater reason to offer approval at this point, because a client who wants his lawyer's approval may want it more acutely when he knows she has had time to get to know him and to assess his case.

freely by offering an empathetic understanding of what has thus far remained less than explicit.

#### D. Common Ground and Difference Between Lawyer and Client

The bonds and gaps between the lawyer and client may profoundly affect the impact of the lawyer's use of approval. I have already suggested two aspects of the lawyer-client relationship that may have such effects. One is the degree to which the client has reason for anxiety about her lawyer's loyalty or understanding; among other factors, differences between lawyer and client, whether stemming from widely felt grounds such as race or from the unique distinctions that exist between any two people, easily give rise to such concern.<sup>56</sup> The other is gender; if men and women understand approval in different ways, and if the sex of the person offering approval further affects its perception,<sup>57</sup> then it behooves lawyers of both sexes to consider their use of approval in light of their own and their client's gender.<sup>58</sup> This perspective on gender, however, suggests a broader proposition as well: there may be many cultural differences in the meaning of approval, and many cultural filters on the perception of approval offered within or across cultural lines. Lawyers would do well to try to identify all of these differences and take them into account when communicating with their clients.<sup>59</sup>

#### Conclusion: The Uses of Approval and the Differences between Lawyering and Psychotherapy

The suggestions I have just offered for the effective use of approval are not meant to provide rules that lawyers can mechanically apply. Such rules may never be formulable. Moreover, as these suggestions reflect, the use of approval is likely to be quite a delicate matter. Poorly employed, approval may undercut empathy and convey indifference or

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56. See *supra* text accompanying notes 23, 40-42.

57. See *supra* notes 32-33.

58. Such consideration may lead both male and female lawyers to modify their use of approval in light of their clients' likely preferences. I do not mean to assume, however, that what makes the client most comfortable is necessarily what the lawyer should do. A lawyer might feel, for example, that eliminating her use of approval in order to avoid putting male clients on the defensive is a form of surrender to male domination, and might therefore refuse to make this change. Such a decision, however, should be made with, rather than without, a recognition of its likely impact on the efficacy of the lawyer's relationships with prospective clients.

59. The same is true with regard to empathy. For example, there are likely to be limits to what a lawyer from one background can plausibly express empathy (or approval) for in talking with a client from another background. See BINDER ET AL., *supra* note 1, at 60. Some gaps may be too wide to be bridged, at least at the beginning of a relationship.

even arrogance. Perhaps a recognition of these dangers, and a wholly justified sensitivity to lawyers' propensity to misunderstand and dominate many of their clients, have contributed to the apparent discount or discouragement, of approval as a technique of client-centered lawyering.

My object in this Essay has not been to dislodge empathy from its central role in client-centered practice, but rather to resurrect approval as another legitimate element in such lawyering. To that end, I have sought to show that a wise and effective use of approval is possible. Indeed, I suspect that despite approval's lack of prominence in accounts of our work, when we examine our actual practices we will find that express or implicit indications of approval have long played a part, even in client-centered lawyering. But this Essay is not a conclusive demonstration of the value of approval. For such a demonstration (or its refutation), law teachers and practitioners need to recognize the apparent potential of approval, and then to examine empirically and experientially the values and the pitfalls of its use, just as we have done with other techniques for working with clients. This Essay is meant to contribute to this process of recognition and study, a process that ultimately will enable us to assess, and to reap, the benefits of this technique.

Considering the role of approval, however, involves more than the mere assessment of a particular technique. It is fair to say that the use of approval would constitute a departure from a model of client-centered therapeutic, or helping, relationships—a model that has been extremely influential in clinical legal education.<sup>60</sup> Carl Rogers, a central figure in the development of this model, was opposed to the use of positive or negative judgments of the client by the helping professional.<sup>61</sup> In urging that approval has a proper place in client-centered lawyering, I mean to suggest as well that lawyer-client relations often differ in significant ways from those between therapists and the people they treat.<sup>62</sup>

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60. Binder, Bergman, and Price, for example, entitled their work *Lawyers as Counselors: A Client-Centered Approach*. BINDER ET AL., *supra* note 1. Bastress and Harbaugh describe their psychological premises as overlapping substantially with the "person-centered approach." BASTRESS & HARBAUGH, *supra* note 3, at 57. Shaffer and Elkins similarly write that they "borrow, in theory and in practice," from client-centeredness (as well as from other theories). SHAFFER & ELKINS, *supra* note 4, at 161. William Simon identifies several other instances of the client-centered psychologist Carl Rogers' impact on legal scholarship. See Simon, *A New Legal Formalism*, *supra* note 29, at 511-12 & n.93.

