



Ohio Prosecuting Attorneys Association

Daniel R. Lutz
Wayne County Prosecutor
On Behalf of OPAA
Opponent Testimony
May 17, 2021

Chairman Dolan, Vice-Chair Gavarone, Ranking Member Sykes and Members of the Senate Finance Committee, my name is Dan Lutz and I am the Wayne County Prosecuting Attorney and current President of the Ohio Prosecuting Attorneys Association. Thank you for the opportunity to provide opponent testimony today on the provision of House Bill 110 that would implement mandatory statewide Targeted Community Alternatives to Prison or TCAP. The OPAA's concerns with TCAP fall generally into three areas: (1) the ability to hold drug offenders accountable through increasing sanctions, (2) sentencing independence, and (3) cost-shifting to local government.

The legislature had lengthy debate during the last general assembly about Ohio's approach to this issue and ultimately decided on the approach adopted in House Bill 1 rather than the approach proposed in Senate Bill 3. I'm sure legislators all had their own reasons for that but ultimately I think that choice rested on the fact that House Bill 1 did a better job of preserving the ability of local officials to decide on a case-by-case basis and individual circumstances how best to sentence and sanction drug offenders.

House Bill 1 has been in effect a little over a month, we have no idea how effective it will be, and here we are already debating a different approach in mandatory TCAP. As has been discussed countless times over the past several years, judges already have a preference for treatment over prison and most often give drug offenders multiple opportunities to be rehabilitated in the community. For some though, the threat of prison and a prison sentence are necessary to hold them accountable and promote rehabilitation. TCAP generally removes this option.

While TCAP does allow a judge to use prison as a sanction, they may do so only if they pay the cost of the prison sentence through a reduction in TCAP dollars. This is a fundamental flaw with how TCAP is conceived because it allows the legislature to exert pressure on judges to sentence a certain way. Attached to my testimony is a law review article that discusses this in great detail that I encourage you all to consider. The article calls for the law to be repealed, stating that "legislative control and financial influence have no place in the judicial branch, specifically the criminal sentencing process." The law review article cites a Canton Repository article where one of the judges in Stark County, just to the East of my county, says TCAP "strips [them] of the discretion to do their job." Providing funding to local communities to provide treatment is a good public policy. Tying that funding to sentencing a certain way is not. It amounts to the legislature exerting undue influence on the judiciary.

Finally, TCAP shifts responsibility for the punishment and rehabilitation of these offenders from the state to the county. While the grant funding that is provided does offset a portion of this cost, the amount of the funding does not substantially cover the cost to local governments of providing treatment or the cost of housing TCAP offenders in our already overcrowded jails.

TCAP may be well intentioned, but it ignores the reality of dealing with a group of offenders for whom sentencing flexibility is required. TCAP instead creates a one-size-fits-all sentence for a group of offenders who have some very complex problems. For the reasons above, we respectfully request that the Senate remove the mandatory TCAP provisions from the bill.

Thank you again for the opportunity to provide testimony. I would be happy to answer any questions.




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Ohio's Targeted Community Alternative to Prison Program: How a Good Idea is Implemented through Bad Policy

Samantha Sohl
Cleveland-Marshall College of Law

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OHIO'S TARGETED COMMUNITY ALTERNATIVE TO PRISON PROGRAM: HOW A GOOD IDEA IS IMPLEMENTED THROUGH BAD POLICY

SAMANTHA SOHL*

ABSTRACT

Just because a legislature can make a law, doesn't mean that they should. The Ohio General Assembly enacted the Targeted Community Alternatives to Prison program to decrease the number of convicted defendants sent to state prison and to increase funding for community control efforts. While the law may be upheld under the Ohio Constitution's Uniformity Clause, the law should still be repealed because legislative control and financial influence have no place in the judicial branch, specifically the criminal sentencing process. However, the law is rooted in good intentions, and many judges have found the additional funding useful, but the conditions on that funding should be repealed.

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I. INTRODUCTION

Should the geographical location of a crime be the sole distinguishing factor between two identical individuals sentenced for the same exact crime? Should other branches be capable of exerting influence over the judicial branch, either at the state or federal level? Should a judge's decision on how to sentence an individual carry a monetary influence?

Imagine that an individual lives in Cuyahoga County in Northeast Ohio, and is found guilty of breaking and entering—a felony of the fifth degree.¹ Now imagine that this defendant has reached the sentencing phase of the process, and because he has no criminal history, the presiding judge is unable to sentence him to prison, without the loss of a substantial sum of the County's money.² Instead, the judge must sentence him to community control sanctions, such as probation, parole, or another community treatment facility, or risk losing much needed grant money for his county.³

Now, imagine that same individual lives in Lake County—another Northeast Ohio county—and is found guilty of breaking and entering. He has, again, reached the sentencing phase of the trial process. He still has no criminal history, but the presiding judge has the discretion to, and ultimately decides, to sentence our defendant to six-months in jail.⁴ Alternatively, imagine that this judge sentences him to the same community control sanctions as in our previous scenario. Even though the outcomes might seem to be the same on the surface, these judges may have arrived at their decisions following different paths of thought. In our Cuyahoga County scenario, the judge's decision may have been motivated by the county's grant money—money that he knows his county needs to establish and maintain more community control sanctions programs. He likely had to balance this factor with the severity of the defendant's crime, as well as his own gut feeling as to what best constitutes justice for this offender. On the other hand, the judge in Lake County did not have such considerations weighing on him. His choice was entirely his own, guided by the law as expressed in the Ohio Revised Code.

The Ohio Targeted Community Alternatives to Prison ("T-CAP") program, established in House Bill 49, went into effect on July 1, 2018.⁵ There were ten "target" counties in which this program mandated the above sentencing guideline.⁶ The other seventy-eight Ohio counties participating in the program are doing so on a completely

* Samantha Sohl - J.D. expected, Cleveland-Marshall College of Law, May 2019. I would like to thank my professors who guided me during the research and writing of this Note. I would also like to thank my fellow editors on the *Cleveland State Law Review* for all their diligence and hard work in the editing and review process.

¹ OHIO REV. CODE ANN. § 2911.13 (West 2019).

² See H.B. 49, 132d Gen. Assemb. (Ohio 2017).

³ See *id.*

⁴ See *id.*

⁵ See generally *id.*

⁶ *Id.* (including Franklin, Cuyahoga, Hamilton, Summit, Montgomery, Lucas, Butler, Stark, Lorain, and Mahoning).

voluntary basis, that is, if they choose to do so at all.⁷ Prior to this legislation, defendants convicted of felonies of the fifth degree were subject to prison terms of six-to-twelve months, and offenders convicted of felonies of the fourth degree were subject to prison terms of six-to-eighteen months.⁸ These offenders were also subject to a simple fine or community control sanctions, in place of prison time. The Ohio Department of Rehabilitation and Correction (“ODRC”) states that the purpose of this legislation is to ensure that offenders receive the treatment that they need while reducing the overpopulation of Ohio’s prisons by diverting certain offenders that it deems are less dangerous or in less need of severe punishment, from prison to community control programs.⁹

Prior to T-CAP taking effect, there was a concern that it would not have a uniform application throughout the state, and may be in violation of the Ohio Constitution.¹⁰ For laws to be valid under the Ohio Constitution, they must be applied in a uniform fashion pursuant to Article II, Section 26 of the Ohio Constitution.¹¹ The Uniformity Clause also adds another qualification: only laws of a general nature are required to have a uniform application.¹² The Ohio Constitution does not define either term, so it is up to the Ohio Supreme Court to do so. While there has been extensive case law regarding laws of a general nature, the Ohio Supreme Court has not reached the issue of whether sentencing laws like T-CAP are of a general nature.

