

**Location of the Criminal Conduct**

Federal law, including court precedent, recognizes the jurisdiction of tribal courts over certain criminal offenses *when those offenses occur in “Indian country”*, a phrase defined in federal statute, 18 U.S.C. §1151. The settlement and implementing acts governing the federally recognized tribes in Maine recognize the jurisdiction of tribal courts over certain criminal offenses that occur on the Passamaquoddy or Penobscot Indian reservations or on Houlton Band Jurisdiction Land.

| Default Federal Indian Law <sup>1</sup>   | Law Currently Applied in Maine   |
|---|--|
| <p><u>Land over which tribal courts have specific, limited criminal jurisdiction:</u></p> <p>“ . . .the term “Indian country” . . . means</p> <p>(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent<sup>2</sup> and, including rights-of-way running through the reservation,</p> <p>(b) all dependent Indian communities<sup>3</sup> within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and</p> <p>(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”<sup>4</sup></p> | <p><u>Land over which tribal courts have specific, limited criminal jurisdiction:</u></p> <ul style="list-style-type: none"> <li>• The Passamaquoddy Tribal Court has jurisdiction over certain criminal and juvenile offenses (see chart below) “committed on the reservation of the Passamaquoddy Tribe”<sup>5</sup> or, potentially, the “extended reservation” of the tribe.<sup>6</sup></li> <li>• The Penobscot Nation Tribal Court has jurisdiction over certain criminal and juvenile offenses (see chart below) “committed on the Indian reservation of the Penobscot Nation”<sup>7</sup> or, potentially, the tribe’s “extended reservation.”<sup>8</sup></li> <li>• The Houlton Band of Maliseet Indians Tribal Court has jurisdiction over certain criminal and juvenile offenses (see chart below) “committed on the Houlton Band Jurisdiction Land.”<sup>9</sup></li> </ul> <p>The Micmac Settlement Act does not authorize / recognize the authority of the Aroostook Band of Micmacs to establish a tribal court.<sup>10</sup></p> |

<sup>1</sup> The “Default Federal Indian Law” set forth in this document is the federal law governing criminal jurisdiction that applies in states or portions of states that are not subject to a contradictory treaty provision, subject to a contradictory federal statute (for example, a land claims settlement act) or subject to Public Law 280.

<sup>2</sup> In general, “even land owned by non-Indians in fee simple (i.e., where there has been ‘issuance of any patent’) is still ‘Indian country’ if it is within the exterior boundaries of an Indian reservation in the United States.” CANBY, WILLIAM C., JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 141 (6th ed. 2015).

<sup>3</sup> To qualify as a “dependent Indian communit[y]”, the land “first . . . must have been set aside by the Federal Government for the use of the Indians as Indian land; second . . . must be under federal superintendence.” *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998); see CANBY, *supra* note 2, at 147.

<sup>4</sup> 18 U.S.C. §1151 (original statute is written as a single paragraph and has been reformatted above).

<sup>5</sup> *Act to Implement the Maine Indian Claims Settlement* (hereinafter “*Maine Implementing Act*”), 30 M.R.S.A. §6209-A(1)(A), (B); see also §6203(5) (defining “Passamaquoddy Indian Reservation”).

<sup>6</sup> MITSC has the authority to recommend that the Legislature designate as an “extended reservation” the land on which “25 or more adult members of the Passamaquoddy Tribe resid[e] within their Indian territory and in reasonable proximity to each other.” *Maine Implementing Act*, 30 M.R.S.A. §6209-A(5). If both the Legislature and relevant tribe approve, Passamaquoddy Tribal Court’s jurisdiction under the *Maine Implementing Act* may be amended to include the “extended reservation.” *Id.*

<sup>7</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-B(1)(A), (B) §6203(8) (defining “Penobscot Indian Reservation”); see also §6203(8) (defining “Penobscot Indian Reservation”).

