

STATE OF OHIO V. AALIM: DUE PROCESS AND MANDATORY
TRANSFER OF JUVENILES TO ADULT COURT

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I. INTRODUCTION

Ohio law requires that juveniles accused of committing certain crimes are automatically removed from the jurisdiction of the juvenile court and transferred to adult court if two requirements are satisfied: (1) they are sixteen or older at the time of the commission of the act charged and (2)

there is probable cause to believe that they committed the act charged.¹ On December 22, 2016, the Supreme Court of Ohio decided *State v. Aalim*, ruling that these mandatory transfer statutes are unconstitutional because they violate a juvenile's right to due process as guaranteed by the Ohio Constitution.² The state then asked the court to reconsider its ruling, and on May 25, 2017, the Supreme Court of Ohio, equipped with two new Justices, overturned its previous decision in *Aalim I* and ruled that the mandatory transfer does not violate due process.³

In 1967, the Supreme Court of the United States transformed juvenile justice when it held that juveniles are constitutionally entitled to procedural safeguards under the Due Process Clause of the Fourteenth Amendment.⁴ Recent Supreme Court jurisprudence regarding the juvenile justice system has focused primarily on the Eighth Amendment's prohibition on cruel and unusual punishment, rather than a Fourteenth Amendment due process analysis.⁵ In this period of Eighth Amendment decisions, the Supreme Court routinely struck down certain punishments as applied to juveniles on the grounds that children are fundamentally different from adults.⁶ While the "kids are different" approach permeates Supreme Court decisions regarding the Eighth Amendment, the Court has never applied the theory to due process concerns.

In 1966, the Supreme Court of the United States declared that juveniles cannot be transferred to adult court without a hearing where they are represented by counsel.⁷ Then, the Supreme Court of Ohio in *Aalim I* became the first high court in the nation to declare that the mandatory transfer of juveniles to adult court is a violation of due process.⁸ The Court noted that children are "constitutionally different from adults,"⁹ and drawing on its previous decisions,¹⁰ held that a due process requirement of "fundamental fairness" requires an amenability hearing to determine a juvenile's suitability to be tried in juvenile or

1. Ohio Rev. Code Ann. § 2152.10(A)(2)(b) (2017); Ohio Rev. Code Ann. §2152.12(A)(1)(b) (2017).

2. *State v. Aalim*, 2016-Ohio-8278 (hereinafter, "Aalim I").

3. *State v. Aalim*, 2017-Ohio-2956 (hereinafter, "Aalim II").

4. *In re Gault*, 387 U.S. 1, 30 (1967).

5. Casey McGowan, et al., *Moving Forward from Gault*, 41 *Champion* 22 (2017).

6. *Id.*

7. *Kent v. United States*, 383 U.S. 541 (1966)

8. McGowan, *supra* note 5 at 25.

9. *State v. Aalim*, 2016-Ohio-8278, at ¶ 22.

10. *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 78. (There, the court held that fundamental fairness requires that the juvenile court judge decide the appropriateness of any adult penalty for juvenile acts.)

adult court.¹¹ Of course, this analysis was subsequently overruled in *Aalim II*. This case was not appealed to the Supreme Court of the United States; however, the time is looming for the nation's highest court to address whether the "kids are different" approach applies to the Fourteenth Amendment as well as the Eighth Amendment.

Part II of this article examines the standards for due process review, provides an overview of Ohio and federal juvenile justice jurisprudence, and breaks down *State v. Aalim*. Part III analyzes the decisions reached by the Supreme Court of Ohio and argues that the court did not reach the correct outcome. Part IV concludes by calling for the Supreme Court of the United States to settle the question posed by *Aalim*.

II. BACKGROUND

This section examines due process and the jurisprudentially recognized notion that "kids are different" in order to provide the context for the Supreme Court of Ohio's decisions in the *Aalim* cases.

Due Process

The concept of "due process" has its foundation in the Fourteenth Amendment to the United States Constitution, which States that no State shall "deprive any person of life, liberty, or property, without due process of law."¹² Within the Ohio Constitution, there is a "due course of law clause" which provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."¹³ The Supreme Court of Ohio has interpreted the Due Course of Law Clause of the Ohio Constitution as coextensive with the Due Process Clause of the United States Constitution because the language is "virtually the same."¹⁴ The Supreme Court of Ohio, however, has also held that the Ohio Constitution is a document of independent force that may provide greater due process protections to juveniles than the United States Constitution.¹⁵

The Supreme Court of the United States has observed that "due

11. *State v. Aalim*, 2016-Ohio-8278, at ¶ 20.

12. U.S. Const. amend. 14, § 1.

13. Ohio Const. art. 1, §16.

14. *In re Hua*, 62 Ohio St.2d 227, 230, 405 N.E.2d 255 (1980).

15. *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, at ¶ 23-24 (finding a greater due-process right to counsel for a juvenile under the Ohio Constitution than under the United States Constitution).

process' has never been, and perhaps can never be, precisely defined."¹⁶ The application of due process differs depending on the importance attached to the interest at stake and the circumstances under which the deprivation of that interest could occur.¹⁷

A Due Process analysis can be either procedural or substantive in nature.¹⁸ The Due Process Clause protects against more than unfair process; it also substantively protects against governmental infringement of liberty interests and fundamental rights.¹⁹ The Supreme Court of the United States has stated that applying the Due Process Clause can be "an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation" by evaluating relevant precedent and considering the several interests that are at stake.²⁰

The requirements of due process are "flexible and call for such procedural protections as the particular situation demands."²¹ When performing a procedural due process analysis, the leading case, *Mathews v. Eldridge*,²² controls. Courts must consider three different factors: (1) the private interest to be affected by the government action; (2) the risk that the procedure will result in an erroneous deprivation of that interest, and the value of any additional procedural safeguards; and (3) the government's interest in the procedure, including the burdens of additional safeguards.²³

The Supreme Court of the United States' "established method of substantive-due-process analysis has two primary features."²⁴ First, the Court has "observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"²⁵ Second, the Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."²⁶

16. *Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina*, 452 U.S. 18, 24 (1981).

17. *Walters v. Natl. Assn. of Radiation Survivors*, 473 U.S. 305, 320 (1985).

18. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

19. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

20. *Lassiter*, 452 U.S. 18 at 24-25.

21. *Morrissey v. Brewer*, 408 U.S. 481 (1972).

22. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

23. *Id.* at 335

24. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

25. *Glucksberg*, 521 U.S. at 720-21, (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

26. *Glucksberg*, 521 U.S. at 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

Supreme Court Jurisprudence

Beginning in 1966, the Supreme Court of the United States Court has consistently held that constitutional protections apply equally to juveniles and adults in the justice system.²⁷ In *Kent v. United States*, a case decided pursuant to the “Juvenile Court Act,” the Court held that before a juvenile court can transfer a defendant to adult court, there must be a hearing and a “full investigation”²⁸ into the case. While the hearing need not conform with all of the requirements of a criminal trial, it must “measure up to the essentials of due process and fair treatment.”²⁹ Due process requires that at this hearing the juvenile be afforded assistance of counsel and a statement of reasons for the decision.³⁰

In 1967, in *In re Gault*, the Court built upon *Kent* and held that juveniles accused of crimes have many of the same due process protections as adults.³¹ This includes adequate written notice, a right to counsel, the right to implicate the Fifth Amendment privilege against self-incrimination, and the right to confront a witness.³² Then, in 1975, the Court held that the double jeopardy clause applies to juveniles as well as adults, so that a juvenile may not be retried as a juvenile or an adult.³³

“Kids are Different”

In 1989, the Supreme Court of the United States upheld the execution of a juvenile who had been convicted of murder.³⁴ In 2005, however, the Court reversed that ruling, finding that the execution of a juvenile is a violation on the Eighth Amendment’s prohibition against “cruel and unusual punishment.”³⁵ The Court noted three important differences between adults and juveniles which demonstrate that the death penalty is not a suitable punishment for juveniles: (1) “a lack of maturity and an underdeveloped sense of responsibility”³⁶ which result in “impetuous and ill-considered actions and decisions;”³⁷ (2) “juveniles are more vulnerable or susceptible to negative pressures, including peer

27. *Kent v. United States*, 383 U.S. 541 (1966).

