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Critical Lessons of Al-Kidd: Respecting the Dignity of Material Witnesses through the Special Needs Doctrine

John Kowalko III

American University Washington College of Law

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CRITICAL LESSONS OF *AL-KIDD*: RESPECTING THE DIGNITY OF MATERIAL WITNESSES THROUGH THE SPECIAL NEEDS DOCTRINE

JOHN KOWALKO III*

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I. INTRODUCTION

Since the September 11, 2001 terrorist attacks, the government has increasingly relied upon the federal material witness statute to arrest and detain persons with knowledge of or connections to suspected terrorists.¹ Of these detentions, the arrest of Abdullah al-Kidd was one of the most publicized in the media, primarily due to his subsequent lawsuit against former Attorney General John Ashcroft. His case made national headlines when the Supreme Court granted certiorari to hear it.² Although the appeal only challenged the Ninth Circuit Court of Appeals’ decision regarding

1. See 18 U.S.C. § 3144 (2012) (permitting the detention of a person with material testimony whose presence may be impracticable to secure by subpoena); Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 695, 702 (2005) (noting that the use of the federal material witness statute since September 11, 2001, has been unprecedented).

2. See, e.g., Adam Liptak, *Supreme Court to Hear Material Witness Case*, N.Y. TIMES (Feb. 20, 2011), <http://www.nytimes.com/2011/02/21/us/politics/21witness.html> (describing the case as the only major national security case of the 2011 Supreme Court term).

Ashcroft's immunity from liability, the ensuing debate centered heavily upon the propriety of the government's use of the federal material witness statute to detain suspected terrorists rather than actual witnesses.

Al-Kidd's central allegation was that Ashcroft had developed a policy to circumvent ordinary Fourth Amendment requirements through use of the federal material witness statute.³ The Supreme Court eventually rejected al-Kidd's suit on the basis that Ashcroft enjoyed immunity from liability.⁴ In unusual fashion, however, the Court went beyond ordinary judicial procedure by also holding that no Fourth Amendment violation had even occurred, despite the lack of effect of the additional holding on the outcome of the case.⁵ This Comment argues that the Fourth Amendment prohibits the pretextual use of the material witness statute to preemptively detain criminal suspects for whom ordinary criminal arrest would be impossible. Part II reviews the federal material witness statute and the exceptions made in the law for special needs cases. After providing an overview of al-Kidd's case against the government, it then introduces concepts of feminist theory and dignity ethics relevant to the social impact of the Fourth Amendment ruling against al-Kidd.⁶ Part III contends that the Supreme Court should not have addressed the Fourth Amendment issues because they were not determinative to the outcome of the case and further argues that the material witness statute falls within the special needs search and seizure line of case law.⁷ Part IV then proposes policy rationales for prohibiting the use of the material witness statute to detain criminal suspects based on insights from feminist theory and dignity ethics.⁸ Finally, Part V concludes that the Court's holding in *Ashcroft v. al-Kidd* will have negative effects on the social and legal perception of witness

3. See *al-Kidd v. Ashcroft (Al-Kidd II)*, 580 F.3d 949, 954 (9th Cir. 2009) (reiterating al-Kidd's allegations of misuse of the statute to arrest suspects for whom sufficient evidence did not exist to arrest on criminal charges).

4. See *Ashcroft v. al-Kidd (Al-Kidd III)*, 131 S. Ct. 2074, 2085 (2011) (holding Ashcroft immune as he did not violate "clearly established law").

5. Compare *id.* at 2083 (defending the resolution of the Fourth Amendment claim and finding no constitutional violation), with *id.* at 2087 (Ginsburg, J., concurring in judgment) (criticizing the majority opinion for resolving a novel claim that had no effect on the outcome of the case).

6. See *infra* Part II (discussing the historical importance of dignity in the law and the ethical considerations necessitated by material witness arrests).

7. See *infra* Part III (arguing, in part, that the reasonableness of a material witness arrest should account for underlying programmatic purposes to prevent against potential abuse).

8. See *infra* Part IV (applying feminist and ethical considerations to analyze the implications of the pretextual use of the material witness statute on the ability of the individual to constitute a dignified identity).

cooperation.

II. BACKGROUND

A. The Federal Material Witness Statute

The federal material witness statute permits the arrest of a person who appears to be material in a criminal proceeding and whose presence may be impracticable to secure at a trial or deposition.⁹ Material witness statutes are meant to aid prosecutors in the gathering of important information against a criminal, and thus allow for the arrest of an individual who is not suspected of a crime. Despite the unique situation presented by the arrest of individuals for the purpose of testimony, material witness arrests are subject to the Fourth Amendment reasonableness requirements because they are seizures within the meaning of the Constitution.¹⁰ Therefore, a material witness arrest warrant must establish probable cause that the statutory requirements are satisfied.¹¹

Material witness arrest warrants, however, do not involve ordinary probable cause that a person is suspected of criminal wrongdoing because the witness is only held to secure testimony.¹² The modification of the probable cause requirement consequently changes other aspects of the warrant and arrest procedure for material witnesses, often lowering the burden on the government in comparison to ordinary criminal arrests. For example, *Miranda* warnings are not required for an incarcerated witness.¹³ Additionally, the establishment of materiality requires only a representation by a “responsible official,” such as a federal prosecutor.¹⁴

B. Opinion and History of the al-Kidd Decision

In 2006, Abdullah al-Kidd brought suit against former Attorney General

9. 18 U.S.C. § 3144 (2012).

10. *See Bacon v. United States*, 449 F.2d 933, 942 (9th Cir. 1971) (rejecting any distinctions separating the material witness statute from the procedural dictates of the Fourth Amendment).

11. *See id.* (requiring probable cause for establishing both the materiality of the testimony and the impracticability of securing the witness’s presence by subpoena).

12. *See al-Kidd III*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (emphasizing that probable cause for material witness arrest warrants differs from the ordinary arrest warrant, which is based on suspicion that the arrestee has committed a crime).

13. *See, e.g., United States v. Anfield*, 539 F.2d 674, 677 (9th Cir. 1976).

14. *See Bacon*, 449 F.2d at 943 (determining that a mere statement by a responsible official is sufficient for the statute, at least in the context of grand jury proceedings).

John Ashcroft and several Federal Bureau of Investigation Special Agents. He alleged, among other claims, violations of the federal material witness statute and the Fourth Amendment.¹⁵ Al-Kidd was arrested pursuant to the statute for allegedly being a material witness in the federal grand jury case against Sami Omar Al-Hussayan.¹⁶ After sixteen days of confinement, al-Kidd was released from custody but required to limit his travel and report regularly to a probation officer.¹⁷ Al-Kidd was never called as a witness in any criminal proceeding.¹⁸

Al-Kidd alleged that, under a policy implemented by former Attorney General Ashcroft, the government abused the material witness statute to pretextually arrest him as a witness when the government actually detained him as a terrorism suspect.¹⁹ Al-Kidd supported his claims with statements by government officials that purported to show a programmatic intent to use the material witness statute to preemptively detain terrorism suspects who could not otherwise be arrested under criminal statutes.²⁰ Al-Kidd also provided details of alleged misrepresentations and omissions in the warrant application used to secure his arrest.²¹

The Idaho District Court rejected Ashcroft's motion for summary judgment on the grounds that al-Kidd alleged the direct involvement of Ashcroft in establishing a policy to misuse the material witness statute by pretextually detaining individuals suspected of a crime.²² The district court also rejected the motion for summary judgment by the federal agents who

15. See *al-Kidd v. Gonzales (Al-Kidd I)*, No. CV:05-093-S-EJL, 2006 WL 5429570, at *1 (D. Idaho Sept. 27, 2006).

16. See *al-Kidd II*, 580 F.3d 949, 952 (9th Cir. 2009).

17. See *id.* at 951-52 (describing the conditions of al-Kidd's conditional release, which limited his movement to four states and required meetings with a probation officer for the next fifteen months).

18. See *id.* at 954 (noting the failure to use al-Kidd in Al-Hussayan's trial or any other proceeding).

19. *Id.* at 952.

20. See *id.* at 954-55 (providing quotes from al-Kidd's complaint by government officials, including Ashcroft, who referenced the use of material witness warrants to aggressively combat terrorism through the apprehension of terrorism suspects).

21. See *id.* at 953 (detailing inaccuracies and omissions in the warrant affidavit, including representing his \$1,700 round-trip coach ticket as a \$5,000 one-way first class ticket, and failing to mention either al-Kidd's or his family's U.S. citizenship and residency or al-Kidd's previous cooperation with the Federal Bureau of Investigation (FBI)).

22. See *al-Kidd I*, No. CV:05-093-S-EJL, 2006 WL 5429570, at *4 (D. Idaho Sept. 27, 2006) (noting that the alleged policy was to preventively detain and investigate terrorism suspects for whom probable cause for criminal arrest could not be established).

obtained and reviewed the material witness warrant, finding that qualified immunity would not apply to the agents based on the facts alleged by al-Kidd.²³

Only Ashcroft appealed the district court's denial of summary dismissal, and the Ninth Circuit upheld the district court's holding in large part.²⁴ The appellate court held Ashcroft liable for the arrest of al-Kidd, reasoning that al-Kidd's allegations included objective indicia that the arrest was related to criminal investigation or detention rather than to securing witness testimony.²⁵ The court considered the programmatic purpose underlying the use of the material witness statute after the September 11, 2001 terrorist attacks on the basis that material witness arrests were not ordinary Fourth Amendment seizures.²⁶ The court reasoned that the prohibition against inquiry into programmatic motivation only applies for arrests accompanied by ordinary probable cause, while material witness arrests do not involve suspicion of wrongdoing.²⁷ The court then denied Ashcroft qualified immunity for the alleged policy through a lengthy discussion of the ways that the Attorney General was on notice that his programmatic use of the statute violated the Fourth Amendment.²⁸ Finally, the court rejected the liability of Ashcroft for the treatment of al-Kidd during his detention, which distinguished its holding from that of the district court.²⁹ However, the court did admonish the treatment of witnesses in confinement as similar to the punishment of criminals.³⁰

On appeal, the Supreme Court of the United States rejected all liability for Ashcroft, finding him to possess qualified immunity because the right allegedly violated was not clearly established.³¹ The Court rejected the

23. *See id.* at *8-9 (holding that the allegations of misrepresentation and omission in the warrant application prevented the application of qualified immunity).