<sup>8</sup> MITSC has the authority to recommend that the Legislature designate as an “extended reservation” the land on which “25 or more adult members of the Penobscot Nation resid[e] within their Indian territory and in reasonable proximity to each other.” *Maine Implementing Act*, 30 M.R.S.A. §6209-B(5). If both the Legislature and relevant tribe approve, Penobscot Nation Tribal Court’s jurisdiction under the *Maine Implementing Act* may be amended to include the “extended reservation.” *Id.*

§6209-B(5).

<sup>9</sup> “Houlton Band Jurisdiction Land” is a specific subset of the Houlton Band Trust Land; the band may request that additional trust land be included in the future. See 30 M.R.S.A. §6209-C(5).

<sup>10</sup> *The Micmac Settlement Act*, 30 M.R.S.A. §§7201 to 7207.

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**Court Criminal Jurisdiction**

| Court                                   | Defendant/Victim  | Default Federal Indian Law <sup>1</sup>  | Law Currently Applied in Maine (MICA/MIA)   | Task Force Consensus |
|---|---|--|---|----------------------|
| <p><b>Tribal Court<sup>11</sup></b></p> | <p><i>Indian defendant &amp; Indian victim or victimless crimes</i></p> | <p>Possibly<sup>12</sup> concurrent jurisdiction (with federal courts) over “<b>major crimes</b>”<sup>13</sup> committed against an Indian victim.</p> <p>Exclusive jurisdiction over <b>other crimes</b> committed against an Indian victim.<sup>14</sup></p> <p>Jurisdiction (possibly exclusive, possibly concurrent w/federal courts) over <b>victimless crimes</b>.<sup>15</sup></p> <p><i>Defendant:</i> Indian defendant need not be a member of specific tribe with jurisdiction.<sup>16</sup></p> <p><i>Penalties:</i> Maximum penalty that may be imposed for “any 1 offense”:</p> <ul style="list-style-type: none"> <li>• \$5,000 fine and 1-year imprisonment<sup>17</sup>; or</li> <li>• \$15,000 fine and 3-years imprisonment <b>if</b> certain due process protections are observed<sup>18</sup> and defendant has previously been convicted of a comparable offense</li> </ul> | <p><u>Passamaquoddy Tribal Court:</u> Exclusive jurisdiction over crimes if:</p> <ul style="list-style-type: none"> <li>• <i>Location:</i> on Passamaquoddy Indian Reservation;</li> <li>• <i>Penalties:</i> maximum potential penalty for offense is \$5,000 fine &amp; &lt; 1-year imprisonment; and</li> <li>• <i>Defendant and victim:</i> each a member of the Passamaquoddy Tribe, Houlton Band of Maliseet Indians, or Penobscot Nation <u>or</u> defendant is such a member and it is a victimless crime.<sup>21</sup></li> </ul> <p><i>Juveniles:</i> if court has jurisdiction over an offense committed by an adult, its jurisdiction extends to juveniles. Court also has jurisdiction over juvenile victimless crimes involving drugs and alcohol.<sup>22</sup></p> <p><u>Penobscot Nation Tribal Court:</u> Exclusive jurisdiction over crimes if:</p> <ul style="list-style-type: none"> <li>• <i>Location:</i> on Penobscot Indian Reservation;</li> <li>• <i>Penalties:</i> maximum potential penalty for offense is \$5,000 fine &amp; &lt; 1-year imprisonment; and</li> </ul> |                      |

<sup>11</sup> The *Indian Civil Rights Act* requires tribal courts to protect a criminal defendant’s rights “to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor” and to hire counsel. 25 U.S.C. §1302(a). The *Maine Implementing Act* incorporates these protections. 30 M.R.S.A. §6209-A(2) (Passamaquoddy Tribal Court); §6209-B(2) (Penobscot Nation Tribal Court), §6209-C(4) (Houlton Band of Maliseet Indians Tribal Court).

<sup>12</sup> CANBY, *supra* note 2, at 191 (noting the U.S. Supreme Court has not yet addressed whether tribes retain concurrent jurisdiction over major crimes after enactment of the *Major Crimes Act*, 18 U.S.C. §1153, which gave federal courts jurisdiction over the enumerated major crimes when committed by one Indian against another Indian); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §9.04 (Neil Jessup Newton ed., 2012) (hereinafter “COHEN”) (same).

