

OPINION NO. 2001-039**Syllabus:**

1. A family or household member, as defined in R.C. 2919.25(E)(1), who administers corporal punishment to a child may be arrested and detained for the offense of domestic violence under R.C. 2919.25(A) when the punishment exceeds that which is reasonable and proper under the circumstances, even though the person's conduct falls short of that required to sustain an arrest and detention for the offense of endangering children under R.C. 2919.22(B)(3).
2. The General Assembly has not identified in R.C. 2935.03(B) the reasons a peace officer may consider for not arresting and detaining a

person the officer has reasonable grounds to believe committed the offense of domestic violence. Rather, pursuant to R.C. 2935.032, the policy adopted by an agency, instrumentality, or subdivision to implement the domestic violence arrest provisions must set forth examples of reasons a peace officer may consider for not arresting and detaining a person in that situation.

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio
By: Betty D. Montgomery, Attorney General, October 1, 2001

You have requested an opinion concerning the authority of a peace officer to arrest and detain a person for the offense of domestic violence when that person administers corporal punishment to a child.¹ Your specific questions are as follows:

1. May a parent who administers corporal punishment to a child be arrested and detained for the offense of domestic violence even though the punishment does not create a substantial risk of serious physical harm to the child?
2. What are legally permissible reasons under R.C. 2935.03(B)(3)(c) for not making an arrest for domestic violence when a [peace officer] has reasonable grounds to believe that the offense of domestic violence has been committed and that a particular person is guilty of committing the offense?

You explain that in a recent situation a father slapped his son for engaging in conduct the father considered inappropriate. In accordance with the preferred arrest policy established by the county sheriff under R.C. 2935.032, the father was arrested and charged with domestic violence under R.C. 2919.25(A).²

¹“Corporal punishment” is commonly understood to mean any “punishment that is inflicted upon the body.” *Black’s Law Dictionary* 1247 (7th ed. 1999); accord *Webster’s Third New International Dictionary* 510 (1993). Corporal punishment administered by an adult to a child thus may range in severity from a soft slap to the hand to a beating that is applied to many areas of the body and causes physical trauma such as soft tissue bruising and swelling, cuts and abrasions, or bone fractures. See generally Richard Garner, *Fundamentally Speaking: Application of Ohio’s Domestic Violence Laws in Parental Discipline Cases—A Parental Perspective*, 30 U. Tol. L. Rev. 1, 13 (1998) (“[t]he physical discipline used [by a parent to discipline a child] should be proportionate to the child’s transgression”).

²R.C. 2919.25(A) provides that “[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.” See generally R.C. 2901.21(A) (a person who administers corporal punishment to a child is not guilty of domestic violence under R.C. 2919.25(A) unless “his liability is based on conduct which includes ... a voluntary act” and he “has the requisite degree of culpability” specified in R.C. 2919.25(A)); R.C. 2901.22(B) (“[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist”). For purposes of R.C. 2919.25, “[f]amily or household member” includes “a child of the offender” or “a child of a spouse, person living as a spouse, or former spouse of the offender.” R.C. 2919.25(E). “Physical harm” means “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

You note that while the domestic violence statute makes no mention of a parent administering corporal punishment to a child, Ohio courts have recognized that, in certain situations, a parent's administration of corporal punishment may not constitute the offense of domestic violence. *See, e.g., State v. Dunlap*, Case No. 95-CA-2, 1995 Ohio App. LEXIS 4231 (Licking County Aug. 21, 1995) (unreported), *appeal not allowed*, 74 Ohio St. 3d 1509, 659 N.E.2d 1286 (1996); *State v. Hicks*, 88 Ohio App. 3d 515, 624 N.E.2d 332 (Franklin County 1993). You further note that the child endangering statute makes it a criminal offense for a person to administer corporal punishment to a child when the punishment is excessive under the circumstances and creates a substantial risk of serious physical harm to the child.³ The converse is that a person does not commit the offense of endangering children when the corporal punishment that is administered to a child is not excessive under the circumstances or does not create a substantial risk of serious physical harm to the child.