28. *Id.* at 559.

29. *Id.* at 542.

30. *Id.*

31. *In re Gault*, 387 U.S. 1, 3, 87 S. Ct. 1428, 1431 (1967).

32. *Id.* at 3.

33. *Breed v. Jones*, 421 U.S. 519, 520 (1975).

34. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

35. *Roper v. Simmons*, 543 U.S. 551, 556 (2005).

36. *Id.* at 569.

37. *Id.*

pressure;”³⁸ and (3) “the character of a juvenile is not as well formed as that of an adult,”³⁹ and, thus, “the personality traits of juveniles are more transitory, less fixed.”⁴⁰ The Court also drew on a national consensus against the juvenile death penalty, noting that thirty States prohibit the death penalty for juveniles.⁴¹ Especially relevant to the Court was that there was a trend, albeit slow, in the number of States that had abolished the death penalty for juveniles since their last ruling in *Stanford*.⁴²

In 2010, the Court used this “kids are different” rationale to rule that sentences of life without parole for non-homicidal crimes constitutes cruel and unusual punishment.⁴³ In 2011, the Court determined that there are different standards for juveniles and adults to determine when an individual is “in custody” with respect to *Miranda* rights.⁴⁴

Then, in 2012, the Court ruled that a statute imposing a mandatory life without parole sentence for murder is a violation of the Eighth Amendment.⁴⁵ Notably, the Court affirmed that “children are constitutionally different from adults for purposes of sentencing,” due to “their diminished culpability and greater prospects for reform.”⁴⁶ So, while the principle that “children are constitutionally different” is firmly established in the nation’s highest court, the concept has not been applied to the due process clause of the Fourteenth Amendment.

The Juvenile Justice System in Ohio

Juvenile courts were founded on the premise that the state has a role as *parens patriae*⁴⁷ to a delinquent child, and that the goal of the

38. *Id.*

39. *Id.* at 570.

40. *Id.*

41. *Id.* at 564.

42. *Id.* at 565 (although only five States had abolished the juvenile death penalty since 1989, the court noted that there was a “consistency of direction of change” showing a national consensus against the practice).

43. *Graham v. Florida*, 560 U.S. 48 (2010) (the Court noted that advances in psychology and brain science have shown that juveniles are fundamentally different from adults, that their brains are still maturing through adolescence, and that they are more capable of change than adults).

44. *J. D. B. v. North Carolina*, 564 U.S. 261 (2011). (The court noted that “children are often less mature and responsible than adults;” that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them;” that “they are more vulnerable or susceptible to outside pressures than adults;” and that “children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”)

45. *Miller v. Alabama*, 567 U.S. 460, 461 (2012).

46. *Id.* at 471.

47. Refers to the policy that the government should intervene and act as the parent of a child who cannot care for itself.

juvenile justice system is to rehabilitate and protect the child.⁴⁸ In Ohio, the statutorily-defined purpose of the juvenile justice system includes to “provide for the care, protection, and mental and physical development of children” and “rehabilitate the offender.”⁴⁹ The juvenile justice system has always emphasized individualized assessment, addressing the best interests of the child, and helping juveniles reintegrate into society.⁵⁰

The first juvenile court in the United States was established in Cook County, Illinois, in 1899, and the first juvenile court in Ohio was established in Cuyahoga County in 1902.⁵¹ In 1937, the Ohio legislature established juvenile courts throughout the state, vesting “exclusive original jurisdiction” over any delinquent child.⁵² The amenability hearing before transfer to adult court was added to the juvenile justice system in 1969.⁵³

Mandatory Transfer Laws

In 1996, in response to rising juvenile crime rates⁵⁴ and a growing national fear of “superpredators,”⁵⁵ the Ohio legislature enacted a law requiring the mandatory transfer of juveniles accused of committing certain offenses.⁵⁶ This created “a narrow exception to the general rule that juvenile courts have exclusive subject matter jurisdiction over any case involving a child.”⁵⁷ The statute sets forth which juvenile cases are subject to mandatory transfer and provides that certain children are eligible for mandatory transfer to adult court if they are sixteen or older and commit a category one⁵⁸ or category two offense,⁵⁹ or the child was

48. *State v. Aalim*, 2017-Ohio-2956, at ¶ 63-4 (O’Connor, C.J., dissenting).

49. Ohio Rev. Code Ann. §2152.01 (LexisNexis 2017).

50. *State v. Hanning*, 89 Ohio St.3d 86, 88, 2000 Ohio 436, 728 N.E.2d 1059.

51. *State v. Aalim*, 2017-Ohio-2956, at ¶ 17.

52. *Id.* at ¶ 63 (O’Connor, C.J., dissenting).

53. *Id.* at ¶ 17.

54. *Aalim*, 2017-Ohio-2956, at ¶ 2; *State v. Hanning*, 89 Ohio St.3d 86, 89, 2000-Ohio-436, 728 N.E.2d 1059 (noting that the mandatory-transfer statute is part of Ohio’s response to rising juvenile crime).

55. Hillary Clinton, Campaign Speech Advocating for President Clinton’s Bill on Criminal Justice Reform (Jan. 28, 1996).

56. *Aalim*, 2017-Ohio-2956, at ¶ 2. (The law was originally codified as Ohio Rev. Code Ann. § 2151.26, now Ohio Rev. Code Ann. § 2152.12)

57. Ohio Rev. Code Ann. § 2152.01 (2017). (The stated purpose of the statute is to “provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender’s actions, restore the victim, and rehabilitate the offender”).

58. Ohio Rev. Code Ann. § 2152.02(BB) (“Category one offenses” include murder, aggravated murder, attempted murder, or attempted aggravated murder).

59. Ohio Rev. Code Ann. § 2152.02(CC) (“Category two offenses” include voluntary

fourteen or fifteen and had previously committed a category one or category two offense.⁶⁰

In addition to the mandatory transfer statute, a separate statute calls for discretionary transfer, requiring the juvenile court to hold an amenability hearing before transferring a juvenile to adult court.⁶¹ The purpose of this hearing is to determine whether a juvenile is amenable to the juvenile justice system's goal of rehabilitation.⁶² The Ohio legislature, however, deemed that an amenability hearing is not available for a juvenile who qualifies for mandatory transfer.⁶³ In the case of mandatory transfer, a juvenile judge oversees a probable cause hearing where the judge must decide whether the juvenile meets the statutory age requirement, and that there is probable cause to believe that the juvenile committed the crime in question.⁶⁴ If the judge finds that these criteria are satisfied, the juvenile is automatically transferred to adult court with no determination of whether the individual is amenable to rehabilitation.⁶⁵

Twenty-five other States and the federal government have mandatory transfer statutes similar to Ohio's.⁶⁶ Additionally, four States and the District of Columbia provide for a rebuttable presumption in favor of transfer.⁶⁷ Twenty States have elected not to have mandatory transfer laws, providing only for the discretionary transfer of juveniles to adult court.⁶⁸ The states that do not provide for mandatory transfer do so because their legislatures or citizenry have elected not to, not because a higher court has ruled those procedures to be unconstitutional.⁶⁹

Supreme Court of Ohio Jurisprudence

The Supreme Court of Ohio has held that the Ohio Constitution is a "document of independent force,"⁷⁰ and that while the state cannot provide less protection than the United States Constitution requires, they

manslaughter, kidnapping, rape, aggravated arson, aggravated robbery, aggravated burglary, involuntary manslaughter where the underlying predicate offense is a felony, and felonious sexual penetration).