In addition to the constitutionality concern, there is a major policy concern at the forefront of this challenge. The judicial branch, whether it be at the state or federal level, should be free from external influence, which includes the indirect monetary influence T-CAP inadvertently exudes. This concern arises in the target counties that lose grant money when judges do not follow T-CAP’s sentencing guidelines. While additional funding is always desirable, especially in criminal justice reform, making it dependent on a judge’s actions and decisions removes the independence from the judicial branch, thereby allowing constituents to influence judicial decisions.

This Note argues that the T-CAP program, as currently applied to the ten target counties and other voluntary counties, is constitutional, even though it technically violates the Uniformity Clause of the Ohio Constitution.¹³ Ohio’s T-CAP program is a law of a general nature, because sentencing is a subject that affects people of all counties. Furthermore, sentencing is an area of common interest for the citizens of

⁷ *Id.*

⁸ OHIO CRIMINAL SENTENCING COMM’N, *Felony Sentencing Quick Reference Guide* 9 (May 2017), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/judPractitioner/felonyQuickRef.pdf>. In addition to the overcrowding of Ohio’s prisons, there is also an issue of a lack of available treatment and a high rate of recidivism, which is not discussed in this Note.

⁹ *Targeted Community Alternatives to Prison (T-CAP)*, OHIO DEP’T OF REHAB. & CORR., <http://www.drc.ohio.gov/tcap> (last visited February 13, 2018) [hereinafter ODRC].

¹⁰ Alan Johnson, *O’Brien Asks Kasich to Veto Prison Diversion in State Budget*, COLUMBUS DISPATCH (June 30, 2017), <https://www.dispatch.com/news/20170630/obrien-asks-kasich-to-veto-prison-diversion-in-state-budget>.

¹¹ OHIO CONST. art. II, § 26.

¹² *Id.*

¹³ *Id.* (“All laws, of a general nature, shall have a uniform operation through the State.”).

each county. The program, through its statutory application to the ten target counties, may not seem to be uniformly applied, but the voluntary county provision and the ODRC's intention to eventually apply this to all Ohio counties will have a substantial effect on the outcome of potential litigation relating to this issue. Because the legislation that establishes the T-CAP program states that all counties may participate, one could argue that it is uniformly applied. This Note will argue that T-CAP is constitutional even though it is not uniform, as evidenced by the mandatory application in the ten target counties. Even though T-CAP is constitutional, this Note argues that the Ohio General Assembly should still repeal the law as it creates external influence on judges at the county level in Ohio.

Part II of this Note will give a background of the Uniformity Clause of the Ohio Constitution and establish a definition for laws of a general nature. It will also discuss the history of T-CAP, similar programs established by the Ohio General Assembly, and the establishment and organization of Ohio's judicial branch. Part III will analyze Ohio case law to extract a definition of laws of a general nature and will apply T-CAP to the definition to determine whether it meets the definition. Part III will also discuss whether T-CAP is applied uniformly, in compliance with the Ohio Constitution, and will determine whether the voluntary provision in T-CAP calls for a uniform application of the law. Additionally, this Note will analyze whether, regardless T-CAP's constitutionality under the Uniformity Clause, such an external economic influence on the judicial branch is the best way to effect change. Part IV concludes that the T-CAP program does not violate the Ohio Constitution Uniformity Clause, and that the voluntary provision satisfies the requirement of uniformity. Further, this Note will conclude that the judicial branch should be independent and that T-CAP, while its intentions and motivations are commendable, should not be applied in its current form.

II. BACKGROUND

A. The State of the Law in Ohio Before House Bill 49 and T-CAP

In 1979, the Ohio became the sixth state to adopt a community corrections act.¹⁴ These acts established programs and funding to establish local community control sanctions to divert felony offenders from state prison.¹⁵ Ohio used this as an opportunity to create community based correctional facilities and prison subsidy programs. In 1990, this act was amended to include jail diversion programs, which represented a partnership between the state and local governments in creating a network of community control sanctions.¹⁶ Services in these programs include basic

¹⁴ Christopher T. Lowenkamp, et al., *Evaluation of Ohio's CCA Funded Programs Executive Summary*, UNIV. OF CINCINNATI 2 (April 28, 2005), https://www.uc.edu/content/dam/uc/ccjr/docs/reports/project_reports/CCA_Executive_Summary.pdf.

¹⁵ *Id.*

¹⁶ *Id.*; see also *Bureau of Community Sanctions*, OHIO DEP'T OF REHAB. & CORR., <http://www.drc.ohio.gov/community> ("Programs funded by the Bureau [of Community Sanctions] include Halfway Houses, Community-Based Correctional Facilities, Community Residential Centers, Permanent Supportive Housing, and Community Corrections Act grant programs including Intensive Supervision Probation, Standard Probation, Prosecutorial Diversion, Non-Supervisory Treatment Programs, Electronic Monitoring, and Community

probation, supervision, intensive probation supervision, pretrial services, day reports, electronic monitory and house arrest, work release, domestic violence programs, and community service.¹⁷ These programs originally created community based correctional facilities, prison subsidy programs, as well as halfway houses and non-residential community correction programs.¹⁸

The Ohio Community Corrections Act jail and prison diversion programs are funded by the ODRC, just as with T-CAP.¹⁹ In 2002, over 160 subsidy programs in seventy-nine counties received funding through grants for the diversion programs under the Community Corrections Act.²⁰ Multiple studies have been done to verify the effect that the Community Corrections Act programs have had on the recidivism rates of offenders, but it was recommended that the ODRC “develop policy and procedure to guide the placement of offenders” into the programs, and that such policies should put emphasis on the higher risk offenders.²¹

In 2012, the Ohio General Assembly passed Senate Bill 160 which allowed judges to directly sentence certain felony offenders to prison on a first offense for specific crimes, including crimes involving firearms, physical harm, bond violations, or sexual offenses.²² Since 2013, judges in Ohio have been permitted to sentence first-time offenders in those categories to terms in prison if certain conditions are met.²³ Prior to Senate Bill 160, Senate Bill 86 was passed in September 2010, which limited the ability of judges to send many first-time felons to prison for committing fourth and fifth degree felonies.²⁴ This became controversial, especially in cases where certain sexual offenders were no longer eligible for prison.²⁵ While Ohio, like other states, has a history of influencing judicial action through legislation, T-CAP is in a league of its own, specifically in how it influences the judicial branch.²⁶

B. Enactment of T-CAP

The Ohio General Assembly passed House Bill 49 in 2017, thereby establishing T-CAP.²⁷ In relevant part, this law states that:

Work Service.”). It is important to note that these programs have been and continue to be funded by grant money outside of the T-CAP legislation.

¹⁷ Lowenkamp, *supra* note 14, at 3.

¹⁸ *Id.*

¹⁹ *See Bureau of Community Sanctions, supra* note 16.

²⁰ Lowenkamp, *supra* note 14, at 2.

²¹ *Id.* at 4.

²² S.B. 129, 131st Gen. Assemb. (Ohio 2013).

²³ Lowenkamp, *supra* note 14, at 4.

²⁴ Jenna Gant, *New Felony Sentencing Guidelines Take Effect*, CT. NEWS OHIO (April 1, 2013), http://www.courtnewsOhio.gov/happening/2013/sentencingGuidelines_040113.asp#.XEIKE89KgWo.

²⁵ *Id.*

²⁶ *See generally id.*

²⁷ H.B. 49, 132d Gen. Assemb. (Ohio 2017).