In light of the foregoing, your first question asks whether a person who administers corporal punishment to a child may be arrested and detained for the offense of domestic violence under R.C. 2919.25(A), even though the punishment does not create a substantial risk of serious physical harm to the child for the purpose of charging the parent with the offense of endangering children under R.C. 2919.22(B)(3). Our review of the Ohio jurisprudence in this area of the law leads us to conclude that, in such a situation, a person may be arrested and detained for the offense of domestic violence, even though the person's conduct falls short of that required to sustain an arrest and detention for the offense of endangering children. *See State v. Suchomski*, 58 Ohio St. 3d 74, 567 N.E.2d 1304 (1991), *reh'g denied*, 59 Ohio St. 3d 714, 572 N.E.2d 696 (1991); *State v. Miller*, 134 Ohio App. 3d 649, 731 N.E.2d 1192 (Hamilton County 1999); *State v. Hart*, 110 Ohio App. 3d 250, 673 N.E.2d 992 (Defiance County 1996); *State v. Wagster*, Appeal No. C-950584, 1996 Ohio App. LEXIS 1118 (Hamilton County Mar. 27, 1996) (unreported); *State v. Dunlap*; *City of Lorain v. Prudoff*, C.A. No. 93CA005684, 1994 Ohio App. LEXIS 5790 (Lorain County Dec. 21, 1994) (unreported); *State v. Hicks*.

Persons charged with the offense of domestic violence under R.C. 2919.25(A) as a result of administering corporal punishment to a child have argued that such a charge is improper as a matter of law because the General Assembly, through its enactment of R.C. 2919.22(B)(3), has recognized the right of a person to administer reasonable corporal punishment to a child so long as serious physical harm to the child does not result, and thus a

³R.C. 2919.22(B)(3) defines the offense of endangering children in the following terms:

No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

....

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child.

See R.C. 2901.01(A)(5) (defining "[s]erious physical harm to persons" as that term is used in the Revised Code); R.C. 2919.22(E)(1) (whoever violates R.C. 2919.22 is guilty of endangering children).

statutory conflict would be presented were the courts to entertain a charge of domestic violence against a person for the use of corporal punishment. *See, e.g., State v. Suchomski; State v. Hart; State v. Dunlap; State v. Hicks.* *See generally* Richard Garner, *Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases—A Parental Perspective*, 30 U. Tol. L. Rev. 1 (1998) (discussing the scope of the privilege of parental corporal discipline). In the alternative they have argued that they cannot be convicted of domestic violence so long as the corporal punishment they administered was not excessive under the circumstances and did not result in a substantial risk of serious harm to the child. This argument would have the courts apply to the offense of domestic violence the burdens and standards of proof that control when a person is charged with the offense of child endangering under R.C. 2919.22(B)(3). *See, e.g., State v. Hart; State v. Dunlap; State v. Hicks.* *See generally* R.C. 2901.05(A) (“the burden of proof for all elements of [an] offense is upon the prosecution” and “[t]he burden of going forward with the evidence of an affirmative defense, and the burden of proof ... for an affirmative defense, is upon the accused”).

The courts, however, have uniformly rejected these arguments. In *State v. Suchomski* the Ohio Supreme Court found no conflict between the domestic violence statute and the child endangering statute, and, on the facts presented, upheld the conviction of a parent charged with the offense of domestic violence. The court explained that R.C. 2919.25 does not prevent a parent from properly disciplining a child, and that such discipline may include corporal punishment. For purposes of R.C. 2919.25(A), however, “[t]he only prohibition is that a parent may not cause ‘physical harm’ as that term is defined in R.C. 2901.01(C) [now R.C. 2901.01(A)(3)],” which includes “any injury.” *State v. Suchomski*, 58 Ohio St. 3d at 75, 567 N.E.2d at 1305. The court relied upon *Black’s Law Dictionary* 785 (6th ed. 1990) in defining “injury” as “[t]he invasion of any *legally protected interest* of another,” and declared that “[a] child does not have any legally protected interest which is invaded by proper and reasonable parental discipline.” *Id.* (Emphasis in original.)⁴ *Accord State v. Miller*, 134 Ohio App. 3d at 651, 731 N.E.2d at 1194.

