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# CRIMINAL LAW

## ***CAMRETA AND AL-KIDD: THE SUPREME COURT, THE FOURTH AMENDMENT, AND WITNESSES***

**KIT KINPORTS\***

*Although few noticed the link between them, two Supreme Court cases decided in the same week during the 2010 Term, Ashcroft v. al-Kidd and Camreta v. Greene, both involved the Fourth Amendment implications of detaining witnesses to a crime. Al-Kidd, an American citizen, was arrested under the federal material witness statute in connection with an investigation into terrorist activities, and Greene, a nine-year-old suspected victim of child abuse, was seized and interrogated at school by two state officials. The opinions issued in the two cases did little to resolve the constitutional issues that arise in witness detention cases, and in fact muddied the waters by relying on the Whren line of cases to suggest that the motivations underlying the decision to seize a witness are constitutionally irrelevant. In fact, however, the Fourth Amendment doctrine that governs these cases is the special needs exception, which under Supreme Court precedent does trigger an inquiry into subjective motive. As a result, this Article argues that the Fourth Amendment was violated if al-Kidd was pretextually detained because the FBI wanted an opportunity to investigate him, but lacked the probable cause to arrest him, or if the primary purpose for seizing Greene was to generate evidence in connection with the criminal charges pending against her father.*

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## I. INTRODUCTION

They were argued on successive days and decided within the same week. They involved suspected crimes—terrorism and child sexual abuse—the very mention of which generates strong visceral reactions. On the surface, the two cases before the Supreme Court during the 2010 Term—*Ashcroft v. al-Kidd*<sup>1</sup> and *Camreta v. Greene*<sup>2</sup>—did not have much else in common. Al-Kidd was arrested pursuant to a material witness warrant and detained for sixteen days in several high-security prisons as part of the FBI’s investigation of terrorist activities. Greene, a nine-year-old girl, was questioned at school about inappropriate touching state officials suspected she had experienced at the hands of her father. Though seemingly quite different, both cases raised the same fundamental question: what constitutional constraints does the Fourth Amendment impose on the “seizure” of a witness? When the Term ended and the dust settled, it turned out that the Supreme Court had actually said very little. Even more disappointing, the one thing it did tell us—that the reasons animating the seizure of a witness are constitutionally irrelevant<sup>3</sup>—fails to recognize that witness detentions fall within the Court’s special needs jurisprudence and thus should trigger an inquiry into subjective intent.

In *Camreta v. Greene*, police received information suggesting that Nimrod Greene, who had been arrested on sexual abuse charges involving a seven-year-old boy, had also molested his nine-year-old daughter, S.G. Several days after learning that Greene had been released from custody, a state child protective services caseworker, Bob Camreta, and a county deputy sheriff, James Alford, went to interview S.G. at school. The girl was taken out of her classroom and left alone in a room with the two officials for an hour or two while Camreta questioned her. She initially denied the allegations of abuse, but after further interrogation reported that her father had started molesting her when she was three. Although S.G. later recanted these statements, her father went to trial on the charges involving both his daughter and the seven-year-old boy. The jury was unable to reach a verdict. Greene ultimately entered an *Alford* plea to the charges involving the boy, and the charges pertaining to S.G. were dismissed.<sup>4</sup>

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<sup>1</sup> 131 S. Ct. 2074 (2011).

<sup>2</sup> 131 S. Ct. 2020 (2011).

<sup>3</sup> See *al-Kidd*, 131 S. Ct. at 2083.

<sup>4</sup> See *Camreta*, 131 S. Ct. at 2027; *Greene v. Camreta*, 588 F.3d 1011, 1016–20 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011).

In response to a § 1983 suit filed on S.G.'s behalf by her mother, the Ninth Circuit agreed that the girl's Fourth Amendment rights were violated when she was "seize[d] and interrogate[d] . . . in the absence of a warrant, a court order, exigent circumstances, or parental consent."<sup>5</sup> Nevertheless, the court of appeals granted summary judgment to Camreta and Alford on qualified immunity grounds, noting that the lower courts were divided on the proper analytical framework for evaluating the Fourth Amendment issues that arise in child abuse investigations and concluding that the rights the officials violated were not clearly established.<sup>6</sup>

By a vote of seven to two, the Supreme Court determined that the case was moot because S.G. was almost eighteen and lived in another state, and therefore was "no longer in need of any protection from the challenged practice."<sup>7</sup> Accordingly, in an opinion written by Justice Kagan, the Court vacated the Ninth Circuit's ruling on the substance of S.G.'s Fourth Amendment claim without reaching the merits.<sup>8</sup>

The Court delved into the substance of the Fourth Amendment a bit in *Ashcroft v. al-Kidd*. In that case, Abdullah al-Kidd, an African-American man who was born in the United States and converted to Islam in college, came to the FBI's attention during an investigation into terrorist activities in Idaho. Two days before al-Kidd was scheduled to leave the country on a scholarship to study Arabic and Islamic law at a university in Saudi Arabia, FBI agents sought a warrant to detain him under the federal material witness statute. That legislation allows a judge to "order the arrest of [a] person" based on a showing that the person's testimony is "material in a

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<sup>5</sup> *Greene*, 588 F.3d at 1030.

<sup>6</sup> *See id.* at 1026 n.11, 1031–33. *See generally* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (providing that executive branch officials are entitled to qualified immunity in constitutional tort suits unless they "violate[d] clearly established . . . constitutional rights of which a reasonable person would have known").

<sup>7</sup> *Camreta*, 131 S. Ct. at 2034. In a portion of the majority opinion joined by five Justices, the Court also ruled that it had jurisdiction to consider the case even though the cert petition was filed by prevailing parties, and that Article III's requirement of a "personal stake" "often will be met when immunized [government] officials seek to challenge a ruling [in a § 1983 suit] that their conduct violated the Constitution." *Id.* at 2029. The other two Justices in the majority would not have reached that question, but instead would have stopped after finding the case moot. *See id.* at 2036–37 (Sotomayor, J., concurring in the judgment). The two dissenting Justices maintained that the Court did not have jurisdiction to consider a cert petition filed by "true prevailing parties." *Id.* at 2040 (Kennedy, J., dissenting). For the view that this part of the Court's decision reflects the Justices' willingness to develop Fourth Amendment law only in "a zone of limited or no remedies," see Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2010–11 CATO SUP. CT. REV. 237, 258.