<sup>13</sup> *Major Crimes Act*, 18 U.S.C. §1153 (applicable to “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [sexual abuse], incest, a felony under section 113 [aggravated assault], an assault against [a victim <16 years old], felony child abuse or neglect, arson, burglary, robbery and a felony under section 661 [theft]”).

<sup>14</sup> CANBY, *supra* note 2, at 190; COHEN, *supra* note 12, at §9.04.

<sup>15</sup> CANBY, *supra* note 2, at 190 (“[V]ictimless crimes by Indians are matters wholly internal to the tribes....”). *But see* footnote 43 regarding potential concurrent federal jurisdiction.

<sup>16</sup> CANBY, *supra* note 2, at 190 (citing 25 U.S.C. §1301(2)); COHEN, *supra* note 12, at §9.04 (same).

<sup>17</sup> 25 U.S.C. §1302(a)(7)(B).

<sup>18</sup> 25 U.S.C. §1302(a)(7)(C); §1302(c) (required due process protections to impose >1-year sentence: effective assistance of counsel; if defendant is indigent, free counsel by licensed attorney; presiding judge with sufficient legal training and law license; record of the proceeding; and public availability of the tribe’s criminal laws and court rules prior to charging of defendant).

<sup>21</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-A(1)(A).

<sup>22</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-A(1)(B).

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|  |  | <p>or if the crime would be punishable by &gt;1-year imprisonment under federal law. Maximum penalty that may be imposed in “a criminal proceeding”: 9-yrs. imprisonment.<sup>19</sup></p> <p><i>Juveniles:</i> if tribal court has jurisdiction over an offense committed by an adult, its jurisdiction extends to juveniles.<sup>20</sup></p> | <ul style="list-style-type: none"> <li>• <i>Defendant and victim:</i> each a member of “any federally recognized Indian tribe, nation, band or other group” or defendant is such a member and it is a victimless crime.<sup>23</sup></li> </ul> <p><i>Juveniles:</i> if court has jurisdiction over an offense committed by an adult, its jurisdiction extends to juveniles. Court also has jurisdiction over juvenile victimless crimes involving drugs and alcohol.<sup>24</sup></p> <p><u>Houlton Band of Maliseet Indians Tribal Court:</u> May choose<sup>25</sup> to exercise exclusive jurisdiction over crimes:</p> <ul style="list-style-type: none"> <li>• <i>Location:</i> on Houlton Band Jurisdiction Land; and</li> <li>• <i>Penalties:</i> maximum potential penalty for offense is \$5,000 fine &amp; &lt; 1-year imprisonment; and</li> <li>• <i>Defendant and victim:</i> one of the following is true:             <ul style="list-style-type: none"> <li>➤ Each is a member of the Houlton Band of Maliseet Indians or the defendant is such a member and it is a victimless crime;<sup>26</sup> or</li> <li>➤ Potentially jurisdiction when victim and defendant are each a member of Passamaquoddy Tribe, Penobscot Nation or Houlton Band of Maliseet Indians (unclear if victimless crimes are included when the defendant is a Passamaquoddy or Penobscot member).<sup>27</sup></li> </ul> </li> </ul> |  |
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<sup>19</sup> 25 U.S.C. §1302(a)(7)(D).

<sup>20</sup> Cf. CANBY, *supra* note 2 at 195; COHEN, *supra* note 12, at §9.04 n.18. For more information regarding the myriad issues attendant to the exercise of jurisdiction over juvenile Indian defendants, see Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 90 (2016).

<sup>23</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-B(1)(A).

<sup>24</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-A(1)(B).

<sup>25</sup> This chart lists the *potential* criminal jurisdiction of the Houlton Band of Maliseet Indians Tribal Court. The State retains jurisdiction over these offenses until the tribe decides to exercise this jurisdiction; the tribe also has authority to terminate or reassert this jurisdiction at any time. §6209-C(1), (1-A), (1-B) (final, unnumbered paragraphs).

