

SB BILL NO. 166

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INTRODUCED BY Zurnett

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE PENALTY FOR CRIMINAL MISCHIEF INVOLVING VANDALISM TO INCLUDE PUBLIC SPANKING ON THE BARE BUTTOCKS IN CERTAIN CASES; PRESCRIBING HOW THE PENALTY IS TO BE ADMINISTERED; CLARIFYING THAT SPANKING OF A CHILD BY A PARENT FOR DISCIPLINARY OR BEHAVIOR MODIFICATION PURPOSES DOES NOT CONSTITUTE PHYSICAL INJURY OR SEXUAL ABUSE IN DETERMINING CHILD ABUSE; ALLOWING TRANSFER TO CRIMINAL COURT OF PROSECUTION OF A YOUTH 12 YEARS OF AGE OR OLDER WHO COMMITS CRIMINAL MISCHIEF INVOLVING VANDALISM; AND AMENDING SECTIONS 41-3-102, 41-5-206, AND 45-6-101, MCA."

WHEREAS, the Legislature finds that acts of vandalism are acts of violence against society; and
WHEREAS, to reinforce the values of our people and their desire for a civil society that respects persons and property, the Legislature finds it appropriate to reintroduce corporal punishment and the accompanying public shaming as a public policy device to respond to acts of vandalism.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 45-6-101, MCA, is amended to read:
"45-6-101. Criminal mischief. (1) A person commits the offense of criminal mischief if the person knowingly or purposely:
(a) injures, damages, or destroys any property of another or public property without consent;
(b) without consent tampers with property of another or public property so as to endanger or interfere with persons or property or its use;
(c) damages or destroys property with the purpose to defraud an insurer; or
(d) fails to close a gate previously unopened ~~which~~ that the person has opened, leading ~~in~~ into or out of any enclosed premises. This does not apply to gates located in cities or towns.
(2) A person convicted of criminal mischief must be ordered to make restitution in an amount and manner to be set by the court. The court shall determine the manner and amount of restitution after full

1 consideration of the convicted person's ability to pay the restitution. Upon good cause shown by the
2 convicted person, the court may modify any previous order specifying the amount and manner of
3 restitution. Full payment of the amount of restitution ordered must be made prior to the release of state
4 jurisdiction over the person convicted.

5 (3) A person convicted of the offense of criminal mischief shall be fined an amount not to exceed
6 \$500 or be imprisoned in the county jail for ~~any~~ a term not to exceed 6 months, or both. If the offender
7 commits the offense of criminal mischief and causes pecuniary loss in excess of \$500, injures or kills a
8 commonly domesticated hoofed animal, or causes a substantial interruption or impairment of public
9 communication, transportation, supply of water, gas, or power, or other public services, the offender shall
10 be fined an amount not to exceed \$50,000 or be imprisoned in the state prison for ~~any~~ a term not to
11 exceed 10 years, or both.

12 (4) (a) In addition to the penalties imposed in subsection (3), a person 12 years of age or older who
13 is convicted of criminal mischief involving an act of vandalism for a first or subsequent offense in violation
14 of subsection (4)(a)(ii) or for a second or subsequent offense in violation of subsection (4)(a)(i) is subject
15 to public spanking on the bare buttocks in the manner described in subsection (4)(b). As used in this
16 subsection (4), "act of vandalism" means:

17 (i) an act committed without the written authority of an authorized officer or representative of the
18 state in the case of public property or without the written consent of the owner or occupant in the case
19 of private property, including:

20 (A) writing, drawing, painting, marking, or inscribing on public or private property any word, slogan,
21 caricature, drawing, mark, or symbol;

22 (B) affixing, posting, or displaying on public or private property any poster, placard, advertisement,
23 bill, notice, paper, or other document; and

24 (C) hanging, suspending, hoisting, affixing, or displaying on or from public or private property any
25 flag, banner, bunting, or standard bearing a word, slogan, caricature, drawing, mark, or symbol; or

26 (ii) stealing, destroying, or damaging public property.

27 (b) Upon a finding of guilt of criminal mischief involving an act of vandalism, the jury by unanimous
28 vote in cases of a trial by jury or the judge in a nonjury trial shall decide whether public spanking on the
29 bare buttocks will occur and the number of strokes to be inflicted. The sheriff of the county in which the
30 trial occurred or a designee of the sheriff shall conduct the spanking in a public place at or near the location

1 where the offense occurred or on private property if permitted by the property owner. The sheriff shall
 2 publish a public notice in a newspaper in the jurisdiction where the offense occurred for 3 consecutive days
 3 preceding the date of punishment. The notice must include the name of the offender, the time and place
 4 of the spanking, and a summary of the offense. The offender shall reimburse the sheriff for expenses
 5 associated with administration of the spanking, including any costs associated with publication of the
 6 notice.