<sup>8</sup> *See Camreta*, 131 S. Ct. at 2036 & n.11.

criminal proceeding” and that “it may become impracticable to secure the presence of the person by subpoena.”<sup>9</sup> Al-Kidd was arrested at Washington Dulles International Airport, then interrogated and held for sixteen days in high-security cells in three different states. At that point, a judge released him on the condition that he limit his travel to four states, relinquish his passport, report to a probation officer, and agree to home visits. These conditions were eventually removed after fifteen months. Al-Kidd was never charged with a crime or called as a witness in any trial.<sup>10</sup>

Al-Kidd filed a *Bivens* action against numerous federal agencies and officials, including former Attorney General John Ashcroft. His complaint alleged that federal officials, acting pursuant to a policy devised by Ashcroft, were misusing material witness warrants in cases where they had no genuine interest in securing testimony, but really wanted opportunities to investigate suspected terrorists whom they did not have probable cause to arrest.<sup>11</sup> The district court denied the defendants’ motion to dismiss,<sup>12</sup> a ruling that was appealed only by Ashcroft. A divided panel of the Ninth Circuit affirmed the district judge’s decision.<sup>13</sup> Citing dicta from the Second Circuit’s ruling in *United States v. Awadallah*,<sup>14</sup> the Ninth Circuit

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<sup>9</sup> 18 U.S.C. § 3144 (2006). The provision provides in full:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

<sup>10</sup> See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011); *al-Kidd v. Ashcroft*, 580 F.3d 949, 951–54 (9th Cir. 2009), *rev’d*, 131 S. Ct. 2074 (2011).

<sup>11</sup> See *al-Kidd*, 131 S. Ct. at 2079; see also 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, 699 (2005) (noting that the Justice Department “has made no secret” of its use of material witness warrants “to investigate and interrogate . . . possible terrorists”); Donald R. Cochran, *Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start?*, 18 GEO. MASON L. REV. 1, 15 (2010) (agreeing that “there appears to be no doubt” of this fact); cf. James G. Cook, *The Detention of Material Witnesses and the Fourth Amendment*, 76 MISS. L.J. 585, 612 (2006) (observing that the federal material witness statute is “rarely used in other than terrorist-related investigations”).

<sup>12</sup> See *al-Kidd v. Gonzales*, 2006 U.S. Dist. LEXIS 70283 (D. Idaho Sept. 27, 2006).

<sup>13</sup> See *al-Kidd v. Ashcroft*, 580 F.3d at 957–77.

<sup>14</sup> 349 F.3d 42, 59 (2d Cir. 2003) (“[I]t would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established.”); see also *United States v. Awadallah*,

concluded that al-Kidd's claim that "he was arrested without probable cause pursuant to a general policy, designed and implemented by Ashcroft, whose programmatic purpose was not to secure testimony, but to investigate those detained," sufficiently "alleged a constitutional violation" on the part of the former Attorney General.<sup>15</sup>

The Supreme Court reversed by a vote of five to three.<sup>16</sup> Relying on its holding in *Whren v. United States* that the Fourth Amendment's "concern with 'reasonableness'" permits certain law enforcement actions "whatever the subjective intent" of the individual government officials involved,<sup>17</sup> the *al-Kidd* majority held that the motivation underlying a decision to arrest a material witness is constitutionally irrelevant. "Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer," Justice Scalia's majority opinion explained.<sup>18</sup> But the Court stopped there, assuming the validity of the warrant used to arrest al-Kidd and noting that his Fourth Amendment claims against the agents who obtained the warrant "are not before us."<sup>19</sup> Justice Kennedy, who represented the fifth vote for the majority opinion, wrote a separate concurrence, pointing out that the Court had not resolved the "difficult[]" issues surrounding the propriety of "the Government's use of the Material Witness Statute in this case."<sup>20</sup>

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202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002) ("Relying on the material witness statute to detain people who are presumed innocent . . . in order to prevent potential crimes is an illegitimate use of the statute."), *rev'd on other grounds*, 349 F.3d 42 (2d Cir. 2003).

<sup>15</sup> *al-Kidd*, 580 F.3d at 969. The panel further held that Ashcroft was entitled to neither absolute prosecutorial immunity nor qualified immunity. *See id.* at 957–64, 970–73.

<sup>16</sup> Justice Kagan did not participate in the decision. *See al-Kidd*, 131 S. Ct. at 2074.

<sup>17</sup> *Whren v. United States*, 517 U.S. 806, 814 (1996).

<sup>18</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011); *see also* Bascuas, *supra* note 11, at 698 (criticizing the federal government's pretextual use of material witness warrants, but agreeing that "the Fourth Amendment is not concerned with the government's motives for arresting any witness").

<sup>19</sup> *al-Kidd*, 131 S. Ct. at 2083 n.3 (commenting that "[t]he validity of the warrant . . . is the premise of al-Kidd's argument"). *But see id.* at 2087 & n.1 (Ginsburg, J., concurring in the judgment) (finding this assumption "puzzling" and noting that al-Kidd's complaint did not concede the validity of the warrant). The Court went on to hold that Ashcroft was protected by qualified immunity regardless of the constitutionality of his actions, and did not reach "the more difficult question" of his entitlement to absolute immunity. *Id.* at 2085 (majority opinion).

<sup>20</sup> *Id.* at 2085–86 (Kennedy, J., concurring). The three Justices in the minority joined this part of Justice Kennedy's concurrence. Those three Justices would have ruled only that Ashcroft was entitled to qualified immunity; they would not have reached the "novel and trying questions" surrounding the merits of al-Kidd's Fourth Amendment argument. *Id.* at 2087 (Ginsburg, J., concurring in the judgment).