⁴In *State v. Hicks*, 88 Ohio App. 3d 515, 519, 624 N.E.2d 332, 335 (Franklin County 1993), the court of appeals notes that the facts in *State v. Suchomski*, 58 Ohio St. 3d 74, 567 N.E.2d 1304 (1991), *reh’g denied*, 59 Ohio St. 3d 714, 572 N.E.2d 696 (1991), “did not lend themselves to a careful analysis or finely crafted definition of the limits of ‘proper and reasonable parental discipline,’” presumably because the physical discipline meted out by the parent in *Suchomski* went well beyond what could be considered “proper and reasonable” in the circumstances in question. Consequently, the Ohio Supreme Court did not find it necessary to determine precisely which less egregious forms of physical discipline would qualify as “proper and reasonable” corporal punishment under the domestic violence statute. According to the statement of facts in *Suchomski*, the defendant arrived home intoxicated one evening after his wife and two children had gone to sleep for the night. Defendant awakened them all and threatened to beat them. Defendant punched his eight-year-old son in the stomach, repeatedly pushed him to the floor, and then pounded the child’s head against the wall. Defendant asserted that this conduct constituted lawful corporal punishment.

By its very nature, the determination of what is proper and reasonable corporal punishment can only occur on an individual basis, thus requiring each court to take into account the particular facts and circumstances of the administration of corporal punishment that is alleged to constitute domestic violence in the case before it. *State v. Jones*, 140 Ohio App. 3d 422, 430, 747 N.E.2d 891, 897 (Cuyahoga County 2000); *Thompson v. Koontz*, No. 77251, 2000 Ohio App. LEXIS 5474, at *16 (Cuyahoga County Nov. 22, 2000) (unreported); *State v. Hart*, 110 Ohio App. 3d 250, 256, 673 N.E.2d 992, 995 (Defiance County 1996). *See*

The following excerpt from the decision in *State v. Hart*, 110 Ohio App. 3d at 252-53, 673 N.E.2d at 993-94, refutes the related argument regarding the burdens and standards of proof that control when a person is charged with the offense of domestic violence as a result of administering corporal punishment:

In his argument, appellant proposes that since R.C. 2919.22(B)(3) provides a parent the affirmative defense of corporal punishment, parents accused of domestic violence should likewise be afforded the same defense as set out in that section. We do not agree. Under R.C. 2919.22(B)(3), the child endangerment statute, a parent can administer corporal punishment so long as it is not excessive under the circumstances and does not create a substantial risk of harm to the child. *To subscribe to appellant's argument would ignore the fact that R.C. 2919.22 and 2919.25 describe separate crimes with different elements and penalties.* Clearly, the defenses available when charged with each separate crime may also be different, as is the case here. Nor does it seem logical to us to allow a defendant to pluck out a clause provided in a separate statute that sets forth a defense applicable to that specific crime, and apply that to a domestic violence charge. Had the legislature wished to use the standard in R.C. 2919.22(B)(3), a similar provision could have been inserted in R.C. 2919.25. Furthermore the Supreme Court of Ohio [in *State v. Suchomski*] was also presented with the opportunity to engraft the defense of corporal punishment provided for in R.C. 2919.22 to domestic violence cases filed under R.C. 2919.25, but instead formulated a more limited "proper and reasonable" affirmative defense. (Emphasis added; footnote and citation omitted.)