60. Ohio Rev. Code Ann. § 2152.10.

61. Ohio Rev. Code Ann. § 2152.12.

62. *Id.*

63. *Id.*

64. State v. Aalim, 2016-Ohio-8278, at ¶ 3.

65. *Id.*

66. State's Reply Brief, March 1, 2016, 8. (Since the Brief has been filed, the state of California has eliminated mandatory transfer laws through Proposition 57). See Casey McGowan, et al., *Moving Forward from Gault*, 41 *Champion* 22, 25 (2017).

67. State's Reply Brief at 8.

68. *Id.*

69. *Id.* at 6.

70. Arnold v. Cleveland, 616 N.E.2d 163 (1993).

are free to establish greater protections to individuals and groups.⁷¹ Additionally, the Supreme Court of Ohio has ruled that the Ohio Constitution affords greater protection against double-jeopardy for juveniles than the United States Constitution.⁷²

The Supreme Court of Ohio, separately from the Supreme Court of the United States, has recognized that juvenile delinquency proceedings require the same procedural safeguards as adult criminal proceedings.⁷³ This includes the right to counsel;⁷⁴ the right against self-incrimination;⁷⁵ and the right to double-jeopardy protections.⁷⁶ The standard for due process challenges in juvenile proceedings recognized by the state of Ohio is “fundamental fairness.”⁷⁷ The Supreme Court of Ohio has said that the meaning of “fundamental fairness” is as “opaque as its importance is lofty.”⁷⁸ Thus, a “court’s task is to ascertain what process is due while being true to the core concept of due process in a juvenile case - to ensure orderliness and fairness.”⁷⁹

Case Background

Matthew Aalim, who was sixteen and had no criminal record, was charged with what would be considered aggravated robbery if committed by an adult.⁸⁰ The State filed a motion to transfer Aalim to adult court pursuant to the mandatory transfer laws.⁸¹ At the required hearing, the juvenile court found that Aalim was sixteen at the time of the alleged crime, and that there was probable cause to believe that Aalim committed the crime.⁸² Thus, the juvenile court automatically relinquished jurisdiction and Aalim was transferred to adult court.⁸³

Aalim argued that the mandatory transfer provisions violated due process and equal protection, as well as the prohibition against cruel and unusual punishment as guaranteed by the United States Constitution and

71. *Id.*

72. *In re A.G.*, 148 Ohio St. 3d 118, 2016-Ohio-3306, 69 N.E.3d 646, at ¶ 11-13.

73. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 26.

74. *In re Agler*, 249 N.E.2d 808, 810 (1969).

75. *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, 856 N.E.2d 921, at ¶ 1.

76. *In re A.G.*, 69 N.E.3d 646, at ¶ 11-12.

77. *State v. Aalim*, 2017-Ohio-2956, at ¶ 94 (O’Connor, C.J., dissenting) (quoting *C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, at ¶ 80).

78. *Lassiter v. Durham Cty. Dept. of Social Servs.*, 452 U.S. 18, 24 (1981).

79. *In re C.S.*, 2007-Ohio-4919, 115 Ohio St. 3d 267, 874 N.E.2d 1177, at ¶ 81.

80. *State v. Aalim*, 2016-Ohio-8278, at ¶ 2. (Aalim was actually charged with two counts of aggravated robbery with a firearm, because there were two victims.)

81. *Id.*

82. *Id.* at ¶ 3.

83. *Id.*

the Ohio Constitution.⁸⁴ The court disagreed, and Aalim entered a no-contest plea and was sentenced to concurrent prison terms of four years for each count of aggravated robbery.⁸⁵ The Court of Appeals also rejected Aalim's constitutional challenges, upholding mandatory transfer to adult court.⁸⁶ Aalim appealed the case to the Supreme Court of Ohio, claiming that the mandatory transfer provisions violate due process and equal protection.⁸⁷

Aalim I

On December 22, 2016, the Supreme Court of Ohio issued its ruling in *Aalim I*, holding in a 4-3 vote that the mandatory transfer of juveniles to the general division of the common pleas court is a violation of due process under the Ohio Constitution.⁸⁸ The court ruled that, before a juvenile can be transferred to adult court, a juvenile judge must hold an individualized amenability hearing to determine whether the juvenile can meet the juvenile justice system goals of rehabilitation and reintegration.⁸⁹ The court's ruling did not rely on substantive or procedural due process, but instead used the "fundamental fairness" standard for due process claims in Ohio juvenile proceedings.⁹⁰

Matthew Aalim presented facial due process and equal protection challenges to the mandatory transfer provisions, arguing, *inter alia*, that "fundamental fairness requires that every juvenile demonstrate a capacity to change."⁹¹ The court agreed with Aalim's position that juveniles have a "special status,"⁹² and as such are "entitled to be treated as a juvenile" and "should receive an amenability hearing before any transfer" to adult court.⁹³ The court stated that the amenability hearing is necessary because "fundamental fairness requires that juveniles have the opportunity to demonstrate a capacity to change."⁹⁴

The court, citing Ohio and Supreme Court of the United States precedent acknowledging the differences between children and adults

84. *Id.* at ¶ 4.

85. *Id.*

86. *Id.* at ¶ 5.

87. *Id.* at ¶ 6. (In the Supreme Court of Ohio, Aalim did not argue that mandatory transfer is a violation of cruel and unusual punishment).

88. *Id.* at ¶ 31.

89. *Id.*

90. *Id.* at ¶ 25.

91. *Id.* at ¶ 9.

92. *Id.* at ¶ 26.

93. *Id.* at ¶ 20.

94. *Id.*

for Eighth Amendment purposes,⁹⁵ explicitly held that it “is a logical step for us to hold that all children, regardless of age, must have individual consideration at amenability hearings before being transferred from the protections of juvenile court to adult court upon a finding of probable cause for certain offenses.”⁹⁶ The court reasoned that juvenile procedures must account for the differences between adults and children, and that mandatory transfer to adult court is a violation of fundamental fairness, which requires additional procedural safeguards for juveniles.⁹⁷

The court also held that Ohio’s discretionary transfer provisions were not a violation of due process because the procedures satisfy fundamental fairness.⁹⁸ The procedures required before a discretionary transfer include an “investigation into the child’s social history, education, family situation, and any other factor bearing on whether the child is amenable to juvenile rehabilitation, including a mental examination of the child.”⁹⁹ The court ruled that discretionary transfer provisions guarantee that children are recognized as “constitutionally different from adults,” and that in the process, discretionary transfer ensures that juveniles who are not amenable to rehabilitation are transferred to adult court.¹⁰⁰ Thus, the court struck down Ohio’s mandatory transfer laws as a violation of due process under the Ohio Constitution, and upheld the constitutionality of discretionary transfer.¹⁰¹

Three Justices dissented, accusing the majority of over-generalizing the extra protections that the Ohio Constitution guarantees, and changing the law without adequate analysis of what due process requires.¹⁰² Justice French accused the majority of striking down mandatory transfer without any compelling reason to do so besides “mere permissibility.”¹⁰³ Additionally, Justice Kennedy argued that the court did not meet the required standard for finding a statute unconstitutional: proof beyond a reasonable doubt.¹⁰⁴

95. *Roper v. Simmons*, 543 U.S. 551, 570-571 (2005); *Graham v. Florida*, 560 U.S. 48, 77-78 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, 8 N.E.3d 890; *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156; *In re A.G.*, 148 Ohio St. 3d 118, 2016-Ohio-3306, 69 N.E.3d 646; *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729.

