

**STORAGE NAME:** h0327.cp  
**DATE:** March 16, 1997

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
CRIME AND PUNISHMENT  
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**BILL #:** HB 327

**RELATING TO:** Graffiti

**SPONSOR(S):** Representative Rojas

**STATUTE(S) AFFECTED:** Section 806.13, F.S.

**COMPANION BILL(S):** none

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) CRIME AND PUNISHMENT
- (2) CRIMINAL JUSTICE APPROPRIATIONS
- (3)
- (4)
- (5)

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**I. SUMMARY:**

This bill would allow local government to impose mandatory sentences for a violation of a graffiti related ordinance. Local graffiti related ordinances are presently preempted by State law, and, judges usually have discretion as to whether any jail, probation, or community service will be ordered.

The state statute relating to criminal mischief contains a provision which includes graffiti as criminal mischief. Graffiti must cause over 1,000 dollars in damage to be penalized as a felony. If the damage is between \$200 and \$1,000, then the offense is a first degree misdemeanor; and if the damage is under \$200, then the offense is a second degree misdemeanor. Judges have complete discretion to impose any sentence up to 60 days in jail for a second degree misdemeanor and up to 1 year in jail for a first degree misdemeanor.

It is not clear whether this bill would allow local ordinances to increase the penalty for offenses charged under state law, section 806.13, FS. Furthermore, it is not known whether the courts would allow local ordinances to enhance penalties for violations of state laws. The safest course would be to charge offenders under the local ordinance once the local ordinances are no longer preempted.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The statute generally prohibiting criminal mischief, section 806.13, Florida Statutes, contains a provision making the placement of graffiti illegal. An act must be committed willfully and maliciously to be penalized by this section. Malice is the willful destruction of property from actual ill will or resentment. J.R.S. v. State, 569 So. 2d 1323 (1st DCA 1990).

A person who willfully and maliciously places graffiti on property (or does any other type of criminal mischief) commits a misdemeanor of the second degree, punishable by up to 60 days in jail if the damage caused is \$200 or less. If the damage is between \$200 and \$1,000, then the offense is a first degree misdemeanor; and if the damage is over \$1000, then the offense is a third degree felony.

Preemption

Municipal and county ordinances are preempted from imposing penalties that exceed state penalties for similar or identical offenses. Thomas v. State, 614 So. 2d 468 (Fla. 1993). Preemption occurs when the legislature adopts a scheme for the regulation of a given subject; when the state law is adopted local control over the subject covered by state law terminates.

Section 806.13, F.S., gives a court discretion to impose any sentence allowed by the guidelines and the statutory maximum. (Sixty days in jail for a second degree misdemeanor.) Since State law does not impose a minimum penalty for graffiti, then local ordinances may not impose a minimum mandatory penalty unless the legislature passes a law expressly stating that the statute does not preempt local ordinances.

B. EFFECT OF PROPOSED CHANGES:

This bill terminates State preemption for graffiti related local ordinances: "cities and counties shall not be preempted by state statute from establishing higher penalties than those provided by state statute..."

After terminating State preemption in this area, the bill concludes by stating how the municipal ordinances are to be applied in a court proceeding:

In any proceeding to adjudicate an individual for violation of such ordinance, including petitions for delinquency under chapter 39, the court shall apply such higher penalties, mandatory community service, and mandatory restitution.

It appears as if the following words were mistakenly left off the end of the sentence: "as required by local ordinance," or words to that effect. An amendment to remedy this concern has been filed.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill gives local government more authority to punish people who place graffiti on property.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

Not applicable.

- b. Does the bill require or authorize an increase in any fees?

Not applicable.

- c. Does the bill reduce total taxes, both rates and revenues?

Not applicable.

- d. Does the bill reduce total fees, both rates and revenues?

Not applicable.

- e. Does the bill authorize any fee or tax increase by any local government?

Not applicable.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Not applicable.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not applicable.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not Applicable.

(2) Who makes the decisions?

Not applicable.

(3) Are private alternatives permitted?

Not applicable.

(4) Are families required to participate in a program?

Not applicable.

(5) Are families penalized for not participating in a program?

Not applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not applicable.

(2) service providers?

Not applicable.

(3) government employees/agencies?

Not applicable.

**D. SECTION-BY-SECTION ANALYSIS:**

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See Fiscal Comments.

2. Direct Private Sector Benefits:

See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See Fiscal Comments

D. FISCAL COMMENTS:

This bill would allow people to be prosecuted under local graffiti related ordinances. Violations of ordinances are not currently treated as felony offenses. A person may only be sentenced to prison for a felony offense, therefore, this bill would not have an impact on the Department of Corrections. Local governments will be affected depending on the type of mandatory penalties are imposed on people who violate graffiti related ordinances. If the penalties are left to the court's discretion, then there would be no impact because that is the state of the current law. However, local ordinances which do not include malice as an element for a graffiti related offense, would be easier to prove, and could affect local supervising agencies and jails.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The element of malice necessary to prove any type of criminal mischief, including the placement of graffiti, can be very difficult if not impossible to prove beyond a reasonable doubt. Graffiti may just as easily be a form of boasting or advertizing rather than malicious which requires willful destruction of property from actual ill will or resentment.

The concluding sentence of this bill appears incomplete and raises some ambiguities, reads as follows:

In any proceeding to adjudicate an individual for violation of such ordinance, including petitions for delinquency under chapter 39, the court shall apply such higher penalties, mandatory community service, and mandatory restitution.

This last sentence expressly addresses what is to occur if there is a proceeding to **adjudicate** a person, however, the bill leaves open the question of whether mandatory local penalties apply in a hearing where adjudication is withheld. For most criminal offenses, judges have complete discretion whether to impose an adjudication of guilt, or withhold adjudication of guilt. (A person who is adjudicated guilty can not seal or expunge his/her record, and also must lawfully say that he/she has been convicted of a crime when requested on employment application forms.)

It is not clear whether this bill would allow an offender to be charged under the state statute, section 806.13, F.S., and then require a judge to impose a mandatory county penalty. Absent an express provision allowing local ordinances to impose additional or mandatory penalties on top of a sentence for a violation of a State statute, it is unlikely that the appellate courts would permit local governments to enhance the penalty for a state law. Reyes v. State, 655 So. 2d 111 (2nd DCA 1995) (there is no statutory basis for a county to establish an additional local fine for violation of a state statute). Even if a statute does allow a county or municipality to enhance the penalty for a State statute, it is not clear whether the courts would allow local governments to have very different penalties for a violation of the same state law. The safest approach would be to charge offenders with the local ordinance which would not be preempted if this bill becomes law.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

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