American Indian Law Review

Volume 7 | Number 2

1-1-1979

Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant

Steven M. Johnson

NOTES

JURISDICTION: CRIMINAL JURISDICTION AND ENFORCEMENT PROBLEMS ON INDIAN RESERVATIONS IN THE WAKE OF *OLIPHANT*

*Steven M. Johnson**

In their effort to procure greater autonomy and self-determination, American Indian tribes in recent years have attempted to exercise a greater degree of legal authority over non-Indians within reservation boundaries.[1] In 1978 the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*[2] refused to recognize well-established principles of inherent Indian sovereignty[3]

* First Place Winner, 1979 Indian Law Writing Competition. B.A. 1970, University of Montana; M.A. 1974, University of Colorado; J.D. expected 1980, University of Montana.

1. *See* Note, *Indian Law—Indian Tribes Have No Inherent Authority to Exercise Criminal Jurisdiction Over Non-Indians Violating Tribal Criminal Laws Within Reservation Boundaries*, 28 CATHOLIC L. REV. 663, 663 n.1 (1979) [hereinafter cited as Note].

2. 435 U.S. 191 (1978).

3. The leading case dealing with tribal sovereignty is Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). That decision developed an essentially tripartite analysis defining the current extent of tribal sovereignty: (1) Indian tribes originally possessed the inherent sovereignty of any independent nation; (2) the sovereignty of the Indian nations was necessarily lessened after conquest and must yield to conflicting plenary federal authority; and (3) Indian tribes now possess the same measure of internal sovereignty they possessed before conquest except for those powers expressly withdrawn by a congressional treaty or statute, 31 U.S. (6 Pet.), *supra*, at 559-61. *See* Note, *Tribal Courts Lack Jurisdiction Over Non-Indian Offenders*, 1979 WIS. L. REV. 537, 556-57; F. COHEN, FEDERAL INDIAN LAW 122-23 (1942) [hereinafter cited as COHEN].

The Court in *Oliphant* generally accepted this tripartite analysis, finding that tribes retained an inherent "quasi-sovereignty" in some areas, 435 U.S. 191, 208 (1978), but modified the traditional analysis to exclude sovereignty over criminal jurisdiction. Essentially, the Court held that the sovereign power of Indian tribes is extinguished not only when Congress has revoked it by express legislative acts but when the exercise of sovereign power is inconsistent with the status of the tribe. *Id.* at 208. The evolution of the concept of inherent Indian sovereignty in the case law is long and complex. It has been thoroughly discussed in the material cited below and need not be reconsidered here. *See* TASK FORCE REPORT ON FEDERAL, STATE AND TRIBAL JURISDICTION (American Indian Policy Review Comm'n Comm. Print 1976), at 89093; Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 63-65 (1959); Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387, 389-97 (1974) [hereinafter cited as Vollman]; Comment, *Tribal Sovereignty Sustained: Oliphant v. Schlie and Indian Court Criminal Jurisdiction*, 63 IOWA L. REV. 230, 232-35 (1977); Comment, *Oliphant v. Schlie: Recognition of Tribal Criminal Jurisdiction Over Non-Indians*, 1976 UTAH L. REV. 531, 631-33; Recent Developments, *Indian Law—Sovereignty and Tribal Jurisdiction Over Non-Indian Offenders*, 52 WASH. L. REV. 989, 991-95 (1977); Note, *supra* note 1, at 666-76; 24 S.D. L. REV. 217, 218-27 (1979).

and held that Indian courts have no jurisdiction to prosecute non-Indians for crimes on the reservation.[4]

Indian criminal jurisdiction involves an allocation of authority among federal, state, and tribal courts.[5] Tribal jurisdictional powers are derived from the inherent sovereignty of Indian tribes and, before the *Oliphant* decision, were considered to be limited only to the extent that tribal authority had been taken away by treaty or federal statute.[6] The effect of the *Oliphant* decision was to remove the tribe from the tri-sovereign jurisdictional scheme whenever a non-Indian criminal defendant is involved, leaving only the state and the federal government as possible prosecuting entities.

The practical law enforcement problems that result from denying the tribe the power to enforce its laws against non-Indians committing offenses on the reservation are to a large degree self-evident. As the American Indian Policy Review Commission has pointed out, the only workable law enforcement authority present in many areas of Indian country is that of the tribe.[7] The *Oliphant* decision, therefore, may well render law and order less readily attainable in Indian country, particularly in the area of minor offenses of the sort involved in *Oliphant*.[8] Whereas a non-Indian offender who commits a major crime against the person or property of an Indian on the reservation incurs the possibility of being prosecuted in federal court under the General Crimes Act,[9] relatively minor infractions of state and tribal law, such as traffic offenses, trespasses, even petty thefts and simple assault, will probably never rouse the attention of a federal prosecutor nor reach an overburdened federal court system.

The enforcement hiatus created by *Oliphant* could well become especially aggravating, humiliating, and frustrating for the tribes in the case of so-called "victimless" offenses, such as reckless

4. 435 U.S. 191, 208 (1978).

5. *See* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., "Criminal Jurisdiction," MANUAL OF INDIAN LAW D-1 *et seq.* (3d ed. 1977) [hereinafter cited as MANUAL OF INDIAN LAW].

6. COHEN, *supra* note 3, at 122.

7. AMERICAN INDIAN POLICY REVIEW COMM'N, 1 FINAL REPORT 5 (1977) [hereinafter cited as FINAL REPORT].

8. The *Oliphant* case arose out of the arrest of two non-Indians by tribal peace officers on the Port Madison Reservation of the Suquamish Indian Tribe. Mark D. Oliphant was charged with assaulting a tribal officer and with resisting arrest. Daniel B. Belgrade was accused of reckless driving by tribal authorities. 435 U.S. 191, 194 (1978).

9. 18 U.S.C. § 1152 (1970).

driving, speeding and other traffic crimes, gambling offenses, disturbing the peace, or disorderly conduct offenses, which occur with some frequency everywhere. Presumably the tribes are not even empowered to enforce lowly parking meter fines against non-Indian offenders in tribal courts. Taken individually these may seem innocuous; collectively, such minor crimes, if they are not punished effectively, are irksome. One reaction may be anger of the tribe toward non-Indians on the reservation, and there may be disrespect or disdain by some non-Indians toward the tribal authorities. In a newspaper interview published immediately after the Supreme Court handed down the *Oliphant* decision, a candidate for the position of Crow tribal chairman stated that Crow tribal members were "really disturbed" about the Court's holding and predicted some tribal members might "take the law into their own hands."[10] Certainly, if effective alternatives to tribal enforcement are not found, tension between tribes and surrounding non-Indian populations will grow. The dignity of tribal government will suffer in the eyes of Indians and non-Indians alike, and an increase in lawless behavior could ensue.

The *Oliphant* decision comes at a time when non-Indian crime on the reservations is prevalent, a fact the Supreme Court took notice of in *Oliphant*, while deeming it to be a problem calling for congressional and not judicial resolution.[11] Many tribes are plagued by vandalism, illegal dumping of trash, malicious mischief, traffic offenses, and other minor violations of state and tribal law.[12] These are offenses that could be easily dealt with by well-trained Indian police and tribal courts. Even before *Oliphant*, many minor offenses by non-Indians on the reservation went unpunished and thus unregulated largely because of the lack of tribal resources to suppress and prosecute non-Indian crime on any significant scale.[13] To prohibit tribal criminal jurisdiction over non-Indians at a time when tribes are evolving or, indeed, have developed effective police and judicial systems is regrettable. The decision will perpetuate an enforcement vacuum that has traditionally plagued the tribes.

