

1998

## Representing Native People and Indian Tribes: A Reponse to Professor Allegretti

Frank Pommersheim

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Frank Pommersheim, *Representing Native People and Indian Tribes: A Reponse to Professor Allegretti*, 66 Fordham L. Rev. 1181 (1998).

Available at: <https://ir.lawnet.fordham.edu/flr/vol66/iss4/12>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# REPRESENTING NATIVE PEOPLE AND INDIAN TRIBES: A RESPONSE TO PROFESSOR ALLEGRETTI

*Frank Pommersheim\**

PROFESSOR Joseph Allegretti's wonderful, provocative paper has stirred two significant responses within me. One is personal, one is professional, but both are stitched together by an ongoing commitment to try to do the right thing in this world. I will discuss each in turn and then move on to the more arduous task of seeking to actualize them in my teaching, scholarship, and judicial work within Indian country.

The personal response is grounded in my Catholic background—specifically the injunction from God's second great commandment to love one's neighbor as one's self<sup>1</sup> and the awe-inducing aspirations that form the heart of the Sermon on the Mount.<sup>2</sup> In stark contrast, in our secular, capitalist society, there is a relentless pressure to de-personalize, to bottom line, and ultimately to commodify all experience and relationships. This pressure finds its most compatible legal rationale in the notion of contract. While there is certainly a legitimate pedigree in seeing the lawyer-client relationship as essentially contractual

---

\* Professor of Law, University of South Dakota School of Law.

1. See, e.g., *Matthew 22:35-40* (New Oxford Annotated Bible (Revised Standard Version, 1973)):

And one of them, a lawyer, asked [Jesus] a question, to test him. "Teacher, which is the great commandment in the law?" And he said to him, "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it, You shall love your neighbor as yourself. On these two commandments depend all the law and the prophets."

2. *Matthew 5:1-11* (New Oxford Annotated Bible (Revised Standard Version, 1973)):

Seeing the crowds, he went up on the mountain, and when he sat down his disciples came to him. And he opened his mouth and taught them, saying:

"Blessed are the poor in spirit, for theirs is the kingdom of heaven.

"Blessed are those who mourn, for they shall be comforted.

"Blessed are the meek, for they shall inherit the earth.

"Blessed are those who hunger and thirst for righteousness, for they shall be satisfied.

"Blessed are the merciful, for they shall obtain mercy.

"Blessed are the pure in heart, for they shall see God.

"Blessed are the peacemakers, for they shall be called sons of God.

"Blessed are those who are persecuted for righteousness' sake, for theirs is the kingdom of heaven.

"Blessed are you when men revile you and persecute you and utter all kinds of evil against you falsely on my account. . . ."

in nature, Allegretti movingly describes an alternative model that draws on the Christian notion of covenant<sup>3</sup> that is grounded in mutuality and seeks to see clients as fellow subjects rather than impersonal objects. The notion of covenant also suggests a penumbra of community rather than the disconcerting contractual premise of deep atomization. But, of course, perhaps one ought not to claim too much. I understand Allegretti to be describing a worthy ideal, albeit subject to potential problems,<sup>4</sup> but also something to keep us tethered to a common humility. As lawyers, we are distinguished by our craft, not by any innate moral superiority. The model of covenant in the lawyer-client relationship concurs with my Catholic faith in both obvious and radical ways. These are ways—connected with living and actualizing faith—that I had not adequately discerned, and I thank Allegretti for directing my attention to the important spiritual ethos of this most fundamental of legal relationships.

The concept of covenant in the lawyer-client relationship also has significant professional and ethical ramifications in the world of my experience and teaching in the field of Indian law. In Indian law practice, particularly in representing individual Native Americans and Indian tribes, there is often the issue, not of the (non-Indian) lawyer's religious beliefs, but rather the cultural and spiritual beliefs of the client and whether they may be effectively addressed and mediated in the course of representation.

This dilemma poses itself in several different ways. Let me address three of the most significant in my experience. First, it is axiomatic in the dominant society (with its general Judaeo-Christian framework) that there is a distinction between the sacred and the secular. In fact, one might argue that this is a basic premise of the First Amendment and First Amendment jurisprudence. It is not, however, a premise of most Native American religions.<sup>5</sup> In all Native American religions with which I am familiar, the concept of the secular is largely unknown. All of life and all action in life—indeed every breath—is sacred.<sup>6</sup> In this context, any legal claim—particularly those grounded in

---

3. Allegretti's paper claims no religious exclusivity or uniqueness for his model, but only that it is one embedded in his own Catholic tradition. Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 *Fordham L. Rev.* 1101, 1102 n.4 (1998).

4. These problems are set out in Allegretti's paper, Allegretti, *supra* note 3, at 1126-27 and include representing corporations ("things" as opposed to people) and individuals who are unwilling or incapable of being part of such a lawyer-client relationship.

5. A caveat: There is incredible religious/spiritual diversity within Indian country at both the tribal and individual native person level just as there is within the dominant society. This diversity is an aspect of pluralism that cannot be stereotyped with simple romantic notions about native spirituality.