7 ~~(4)~~(5) Amounts involved in acts of criminal mischief committed pursuant to a common
 8 scheme or the same transaction, whether against the public or the same person or several persons, may
 9 be aggregated in determining pecuniary loss."

10
 11 **Section 2.** Section 41-3-102, MCA, is amended to read:

12 **"41-3-102. Definitions.** As used in this chapter, the following definitions apply:

13 (1) "A person responsible for a child's welfare" means:

14 (a) the child's parent, guardian, or foster parent;

15 (b) a staff person providing care in a day-care facility;

16 (c) an employee of a public or private residential institution, facility, home, or agency; or

17 (d) any other person legally responsible for the child's welfare in a residential setting.

18 (2) "Abused or neglected" means the state or condition of a child who has suffered child abuse
 19 or neglect.

20 (3) (a) "Adequate health care" means any medical care, including the prevention of the withholding
 21 of medically indicated treatment or medically indicated psychological care permitted or authorized under
 22 state law.

23 (b) This chapter may not be construed to require or justify a finding of child abuse or neglect for
 24 the sole reason that a parent, due to religious beliefs, does not provide medical care for a child. However,
 25 this chapter may not be construed to limit the administrative or judicial authority of the state to ensure that
 26 medical care is provided to the child when there is imminent or substantial risk of harm to the child.

27 (c) The term does not include self-defense, defense of others, or action taken to prevent the child
 28 from self-harm that does not constitute harm to a child's health or welfare.

29 (4) "Child" or "youth" means any person under 18 years of age.

30 (5) (a) "Child abuse or neglect" means:

- 1 (i) harm to a child's health or welfare; or
2 (ii) threatened harm to a child's health or welfare.
- 3 (b) The term includes harm or threatened harm to a child's health or welfare by the acts or
4 omissions of a person responsible for the child's welfare.
- 5 (6) "Department" means the department of public health and human services provided for in
6 2-15-2201.
- 7 (7) "Harm to a child's health or welfare" means the harm that occurs whenever the parent or other
8 person responsible for the child's welfare:
- 9 (a) inflicts or allows to be inflicted upon the child physical or mental injury;
10 (b) commits or allows to be committed sexual abuse or exploitation of the child;
11 (c) induces or attempts to induce a child into giving untrue testimony that the child or another child
12 was abused or neglected by a parent or person responsible for the child's welfare;
13 (d) causes failure to thrive or otherwise fails to supply the child with adequate food or fails to
14 supply clothing, shelter, education, or adequate health care, though financially able to do so or offered
15 financial or other reasonable means to do so;
16 (e) abandons the child by leaving the child under circumstances that make reasonable the belief
17 that the parent or other person does not intend to resume care of the child in the future or willfully
18 surrenders physical custody for a period of 6 months and during that period does not manifest to the child
19 and the person having physical custody of the child a firm intention to resume physical custody or to make
20 permanent legal arrangements for the care of the child; or
21 (f) is unknown and has been unknown for a period of 90 days and reasonable efforts to identify
22 and locate the parents have failed.
- 23 (8) "Limited emancipation" means a status conferred on a youth by a court after a dispositional
24 hearing in accordance with 41-3-406 under which the youth is entitled to exercise some but not all of the
25 rights and responsibilities of a person who is 18 years of age or older.
- 26 (9) "Mental injury" means an identifiable and substantial impairment of the child's intellectual or
27 psychological functioning.
- 28 (10) "Parent" means a biological or adoptive parent or stepparent.
- 29 (11) (a) "Physical injury" means death, permanent or temporary disfigurement, or impairment of
30 any bodily organ or function. The term includes death, permanent or temporary disfigurement, and

1 impairment of a bodily organ or function sustained as a result of excessive corporal punishment.

2 (b) The term does not include spanking of a child by a parent for disciplinary or behavior
3 modification purposes.

4 (12) (a) "Sexual abuse" means the commission of sexual assault, sexual intercourse without
5 consent, indecent exposure, deviate sexual conduct, or incest, as described in Title 45, chapter 5, part 5.

6 (b) Sexual abuse does not include any necessary touching of an infant's or toddler's genital area
7 while attending to the sanitary or health care needs of that infant or toddler by a parent. Sexual abuse does
8 not include spanking of a child by a parent for disciplinary or behavior modification purposes.

9 (13) "Sexual exploitation" means allowing, permitting, or encouraging a child to engage in a
10 prostitution offense, as described in 45-5-601 through 45-5-603, or allowing, permitting, or encouraging
11 sexual abuse of children as described in 45-5-625.