24. *See al-Kidd II*, 580 F.3d at 977, 979 (finding Ashcroft liable for al-Kidd's arrest, but not liable for his treatment during confinement).

25. *See id.* at 963-64 (highlighting various investigatory aspects of al-Kidd's arrest, including that al-Kidd never actually testified as a witness).

26. *See id.* at 968.

27. *Id.*

28. *See id.* at 975-76 (detailing several instances of publicity regarding the abuse of the material witness statute).

29. *See id.* at 978-79 (providing an overview of the abuse al-Kidd allegedly suffered during his confinement, but rejecting the claim for liability as deficient).

30. *See id.* at 953, 977 (recognizing a governmental obligation to not treat witnesses as criminals and describing the conditions of al-Kidd's incarceration, which included imprisonment in high-security units of detention facilities, multiple strip searches, a cell that was kept lit twenty-four hours a day, and permission to leave the cell for only one to two hours each day).

31. *See al-Kidd III*, 131 S. Ct. 2074, 2083-84 (2011).

reasoning of the lower courts as insufficient to negate qualified immunity.³² The Court then proceeded to rule on the alleged Fourth Amendment violation, although the resolution of this issue was not determinative to the outcome of the decision.³³ The Court recognized that special needs and administrative search and seizure cases were exceptions to the general prohibition on inquiry into motivating intent, but the majority determined that these cases rested on a lack of individualized suspicion and were thus inapplicable to al-Kidd's circumstances.³⁴

The Court's reasoning on the Fourth Amendment issue rested on the presumption that al-Kidd had conceded that individualized suspicion existed in the warrant application.³⁵ This presumption, however, was contested in concurring opinions.³⁶ Even Justice Kennedy, who joined the majority opinion in full, felt obliged to observe that the holding did not resolve whether the use of the material witness statute against al-Kidd was lawful.³⁷ Justice Kennedy also cautioned that the ordinary Fourth Amendment warrant procedure might not be applicable to a material witness arrest warrant because of the differences in the meaning of suspicion.³⁸ Concurring in the judgment, Justice Ginsburg and Justice Sotomayor were more critical of the possible breadth of the majority's opinion, finding it unnecessary and unjustified.³⁹ Justice Ginsburg also disputed the presumption that the warrant application was based on individualized suspicion, reasoning that "suspicion" is a term with specific

32. *Id.*

33. *See id.* at 2080 (determining the resolution of the Fourth Amendment claim to be appropriate in ensuring that qualified immunity is not undermined by lower courts even though the holding would have no effect on the outcome of the case).

34. *See id.* at 2080-82 (finding that the material witness warrant for al-Kidd contained "individualized reasons" regarding al-Kidd's detention).

35. *See id.* at 2082 (finding an admittance of individualized suspicion on the basis that al-Kidd conceded the affidavit contained individualized reasons).

36. *See, e.g., id.* at 2087-88 (Ginsburg, J., concurring in judgment) (addressing several deficiencies in the warrant affidavit).

37. *See id.* at 2085-86 (Kennedy, J., concurring) (stating that the majority's holding is limited to the legal theories presented to the Court and does not resolve the lawfulness of the arrest).

38. *See id.* at 2086 (Kennedy, J., concurring) (emphasizing that ordinary probable cause is based on suspicion of criminality).

39. *See id.* at 2087-88 (Ginsburg, J., concurring in judgment) (objecting to the disposition of the Fourth Amendment claim given the omissions and misrepresentations in the warrant application); *id.* at 2089-90 (Sotomayor, J., concurring in judgment) (criticizing the majority's opinion for unnecessarily resolving the novel Fourth Amendment claim through use of unsupported assumptions).

legal meaning that refers to “suspicion of wrongdoing.”⁴⁰

Following the disposition of the Supreme Court concerning al-Kidd’s claims against Ashcroft, the Idaho District Court granted al-Kidd’s motion for summary judgment against the federal agent who prepared the material witness arrest warrant affidavit on the basis of the affidavit’s deficiencies.⁴¹ In contrast, the district court granted summary judgment in favor of the agent who reviewed the warrant application.⁴²

C. Special Needs Searches and Seizures

Administrative, or special needs, searches and seizures are those whose primary objective programmatic purpose is not related to a general interest in criminal law enforcement.⁴³ Both the warrant and probable cause requirements can be modified in administrative searches and seizures, including those related to individualized suspicion and a reasonable belief that a suspect is committing a crime.⁴⁴ The special needs of the government provide an exception to these requirements in various particular contexts, with the involvement of law enforcement not being determinative.⁴⁵

Although *Whren v. United States* generally prohibits inquiry into subjective motivating intent, special needs cases allow for inquiry into

40. See *id.* at 2088 n.3 (Ginsburg, J., concurring in judgment) (stating that the legal meaning of the term suspicion is not genuinely debatable).

41. See *al-Kidd v. Gonzales (Al-Kidd IV)*, No. 1:05-cv-093-EJL-MHW, 2012 WL 4470776, at *3, 6 (D. Idaho Sept. 27, 2012) (holding that the agent improperly misrepresented the truth and recklessly omitted crucial information from the affidavit).

42. See *id.* at *11 (finding that the reviewing agent acted reasonably because he had no knowledge of the deficiencies).

43. See *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (recognizing that the special needs requisite to establish an administrative purpose are separate from general law enforcement interests); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (prohibiting roadblocks that “primarily serve the general interest in crime control”).

44. See *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (recognizing that special needs may permit departure from the usual warrant and probable cause requirements); see also *Ferguson*, 532 U.S. at 79 n.15 (noting that special needs have allowed for the suspension of Fourth Amendment warrant and probable cause requirements).

45. See, e.g., *Illinois v. Lidster*, 540 U.S. 419 (2004) (information-seeking roadblock); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk driver roadblocks); *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602 (1989) (drug testing of adults in safety-sensitive work contexts); *Griffin*, 483 U.S. 868 (probationers); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (national border control); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory searches); *Camara v. Municipal Court of the City & Cnty. of S.F.*, 387 U.S. 523 (1967) (safety inspections).

objective programmatic purposes.⁴⁶ When a search or seizure has dual purposes, the special needs exception applies if the primary purpose is not related to criminal law enforcement.⁴⁷ This inquiry into programmatic purpose precludes the use of an alleged administrative purpose from being used as a pretext to avoid the usual probable cause and warrant requirements.⁴⁸ Therefore, the immediate objective of a search or seizure cannot be a general crime control purpose but must have an actual administrative purpose.⁴⁹

A general interest in criminal law enforcement does not include all government action that relates to crime control but only those situations within the ordinary activity of law enforcement.⁵⁰ Ordinary Fourth Amendment searches and seizures involve ascertaining evidence of criminal wrongdoing based on individualized suspicion, while the special needs exception applies when the primary purpose of the intrusion goes beyond an interest in ordinary criminal wrongdoing to an administrative concern.⁵¹ Further, the Court has distinguished between the purpose of uncovering criminal wrongdoing of the searched or seized person and the purpose of eliciting information from that person to incriminate another.⁵² Indeed, in *Illinois v. Lidster*, the Court specifically determined the special needs exception applies to seizures with the purpose of eliciting

46. Compare *Whren v. United States*, 517 U.S. 806, 813-14 (1996) (rejecting inquiry into subjective motivations of individual officers), with *Edmond*, 531 U.S. at 45-46 (allowing inquiry into programmatic purpose for searches justified by special needs).

47. Compare *Edmond*, 531 U.S. at 41-42 (prohibiting roadblocks for narcotic interdiction because the primary purpose was detecting evidence of ordinary criminal wrongdoing), with *Sitz*, 496 U.S. at 469 (allowing for the seizure of vehicles at roadblocks to check for drunk driving due to the public safety concern).

48. See *Ferguson*, 532 U.S. at 85 (holding that the pretextual use of routine medical treatment to obtain evidence for the purpose of incriminating patients violates the Fourth Amendment); see also *Whren*, 517 U.S. at 811-12 (explaining that an administrative purpose cannot be used as pretext to avoid the need for probable cause when the purpose for the search is not administrative).

49. See *Ferguson*, 532 U.S. at 83 (rejecting government invocation of the special needs exception when the purpose of a search was primarily to generate evidence for use by law enforcement).

50. See *Edmond*, 531 U.S. at 42 (recognizing that a high level of generality in contextualizing the purpose of roadblocks could permit roadblocks for any conceivable law enforcement purpose).

51. See *id.* at 41-42 (noting that the purpose of a narcotic interdiction roadblock is merely to discover evidence of ordinary criminal wrongdoing).

52. See *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (distinguishing a roadblock designed to discover witnesses to a crime from one meant to determine whether the occupants of a vehicle were involved in criminality).

information from potential witnesses of a crime because the primary purpose is not a general interest in crime control.⁵³

D. Feminist Theory and Dignity Ethics

Supreme Court jurisprudence increasingly relies upon dignity as a basis for decisions, with a trend of rising use since the twentieth century.⁵⁴ When combined with the feminist theory insight that social context is constitutive of the broader meaningful world, dignity within the law becomes significant to establishing individual identity.⁵⁵ To avoid jeopardizing the realization of the self, the legal system should appreciate the effects of the law on dignity.⁵⁶

The government's power to arrest individuals solely for witnessing a crime permits treatment of these individuals that differs from ordinary noncriminal citizens. Given this governmental power, courts have a manifest obligation to consider the ethical implications of the use of the material witness statute.⁵⁷ The Supreme Court frequently invokes dignity when analyzing claims of discrimination, where the assertion of inferiority through differential treatment has no justifiable basis.⁵⁸ Additionally, the Court has relied upon dignity to protect the reputations of ordinary citizens

53. See *id.* at 424 (holding that information-seeking vehicular roadblocks are permissible under the Fourth Amendment because the target of criminal interest is not the vehicle's occupant).