96. *State v. Aalim*, 2016-Ohio-8278, at ¶ 24.

97. *Id.* at ¶ 25.

98. *Id.* at ¶ 28.

99. *Id.* at ¶ 27.

100. *Id.* at ¶ 28.

101. *Id.* at ¶ 31.

102. *Id.* at ¶ 35 (Kennedy, J., concurring in part and dissenting in part).

103. *Id.* at ¶ 47 (French, J., dissenting).

104. *Id.* at ¶ 36 (Kennedy, J., dissenting). (To succeed on a facial challenge, there must be no set

Justice Kennedy also reasoned that “fundamental fairness” is not an appropriate standard to be applied to mandatory transfer provisions because the principle is less concrete than the standards in the court’s previous decisions regarding juveniles in the Sixth and Eighth Amendment contexts.¹⁰⁵ Justice Kennedy, however, argued that the “fundamental fairness” is satisfied by the statutorily required probable cause hearing.¹⁰⁶ In Ohio, “fundamental fairness” requires that juvenile proceedings require such “basic constitutional protections as notice of the charges and the rights to counsel, confrontation, and cross-examination.”¹⁰⁷ According to Justice Kennedy, this standard is satisfied in the mandatory transfer statute, and furthermore, the decision to provide a juvenile with an amenability hearing is the province of the General Assembly.¹⁰⁸ Thus, Justice Kennedy accused the majority of overstepping its bounds to overrule a process that the legislature has the exclusive authority to create.¹⁰⁹

Justice French, joined in dissent by Justice O’Donnell, also examined the due process ramifications in greater detail than the majority’s “fundamental fairness” review, performing both procedural and substantive due process analyses, and finding that the mandatory transfer provisions offend neither.¹¹⁰ First, Justice French wrote that substantive due process is not violated because the right to a juvenile court hearing or an amenability hearing is not a fundamental right “deeply rooted in the nation’s history” because the juvenile court system was not created until 1899, and was not adopted in Ohio until 1937.¹¹¹ Justice French noted that Aalim did not explicitly argue that mandatory transfer violates procedural due process.¹¹² However, Justice French still wrote that procedural due process was not violated because the mandatory transfer provisions do not deprive a juvenile of a life, liberty, or property interest.¹¹³ Further, even if mandatory transfer deprived a juvenile of liberty by interest in retaining juvenile status, Justice French argued that the statutory provisions of a “probable cause hearing” provides enough due process before the transfer is completed.¹¹⁴

of circumstances under which the law would be valid; it must be unconstitutional in all applications. Justice Kennedy said that the “majority’s analysis does not meet this high standard”).

105. *Id.* at ¶ 40.

106. *Id.* at ¶ 41.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at ¶ 51 (French, J., dissenting).

111. *Id.* at ¶ 54.

112. *Id.* at ¶ 62.

113. *Id.* at ¶ 57.

114. *Id.* at ¶ 62.

Aalim II

At the end of December 2016, Justices Lanzinger and Pfeifer, both in the majority in *Aalim I*, retired.¹¹⁵ Their seats on the bench were replaced by Justice DeWine and Justice Fischer.¹¹⁶ On January 3, 2017, the State filed a motion for reconsideration of the decision.¹¹⁷ The Supreme Court of Ohio can grant motions for reconsideration to “correct decisions which, upon reflection, are deemed to have been made in error.”¹¹⁸ On May 25, 2017, the court granted reconsideration and reversed the decision in *Aalim I*.¹¹⁹

In its motion for reconsideration, the State argued that the majority in *Aalim I* failed to consider the provision of the Ohio Constitution that gives the General Assembly the exclusive authority to determine the jurisdiction of the courts of common pleas.¹²⁰ The court agreed and granted the motion on the basis that the ruling in *Aalim I* undermined the legislature’s exclusive authority to define the jurisdiction of the courts.¹²¹

The new five-member majority held that mandatory transfer does not violate due process under the Ohio Constitution or the United States Constitution.¹²² Writing for the majority, Justice Kennedy dismissed Aalim’s argument on substantive due process grounds “in short order,”¹²³ holding that “[b]ecause Ohio’s Due Course of Law Clause and the federal Due Process Clause both predate the creation of juvenile courts in Ohio and throughout the United States, these provisions cannot have created a substantive right to a specific juvenile-court proceeding.”¹²⁴ The court wrote that an amenability hearing is not “deeply rooted in our Nation’s history and tradition” or “implicit in the concept of ordered liberty.”¹²⁵ Further, the court refused to define an

115. Randy Ludlow, *Paul E. Pfeifer, Retiring Ohio Supreme Court Justice has left mark*, Columbus Dispatch (December 26, 2016, 12:01 A.M.), <http://www.dispatch.com/content/stories/local/2016/12/26/paul-e-pfeifer-retiring-justice-has-left-mark.html>.

116. *Id.*

117. Marianna Brown Bettman, *Commentary: On Reconsideration: What’s Up With State v. Aalim?*, Legally Speaking Ohio (April 4, 2017), <http://www.legallyspeakingohio.com/2017/04/commentary-on-reconsideration-whats-up-with-state-v-aalim/>.

118. State ex rel. Huebner v. W. Jefferson Village Council, 662 N.E.2d 339, 341(1995).

119. State v. Aalim, 2017-Ohio-2956, at ¶ 4.

120. *Id.* at ¶ 1.

121. *Id.*

122. *Id.* at ¶ 4.

123. *Id.* at ¶ 17.

124. *Id.*

125. *Id.*

amenability hearing as a fundamental right based on its analysis of Supreme Court of the United States rulings.¹²⁶ The majority found that the Supreme Court of the United States has been reluctant to expand substantive due process and create new fundamental rights.¹²⁷ Therefore, the Supreme Court of Ohio refused to find a fundamental right in an amenability hearing.¹²⁸

The majority also found that mandatory transfer satisfies the “fundamental fairness” requirements of a hearing with effective assistance of counsel and a statement of reasons for the transfer.¹²⁹ The court also distinguished the ruling in *Kent* requiring a “full investigation” before transfer to adult court, because that ruling was limited strictly to the Juvenile Court Act, and therefore did not apply to Ohio’s mandatory transfer laws.¹³⁰ The court stated that fundamental fairness was satisfied because, before Aalim was transferred to adult court, a juvenile judge conducted a hearing wherein it was found that Aalim was sixteen, and that there was probable cause to believe that Aalim committed the crime.¹³¹

Newcomer Justice DeWine wrote a separate concurrence, emphasizing why reconsideration was correct, and setting forth the proper analysis for substantive and procedural due process.¹³² Justice DeWine wrote that “procedural due process assesses the adequacy of procedures employed,” and “substantive due process reviews legislative enactments.”¹³³ Justice DeWine concluded that because the mandatory transfer provisions are a legislative enactment of general applicability, the only possible claim that could be made is one of substantive due process.¹³⁴ Justice DeWine wrote that the court improperly transformed the “fundamental fairness” standard from procedural into substantive, and therefore it should not apply to this case.¹³⁵ Justice DeWine also criticized the theory of substantive due process, as “perhaps the most . . . controversial part of our federal constitutional tradition.”¹³⁶ Due to this, Justice DeWine expressed a reluctance to expand the concept to include a fundamental right to an amenability hearing.¹³⁷ While understanding

126. *Id.*

127. *Id.* at ¶ 17, 18.