12 (14) "Social worker" means an employee of the department who, prior to the employee's field
13 assignment, has been educated or trained or is receiving education or training in a program of social work
14 or a related field that includes cognitive and family systems treatment or who has equivalent verified
15 experience or verified training in the investigation of child abuse, neglect, and endangerment. This definition
16 does not apply to any provision of this code that is not in this chapter.

17 (15) "Threatened harm to a child's health or welfare" means substantial risk of harm to the child's
18 health or welfare.

19 (16) (a) "Withholding of medically indicated treatment" means the failure to respond to an infant's
20 life-threatening conditions by providing treatment, including appropriate nutrition, hydration, and
21 medication, that, in the treating physician's or physicians' reasonable medical judgment, will be most likely
22 to be effective in ameliorating or correcting the conditions.

23 (b) The term does not include the failure to provide treatment, other than appropriate nutrition,
24 hydration, or medication, to an infant when, in the treating physician's or physicians' reasonable medical
25 judgment:

26 (i) the infant is chronically and irreversibly comatose;

27 (ii) the provision of treatment would:

28 (A) merely prolong dying;

29 (B) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

30 (C) otherwise be futile in terms of the survival of the infant; or

1 (iii) the provision of treatment would be virtually futile in terms of the survival of the infant and the
2 treatment itself under the circumstances would be inhumane. For purposes of this subsection (16), "infant"
3 means an infant less than 1 year of age or an infant 1 year of age or older who has been continuously
4 hospitalized since birth, who was born extremely prematurely, or who has a long-term disability. The
5 reference to less than 1 year of age may not be construed to imply that treatment should be changed or
6 discontinued when an infant reaches 1 year of age or to affect or limit any existing protections available
7 under state laws regarding medical neglect of children over 1 year of age.

8 (17) "Youth in need of care" means a youth who is abused or neglected."
9

10 **Section 3.** Section 41-5-206, MCA, is amended to read:

11 **"41-5-206. Transfer to criminal court prior to prosecution.** (1) After a petition has been filed
12 alleging delinquency, the court may, upon motion of the county attorney, before hearing the petition on its
13 merits, transfer the matter of prosecution to the district court if:

14 (a) (i) the youth charged was 12 years of age or ~~more~~ older at the time of the conduct alleged to
15 be unlawful and the unlawful act would constitute sexual intercourse without consent as defined in
16 45-5-503, criminal mischief involving an act of vandalism as defined in 45-6-101(4), deliberate homicide
17 as defined in 45-5-102, mitigated deliberate homicide as defined in 45-5-103, or the attempt, as defined
18 in 45-4-103, of either deliberate or mitigated deliberate homicide if the act had been committed by an adult;
19 or

20 (ii) the youth charged was 16 years of age or ~~more~~ older at the time of the conduct alleged to be
21 unlawful and the unlawful act is one or more of the following:

22 (A) negligent homicide as defined in 45-5-104;

23 (B) arson as defined in 45-6-103;

24 (C) aggravated or felony assault as defined in 45-5-202;

25 (D) robbery as defined in 45-5-401;

26 (E) burglary or aggravated burglary as defined in 45-6-204;

27 (F) aggravated kidnapping as defined in 45-5-303;

28 (G) possession of explosives as defined in 45-8-335;

29 (H) criminal sale of dangerous drugs as defined in 45-9-101;

30 (I) criminal production or manufacture of dangerous drugs as defined in 45-9-110;

1 (J) attempt, as defined in 45-4-103, of any of the acts enumerated in subsections (1)(a)(ii)(A)
2 through (1)(a)(ii)(I);

3 (b) a hearing on whether the transfer should be made is held in conformity with the rules on a
4 hearing on a petition alleging delinquency, except that the hearing must be conducted by the youth court
5 without a jury;

6 (c) notice in writing of the time, place, and purpose of the hearing is given to the youth, the
7 youth's counsel, and the youth's parents, guardian, or custodian at least 10 days before the hearing; and

8 (d) the court finds upon the hearing of all relevant evidence that there is probable cause to believe
9 that:

10 (i) the youth committed the delinquent act alleged;

11 (ii) the seriousness of the offense and the protection of the community require treatment of the
12 youth beyond that afforded by juvenile facilities; and

13 (iii) the alleged offense was committed in an aggressive, violent, or premeditated manner.

14 (2) In transferring the matter of prosecution to the district court, the court may also consider the
15 following factors:

16 (a) the sophistication and maturity of the youth, determined by consideration of the youth's home,
17 environmental situation, and emotional attitude and pattern of living;

18 (b) the record and previous history of the youth, including previous contacts with the youth court,
19 law enforcement agencies, youth courts in other jurisdictions, prior periods of probation, and prior
20 commitments to juvenile institutions. However, lack of a prior juvenile history with youth courts is not of
21 itself grounds for denying the transfer.