61. See CARL ROGERS, *The Characteristics of a Helping Relationship*, reprinted in THE CARL ROGERS READER, *supra* note 26, at 108, 121-23; SHAFFER & ELKINS, *supra* note 4, at 159; Simon, *A New Legal Formalism*, *supra* note 29, at 511-14.

62. It might further be argued that approval has a proper role even in psychotherapy. Some schools of psychotherapy do, as Bastress and Harbaugh point out, endorse a much more judgmental or directive style than client-centeredness advocates. See BASTRESS & HARBAUGH, *supra* note 3, at 32-53, 55-56 (discussing behaviorism, rational-emotive therapy, trans-

These relationships differ because lawyers and clients tend to have different mutual objectives than do therapists and patients, even though client-centered lawyers share with therapists an intense concern with helping clients make decisions about their lives. The contrast between the two professions is far from absolute or universal, for lawyers may develop relationships with their clients that vary from instrumental to intimate, just as therapists may play roles ranging from prolonged psychoanalysis to short-term intervention. Nonetheless, it seems reasonable to say that client-centered lawyers usually seek to help clients make their own decisions in order to get those decisions made, and made as well as possible. Therapists, on the other hand, are not so often centrally concerned with obtaining decisions on particular matters, and instead tend to be relatively more focused on assisting the client to become the sort of person who can make decisions.<sup>63</sup>

Since lawyers are less interested in helping the client become a different person, it seems likely that legal clients are often less vulnerable to their helpers' domination than therapeutic patients are. Because lawyers' clients probably do not normally need to open themselves up to their helper as completely as do patients in therapy, there is less danger that the use of approval will discourage needed revelations. Similarly, because lawyers' clients do not typically experience the same profound sense of personal incapacity that plagues many therapeutic patients, there is less risk that the sense of being judged, which approval may inadvertently generate, will add to the client's felt disempowerment.

None of this is to say that the problem of domination is absent in lawyer-client relationships. The combination of lawyers' expertise and clients' need often provides fertile soil for lawyer power to establish itself. Indeed, in some of these relationships the professional's power may be greater than it is in many therapeutic contexts. Many legal clients become enmeshed in the law involuntarily and have little choice about whether to turn to a lawyer for help; involuntary therapeutic clients do exist but seem to be less common. Many legal clients are also divided

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actional analysis, and reality therapy). I do not mean, however, to take any position on how psychotherapists should do their work.

63. Bastress and Harbaugh emphasize a similar contrast. *Id.* at 20. Lawyers' focus on getting the client to make decisions also reflects the reality that in many lawyer-client relationships some decision must be made, usually after no more than a few meetings between the lawyer and the client. While there are also many quasi-therapeutic interventions that must be completed quickly, time pressure may well require the lawyer to press the client towards closure in a manner that therapists have much less occasion to use. *Id.* at 57. Time pressure may also make it important for the lawyer to use conventional and familiar techniques of building relationships, such as approval, when a more leisurely approach could build client trust on different bases.

from their lawyers by profound cultural, ethnic, or other differences. These gaps may produce a vulnerability comparable in intensity to that felt by a therapeutic patient who, while psychically fragile, may more closely resemble his therapist in socioeconomic respects.

The different sources of legal clients' vulnerability, however, suggest that somewhat different strategies may be appropriate to alleviate this problem. Albeit with some exaggeration, we might say that the therapist must persuade her client to make himself more vulnerable to her by lowering the defenses on which he is accustomed to rely, whereas the lawyer must persuade her client to become less vulnerable to her by reclaiming the capacity to run his life that he ordinarily wields. In this effort, the lawyer may well profit from the various kinds of bonds that approval can generate, simply because approval is a common element of ordinary interaction. Lawyers' clients may be reassured by signs that conventional forms of interaction are suitable in the lawyer's office, while patients might see the same responses from their therapist as disconcertingly inconsistent with the special character of the therapeutic relationship.