128. *Id.* at ¶ 17.

129. *Id.* at ¶ 25.

130. *Id.* at ¶ 26.

131. *Id.* at ¶ 27.

132. *Id.* at ¶ 39 - 40 (DeWine, J., concurring).

133. *Id.* at ¶ 41.

134. *Id.* at ¶ 42.

135. *Id.* at ¶ 42-43.

136. *Id.* at ¶ 47.

137. *Id.* at ¶ 48.

that it may be a good idea to end mandatory transfer, Justice DeWine believes that choice belongs exclusively to the state legislature.¹³⁸

Chief Justice O'Connor authored the dissent, providing a passionate defense of the ruling in *Aalim I.*¹³⁹ Chief Justice O'Connor reiterated the objectives of the juvenile justice system,¹⁴⁰ emphasized Supreme Court of the United States rulings providing heightened protections for juveniles,¹⁴¹ and outlined the Court's responsibility to strike down legislation that infringes on constitutional rights.¹⁴² Chief Justice O'Connor wrote that the Supreme Court of Ohio has the duty to be a constitutional check on the General Assembly to ensure that juveniles due process rights are protected.¹⁴³

The dissent's legal analysis begins by addressing why the issue of mandatory transfer is so important for a juvenile by quoting the State's counsel at oral argument: "But the crux of the issue is punishment. That's what this is all about. It's not really about process, it's not about procedure. It's about what do we do to punish these juveniles who are transferred over to adult court."¹⁴⁴ Based on this reasoning, the Chief Justice concludes that Supreme Court of the United States rulings in *J.D.B.*, *Miller*, and *Roper*, limiting juvenile punishments, are instructive to the issue of an amenability hearing.¹⁴⁵

Chief Justice O'Connor's dissent does not address mandatory transfer in terms of substantive due process, instead focusing on procedural due process and "fundamental fairness."¹⁴⁶ The Chief Justice cites precedent recognizing that States can create liberty interests that are protected by the due process clause,¹⁴⁷ and argues that juveniles have a substantial liberty interest in retaining their status as a juvenile.¹⁴⁸ Therefore, before depriving a juvenile of that liberty interest, the court must abide by the balancing test set forth in *Mathews*, requiring a consideration of the liberty interest and the risk of an erroneous deprivation of that interest, combined with the value of additional safeguards and any interest the government has in the matter.¹⁴⁹ To the dissent, juveniles have a substantial liberty interest in maintaining their juvenile status because a

138. *Id.* at ¶ 50 (O'Connor, C.J., dissenting).

139. *Id.* at State v. Aalim, 2017-Ohio-2956, ¶ 52.

140. *Id.* at ¶ 64 (quoting *In re T.R.*, 556 N.E.2d 439, (1990)).

141. *Id.* at ¶ 65.

142. *Id.* at ¶ 66.

143. *Id.* at ¶ 66, 67.

144. *Id.* at ¶ 74.

145. *Id.*

146. *Id.* at ¶ 75.

147. *Id.* at ¶ 78.

148. *Id.* at ¶ 79.

149. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

conviction in adult court is more severe and carries more serious consequences than a conviction in juvenile court, including public awareness of their crimes.¹⁵⁰ Chief Justice O'Connor also wrote that the erroneous deprivation of a juvenile's liberty interest is substantial because, under the current mandatory transfer procedures, the juvenile judge is not allowed to consider whether an offender is amenable to the goals of the juvenile justice system, and "there is significant risk of turning a delinquent capable of rehabilitation into a lifelong criminal."¹⁵¹ Finally, the dissent argues that there is minimal impact on the government's interest and burden of requiring an amenability hearing because the difference in resources between an amenability hearing and the required probable cause hearing are negligible.¹⁵² So, this minimal burden does not outweigh the juvenile's interest in retaining juvenile status.¹⁵³

Chief Justice O'Connor also provided a separate "fundamental fairness" dissent, arguing that mandatory transfer does not comport with the "full investigation" standard of *Kent*.¹⁵⁴ Further, the Chief Justice criticized the majority's reasoning that *Kent* only requires a hearing where the juvenile is represented by counsel and a statement of reasons for the transfer.¹⁵⁵ Chief Justice O'Connor argues that the *Kent* court considered factors such as a juvenile's criminal history and "sophistication and maturity."¹⁵⁶ Based on the facts of *Kent*, O'Connor argues that Ohio's mandatory transfer laws do not provide the required process or "ceremony," and therefore do not comply with fundamental fairness.¹⁵⁷ In Chief Justice O'Connor's words: "a hearing in which there is no consideration of a juvenile's amenability to rehabilitation and treatment in the juvenile-justice system is not a meaningful opportunity to be heard."¹⁵⁸ The Chief Justice concluded the dissent with a plea for the Supreme Court of the United States, which has been silent on the issue of juvenile transfer to adult court since 1966, to address due process in the juvenile justice context.¹⁵⁹

Justice O'Neill wrote a separate dissent, beginning by voicing disagreement to reconsider the case, as there is "nothing new to reconsider here; the only thing that has changed is the makeup of this

150. *Aalim*, 2017-Ohio-2956, at ¶ 83 (O'Connor, C.J., dissenting).

151. *Id.* at ¶ 89.

152. *Id.* at ¶ 90-91.

153. *Id.* at ¶ 93.

154. *Id.* at ¶ 95.

155. *Id.* at ¶ 98.

156. *Id.* at ¶ 99.

157. *Id.* at ¶ 104.

158. *Id.* at ¶ 108.

159. *Id.* at ¶ 106.

court.”¹⁶⁰ Justice O’Neill also wrote that *Aalim I* was decided based on procedural due process and substantive due process.¹⁶¹ O’Neill argued that society has developed a new fundamental right: to treat children as childlike,¹⁶² and that the court has the authority to protect that right as a recognition of a societal conscience.¹⁶³

III. DISCUSSION

This section will analyze the rulings in the *Aalim* cases and provide a glimpse of the future of mandatory transfer laws. This article will not address the appropriateness of the Supreme Court of Ohio’s granting of the motion for reconsideration. The paramount, yet still unresolved issue in the *Aalim* cases, is the definition and applicability of fundamental fairness in juvenile proceedings; neither the holding in *Aalim I* or *Aalim II* provided any clarity on the subject.

*The Justices in the Aalim cases incorrectly defined and applied
substantive due process and procedural due process.*

A constitutional due process analysis is not a matter easily undertaken. When “fundamental fairness” precedent is added to the equation, the task muddies the waters even more. While there may, in theory, be a “clear demarcation”¹⁶⁴ between the concepts of substantive and procedural due process, the Justices’ almost laughable inability to agree on the due process *inquiry*, let alone the constitutionality of the matter, suggests otherwise.

To recap, *Aalim I* was decided on the standard of fundamental fairness. Justice Kennedy’s concurrence in *Aalim I* blends fundamental fairness with procedural due process, and the dissent stems from substantive and procedural due process analyses. *Aalim II* was decided on substantive due process and fundamental fairness. Justice DeWine wrote a separate concurrence, joined by the author of the majority opinion, in order to define substantive and procedural due process, and differentiate between procedural fundamental fairness and substantive fundamental fairness. Justice DeWine believed that *Aalim I* was decided based on a “substantive due process standard of fundamental fairness.”¹⁶⁵ Justice O’Connor based the dissent on separate analyses of

160. *State v. Aalim*, 2017-Ohio-2956 at ¶ 110 (O’Neill, J., dissenting).