Thus, the Court's opinions in these two cases left open fundamental questions surrounding the constitutionality of witness detentions.<sup>21</sup> Although one noted Fourth Amendment scholar has opined that these issues "will seldom arise in court," because witness seizures rarely lead to evidence that becomes the subject of a motion to suppress,<sup>22</sup> cases like *Camreta* and *al-Kidd* will likely recur. In the wake of September 11th, the federal government made aggressive use of material witness warrants in terrorism investigations.<sup>23</sup> Similarly, state officials have reason to prefer interviewing suspected child abuse victims at school,<sup>24</sup> and the division among the lower courts on the Fourth Amendment issues arising in child abuse cases will presumably persist until resolved by the Supreme Court.<sup>25</sup>

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<sup>21</sup> Although the Court had not previously ruled on the Fourth Amendment implications of witness detentions, earlier decisions had held that the arrest of a material witness does not effect a taking in violation of the Fifth Amendment, *see* *Hurtado v. United States*, 410 U.S. 547, 589 (1973), and had also rejected a Privileges and Immunities Clause challenge to the Uniform Law to Secure the Attendance of Witnesses (though it declined to decide whether the denial of bail violates due process), *see* *New York v. O'Neill*, 359 U.S. 1, 6–8 (1959). In addition, there is dictum in several other Supreme Court opinions arguably supporting the constitutionality of the federal material witness statute. *See* *Stein v. New York*, 346 U.S. 156, 184 (1953) (noting that "[t]he duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness"); *Barry v. United States*, 279 U.S. 597, 617 (1929) (observing that "[t]he constitutionality of [the federal material witness] statute has never been doubted"). *But cf.* *Bascuas*, *supra* note 11, at 725–31 (finding "no support in any Supreme Court case for the prolonged or indefinite detention" of material witnesses under the federal statute); *Cook*, *supra* note 11, at 598–602 (observing that "surprisingly the Supreme Court has never been called upon to consider the constitutionality of the material witness statute").

<sup>22</sup> 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.2(b), at 289 (4th ed. 2004).

<sup>23</sup> *See, e.g.*, Ronald L. Carlson, *Distorting Due Process for Noble Purposes: The Emasculation of America's Material Witness Laws*, 42 GA. L. REV. 941, 970 (2008) (noting that "things changed radically" after September 11th); *Cochran*, *supra* note 11, at 10 (citing reports putting the number of post-September 11th material witness detainees somewhere between forty and seventy).

<sup>24</sup> *See, e.g.*, *Greene v. Camreta*, 588 F.3d 1011, 1016 (9th Cir. 2009) (quoting *Camreta*'s comment that school interviews are "a regular part of [child protective services] practice"), *vacated as moot*, 131 S. Ct. 2020 (2011); Brief of the States of Arizona, et al. as Amici Curiae in Support of Petitioners at 38–40, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478) (amicus brief filed on behalf of forty states and the District of Columbia arguing that school interviews of suspected child abuse victims are reasonable); Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 438 (2005) (citing state statutes and explaining why interviews are conducted at school).

<sup>25</sup> *See supra* note 6 and accompanying text; *see also infra* note 116 (citing conflicting cases).

This Article analyzes the constitutional implications of witness seizures, concluding that they are a form of administrative intrusion and therefore must satisfy the dictates of the Court's special needs jurisprudence. Law enforcement officials wear different hats and play different roles, and when they are conducting criminal investigations, any seizure they make requires traditional probable cause and a warrant, or some exception to those requirements. By contrast, the special needs exception comes into play when they are acting in an administrative capacity. But justifying a seizure under that doctrine requires proof that the primary purpose animating the detention was something other than the goals of ordinary criminal law enforcement. That burden cannot be met if the FBI arrested al-Kidd to buy time while investigating his activities, or if the immediate goal for seizing S.G. was to collect evidence to be used in prosecuting the charges pending against her father.

In exploring these issues, the Article proceeds in three parts. Part II discusses the Supreme Court's traditional Fourth Amendment jurisprudence, first addressing probable cause and reasonable suspicion and then several warrant exceptions. Finding no justification for witness seizures down any of these paths, Part III turns to the special needs cases and concludes that any attempt to take advantage of this doctrine requires an inquiry into the subjective motivation underlying a witness detention. Moreover, in cases where constitutional challenges are leveled at a discretionary witness detention decision made by particular government actors, rather than at the administrative scheme as a whole, that purpose inquiry must focus on the individual officials involved to ensure that the seizure was designed to serve administrative rather than law enforcement goals. Finally, Part IV considers the general reasonableness balancing approach the Court has applied in several recent Fourth Amendment decisions, pointing out that the privacy interests infringed by the seizure of innocent witnesses weigh heavily against the government in these cases. All bets are off, however, when it comes to predicting the outcome of such a balancing test, and the Article concludes that the special needs doctrine is the more appropriate vehicle for analyzing the constitutionality of witness detentions.

## II. "ORDINARY" FOURTH AMENDMENT ANALYSIS

Under the Court's "ordinary" Fourth Amendment jurisprudence,<sup>26</sup> a search or seizure requires both probable cause and a warrant, or some

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<sup>26</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).



established exception to these requirements.<sup>27</sup> A less intrusive *Terry* stop and frisk may be performed based only on reasonable suspicion and itself constitutes one such warrant exception.<sup>28</sup> This Part looks first at the concepts of probable cause and reasonable suspicion, and then several plausible warrant exceptions, finding no available tool there to justify witness detentions.

#### A. PROBABLE CAUSE AND REASONABLE SUSPICION

A major hurdle for the government in trying to justify the seizure of witnesses is that the concept of probable cause historically has referred to a belief that the person being detained herself committed some crime. As the Court put it in *Beck v. Ohio*, the constitutionality of an arrest turns on whether the police “had probable cause to make it—whether . . . the facts and circumstances . . . were sufficient to warrant a prudent man in believing that *the petitioner* had committed or was committing an offense.”<sup>29</sup> The usual concept of probable cause therefore does not encompass reason to believe an individual has information that might lead to probable cause to arrest another.