54. See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 179 (2011) (providing statistical analysis of increasing invocation of the term dignity since 1946).

55. See Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 188 (2011) (characterizing identity as dependent upon the relation between dignity and the law); Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 4-5, 17 (2002) (describing the individual as constituted by the relationship to society, the world, and the law).

56. See Henry, *supra* note 54, at 208, 246-49 (expressing the contingency of identity on the recognition of dignity, including recognition by the state as the embodiment of community norms); see also *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion)) (relating personal dignity to the ability to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life").

57. See Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1565 (1994) (characterizing material witness arrests as an intimidating aspect of our justice system that demands the implementation of ethical considerations).

58. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (holding that exclusions from jury selection based solely on gender are offensive to personal dignity).

against defamation.⁵⁹ Through these decisions, the Court expresses the centrality of dignity in the constitution of individual identity, with an emphasis on the recognition of dignity under the law.⁶⁰ Further, the Fourth Amendment, by prohibiting unreasonable government seizures, guarantees respect for the dignity of persons.⁶¹

III. ANALYSIS

A. The Court in al-Kidd, by Ruling on a Novel Fourth Amendment Claim Without Consideration of the Facts, Did Not Exhibit Sufficient Appreciation for Its Fourth Amendment Holding.

The majority opinion characterized the Fourth Amendment claim broadly, based on presumed admissions by al-Kidd, as whether an arrest unconstitutionally violates Fourth Amendment reasonableness when the warrant is objectively valid but based on improper intent.⁶² With this broad interpretation of the allegation, the majority was able to find the holding of *Whren v. United States* controlling, and thus prohibited inquiry into the motivating intent underlying a material witness arrest.⁶³ The majority bolstered its reliance on *Whren* by appealing to *City of Indianapolis v. Edmond* to demonstrate that al-Kidd's case was not a special needs case. While *Edmond* allowed inquiry into motivating purpose, the majority distinguished the lack of individualized suspicion in *Edmond* from the lack

59. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)) (finding that dignity protects personal reputation from unjustified invasion).

60. See Rao, *supra* note 55, at 188-89 (referencing prohibitions against discrimination and defamation to exemplify the societal and legal input into identity as it relates to conceptions of dignity). Without the recognition of dignity in the law, the individual loses the ability to realize that part of identity constituted by the law and the legal system.

61. See, e.g., *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 613-14 (1989) (finding that the Fourth Amendment guarantees the dignity of persons, along with their privacy and security, against certain arbitrary acts by the government).

62. See *al-Kidd III*, 131 S. Ct. 2075, 2080, 2085 (2011) (characterizing the holding of the Court as addressing only the effect of improper motive upon the reasonableness of a material witness arrest).

63. See *id.* at 2082-83 (applying *Whren* to determine that the analysis of reasonableness in material witness arrest cases prohibits consideration of alleged pretext). In *Whren*, an allegedly pretextual stop of an automobile for illegal drug-dealing activity was found to be constitutional because valid probable cause existed for the stop. *Whren v. United States*, 517 U.S. 806, 811-13 (1996). The Court rejected the use of subjective motives to invalidate a stop otherwise justifiable by probable cause. *Id.* at 813-15 (noting the difficulty of analyzing subjective motives).

of probably cause allegedly challenged by al-Kidd.⁶⁴

The majority's reliance on *Edmond* and *Whren* was dependent upon the presumption that al-Kidd conceded a validly obtained warrant based on individualized suspicion because the majority interpreted a lack of individualized suspicion as essential to the special needs exception.⁶⁵ The justices who concurred in the judgment severely questioned this presumption by the majority because they felt the facts of the case presented serious issues surrounding the validity of the warrant.⁶⁶ The concurrences in judgment by Justice Ginsburg and Justice Sotomayor identified the Fourth Amendment issue as inextricably intertwined with the particularities of al-Kidd's arrest and detention, especially regarding the deficiencies of the warrant.⁶⁷ The actual facts undermined the premises that confined the majority's Fourth Amendment analysis. Consequently, the justices concurring in the judgment characterized the majority's holding on the Fourth Amendment issue as narrow because of the limitations of the majority's analysis.⁶⁸ If the majority had sufficiently appreciated the factual difficulties surrounding al-Kidd's Fourth Amendment claim, then it would have been unable to reach such a broad resolution of the issue on the merits.

64. See *al-Kidd III*, 131 S. Ct. at 2080-82 (distinguishing the lack of individualized suspicion in *Edmond* from the lack of probable cause allegedly challenged by al-Kidd). The holding in *Edmond* relied on the lack of individualized suspicion, while the holding in *Whren* relied on its existence. The majority, after assuming al-Kidd's admission of valid individualized suspicion, relied on that assumption to distinguish *Edmond* and follow *Whren*. See *id.* at 2082-83.

65. See *id.*

66. See *id.* at 2087-88 (Ginsburg, J., concurring in judgment) (finding persuasive reasons to question the majority's initial presumption because of the omissions and misrepresentations contained in the warrant affidavit). The affidavit did not inform the issuing judge of several aspects of the case, including that al-Kidd previously cooperated with the FBI, that al-Kidd's parents, wife, and children all had U.S. citizenship and residency, or the particular information al-Kidd possessed or how it was material to a prosecution. See *id.* at 2087-88, 2088 n.2. The affidavit also misrepresented al-Kidd's \$1,700 round-trip coach flight to Saudi Arabia as a \$5,000 one-way first-class ticket. *Id.* at 2088.

67. Within the context of the Fourth Amendment question, Justice Ginsburg addressed the deficiencies of the warrant and the treatment of al-Kidd during his detention. See *id.* at 2087-89. Similarly, Justice Sotomayor criticized the majority's presentation of the Fourth Amendment issue as "artificial" and qualified it with references to al-Kidd's prolonged detention and the warrant's deficiencies. *Id.* at 2090 (Sotomayor, J., concurring in judgment).

68. See *id.* at 2090 (Sotomayor, J., concurring in judgment) (describing the majority's ruling as a narrow one based on questionable premises and without sufficient appreciation of the actual facts).

1. The Court Did Not Need to Address the Fourth Amendment Claim Because the Resolution of the Issue Did Not Affect the Outcome of the Case.

Judicial convention cautions against resolving constitutional issues that do not affect the outcome of a case.⁶⁹ Courts risk unnecessarily wasting judicial resources as well as creating precedent based on limited interpretations of difficult constitutional questions.⁷⁰ The Court in *al-Kidd*, however, resolved al-Kidd's Fourth Amendment claim despite the outcome of the case being determined by the issue of qualified immunity.⁷¹

The precedential value of the Fourth Amendment determination in *al-Kidd* remains unclear because of the inconsistency within the language of the opinions.⁷² Although the majority classifies the Fourth Amendment determination as a holding, it recognizes that the holding does not affect the outcome of the case.⁷³ Because all the opinions agree that the issue was not determinative to the outcome of the case, the most appropriate classification of its resolution would be dicta.⁷⁴ Indeed, Part I of Justice Kennedy's concurrence, which was joined by the three justices who did not join the majority opinion, attempts to limit the holding of the Court's majority to addressing only the legal theory before the Court.⁷⁵

Justice Scalia, on the other hand, made particular effort in his majority opinion to justify the departure from usual judicial convention.⁷⁶ The

69. See *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009) (expressing hesitation regarding the determination of novel constitutional claims when they are irrelevant to the determination of the broader case).

70. See *id.* at 236, 238, 241 (reviewing the potential defects of judicial decisions based on avoidable determinations).

71. See *al-Kidd III*, 131 S. Ct. at 2080 (recognizing that the Fourth Amendment question is not determinative to the case, but concluding that its resolution is required to prevent lower courts from slowly undermining the values of qualified immunity).

72. See *id.* at 2080, 2085 (referring to the Fourth Amendment determination as a holding, but one that does not affect the outcome of the case); *id.* at 2088 (Ginsburg, J., concurring in judgment) (describing to the Fourth Amendment holding as a determination on the merits, but criticizing it as improper).

73. See *id.* at 2080 (majority opinion) (suggesting the determination prohibits future constitutional challenges).

74. See *id.* at 2087 (Ginsburg, J., concurring in judgment) (classifying the issue as novel and its resolution as unnecessary). But see *id.* at 2085 (majority opinion) (presenting the Fourth Amendment determination as limiting subsequent constitutional challenges).

75. See *id.* at 2085-86 (stating that the limited Fourth Amendment determination did not resolve whether the use of the material witness statute against al-Kidd was lawful).

76. See *id.* at 2080 (discussing his reasons for addressing the Fourth Amendment violation).

majority relied upon *Pearson* in granting itself the discretion to decide the Fourth Amendment claim even though the determination of qualified immunity resolved the case on its own.⁷⁷ Despite the admitted novelty and difficulty of the Fourth Amendment claim, the majority felt obligated to resolve the issue and thus prevent erroneous constitutional determinations from obtaining precedential value in lower courts.⁷⁸

The opinions concurring in the judgment relied upon the passage in *Pearson* to criticize the resolution of the Fourth Amendment issue, in spite of the majority's justifications.⁷⁹ The issue was too novel and unnecessary for a satisfactory precedential holding, especially given the serious factual difficulties present in the case.⁸⁰ However, as a result of the majority's asserted holding, material witnesses may now be unable to challenge their arrest based on pretextual motivation.

2. The Court Failed to Consider the Deficiencies of the Warrant Because It Based Its Conclusions on Presumptions Unwarranted by the Facts.