In answer to your first question, therefore, it is our opinion that a family or household member, as defined in R.C. 2919.25(E)(1), who administers corporal punishment to a child may be arrested and detained for the offense of domestic violence under R.C. 2919.25(A) when the punishment exceeds that which is reasonable and proper under the circumstances, even though the person's conduct falls short of that required to sustain an arrest and detention for the offense of endangering children under R.C. 2919.22(B)(3). However, before a family or household member may be convicted of the offense of domestic violence, the prosecution must sustain its burden of proving that the family or household member knowingly caused, or attempted to cause, physical harm, as defined in R.C. 2901.01(A)(3), to the child.

We are aware that our answer to your first question implicates the right of parents to direct the upbringing of their children, insofar as corporal punishment, especially in the case of younger children, may be considered an effective means of teaching a child right from wrong. The plain language of R.C. 2919.25(A) and the decisions of the courts that have examined R.C. 2919.25(A) in this context, however, compel the conclusion that a parent may be subject to arrest and detention for the offense of domestic violence when the corporal punishment administered to a child exceeds that which is reasonable and proper under the circumstances.

generally Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases—A Parental Perspective, 30 U. Tol. L. Rev. at 17 ("Ohio's domestic violence statute is overbroad as applied to parental corporal discipline cases because it does not delineate the parameters of what constitutes legal parental discipline").

Nonetheless, it is the case that Ohio law recognizes the right of a parent, a school official, or one who stands *in loco parentis* to administer reasonable corporal punishment as a means of disciplining a child. See *State v. Suchomski*; R.C. 2151.031(C) (“[e]xcept as provided in [R.C. 2151.031(D)],⁵ a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under [R.C. 2919.22]” (footnote added)); R.C. 2919.22(B)(3) (a person commits the offense of endangering children when he administers corporal punishment or other physical disciplinary measure that “is excessive under the circumstances and creates a substantial risk of serious physical harm to the child”); R.C. 3319.41(E) (school personnel “may inflict or cause to be inflicted reasonable corporal punishment upon a pupil ... whenever such punishment is reasonably necessary in order to preserve discipline while the student is subject to school authority”); *Fundamentally Speaking: Application of Ohio’s Domestic Violence Laws in Parental Discipline Cases—A Parental Perspective*, 30 U. Tol. L. Rev. at 15 (“it cannot seriously be questioned that reasonable parental corporal discipline is included in the fundamental right of child rearing”); 1992 Op. Att’y Gen. No. 92-082 (syllabus, paragraph one) (“[u]nder Ohio law, no child abuse of a school child occurs when reasonable corporal punishment that is reasonably necessary to preserve discipline is inflicted in accordance with R.C. 3319.41(A) ... and there is no violation of R.C. 2919.22”).

We would suspect that in most situations the administration of corporal punishment to a child does not rise to the level of domestic violence for purposes of R.C. 2919.25(A). And yet a fine line separates corporal punishment that is reasonable and proper under the circumstances from that which exceeds this standard. As explained in note one, *supra*, corporal punishment administered to a child can cover a broad range of severity and intensity. Thus, “[e]ach case [in which domestic violence against a child is alleged] should be viewed on a case-by-case basis” by local law enforcement officers, prosecutors, and judges to determine whether the corporal punishment was reasonable and proper under the circumstances. *Thompson v. Koontz*, No. 77251, 2000 Ohio App. LEXIS 5474, at *16 (Cuyahoga County Nov. 22, 2000) (unreported).

Accordingly, local officials must take care to ensure that the discretion the law grants them to arrest and detain a person for the commission of a criminal offense is exercised reasonably and prudentially whenever they are confronted with a situation in which a person’s administration of corporal punishment may constitute domestic violence under R.C. 2919.25(A). Among other matters, they should carefully evaluate the circumstances in which the corporal punishment was administered to determine whether the person acted with the requisite culpability for the offense of domestic violence, see note two, *supra*. Cf., e.g., *City of Galion v. Martin*, Case No. 3-91-6, 1991 Ohio App. LEXIS 6092, at *3 (Crawford County Dec. 12, 1991) (unreported) (“[s]triking a child in anger is not the same as disciplining an unruly child. The domestic violence statute is intended to prevent familial assaults of the type committed by Appellant”).