10. Hardin Herald, Mar. 9, 1978, at 1, *reprinted in* U.S. Cong., Senate Select Comm. on Indian Affairs, *Hearing on S. 2502, Tribal-State Compact Act of 1978*, 95th Cong., 2d Sess. 81 (1978) [hereinafter cited as *Hearing on S. 2502*].

11. 435 U.S. 191, 212 n.18 (1978).

12. 4 NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN 52 (1974) [hereinafter cited as JUSTICE AND THE AMERICAN INDIAN].

13. *See* Vollman, *supra* note 3.

This note will first briefly outline the rules governing state and federal criminal jurisdiction in Indian country. Second, since, after *Oliphant*, only the state and the federal government remain as potential prosecuting entities, this note will examine the suitability of each to fill the enforcement vacuum that has resulted from removal of the tribe from the tripartite of criminal jurisdiction in Indian country where a non-Indian defendant is involved. Third, the note will discuss potential solutions to the jurisdictional and enforcement problems that have surfaced as a result of the *Oliphant* decision.

The Pattern of State and Federal Criminal Jurisdiction in Indian Country

A state's claim to criminal jurisdiction in Indian country is premised fundamentally on the theory that it has sovereignty over all citizens, inhabitants, and lands within its borders.[14] State powers are, however, limited by the superior power of the federal government "to regulate commerce with the Indian tribes and to exercise its guardianship responsibilities over its Indian wards."[15] The result is that states have no jurisdiction over crimes committed in Indian country by non-Indians against Indians or by Indians against non-Indians unless expressly granted by Congress.[16] Under Public Law 83-280, for example, some states have been accorded jurisdiction over crimes by or against Indians in Indian country.[17] There is, however, one important judicially created ex-

14. MANUAL OF INDIAN LAW, *supra* note 5, at D-1.

15. *Id.*

16. Williams v. United States, 327 U.S. 711, 714 (1946). The general rule that federal authority to regulate affairs with Indian tribes is preemptive, leaving no room for the states to exercise jurisdiction over Indians or their property within Indian country except as specifically authorized by Congress, has been repeatedly reaffirmed by the Supreme Court in recent years. Bryan v. Itasca County, 426 U.S. 373 (1976); Fisher v. District Ct., 424 U.S. 382 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Ct., 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959).

17. Now codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and other scattered sections in 18 and 28 U.S.C., *as amended by* 25 U.S.C. §§ 1321-26 (1978). In Indian country affected by Public Law 83-280, the allocation of federal and state jurisdiction differs from that in non-Public Law 83-280 states. Public Law 83-280 confers on six "mandatory" states, and on several "optional" states, criminal jurisdiction over offenses committed by or against Indians in Indian country, as follows: "to the same extent that such state has jurisdiction over offenses committed elsewhere within the state, and the criminal laws of such states shall have the same force and effect within such Indian country as they have elsewhere within the state."

The General Crimes Act is not applicable in Public Law 83-280 jurisdictions. 18

ception to the rule that states only possess such criminal jurisdiction as expressly conferred by federal statute. Under the so-called *McBratney* rule developed by the United States Supreme Court, states are vested with exclusive jurisdiction over offenses committed by non-Indians against non-Indians in Indian country, unless Congress has specifically provided for exclusive federal jurisdiction.[18]

The general criminal jurisdiction of the federal courts in Indian country is founded upon the General Crimes Act[19] and the Major Crimes Act.[20] Under these statutes and the established case law the respective criminal jurisdiction of federal, state, and tribal courts depends upon whether the person charged or the victim of the crime is an Indian and upon whether the offense was committed in Indian country. Case law has developed a definition of "Indian" for the purposes of criminal jurisdiction.[21] "Indian country" is statutorily defined as (1) all land within an Indian reservation (including public rights-of-way and patents), (2) dependent Indian communities (whether or not within reservation boundaries), and (3) all Indian allotments to which Indian title has not been extinguished (whether or not located within reservation boundaries).[22] The General Crimes Act has been held to extend federal criminal laws applicable in federal enclaves,[23] including the Assimilative Crimes Act,[24] to Indian country. Despite the broad language of the statute, the General Crimes Act does not apply to crimes committed by non-Indians against non-

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U.S.C. § 1162(a) (1970) (mandatory states); 25 U.S.C. § 1321(a) (1970) (optional states). Therefore, except for crimes that are peculiarly federal in nature, Public Law 83-280 states may exercise jurisdiction in Indian country to the exclusion of federal authorities over offenses committed by Indians against either Indians or non-Indians, and over offenses by non-Indians against Indians. *See* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., MANUAL OF INDIAN CRIMINAL JURISDICTION 107 *et seq.* (1977) [hereinafter cited as INDIAN JURISDICTION].

18. *See* New York v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. Kagama, 118 U.S. 377 (1886); Utah v. N. Ry. v. Fisher, 116 U.S. 28 (1885); United States v. McBratney, 104 U.S. 621 (1881). These cases created an exception to the doctrine of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that Indian lands were extraterritorial to the states in which they were located. *See* INDIAN JURISDICTION, *supra* note 17, at 87.

19. 18 U.S.C. § 1152 (1970).

20. 18 U.S.C. § 1153 (1970).

21. *See* MANUAL OF INDIAN LAW, *supra* note 5, at D-1 n.3.

22. 18 U.S.C. § 1151 (1970).

23. *In re* Wilson, 140 U.S. 575 (1891).

24. Williams v. United States, 327 U.S. 711, 713 (1946).

Indians.[25] Neither does it extend to offenses committed by one Indian against the person or property of another Indian,[26] nor does it apply to any Indian who has been punished by tribal law for an offense committed in Indian country.[27] The Assimilative Crimes Act[28] applies state law in federal court to define criminal conduct where federal law does not govern in the activity. In effect, the Act adopts state law as federal law to fill gaps in the federal criminal code.[29]

The Major Crimes Act makes fourteen specific crimes committed by one Indian against either another Indian or a non-Indian punishable in federal court.[30]

Present Federal Suitability to Prosecute Minor Non-Indian Crime on the Reservation

Asked his opinion of the effect of *Oliphant* on law enforcement on the reservations immediately after the Supreme Court handed down that decision, the United States Attorney in Butte, Montana stated: " 'It would be a sort of vacuum, that's for sure. It could dramatically change some of the Indian jurisdictional rights that have gone into effect since 1935.' "[31]

As to the role of the United States Attorney and other federal law enforcement officials in filling that void, the Montana attorney reportedly said that the United States government

> "doesn't have the staff to be policemen" when it comes to enforcing all laws on reservations. He said neither the F.B.I. nor his office could be expected to keep up with the caseload if all non-Indian persons charged with minor crimes on Indian reservations were to be referred to the federal level for prosecution.[32]

The article then continued:

25. United States v. Wheeler, 435 U.S. 313, 324 (1978).

26. *Ex parte* Crow Dog, 109 U.S. 556 (1883).

27. Henry v. United States, 432 F.2d 114 (9th Cir. 1971); United States v. LaPlant, 156 F. Supp. 660 (D. Mont. 1957).

28. 18 U.S.C. § 13 (Supp. 1976).

29. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 533-34 (1976).

30. 18 U.S.C. § 1153 (1970).

31. Billings Gazette, Mar. 7, 1978, at 8A, *reprinted in Hearing on S. 2502, supra* note 11, at 81.

32. *Id.*

> The U.S. Justice Department currently investigates all felony charges—whether against Indian or non-Indian—committed on Indian reservations.
>
> The big question now is, who will assume jurisdiction over non-Indians charged with misdemeanor crimes on the reservation—federal or state and county courts? Or will a separate justice system for non-Indians be set up on the reservations?[33]

The article in general and the comments of the federal prosecutor in particular indicate the present inadequacy of the federal system of criminal enforcement and prosecution to fill the gap created by *Oliphant*. Tribes have long complained of the reluctance of federal authorities to prosecute non-Indians for offenses committed on the reservation. This reluctance is based partly on attitude and partly on inadequate resources and logistics. The United States Attorney's office is often located in major cities remote from Indian communities. There matters affecting the tribes on a day-to-day basis are not publicized and do not appear to be matters of great weight.[34] Some offices are responsible for several Indian reservations within the judicial districts.[35] Tribes have complained that the federal prosecutors are often uncooperative, if not openly hostile, when requested to prosecute minor criminal cases arising on the reservation.[36] In declining to investigate and prosecute a case rigorously, the United States Attorney may be influenced by his own view of what constitutes "moral, acceptable or excusable behavior," and his view may not correspond with Indian tradition or tribal policy.[37]

Jurisdictional questions would not seem to be a barrier to federal prosecution of non-Indian violators of federal or state offenses. When such violations occur on the reservation, the General Crimes Act gives federal court jurisdiction over federally defined offenses, and the application of the Assimilative Crimes Act through the General Crimes Act allows federal courts to borrow state criminal law in order to define federal criminal offenses.[38]

The inadequacy of the federal criminal system *as it now exists* to replace local tribal police and tribal courts in protecting tribal

33. *Id.*
34. 5 JUSTICE AND THE AMERICAN INDIAN, *supra* note 12, at 33.
35. *Id.*
36. 1 JUSTICE AND THE AMERICAN INDIAN, *supra* note 12, at 54.
37. 5 JUSTICE AND THE AMERICAN INDIAN, *supra* note 12, at 38.
38. See notes 19-29 *supra* and accompanying text.

interests against minor, annoying non-Indian criminal conduct was aptly summarized in the brief of the Suquamish Tribe to the United States Supreme Court in the *Oliphant* case:

> Federal law is not designed to cover the range of conduct normally regulated by local governments. . . . Federal authorities are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel for witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence.[39]

State Jurisdiction as a Suitable Alternative to Tribal Jurisdiction

A reluctance to prosecute non-Indians vigorously for minor offenses committed on the reservation is characteristic of state as well as of federal prosecutors. Prosecutors in counties adjoining Indian reservations are frequently not anxious to prosecute because limitations on state process within Indian country may frustrate attempts to obtain witnesses.[40] In addition, the jurisdictional division between federal, state, and tribal governments is less than clear[41] and the peace and dignity of the government affected is not that of the state but that of the Indian tribe.[42]

In individual cases, the reluctance of the state to prosecute non-Indians for victimless offenses committed on the reservation is grounded in practical considerations of procedural mechanics and political expediency as well as in a basic uncertainty regarding substantive jurisdiction. However, there can be no doubt that in general the state has a legitimate interest in effective law enforcement on the reservation. Certainly it is in the state's interest that public highways traversing the reservation are adequately patrolled and do not become unregulated racetracks. State citizens, both Indian and non-Indian, make frequent use of these highways. In the western states, crossing a reservation is often unavoidable unless one is willing to take long and time-consuming detours on secondary roads. Although a state's interest in

39. Brief for Respondent at 65, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

40. *Id.*

41. *Id.*

42. *Id.*

safe highways is indisputable, jurisdictional uncertainties hamper effective enforcement of highway safety laws. Such public rights-of-way as highways traversing reservations are defined by Section 1151 of Title 18 of the United States Code as part of Indian country. Hence, offenses committed on highways by tribal members are subject to federal and tribal jurisdiction under the General Crimes Act.[43] It has been specifically held that the state may not prosecute tribal members for highway violations occurring on a public highway within the exterior boundaries of an Indian reservation on the grounds that the General Crimes Act preempts state jurisdiction when an Indian defendant is involved.[44]

As a practical result, state highway patrolmen are often reluctant to stop speeding or reckless drivers on reservation highways because the state lacks jurisdiction if the driver is an Indian. As will be discussed more fully later,[45] there is even uncertainty regarding the extent to which the *McBratney* rule grants states jurisdiction to prosecute non-Indians for state-defined "victimless" offenses, such as highway violations, occurring in Indian country. Since *Oliphant*, tribal police officers may well be reluctant to patrol public highways crossing the reservation in a vigorous manner for fear that the traffic violator stopped could be a non-Indian whom the tribe could not punish.

Generally, the state has an obvious interest in preventing the jurisdictional and enforcement vacuum from rendering the reservations havens for non-Indian crime. Given the tribe's lack of criminal jurisdiction over non-Indians, the remoteness of federal law enforcement and prosecuting personnel, and the uncertainties surrounding state jurisdiction, non-Indians—by simply crossing into a reservation—could conceivably evade criminal prosecution and conviction for violation of state laws governing such matters as drug possession and sale, alcohol regulation, or gambling.

Although states are presently reluctant to prosecute non-Indians for violations of state law that occur on the reservation, they certainly have a legitimate interest in doing so insofar as current jurisdictional uncertainties can be resolved in favor of state jurisdiction to punish non-Indian victimless offenses occurring on the reservation.

43. See text accompanying notes 19-29 *supra*.
44. *In re* Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958).
45. See text accompanying notes 58-78 *infra*.

Potential Solutions to Jurisdiction and Enforcement Problems

1. *Increased Federal Presence in Indian Country*

Even before *Oliphant* increased the enforcement problems on reservations, recommendations were being made to improve the effectiveness of the federal criminal justice system in combatting crime on the reservation. In its Final Report the American Indian Policy Review Commission recommended that the Department of Justice issue regulations directing United States Attorneys to accept criminal referrals from qualified tribal and BIA police and investigators.[46] Interestingly, a Department of Justice report had itself ascertained that United States Attorneys had declined to prosecute 75 percent of the Indian cases presented to them.[47] While this figure may not vary substantially from the rate of decline in cases involving non-Indian matters, it nevertheless indicates that a larger number of Indian criminal cases go unprosecuted. This is especially true because the federal government is often the only available prosecuting entity on the reservation. In non-Indian matters, by contrast, state prosecutors may act where federal authorities have declined to prosecute.[48]

Following *Oliphant*, the concern for more effective federal prosecution of on-reservation crime has mounted. Reacting to the Court's holding in that case, one commentator has stated: "Non-Indian crime on the reservation is growing and the burden of the problem now falls squarely upon the U.S. Attorneys' offices. Serious adjustments in both the capacity and philosophy of these offices will be necessary if the reservations are to be truly secure against all crime."[49] In a letter to former United States Attorney General Griffin Bell, the United States Civil Rights Commission expressed its concern over the delivery and quality of law enforcement services on and near reservations in the wake of the *Oliphant* decision. Referring to the criticism which the American Indian Policy Review Commission and the National American Court Judges Association had leveled against the role of the FBI in investigation, and the role of the United States Attorneys in

46. Recommendation No. 26, FINAL REPORT, *supra* note 7, at 17.

47. U.S. Dep't of Justice, Report of Task Force on Indian Matters 41 (1975), *cited in* Note, *supra* note 1, at 686-87 n.135.