6. See, e.g., Joseph Epes Brown, *The Spiritual Legacy of the American Indian*, at X (1982) (discussing the integration of religious elements in "arts and crafts, music,

tradition and history—may potentially be religious or sacred in nature.

The key in this regard is that certain legal arguments and claims understood by an attorney as essentially secular in character may not be so regarded by the native or tribal client. Let me give an example from my own work in Indian country with the tribes of the Great Sioux Nation.<sup>7</sup> The constituent tribes of the Great Sioux Nation hold that their treaties with the federal government are not mere legal and political documents, but are in the nature of diplomatic agreements that are essentially religious and cultural in nature and form a covenant and relationship of mutuality between two people.<sup>8</sup> This is most strongly evidenced by the fact that the treaty-making process in Sioux country culminated in the smoking of the sacred pipe.<sup>9</sup> The learning of this example is not to be found in the more obvious lesson that your religion may not be the religion of your client, but rather in the *telos* that what appears secular (and therefore mundane) to you may indeed be sacred to your client. Such a realization must inevitably change your understanding of your tribal client.

This realization in turn leads to the second element in the exploration of the lawyer-client relationship in Indian country. It involves a tribal client's potential desire to make legal and cultural arguments for example, about the necessity of honoring treaties—that you know are

---

subsistence activities, and social and political organizations" of American Indian tribes).

7. "The Great Sioux Nation" generally refers to the signatory tribes of the Fort Laramie Treaty of 1868 and includes the Cheyenne River Sioux Tribe, Standing Rock Sioux Tribe, Rosebud Sioux Tribe, the Oglala Sioux Tribe, Lower Brule Sioux Tribe, Crow Creek Sioux Tribe, Santee Sioux Tribe of Nebraska, and the Fort Peck Sioux in Montana.

8. See generally Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 13-19 (1995) (providing background on the development of reservations and spiritual quality of Indian ties to the land).

9. It is important to note that the Lakota did not see the treaty as mere expedience and the power politics of the day, subject to future accommodation to other emerging national interests. Every treaty was settled with the smoking of the pipe. As insightfully noted by Father Peter John Powell, the well-known historian and anthropologist:

[W]hites rarely, if ever, have understood the sacredness of the context in which treaties were concluded by Lakota people . . . . "The pipe never fails," my people, the Cheyennes, say. For the pipe is the great sacramental, the great sacred means that provides unity between the Creator and the people. Any treaty that was signed was a sacred agreement because it was sealed by the smoking of the pipe. It was not signed by the Chiefs and headmen before the pipe had been passed. Then the smoking of the pipe sealed the treaty, making the agreement holy and binding.

Thus, for the Lakotas, the obligations sealed with the smoking of the pipe were sacred obligations.

Peter John Powell, *The Sacred Treaty* (undated), in Roxanne Dunbar Ortiz, *The Great Sioux Nation: Sitting in Judgment on America* 105, 106 (1977).

unlikely to win doctrinally.<sup>10</sup> In addition, you may know of a legal doctrine such as “takings” jurisprudence that is more likely to “win” and achieve compensation for your client.<sup>11</sup> The potential conflict between law and culture requires a sensitivity to how “winning” is defined and understood by your client. For example, “winning” may not simply mean obtaining a money judgment at the expense of conceding the federal government’s ability to unilaterally abridge treaties.

None of this is necessarily to be understood in strict either/or terms. Yet, it does require an ethical sensibility that must be attentive to the possibility that the cultural and spiritual concerns of your client may require a unique ability to engage in dialogue and to “translate”<sup>12</sup> such concerns from outside the law to inside the law in such a way that respects both the deepest wishes of your client and the demands of the craft that we in the profession practice. There are no easy answers, but without being alert to the right questions, the legacy of a kind of self-righteous Indian law “liberalism”<sup>13</sup> will undoubtedly continue.

Third and last, is the cautionary note that good will is not enough. It is a necessary but not sufficient condition in this arena. Attorneys in the Indian law context must do more to increase their historical and cultural knowledge and understanding of their native and tribal clients. This means additional work and study. This is especially true if we are sustained by a religious ethos that is rooted in a commitment to justice and compassion. When we are guided by such an ethic, we cannot do otherwise. Humility before the Spirit of the Universe and fidelity to the work we have undertaken in its name commend us to the necessary labor that is part of the mutual covenant we undertake in representing individual native and tribal clients.

---

10. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding that Congress may unilaterally abrogate treaties).

11. See, e.g., *United States v. Sioux Nation*, 448 U.S. 371, 411 n.27, 424 (1980) (awarding the Sioux Nation compensation for the “taking” of the Black Hills, but curtly dismissing treaty violation claim in a footnote).

12. See, for example, James Boyd White, *Justice As Translation* (1990), for a discussion of this process in a law and literature context.

13. See, e.g., Frank Pommersheim, *Making All the Difference: Native Americans Testimony at the Black Hills*, 69 N.D. L. Rev. 337, 342-52 (1993) (reviewing Edward Lazarus, *Black Hills/White Justice* (1991)) (stating that Indian law “liberalism” refers to non-Indians who know what is “best” for Indians without ever talking to them or engaging them as fellow subjects).