The same is true of the reasonable suspicion required to stop. In its landmark decision in *Terry v. Ohio*, the Supreme Court relied on a balancing test—weighing “the need to search [or seize] against the invasion which the search [or seizure] entails”—to justify creating the stop-and-frisk exception to the warrant requirement (and to probable

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<sup>27</sup> See *Terry v. Ohio*, 392 U.S. 1, 20 (1968); see also, e.g., *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989). But cf. Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978 (identifying five “irreconcilable” models used in the Supreme Court’s Fourth Amendment jurisprudence, and arguing that the Court “choose[s] whichever model it sees fit to apply”).

<sup>28</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>29</sup> *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (emphasis added); see also *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (“We have stated . . . that ‘[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,’ and that the belief of guilt must be particularized with respect to the person to be searched or seized.” (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979))); *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (“This Court repeatedly has explained that ‘probable cause’ to justify an arrest means facts and circumstances . . . that are sufficient to warrant a prudent person . . . in believing . . . that the suspect has committed, is committing, or is about to commit an offense.”); *Terry v. Ohio*, 392 U.S. at 26 (referring to an arrest as “the initial stage of a criminal prosecution,” and noting that “an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime”); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (“The substance of all the definitions’ of probable cause ‘is a reasonable ground for belief of guilt.’” (quoting *McCarthy v. DeArmit*, 99 Pa. 63, 69 (1881))). See generally *Cook*, *supra* note 11, at 603 (noting that this definition of probable cause “never has . . . been doubted”).

cause).<sup>30</sup> “[E]ffective crime prevention and detection,” the Court reasoned, requires that police be able to “approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”<sup>31</sup> As the Court later described the reasonable suspicion standard, police must have “a particularized and objective basis for suspecting *the particular person* stopped of criminal activity.”<sup>32</sup>

The Court extended *Terry* in *United States v. Hensley* to allow stops made to “investigate past criminal activity,” at least those offenses that rise to the level of felonies.<sup>33</sup> But here again the Court only endorsed the stop of an individual “suspected of involvement” in the previous crime based on reasonable suspicion that the person herself “was involved in or is wanted in connection with a completed felony.”<sup>34</sup>

An extension of the usual understanding of probable cause and reasonable suspicion is therefore necessary to allow government officials to seize witnesses like al-Kidd and S.G. That is not to say that law enforcement’s hands are tied in interviewing witnesses in the course of criminal investigations. The Fourth Amendment governs only police activity that rises to the level of a “seizure” or a “search.”<sup>35</sup> Thus, officers may certainly ask questions of prospective witnesses, approach them, and

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<sup>30</sup> *Terry*, 392 U.S. at 20–21 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967)).

<sup>31</sup> *Id.* at 22.

<sup>32</sup> *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (emphasis added); *see also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (requiring “‘a particularized and objective’ basis for suspecting the person stopped of criminal activity” (quoting *Cortez*, 449 U.S. at 417–18)).

<sup>33</sup> *United States v. Hensley*, 469 U.S. 221, 228 (1985).

<sup>34</sup> *Id.* at 229. Any seizure of a witness attempting to fit within the confines of a *Terry* stop must also be limited in duration. Although the Court held in *United States v. Sharpe*, 470 U.S. 675, 686 (1985), that the key inquiry was whether the police were “diligently pursu[ing] a means of investigation that was likely to confirm or dispel their suspicions quickly,” and it “decline[d] to adopt any outside time limitation” for a *Terry* stop in *United States v. Place*, 462 U.S. 696, 709 (1983), the Court also refused to allow a stop of an hour and half in the latter case, noting that “we have never approved a seizure . . . for the prolonged 90-minute period involved here.” *Id.* at 709–10. The duration of the interview in *Camreta* was disputed, with S.G. alleging that it went on for two hours and the defendants countering that it lasted only an hour. *See Greene v. Camreta*, 588 F.3d 1011, 1017 n.1 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011). But certainly al-Kidd’s sixteen-day detention can hardly be considered a mere *Terry* stop. *See generally* 4 LAFAYE, *supra* note 22, § 9.2(f), at 337 n.206, 340 n.216 (citing lower court cases allowing stops of an hour, but generally disapproving of those lasting two hours or more).

<sup>35</sup> *Cf. Coleman*, *supra* note 24, at 430 (noting that the overwhelming majority of child abuse investigations are “conducted with the apparent consent of relevant adults”).

seek their cooperation.<sup>36</sup> But they must stop short of “seizing” a witness—taking steps that would lead a reasonable person in her position to feel she was not “free to leave,” “free to decline the officers’ requests or otherwise terminate the encounter”—absent reasonable suspicion that the witness herself may be involved in a crime.<sup>37</sup>

As the Court pointed out in *al-Kidd*, the *Whren* line of cases does make clear that seizures that are “otherwise lawful” do not violate the Fourth Amendment simply because of a government official’s “subjective intent alone.”<sup>38</sup> In the words of the *al-Kidd* majority, “ulterior motives” do not invalidate “an objectively reasonable traffic stop” or other “searches that are legitimate for other reasons.”<sup>39</sup> Thus, for example, when police

<sup>36</sup> See, e.g., *United States v. Drayton*, 536 U.S. 194, 200 (2002) (“Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.”); *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991) (same).

<sup>37</sup> *Bostick*, 501 U.S. at 435–36 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)). *al-Kidd* was unquestionably subject to an arrest, and the *Camreta* defendants did not challenge the district court’s finding that S.G. was “seized” on the facts there. See *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011). Some amicus briefs filed in the Supreme Court did, however, dispute that issue. See Amici Curiae Brief in Support of Petitioner, James Alford, Deputy Sheriff, Deschutes County, Oregon, by the Los Angeles County District Attorney at 9–18, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (No. 09-1478); Brief of the California State Association of Counties, and League of California Cities as Amici Curiae in Support of Petitioners at 11–22, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478). Any analysis of that question in subsequent cases must take into account the Court’s recent holding that the comparable “reasonable suspect” standard used to define custody for purposes of *Miranda* must consider the age of a child, at least if her age was “known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer.” *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011).