<sup>26</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-C(1)(A) (Houlton Band of Maliseet Indians Tribal Court has jurisdiction over crimes “committed . . . by a member of the Houlton Band of Maliseet Indians, except when committed against a person [or the person’s property] who is not a member of the Houlton Band of Maliseet Indians.”).

<sup>27</sup> Under §6209-C(1-A)(A) of the *Maine Implementing Act*, the Houlton Band of Maliseet Indians Tribal Court has jurisdiction over crimes,

committed on the Houlton Band Jurisdiction Land by a member of the Penobscot Nation *against* a member or property of a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians *under this subsection*, and by a member of those federally recognized Indian tribes otherwise subject to the exclusive jurisdiction of the Houlton Band of Maliseet Indians *under this subsection* against a member or the property of a member of the Penobscot Nation. (Emphasis added.)

Because the relevant *subsection*, §6209-C(1-A), only expressly subjects *members of the Penobscot Nation* to the jurisdiction of the Houlton Band of Maliseet Indians Tribal Court, a literal reading of the statutory language requires both defendant and victim to be members of the Penobscot Nation. Similar language is employed in §6209-C(1-B)(A) regarding the Houlton Band of

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|  |   |   | <i>Juveniles</i> : if court has jurisdiction over an offense committed by an adult, its jurisdiction extends to juveniles. Court also has jurisdiction over juvenile victimless crimes involving drugs and alcohol. <sup>28</sup>   |  |
|  | <i>Indian defendant &amp; Non-Indian victim</i> | Unclear if concurrent jurisdiction (with federal courts) over “ <b>major crimes</b> ” exists. <sup>29</sup><br>Clear concurrent jurisdiction (with federal courts) over <b>other crimes</b> . <sup>30</sup>   | No tribal jurisdiction. <sup>31</sup>   |  |
|  | <i>Non-Indian defendant &amp; Indian victim</i> | Generally, tribal courts lack jurisdiction over non-Indian defendants. <sup>32</sup><br><u>VAWA Exception</u> : Concurrent jurisdiction (with state or federal courts) over: <ul style="list-style-type: none"> <li>• <i>Offense</i>: domestic or dating violence, and certain protection order violations;</li> <li>• <i>Defendant and victim</i>:                         <ul style="list-style-type: none"> <li>➢ non-Indian defendant resides or is employed in the tribe’s Indian country <u>or</u> is the spouse, intimate partner or dating partner of a tribal member or Indian residing in tribe’s Indian country; <u>and</u></li> <li>➢ victim: is an Indian.</li> </ul> </li> <li>• <i>Penalties/due process</i>: maximum penalties and due process protections outlined above for crimes by Indian</li> </ul> | No tribal jurisdiction. <sup>31</sup><br><b>Note</b> : If enacted, LD 766 (as amended) <sup>34</sup> would expand tribal court criminal jurisdiction as follows:<br>(1) The Passamaquoddy Tribal Court and Penobscot Nation Tribal Court would have the choice whether to exert concurrent jurisdiction (with State courts) over: <ul style="list-style-type: none"> <li>• <i>Offense</i>: adult (non-juvenile) Class D domestic violence offenses and protection order violations;</li> <li>• <i>Defendant</i>: not member of federally recognized tribe;</li> <li>• <i>Victim</i>: member of a federally recognized tribe, nation, band or other group;</li> <li>• <i>Penalties</i>: <i>maximum</i> potential penalties for the offense must not exceed \$2,000 fine or 1-year imprisonment;</li> <li>• <i>Due process</i>: must have a representative jury (same language as VAWA) <u>and</u> a unanimous jury verdict.</li> </ul> |  |

Maliseet Indians Tribal Court’s criminal jurisdiction over members of the Passamaquoddy Tribe. Yet, the structure of these provisions suggests that the Legislature may have intended to grant the court criminal jurisdiction over crimes committed by a member of any one of these three tribes against another member of any one of these three tribes. (This interpretation would match the literal language of the statutes if the word “section” replaced the word “subsection” in §6209-C(1-A) and (1-B).) There are no court cases addressing this issue, however.