Your second question asks us to identify legally permissible reasons under R.C. 2935.03(B)(3)(c) for which a peace officer may decide not to arrest and detain a person when the officer has reasonable grounds to believe such person committed the offense of domestic violence. R.C. 2935.03(B) states that it is the “preferred course of action in this state” that a peace officer “arrest and detain” a person until a warrant can be obtained if: (1)

⁵R.C. 2151.031(D) provides that, as used in R.C. Chapter 2151, the term “abused child” includes any child who “[b]ecause of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child’s health or welfare.”

the peace officer has reasonable grounds to believe that the offense of domestic violence as defined in R.C. 2919.25 has been committed, and (2) the peace officer has reasonable cause to believe that a particular person is guilty of committing the offense. If there are reasonable grounds for believing that members of a family or household have committed the offense against each other, the preferred course of action in Ohio is to arrest and detain the primary physical aggressor. R.C. 2935.03(B)(3)(b). Thus, pursuant to R.C. 2935.03(B), it is the preferred course of action for a peace officer to arrest and detain a person when the officer has reasonable cause to believe the person has committed a domestic violence offense. 1996 Op. Att'y Gen. No. 96-061 at 2-247 and 2-248.

R.C. 2935.03(B) does not, however, *require* a peace officer to arrest and detain such a person. *See also* R.C. 2935.032. R.C. 2935.03(B)(3)(c) states that, if a peace officer does not arrest and detain a person whom the officer has reasonable cause to believe committed the offense of domestic violence when it is the preferred course of action in this state that the officer arrest that person, the officer shall articulate in the written report of the incident⁶ a clear statement of the officer's reasons for not arresting and detaining that person until a warrant can be obtained.

A review of R.C. 2935.03(B) reveals that the General Assembly has not identified in the statute the reasons a peace officer may consider for not arresting and detaining a person when the officer has reasonable grounds to believe that the person committed the offense of domestic violence. Instead, R.C. 2935.032 requires that an agency, instrumentality, or political subdivision that is served by any peace officer described in R.C. 2935.03(B)(1) adopt written policies and procedures for the implementation of the domestic violence arrest provisions of R.C. 2935.03(B)(3). By requiring each agency, instrumentality, and political subdivision to adopt its own policies and procedures, the General Assembly encourages these entities to inform and instruct their peace officers about the preferred course of action when a peace officer has reasonable cause to believe that the offense of domestic violence has been committed. As explained in *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1554-55 (1993):

Whether by ignorance or inertia, legislative changes [concerning domestic violence] may go unenforced until the police chief makes it clear that the new law is in fact new policy. By incorporating the new law into departmental guidelines and training, a department instructs its officers to take the legislation seriously. Guidelines and training sessions also help police to understand how abstract statutory amendments are to be applied in practice. For instance, manuals can be specific about what charges are appropriate for what behavior and when arrests should be made.... Furthermore, legislators anticipate that the public scrutiny to which guidelines are open will encourage compliance with the statutory policy. (Footnotes omitted.)

Accord Pamela Blass Bracher, Comment, *Mandatory Arrest for Domestic Violence: The City of Cincinnati's Simple Solution to a Complex Problem*, 65 U. Cin. L. Rev. 155, 180 n.205 (1996).

R.C. 2935.032 also vests in local entities the discretion to determine how their peace officers are to handle domestic violence cases. *See, e.g.*, R.C. 2935.032(B) (authorizing an agency, instrumentality, or political subdivision that is served by any peace officer described

⁶Pursuant to R.C. 2935.032(D), "[a] peace officer who investigates a report of an alleged incident of the offense of domestic violence ... shall make a written report of the incident whether or not an arrest is made."

in R.C. 2935.03(B)(1) to adopt procedures that require the arrest of an alleged offender or grant less discretion in deciding whether to arrest than provided by statute). Because local conditions vary, there is a "strong policy belief that few limits should be placed on a [peace officer's] discretion." *Mandatory Arrest for Domestic Violence: The City of Cincinnati's Simple Solution to a Complex Problem*, 65 U. Cin. L. Rev. at 169.