When resolving a motion to dismiss, courts must accept the factual allegations of the nonmoving party as true.⁸¹ In *al-Kidd*, the majority opinion accepts this dictate but then only provides a cursory description of the facts alleged by al-Kidd, whose complaint was being challenged by Ashcroft.⁸² When analyzing al-Kidd's Fourth Amendment claim, the majority then entirely omits any discussion of al-Kidd's factual allegations against Ashcroft.⁸³ Although the majority did not explicitly reject al-

77. *See id.* (circumventing its recognition that cautious thought is required before resolving issues unnecessary to the outcome of the case); *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (permitting court discretion to resolve qualified immunity claims by addressing both the alleged constitutional violation and the clearly established standard, or only the latter).

78. *See al-Kidd III*, 131 S. Ct. at 2080 (expressing concern about the insulation of judgments on novel constitutional issues).

79. *See, e.g., al-Kidd III*, 131 S. Ct. at 2087 (Ginsburg, J. concurring in judgment) (quoting *Pearson*, 555 U.S. at 236-37) (relying on *Pearson* to object to the majority's Fourth Amendment holding as unnecessary).

80. *See id.* at 2089-90 (Sotomayor, J., concurring in judgment) (condemning the majority's ruling as narrow, unnecessary, and questionable, especially in light of the alleged facts).

81. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)) (holding that factual allegations must be assumed true unless they are mere conclusions); *see also al-Kidd III*, 131 S. Ct. at 2079 (stating an intention to accept the factual allegations in al-Kidd's complaint as true).

82. *See al-Kidd III*, 131 S. Ct. at 2079 (mentioning briefly Ashcroft's alleged policy, the apprehension of al-Kidd, and the length of al-Kidd's confinement and supervised release).

83. *See id.* at 2080-83 (failing to mention a single factual allegation, and providing

Kidd's allegations, its opinion ignored them and their impact on the issues. The majority should have considered the facts of the case in its opinion to ensure appreciation for al-Kidd's situation and awareness of the stigma that al-Kidd was trying to avoid.⁸⁴ The failures of the warrant affidavit deprived al-Kidd of his due process and characterized him as a possible suspected terrorist. The majority should have included these facts, which were support for al-Kidd's claim against Ashcroft, and which showed the possible abuse that material witness arrests pose.

In addition to omitting the factual allegations of al-Kidd's complaint from its discussion, the majority introduces its own deductions to defeat al-Kidd's Fourth Amendment claim. The majority uses the presumption that al-Kidd had conceded the warrant was suspected by individualized suspicion to find no Fourth Amendment violation.⁸⁵ The majority's reasoning is that al-Kidd's acknowledgement of individualized reasons in the warrant affidavit means al-Kidd conceded that the warrant for his arrest was based on individualized suspicion.⁸⁶ The majority thus equates "individualized reasons" for the belief that al-Kidd was a material witness with the existence of "individualized suspicion."⁸⁷ On the basis of this presumption of properly individualized suspicion, the majority proceeds to infer a validly obtained warrant, even stating in a footnote that the validity of the warrant was the premise of al-Kidd's argument.⁸⁸ The majority concludes its opinion by appealing to the validity of the warrant as a central premise in its Fourth Amendment holding.⁸⁹

The justices concurring in the judgment justifiably criticized the logic of the majority's presumptions concerning al-Kidd's concessions in his complaint.⁹⁰ The complaint alleged that the affidavit accompanying the warrant application contained numerous omissions and

only that al-Kidd alleged he was detained as a suspected criminal).

84. *Cf. al-Kidd II*, 580 F.3d 949, 954 (9th Cir. 2009) (stating that al-Kidd has been unemployed due to the inability to obtain a security clearance as a result of his arrest).

85. *See al-Kidd III*, 131 S. Ct. at 2083.

86. *See id.* at 2082.

87. *See id.*

88. *See id.* at 2083 n.3 (asserting that al-Kidd accepts the validity of the warrant by seeking to hold Ashcroft liable for the improper motive of the material witness arrest policy).

89. *See id.* at 2085 (stating that an arrest pursuant to a valid warrant cannot be challenged on the basis of improper motive).

90. *See id.* at 2087-88 (Ginsburg, J., concurring in judgment) (applying the factual allegations in al-Kidd's complaint to question the possibility of a validly obtained warrant).

misrepresentations.⁹¹ Further, the majority omits al-Kidd's case against the FBI Special Agents, which challenged the validity of the warrant and resulted in a finding of recklessness for the affidavit errors.⁹² The failure of the majority to consider these aspects of al-Kidd's case prevented the judicial process from considering the full context of his situation and its effect on his identity.

The factual allegations in the complaint, along with the suit against the Special Agents, are inconsistent with a concession that the warrant for al-Kidd's arrest was validly obtained.⁹³ The majority, however, omits these facts from its discussion, causing a disconnect between the actual facts and the majority's presumptions as well as a lack of clarity concerning the majority's perspective.⁹⁴ Although al-Kidd sought to hold Ashcroft liable for a policy of improperly arresting terrorism suspects as material witnesses, al-Kidd did not premise this claim on the validity of the warrant.⁹⁵ Instead, al-Kidd alleged that an aspect of the policy implemented by Ashcroft was to arrest material witnesses even when the requirements of the material witness statute were not met.⁹⁶ Further, al-Kidd contended that his arrest was a direct result of this aspect of the policy, and did so with sufficient force that the Ninth Circuit allowed this claim to proceed against Ashcroft.⁹⁷ The presumptions made by a majority of the Supreme Court are irreconcilable in light of these factual allegations made by al-Kidd and do not exhibit sufficient appreciation for his situation.

The justices who did not join the majority opinion questioned the initial

91. *See id.* (reiterating the allegations of a deficient warrant, including the affidavit's claim that al-Kidd was taking a \$5,000 one-way first class ticket to Saudi Arabia when he was actually taking a \$1,700 round-trip coach ticket and its failure to include the U.S. residency and citizenship of al-Kidd and his family or al-Kidd's previous repeated cooperation with the FBI).

92. *See al-Kidd IV*, No. 1:05-cv-093-EJL-MHW, 2012 WL 4470776, at *6 (D. Idaho Sept. 27, 2012) (granting summary judgment against the FBI agent who prepared the warrant application due to the agent's reckless disregard for the truth).

93. *Cf. al-Kidd III*, 131 S. Ct. at 2088-89 (Ginsburg, J., concurring in judgment) (arguing that the validity of the warrant is severely undermined both by the allegations in al-Kidd's complaint and by his continuing claims against the Special Agents).

94. *See id.* at 2087 (characterizing the presumptions made by the majority regarding a validly obtained warrant as "puzzling").

95. *See id.* at 2090 (Sotomayor, J., concurring in judgment) (emphasizing that the validity of the warrant was severely questioned even as al-Kidd sought to hold Ashcroft liable for the alleged policy).

96. *See al-Kidd II*, 580 F.3d 949, 957 (9th Cir. 2009).

97. *See id.* at 977 (finding the claim plausible on the basis of the allegations in al-Kidd's complaint).

presumption that al-Kidd had conceded individualized suspicion existed.⁹⁸ The majority applied this presumption to deny an inquiry into the programmatic purpose underlying the use of the material witness warrant and reject al-Kidd's Fourth Amendment claim.⁹⁹ In rejecting the unusual status of the material witness statute in the criminal justice system, the majority was able to situate its analysis squarely inside *Whren*.¹⁰⁰ According to the majority, individualized suspicion accompanying a warrant grants stronger protection than many cases where a warrant is not required but inquiry into purpose is prohibited.¹⁰¹ However, inquiry into programmatic purpose is the only way to directly confront pretextual motivations and thus prevent such pretext from imposing an identity of criminality through conflation of witnesses with criminal suspects.¹⁰²

The failure of the government to establish individualized suspicion was central to al-Kidd's allegations against the government because al-Kidd argued that the only individualized suspicion was of him being a criminal suspect and not of him being a material witness.¹⁰³ In making a similar point, Justice Ginsburg contended that the majority's use of the word suspicion was unprecedented because it referred to suspicion only that a person had witnessed a crime but not that the person was engaged in any wrongdoing.¹⁰⁴ In *Illinois v. Lidster*, the Court reached the same conclusion by holding that detentions for the purpose of seeking

98. See *al-Kidd III*, 131 S. Ct. at 2088 n.3 (Ginsburg, J., concurring in judgment) (engaging in a lengthy discussion about the particular legal meaning of "suspicion" being limited to "suspicion of wrongdoing").

99. See *id.* at 2082-83 (majority opinion) (determining that only a lack of individualized suspicion permitted eschewing *Whren*'s prohibition on inquiry into subjective motivation and that al-Kidd's Fourth Amendment claim therefore had no basis).

100. See *id.* at 2082 (finding *Whren*'s prohibition on inquiry into subjective motivation to be controlling after dismissing any special needs exception due to the presumed existence of individualized suspicion).

101. See *id.* (appealing to cases, including *Terry v. Ohio*, where an objective standard is applied to warrantless searches based on a lesser showing of reasonable suspicion).

102. Cf. Ronald L. Carlson, *Distorting Due Process for Noble Purposes: The Emasculation of America's Material Witness Laws*, 42 GA. L. REV. 941, 957 (2008) (asserting that the pretextual use of the material witness statute to arrest criminal suspects blurs the necessary and important distinction between witness and criminal suspect).

103. See *al-Kidd III*, 131 S. Ct. at 2079 (describing the policy alleged by al-Kidd as arresting suspected terrorists who were never intended to be used as actual witnesses).

104. See *id.* at 2088 n.3 (Ginsburg, J., concurring in judgment) (noting that all prior decisions used the term suspicion to mean a suspicion of wrongdoing).

information did not involve suspicion of the detained individual.¹⁰⁵ Given the unprecedented application of the word suspicion to apply to witnesses, the use of the material witness statute to detain persons is unique, and the issue of its pretextual use is novel.¹⁰⁶ Because the majority presupposed individualized suspicion, it was able to avoid analyzing the Fourth Amendment claim or its effect on al-Kidd with the necessary complexity.¹⁰⁷

3. Because al-Kidd's Treatment Exemplifies the Excesses in the Use of the Material Witness Statute, the Court Should Not Have Ignored the Alleged Abuse al-Kidd Suffered While Incarcerated.