In addition, unlike the other tribal court statutes in the *Maine Implementing Act*, §6209-C(1-A)(A) and (1-B)(A) require that the offense be committed “against” an identified class of Indians for tribal court jurisdiction to attach. A literal reading of this language excludes jurisdiction over victimless crimes when the defendant is a Penobscot or Passamaquoddy member. Similar language in the federal *General Crimes Act*, 25 U.S.C. §1152, has resulted in uncertainty whether tribal jurisdiction is nevertheless retained over “victimless crimes.” See footnote 43.

<sup>28</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-C(1)(B); (1-A)(B); (1-B)(B).

<sup>29</sup> CANBY, *supra* note 2, at 190-91; COHEN, *supra* note 12, at §9.04 (noting that the U.S. Supreme Court “has not addressed the issue” and lower courts have “arrived at different conclusions”).

<sup>30</sup> CANBY, *supra* note 2, at 190 (observing that the *General Crimes Act*, 25 U.S.C. §1152, expressly recognizes tribal concurrent jurisdiction by granting federal jurisdiction over non-major offenses committed by Indians against non-Indians in Indian country, but excluding federal jurisdiction if the Indian defendant has already “been punished by the local law of the tribe”).

<sup>31</sup> *Maine Indian Claims Settlement Act of 1980*, 25 U.S.C. §1725(a); *Maine Implementing Act*, 30 M.R.S.A. §6204.

<sup>32</sup> CANBY, *supra* note 2, at 195 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)); COHEN, *supra* note 12, at §9.04 (same). Tribal courts likely have the power to control decorum and punish disruptive non-Indian litigants through the criminal contempt power, however. CANBY, *supra* note 2, at 195; COHEN, *supra* note 12, at §9.04.

<sup>34</sup> LD 766, as amended by Committee Amend. “A” (H-648) & House Amend. “A” (H-655). This bill passed both chambers of the Maine Legislature and is awaiting action by the Governor.

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|                     |   | defendants apply and, if imprisonment is imposed, there must be a representative jury ( <i>i.e.</i> , a jury that includes non-Indians). <sup>33</sup> | (2) Judiciary Committee may report out legislation to give Penobscot & Passamaquoddy tribes jurisdiction over “crimes other than Class D and E crimes” consistent with 25 U.S.C. §1302 & §1304 (VAWA Reauth. of 2013).  |  |
|                     | <i>Non-Indian defendant &amp; Non-Indian victim or victimless</i> | No tribal jurisdiction. <sup>32</sup>  | No tribal jurisdiction. <sup>31</sup>   |  |
| <b>State Courts</b> | <i>Indian defendant &amp; Indian victim or victimless crimes</i>  | No state jurisdiction. <sup>35</sup>   | Except for offenses in exclusive jurisdiction of a tribal court as set forth above, State courts have jurisdiction over all non-federal adult crimes and juvenile crimes. <sup>36</sup> <ul style="list-style-type: none"> <li><i>Exception to tribal court exclusive jurisdiction:</i> a State court may enter a conviction involving a crime that is within the exclusive jurisdiction of a tribal court if the crime is a lesser-included offense of a crime charged in State court.<sup>37</sup></li> </ul> |  |
|                     | <i>Indian defendant &amp; Non-Indian victim</i>                   | No state jurisdiction. <sup>35</sup>   | Exclusive state jurisdiction. <sup>36</sup>   |  |
|                     | <i>Non-Indian defendant &amp; Indian victim</i>                   | No state jurisdiction. <sup>38</sup>   | Exclusive state jurisdiction. <sup>36</sup>   |  |
|                     | <i>Non-Indian defendant &amp; Non-Indian victim or no victim</i>  | Exclusive state jurisdiction. <sup>39</sup>  | Exclusive state jurisdiction. <sup>36</sup>   |  |

<sup>33</sup> *Violence Against Women Reauthorization Act of 2013*, 25 U.S.C. §1304; CANBY, *supra* note 2, at 196-97; COHEN, *supra* note 12, at §9.02[3][d] (Supp. 2017).