[N]o person sentenced by the court of common pleas of a target county or of a voluntary county to a prison term that is twelve months or less for a felony of the fifth degree shall serve the term in an institution under the control of the department of rehabilitation and correction. The person shall instead serve the sentence as a term of confinement in a facility in division (C) or (D) of this section.²⁸

Section (C) goes on to state that:

A person who is convicted of or pleads guilty to one or more misdemeanors and who is sentenced to a jail term of imprisonment pursuant to the conviction or convictions shall serve that term in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse; in a community alternative sentencing center or district community alternative sentencing center . . . or if the misdemeanor or misdemeanors are not offenses of violence, in a minimum security jail.²⁹

Section (D) establishes that “[n]othing in this section prohibits the commitment, referral, or sentencing of a person who is convicted of or pleads guilty to a felony to a community-based correctional facility.”³⁰

With the passage of the bill, T-CAP is now mandatory for ten target counties, namely Franklin, Cuyahoga, Hamilton, Summit, Montgomery, Lucas, Butler, Stark, Lorain, and Mahoning counties, and is voluntary for Ohio’s seventy-eight other counties.³¹ T-CAP will give grants to participating counties to supplement the community corrections funds that to establish new programs that seek to address the needs of Ohio’s prison program, its citizens, while also looking to reduce the state prison population.³²

As incentive for enforcement, T-CAP provides grants to supplement community correction funds.³³ However, T-CAP also penalizes participating counties with a deduction from the grant issued per prisoner that the participating county sentences to prison that would otherwise be eligible for a diversion program.³⁴ While this does not technically qualify as a penalty provision—because the county cannot lose what it never had—it is a significant concern that T-CAP presents the power to potentially manipulate judges to sentence offenders, against their better judgment, because they fear their political reputation and the risk of losing grant dollars.

T-CAP seeks to reduce the prison population by diverting level-five felony offenders, who meet specific criteria, from state prison to local community sanction

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² ODRC, *supra* note 9.

³³ *Targeting Community Alternatives to Prison by Helping Ohio Communities Manage Low-Level, Non-Violent Offenders*, OHIO DEP’T OF REHAB. & CORR., <http://www.ccao.org/wp-content/uploads/TCAP%20Fact%20Sheet.pdf> (last visited February 3, 2019).

³⁴ *See* ODRC, *supra* note 9.

programs.³⁵ Fifth degree felonies are the lowest felony level recognized by Ohio law.³⁶ Counties can also elect to apply T-CAP to certain fourth degree felony offenses.³⁷ Ohio defines the prison term for fifth degree felony offenders as ranging from six-to-twelve months, and six-to-eighteen months for fourth degree felonies.³⁸ These offenses typically include crimes relating to drug possession and certain theft or assault cases.³⁹ Additionally, violent offenders, sexual offenders, and certain drug offenders are not eligible for diversion under T-CAP.⁴⁰ Offenders of crimes with mandatory prison terms are also not eligible.⁴¹

The ODRC administered pilot grants that involve eight county common pleas courts, including Clinton, Ross, Medina, Lucas, Defiance, Henry, Williams, and Fulton counties.⁴² These pilot counties received T-CAP grant funding and agreed to supervise, treat, and sanction all offenders under the program locally without the use of a state prison sanction.⁴³ While some courts have been receptive and have praised T-CAP, other courts have found that having such funding predicated on judicial decisions amounts to bribery.⁴⁴

³⁵ Ohio H.B. 49.

³⁶ OHIO CRIMINAL SENTENCING COMM'N, *supra* note 8.

³⁷ See ODRC, *supra* note 9 (“Two of the grant sites, Medina and the multi county site, also choose to target the same Felony 4 offenses.”). Additionally, T-CAP applies to those sentenced to a prison term of twelve months or less, which includes certain fourth degree felony offenses.

³⁸ OHIO REV. CODE ANN. § 2929.14 (A)(4)–(5) (West 2018).

³⁹ OHIO CRIMINAL SENTENCING COMM'N, *supra* note 8, at 5–6.

⁴⁰ Ohio H.B. 49.

⁴¹ *Id.*

⁴² ODRC, *supra* note 9.

⁴³ *Id.*

⁴⁴ Compare *TCAP Testimony: Hearing on H.B. 49 Before the Ohio Gen. Assembly*, 132d Gen. Assemb. (Mar. 31, 2017) (testimony of Judge Joyce V. Kimbler, Medina County Court of Common Pleas), with Ed Balint, *Judges: New Felony Sentencing Law Puts Stark at Risk*, CANTON REPOSITORY (Oct. 3, 2017), <http://www.cantonrep.com/news/20171003/judges-new-felony-sentencing-law-puts-stark-at-risk>. Judge Kimbler is a judge in the Medina Court of Common Pleas. Medina is one of the counties that has already received a pilot grant from the ODRC through T-CAP. Judge Kimbler submitted her testimony to the Ohio Senate Finance Committee to share her praise of the program. Judge Kimbler stated that with the funding from T-CAP, Medina has been able to directly address the local heroin epidemic. Additionally, Judge Kimbler stated that the money allowed the sheriff to re-open a previously closed jail pod to house low-level offenders. While all of these outcomes are desirable and entirely necessary to address the issues targeted by T-CAP, this type of funding should come without restrictions on judges' actions.

C. Examples and Explanations of Ohio's Prison Program and Alternative Community Control Sanctions

Prison is the most restrictive sanction for offenders.⁴⁵ Counties may spend T-CAP funding on any community correction purpose that avoids such a restriction, including: supervision services, local incarceration (including community based correction facility placements), electronic monitoring, substance use monitoring, substance abuse treatment, and additional programming and resources that the county may deem necessary.⁴⁶ Supervision services include probation, which is defined as a "court ordered period of correctional supervision in the community."⁴⁷ In other words, probation is a suspension of a sentence that is used as an alternate to jail or prison. Local incarceration could be in a jail or a community based correction facility, which is a residential sanction that provides an alternative to prison for offenders on felony probation.⁴⁸ Residential sanctions are those in which the offender is confined to a facility, while a non-residential sanction is a lack of confinement, but the offender is subject to the supervision of the locality, county, or state.⁴⁹ Under T-CAP, individuals sentenced to twelve months or less in state prison can still serve their sentence in local jails.⁵⁰

D. Relevant Ohio Prison Statistics

Ohio's prison population is counted as of January 1 each year and has steadily increased.⁵¹ In 2007, the prison population totaled 48,482 inmates, and in 2011, the population totaled 50,857 inmates.⁵² Correctional facilities also measure the total number of offenders within a year who are committed to prison, which at one point was as high as 28,714 persons in 2006, and as low as 23,191 in 2010.⁵³

It is important to note that many of the target counties are also the counties in Ohio that commit the most offenders to prisons.⁵⁴ The counties with the highest percentage of commitments in 2010 were Lucas, Stark, Montgomery, Summit, Franklin, Hamilton, and Cuyahoga.⁵⁵ These seven counties totaled about the same number of commitments as all of Ohio's other eighty-one counties combined.⁵⁶ Additionally,

⁴⁵ OHIO DEP'T OF PUB. SAFETY, *Ohio Criminal Justice Statistics* 59 (2010), http://www.publicsafety.ohio.gov/links/ocjs_statistics.pdf.

⁴⁶ ODRC, *supra* note 9; *see also T-Cap Testimony, supra* note 44 (explaining that Medina county re-opened a local jail pod at the sheriff's office to monitor local offenders more closely).

⁴⁷ OHIO DEP'T OF PUB. SAFETY, *supra* note 45, at 54.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See T-Cap Testimony, supra* note 44.

⁵¹ OHIO DEP'T OF PUB. SAFETY, *supra* note 45, at 61.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 62.