The finding that an individual was seized seemingly forecloses a claim of voluntary consent, which would dispense with both the warrant requirement and the need to show probable cause or reasonable suspicion. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). In any event, an argument based on consent would obviously be unavailing in *al-Kidd*. In *Camreta*, there was no contention that nine-year-old S.G. was herself capable of giving consent, and the whole point of interviewing her at school was to avoid seeking consent from her parents. See *Coleman*, *supra* note 24, at 438; Brief of the States of Arizona, et al. as Amici Curiae in Support of Petitioners, *supra* note 24, at 39. Nevertheless, a victim of child abuse, especially an older one, could conceivably give consent to a school interview. See Transcript of Oral Argument at 36, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1457, 09-1478) (Justice Alito questions whether a “child at 16 [is] incapable of consenting”). But in those circumstances, a reasonable child in the same situation would presumably feel free to leave the meeting and no Fourth Amendment “seizure” would occur.

<sup>38</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996) (emphasis added) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). For further discussion of *Whren*, see *infra* notes 154–57 and accompanying text.

<sup>39</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082 (2011).

have the probable cause or reasonable suspicion required for an arrest or stop, their underlying motivation does not “strip the agents of their legal justification.”<sup>40</sup> But these statements beg the question whether detention is “legitimate”—or “otherwise lawful”—absent probable cause or reasonable suspicion that the individual herself is involved in criminal activity. Certainly, the *Whren* line of cases teaches that probable cause or reasonable suspicion to believe the detainee committed or is about to commit a crime justifies an arrest or stop, regardless of the officer’s underlying reason for deciding to seize the individual.<sup>41</sup> Under those circumstances, traditional probable cause or reasonable suspicion itself makes the seizure reasonable. But, as discussed above, the usual concepts of probable cause and reasonable suspicion do not apply simply because there is reason to believe the detainee witnessed a crime. Some alternative “legal justification” is required to make the seizure of a witness “objectively reasonable” and thus “otherwise lawful” under the *Whren* line of cases.

It is conceivable that the same balancing test that led to *Terry* and *Hensley* might justify expanding the stop-and-frisk doctrine to allow the seizure of witnesses. Although the competing interests implicated by witness detentions are addressed in detail below,<sup>42</sup> suffice it to say here that strong arguments militate against such an extension of the stop-and-frisk cases. On one side of the balance, the privacy interests are much weightier when the individuals who are seized are not themselves suspects but merely innocent victims or witnesses.<sup>43</sup> On the other side of the scales, the “crime

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<sup>40</sup> *Whren*, 517 U.S. at 812; see also *id.* at 813 (likewise observing that “the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action” (quoting *Scott v. United States*, 436 U.S. at 138)). But see Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 77–95 (2007) (pointing out that the Court’s Fourth Amendment jurisprudence has seen a fair amount of fluctuation between objective and subjective standards).

<sup>41</sup> See *Whren*, 517 U.S. at 819 (rejecting a claim of pretext and concluding that the traffic stop was reasonable because police had probable cause of a traffic violation); see also *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (concluding that a police officer’s “subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause”); *Arkansas v. Sullivan*, 532 U.S. 769, 771–72 (2001) (per curiam) (holding that custodial arrest for a “fine-only traffic violation,” which led to the discovery of narcotics during an inventory search of a vehicle, was not “rendered invalid by the fact that it was “a mere pretext for a narcotics search”” (quoting *Whren*, 517 U.S. at 813) (quoting *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973))).

<sup>42</sup> See *infra* notes 194–208 & 224–28 and accompanying text.

<sup>43</sup> Cf. *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (“If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe

prevention” half of the government interest in “effective crime prevention and detection” relied on in *Terry* is diminished in cases where witnesses are seized.<sup>44</sup> Of course, that was true in *Hensley* as well, where the Court instead cited a policy more akin to *Terry*’s “crime detection”—“the strong government interest in solving crimes and bringing offenders to justice.”<sup>45</sup> But in both cases these policy concerns imply a species of exigency: the goals of preventing an imminent crime and thereby protecting the public safety in *Terry*,<sup>46</sup> and the prospect in *Hensley* that a suspect “police have been unable to locate” might “flee in the interim and . . . remain at large.”<sup>47</sup> Thus, the lower courts have consistently—and properly—refused to extend *Terry* to permit the seizure of witnesses, except in situations where a crime has just occurred and the police have an immediate need to ascertain the facts and identify potential witnesses.<sup>48</sup>

Although the *al-Kidd* majority did not discuss these questions at any length, given its assumption that *al-Kidd* admitted the validity of the material witness warrant used to arrest him,<sup>49</sup> the various opinions issued in the case did include some preliminary observations relevant to the definitions of probable cause and reasonable suspicion. At one point, Justice Scalia’s opinion for the Court acknowledged that the Framers’ hostility to general warrants might “perhaps” suggest that the reference to “probable cause” in the Fourth Amendment’s Warrant Clause “meant only probable cause to suspect a violation of law,” and not probable cause that “the individual named in the warrant was a material witness.”<sup>50</sup> But that proposition, Justice Scalia continued, would render all material witness warrants unconstitutional, “whether pretextual or not.”<sup>51</sup> Because that prospect went beyond the argument pressed by *al-Kidd*, the Court chose to leave it unresolved. The fears expressed by the majority, however,

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conditions.”); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (“This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.”); *Camara v. Mun. Court*, 387 U.S. 523, 530 (1967) (rejecting as “anomalous” the proposition that “the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior”).

<sup>44</sup> *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

<sup>45</sup> *United States v. Hensley*, 469 U.S. 221, 229 (1985).