However, without explicit policies and procedures, peace officers may abuse their arrest powers or increase the risk of harm to a domestic violence victim. *Id.* at 180. As a result, the General Assembly requires entities to adopt their domestic violence policies and procedures "in conjunction and consultation with shelters in the community for victims of domestic violence and private organizations, law enforcement agencies, and other public agencies in the community that have expertise in the recognition and handling of domestic violence cases." R.C. 2935.032(E). See generally John Paul Christoff, *Ohio's Domestic Violence Laws: Recommendations for the 1990's*, 19 Ohio N.U. L. Rev. 163, 197 (1992) ("genuine effectiveness [of the domestic violence statute] can be achieved only when there is a commitment of all groups involved to combat domestic violence. Only when judges, prosecutors, law enforcement, and advocacy groups work in concert can there be real progress made"). In addition, a domestic violence arrest policy adopted by a law enforcement agency must include

[e]xamples of reasons that a peace officer may consider for not arresting and detaining until a warrant can be obtained a person who allegedly committed the offense of domestic violence or the offense of violating a protection order when it is the preferred course of action in this state that the officer arrest the alleged offender, as described in division (B)(3)(b) of section 2935.03 of the Revised Code.

R.C. 2935.032(A)(4).

In situations involving a person's use of corporal punishment, a domestic violence arrest policy should set forth examples that a peace officer may consider for not arresting and detaining a person that administers corporal punishment to a child. For example, the policy may properly authorize a peace officer in such a situation to consider whether the corporal punishment is reasonable and proper under the circumstances. See *State v. Suchomski*. In order to aid a peace officer in making that determination, the policy may set forth specific factors the officer is to consider. Such factors may include the age, size, and conduct of the child, the nature of the child's misconduct, the influence of the child's misconduct upon other children in the same family or group, the mental and physical condition of the child, the child's response to corporal punishment, the location, severity, frequency, and duration of the punishment, and the nature of the instrument used for administering the punishment.

A peace officer should also consider a person's state of mind while administering the corporal punishment, a person's history of domestic violence or other violent acts, statements made to the officer by the person, the child, or witnesses, the officer's evaluation of the child's safety, and any other facts or circumstances the officer considers relevant.⁷ See

⁷However, a peace officer may "not consider as a factor any possible shortage of cell space at the detention facility to which the person will be taken subsequent to the person's arrest or any possibility that the person's arrest might cause, contribute to, or exacerbate overcrowding at that detention facility or at any other detention facility." R.C. 2935.03(B)(3)(f).

State v. Jones, 140 Ohio App. at 430, 747 N.E.2d at 897; *State v. Hart*, 110 Ohio App. 3d at 256, 673 N.E.2d at 995; *Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases—A Parental Perspective*, 30 U. Tol. L. Rev. at 21; see also R.C. 2935.032(D) (“[t]he report [of an alleged incident of the offense of domestic violence] shall document the officer’s observations of the victim and the alleged offender, any visible injuries of the victim or alleged offender, any weapons at the scene, the actions of the alleged offender, any statements made by the victim or witnesses, and any other significant facts or circumstances”).

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A family or household member, as defined in R.C. 2919.25(E)(1), who administers corporal punishment to a child may be arrested and detained for the offense of domestic violence under R.C. 2919.25(A) when the punishment exceeds that which is reasonable and proper under the circumstances, even though the person’s conduct falls short of that required to sustain an arrest and detention for the offense of endangering children under R.C. 2919.22(B)(3).
2. The General Assembly has not identified in R.C. 2935.03(B) the reasons a peace officer may consider for not arresting and detaining a person the officer has reasonable grounds to believe committed the offense of domestic violence. Rather, pursuant to R.C. 2935.032, the policy adopted by an agency, instrumentality, or subdivision to implement the domestic violence arrest provisions must set forth examples of reasons a peace officer may consider for not arresting and detaining a person in that situation.