161. *Id.* at ¶ 115.

162. *Id.* at ¶ 116.

163. *Id.*

164. *Aalim*, 2017-Ohio-2956 at ¶ 41 (DeWine, J., concurring).

165. *Id.* at ¶ 47.

procedural due process and fundamental fairness and mentioned in a footnote that *Aalim I* was decided on procedural due process, a term that was never once used in that majority decision. Suffice it to say, the Supreme Court of Ohio has not provided us with a model of clarity.

The court does not provide any lucidity on the similarities and differences between procedural and substantive due process and, due to this lack of precision, the Justices cannot even agree on the proper nature of analysis. Each analysis is appropriate in a separate context; however, the two concepts can overlap. Essentially, substantive and procedural due process can be distinguished based on the remedy sought. Substantive due process is invoked when a plaintiff is challenging a government action as violating a constitutional right. Procedural due process is invoked when a government action is being challenged as having a lack of adequate safeguards before depriving an individual of a protected interest. The inquiry, however, is not as simple as it seems. Not every deprivation of a protected interest gives rise to a procedural due process claim.

A person may not bring a procedural due process claim when seeking benefits. However, a procedural due process claim is available when a benefit is terminated without adequate safeguards, because an individual has an interest in the continued receipt of benefits. For example, if the government would pass a law prohibiting abortion, a challenge to the law would not be based on the procedures of the government, but on the substantive constitutionality of the law. But, if the government were to cut welfare benefits for all recipients, procedural due process requires that there be a fair process for this determination. Also, once an interest is statutorily conferred, a legislature may not deprive an individual of that interest without appropriate procedure. Procedural protections are required when there is a deprivation of a constitutionally protected interest, and an issue about how the law applies to a specific individual. There is no disagreement among any Justices in the *Aalim* cases that a juvenile has a protected interest in retaining juvenile status for criminal proceedings.

In *Aalim II*, Justice DeWine's concurrence suggests that *Aalim* could not possibly have a procedural due process claim because "a challenge to a generalized legislative determination—for example, that all juveniles of a certain age who are charged with certain qualifying crimes must be tried in adult court—is made under the substantive component of the Due Process Clause."¹⁶⁶ This is an overbroad generalization. A statute can be challenged based on procedural due process, but only when the challenge is to the fairness of the process being followed, and

166. *Id.* at ¶ 42.

if the potential impact on an individual could result in the loss of a benefit.¹⁶⁷

Indeed, *Kent* was decided pursuant to the Juvenile Court Act, a statute of general applicability. Thus, if the concurrence were correct, the claim available to Kent would be one of substantive due process. This must mean that the outcome of *Kent*; that “there is no place in the U.S. system of law for waiving juvenile jurisdiction without ceremony--without hearing, without effective assistance of counsel, without a statement of reasons,”¹⁶⁸ must be a substantive standard. The Supreme Court of the United States disagrees. If a mandatory transfer challenge can be brought as a procedural due process claim, the juvenile must show that the challenge is not to apply for the benefit of the juvenile justice system, but to retain the statutorily created entitlement of the juvenile justice system.

Fundamental fairness is not an independent analysis, but a requirement of due process, and must be applied in either a procedural or substantive due process review.

Neither majority can come to an agreement on the application of the standard of fundamental fairness, nor its relation to procedural or substantive due process. The question remains: is fundamental fairness a procedural standard, substantive, or neither? Or is it a due process standard independent of the procedural/substantive analysis?

The notion of fundamental fairness in due process cases is not a new one in Supreme Court of the United States jurisprudence, dating back to at least 1942.¹⁶⁹ It was first introduced in the juvenile context in Justice Harlan’s 1967 concurring opinion in *In re Gault*.¹⁷⁰ The Supreme Court of Ohio has adopted the view that “[a]pplying the Due Process Clause is therefore an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several

167. Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 604, 2015; see *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999) (“In both cases [*Goldberg v. Kelly* and *Mathews v. Eldredge*], an individual’s entitlement to benefits had been established, and the question presented was whether predeprivation notice and a hearing were required before the individual’s interest in continued payment of benefits could be terminated”).

168. *Kent v. United States*, 383 U.S. 541, 542 (1966)

169. *Betts v. Brady*, 316 U.S. 455. (“Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial”).

170. *In re Gault*, 387 U.S. 1, 72 (1967) (“No more restrictions should be imposed than are imperative to assure the proceedings’ fundamental fairness”).

interests that are at stake.”¹⁷¹ Thus, the court must determine what constitutes fundamental fairness by “being true to the core concept of due process in a juvenile case.”¹⁷²

Although it may seem like a strictly procedural standard, the concept has been applied in substantive due process since at least 1963, when the Supreme Court of the United States decided *Gideon v. Wainwright*. There, the Court ruled that fundamental fairness requires a substantive due process right for indigent defendants to have counsel appointed to represent them.¹⁷³ The fundamental fairness standard was commonly used by the Warren Court¹⁷⁴ to review constitutional criminal procedure claims.¹⁷⁵ However, the Court moved away from that standard and began to use the doctrine of selective incorporation.¹⁷⁶ Fundamental fairness is not dead, however, as the Supreme Court of the United States sometimes uses the standard to address pre-trial and post-trial procedures.¹⁷⁷

The majority in *Aalim I* incorrectly and impermissibly used a strict fundamental fairness standard in reaching its decision. The concept is not a separate standard, but can sometimes be a requirement of due process which must be applied in either the procedural or substantive due process context, not as a standalone analysis.¹⁷⁸ To separate the standard as an independent inquiry would create a third standard for due process analysis and only confuse courts and legal scholars more than they already are.

So, *Aalim* properly brought two separate arguments pertinent to this analysis: (1) that fundamental fairness grounded in procedural due process requires that a juvenile demonstrate the capacity to change;¹⁷⁹ and (2) that juveniles have a substantive due process right to retain their

171. *State v. Aalim*, 2017-Ohio-2956 at ¶ 22.

172. *Id.* at ¶ 23.

173. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

174. Earl Warren was the Chief Justice of the Supreme Court of the United States from 1953-1969.

175. Tracey L. Mears, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 *Ohio State Journal of Criminal Law* 105, 106 (2012).

176. *Id.* at 113. (Selective Incorporation is a theory that holds that the Due Process Clause of the Fourteenth Amendment incorporates to the States certain guarantees of the Bill of Rights).

177. *Id.* at 115.

178. *In re C.S.*, 2007-Ohio-4919, 115 Ohio St. 3d 267, 277, 874 N.E.2d 1177, 1187. (“Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, the phrase expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.”)

179. While *Aalim*’s fundamental fairness argument was not explicitly brought under procedural due process, as discussed above, fundamental fairness is not an independent standard of due process review. Because *Aalim* made a separate substantive due process argument, the fundamental fairness argument should be applied to procedural due process.

status as a child.¹⁸⁰

Aalim's challenge to mandatory transfer was properly brought as a violation of substantive due process; however, the right to an amenability hearing has not been recognized as a fundamental right guaranteed by the Constitution, and therefore the substantive claim was appropriately dismissed.

No court has ever held that juveniles have a fundamental right, guaranteed by the Constitution, to be treated as juveniles in the criminal justice context. Fundamental rights include those which are "objectively, deeply rooted in this Nation's history and tradition . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"¹⁸¹ When a fundamental right is inhibited by legislation, the legislation must be narrowly tailored to achieve a compelling governmental interest; a very high standard.