48. *See* NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 33-35 (D. Getches ed. 1978).

49. Keys, *Some Early Comments on the Meaning of Oliphant*, 5 INDIAN L. RPTR. M-24, M-25 (1978).

prosecution of reservation crime, the Commission requested the Justice Department to make known its views on the efficacy of the existing program and on any plans for changes in the area.[50]

The National American Indian Court Judges Association has proposed several ways of increasing the effectiveness of federal prosecution and investigation of reservation crime. It has recommended the appointment of one or more assistant United States Attorneys in each office to deal with Indian matters.[51] An assistant prosecutor who devoted a substantial amount of his or her time to Indian problems would not only develop expertise in Indian law, but, it is hoped, would also develop a sensitivity toward the tribal point of view. The Indian Court Judges Association also advocates placing federal investigating personnel directly on the reservation.[52] At present, several days often elapse between the commission of a crime on the reservation and the arrival of an FBI or BIA investigator who must travel to the reservation from some distance. In the intervening time tribal police may have difficulty in preserving valuable evidence that, if investigated immediately by the appropriate federal officials could lead to a conviction.

The BIA and FBI currently almost exclusively investigate felonies that occur on the reservation. Given the enforcement hiatus left by *Oliphant*, an effective federally approved procedure for the investigation of misdemeanors committed by non-Indians on the reservation is clearly called for. The recommendation of the American Indian Policy Review Commission that the Department of Justice issue regulations mandating United States Attorneys to accept criminal referrals from specially trained tribal police is certainly one feasible solution.[53]

Another approach would be to systematically federalize all tribal police after appropriate training in investigative procedures.[54] Such an approach would have the advantage of directly involving

50. Letter from U.S. Civil Rights Comm'n to U.S. Att'y Gen. Griffin Bell, Mar. 14, 1978, *reprinted in* 5 INDIAN L. RPTR. M-26 (1978).

51. 5 JUSTICE AND THE AMERICAN INDIAN, *supra* note 12, at 49-50.

52. *Id.*

53. *See* Recommendation No. 26, FINAL REPORT, *supra* note 7, and text accompanying note 46.

54. Such an approach was suggested by Arlen Whiteman, a candidate for the office of Crow tribal chairman, as a solution to the enforcement problems created by *Oliphant*. He made the recommendation in a Mar. 9, 1978, interview published in the Hardin Herald. Hardin Herald, Mar. 9, 1978, at 8, *reprinted in Hearing on S. 2502, supra* note 11, at 81.

tribal members in the protection of tribal interests. The same police responsible for enforcing tribal law against tribal members would be actively engaged in enforcing federal law and state law adopted as federal law under the Assimilative Crimes Act uniformly against Indian and non-Indian offenders. It might also be possible, under such an approach, for federalized tribal police to enforce and for federal courts to adopt tribal law as federal law under the Assimilative Crimes Act. The federal courts have consistently used state substantive law when applying the Assimilative Crimes Act to Indian country. The statutory language is, however, "State, Territory, Possession, or District in which such place [*i.e.*, the federal enclave] is situated, by the laws thereof in force at the time of such act or omission . . . ."[55] It has been suggested that this wording leaves open the question as to whether tribal law could be considered the local law of the jurisdiction in the *Oliphant*-type situation.[56]

The Judges Association has also recommended that grand juries be impanelled on the specific reservation where a major crime occurs and that the federal trials of cases arising from crimes committed on the reservation be held on the reservation itself, rather than in the far distant areas where federal courts sit.[57] An increased federal presence on the reservations can be an adequate solution to the enforcement vacuum left by *Oliphant* if procedures are developed to investigate efficiently and vigorously and then prosecute non-Indian misdemeanors. Federalization of tribal police would allow direct tribal participation and ensure that those who care most about the peace and tranquility of the reservation would be primarily responsible for law enforcement there. Tribal policy as to what constitutes excusable behavior and what criminal activity most warrants prosecution would presumably be reflected in the judgment of the tribal police in exercising that discretion any peace officer must exercise in making arrests and in otherwise suppressing criminal activity. Tribal policy could be effectuated to a greater degree if federal courts should one day hold that tribal law qualifies as the local law to be applied under the Assimilative Crimes Act.

55. 18 U.S.C. § 13 (Supp. 1976).

56. Note, *Oliphant v. Suquamish Indian Tribe: A Jurisdictional Quagmire*, 24 S.D. L. REV. 217, 236 (1979).

57. 5 JUSTICE AND THE AMERICAN INDIAN, *supra* note 12, at 49-50.

2. *Expanded State Jurisdiction of Non-Indian "Victimless" Offenses in Indian Country Under the McBratney Rule*

In view of the state's clear interest in effective law enforcement in Indian country,[58] increased state assertion of jurisdiction over non-Indian victimless and consensual offenses occurring in Indian country is one practical response to fill the jurisdictional and enforcement vacuum left by the *Oliphant* decision. This potential solution will necessarily entail judicial construction to the extent of the *McBratney* rule,[59] which allows state criminal jurisdiction over non-Indians committing crimes against other non-Indians in Indian country. There is also some limited precedent for regarding *McBratney* as authority for state assumption of jurisdiction over victimless offenses (as defined by state law) committed by non-Indians on Indian reservations.

In *State ex rel. Nepstad v. Danielson*,[60] the Montana Supreme Court upheld the state prosecution and conviction of a non-Indian for violation of a state fish and game statute while on an Indian reservation. In so doing, the court found that Section 1165 of Title 18 of the United States Code, making unlawful the entry onto Indian land for the purpose of hunting, fishing, or trapping, did not preempt the application of state law on the reservation. In the court's view, the federal statute dealt primarily with trespass and not with fish and game regulation. After deciding there was no federal preemption of the field, the court, assuming that the *McBratney* principle applied, summarily upheld the non-Indian defendant's conviction. An earlier case upholding state jurisdiction of state fish and game offenses committed by a non-Indian in Indian country is *Ex parte Crosby*,[61] a 1915 decision by the Nevada Supreme Court. In an early Washington state case, a non-Indian charged with the arguably victimless offense of manufacturing liquor on an Indian reservation was held to be properly within the state court's jurisdiction.[62] An early Minnesota case

58. See text accompanying notes 31-35 *supra*.

59. See text accompanying note 17 *supra*.

60. 149 Mont. 438, 427 P.2d 689 (1967).

61. 38 Nev. 389, 149 P. 989 (1915). In 1971 the Solicitor of the Interior, relying on *Danielson* and on *Crosby*, as well as on the opinions of the attorneys general of Nevada, New Mexico, and Oregon, stated that a state had both the power and the right to exercise jurisdiction over non-Indians alleged to have violated state game laws on an Indian reservation. 78 I.D. 101, 104.

62. State v. Lindsey, 133 Wash. 140, 233 P. 327 (1925).

upheld state jurisdiction over a non-Indian woman charged with the state-defined consensual offense of adultery; the charge against the other participant, an Indian man, was dismissed as being beyond state court jurisdiction.[63] While not examining the issue in great detail, more recent decisions have upheld state jurisdiction over possessory drug offenses[64] and traffic offenses[65] committed by non-Indians on Indian reservations.