The conditions of al-Kidd's confinement are a separate issue from al-Kidd's Fourth Amendment claim, and even the Ninth Circuit rejected al-Kidd's claim against Ashcroft for the abusive treatment of his incarceration.¹⁰⁸ The Ninth Circuit, however, also determined that the government has an obligation to not treat detained witnesses the same as it treats criminals who are incarcerated for punishment.¹⁰⁹ Justice Ginsburg lends support to the Ninth Circuit's view, finding no legitimate basis for the harsh conditions al-Kidd faced while confined.¹¹⁰ Justice Ginsburg

105. In *Lidster*, the Court upheld a vehicle stop at a checkpoint because the checkpoint was to ask for the public's help in providing information about a crime. See *Illinois v. Lidster*, 540 U.S. 419, 423 (2004). The information-seeking stop differed from the invalid stop in *Edmond*, where the primary purpose was to "determine whether a vehicle's occupants were committing a crime." *Id.* The Court found individualized suspicion to be largely irrelevant in cases involving detentions of potential witnesses. *Id.* at 424-25. The concurrence in part and dissent in part rejected the analysis of the checkpoint stop's reasonableness, questioning the degree of and rationale for the interference with individual liberty. See *id.* at 428-29 (Stevens, J., concurring in part and dissenting in part) (recommending remand on the issue of the reasonableness of the checkpoint since the factual issue had not been addressed yet by lower courts).

106. Cf. *al-Kidd III*, 131 S. Ct. at 2087-88 (Ginsburg, J., concurring in judgment) (criticizing the disposition of the novel Fourth Amendment claim); see also *id.* at 2090 (Sotomayor, J., concurring in judgment) (noting that the Court never previously addressed a Fourth Amendment claim where the detained individual was not suspected of committing any crime).

107. See *id.* at 2090 (Sotomayor, J., concurring in judgment) (noting the various factual difficulties that the majority avoids through its use of presumptions).

108. See *al-Kidd II*, 580 F.3d 949, 957, 979 (9th Cir. 2009) (distinguishing al-Kidd's Fourth Amendment claim from his Fifth Amendment claim against his custodial conditions, and rejecting Ashcroft's liability under the Fifth Amendment claim for a failure to allege adequate facts to show personal involvement).

109. See *id.* at 977 (requiring the government to recognize an important distinction between the punishment of criminals and the detention of witnesses).

110. See *al-Kidd III*, 131 S. Ct. at 2089 (Ginsburg, J., concurring in judgment) (criticizing al-Kidd's custodial conditions when his detention was meant to secure his

presents her concern as one related to the legality of the government's use of the material witness statute.¹¹¹ Even if the incarceration conditions of a material witness cannot be directly challenged by use of the Fourth Amendment, the majority should have considered the claims to inform its determination of whether the Fourth Amendment was applicable in its usual sense. The conditions of incarceration—and the sense of difference for what is appropriate for a witness compared to a criminal—emphasize the uniqueness of the material witness statute.¹¹²

Although al-Kidd was not arrested on suspicion of criminal activity, he was treated in a manner that was worse than the criminals incarcerated in the same facilities.¹¹³ During his sixteen days of incarceration, al-Kidd was kept in the high-security units of three facilities and strip searched multiple times.¹¹⁴ He was confined almost entirely to his cell, allowed out only one to two hours a day, and, when transferred between facilities, was handcuffed and restrained with shackles around his wrists, legs, and waist.¹¹⁵ Both the Ninth Circuit and a minority of the Supreme Court condemned the treatment of al-Kidd, and Justice Ginsburg described his incarceration as “brutal.”¹¹⁶

Al-Kidd has not been the only material witness to face harsh treatment during his period of confinement, and similar allegations of witness mistreatment surfaced soon after the September 11, 2001 terrorist attacks.¹¹⁷ For example, in September 2001, federal agents arrested Osama Awadallah as a material witness, and he was immediately placed into solitary confinement.¹¹⁸ In circumstances similar to those alleged by al-

testimony).

111. *See id.* (building on Justice Kennedy's concurrence regarding questions unaddressed by the majority, while emphasizing that the issue is one of the legality of the government's use of the material witness statute).

112. This is especially important to the negative repercussions on the arrested witness and on that witness's ability to constitute an identity as a non-criminal.

113. *See al-Kidd II*, 580 F.3d at 953 (noting that al-Kidd's cell was the only one kept lit twenty-four hours a day).

114. *See al-Kidd III*, 131 S. Ct. at 2089 (Ginsburg, J., concurring in judgment) (criticizing the conditions of al-Kidd's confinement, which included several body-cavity inspections, as similar to criminal punishment).

115. *See al-Kidd II*, 580 F.3d at 953.

116. *See al-Kidd III*, 131 S. Ct. at 2089 (Ginsburg, J., concurring in judgment) (concluding that al-Kidd's treatment expresses a disrespect for human dignity that must be constrained).

117. *See al-Kidd II*, 580 F.3d at 978 (noting criticisms of witness detention practices from news outlets as early as December 2001 and later from courts).

118. *See United States v. Awadallah*, 202 F. Supp. 2d 55, 60-61 (S.D.N.Y. 2002) (reciting the uncontested circumstances of Awadallah's incarceration, including regular

Kidd, the district court noted that Awadallah's incarceration was more restrictive than most of the criminals held in the same facilities.¹¹⁹ The incarcerations of Awadallah and al-Kidd were not isolated incidents, and an Assistant United States Attorney even expressed his frustration to the Office of the Inspector General that the Bureau of Prisons did not distinguish between terrorism suspects and material witnesses.¹²⁰ The OIG Report concluded that the government engaged in a policy of mistreating material witnesses, at least of those incarcerated at the New York Metropolitan Detention Center.¹²¹

These issues regarding incarceration of material witnesses should be taken into account to appreciate the implications of the majority's analysis in *al-Kidd* because of the severe privacy intrusions they impose on witnesses.¹²² The Ninth Circuit criticized similar treatment of witness and criminals during confinement because of the uniqueness of the authority of the government to detain witnesses through incarceration.¹²³ The court found an obligation of the government to not treat witnesses like criminals when the government is empowered to detain those who are not suspected of a crime.¹²⁴ The potential for undermining the purpose of the statute in obtaining witness cooperation through harsh detention treatment further emphasizes the unique status of material witness arrests.¹²⁵ These Fifth Amendment issues cannot be directly challenged using the Fourth Amendment, but they should inform any analysis of Fourth Amendment claims regarding the legality of material witness detentions because they are the direct impact of those detentions.¹²⁶

strip searches and videotaping whenever he was removed from his cell).

119. *See id.* (distinguishing Awadallah's treatment as a material witness from other prisoners with respect to family visits, phone calls, and shower access).

120. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, at 20 (2003) [hereinafter OIG REPORT] (noting an Assistant United States Attorney's complaint over his lack of input into the detentions of detainees).

121. *See id.* at 197 (determining that insufficient inspections prevented a conclusion that a similar pattern of abuse existed at the other facility investigated).

122. *Cf. al-Kidd III*, 131 S. Ct. 2074, 2089 (2011) (Ginsburg, J., concurring in judgment) (implying that the majority's disposition of the Fourth Amendment issue avoided implementing safeguards against future witness mistreatment).

123. *See al-Kidd II*, 580 F.3d 949, 977 (9th Cir. 2009).

124. *Id.*

125. *Cf. al-Kidd III*, 131 S. Ct. at 2089 (Ginsburg, J., concurring in judgment) (questioning treatment that punishes witnesses when the purpose of the incarceration is to obtain testimony).

126. *See id.* (explaining that the treatment of al-Kidd impacts the legality of the use

4. The Court Should Have Considered the Alleged Policies of Ashcroft in Reaching Its Fourth Amendment Determination Because These Policies Were the Basis for al-Kidd's Fourth Amendment Claim.

Al-Kidd based his challenge to his arrest and detention on the specific policies he alleged Ashcroft implemented after the September 11, 2001 terrorist attacks.¹²⁷ These alleged policies were in response to the threat of terrorism and were meant to enhance the government's ability to combat that threat.¹²⁸ The majority, however, failed to discuss these policies and did not mention the context of terrorism in its Fourth Amendment analysis.¹²⁹ Instead, the majority limited its Fourth Amendment reasonableness analysis to exclude consideration of these central issues.¹³⁰

Al-Kidd alleged that Ashcroft implemented policies after September 11, 2001, that used the material witness statute to detain terrorism suspects for whom the government could not satisfy probable cause to arrest for criminal activity.¹³¹ Relying on quotes from Executive Branch officials, al-Kidd alleged that Ashcroft's policies violated the material witness statute by ignoring the requirement of impracticability in securing testimony without incarceration.¹³² Al-Kidd also disputed the materiality of the detained witnesses by identifying low rates of material witnesses' testimony in trials and a statement by a government official that admitted that material witnesses may have no useful information.¹³³ Al-Kidd then applied these allegations to his own situation to show that the government

of the material witness statute).

127. See *al-Kidd II*, 580 F.3d at 954 (describing al-Kidd's allegations against Ashcroft as premised on an asserted policy to pretextually detain terrorism suspects by using the material witness statute for investigatory functions).

128. See *id.* (citing al-Kidd's complaint that quotes Ashcroft as using the aggressive detention of material witnesses to prevent new terrorist attacks).

129. See *generally al-Kidd III*, 131 S. Ct. at 2079-83 (discussing only briefly the alleged policies implemented by Ashcroft and failing to mention the word "terror" or any of its derivations during its Fourth Amendment analysis).

130. See *id.* at 2083 (holding that *Whren* prohibits inquiry into motivating intent underlying material witness arrests).