The majority in *Aalim II* unpersuasively, yet correctly, dismissed the notion that juveniles have a fundamental right to an amenability hearing. The majority reasoned that because both Ohio's Due Course of Law Clause (1851) and the Fourteenth Amendment (1868) predate the creation of the juvenile court system in 1899, and the addition of an amenability hearing to the juvenile court system in 1969, that there cannot be a substantive right to the specific juvenile court proceeding.¹⁸² This hollow analysis, while commonly used, directly contradicts established Supreme Court of the United States precedent finding fundamental rights that similarly do not predate the Due Process Clause. Examples include the right to receive an abortion,¹⁸³ the right to use contraceptives,¹⁸⁴ the right of two consenting adults of the same sex to engage in sexual conduct,¹⁸⁵ and the right to personal choice regarding marriage.¹⁸⁶

Substantive due process, rightly so, has been criticized as an avenue for ambitious judges to instill their own personal beliefs into the law. But, simply disagreeing with the notion of substantive due process does not allow the majority to intentionally misinterpret established precedent recognizing that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth

180. Merit Brief of Appellant Matthew Aalim, January 11, 2016, i, ii.

181. *State v. Aalim*, 2017-Ohio-2956 at ¶ 16.

182. *Id.* at ¶ 17.

183. *Roe v. Wade*, 410 U.S. 113 (1973).

184. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

185. *Lawrence v. Texas*, 539 U.S. 558 (2003).

186. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Amendment protects.”¹⁸⁷

Moreover, the majority’s analysis also fails common sense. Its closed-minded, literalistic approach to substantive due process claims, which, if adopted, would mean that fundamental rights not recognized in 1868 are unprotected by the Constitution. Surely this cannot be right. Consider the fact that it was not until 1963 that the Court recognized a fundamental due process right to the assistance of counsel in a state court proceeding.¹⁸⁸ It seems the *Aalim II* majority would have no quarrel with the termination of the public defender’s office. In a more relevant hypothetical, imagine that, rather than instituting the mandatory transfer of certain juveniles to adult court, the Ohio General Assembly decided to enact legislature that abolished the entire juvenile justice system. Then could the majority comfortably reason that there is no substantive due process right to have a juvenile justice system? That a system established for more than a century and existing in every state is not “deeply rooted in our Nation’s history?” Common sense indicates otherwise.

Regardless of the flaws inherent in its reasoning, the *Aalim II* majority’s ruling is ultimately correct, because neither the Supreme Court of the United States, nor any other court, which for good reasons are reluctant to “discover” new fundamental rights, has recognized a fundamental right for a juvenile to receive a specific criminal procedure. Certainly, *Aalim* was decided under the Due Course of Law Clause of the Ohio Constitution, which is a document of independent force. And, the U.S. Constitution provides the floor, not the ceiling, for individual States to abide by. Nevertheless, considering the inability of the Justices to agree on the standard of analysis, and the fact that the majority in *Aalim I* failed to even consider the issue in terms of substantive due process, at this time there is not a compelling reason for the Supreme Court of Ohio to recognize a right to an amenability hearing as a fundamental right.¹⁸⁹

187. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992).

188. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

189. For legislation not affecting a fundamental right, the government need only prove a rational basis for the statute. Therefore, in order for mandatory transfer to pass substantive due process review, it must be rationally related to a legitimate government interest; a very low standard where the courts are extremely deferential to the legislature. Because state legislatures unquestionably have a legitimate interest in preventing and punishing crime, and because there is at least a rational basis for sending juveniles to adult court in relation to that interest, mandatory transfer statutes pass substantive due process muster. For this reason, the majority in *Aalim I* wisely did not perform a substantive due process analysis.

The ruling in Kent supports the notion that Aalim appropriately challenged mandatory transfer on the basis of procedural due process.

The appropriate standard for due process in juvenile proceedings, as set out by the Supreme Court of the United States in 1967, and adopted by the Supreme Court of Ohio,¹⁹⁰ is fundamental fairness,¹⁹¹ which should be applied in either a procedural or substantive due process analysis. The only time the Supreme Court of the United States has ever addressed mandatory transfer of juveniles to adult court was *Kent* in 1966, decided on procedural due process grounds.¹⁹² There, the Supreme Court of the United States held that procedural due process requires that a juvenile court cannot waive its jurisdiction over a child without “ceremony--without hearing, without effective assistance of counsel, without a statement of reasons,”¹⁹³ because transfer is such a “critically important” action determining the rights of the individual. As the court noted: “[i]t would be extraordinary if society’s special concern for children, as reflected in the [Act], permitted this procedure.”¹⁹⁴ Thus, the intent of the act is of special relevance when assessing the procedures in place.

The appropriateness of Aalim’s fundamental fairness procedural due process claim is contingent on the court deciding that receiving an amenability hearing is not an application for a benefit, but a petition for the retention of a benefit. As discussed above, a procedural due process challenge can only exist when the petitioner is attempting to retain a statutorily-conferred benefit and is not applicable when the petitioner is applying to receive an additional benefit. The ruling in *Kent*, grounded in procedural due process, supports the theory that juveniles may challenge transfer to adult court on the basis that they are being deprived of the benefit of the juvenile justice system: “[t]he net, therefore, is that petitioner -- then a boy of 16 -- was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the ‘exclusive’ jurisdiction of the Juvenile Court.”¹⁹⁵ The court ordered that these procedures must include “a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court’s decision”.¹⁹⁶ The court “believe[d] that this

190. In re C.S., 2007-Ohio-4919, 115 Ohio St. 3d 267, 874 N.E.2d 1177, at ¶ 80.

191. In re Gault, 387 U.S. 1, 87 (1967).

192. *Kent v. United States*, 383 U.S. 541, 542 (1966).

193. *Id.*

194. *Id.* at 554.

195. *Id.* at 557. (Emphasis added).

196. *Id.*

result is required by the statute read in the context of constitutional principles relating to due process.”¹⁹⁷

The court in Aalim I acted within its authority when it ruled that mandatory transfer without an amenability hearing was a violation of due process.

As discussed above, Aalim appropriately challenged mandatory transfer as a violation of procedural due process because Aalim was being deprived of the benefit of the juvenile justice system. The Supreme Court of Ohio acted within its purview when it declared that due process under the Ohio Constitution requires an amenability hearing before transfer to adult court. The outcome may be different if the court decided the case under the due process clause of the United States Constitution, as the Supreme Court of the United States has never made a similar decision on mandatory transfer.

As the court stated, the Ohio Constitution is a document of independent force; the Ohio Due Course of Law Clause is given the same effect as the federal due process clause; and the federal constitution provides the floor, not the ceiling, for individual States to abide by. Further, the Supreme Court of Ohio has ruled that the Ohio Constitution requires greater protection than the U.S. Constitution.¹⁹⁸ The Supreme Court of Ohio has also recognized that “[s]ince its origin, the juvenile justice system has emphasized individual assessment, the best interest of the child, treatment, and rehabilitation, with a goal of reintegrating juveniles back into society.”¹⁹⁹

The Supreme Court of Ohio in *Aalim I* conducted an analysis very similar to that of the Supreme Court of the United States in *Kent*. The Supreme Court of the United States declared that, in light of the purpose of the Juvenile Court Act and, because juveniles are entitled to the benefit of the juvenile court, due process required additional procedural safeguards before transferring a child to adult court. The Supreme Court of Ohio similarly held that, because juveniles have a special status, and in conjunction with the purpose to “provide for the care, protection, and mental and physical development of children . . . and rehabilitate the

197. *Id.*

198. *Simpkins v. Grace Brethren Church of Delaware*, 2016-Ohio-8118, 149 Ohio St. 3d 307, 75 N.E.3d 122 at ¶ 61 (Lanzinger, J., concurring in judgment only).

