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Matthew L.M. Fletcher

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## REFLECTIONS ON THE RESTATEMENT OF THE LAW OF AMERICAN INDIANS

Professor Matthew L.M. Fletcher, Reporter for the Restatement

34TH ANNUAL INDIAN LAW SYMPOSIUM  
RESTATEMENT OF THE LAW OF AMERICAN INDIANS  
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### INTRODUCTION

I've been asked to talk about and give some reflections about the Restatement project. And I'm going to start by telling a story about my family. I'm a descendant of a man named Leopold Pokagon. He is the namesake for which the Pokagon Band of Potawatomi Indians here in Michigan is named. He's a great, great, great grandfather of mine. I don't know how many greats, but several. And also, just a legendary figure. There are many stories about Leopold. He's the reason that the Pokagon Potawatomi Nation is not either terminated, extinguished, or residing somewhere in Iowa or Oklahoma.

He was a true leader in that he saved his tribe from removal to the West. From extinction really. His name is sort of anglicized, it doesn't sound like Pokagon. There's a funny story about his name, which is that it was a nickname and from some telling, not a real generous nickname. The word Pokagon comes from, in the Potawatomi, Poké-igan, which means rib. And it seems odd to call somebody rib. But think about what a rib does, where it's located on the human body. It's a shield. It's a shield protecting primarily the heart and lungs. And if you look at the image behind me, which is an Anishinaabe image representing the seven clans. Seven clans of Anishinaabe people, they're all connected by those little strings, and you can see the little red dots. Those are the heart. That's the démen, the heart, which is also the same word for strawberry because they kind of look the same and that's what he was known for. He was a protector.

And when I think about the Restatement, I think about what work a rib does. One of the goals that we had, when we moved forward with this project, was to highlight the duty of protection, in some respects, to protect Indian law. And to elevate what we know is the trust responsibility as more legalistic, highly symbolic, and enforceable trust duty.

We got to know a lot of people over this period of time. We drew upon friendships. We leaned heavily on people to work on this thing with us. It was a 10-year project and I never thought I would be saying I'd be working on something for 10 years because my attention span is so short. Eric said I finished the project quickly because if I didn't finish it right away, it would never get done.

## REMARKS

So, let's talk a little bit about the substantive reflection I wanted to make about the Restatement, which has everything to do with the duty of protection, and the trust responsibility. You might ask, what work does the Restatement do in a field populated by, say, Felix Cohen, the Cohen Handbook of Federal Indian Law, which is the gold star and gold standard for treatises, really not just in Indian law but pretty much anywhere. Well, I'd like to think that it's one of the things we're trying to advocate for through this for this process is we have to be very subtle.

First of all, we can't really say this is the way the law should be. We can only say what a Restatement project can say, this is what the law is. But there are places where we can re-craft and reframe how certain parts of Indian law are reviewed, So, I've talked about other contexts, but this is the one I want to talk about today is the trust relationship. We use the phrase very carefully in the Restatement: "trust relationship." This is the relationship between the United States and Indian tribes. Most people call it the trust duty or the trust responsibility. The reporters wanted to call it the "trust responsibility."

Apparently, this is a fight that we could not win. We had to call it the trust relationship. A duty, a responsibility is enforceable. We had a dearth of cases in which a federal court, well, really the Supreme Court, holding explicitly that the trust relationship is enforceable. Yes, you can sue the United States for monetary damages under the Tucker Act, as we reported in section 10 of the Restatement. Hard thing to do, and it's extremely difficult to force the United States to fulfill the duty of protection, i.e., its trust responsibility.

So, we call it a trust relationship, but embedded throughout this book, throughout this entire project are important elements that have to do with this supposedly unenforceable legal principle. Section 4 describes what we call in the book the general trust relationship. This is again separate from section 10, which says: yes, you can sue the United States for money damages, and there's some material in there about seeking injunctions from federal agencies from violating your trust duty itself, but the general trust relationship is the relationship between the United States and Indian tribes. It's formed typically through the creation through the negotiation

or application of a treaty or the acknowledgment by the United States or the Department of the Interior of the continuing sovereignty of a tribal nation. That, in short, is all it is. But if you look deeper into the history of this relationship, you'll see that tribes gave up an enormous amount of lands and resources in an arm's length negotiation with the United States government. Unfortunately, in many respects—culture, language, our children, and our traditions—we exchanged for this duty of protection and a few other things too, like reservations, and, you know, lands, that sort of thing.