The United States Supreme Court has never held that the *McBratney* rule extends to victimless and consensual offenses, and much of the limited precedent stems from turn of the century state appellate courts. Nevertheless, a cogent argument can be made that the historical practice has been to regard *McBratney* as authority for state jurisdiction over victimless offenses committed by non-Indians on the reservation. If an adequate federal response to solve the enforcement problems posed by *Oliphant* is not forthcoming, state courts are more likely to so construe *McBratney*, especially when both tribal and state law enforcement agencies are desirous of increased state jurisdiction over victimless crimes on reservations.

Expressly relying on the above cited cases and construing *McBratney* as applying to victimless offenses, the Office of Legal Counsel of the United States Department of Justice prepared a memorandum in which it contends that the states—and not the federal government—have *exclusive* jurisdiction over most traffic offenses and other crimes committed on Indian reservations by non-Indians when there is no identifiable victim.[66] The memorandum was prepared and filed in the United States District Court for New Mexico in support of the Justice Department's motion for summary judgment in a case styled *Mescalero Apache Tribe v. Bell.*[67] In this case the tribe sought to require the United States to enforce the New Mexico state traffic codes against non-Indians operating vehicles on the reservation. This suit appears to have been initiated in response to *Oliphant*. Federal courts would arguably be empowered to enforce state traffic laws by adopting them as federal law under the Assimilative Crimes Act.

63. State v. Campbell, 53 Minn. 354, 55 N.W. 552 (1893).

64. State v. Jones, 92 Nev. 116, 546 P.2d 235 (1976) (possession of marijuana).

65. State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

66. Memorandum for Benjamin R. Civiletti, Deputy Attorney General, Jurisdiction Over "Victimless" Crimes Committed by Non-Indians on Indian Reservations, *reprinted in* 6 INDIAN L. RPTR. K-15 (1979) [hereinafter cited as Justice Dep't Memo].

67. No. 78-926C (D.N.M., filed Dec. 14, 1978).

The memorandum reasons that federal jurisdiction over non-Indian victimless offenses is not invoked by a mere generalized interest in peace and tranquility on the reservation.[68] According to the Justice Department, the *McBratney* case itself, which involved the murder of one non-Indian by another non-Indian on a reservation, "belies that view since . . . a murder on the reservation—a much more significant breach of the peace than simple vagrancy, drug possession, speeding, or public drunkenness"—provided no basis for an assertion of federal jurisdiction.[69] Federal jurisdiction over non-Indian victimless offenses could only be invoked if there is a "concrete and particularized threat to the person or property of an Indian or to specified tribal interests,"[70] for example: (1) crimes calculated to obstruct the functioning of tribal government (*e.g.*, bribery of tribal officials); (2) consensual crimes with Indian participants (*e.g.*, statutory rape); or (3) crimes under state law which, when adopted as federal law, involve a direct threat to an identifiable Indian victim (*e.g.*, reckless endangerment, criminal trespass, riot or rout, disruption of a public meeting or worship service conducted by the tribe).

The memo argues further that even where federal jurisdiction over non-Indian victimless offenses properly lies, state courts retain concurrent jurisdiction.[71] To reach this conclusion, the Attorney General relies primarily on the *Williams v. Lee*[72] preemption analysis. Accordingly, "in the absence of express federal legislation, the authority of the states should be seen to be circumscribed only to the extent necessary to protect Indian interests in making their own laws and being ruled by them."[73] There would be such interference with tribal government if a state attempted to prosecute an Indian defendant, but there is no such danger to Indian interests if state as well as federal prosecutions of non-Indians could be sustained.[74] Federal jurisdiction would remain to protect the Indian tribes if a state prosecution was not undertaken or was prosecuted in bad faith.[75]

The memorandum of the Justice Department should not be regarded as definitive authority as to whether states may prosecute

68. Justice Dep't Memo, *supra* note 66, at K-18.
69. *Id.*
70. *Id.*
71. *Id.* at K-18 to K-20.
72. *Id.* at K-19, *citing* Williams v. Lee, 358 U.S. 217, 220 (1959).
73. *Id.*
74. *Id.*
75. *Id.* at K-19 to K-20.

non-Indians for victimless crimes committed on the reservation. Given the adversary context that gave rise to the memorandum, it should be taken *cum grano salis*. In its memorandum the Justice Department was, in effect, telling the Mescalero Apache Tribe to look to the states first for protection against non-Indian crime and to the federal government only when the state protection had proven ineffectual. The argument seems inconsistent with the federal government's special trust responsibility to the tribes. Interestingly, a Solicitor's Opinion[76] reaches a conclusion opposite to that of the Attorney General with respect to state jurisdiction over non-Indian victimless offenses on the reservation. The Solicitor saw the General Crimes Act as an expression of congressional intent to preempt state court jurisdiction of victimless offenses even where the non-Indian conduct threatened what the Justice Department's memorandum would arguably label a "generalized interest" in reservation peace and tranquility.[77] The Solicitor stated that the policy of the General Crimes Act was clearly to give to the tribes the protection of the United States in return for which the tribes had given up their sovereignty[78] with the result that federal, and not state, jurisdiction is appropriate.

Although the final word has not been spoken on state jurisdiction over non-Indian victimless crimes on the reservation, state courts are likely to continue to uphold such jurisdiction until the Supreme Court says otherwise, especially where tribes and states are mutually desirous of such a jurisdictional arrangement.

3. *Inherent Tribal Powers to Exclude Non-Indian Trespassers from the Reservation*

Although the United States Supreme Court in *Oliphant* held that Indian tribal courts do not have any criminal jurisdiction over non-Indians absent an affirmative delegation of such power by Congress, that decision did not deprive the tribes of any power they possessed to detain—as opposed to arrest for purposes of prosecuting in tribal courts—non-Indian offenders. In fact, the Court in reaching its conclusion expressly relied on treaty provisions that prescribed the tribes should turn over non-Indian of-

76. Dep't of Interior Solicitor's Opinion, Jurisdiction Over Offenses Committed by Non-Indians Against Indians in Indian Country, Apr. 10, 1978, *reprinted in* 5 INDIAN L. RPTR. H-10 (1978).

77. Examples are drunkenness in a tribal building or during a tribal function, or reckless driving near an Indian school or in an Indian community. *Id.* at H-12.

78. *Id.*

fenders to federal authorities for prosecution.[79] These provisions strongly imply a tribal right to detain or arrest and remit to federal authorities violators of federal law.

It has been held that Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress.[80] Intrinsic in that sovereignty is the power of a tribe to create and administer a criminal justice system and the power to exclude non-Indian trespassers who have violated state or federal law by delivering the offenders to the appropriate authorities. The leading case in this area is *Ortiz-Barraza v. United States*.[81]

The *Ortiz* case involved the detention and frisk of the person of a non-Indian and the search of his vehicle by a tribal police officer. The officer drove a distinctly marked patrol car with a red light on top and was not deputized by state or federal authorities to enforce state or federal laws. Noticing a suspicious-looking pickup truck parked on a public highway within the boundaries of the Papago Indian Reservation, the officer approached the driver and asked to see the latter's operator's license and vehicle registration. The driver stated in Spanish that he spoke no English. The tribal officer then frisked the defendant for identification; finding none, he then searched the cab of the truck. When he found no identifying papers in the pickup cab, the officer believed he was dealing with an alien who had illegally entered the country and who could be transporting either controlled substances or illegal aliens over the United States-Mexican border. Therefore, the tribal officer searched the camper, where he found burlap sacks containing marijuana. The officer then took the defendant to the reservation detention facility where he was held until federal authorities took custody of him.