<sup>35</sup> CANBY, *supra* note 2, at 200-01 (“States traditionally have no criminal jurisdiction in Indian country over crimes by Indians against anyone . . .”).

<sup>36</sup> *Maine Indian Claims Settlement Act of 1980*, 25 U.S.C. §1725(a); *Maine Implementing Act*, 30 M.R.S.A. §6204. State courts do not have jurisdiction, however, over general federal criminal statutes—for example, theft from the U.S. mail. See footnote 40.

<sup>37</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-A(3); §6209-B(3); §6209-C(3).

<sup>38</sup> CANBY, *supra* note 2, at 170 (“Crimes . . . by non-Indians against Indians are punishable exclusively by the federal government. *Williams v. United States*, 327 U.S. 711 (1946).”).

<sup>39</sup> CANBY, *supra* note 2, at 199-200, 203 (citing *United States v. McBratney*, 104 U.S. 621 and *Draper v. United States*, 164 U.S. 240 (1896)); COHEN, *supra* note 12, at §9.03[1].

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| <b>Federal Courts</b> | <i>All defendants (victim irrelevant)</i>                        | Exclusive jurisdiction over “general federal criminal statutes that are effective throughout the nation” and that apply “to all persons, whether or not Indian.” <sup>40</sup>   | Same as default federal Indian law (not abrogated in settlement or implementing acts). |  |
|                       | <i>Indian defendant &amp; Indian victim or victimless crimes</i> | Concurrent jurisdiction (with tribes), over “ <b>major crimes</b> ” committed against an Indian victim. <sup>41</sup><br>No jurisdiction over <b>other crimes</b> committed against Indian victims. <sup>42</sup><br>Unclear whether jurisdiction exists over <b>victimless crimes</b> committed by Indians. <sup>43</sup> | No federal jurisdiction. <sup>44</sup>   |  |
|                       | <i>Indian defendant &amp; Non-Indian victim</i>                  | Jurisdiction over all crimes <u>unless</u> the Indian defendant has been “punished by the local law of the tribe.” <sup>45</sup>   | No federal jurisdiction. <sup>46</sup>   |  |
|                       | <i>Non-Indian defendant &amp; Indian victim</i>                  | Exclusive jurisdiction over all crimes. <sup>47</sup>  | No federal jurisdiction. <sup>46</sup>   |  |
|                       | <i>Non-Indian defendant &amp; Non-Indian victim or no victim</i> | No federal jurisdiction when victim is a non-Indian. <sup>48</sup><br>Unclear whether federal courts have jurisdiction when it is a victimless crime. <sup>49</sup>  | Same as default federal Indian law (not altered in settlement or implementing acts).   |  |

<sup>40</sup> CANBY, *supra* note 2, at 170 (noting these “general federal criminal statutes”—e.g., theft from the U.S. mail or gun possession crimes that involve interstate commerce—“apply in Indian country to all persons, whether or not Indian.”).

<sup>41</sup> *Major Crimes Act*, 18 U.S.C. §1153 (applicable to “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [sexual abuse], incest, a felony under section 113 [aggravated assault], an assault against [a victim <16 years old], felony child abuse or neglect, arson, burglary, robbery and a felony under section 661 [theft]. . .”).

<sup>42</sup> *General Crimes Act*, 18 U.S.C. §1152; CANBY, *supra* note 2, at 178, 203.

<sup>43</sup> Under the *General Crimes Act*, 25 U.S.C. §1152, a non-major crime “committed by one Indian *against* the person or property of another Indian” is excepted from federal court jurisdiction. A literal reading of §1152 thus requires an Indian victim for the exception to attach, rendering “victimless crimes” like traffic or public decency offenses subject to federal rather than tribal court jurisdiction. Although the U.S. Supreme Court rejected that strict reading in an adultery case, *United States v. Quiver*, 241 U.S. 602 (1916), and concluded tribes retained jurisdiction over that victimless offense, several lower federal courts reached the opposite conclusion for other victimless offenses. CANBY, *supra* note 2, at 178-80, 203; COHEN, *supra* note 12, at §9.02[1][c][iii].