22 (3) The court shall grant the motion to transfer if the youth was 16 years ~~old~~ of age or older at the
23 time of the conduct alleged to be unlawful and the unlawful act would constitute deliberate homicide as
24 defined in 45-5-102, mitigated deliberate homicide as defined in 45-5-103, or the attempt, as defined in
25 45-4-103, of either deliberate or mitigated deliberate homicide if the act had been committed by an adult.

26 (4) Upon transfer to district court, the judge shall make written findings of the reasons why the
27 jurisdiction of the youth court was waived and the case transferred to district court.

28 (5) The transfer terminates the jurisdiction of the youth court over the youth with respect to the
29 acts alleged in the petition. A youth may not be prosecuted in the district court for a criminal offense
30 originally subject to the jurisdiction of the youth court unless the case has been transferred as provided in

1 this section. A case may be transferred to district court after prosecution as provided in 41-5-208 or
2 41-5-1105.

3 (6) Upon order of the youth court transferring the case to the district court under subsection (5),
4 the county attorney shall file the information against the youth without unreasonable delay.

5 (7) Any offense not enumerated in subsection (1) that arises during the commission of a crime
6 enumerated in subsection (1) may be:

7 (a) tried in youth court;

8 (b) transferred to district court with an offense enumerated in subsection (1), upon motion of the
9 county attorney and order of the youth court judge.

10 (8) If a youth is found guilty in district court of any of the offenses transferred by the youth court
11 and is sentenced to the state prison, the commitment must be to the department of corrections. The
12 department shall confine the youth in whatever institution that it considers proper, including a state youth
13 correctional facility under the procedures of 52-5-111. However, a youth under 16 years of age may not
14 be confined in the state prison.

15 (9) A youth whose case is transferred to district court may not be detained or otherwise placed
16 in a jail or other adult detention facility before final disposition of the youth's case unless:

17 (a) alternative facilities do not provide adequate security; and

18 (b) the youth is kept in an area that provides physical, as well as sight and sound, separation from
19 adults accused or convicted of criminal offenses."

20 -END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0166, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act revising the penalty for criminal mischief involving vandalism to include public spanking on the bare buttocks in certain cases.

ASSUMPTIONS:

1. This legislation would widen the net of both adults and juveniles charged with criminal mischief involving an act of vandalism.
2. There were 162 youths adjudicated for felony criminal mischief in fiscal year 1993. This equates to a two-year average of 164 youths.
3. Misdemeanor criminal mischief youths numbered 1,158 and 1,115 for fiscal years 1993 and fiscal year 1994, respectively. This equates to a two-year average of 1,137.
4. Assume one-half of 1,137 and 164 (651) involved vandalism.
5. In fiscal year 1996, there were 90 adults sentenced to probation due to criminal mischief; assume one-half (45) involved vandalism.
6. The Department of Corrections assumes, in addition to the spankings, youth convictions of criminal mischief involving vandalism would increase by 50 percent $(651 * 1.50) = 326$; adult convictions would increase by 50 percent $(45 * 1.50) = 38$.
7. There would be 38 additional adult offenders per year placed on probation for 1 year in fiscal year 1998 and another 38 offenders would be placed on probation for one year in fiscal year 1999.
8. Fiscal year 1996 cost per day of adult probation was \$2.68.
9. Assume that of the additional 326 juvenile offenders each year, 25 percent (82) would be transferred to criminal court and placed on probation for a period of one year; the remaining 244 would be placed on probation for a period of one year.
10. There is no discernible impact to Department of Justice. To the extent the bill results in additional appeals of criminal mischief and vandalism cases to the Montana Supreme Court, it will impact the workload of the Legal Services Division, but that impact is impossible to quantify.
11. There is no fiscal impact to Department of Public Health and Human Services as a result of SB 166.
12. There is no fiscal impact to the state funded judiciary.
13. The existing databases at the Department of Commerce do not include information that define any fiscal impact to SB 166.

FISCAL IMPACT:

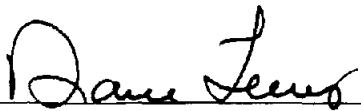
Department of Corrections:	<u>FY98</u>	<u>FY99</u>
<u>Expenditures:</u>	<u>Difference</u>	<u>Difference</u>
Operating Expenses	117,384	117,384
<u>Funding:</u>		
General Fund (01)	117,384	117,384

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

County expenditures would increase as county probation officers see their caseload increase statewide by these additional 244 juveniles.

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

Unable to determine.

 1-17-97
DAVID LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

JIM BURNETT, PRIMARY SPONSOR DATE
Fiscal Note for SB0166, as introduced

SB 166