But the relationship itself is really not all that well fleshed out. Nobody really knows what it is. So, we're trying to put some flesh into that. And if you look at the extremely lengthy reporters' notes for section 4, you will see the manifestation of the duty of protection. It's unusual for reporters' notes in Restatement projects for the ALI to have that much material. But the general trust relationship itself is everything. It is massive and also very, very indeterminate.

We also included section 7(e) under the powers of Congress. Congress actually has acquired power by virtue of its status as the protector. Or we use the metaphor of the trustee for Indian tribes and Indian people. That is independently a source of federal power to enact Indian affairs legislation. Of course, there's section 9, which says that so long as Congress is acting to fulfill the trust relationship, then its statutes are constitutional, even if it creates what otherwise might be considered a racial classification.

So, if you go back to section 4, you'll see in comments c, d, and e that we have some big descriptions of what the duty of protection actually is or the general trust responsibility. You have safeguarding tribal property which is the United States' obligation to make sure that additional Indian lands are not lost. You have comment d preserving tribal self-government. And it is an obligation of the United States to maintain tribal governments and preserving lands, preserving self-determination. And then, of course, there's comment e, which talks a little bit about how the government provides governmental services.

Now it's clear from the Restatement that Congress has the power to do all of these things. What is less clear, and something we could not affirmatively state as black letter law, was that the United States actually has an obligation enforceable in court to do all those things. And that's the future, right? There is some litigation pending where some of the contours of that enforceable obligation are present. It's clear tribes who negotiated these treaties, who entered into these relationships with the United States, firmly believe that the duty of protection is a legal obligation that is enforced. Or should absolutely be enforceable.

The Department of Interior, with a few blips here and there, depending on who's in the administration, also takes that position. Congress even takes that position when it adopts any statute of Indian affairs in the last half century—there is a good chance that at the beginning of that statute is a provision that says we understand as Congress that the trust responsibility is enforceable.

And then there's the Department of Justice. And its position is no, the duty of protection, the trust relationship is not enforceable. It is a purely voluntary federal government gift. It is merely a moral obligation. Moral obligations on a sovereign like the United States are not enforceable. The Supreme Court, if confronted directly with these questions, and it never really has been yet, will just more or less likely to go along with the Department of Justice on this question.

But there are cracks in that façade. We like to think that the force of the Restatement behind the black letter and even the comments can help undo that position. And when I say cracks, I think probably the biggest one I've seen is language from a Supreme Court decision called *Cougar Den*. Which came out of your own state, Washington State, and Justice Gorsuch. There was no majority opinion in that case. Justice Gorsuch wrote a concurring opinion where he basically said something that is a condemnation of the idea that the general trust responsibility or the duty protection is unenforceable. He said when tribes negotiated Indian treaties and they gave the lands and resources—I know here in Michigan, nobody can ever really quantify what the value of those things are, I would say trillions of dollars—tribes did not get nothing in exchange for that. You get tiny little reservations, relatively speaking, some on and off reservation treaty rights. You've got the sort of existence and continuing government relationship. But in terms of pure monetary value, that's a pittance compared to what tribes gave up.

There has to be something else. And almost like the dark matter of the universe, the dark matter of Indian law. And that's I think the duty of protection. This book is full of places where the United States does engage in fulfilling its trust responsibility. And of course, the book could be ten times bigger for all the places where the United States does not.

So, I come back to my metaphor of the rib. And you look at that, the painting behind me. You see the heart, the heart berry. The *démen*, which is what the heart protects and you know with any luck this material in this Restatement will and can be used to strengthen that. To protect that notion, and also to enhance hopefully for tribes and the people Indian people in the United States who desperately need this assistance and who negotiated for this protection to eventually be entitled to that.