⁵⁵ *Id.*

⁵⁶ *Id.*

these seven counties often yield the highest percentage of returning criminals or reoffenders.⁵⁷

In 2010, 27.3% of all offenders committed in Ohio were offenders of felonies of the fifth degree⁵⁸ and 23.9% of offenders committed were offenders of felonies of the fourth degree.⁵⁹ In other words, over half of the prison population in Ohio was sentenced to state prison for violating fourth or fifth degree felonies. It is also important to note that 26% of offenders committed to state prison in Ohio committed violent crimes against persons, while another 26% committed drug offense.⁶⁰ This emphasis is important because certain offenses, such as those that include violence and drugs, are not included in T-CAP's changes to the sentencing guidelines.⁶¹

Furthermore, state prisons are funded through the state budget.⁶² Ohio's prisons are overcrowded and underfunded, and as such, T-CAP intends to fix these problems by incentivizing counties to stop sending lower level offenders to state prison.⁶³ The ultimate goal of the program is to decrease the state budget for state prisons, but this is done at the expense of underfunding the counties and communities in which the offenders remain after sentencing. Additionally, if the offender is eligible for T-CAP and the judge still sentences him or her to prison, then the county loses funds that may already be insufficient to support the community control sanctions that T-CAP aims to build.⁶⁴

E. The Ohio Constitution and the Uniformity Clause

Article II of the Ohio Constitution vests the legislative power in the Ohio General Assembly.⁶⁵ Similar to the United States Constitution, the Ohio Constitution establishes the requirements for holding office in the Ohio General Assembly, the organization of each house, and the process for a bill to become a law.⁶⁶ The Ohio Constitution places limits on the types of laws that the General Assembly can pass.⁶⁷ For example, Article II, Section 26 of the Ohio Constitution specifically prohibits the General Assembly from passing legislation that has a special effect on a limited number of counties throughout the state, stating that "[a]ll laws, of a general nature,

⁵⁷ *Id.*

⁵⁸ *Id.* at 64.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See H.B. 49, 132d Gen Assemb. (Ohio 2017). Additionally, seven percent of felony offenders committed to state prisons were guilty of sexual offenses, which are also not included in the legislation that established T-CAP; OHIO DEP'T OF PUB. SAFETY, *supra* note 45, at 64.

⁶² See generally ODRC, *supra* note 9.

⁶³ See *id.*

⁶⁴ See generally *id.*

⁶⁵ OHIO CONST. art. II, § 1 ("The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives.")

⁶⁶ *Id.* §§ 2–3, 5, 7, 15, 16.

⁶⁷ *Id.* § 26.

shall have a uniform operation throughout the state.”⁶⁸ This section of the Ohio Constitution intends to restrict the General Assembly from making special laws, provides for the fair application of laws, and ensures the General Assembly employs the necessary time, knowledge, and skill in legislating.⁶⁹

The drafters of the Ohio Constitution did not provide a definition for laws of a general nature, so it falls on the Ohio Supreme Court to define this term.⁷⁰ As an example of this, in 1984, Ohio placed a measure on the ballot seeking to construct free turnpikes.⁷¹ Although this measure purportedly won by a majority vote, a challenge ensued because the number of votes for and against the free turnpikes was less than the number of votes cast in that county for the secretary of state.⁷² As such, the plaintiff claimed that the ballot’s issue did not actually obtain a majority of votes.⁷³ Furthermore, the plaintiff asserted that even if the ballot measure carried a majority of the votes, the commissioner would not be able to proceed under the act because it violated Article II, Section 26 of the Ohio Constitution.⁷⁴

Prior to *Hixson*, the Ohio Supreme Court established a general rule as to the scope and enforcement of the constitutional section, but refused to “define [it] with precision,” instead noting the complexity of establishing such a definition.⁷⁵ The court in *Hixson* asked how to determine whether a given subject is of a general nature and established a test: “[i]f the subject does or may exist in, and affect the people of, every county in the state, it is of a general nature. On the contrary, if the subject cannot exist in, or affect the people of, every county, it is local or special.”⁷⁶ This definition and test has not been overruled in over a century.⁷⁷

After establishing the definition of laws of a general nature, the court asked whether the subject of roads and highways is of a local or general nature.⁷⁸ The court concluded that if they were not of a general nature, members of the Ohio General Assembly would lobby for their specific constituents instead of the entire state, the population of which is utilizing the roads.⁷⁹ The court also reasoned that laws concerning roads were enacted by the second session of the General Assembly, which

⁶⁸ *Id.*

⁶⁹ *Hixson v. Burson*, 43 N.E. 1000, 1002 (Ohio 1896).

⁷⁰ *See id.* at 1001.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *Kelly v. State*, 6 Ohio St. 269, 271 (Ohio 1856)).

⁷⁶ *Id.*

⁷⁷ *See Brown v. State*, 166 N.E.2d 214, 216 (Ohio 1929); *State ex rel. Zupancic v. Limbach*, 568 N.E.2d 1206, 1212 (Ohio 1991); *Put-in-Bay Island Taxing Dist. Auth. v. Colonial Inc.*, 605 N.E.2d 21, 23 (1992).

⁷⁸ *Hixson*, 43 N.E. at 1002.

⁷⁹ *Id.*

emphasizes the importance of roads in uniformity across the entire state.⁸⁰ From this, the court concluded that the subject of roads is of a general nature, and “that it is not only capable of being, but ought to be, legislated upon by general laws having a uniform operation throughout the state.”⁸¹

As with the term “laws of a general nature,” the drafters of the Ohio Constitution did not provide a definition or test for the requirement of uniform application of all laws. The Ohio Supreme Court has held that uniform operation means “universal operation as to territory. It takes in the whole state.”⁸² Additionally, the court held that this term means “universal operation as to all persons and things in the same condition or category.”⁸³ The court concluded that, “[w]hen a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state.”⁸⁴

But, the Ohio Supreme Court did not stop there. Instead of establishing a quasi-exception to the uniform application requirement—that the law does not need to have current effect in every county to be constitutional—it held that a law need only be able to take effect if a county meets the criteria established by the promulgated law.⁸⁵ Thus, so long as it is possible to meet a law’s criteria, the law does not violate the Uniformity Clause.

F. The Structure of Ohio’s Judicial Branch

Article IV of the Ohio Constitution establishes the judicial branch for the State.⁸⁶ It states that “[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.”⁸⁷ It further provides for the organization and jurisdiction of the common pleas courts, stating that “[t]here shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state.”⁸⁸

The selection, or more specifically, the election process, is set out in Article IV as well.⁸⁹ “The judges of the courts of common pleas . . . shall be elected by the electors of the counties . . . in which their respective courts are located, for terms not less than six years.”⁹⁰ This means that in Ohio, as with other states, a voter will find judges on

⁸⁰ *Id.* at 1001.

⁸¹ *Id.* at 1003.

⁸² *State ex rel. Wirsch v. Spellmire*, 65 N.E. 619, 622 (Ohio 1902).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Kelley’s Island Caddy Shack, Inc. v. Zaino*, 775 N.E.2d 489, 492 (Ohio 2002).

⁸⁶ OHIO CONST. art. IV.

⁸⁷ *Id.* § 1.

⁸⁸ *Id.* § 4.

⁸⁹ *Id.* § 6.

⁹⁰ *Id.* § 5.

their ballots in both the primary and general elections. At the time of the primary, the judges must declare a party affiliation.⁹¹

III. T-CAP IS NOT UNIFORMLY APPLIED PURSUANT TO ARTICLE II, SECTION 26 OF THE OHIO CONSTITUTION

Ohio House Bill 49 lists eight target counties that must follow T-CAP.⁹² The Ohio Constitution prohibits this sort of law from enforcement when such enforcement is not uniformly applied across the entire state.⁹³ The statute's voluntary provision provides for potential enforcement throughout all counties of the entire state, but still mandates participation of the eight named counties.⁹⁴ The Ohio Supreme Court has heard many cases regarding uniformity provision, and as such, the court has established a test regarding the application of general laws in a uniform fashion.⁹⁵

A. Laws of a General Nature

The Ohio Constitution does not provide a definition for "law of general nature." In *Hixson*, the court held that laws are of a general nature "if the subject does or may exist in, and affect the people of, every county, in the state" or where all citizens of the state have a common interest.⁹⁶ The court further explained that the constitutionality of a statute is determined by both its subject matter and its operation and effect, not alone by its form.⁹⁷ Therefore, the analysis of T-CAP under the uniformity clause must include not only the text of the statute, but the application of the law.