<sup>44</sup> *Maine Indian Claims Settlement Act of 1980*, 25 U.S.C. §1725(c) (abrogating federal jurisdiction under the Major Crimes Act, 18 U.S.C. §1153, in the State of Maine).

<sup>45</sup> *General Crimes Act*, 18 U.S.C. §1152; CANBY, *supra* note 2, at 181, 203; COHEN, *supra* note 12, at §9.02[1][D][ii].

<sup>46</sup> *Maine Indian Claims Settlement Act of 1980*, 25 U.S.C. §1725(c) (abrogating federal jurisdiction under the General Crimes Act, 18 U.S.C. §1152, in the State of Maine).

<sup>47</sup> *General Crimes Act*, 18 U.S.C. §1152; CANBY, *supra* note 2, at 176, 203.

<sup>48</sup> CANBY, *supra* note 2, at 176, 203 (citing *United States v. McBratney*, 104 U.S. 621 (1881) and *Draper v. United States*, 164 U.S. 240 (1896)).

<sup>49</sup> CANBY, *supra* note 2, at 177, 203 (discussing lower court cases reaching different conclusions on this issue).

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|  | <i>Juvenile offenses</i> | Jurisdiction over offenses committed by a juvenile <u>if</u> (1) federal court would have jurisdiction over the offense if committed by an adult and (2) state court lacks jurisdiction or declines to exercise its jurisdiction. <sup>50</sup> | Same as default federal Indian law (not abrogated in settlement or implementing acts), but because federal courts lack criminal jurisdiction in Maine other than over generally applicable federal offenses, part (1) of the test will not be met for nearly all offenses. |  |
|--|--------------------------|---|--|--|

**Other issues related to criminal jurisdiction**

| Issue  | Default Federal Indian Law <sup>1</sup>   | Law Currently Applied in Maine (MICSA/MIA)   | Task Force Consensus |
|--|---|--|----------------------|
| <b>Legislative authority to define criminal offenses in Indian country</b> | <b>Tribal government</b> has legislative authority to define all crimes over which tribal court has exclusive or concurrent jurisdiction in Indian country (for example, crimes by an Indian against an Indian victim & VAWA crimes). <sup>51</sup> | <b>Tribal governments</b> generally lack authority to define crimes in Indian country. <sup>52</sup> <ul style="list-style-type: none"> <li><u>Exception:</u> Passamaquoddy Tribe and Penobscot Nation have “<i>exclusive</i> authority . . . to promulgate and enact ordinances regulating” the taking of wildlife within their respective Indian territories as well as the taking of fish in any pond of less than 10 acres of surface area within their respective Indian territories.<sup>53</sup> <i>See Fish &amp; Game chart.</i></li> </ul> |                      |
|  | <b>State legislatures</b> only have legislative authority to define the crimes within their court jurisdiction (crimes by a non-Indian against either a non-Indian victim or no victim).  | <b>Maine legislature:</b> except where a tribe or MITSC has exclusive authority to promulgate hunting/fishing ordinances (see row above and footnote 53) “[t]he definitions of the criminal offenses and juvenile crimes and the punishments applicable to those criminal offenses and juvenile crimes . . . are governed by the laws of the State.” <sup>54</sup>   |                      |

<sup>50</sup> 18 U.S.C. §5032; COHEN, *supra* note 12, at §9.02[1][e] n.71 (“Under the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. §§5031-5042, both the [*General Crimes Act* and the *Major Crimes Act*] can apply to the conduct of juveniles in Indian country.”).

<sup>51</sup> Cf. CANBY, *supra* note 2, at 181, 190.

<sup>52</sup> *Maine Indian Claims Settlement Act of 1980*, 25 U.S.C. §1725(a); *Maine Implementing Act*, 30 M.R.S.A. §6204.