The Ninth Circuit upheld the defendant's conviction for violation of federal drug laws despite the defendant's contention that the tribal officer had acted in excess of his authority by conducting the search as part of an investigation of suspected state and

79. 435 U.S. 191, 208 (1978).

80. United States v. Mazurie, 419 U.S. 544 (1975).

81. Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). There is nothing in *Oliphant* to suggest that the limited jurisdiction of tribal and Bureau of Indian Affairs police, *i.e.*, to arrest non-Indians and turn them over to the proper authorities, has been removed. A recent Solicitor's Opinion, issued after *Oliphant*, reaffirms the right of tribal police to arrest non-Indian offenders and deliver them to federal authorities. See note 76 *supra*.

federal law violations. The court found that the tribal officer had the authority to investigate on-reservation violations of state and federal law whenever the exclusion of the non-Indian offender from the reservation may be contemplated, noting that the power to exclude non-Indians from the reservation would be meaningless if the tribal police were not empowered to investigate such violations.[82] Expulsion from the reservation, as the term was used in the court's opinion, included the detention of the non-Indian offender and his remittance to appropriate non-Indian authorities.

Accordingly, it seems clear that tribal police officers may stop non-Indian traffic offenders on the reservation and detain them until appropriate non-Indian law enforcement officers appear on the scene. The power to investigate crimes, with which a tribal officer is inherently authorized to conduct, logically includes, in the context of traffic offenses, for example, the power to stop a vehicle of a suspected offender.[83]

4. *Traditional Cross-Deputization*

Pursuant to cross-deputization agreements between tribes and states, tribal peace officers enforce the laws of the states against persons or property subject to state jurisdiction, and state officers enforce laws of the tribes against persons or property subject to tribal jurisdiction. In such instances the state or tribal officer is acting as an officer of the government whose law is being enforced.

While offering some potential as a solution to the enforcement problems after *Oliphant*, cross-deputization is of only limited usefulness. First, it has become less frequent in recent years because of increased friction between tribal and state officials—friction that may be associated with the quest of Indian tribes for greater autonomy and rights of self-government. Whether the *Oliphant* decision will be conducive to greater cooperation between state and tribal authorities remains to be seen. Second, and more fundamental, the effectiveness of cross-deputization as a solution to *Oliphant*-type enforcement problems

82. *Id.* at 1180.

83. The fact that a state offense occurs within the right of way of a state highway in no way affects the authority of a tribal officer to act. Rights-of-way running through a reservation are, by statutory definition, part of the reservation and are within the *territorial* jurisdiction of the tribal police. *See* 18 U.S.C. § 1151 (1970); Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973).

depends largely on judicial recognition of state jurisdiction over non-Indian victimless offenses in Indian country—a question not yet finally resolved. Should it be determined that no such jurisdiction exists, cross-deputized tribal officers will be powerless to enforce state law on the reservation because state law would not extend there. If courts opt in favor of state jurisdiction over non-Indian victimless offenses, then cross-deputization can become a viable response to the enforcement hiatus left by the *Oliphant* decision.

However the victimless crime jurisdictional question is resolved, cross-deputization agreements assume that the judicial or administrative body which ultimately orders enforcement of the law is an arm of the same governmental body (tribe or state) whose law is being enforced. A more useful, comprehensive, and flexible approach to solving jurisdictional and enforcement problems would lie in tribal-state agreements whereby a tribe authorized a state to apply in state tribunals either the laws of the tribe or the state to persons subject to tribal jurisdiction within the reservations. Conversely, a state could authorize a tribe to enforce in its tribunals state laws against persons or property within an Indian reservation who or which are subject to state jurisdiction.

The next section deals with proposed congressional enabling legislation that would allow states and tribes to enter into just such flexible jurisdictional and enforcement agreements on a local level.

The Tribal-State Compact Act of 1979

Senate Bill 1811, the Tribal-State Compact Act of 1979, is proposed congressional legislation that, if enacted, would give state and tribal governments authority to enter into cooperative intergovernmental agreements or compacts which may call for the application or enforcement of each other's laws. The bill, if it becomes law, would provide a framework for solving many of the jurisdictional and enforcement difficulties posed by *Oliphant*. It would also resolve a broad range of jurisdictional disputes between the states and the tribes in both the civil and criminal law areas. However, the bill does *not* purport by its own power to vest in Indian tribes the power to exercise criminal jurisdiction over non-Indians.[84] Neither does it *generally* alter the current

84. S. REP. 1178, *Tribal-State Compact Act of 1978*, to accompany S. 2502, at 7, 95th Cong., 2d Sess. (1978) [hereinafter cited as S. REP. 1178].

jurisdictional allocation in Indian country by federal, state, and tribal governments by its own force.[85] It does, however, empower tribes and states cojointly to alter that general jurisdictional pattern in *particular* instances. It does so by allowing the tribes and the states and their political subdivisions to enter into compacts or agreements that provide for the application of the civil, criminal, or regulatory laws of either entity over Indians or non-Indians, as they see fit.[86] S. 1181 is intended to provide a flexible vehicle to enable the parties most directly affected by jurisdictional allocations to tailor comprehensive solutions whenever jurisdictional questions are the subject of a tribal-state agreement.[87]

The bill is intended to authorize tribes to enter into agreements with the states that will authorize the state to enforce state or tribal laws over Indians in those cases where the tribe has the underlying authority.[88] It is also the intent of the bill to authorize states to enter into agreements with Indian tribes for the enforcement of state or tribal laws against non-Indians within Indian country in tribal courts in those cases where the state has the underlying authority.[89] To that extent the bill modifies the holding of *Oliphant*.[90]

Before its current consideration as S. 1181 by the Senate Select Committee on Indian Affairs in the first session of the Ninety-sixth Congress, the Tribal State Compact Act was introduced and considered in the second session of the Ninety-fifth Congress as S. 2502. On September 7, 1978, it was reported to the full Senate. On October 6, 1978, the Senate passed an amended version which was referred to the House Committee on Interior and Insular Affairs. In the House the original bill had been introduced as H. R. 11489, but neither the original bill nor the Senate's amended version was acted upon by the House before the close of the Ninety-fifth Congress.