In its application, T-CAP's subject matter affects every citizen of every county in the State.⁹⁸ This is evidenced in the introductory hypothetical of this Note. In its operation, T-CAP does not apply to every citizen of every county in Ohio, because ten counties are targeted, while the other seventy-eight counties can choose to elect into T-CAP or maintain the same system they have always had.⁹⁹ This calls into question the constitutionality of this portion of House Bill 49, because in form, it is seemingly uniformly applied, while in operation it is not.

⁹¹ Lorraine Bailey, *Nonpartisan Judicial Election Law Upheld*, COLUMBUS DISPATCH (February 11, 2016), <https://www.dispatch.com/news/20171020/ohios-judicial-races-are-nonpartisan-in-name-only-expert-says>.

⁹² H.B. 49, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

⁹³ OHIO CONST. art. II, § 26.

⁹⁴ Ohio H.B. 49 ("Voluntary county' means any county in which the board of county commissioners of the county and the administrative judge of the general division of the court of common pleas of the county enter into an agreement of the type described in division (B)(3)(b) of this section.").

⁹⁵ See *Hixson v. Burson*, 43 N.E. 1000, 1002 (Ohio 1896); see also *State ex rel. Wirsch v. Spellmire*, 65 N.E. 619, 622 (Ohio 1902); *S. Euclid Fraternal Order of Police, Lodge 80 v. D'Amico*, 468 N.E. 2d 735 (Ohio Ct. App. 1983); *Cincinnati v. Shannon*, 410 N.E. 2d 1265 (Ohio Ct. App. 1979).

⁹⁶ *Hixson*, 43 N.E. at 1002.

⁹⁷ *Id.* at 1001.

⁹⁸ ODRC, *supra* note 9.

⁹⁹ *Id.*

Hixson provided a definition for laws of a general nature in 1896 that has not been overruled in over 120 years.¹⁰⁰ The Ohio Supreme Court has consistently applied the *Hixson* definition in cases addressing constitutional challenges under Article II, Section 26 of the Ohio Constitution.¹⁰¹ There would be no difference when considering T-CAP, and as such, the Ohio Supreme Court would find T-CAP unconstitutional under the Uniformity Clause because it is not uniformly applied; however, the voluntary provision and the Ohio General Assembly's intent might impact this conclusion.

1. T-CAP Is a Law of a General Nature

To determine whether a law concerns a subject matter of a general nature, the court must first determine the subject matter of the law.¹⁰² House Bill 49, specifically its sections establishing T-CAP, address the broad subject matter of sentencing criminal offenders.¹⁰³ T-CAP places restrictions on common pleas judges in specific counties regarding what types of offenders judges can sentence to state prison, send to a diversion program, or place under community control sanctions.¹⁰⁴ While T-CAP mandatorily applies to a certain number of counties, criminal sentencing occurs in every county, thus creating safety concerns.

For example, laws prohibiting and criminalizing conduct considered a felony are found in the Ohio Revised Code.¹⁰⁵ The Ohio Revised Code applies to every county in Ohio.¹⁰⁶ Therefore, a felony offense in Cuyahoga County is considered a felony offense in every single Ohio county. The Ohio Revised Code also contains sentencing guidelines.¹⁰⁷ Because these guidelines are the same for every judge, regardless of county, it is logical to conclude that sentencing guidelines are laws of a general nature.

Furthermore, applying the definition established in *Hixson*, sentencing guidelines are laws of a general nature because they exist in and affect the people in every county in the state.¹⁰⁸ The Ohio General Assembly enacts the laws prohibiting the behavior covered by T-CAP. Therefore, the sentencing for the violations of these laws also applies to every citizen in Ohio, and because T-CAP concerns sentencing regulations, it is a law of a general nature.

The General Assembly may attempt to alter sentencing guidelines in an attempt to appease members' specific constituents, whether they make them more stringent, harsher, or lesser. However, this would be bad policy, as it would prove illogical to allow different counties to devise different punishments for state statutory offenses. Think back to the hypothetical provided in the Introduction of this Note—two

¹⁰⁰ See *Hixson*, 43 N.E. 1000.

¹⁰¹ See, e.g., *Desenco, Inc. v. City of Akron*, 706 N.E.2d 323, 330 (Ohio 1999); *Middletown v. Ferguson*, 495 N.E.2d 380, 387 (Ohio 1986); *State ex rel. Wirsch v. Spellmire*, 65 N.E. 619, 620 (Ohio 1902).

¹⁰² *Hixson*, 43 N.E. at 1002.

¹⁰³ H.B. 49, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

¹⁰⁴ See *id.*

¹⁰⁵ See, e.g., OHIO REV. CODE ANN. § 2911.13(C) (West 2019).

¹⁰⁶ See generally OHIO REV. CODE tit. 3.

¹⁰⁷ See, e.g., OHIO REV. CODE ANN. § 2929.14 (West 2019).

¹⁰⁸ *Hixson v. Burson*, 43 N.E. 1000, 1001 (Ohio 1896).

identical felony offenders in neighboring counties could receive entirely different sentences under T-CAP as applied, because Cuyahoga County is a target county, while Lake County has not yet decided to volunteer for T-CAP. While individuals often receive different sentences, T-CAP pushes past these bounds by mandating a difference, particularly because it is the difference between state prison and community control.

B. Uniform Application of Laws of a General Nature

Because the subject of sentencing is of a general nature, T-CAP is a law of a general nature, which means it must be uniformly applied across the state to be constitutional.¹⁰⁹ Similar to laws of a general nature, the Ohio Constitution does not provide a definition or explanation for the meaning of “uniform application.” In *Hixson*, the court held that roads were a subject of a general nature, but the court never reached the question of whether it was uniformly applied.¹¹⁰ To be constitutional, the General Assembly must apply T-CAP uniformly, meaning, it must have “universal operation as to territory” and “universal operation as to all persons and things in the same condition or category.”¹¹¹

1. T-CAP is Not Applied Uniformly

Under the Ohio Supreme Court’s definition, T-CAP is not uniformly applied. When applying that reasoning, T-Cap may seem unconstitutional. T-CAP does not have “universal operation” because it is not operative in all eighty-eight of Ohio’s counties.¹¹² It might have met this universal operation requirement if *every* voluntary county elected into T-CAP, however such is not the case at this time.¹¹³

Additionally, T-CAP does not have “universal operation as to all persons and things in the same condition or category.”¹¹⁴ The program must be effective upon all fourth and fifth-degree felony offenders that meet the criteria established in House Bill 49, but it is only effective upon those offenders in the target counties, as well as those offenders living in counties which choose to participate.¹¹⁵ Because of this, T-CAP does not have universal operation on all persons in the same category, because fourth and fifth degree felony offenders can, and will, be sentenced differently under the law.

¹⁰⁹ See H.B. 49, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

¹¹⁰ *Hixson*, 43 N.E. at 1003.

¹¹¹ *State ex rel. Wirsch v. Spellmire*, 65 N.E. 619, 622 (Ohio 1902).

¹¹² See Ohio H.B. 49.