<sup>53</sup> The *Maine Implementing Act* does not specify whether the hunting, trapping and fishing ordinances enacted by the Penobscot Nation and the Passamaquoddy Tribe may impose criminal penalties. 30 M.R.S.A. §6207(1). Several of the hunting and fishing ordinances enacted by the Passamaquoddy Tribe and Penobscot Nation do include criminal penalties, however. *See, e.g.,* [http://www.wabanaki.com/wabanaki\\_new/documents/American%20Eel%20Management%20Plan%20Part%205.pdf](http://www.wabanaki.com/wabanaki_new/documents/American%20Eel%20Management%20Plan%20Part%205.pdf) (last visited Oct. 1, 2019).

In addition, MITSC has “*exclusive* authority to promulgate fishing rules or regulations” on certain ponds and sections of river within the Penobscot or Passamaquoddy Indian territories. §6207(3). It is not clear whether the rules promulgated by MITSC are criminal or civil in nature because they do not include penalty provisions. *See* <https://www.mitsc.org/s/Rules-Fishing-on-Waters.pdf> (last visited Oct. 1, 2019).

<sup>54</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-A(2); §6209-B(2); §6209-C(2). *See also* 30 M.R.S.A. §6204; *Maine Indian Claims Settlement Act of 1980*, 25 U.S.C. §1725(a).

The information contained herein is summary information for discussion purposes only and does not represent the opinion of the Task Force, its individual members, or tribes.

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|------------------------|--|--|--|
|                        | <b>Congress</b> has legislative authority over Indian country. <sup>55</sup>   | <b>Congress</b> has legislative authority over Indian country but has waived applicability of several federal criminal laws to Maine. <sup>56</sup>  |  |
| <b>Double Jeopardy</b> | Under the dual sovereignty doctrine, successive prosecutions by a tribe, state and the federal government for the same conduct do not violate the Fifth Amendment to the U.S. Constitution. <sup>57</sup> <ul style="list-style-type: none"> <li><u>Exception</u>: by statute, an Indian defendant may not be prosecuted in federal court for a non-major crime committed against a non-Indian victim if the defendant has been punished under tribal law.<sup>58</sup></li> </ul> | Under the dual sovereignty doctrine, successive prosecutions by a tribe, state and the federal government for the same conduct do not violate the Fifth Amendment to the U.S. Constitution. <sup>57</sup> <p>In addition, successive prosecutions by the State and the tribes for the same conduct are specifically authorized by statute and do not violate double jeopardy prohibitions under the Maine constitution.<sup>59</sup></p> |  |

<sup>55</sup> See CANBY, *supra* note 2 at 176 (explaining that, when federal jurisdiction is based on the *General Crimes Act*, 18 U.S.C. §1152, the criminal laws of the state in which the offense was committed are borrowed to define the offenses and permissible sentences for any crime not defined under federal law); *id.* at 185 (explaining that, the *Major Crimes Act*, 18 U.S.C. §1135(b), borrows the criminal laws of the state in which the offense was committed to define the elements of the crime and potential punishments for any of the major crimes not defined by federal law).

<sup>56</sup> *Maine Indian Claims Settlement Act of 1980*, 25 U.S.C. §1725(c) (waiving criminal jurisdiction under several federal statutes, including the *General Crimes Act*, 18 U.S.C. §1152, and the *Major Crimes Act*, 18 U.S.C. §1153). In addition, under 25 U.S.C. §1735(b), the “provisions of any Federal law enacted after” October 10, 1980 “for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt application of the laws of the State of Maine . . . shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.”

<sup>57</sup> COHEN, *supra* note 12, at §9.05 (citing, for example, *United States v. Wheeler*, 435 U.S. 313 (1978)).

<sup>58</sup> *General Crimes Act*, 18 U.S.C. §1152; CANBY, *supra* note 2, at 181; COHEN, *supra* note 12, at §9.02[1][d][ii].

<sup>59</sup> *Maine Implementing Act*, 30 M.R.S.A. §6209-A(4); §6209-B(4); §6209-C(4); *Sate v. Mitchell*, 1998 ME 128, 712 A.2d 1033.