The bill represents a priority recommendation contained in the Final Report of the American Indian Policy Review Commission, that, "States and county governments sit down with the tribal governments and to the extent possible resolve their jurisdictional conflicts to their mutual satisfaction on the basis of mutual

85. *Id.*
86. *Id.*
87. *Id.* at 7-8.
88. *Id.* at 13.
89. *Id.*
90. *Id.*

respect."[91] The keynote of the Commission's recommendation is thus cooperation. The Commission rejected as not feasible any "attempt to legislatively determine the precise powers of each of [the some 287 tribal governments in the United States] in one legislative enactment."[92] Similarly, it rejected the notion that "the jurisdiction of the tribes should be limited to their membership alone. If such a position were adopted it could truly be said that the tribes were mere social clubs, an assembly of property owners, with no more authority than any civic association."[93] Only to the extent that resolution between the state and its political subdivision (*e.g.*, county and municipal governments), on the one hand, and tribal government, on the other, cannot be achieved on a cooperative basis, did the Commission recommend legislative action by Congress to resolve jurisdictional conflicts.[94]

The legislative purpose underlying S. 1181 is to facilitate these recommendations of the American Indian Policy Review Commission. In seeking to implement these recommendations, the staff of the Senate Select Committee on Indian Affairs found that despite considerable interest on the part of state and county organizations to discuss jurisdictional issues with the tribes, there are existing legal impediments preventing agreements relating to jurisdictional issues.[95] Accordingly, the bill has two main aims: (1) to allow states and tribes to solve local problems on a local level by providing affirmative congressional approval for them to enter into flexible jurisdictional and enforcement agreements on the basis of mutual assent;[96] and (2) to remove the existing legal obstacles to such agreements presented by the formal prerequisites of Public Law 83-280 to the transfer of jurisdiction from the tribe to the state.[97] Express congressional approval is always required for state courts to assume jurisdiction in Indian country. At present, Public Law 83-280 is the only statute of general applicability that specifically addresses the allocation of jurisdiction between the tribes and the states.[98] There are substantial legal

91. 1 FINAL REPORT, *supra* note 7, at 5.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* STAFF OF SENATE SELECT COMM. ON INDIAN AFFAIRS, STAFF BACKGROUND MEMORANDUM ON S. 2502 (Comm. Print 1978) *as reprinted in Hearing on S. 2502, supra* note 11, at 13 [hereinafter cited as STAFF MEMO].

96. Compare generally STAFF MEMO, *supra* note 95.

97. *Id.* at 13-15.

98. *As amended by* Title IV of the 1968 Indian Civil Rights Act, 25 U.S.C. §§ 1321-25. See also text at note 17.

questions associated with that statute, however, such as the right of the tribe to rescind a jurisdictional grant to a state and to reassume jurisdiction itself; whether a tribal grant of jurisdiction to the state need necessarily be exclusive, thus precluding the possibility of concurrent tribal-state jurisdiction; whether the statute permits piecemeal subject matter or geographic jurisdiction, or whether such assumption of jurisdiction by the state must be all-inclusive; and whether a state can assume any jurisdiction over an Indian in Indian country without first amending the state constitution.

As originally enacted, Public Law 83-280 did not require that jurisdictional allocations between the tribes and the states rest on the mutual consent of the two parties. Public Law 83-280 was amended in 1968, however, to require tribal consent before a state could assume jurisdiction over Indians in Indian country. Provision was also made for the states to retrocede jurisdiction to the federal government, if they desired to do so, but no similar privilege was granted to the tribes. S. 1181 does not purport to amend Public Law 83-280 to allow tribal retrocession. It does, however, avoid the pitfalls of that legislation by specifically providing for cancellation of agreement by either party.[99] It avoids the inflexibility of Public Law 83-280 by authorizing the broadest latitude to tribal and state governments to enter into government agreements rather than formal cessions of jurisdiction with a resultant permanent loss of control.[100]

The heart of the legal impediment to intergovernmental agreements posed by Public Law 83-280 lies in two key legal tests that are employed to determine whether state action in Indian country can be sustained.[101] The first test, formulated in *Williams v. Lee*,[102] is whether the action infringes on the right of the Indian tribes to be self-governing. In 1971, in *Kennerly v. District Court*,[103] the Supreme Court, elaborating on the *Williams* test, said the true test was "federal preemption." Thus, in absence of compliance by both the state and the tribe with some federal enabling statute, in this case Public Law 83-280, the jurisdiction of a state over an Indian in Indian country could not be sustained. Therefore, it was held in *Kennerly* that a state could not exercise

99. STAFF MEMO, *supra* note 95.
100. *Id.*
101. *Id.* at 13-15; S. REP. 1178, *supra* note 84, at 6-7.
102. 358 U.S. 217, 220 (1959).
103. 400 U.S. 423 (1971).

civil jurisdiction over a purchase and sale agreement between an Indian and a non-Indian on the Blackfeet Reservation, even though a tribal ordinance authorized state jurisdiction over civil matters within the reservation.

While the infringement and the preemption tests provide substantial protection to tribal governments, the preemption test in particular may on occasion thwart the effort of tribes to work with states on a cooperative basis. In *Blackwolf v. District Court*,[104] it was held that the state of Montana could not exercise jurisdiction over an Indian juvenile for conduct within a reservation, even though the child had been adjudicated a delinquent in tribal court and remanded to state authorities for further proceedings in accordance with a tribal ordinance that provided for such a procedure. In *White v. Califano*,[105] it was held that a state could not exercise jurisdiction to order an involuntary commitment of a mentally ill Indian residing within a reservation, even though the tribal court had adjudicated her to be mentally ill and had ordered her committed to the State Human Services Center. In these two instances, the interests of tribal government clearly would have been furthered by allowing tribes to arrange with the states for the enforcement of tribal law or the application of state law to their own tribal members in selected circumstances.[106]

Although *Oliphant* held that Indian tribes cannot exercise any *inherent* criminal jurisdiction over non-Indians, tribes may clearly exercise derivative authority over non-Indians under appropriate federal legislation.[107] The promise that S. 1181 holds as a means of coming to terms with the enforcement and jurisdictional vacuum left by *Oliphant* becomes apparent from a consideration of the bill's provisions relating to the extent and variety of agreements it would authorize. Section 101(a) of the bill extends the authority of the United States to tribes, states, and political subdivisions to enter into agreements providing for (1) the enforcement or application of civil, criminal, and regulatory laws of each within their respective jurisdiction; (2) the allocation or determination of governmental responsibility of states and tribes over specified matters or specified geographical areas, or both, including agreements or compacts which provide for concurrent jurisdiction; and (3) agreements or compacts which provide for

104. 158 Mont. 523, 493 P.2d 1293 (1972).
105. 437 F. Supp. 543 (D.S.C. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978).
106. *See* S. REP. 1178, *supra* note 84, at 7.
107. United States v. Mazurie, 419 U.S. 544 (1975).

the transfer of jurisdiction of individual cases from tribal to state court, or vice versa, pursuant to established legal procedures. Thus, S. 1181 would authorize agreements between tribes and states according to which non-Indian offenders may be arrested by tribal police for violations of either tribal or state law and may be prosecuted in tribal court for the violation of either tribal or state law, as the parties may agree. Such a tribal-state agreement could authorize a transfer of a case against a non-Indian from tribal to state court, which would then be obligated to prosecute the defendant according to either state or tribal law, depending on the terms of the agreement.

Conversely, a tribe might transfer territorial jurisdiction over some or all roads and highways within a reservation, partial or total subject-matter jurisdiction over traffic offenses, or personal jurisdiction over tribal members to a state possessing both the facilities and the desire to assume the responsibility for making reservation roadways safe. The agreement might provide for the state to enforce its laws uniformly against Indians and non-Indians alike (assuming for the moment that states have criminal jurisdiction over victimless offenses such as traffic violations), or to enforce only tribal law against both tribal or nontribal members.