¹¹³ David Wright, *Highland County Nixes ODRC Program Participation*, THE TIMES-GAZETTE (Aug. 16, 2017), <http://www.timesgazette.com/news/18630/highland-county-nixes-odrc-program-participation> (discussing the Highland County Board of Commissioners decision to opt out of T-CAP because they were concerned as to whether or not the program would be beneficial to the county); Ed Balint, *supra* note 44 (discussing Stark County’s judges’ concerns regarding T-CAP, specifically its potential effect on public safety and receiving insufficient funds for the justice system to serve its purpose).

¹¹⁴ *Wirsch*, 65 N.E. at 622.

¹¹⁵ See ORDC, *supra* note 9.

2. Uniform Application Under *City of E. Liverpool v. Columbiana County Budget Commission*

Our analysis continues, however, because the Ohio Supreme Court has held that geographic distinctions alone may not be enough for a successful constitutional challenge under the Uniformity Clause.¹¹⁶ This is where the anticipated constitutional challenge to House Bill 49 and T-CAP falls apart. In *City of East Liverpool v. Columbiana County Budget Comm'n*, the City of East Liverpool challenged the constitutionality of a piece of legislation that changed the procedure for the adoption of an alternative method for apportioning specific funds, claiming that the law in question violated the Uniformity Clause.¹¹⁷ East Liverpool challenged the law because its share of the apportioned funds decreased, and it contended that the new procedure violated the clause because it is “limited to ‘counties in which [the largest city] has a population of twenty thousand or less and a population that is less than fifteen percent of the total population of the county.’”¹¹⁸

Accordingly, the City of East Liverpool claimed that the “geographic limitation transforms [the law] into a special law on a general subject matter.”¹¹⁹ The Ohio Supreme Court held that the law did not violate the Uniformity Clause because the constitution prohibits “arbitrary geographic distinctions, not reasonable measures that have a geographic element or disparate geographic effect.”¹²⁰ It reasoned that a limit based on population “represents a rational balancing of political subdivision interests” to balance out the population concentration in big cities versus the smaller population in smaller cities.¹²¹

In *City of East Liverpool*, the court specifically stated that the Uniformity Clause prohibits “arbitrary geographic distinctions,” which means that further analysis is necessary to determine what the court considers to be an arbitrary distinction.¹²² The Ohio Supreme Court has stated that “a law operates as an unreasonable classification where it seeks to create artificial distinctions where no real distinction exists.”¹²³ The court also stated that courts should “look to the purpose underlying the statutory classification and if the statute achieves a legitimate governmental purpose and operates equally on all persons or entities included within its provisions, it shall be deemed constitutional.”¹²⁴ In *City of East Liverpool*, the Ohio Supreme Court held that the statute in question was a general law and that it operated uniformly because it may apply to any county that meets the population requirement.¹²⁵

¹¹⁶ See *City of E. Liverpool v. Columbiana Cty. Budget Comm'n*, 870 N.E.2d 705, 710 (Ohio 2007).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *State ex rel. Zupancic v. Limbach*, 568 N.E.2d 1206, 1213 (Ohio 1991).

¹²⁴ *Id.* at 1214.

¹²⁵ *City of E. Liverpool*, 870 N.E.2d at 710–11.

As it currently stands, T-CAP does not have a uniform application across the state; however, the Ohio Supreme Court rejected the argument that a geographic distinction is a violation of the Uniformity Clause.¹²⁶ The legislation that created T-CAP creates a geographic distinction. The *City of East Liverpool* court found that the geographical distinction was based on the population differences and felt that the distinction was good law to balance out the population disparity between big and small cities.¹²⁷ One could argue this is also the case for the application of T-CAP. The primary purpose of T-CAP is to decrease the population and expenses of state prisons by incentivizing, or penalizing, counties that send low-level offenders to state prison.¹²⁸ This is done by targeting those counties that commit the most offenders to state prisons.¹²⁹ Additionally, it is the intent of the Ohio General Assembly and the ODRC to put T-CAP into effect in all counties as soon as it is plausible.¹³⁰ Because of its purpose and application strategy, T-CAP should fall under the quasi-exception established in *City of East Liverpool*. Furthermore, T-CAP does not create “arbitrary” geographic distinctions. Of the ten mandated counties, Lucas, Stark, Montgomery, Summit, Franklin, Hamilton, and Cuyahoga commit the most offenders to state prisons in Ohio.¹³¹ Because seven of the ten mandated counties contribute the highest number of offenders in Ohio to the state prisons, it is logical for the Ohio General Assembly to target these counties in their first attempt to apply T-CAP.

Additionally, the court “should inquire into the purpose underlying a statutory classification where such classification causes disparate results, and if the statute achieves a legitimate governmental purpose and operates equally on all persons or entities included within its provisions it shall be deemed constitutional.”¹³² Clearly, on its face, T-CAP causes disparate results by separating Ohio’s counties into target and voluntary.¹³³ However, the analysis cannot end there, as stated by the court in *Zupancic*.¹³⁴ T-CAP does not operate as an unreasonable classification because there is a very real distinction that exists between the counties, as evidenced by the targeting of those counties that send the most offenders to state prisons. Finally, looking to the underlying purpose of the statutory classification employed by T-CAP, it is clear that T-CAP should fall under the quasi-exception to the uniformity requirement. The ODRC stated that the purpose of this legislation was to ensure that offenders receive the treatment that they need and to reduce the overpopulation of Ohio’s prisons by diverting certain offenders, especially those deemed less dangerous or in need of less severe punishment, from prison to community control programs. T-CAP aims to achieve this legitimate governmental purpose while applying equally to all persons, namely fourth and fifth degree felony offenders.

¹²⁶ *Id.* at 710.

¹²⁷ *Id.*

¹²⁸ ODRC, *supra* note 9.

¹²⁹ OHIO DEP’T OF PUB. SAFETY, *supra* note 45, at 62.

¹³⁰ ODRC, *supra* note 9.

¹³¹ OHIO DEP’T OF PUB. SAFETY, *supra* note 45, at 62.

¹³² *State ex rel. Zupancic v. Limbach*, 568 N.E.2d 1206, 1207 (Ohio 1991).

¹³³ See H.B. 49, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

¹³⁴ *Zupancic*, 568 N.E.2d at 1213–14.

C. The Voluntary Provision Brings T-CAP Under the Quasi-Exception to the Uniformity Clause

The Ohio Supreme Court has carved out a quasi-exception to the Uniformity Clause, holding that “uniformity does not require that the statute actually have current application in every county.”¹³⁵ Therefore, the voluntary provision under T-CAP may seem to resolve the issue of whether the statute is uniformly applied, because all counties can participate if they so choose.¹³⁶ Additionally, the ODRC and the Ohio General Assembly have stated that T-CAP is still in a pilot stage.¹³⁷ This indicates that, while there may not be a current application in every county, the intent is to apply T-CAP in every county, thus exceeding the court’s test in *Kelley’s Island Caddy Shack, Inc. v. Zaino*.¹³⁸

In *Kelley’s Island*, a vendor in the village of Kelley’s Island challenged a law enacted by the Ohio General Assembly which allowed towns or cities to declare themselves resort areas if they met certain criteria.¹³⁹ Once established as a resort area, the town or city could levy taxes on vendors, which Kelley’s Island did.¹⁴⁰ The court, in establishing the quasi-exception, found that the statute did not violate the Uniformity Clause because “a statute is deemed to be uniform despite applying to only one case so long as its terms are uniform and it may apply to cases similarly situated in the future.”¹⁴¹

The court distinguished *Kelley’s Island*, from another similar case, *Put-in-Bay Island Taxing Dist. Auth. v. Colonial, Inc.*, which held that a tax levied on vendors violated the Uniformity Clause with its geographic limitation, because there are a finite number of islands in the State of Ohio.¹⁴² *Kelley’s Island* and *Put-in-Bay* represent two similar issues that were decided very differently. The deciding factor in these two cases was the potential for the application of the resort area designation for the tax to take effect.¹⁴³ In both cases, vendors challenged the laws because it took a portion of their profits. The court held the law in *Put-in-Bay* was unconstitutional because its limit constituted an exclusive club that no one else in Ohio could join.¹⁴⁴ The court in *Kelley’s Island*, on the other hand, reasoned that it doesn’t matter how the law is applied, as long as it has the potential for uniform application.¹⁴⁵

¹³⁵ *Kelley’s Island Caddy Shack, Inc. v. Zaino*, 775 N.E.2d 489, 492 (Ohio 2002).