<sup>46</sup> *See Terry*, 392 U.S. at 30 (pointing out that it was “necessary for the protection of [the officer] and others to take swift measures to discover the true facts and neutralize the threat of harm”).

<sup>47</sup> *Hensley*, 469 U.S. at 229.

<sup>48</sup> *See* 4 LAFAVE, *supra* note 22, § 9.2(b), at 289–92.

<sup>49</sup> *See supra* note 19 and accompanying text.

<sup>50</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084–85 (2011).

<sup>51</sup> *Id.* at 2085.

overstate the implications of confining the concepts of probable cause (and reasonable suspicion) to their traditional meanings. While probable cause that someone is a material witness may not be the basis for a traditional warrant, it might nevertheless justify the issuance of a *Camara*-type warrant under the “special needs” administrative search exception to the warrant requirement.<sup>52</sup> That exception is taken up in Part III of this Article.

The *al-Kidd* majority’s second reference to these issues cuts clearly in the other direction. In response to a separate opinion written by Justice Ginsburg and joined by Justices Breyer and Sotomayor, the Court took issue with Justice Ginsburg’s observation that “[t]he word ‘suspicion’ . . . ordinarily indicates that the person suspected has engaged in wrongdoing.”<sup>53</sup> Citing “common” and “idiomatic” examples like “I have a suspicion she is throwing me a surprise birthday party,” the majority argued that the precedents cited by the three Justices “prove nothing except that searches and seizures for reasons other than suspected wrongdoing are rare.”<sup>54</sup> “The import of the term in legal argot is not genuinely debatable,” Justice Ginsburg convincingly retorted.<sup>55</sup> Moreover, as discussed below, Fourth Amendment intrusions for “other” purposes are not “rare.” They are, in fact, quite common, and are constitutionally permissible assuming they satisfy the requirements of the Court’s “special needs” jurisprudence.<sup>56</sup>

Justice Kennedy, who represented the fifth vote for the majority, also wrote separately, weighing in on these questions in a concurrence joined by the three Justices who signed on to the Ginsburg opinion. Acknowledging that “[t]he typical arrest warrant”—unlike a material witness warrant—is

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<sup>52</sup> See *Camara v. Mun. Court*, 387 U.S. 523, 538 (1967) (concluding that “the facts that would justify an inference of ‘probable cause’ to make an [administrative] inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken,” and that “probable cause” for a housing inspection warrant turns on “reasonable legislative or administrative standards for conducting an area inspection” (quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting))); see also *Griffin v. Wisconsin*, 483 U.S. 868, 877–78 & n.4 (1987) (noting the distinction between the “probable cause” required for “administrative search warrants” and for “constitutionally mandated judicial warrants”); *Michigan v. Tyler*, 436 U.S. 499, 506 & n.5 (1978) (observing that “[t]he showing of probable cause” needed for a warrant depends on “the object” of the search, and setting out the requirements for an administrative warrant to investigate the cause of a fire).

<sup>53</sup> *al-Kidd*, 131 S. Ct. at 2088 n.3 (Ginsburg, J., concurring in the judgment) (citing numerous Supreme Court precedents that “have uniformly used the term ‘individualized suspicion’ to mean ‘individualized suspicion of wrongdoing’”).

<sup>54</sup> *Id.* at 2082 n.2 (majority opinion).

<sup>55</sup> *Id.* at 2088 n.3 (Ginsburg, J., concurring in the judgment).

<sup>56</sup> In fact, these searches now consume an entire volume of the LaFave search and seizure treatise. See 5 LAFAVE, *supra* note 22, §§ 10.1–.11, at 3–541.

based on probable cause that the arrestee has committed a crime,” Justice Kennedy commended the Court for discussing “only the legal theory put before it” and leaving open the “difficult[]” issues surrounding “when material witness arrests might be consistent with statutory and constitutional requirements.”<sup>57</sup> Justice Kennedy went on to observe that even if material witness warrants do not fall within the Warrant Clause, they might nevertheless be constitutional under the Fourth Amendment’s “separate reasonableness requirement for seizures of the person.”<sup>58</sup> In support of this comment, Justice Kennedy cited the Court’s decision in *United States v. Watson*, which recognized an exception to the warrant requirement for arrests in public places.<sup>59</sup>

The next Section addresses the Fourth Amendment warrant exceptions, beginning with *Watson*. As that discussion makes clear, *Watson* does not support Justice Kennedy’s proposed justification for material witness warrants. Neither does the other plausible warrant exception—for exigent circumstances—thus leaving witness detentions subject to the dictates of the special needs doctrine.

## B. WARRANT EXCEPTIONS

Although the Supreme Court’s jurisprudence has traditionally premised the constitutionality of a Fourth Amendment intrusion on a warrant, the Court has not hesitated in recognizing numerous exceptions to the warrant requirement.<sup>60</sup> Aside from the special needs exception, which is analyzed in the following Part, neither of the other two credible

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<sup>57</sup> *al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring).

<sup>58</sup> *Id.*

<sup>59</sup> *United States v. Watson*, 423 U.S. 411 (1976).

<sup>60</sup> *See, e.g., Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (“Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured . . . [.] subject to certain reasonable exceptions.”); *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (“Although as a general matter, warrantless searches ‘are *per se* unreasonable under the Fourth Amendment,’ there are ‘a few specifically established and well-delineated exceptions’ to that general rule.” (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))); *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (“[O]ur analysis begins . . . with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are . . . unreasonable . . . subject only to a few . . . exceptions.’” (quoting *Katz v. United States*, 389 U.S. at 357)). *But cf. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 43, 47 (1969) (arguing that the Fourth Amendment was aimed primarily at oppressive warrants rather than warrantless searches and therefore that the warrant presumption “stood the amendment on its head”); Clancy, *supra* note 27, at 1034 (finding “little—if any—historical or modern support for creating a blanket warrant requirement”).

candidates—the exceptions for warrantless arrests and for exigent circumstances—supports the constitutionality of witness seizures.