An agreement calling for the state to enforce tribal law against tribal members and state law against non-Indians would also be possible. Similarly, it could be provided that tribal members be brought before tribal court and non-Indians before state courts if the parties so desired. Myriad permutations and computations of personal, subject matter, and territorial jurisdiction transfers from the one government entity to the other would be possible. The parties are free to tailor an agreement to cover unique local enforcement and jurisdictional problems not shared by other tribes and other states. Flexibility, nonuniformity, and decentralization are the hallmarks of S. 1181. The bill certainly marks a shift in emphasis of federal Indian policy away from solving Indian-related problems on a national level toward solving them on a local level. Insofar as it does not require approval of tribal-state agreements by the Secretary of the Interior,[108] S. 1181

108. Originally S. 2502 made all tribal-state agreements subject to the approval of the Secretary of the Interior. During the hearings on S. 2502, representatives criticized the secretarial approval requirement as an unwarranted extension of the power of the Secretary. *See Hearing on S. 2502, supra* note 11, at 32 (comments of Sam Deloria, Director of the American Indian Law Center), into an area in which the trust responsibility has

recognizes the competency of today's tribes to negotiate as equals with state government.[109]

S. 1181 is by no means a panacea to the jurisdictional void wrought by the *Oliphant* decision. It authorizes tribal-state jurisdictional transfers *only* where either the state or the tribe clearly has jurisdiction over the subject matter, persons, or territory in question. It does not authorize any derogation from existing federal jurisdiction. The most pressing enforcement and jurisdictional problems in the post-*Oliphant* era are to be found in the area of victimless crimes. Yet the extent of federal jurisdiction under the General Crimes Act and the extent of state jurisdiction under the *McBratney* doctrine over victimless non-Indian offenses is not clear. To the extent that the states are found to have such jurisdiction, tribal-state compacts of the sort authorized by S. 1181 can provide a means of clearly defining the roles of tribal and state policies in enforcement and of tribal and state courts in prosecution of offenses committed by non-Indians in Indian country.

Conclusion

Any effective solution to the enforcement problems that resulted from the Supreme Court's holding in *Oliphant* that Indian tribes have no inherent criminal jurisdiction over non-Indians necessarily depends on the cooperation and good faith of the three government entities among which jurisdiction in Indian country is divided.

If, pursuant to its special trust responsibilities toward the Indian tribes, the federal government is looked to as the source of a solution, a fundamental change in the philosophy, procedure, and training of federal law enforcement officers and prosecuting officials would seem necessary. Regulations could be issued by the Justice Department to obligate United States Attorneys' offices to accept criminal referrals from qualified tribal police or

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not traditionally been regarded as authorizing an intrusion into tribal affairs. *See Hearing, supra*, at 67 (comments of Alex La Forge, Chairman, Law and Order Commission, Crow Tribal Council, Montana). The secretarial approval requirement has now been deleted. S. 1181 requires in Section 101(c) simply that tribal-state compacts be filed with the Secretary within thirty days of consummation.

109. In the hearings on S. 2502, the opinion was expressed that the legislation would put the tribes on an equal footing with the states. Only when that is done can true dialogue begin. *See, e.g., Hearing on S. 2502, supra* note 11, at 74 (statement of Alex La Forge).

BIA investigators. Tribal police could be federalized, *i.e.*, empowered to enforce federal law (either state or tribal law adopted as federal law through the Assimilative Crimes Act) against non-Indian offenders. At any rate, federal law enforcement personnel of some kind should be placed on the reservations, and each United States Attorney's office in whose district an Indian tribe is located should assign at least one prosecutor to specialize more or less exclusively in Indian-related matters.

Tribes can attempt to protect their interests by making maximum use of their inherent power to exclude non-Indian offenders from the reservation by detaining them until the appropriate federal or state law enforcement authorities arrive to arrest the offender. Tribal action of this sort can, however, only become an effective remedy to the enforcement problems posed by *Oliphant* if federal or state authorities are willing to cooperate by taking custody of non-Indian offenders detained by tribal authorities and vigorously prosecuting. Similarly, cross-deputization depends on state-tribal cooperation if it is to be effective in combatting non-Indian crime on the reservations because cross-deputization agreements will not materialize if a cooperative attitude does not exist between state and tribal authorities.

Cooperation and good faith between government entities with jurisdictional responsibilities in Indian country is the premise upon which the enforcement and jurisdictional agreements authorized by S. 1181 are based. Perhaps, if S. 1181 becomes law, the tribes and the states will realize that practical solutions to mutually aggravating problems are possible only if they set aside their jurisdictional jealousies and together seek a mutually satisfactory solution.[110] The mere enactment of S. 1181 into law would be a clear signal to the states and the tribes that intergovernmental cooperation had become federal policy and that no general federal solution to jurisdictional disputes would be forthcoming. As such, the bill would, by its simple enactment, constitute a powerful inducement for tribes and states to sit down,

110. It was frequently stated in the hearings on S. 2502 that in the past discussions of the intergovernmental relationship issues between tribes and states have been preoccupied with those jurisdictional issues that divide the two governments. There was very little discussion on the many areas where the two governments can cooperate with each other. *See, e.g., Hearing on S. 2502, supra* note 11, at 31 (comments of Sam Deloria). The legislation was often viewed as initiating a process whereby tribes and states could first enter into agreements on "easy questions" and then in time would negotiate agreements on more significant and complex jurisdictional issues once they have established a cooperative relationship with each other. *Id.* at 32.

hammer out differences, and fashion agreements that represent a particularized response to their own unique local problems. The enactment of S. 1181 would leave a way open for tribal-state agreements on hot pursuit, child support, child placement, extradition[111] and rendition, arrest and detention procedures, fish and game zoning violations, speed limits, and collection and sharing of tax revenues, to name only a few areas.

In order for S. 1181 to become an effective means toward solving the most troublesome enforcement problem left by *Oliphant*, however, states must be judicially recognized as having victimless crime jurisdiction over non-Indians on Indian reservations. Without the resolution of whether the state or the federal government or both have jurisdiction in that area, any attempted enforcement solutions to an *Oliphant* kind of problem will be marred by uncertainty. Should the courts ultimately decide that the federal courts have exclusive jurisdiction, only an increased federal presence on the reservations or congressional delegation of authority to the tribes to prosecute non-Indians will adequately fill the jurisdictional and enforcement void left behind as the legacy of *Oliphant*. If states are recognized as having jurisdiction exclusive of or concurrent with the federal government, then S. 1181 is the most promising vehicle for an effective solution, allowing, as it does, a specific, localized resolution in contrast to a general, national remedy to the threat imposed by non-Indian victimless offenses on the reservation.

111. Extradition is a subject area that has caused some controversy in Montana in the past. In State *ex rel.* Merrill v. Turtle, 413 F.2d 683, 686 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), it was held that where the tribal government had provided for extradition procedures, a state had no power to extradite an Indian from the reservation according to state law since that would impermissibly infringe upon tribal government in contravention of the *Williams v. Lee* test, 358 U.S. 217, 220 (1959). The Montana Supreme Court has narrowly interpreted and applied the holding of *Merrill*. In State *ex rel.* Old Elk v. District Ct., 170 Mont. 208, 552 P.2d 1394, 1398 (1976), the Montana court held that in the absence of tribal law and federal regulations pertaining to extradition of a reservation Indian, an arrest could be made on the reservation by a state officer pursuant to a state arrest warrant despite the refusal of a tribal judge to issue a tribal court order for the arrest of the person sought. The Crow Tribe subsequently adopted a tribal ordinance governing extradition procedures. *See* Rule 26, Law and Order Code of the Crow Tribe.