¹³⁶ See ODRC, *supra* note 9.

¹³⁷ *Id.*

¹³⁸ *Kelley’s Island Caddy Shack, Inc.*, 775 N.E.2d at 492.

¹³⁹ *Id.* at 490.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 492.

¹⁴² See *id.* (citing *Put-in-Bay Island Taxing Dist. Auth. v. Colonial, Inc.*, 605 N.E.2d 21, 23 (Ohio 1992)).

¹⁴³ *Kelley’s Island Caddy Shack, Inc.*, 775 N.E.2d at 492.

¹⁴⁴ *Put-in-Bay Island Taxing Dist. Auth. v. Colonial, Inc.*, 605 N.E.2d 21, 23 (Ohio 1992). There is a finite number of islands in Ohio and barring a natural disaster or a miracle, no other towns would be able to achieve island status.

¹⁴⁵ *Kelley’s Island Caddy Shack, Inc.*, 775 N.E.2d at 492.

The question presented here is whether the voluntary provision in T-CAP satisfies this exception-like language in *Kelley's Island*, or whether it is similar to the law that was found unconstitutional in *Put-in-Bay*. House Bill 49's provision that all counties may participate in T-CAP if they so choose answers this question in a positive manner, because the law has the ability to take effect in every single Ohio county and every single county has the opportunity to elect into the program if they so choose.¹⁴⁶ The court in *Put-in-Bay* found that the required characteristic of the town being an island was exclusive and no other towns in Ohio could join.¹⁴⁷ That is not the case with T-CAP, not only because of the voluntary participation provision, but because there are no further distinctions other than the target and voluntary counties component. Further, there are no limits on the participation of voluntary counties.¹⁴⁸ T-CAP may not have current application in every county, but such facts are essential in determining whether T-CAP falls under the quasi-exception.

House Bill 49 contains a provision that allows other counties, outside of the eight target counties, to participate in T-CAP.¹⁴⁹ Under this provision, counties can choose to join the program and receive grant money as an incentive to divert fourth and fifth degree felony offenders, who meet the additional criteria under T-CAP, from state prisons to community control sanctions.¹⁵⁰ Some argue that the counties voluntarily participating in T-CAP see the grant program as an incentive program, not as a penalty.¹⁵¹ These counties would theoretically volunteer to participate with full knowledge of the grant money, and such will likely be a deciding factor in participating. The counties that were mandated to participate do not receive the same perk, however this is insignificant. This incentive program strongly resembles a penalty program and risks making judges focus more on his or her constituents than justice and rehabilitation.

However, further analysis is needed. The court must consider the voluntary provision, along with the mandate to determine whether it has a uniform application throughout the entire State of Ohio. Additionally, it must consider whether it is the Ohio General Assembly's intent to apply the same sentencing guidelines and distribute similar grant money to all counties throughout Ohio, without the distinction of target or voluntary. While the voluntary provision seemingly satisfies the court's reasoning in *Kelley's Island*, an issue arises that presents the reverse of the *Kelley's Island* holding. Namely, instead of being able to participate in T-CAP, the mandated counties cannot opt out of participation in T-CAP.¹⁵² There is a considerable distinction between the ten target counties, which are subject to the mandate, and the voluntary

¹⁴⁶ H.B. 49, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

¹⁴⁷ *Put-in-Bay Island Taxing Dist. Auth.*, 605 N.E.2d at 23.

¹⁴⁸ See Ohio H.B. 49.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Josh Sweigert, *Sheriff's Fear that Local Jails Will Swell from State Prison Program*, DAYTON DAILY NEWS (Nov. 8, 2017), <https://www.mydaytondailynews.com/news/crime--law/going-shove-felons-down-our-throats-ohio-sheriff-says-about-new-prison-law/dpaChPVtFvGR1Vozqs6EvJ/>.

¹⁵² OHIO REV. CODE ANN. § 2929.34(B)(3)(a)–(b) (West 2019); see also ODRC, *supra* note 9.

counties.¹⁵³ That distinction has never been contradicted. The distinction serves a purpose, such as targeting the counties that contribute the most offenders to Ohio's prisons first to begin effecting real change.

IV. T-CAP IS NOT GOOD PUBLIC POLICY AND THE OHIO GENERAL ASSEMBLY SHOULD REPEAL THE LAW

It may be argued that the loss of grant money per prisoner sentenced to prison that is eligible for diversion under T-CAP is a penalty provision. However, the penalty provision in House Bill 49 is less of a penalty and more of an incentive for participation for the voluntary counties, because they likely chose to participate because of additional funding options. A problem arises when judges divert from T-CAP's required path and lose grant money given to their counties.¹⁵⁴ Specifically, opponents of T-CAP are concerned that this provision, which they view as a penalty, will exert undue influence upon judges.¹⁵⁵

Before it went into effect, T-CAP faced a great deal of controversy.¹⁵⁶ Concerns with T-CAP have ranged from issues pertaining to judicial discretion, to concerns that the program will underfund counties.¹⁵⁷ For example, Highland County announced its decision not to participate in the program, citing concerns about underfunding, primarily that T-CAP does not provide enough funds to supplement the mandatory changes that accompany the grants.¹⁵⁸ This lack of funding will undermine the purpose of the program. Smaller counties may find the funding to be adequate, especially because many of those counties have underfunded programs and an influx of offenders.

The uniform application of laws is also important for the social order, which was a motivation for the drafters of the Ohio Constitution.¹⁵⁹ If different Ohio counties could make rules regarding sentencing that differ from statewide laws, then safety and order may be called into question. It is argued "that actual legal systems in reasonably successful societies have a clear moral principle behind at least much of their law . . . [which] includes social order."¹⁶⁰ Therefore, laws that do not have a clear moral principle do not support the social order. This is evident in the drafters' intent of the Uniformity Clause that members of the Ohio General Assembly cannot enact

¹⁵³ See OHIO DEP'T OF PUB. SAFETY, *supra* note 45, at 62.

¹⁵⁴ ODRC, *supra* note 9.

¹⁵⁵ Bailant, *supra* note 113 ("A Stark County judge has compared the new grant program for fifth-degree felonies to bribery. Another primary criticism is it strips judges of the discretion to do their job.").

¹⁵⁶ Thomas Suddes, Editorial, *Gov. Kasich's Stay-out-of-Prison Free Card*, CLEVELAND.COM (May 4, 2017), https://www.cleveland.com/opinion/index.ssf/2017/04/gov_kasichs_budget_could_mean.html.

¹⁵⁷ Rocky A. Coss, Opinion, *Judge Coss Addresses Proposed Amendment in Ohio House Bill 49 and Its Effect on the Local Level*, HIGHLAND CTY. PRESS (Feb. 15, 2017), <https://highlandcountypress.com/Content/Opinions/Opinion/Article/Judge-Coss-addresses-proposed-amendment-in-Ohio-House-Bill-49-and-its-effect-on-the-local-level/4/22/37307>.

¹⁵⁸ Wright, *supra* note 113.

¹⁵⁹ See *Hixson v. Burson*, 43 N.E. 1000, 1002 (Ohio 1896).