### *I. Warrantless Arrests*

*United States v. Watson* upheld the constitutionality of a federal statute allowing postal inspectors to make warrantless arrests in a public place if they had “reasonable grounds to believe that the person to be arrested has committed or is committing . . . a felony.”<sup>61</sup> In support of its decision, the Court reasoned that the legislation in question was not “isolated or quixotic,” citing other comparable federal and state statutes as well as the “ancient” common law doctrine providing that warrantless felony arrests may be made in public based solely on probable cause.<sup>62</sup> Notably, the *Watson* Court specified that by probable cause, it was expressly referring to “[t]he usual rule [allowing warrantless arrests of persons] believed by the officer upon reasonable cause to have been guilty of a felony.”<sup>63</sup> *Watson* therefore does not support any alteration in the traditional understanding of probable cause.

Admittedly, the opinion in *Watson* relied on the “strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is “reasonable””—a description that arguably applies to the federal material witness statute as well.<sup>64</sup> Like the federal provision before the Court in *Watson*, the material witness statute is of longstanding duration and has analogues in every state.<sup>65</sup> The existence of a statute, even one with a lengthy pedigree, does not absolve it from constitutional scrutiny, however.<sup>66</sup> Moreover, the question whether these statutes historically

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<sup>61</sup> 18 U.S.C. § 3061(a)(3) (2006).

<sup>62</sup> *Watson*, 423 U.S. at 416, 418.

<sup>63</sup> *Id.* at 417 (quoting *Carroll v. United States*, 267 U.S. 132, 156 (1925)); *see also id.* at 419 (observing that “the prevailing rule” permits “a peace officer or a private citizen [to] arrest a felon without a warrant” (quoting *Kurtz v. Moffitt*, 115 U.S. 487, 504 (1885))); *id.* at 415 (noting that “there was probable cause in this case to believe that Watson had violated § 1708”).

<sup>64</sup> *Id.* at 416 (quoting *United States v. Di Re*, 332 U.S. 581, 585 (1948)).

<sup>65</sup> Material witness statutes have their roots in sixteenth-century English law, and the federal legislation dates back to 1789. *See* Carlson, *supra* note 23, at 944; Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN’S L. REV. 483, 487–89 (2002). Likewise, every state has a material witness statute, and most of them are more than a century old. *See In re Bacon*, 449 F.2d 933, 939 (9th Cir. 1971).

<sup>66</sup> *See, e.g.,* *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311 (1978) (striking down a provision in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a) (2006), that permitted warrantless safety inspections of business premises).



authorized the detention of a witness who had never refused to promise to appear is the subject of considerable dispute.<sup>67</sup>

Additionally, nothing in *Watson* deviated from the Court's standard Fourth Amendment jurisprudence, which conditions the constitutionality of searches and seizures on both a warrant *and* traditional probable cause (or some well-established exception to those requirements).<sup>68</sup> It is not entirely clear what Justice Kennedy meant by the reference in his *al-Kidd* concurrence to a "separate reasonableness requirement for seizures of the person," and he did not quote or cite any particular portion of the Court's ruling in *Watson*.<sup>69</sup> The opinion in *Watson* did evaluate whether it was "reasonable" within the meaning of the Fourth Amendment to recognize a warrant exception for arrests in public places,<sup>70</sup> but in this sense it was no different from any Fourth Amendment decision addressing the constitutionality of a new exception to the warrant requirement, whether for seizures or for searches.<sup>71</sup> A few recent Supreme Court opinions have used a general reasonableness-balancing rubric in a different way—to evaluate whether the Fourth Amendment was violated on the facts of the particular case—and those opinions are explored below in Part IV. But *Watson* is not one of them. Thus, Justice Kennedy's *al-Kidd* concurrence notwithstanding, *Watson* did not turn on "a separate reasonableness requirement" and certainly not one distinctly pertaining to "seizures of the person." *Watson* therefore cannot be relied upon to provide a constitutional foundation for witness detentions.

## 2. Exigent Circumstances

Exigency has long been considered a justification for dispensing with a warrant, but not an exception to probable cause. Thus, the fear that an individual may elude the police allows them to make a warrantless arrest, in the home, for example, but only if they also have probable cause to believe

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<sup>67</sup> See, e.g., Bascuas, *supra* note 11, at 705 (describing the view that federal law has traditionally permitted the arrest of material witnesses as one based on "flawed history"); Cook, *supra* note 11, at 606–10 (surveying English and American common law and finding no support for the detention of material witnesses who did not refuse to comply with a subpoena).

<sup>68</sup> See *supra* note 27 and accompanying text.

<sup>69</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring).

<sup>70</sup> See *United States v. Watson*, 423 U.S. 411, 415–17 (1976).

<sup>71</sup> See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (noting that "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions").

that the individual committed a crime.<sup>72</sup> Likewise, law enforcement officials may conduct a warrantless search to “prevent the imminent destruction of evidence,”<sup>73</sup> but only if they have probable cause to believe the evidence can be found in the place they are searching.<sup>74</sup> Like *Watson*’s warrant exception for arrests, therefore, the exigent circumstances doctrine does not support an expansion of the traditional understanding of probable cause.

Admittedly, as the Court recently observed in *Kentucky v. King*, its Fourth Amendment rulings have “identified several [types of] exigencies,”<sup>75</sup> some of which arise in situations where law enforcement officials have donned “the uniform of a firefighter” (or a paramedic) “rather than a policeman.”<sup>76</sup> Thus, in *Brigham City v. Stuart*, for example, the Court concluded that the “emergency aid” exception allows police to make a warrantless entry into a home “to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”<sup>77</sup> Likewise, in *Georgia v. Randolph*, the Court indicated that police may enter a home without a warrant to protect a victim of domestic violence.<sup>78</sup> But these cases involve “deviations from the typical police search”—i.e., from “the paradigmatic entry” for the criminal law enforcement purposes of arresting and searching for evidence.<sup>79</sup> Rather, in these situations the police are conducting a regulatory or administrative search, which can only be justified under the special needs doctrine discussed in the next Part.