To the extent that the legal client's vulnerability is a product of social disadvantage and subordination, a true solution may require changes in the client's life outside the lawyer's office. To that end, some scholars have envisioned a political engagement between lawyer and client, in which lawyers enter into a relationship not so much of helping as of alliance.<sup>64</sup> In this vision, the solution to the problem of lawyers' power is not—or not only—to reduce the lawyers' authority, but to enhance the clients' capacity, in particular by participating with them in a struggle to change the conditions of their lives. In many respects, this is a deeply attractive, though perhaps unattainable, aspiration for lawyer-client relationships. Lawyers who see political struggle as the path to clients' personal empowerment, however, can hardly aspire to make expressions of approval or disapproval off limits, for such expressions of opinion are part and parcel of politics. Indeed, lawyers will presumably want to encourage their clients to offer such opinions themselves. To avoid discouraging this very result, lawyers committed to political alliance might well restrain their own use of approval and disapproval, so as not to drown out their clients. But such lawyers would have good reason not to alto-

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64. See *supra* note 23 and sources cited there; see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 324-40 (1988) (describing the ethical implications of political "comradship" between lawyers and clients); William H. Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469, 484-89 (1984) (articulating a "Critical vision" of lawyering, a vision "animated by an ideal of practice as a process of constituting or reconstituting nonhierarchical communities of interest"). The description of this political vision in the text is not meant, however, as a precise restatement of any of these writers' views.

gether foreswear giving voice to their positive and negative judgments, for clients who look to their lawyers as political allies will naturally expect to hear political opinions from them. And the ultimate goal of such an alliance is not to free clients from the burden of hearing the lawyer's views but to help the clients win the power to state their own views too.<sup>65</sup>

Finally, even if clients' vulnerability to lawyers had the same sources, and the same solutions, as patients' vulnerability to therapists, lawyers are vulnerable to clients in a special way that provides a concomitant justification for the use of approval. Lawyers who represent clients must do something that therapists are much less frequently obliged to do—namely, to take action that will help the client by damaging others. This is not to understate the ethical dilemmas faced by therapists, who may become painfully entangled in their patients' affairs, for example when they learn that their patients intend to act unethically or dangerously.<sup>66</sup> Usually, however, therapists are not called on either to make their patients' wishes a reality or to prevent their patients from doing so on their own. Lawyers, however, are routinely called upon to give positive aid to their clients in conduct that, although legal, may not be ethical.<sup>67</sup> As I have already suggested, lawyers who respond to this prospect by engaging their clients in a moral dialogue cannot refrain from offering approval when their clients actually come to agree with what the lawyers have urged.<sup>68</sup>

The contrasts I have outlined between the responsibilities of lawyers and therapists have been drawn with a broad brush. Even put so broadly, these differences do not suggest that the lessons of client-centered psychology should be ignored in client-centered lawyering. On the contrary, the guidance of client-centered psychology has been an extremely fruitful source for clinical legal educators' efforts to reshape the contours of legal practice. Nonetheless, it is important for us to remem-

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65. By no means every lawyer who feels political sympathy for her clients, however, would subscribe to this vision of alliance. At the "Theoretics of Practice" conference Nancy Polikoff vividly and thoughtfully described her own practice, in which she has resisted telling clients what she feels they should do even when she had deep political and personal bonds to them.

66. See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

67. William Simon emphasized the impact that lawyers' and clients' work together has on third parties in his critique of what he called the "Psychological Vision" of lawyering, noting an over-emphasis on "the immediate and the personal aspects of the lawyer-client relation." See Simon, *A New Legal Formalism*, *supra* note 29, at 502.

68. See *supra* text accompanying notes 35-39. Bastress and Harbaugh also recognize that in undertaking a moral dialogue the lawyer "move[s] beyond the Rogerians." BASTRESS & HARBAUGH, *supra* note 3, at 57.

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ber that all helping relationships are not the same. Here, as elsewhere, theory can mislead as well as enlighten, and it may be that the very power of client-centeredness as a model has distracted us, to some extent, from an appreciation of the unique features of the lawyer-client relationship. This Essay's examination of the technique of approval thus seeks to contribute both to a continued critical analysis of psychological models of lawyering, and to our search for other, complementary theoretical frameworks within which to understand more fully the work of lawyers.