¹⁶⁰ Russell Hardin, *Law and Social Order*, 11 PHIL. ISSUES 61, 61 (2001).

legislation that favors their constituents over others.¹⁶¹ And while the uniform application of laws is important for the social order, the lack of *per se* uniform application under T-CAP does not undermine the social order, because there is a clear moral principle behind the law. The ODRC has stated that the purpose is to decrease the prison population, and perhaps alone this would not stand up to such scrutiny, but it is also to get offenders the treatment they need and lower the rate of re-offending.¹⁶²

A. T-CAP's Impact on Judicial Discretion and Independence

Concerns arise that this will make judges more susceptible to their constituents instead of the impartial independent entity that they are supposed to represent in the political and legal system. Historically, the judicial branch of the government is intended to be independent of partisanship, instead upholding and interpreting the law as it relates to the Constitution of the United States and the respective states.¹⁶³ But T-CAP causes judges to be more susceptible to their constituents, instead of remaining insulated from the political atmosphere, because they rely on the public for re-election.

Additionally, Stark County declined to put the program into effect early, turning down roughly \$900,000 in funding by doing so.¹⁶⁴ Stark County judges reject participation and feel that participating in T-CAP amounts to "bribery" and "strips [them] of the discretion to do their job."¹⁶⁵ Safety greatly influences the decision as well. Stark County claims that the law represents about 130 defendants, but the grant is insufficient to cover the community treatment for these offenders.¹⁶⁶

In Ohio, county common pleas judges are elected by the citizens of each judge's respective county.¹⁶⁷ In the primary elections, party affiliation is included on the ballot.¹⁶⁸ This is already one step away from judicial independence, because judges are beholden to a political party, when in theory they are supposed to be independent of partisanship.¹⁶⁹ Now, it is true that in the general election, judges names appear on the ballot without a party distinction, but this is insignificant, because to make it to the general election, the judges must first make it past the partisan primary election.¹⁷⁰

T-CAP makes the judicial branch even less independent of partisan politics by predicating much needed funding on the judges' decisions. While the money is much needed and some judges have found the grants to be a marvelous gift, it cannot be ignored that the judicial branch is losing independence. It is the judge's responsibility to sentence an offender, and it should be left to the judge's discretion when fashioning

¹⁶¹ See *Hixson*, 43 N.E. at 1002.

¹⁶² ODRC, *supra* note 9.

¹⁶³ See Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 577 (2014) (discussing the history of judicial independence, including Alexander Hamilton's argument for independence in the Federalist Papers).

¹⁶⁴ Balint, *supra* note 44.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ OHIO CONST. art. IV, § 5.

¹⁶⁸ See Bailey, *supra* note 91.

¹⁶⁹ Gilbert, *supra* note 163, at 577.

¹⁷⁰ See *id.*

the sentence, whether it's a community control sanction, such as probation, or a more restrictive sanction, such as state prison. And even though T-CAP does not take away that sentencing responsibility, it adds even more responsibility for judges to carry in that judges become responsible for the county gaining or losing T-CAP grant money, and consequently gaining or losing potential votes in both the primary and general elections.

While Ohio's prisons are overcrowded, and county and other local level community control programs are underfunded, conditioning this necessary grant money on judicial decisions is unnecessary and improper.¹⁷¹ The Ohio General Assembly should still distribute this grant money on the condition that it is used to expand community controls, because there is evidence that it works, as seen in Medina County. Judge Joyce Kimbler, a Medina County Court of Common Pleas judge, is a zealous advocate of T-CAP's grants because it has finally given her the power to deal with the overwhelming heroin epidemic, in addition to the other offenders in her county.¹⁷² This is exactly what the ODRC and the Ohio General Assembly intended T-CAP to do; however, they are misguided by the notion that the only way to reach this desired outcome is by indirectly funding judicial decisions. As evidenced by Judge Kimbler's enthusiastic response to finally being able to do something beneficial for her county in regard to the heroin issue, it is imperative that Ohio's common pleas judges divert lower level offenders if the county has the resources without the addition of a condition placed on the funding.

T-CAP intends to decrease the prison population, because state prisons in Ohio are over capacity.¹⁷³ The purpose of the statutory classification is that the ten target counties contribute the most fourth and fifth degree felony offenders to state prisons.¹⁷⁴ Furthermore, the program is in a pilot or trial stage at the moment, so it does not mean that it will not be mandated to other counties in the future.¹⁷⁵ Because of this, it is unlikely that the geographic classification, based on the state's purported interest, will nullify the law pursuant to the Uniformity Clause of the Ohio Constitution. However, the geographic classification is not arbitrary and it serves the ODRC's purpose, and therefore, it will likely be found to be constitutional. But a finding of constitutionality does not mean that the law is good public policy.

IV. CONCLUSION

T-CAP is a law of a general nature and, therefore, uniform application is constitutionally required. While the law has a great motive in reducing the prison population in Ohio, it needs to be applied across every county to be constitutional and

¹⁷¹ See Jackie Borchardt, *Proposed Reforms Could Divert 3,400 Offenders from Ohio's Overcrowded Prisons. Not Everyone Is on Board.*, CLEVELAND.COM (Apr. 26, 2017), https://www.cleveland.com/metro/index.ssf/2017/04/proposed_reforms_could_divert.html.

¹⁷² *TCAP Testimony*, *supra* note 44.

¹⁷³ ODRC, *supra* note 9.

¹⁷⁴ OHIO DEP'T OF PUB. SAFETY, *supra* note 45. The seven most highly populated counties in Ohio committed fifty-three percent of offenders to prison, which are often the counties to which most offenders return. The counties are Lucas, Stark, Montgomery, Summit, Franklin, Hamilton, and Cuyahoga. These are also the counties in which T-CAP will go into effect in July 1, 2018, supporting the purpose of the program.

¹⁷⁵ ODRC, *supra* note 9.

effective. Judges should not be monetarily incentivized to sentence offenders, because they are supposed to be independent actors in the judicial system. Uniform application of T-CAP would preserve judicial integrity and improve Ohio's prison system, but uniform application is not the best choice. Judicial discretion and independence is of the utmost importance in an effective government, and connecting judges to financial aid to their respective counties is bad public policy.¹⁷⁶ The Ohio General Assembly should appeal House Bill 49's establishment of T-CAP and replace it with a simple grant program that does not condition the funding on judicial decision.

The hypothetical presented in the Introduction of this Note is a potential consequence of the current lack of uniform application of T-CAP across Ohio. The purpose of the law, however, is to reduce prison population, which will likely result because it mandates participation to those counties that contribute the most offenders to state prisons each year.¹⁷⁷ While the purpose of the law does not supersede the Ohio Constitution, nor its drafters' rationale for Article II, Section 26 that laws that affect the entire state should have the same application, T-CAP is still constitutionally valid under the Uniformity Clause.¹⁷⁸ The drafters did not want a lack of fairness permeating and affecting the enforcement of such laws.¹⁷⁹ This is evident in the language of the Uniformity Clause which limits the requirement of uniform application to laws of a general nature, but does not include local ordinances or special laws that only concern specific aspects of some counties.¹⁸⁰ T-CAP, even though it is not *per se* uniformly applied, does not effect a lack of fairness, because the purpose of the law is best served by targeting certain counties to start with, because the target counties contribute the most offenders to state prisons in Ohio.¹⁸¹

¹⁷⁶ Gilbert, *supra* note 163, at 577.

¹⁷⁷ ODRC, *supra* note 9.

¹⁷⁸ See *Hixson v. Burson*, 43 N.E. 1000, 1002 (Ohio 1896).

¹⁷⁹ See *id.*

¹⁸⁰ See OHIO CONST. art II, §26.

¹⁸¹ ODRC, *supra* note 9.