131. See *al-Kidd II*, 580 F.3d at 954 (reciting the evidence in al-Kidd's complaint, including a quote by Ashcroft and an internal Department of Justice memorandum that both suggested that the material witness statute would be used as part of aggressive detention tactics against terrorism suspects).

132. See *id.* at 955 (identifying direct evidence in al-Kidd's complaint that the government used the material witness statute to arrest individuals for investigatory purposes rather than to produce testimony).

133. See *id.* at 975 (noting that possibly half of all material witnesses were never called to testify and that at least one government official was aware of the possibility that material witnesses would not be useful in an investigation).

detained him as a material witness only as a pretext for investigating suspicions of involvement in terrorism.¹³⁴

The Supreme Court, however, did not address these factual allegations, but instead dismissed inquiry into the intent behind material witness arrests by relying on *Whren*.¹³⁵ The majority used al-Kidd's presumed concession of individualized suspicion to foreclose any inquiry into the alleged pretextual motivation.¹³⁶ In the course of its analysis, the majority did not once mention the alleged policies, despite al-Kidd's reliance on those policies to challenge the validity of the warrant and the presumed existence of individualized suspicion.¹³⁷

The majority's analysis thus foreclosed the possibility of consideration of the central claims of al-Kidd's complaint.¹³⁸ The majority relied on presumptions and the omission of details to resolve the case squarely under precedent even though the facts presented a far more complex situation.¹³⁹ Additionally, the failure of the Supreme Court to mention the context of terrorism allowed for an expansive impact of the Fourth Amendment analysis that is seemingly meant to affect all material witness arrests without regard to the circumstances of the arrest.¹⁴⁰ As a consequence, the criminal stigma imposed on witnesses by pretextual arrests may be expansive but has no redress under the Fourth Amendment.

134. See *id.* at 955, 963 (establishing an investigatory purpose by relying on the circumstances of his arrest, such as interrogations unrelated to Al-Hussayen, and also FBI Director Robert Mueller's identification of al-Kidd's arrest as a success in the fight against terrorism).

135. See *al-Kidd III*, 131 S. Ct. at 2080 (holding motivating intent is irrelevant for the Fourth Amendment analysis).

136. See *id.* at 2082 (holding that a finding of individualized suspicion provides sufficient protection to avoid going beyond an analysis of objective reasonableness).

137. Compare *id.* at 2080-83 (dismissing al-Kidd's Fourth Amendment claim while not mentioning Ashcroft's alleged policies), with *id.* at 2090 (Sotomayor, J., concurring in judgment) (criticizing the majority's presumptions and determining that the pretextual use of the material witness statute is a difficult question).

138. See *id.* at 2090 (Sotomayor, J., concurring in judgment) (criticizing the majority for using presumptions to avoid factual difficulties).

139. See *id.* at 2082 (majority opinion) (relying on *Whren* to dismiss al-Kidd's claim). But see *id.* at 2090 (Sotomayor, J., concurring in judgment) (finding the issue to be novel and difficult but its presentation by the majority to have been artificial).

140. See *id.* at 2083 (majority opinion) (applying the Fourth Amendment analysis broadly to all arrests pursuant to the material witness statute).

B. Material Witness Arrests Should Be Considered Special Needs Seizures Because Their Unusual and Less Protected Legal Status Demands that Impermissible Programmatic Purposes Be Prohibited.

Material witness arrests are special needs seizures because they go beyond the ordinary needs of criminal law enforcement.¹⁴¹ Although a seizure may be incidentally related to a general interest in crime control, the primary purpose must go beyond the ordinary enterprise of investigating crimes.¹⁴² Seizures that are meant to procure witness testimony are not within the ordinary needs of criminal law enforcement because their investigatory intent is not directed at the person seized.¹⁴³ By application of the special needs exception, material witnesses can avoid pretextual arrests and the resultant stigma of criminality.

1. The Unique Incarceration of Persons Based Solely on Their Witness to a Crime Converts Material Witness Arrests into Special Needs Seizures.

Material witness arrests, like the seizures of witnesses in other contexts, do not involve suspicion that the detained individual committed or is committing a crime.¹⁴⁴ Indeed, the Ninth Circuit relied on the distinction between seizures of criminal suspects and seizures of witnesses to find the arrest of al-Kidd unconstitutional.¹⁴⁵ The concurring justices on the Supreme Court agreed that warrants obtained under the material witness statute were unique because they did not rely upon probable cause that the individual had committed a crime.¹⁴⁶ The majority's analysis is therefore

141. *Cf. Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001) (prohibiting special needs exceptions when the primary objective governmental purpose is to generate evidence for use by law enforcement).

142. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 43-44 (2000) (prohibiting checkpoints to search for evidence of narcotics, although recognizing that the immediate hazard to public safety allows for checkpoints designed to stop drunk drivers).

143. *See Illinois v. Lidster*, 540 U.S. 419, 428 (2004) (Stevens, J., concurring in part and dissenting in part) (recognizing the significant distinction between targeting an individual for suspicion of a crime and targeting an individual for information about a crime committed by another).

144. *Cf. id.* at 424 (majority opinion) (holding that seizures meant to seek information about a crime not performed by the seized person go beyond the ordinary needs of law enforcement).

145. *See al-Kidd II*, 580 F.3d 949, 969-70 (9th Cir. 2009) (holding that the pretextual use of the material witness statute to investigate suspects without a showing of probable cause violates the Fourth Amendment).

146. *See al-Kidd III*, 131 S. Ct. 2074, 2086 (2011) (Stevens, J., concurring) (finding that the standard for obtaining material witness arrest warrants is atypical because witnesses are not criminal suspects).

flawed because it does not recognize its reliance on a reinterpretation of the word “suspicion” that allows it to ignore the unusual status of a material witness arrest as not dependent upon ordinary probable cause.¹⁴⁷

The majority in *al-Kidd* relied upon three erroneous assumptions to determine that the special needs exception does not apply to material witness arrests. First, the majority interpreted *Edmond* as approving checkpoints for general crime control purposes that were based upon merely some quantum of individualized suspicion.¹⁴⁸ Second, the majority broadly interpreted the term “suspicion” to go beyond suspicion that an individual has committed or is committing a crime.¹⁴⁹ Finally, the majority presumed that *al-Kidd* conceded the existence of individualized suspicion and thus precluded himself from challenging pretextual use of the material witness statute.¹⁵⁰

The foundational premise of the majority’s argument, that some quantum of individualized suspicion will sufficiently justify a seizure to prevent inquiry into motivating intent, is a misinterpretation of the analysis in *Edmond*.¹⁵¹ The majority asserted that the Court in *Edmond* would approve checkpoint stops based upon any amount of individualized suspicion even though the purpose was a general interest in crime control.¹⁵² The majority then erroneously concludes that the lack of a general seizure scheme undertaken without individualized suspicion prohibits the consideration of programmatic purposes.¹⁵³ However, the Court in *Edmond* only expressed that such a conclusion may be permissible and not that a prohibition on programmatic purpose was certain.¹⁵⁴ *Al-Kidd*’s majority therefore

147. See *id.* at 2081 (majority opinion) (relying on *Edmond*’s approval of checkpoints for general crime control purposes that are based on individualized suspicion to reject inquiry into motivating intent).

148. See *id.* (ignoring the context of a statement made in *Edmond* and introducing the word “merely” to change its meaning).

149. See *id.* at 2082 n.2 (arguing that the term “suspicion” must be understood to have a common and idiomatic meaning, rather than a particular legal one).

150. See *id.* at 2083 (holding that no Fourth Amendment violation occurred because the arrest was objectively justified).

151. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) (holding that the constitutionality of a checkpoint scheme depends on the balancing of competing interests).

152. See *al-Kidd III*, 131 S. Ct. at 2081 (interpreting *Edmond* as making a determinate holding regarding a hypothetical situation that was not before the Court in *Edmond*).

153. See *id.* at 2082 (concluding that the existence of individualized suspicion prohibits an analysis under the special needs exception).

154. Compare *id.* at 2081 (“*Edmond* explicitly said that it would approve checkpoint stops for ‘general crime control purposes’ that were based upon merely

interprets *Edmond*'s permissive attitude towards consideration of programmatic purpose in analyzing Fourth Amendment seizures to be an absolute one that permits this consideration only when the seizure is undertaken without generalized suspicion.¹⁵⁵ The majority's approach modifies *Edmond* by inferring an "only" in a sentence, which effectively distorts the actual holding.¹⁵⁶ Individualized suspicion may justify a seizure sufficiently to prohibit inquiry into individualized suspicion, but that does not mean that any quantum of individualized suspicion will inevitably justify such a seizure.¹⁵⁷

The majority proceeds to use this interpretation of *Edmond* as the basis upon which its interpretation of the term "suspicion" and of al-Kidd's complaint prohibit an inquiry into the alleged policies implemented by Ashcroft.¹⁵⁸ These latter two interpretations are intertwined because the majority asserts that the term "suspicion" includes suspicion that one is a witness in a criminal investigation and then infers that al-Kidd conceded that such suspicion must exist.¹⁵⁹ Justice Ginsburg, however, disputes that the use of the term "suspicion" in legal discourse has the same meaning as its use in common parlance.¹⁶⁰ Further, Justice Ginsburg questions the validity of the warrant on the basis that the individualized reasons provided in the affidavit accompanying the warrant application were undermined by omissions and misrepresentations.¹⁶¹ Without these assumptions by the

'some quantum of individualized suspicion.'"), with *Edmond*, 531 U.S. at 47 ("When law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . stops can only be justified by some quantum of individualized suspicion.").

155. See *id.* at 2081 (effectively interpreting the statement in *Edmond* that purpose "may be relevant" when a seizure is without individualized suspicion to mean that purpose may be relevant only in such a situation).

156. Cf. *id.* at 2083 (criticizing al-Kidd for making this same error in his interpretation of *Whren*).

157. See *Edmond*, 531 U.S. at 457 (asserting that individualized suspicion is required but not necessarily sufficient to justify a checkpoint based on primarily general crime control purposes).