199. *State v. Hanning*, 728 N.E.2d 1059 (2000); Previously, the Supreme Court of Ohio has ruled that automatic lifelong registration requirements for juvenile sex offenders is a violation of due process. *See In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729 at ¶ 71. (The court reasoned that because the goals of the juvenile justice system are rehabilitation and reintegration, fundamental fairness requires that a juvenile judge exercises discretion when deciding what punishment is appropriate for the individual circumstances).

offender,”²⁰⁰ the additional procedural safeguard of an amenability hearing is required before depriving a juvenile of the benefit of the juvenile court system. The court ruled that because juveniles are constitutionally required to be treated differently from adults for sentencing purposes, that juvenile procedures must also account for that difference.

The court had the authority to make this ruling, however the majority of *Aalim I* did not perform the appropriate procedural due process analysis, instead relying solely on the principle of fundamental fairness. A proper *Mathews v. Eldridge* analysis was not performed until the dissenting opinion of *Aalim II*. *Mathews* requires a consideration of the petitioner’s interest and the risk of an erroneous deprivation of that interest if the current procedures are used, combined with the value of additional safeguards and weighed against any interest the government has in the matter. A strong argument can be made that these factors are satisfied; and apparently the majority in *Aalim II* did not dispute this, because they did not perform a *Mathews* procedural analysis.

Juveniles have a substantial interest in retaining their juvenile status, as the State of Ohio has admitted that the real issue in mandatory transfer cases is punishing, not rehabilitating the offender. Further, mandatory transfer poses a high risk of an erroneous deprivation of a juvenile’s interest in retaining juvenile status and the benefit of the juvenile system. In the probable cause hearing, a juvenile judge is allowed no discretion, and is required to transfer the child to adult court if there is probable cause that the juvenile committed the crime alleged. Moreover, the value of additional safeguards is high. An amenability hearing would require slightly more resources than the already required probable cause hearing, yet it would result in greater protection of a juvenile’s interest in juvenile status, because an individualized determination would allow for a discretionary transfer to adult court if the juvenile judge believes that the juvenile is not able to be rehabilitated.

Finally, although the government certainly has an interest in punishing juvenile criminal offenders, the government also has an interest in serving as its *parens patriae* role and rehabilitating the juvenile offender. A juvenile’s substantial interest in retaining the benefit of the juvenile justice system is not outweighed by the minimal additional expenditure that an amenability hearing would require. Nor is it outweighed by the governments interest in punishing juvenile crime, because that interest must be balanced by the governments interest in rehabilitating the juvenile offender. The *Mathews* test is likely satisfied.

200. Ohio Rev. Code Ann. § 2152.01 (2017).

The majority in *Aalim I* did not abuse its judicial power in ruling that the Ohio Constitution requires an amenability hearing before a juvenile is transferred to adult court; however, the analysis used to reach that decision was flawed. Even so, the addition of an individualized amenability hearing likely satisfies the procedural due process test enunciated in *Mathews v. Eldridge*. And, while the Supreme Court of the United States has never issued a similar ruling, the Supreme Court of Ohio is permitted to do so, because the Ohio Constitution is a document of independent force. The ruling of *Aalim I* should not have been disturbed.

Because mandatory transfer to adult court is so similar to sentencing, the Supreme Court of the United States “kids are different” approach should be applied to juvenile proceedings.

In 2005, the Supreme Court of the United States ruled that the execution of a juvenile is a violation of the Eighth Amendment’s prohibition against “cruel and unusual punishment, because juveniles are categorically different from adults.”²⁰¹ Then, in 2010, the Court used this “kids are different” rationale to rule that sentences of life without parole for non-homicidal crimes constitutes cruel and unusual punishment because juveniles are fundamentally different from adults.²⁰² In 2011, the Court noted that “children are often less mature and responsible than adults;”²⁰³ they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”²⁰⁴ “[T]hey are more vulnerable or susceptible to outside pressures than adults”²⁰⁵ and “children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”²⁰⁶ In 2012, the Court explicitly affirmed that “children are constitutionally different from adults for purposes of sentencing,” due to “their diminished culpability and greater prospects for reform.”²⁰⁷

The next logical step is to extend this “kids are different” analysis to

201. *Roper v. Simmons*, 543 U.S. 551, 556 (2005). (The Court noted that children possess “a lack of maturity and an underdeveloped sense of responsibility” which results in “impetuous and ill-considered actions and decisions;” “juveniles are more vulnerable or susceptible to negative pressures, including peer pressure;” and “the character of a juvenile is not as well formed as that of an adult.”).

202. *Graham v. Florida*, 560 U.S. 48, 68-69 (2010). (The Court noted that juveniles’ brains are still maturing through adolescence, and they are more capable of change than adults).

203. *J. D. B. v. North Carolina*, 564 U.S. 261 (2011).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

address pre-sentencing procedures; namely, mandatory transfer. The Supreme Court of the United States has repeatedly recognized that there are constitutional differences between children and adults for the purposes of sentencing, however, the Court has not explicitly held that this constitutional difference is limited to sentencing. Indeed, it defies logic to insist that juveniles are constitutionally different for this one limited purpose.

Mandatory transfer to adult court is essentially the same as a sentence: “a transfer to adult court almost always is intended to allow for a harsher sentence than a juvenile court could impose.”²⁰⁸ This is but a truism. If it were not, mandatory transfer would not exist. Regardless, we do not have to speculate as to the function of mandatory transfer, because the State of Ohio settled the matter at oral arguments: “the crux of the issue is punishment.”²⁰⁹ Each transferred juvenile is deprived of the rehabilitative functions of the juvenile justice system and subjected to the harsh realities of adult court. Surely this is what the General Assembly intended when it enacted the statute; however, that does not mean that the statute should pass constitutional muster. Rather, because mandatory transfer implicates punishment and is principally similar to sentencing, the “kids are different” approach should be applied to juvenile proceedings. In recognition that juveniles are fundamentally different than adults, juveniles should have a right to ensure that an individualized determination of the juvenile’s ability to meet the goals of the juvenile justice system is made before transfer to adult court.

Due to the controversial history of substantive due process, this article will not argue for the Supreme Court of the United States to recognize a substantive constitutional right for a juvenile to be entitled to receive the protections of the juvenile justice system. But, in light of the firmly grounded principle that “kids are different,” the Supreme Court of the United States needs to address the issue of mandatory transfer to adult court and make a ruling on whether juveniles are constitutionally different for pre-sentencing purposes.

IV. CONCLUSION

The effect of *Aalim I*, though now overruled, will send shockwaves throughout the juvenile justice system. Never before has a high court recognized that automatic transfer of juveniles to adult court is a violation of due process. It has been over fifty years since the Supreme Court of the United States has addressed mandatory transfer. The Court

208. *State v. Aalim*, 2017-Ohio-2956 at ¶ 68 (O’Connor, C.J., dissenting).

209. *Id.* at ¶ 74

needs to address what constitutes fundamental fairness in transfer proceedings, and rule as to whether “kids are different” applies to criminal proceedings as well as sentencing. The impact of *Aalim* is yet to be determined, but it is likely that it has signaled the beginning of the end of automatic transfer of juveniles to adult court.