158. See *al-Kidd III*, 131 S. Ct. at 2082-83 (applying the presumed existence of individualized suspicion to reject consideration of the allegedly pretextual use of the material witness statute).

159. See *id.* at 2082 (inferring al-Kidd's concession of individualized suspicion from the fact that the warrant application gave individualized reasons to believe al-Kidd was a material witness).

160. See *id.* at 2088 n.3 (Ginsburg, J., concurring in judgment) (providing extensive case law to show that the phrase "individualized suspicion" has been exclusively used to refer to suspicion of wrongdoing).

161. See *id.* (debating the assumption of a valid material witness warrant as well as the propriety of a merits determination).

majority, strong cause exists to believe that the material witness statute should undergo analysis under the special needs exception.¹⁶²

Based on the rationale of *Lidster*, the seizure of witnesses using the material witness statute should be considered a special needs exception.¹⁶³ Witness detentions differ greatly from the situation in *Edmond*, where the Court held unconstitutional the suspicionless detention of individuals for drug possession because the seizures did not satisfy any special needs exception.¹⁶⁴ Although material witness arrests do not involve suspicion of a crime, these detentions should be permitted as exceptions to the general dictates of the Fourth Amendment and allowed to advance important law enforcement objectives.¹⁶⁵ In *Lidster*, the Court recognized the importance of witness detentions in certain circumstances, and thus applied the special needs doctrine to allow for this unusual situation, where information is collected through cooperation with noncriminal citizens.¹⁶⁶ Similarly, the Court in *al-Kidd* should have recognized the distinctive aspects of material witness arrests, and permitted them only as pursuant to the special needs exception.¹⁶⁷

The appropriateness of the application of the special needs exception to the material witness statute is evident through the uniqueness and rarity of its occurrence in law enforcement activity.¹⁶⁸ Instead of stopping an individual for suspicion of a crime, the person is being detained for having information about a crime.¹⁶⁹ Lower courts have thus rightly recognized

162. *Cf. al-Kidd II*, 580 F.3d 949, 966-70 (9th Cir. 2009) (using the unusual status of material witness arrests to justify the application of the special needs exception and conclude that a Fourth Amendment violation had occurred).

163. *Cf. Illinois v. Lidster*, 540 U.S. 419, 423-25 (2004) (applying special needs analysis to detentions that have the purpose of obtaining information from witnesses as opposed to the purpose of incriminating the detained individual); *see also supra* note 106 and accompanying text.

164. *See id.* at 423 (distinguishing stops to obtain information from potential witnesses to a crime from the general interest in crime control found in *Edmond*).

165. *See id.* at 427 (applying the special needs exception to motorist checkpoints because of the importance of the information-seeking activity).

166. *See id.* at 424 (recognizing that information-seeking stops differ from law enforcement's ordinary interest in crime control, which targets criminal suspects for investigation).

167. *Cf. al-Kidd III*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (noting the atypical aspects of warrants and arrests under the material witness statute).

168. *See al-Kidd II*, 580 F.3d 949, 966 n.16 (9th Cir. 2009) (observing that only 3.6% of federal arrests are pursuant to the material witness statute, and only 0.3% of federal arrests outside the context of immigration are pursuant to the statute).

169. *See id.* at 969 (recognizing the distinction between a witness and a criminal as central to analysis of material witnesses and thus permitting inquiry into programmatic intent).

the important distinction between detention of criminals and detention of material witnesses.¹⁷⁰ Additionally, all four concurring justices on the Supreme Court agreed that material witness arrests are so unusual that they may not be covered by the Warrant Clause.¹⁷¹ The inapplicability of the Warrant Clause is a key aspect of special needs cases, as they often do not involve individualized suspicion.¹⁷² Without the element of criminality, and the corresponding requirement of probable cause for suspicion of a crime, the detention of witnesses is most adequately covered in our judicial system by application of the special needs exception.¹⁷³ The special needs exception would then distinguish material witness arrests from ordinary criminal arrests and help allay the imputation of criminality.

2. The Programmatic Purpose Behind Material Witness Arrests Must Be Considered to Prevent Abuse of the Statute Because the Statute Is Particularly Vulnerable Given Its Special Needs.

The material witness statute is vulnerable to abuse because it does not involve the ordinary suspicion of criminal activity that characterizes most law enforcement activity.¹⁷⁴ The requirement of probable cause in the material witness statute does not afford the same protections as the requirement of probable cause for arrest of criminal suspects.¹⁷⁵ Because ordinary probable cause already includes individualized suspicion of criminal involvement, an arrest warrant adequately based on ordinary probable cause could not, by definition, be used to pretextually arrest an individual for whom no ordinary probable cause to arrest existed. Conversely, the nature of the material witness statute, which is precisely meant to avoid the requirement of probable cause for suspicion of criminal

170. *See id.* at 977 (admonishing the treatment of incarcerated witnesses as similar to the punishment of criminals through incarceration).

171. *See al-Kidd III*, 131 S. Ct. at 2086 (Kennedy, J., concurring) (noting that material arrest warrants are not issued on the basis of probable cause that the arrestee committed a crime).

172. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (comparing the permissible information-seeking stop to other special needs cases that did not involve individualized suspicion).

173. *See al-Kidd II*, 580 F.3d at 970 (allowing for consideration of programmatic purpose in material witness arrests due to the distinctive lack of probable cause for suspicion of criminal activity).

174. *See id.* (noting the inapplicability of ordinary probable cause to material witness arrests and warrants and recognizing a resultant susceptibility to pretextual use).

175. *See id.* at 968 (finding that probable cause to arrest material witnesses has similar procedural protections to ordinary probable cause, but that it still does not satisfy the probable cause requirements of the Fourth Amendment).

activity, allows for the potential pretextual use to arrest criminal suspects for whom ordinary probable cause does not exist because the government has less to show.¹⁷⁶ Additionally, the means of satisfying the probable cause requirements for a material witness arrest can be substantially easier to satisfy.¹⁷⁷ Given these distinctive aspects regarding material witness arrests, consideration of programmatic purposes would allow for an inquiry into the heightened possibility of misuse.¹⁷⁸

A prohibition on inquiry into programmatic purpose behind the use of the material witness statute makes the statute vulnerable to misuse.¹⁷⁹ As the majority in *al-Kidd* admits, seizures unaccompanied by suspicion of wrongdoing are a rare occurrence and thus are frequently unaddressed by courts.¹⁸⁰ The lack of judicial precedent further compounds the difficulties inherent in determining the practicality of securing witness testimony by subpoena or deposition.¹⁸¹ Further compounding the problem is the lack of judicial supervision required for the issuance of subpoenas.¹⁸² As a consequence of these difficulties, judges rarely, if ever, deny a request for a material witness warrant when related to the context of terrorism.¹⁸³ Therefore, inquiry into the programmatic purpose behind material witness arrests is necessary to protect the Fourth Amendment and prevent abuse of the material witness statute.

176. See *id.* at 970 (observing the vulnerability of the material witness statute to pretextual use to arrest criminal suspects for whom ordinary probable cause does not exist).

177. See *Bacon v. United States*, 440 F.2d 933, 943 (1971) (holding that, for grand jury proceedings, the mere assertion by a federal prosecutor will satisfy the probable cause requirement for the materiality of the witness).

178. See *al-Kidd II*, 580 F.3d at 968-70 (rejecting *Whren*'s prohibition on inquiry into programmatic purpose because of the lack of ordinary probable cause in material witness arrests and the potential for misuse).

179. See Kit Kinports, *Camreta and al-Kidd: The Supreme Court, the Fourth Amendment, and Witnesses*, 102 J. CRIM. L. & CRIMINOLOGY 283, 288 (2012) (noting the possibility for recurring instances of abuse due to the lack of judicial oversight).

180. See *al-Kidd III*, 131 S. Ct. at 2082 n.2 (commenting on the lack of case law using the word "suspicion" without meaning suspicion of wrongdoing).

181. *Cf. id.* at 2086 (Kennedy, J., concurring) (expressing concern about the uncertain scope of the statute's lawful use).

182. Wesley MacNeil Oliver, *Material Witness Detentions After al-Kidd*, 100 KY. L.J. 293, 322 (2012) (asserting that the goal of material witness arrests is unrelated to ordinary law enforcement because of the manner that subpoenas are issued).

183. See HUMAN RIGHTS WATCH, *WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11*, at 45 (2005), available at <http://www.hrw.org/reports/2005/us0605/us0605.pdf> (finding no instances of a court denying a government application for a material witness warrant in connection with September 11, 2001).

Consideration of the programmatic purpose behind the arrest of al-Kidd, based on the allegations contained in al-Kidd's complaint, would result in a finding that al-Kidd's arrest was improper.¹⁸⁴ The government may not use the material witness statute to avoid the Fourth Amendment requirements of probable cause for the arrest of criminal suspects.¹⁸⁵ Al-Kidd's complaint presented numerous instances of statements by government officials that the material witness statute was being used to arrest suspected terrorists for whom ordinary probable cause could not be established, including statements about al-Kidd specifically.¹⁸⁶ Pretextual use of the material witness statute goes beyond its limited use under the special needs exception because this use serves the ordinary needs of law enforcement instead of the distinctive purpose of securing witness testimony.¹⁸⁷ Consequently, although al-Kidd's claim against Ashcroft was barred due to qualified immunity, the policy implemented by Ashcroft and the subsequent arrest of al-Kidd pursuant to that policy were unconstitutional.¹⁸⁸

IV. POLICY RECOMMENDATIONS

A. Justice Should Require Consideration of How Social Meaning, Especially Stigma, Affects the Dignity of Material Witnesses.

Dignity is dependent upon respect within one's community, and especially respect for one's self-determination of individual identity.¹⁸⁹ The actions of the state and the perceptions of society are intimately intertwined with the expression of dignity because identity is a concrete notion constituted by a particular historical context.¹⁹⁰ The attitude of

184. See *al-Kidd II*, 580 F.3d 949, 970 (9th Cir. 2009) (holding that the pretextual use of the material witness statute to arrest criminal suspects violates the Fourth Amendment).

185. See *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) (noting in dicta that the government cannot use the material witness statute to arrest suspected criminals for whom probable cause cannot be established).

186. See *al-Kidd II*, 580 F.3d at 963-64 (summarizing the allegations made by al-Kidd and concluding that, if true, they were objective indicia of an impermissible investigative or preemptive detention).

187. See *id.* at 969 (holding that the use of the material witness statute for a criminal investigatory purpose violates the Fourth Amendment).

188. Cf. *al-Kidd III*, 131 S. Ct. 2074, 2090 (2011) (Sotomayor, J., concurring in judgment) (stating that the Court did not decide whether the pretextual use of the material witness statute was lawful, but only that Ashcroft was qualifiedly immune).

189. See Rao, *supra* note 55, at 188 (arguing for an understanding of dignity as based on the expression of one's self-identity).

190. See Taslitz, *supra* note 55, at 17 (utilizing consent to argue for a conception of

one's community, which importantly includes the attitudes of the state as expressed by the law, thus has a vital role in the constitution of self-identity.¹⁹¹ The law takes part in the constitution of the self. Given the broad and various ways that the law affects and takes part in our lives, the law can be seen as a significant aspect of who one is. If social meaning, therefore—and the contributions to it by the law—are central to establishing a dignified identity, then justice demands its consideration in judicial analysis.¹⁹²

Material witnesses are especially vulnerable to the imputation of negative social meaning because of their unusual treatment in the legal system.¹⁹³ While arrest and incarceration can be stigmatizing on its own, arrest and incarceration with the implication that one is involved in criminality is far more stigmatizing, and thus damaging to personal agency in creating one's own sense of identity. The feminist concern with the effect of social meaning on the constitution of identity can help address limited consideration of the social context of judicial processes.¹⁹⁴ Feminism has been used to explore the impacts of social meaning on women by relying on critical factual inquiry and the discovery and rejection of unsupported presuppositions. This same critical perspective can provide a more appreciative analysis of the impact of Fourth Amendment analysis on material witnesses.¹⁹⁵

The increasing use of dignity in Supreme Court decisions can be seen as a signal of the consideration of social meaning in legal analysis.¹⁹⁶ In particular, the Court has shown an implicit concern with stigmatizing social meaning when dealing with Fourth Amendment analysis.¹⁹⁷ Justifications

the self that is shaped by society and the state).

191. See Rao, *supra* note 55, at 188 (relying on defamation and hate speech laws to argue for the respect required for expression of dignity).

192. See Taslitz, *supra* note 55, at 79 (concluding that a social meaning inquiry improves reasonableness balancing in Fourth Amendment analysis and helps ensure justice).

193. See Oliver, *supra* note 182, at 316 (providing historical background of public and statutory approval of detaining criminal suspects as material witnesses).

194. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) (utilizing feminist theory to question the impact on women of not considering gender implications in apparently neutral practices).

195. Cf. *Illinois v. Lidster*, 540 U.S. 419, 423 (2004) (relying on the distinctiveness of witness questioning to distinguish an information-seeking checkpoint from other checkpoints).

196. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (using dignity as a constitutive aspect of meaning to uphold a woman's right to choose whether to terminate a pregnancy).

197. See Taslitz, *supra* note 55, at 77 (arguing that the stigma attached to drug-

based on unwarranted stigma certainly have a basis in Supreme Court precedent in contexts such as racial discrimination.¹⁹⁸ These concerns about social meaning should be considered in Fourth Amendment analysis of material witness arrests because the dignity of witnesses is at risk when the stigma of criminality is imparted to the mere status of being a witness to a crime.¹⁹⁹

B. Arrests of Material Witnesses Should Be Considered Special Needs Exceptions, Rather Than Satisfying the Ordinary Needs of Criminal Law Enforcement, to Avoid Stigmatization of Witnesses as Criminals.

The judicial treatment of material witnesses like criminals contains the threat of conflating the status of being a witness with being involved in criminality.²⁰⁰ The decision of the Court in *al-Kidd* undermined a crucial avenue for avoiding the stigmatization of material witnesses by removing the possibility for inquiry into pretextual use of the material witness statute to detain suspects as witnesses.²⁰¹ Pursuant to the majority's dicta that excluded special needs analysis of material witness arrests, the government would be permitted to detain criminal suspects by arresting them as witnesses.²⁰² The arrest of individuals with no means to distinguish between those arrested for merely being witnesses and those arrested for being criminal suspects would reinforce the popular negative attitude against all those who are arrested.²⁰³

Material witness arrests should be analyzed under the special needs exception because the stigma of criminality should not be imparted to the

using mothers explains the difference in outcomes between *Ferguson* and *Edmond*).

198. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (holding separate educational facilities to be unconstitutional because of the feeling of inferiority imparted on black students).

199. Cf. Studnicki, *supra* note 57, at 1565 (arguing for the importance of ethical considerations in the context of material witnesses due to the distinctive use of government power to arrest those who are not suspected of criminal activity).

200. See Carlson, *supra* note 102, at 972 (urging a strong judicial declaration separating the statuses of witness and defendant).

201. Cf. Taslitz, *supra* note 55, at 30 (arguing that government objectives that are less stigmatizing should be considered under the special needs exception).

202. See *al-Kidd III*, 131 S. Ct. 2075, 2083 (2011) (asserting that the pretextual use of the material witness statute does not violate the Fourth Amendment).

203. See Oliver, *supra* note 182, at 317 (finding that the public was historically most tolerant of the use of material witness statutes to pretextually arrest criminal suspects). The point in this Article is that the historical tolerance of the pretextual use of material witness statutes and the legacy of that perception need to be challenged to validate the use of material witness arrests as respectful of individual liberty and dignity.

status of being a witness.²⁰⁴ By rejecting a special needs analysis, the majority effectively asserted that material witness arrests are part of the ordinary needs of law enforcement.²⁰⁵ However, material witness arrests do not have a general law enforcement purpose but rather serve the distinctive special need of securing witness testimony.²⁰⁶ The majority ignored the unusual status of material witnesses by situating its analysis within the context of *Whren*'s prohibition on inquiry into programmatic purposes.²⁰⁷ Appreciation of the uniqueness of material witness arrests under the special needs doctrine would allow for a more sufficient consideration of the factual allegations concerning the programmatic purpose underlying al-Kidd's arrest.²⁰⁸ With consideration of the alleged policy implemented by Ashcroft, the stigma of criminality imparted to material witnesses such as al-Kidd could be avoided, at least in significant part, because criminal suspects could not be pretextually detained as material witnesses, and especially not as part of an official policy.

In a larger context, the application of feminist theory suggests that a purpose that stigmatizes the target of a seizure should be considered a criminal law enforcement purpose.²⁰⁹ If the Supreme Court explicitly embraced such an understanding, then law enforcement officers would be incentivized to avoid stigmatizing material witnesses through pretextual policies.²¹⁰ Combining this incentive for law enforcement with judicial precedent that respects the dignity of witnesses to constitute their own identity separate from criminality would allow the application of the special needs exception to uphold the important status of being a witness.

204. Cf. Taslitz, *supra* note 55, at 77 (arguing that the social stigma attached to drug-abusing pregnant women most appropriately identifies the search for drug abuse evidence as a criminal matter instead of an administrative one).

205. See *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (identifying the distinguishing factor of special needs cases as going beyond a general interest in crime control).

206. See *al-Kidd III*, 131 S. Ct. at 2088 n.3 (Ginsburg, J., concurring in judgment) (showing the unusual use of the word "suspicion" when applied to material witnesses since witnesses are not suspected of a crime but rather supply testimony).

207. See *id.* at 2082 (majority opinion) (relying on a presumption of individualized suspicion to reject the application of special needs analysis).

208. Cf. *id.* at 2083 (rejecting inquiry into the alleged programmatic purposes because of the reliance on *Whren*).

209. See Taslitz, *supra* note 55, at 30 (positing that social meaning is the most significant factor in determining whether the primary objective purpose of a search or seizure is ordinary criminal law enforcement or administrative).

210. See *id.* at 37 (arguing that the Court implicitly embraced the importance of social meaning and stigmatization in distinguishing *Ferguson* from similar earlier cases).

V. CONCLUSION

The unprecedented use of the material witness statute to preemptively detain terrorism suspects for whom ordinary probable cause to arrest cannot be established demands judicial action that distinguishes mere witnesses from criminal defendants.²¹¹ Analysis under the special needs exception allows for this legal distinction because the consideration of programmatic purpose would prohibit the pretextual use of the material witness statute to arrest criminal suspects as an official policy.²¹² The majority in *al-Kidd*, however, did not exhibit sufficient appreciation for either the allegations made by al-Kidd or the unique status of the material witness statute and thus failed to reach the appropriate conclusion regarding the allegations of pretext. As a result, the stigma of criminality may be easily imparted upon mere witnesses without redress because an inquiry into misuse of the material witness statute is prohibited.

The majority's failure in *al-Kidd* to consider the alleged pretextual use of the material witness statute was not only misguided on the basis of precedent, but the possible import of stigma on witnesses undermines the important value placed on witness cooperation. The special needs line of cases provides precisely the necessary analysis to effectively distinguish between a witness and a criminal suspect by allowing for consideration of programmatic purpose underlying a scheme of arrests. With the threat of imparting unwarranted stigma onto material witnesses, justice requires that a deeper inquiry into underlying motivations be permitted for material witness arrests.

211. See Carlson, *supra* note 102, at 972 (urging a vigorous distinction by the federal judiciary between criminal suspects and material witnesses).

212. See *al-Kidd II*, 580 F.3d 949, 968-69 (9th Cir. 2009) (applying the special needs exception to find a violation of the Fourth Amendment in Ashcroft's alleged policy of pretextually using the material witness statute).