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<sup>72</sup> See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *United States v. Santana*, 427 U.S. 38, 42–43 (1976).

<sup>73</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. at 403).

<sup>74</sup> See, e.g., *Vale v. Louisiana*, 399 U.S. 30, 34–35 (1970).

<sup>75</sup> *Kentucky v. King*, 131 S. Ct. at 1856.

<sup>76</sup> *Michigan v. Tyler*, 436 U.S. 499, 506 (1978).

<sup>77</sup> *Brigham City*, 547 U.S. at 403; see also *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (per curiam) (likewise applying the emergency aid doctrine).

<sup>78</sup> *Georgia v. Randolph*, 547 U.S. 103, 118 (2006). In both *Brigham City* and *Randolph*, the Court used variations of the ambiguous phrase “reason to believe” in discussing the standard of exigency the prosecution must meet. See *Brigham City*, 547 U.S. at 400 (noting that the police may make a warrantless entry into a home if they have “an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury”); *Randolph*, 547 U.S. at 118 (observing that police may enter a home to protect a victim of domestic violence “so long as they have good reason to believe such a threat exists”). For the view that terms like “reason to believe” muddle the concepts of probable cause and reasonable suspicion, see Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 649–57 (2009).

<sup>79</sup> *Tyler*, 436 U.S. at 504–05.

To be sure, the Court's opinion in *Brigham City v. Stuart* made an unconvincing attempt to distinguish the emergency aid doctrine at issue there from the administrative search cases—and it did so because the Court needed some justification for refusing to consider whether the police really entered the home “to assist the injured” or instead to “gather evidence.”<sup>80</sup> But in the single paragraph of the *Brigham City* opinion devoted to endorsing the emergency aid exception, the Court cited by way of support three of its precedents: two administrative search cases, *Michigan v. Tyler* and *Mincey v. Arizona*, and unsupported dictum from its two-month-old decision in *Georgia v. Randolph*.<sup>81</sup> *Tyler* described “[a] burning building” as an “emergency situation[]” that arises “in the regulatory field,” clearly distinguishing the administrative entry of the scene of a fire from the exigent circumstances exception available to “criminal law enforcement officials” who wish to enter without a warrant in order to effect an arrest or “prevent the imminent destruction of evidence.”<sup>82</sup> Likewise, in *Mincey* the Court refused to permit a search to “gather evidence” at a homicide scene that went beyond “legitimate emergency activities.”<sup>83</sup> And interestingly, *Georgia v. Randolph*, again in dictum, seemed to acknowledge the relevance of the police officer's motives, referring to “[t]he undoubted right of the police to enter *in order to protect* a victim.”<sup>84</sup> Therefore, despite the reasoning in *Brigham City*, the precedents on which the Court relied (in what Justice Stevens called “an odd flyspeck of a case”<sup>85</sup>) clearly recognized the analytical difference between criminal investigations and

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<sup>80</sup> *Brigham City*, 547 U.S. at 404. The Court's cursory discussion here suggested two possible arguments: that inquiries into motive are confined to “programmatically searches conducted without individualized suspicion,” and that such inquiries make no attempt to “discern[] what is in the mind of the individual officer conducting the search.” *Id.* at 405. As discussed below, *see infra* notes 143–70 & 179–84 and accompanying text, neither of these purported distinctions accurately describes the administrative search precedents. For further discussion of *Brigham City*'s refusal to acknowledge the relevance of police officer motives, *see infra* notes 163–70 and accompanying text.

<sup>81</sup> *See Brigham City*, 547 U.S. at 403 (citing *Randolph*, 547 U.S. at 118; *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *Tyler*, 436 U.S. at 509).

<sup>82</sup> *Tyler*, 436 U.S. at 506, 512 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 539 (1967)) (holding that police may make an administrative inspection of a fire scene if their “purpose is to ascertain the cause of a fire rather than to look for evidence of a crime,” but they need a warrant based on a “traditional showing of probable cause” to “gather evidence for a possible prosecution”).

<sup>83</sup> *Mincey*, 437 U.S. at 389, 393–95 (rejecting the state's call for a “murder scene exception” to the warrant requirement).

<sup>84</sup> *Randolph*, 547 U.S. at 118–19 (emphasis added); *see also id.* at 121 (observing that police may not enter based on the consent of one co-tenant if they “removed” another occupant “for the sake of avoiding a possible objection” (emphasis added)).

<sup>85</sup> *Brigham City*, 547 U.S. at 407 (Stevens, J., concurring).

administrative searches like those conducted pursuant to the emergency aid doctrine.<sup>86</sup>

Thus, the danger of losing a witness's testimony may well be a type of exigency, but that does not give the government constitutional carte blanche to detain her.<sup>87</sup> Assuming an absence of probable cause to believe the witness herself has committed a crime, which would trigger the exigent circumstances exception applicable in ordinary criminal law enforcement cases, the seizure must comply with the special needs doctrine described below. Even the presence of the material witness warrant in *al-Kidd*—or a court order in a case like *Camreta*<sup>88</sup>—does not change this calculus because those warrants, like the probable cause on which they are based, are *Camara*-type warrants issued in special needs cases rather than traditional warrants.<sup>89</sup> Thus, the only route to a constitutionally permissible detention of a witness, with or without a warrant, goes through the special needs doctrine. That doctrine is the subject of the next Part.

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<sup>86</sup> See also *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (referring to “community caretaking functions” in connection with an administrative inventory search); 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.6(b), at 86 (4th ed. Supp. 2010) (noting that it was “common” for lower courts applying the emergency aid doctrine prior to *Brigham City* to require that the “search must not be primarily motivated by intent to arrest and seize evidence” (quoting 3 LAFAYE, *supra* note 22, § 6.6(b), at 454)).

<sup>87</sup> The complaints in *al-Kidd* and *Camreta* were dismissed prior to trial, and it is disputed whether “a genuine exigency” existed on the facts of either case. *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011); see *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (noting that al-Kidd might have been “willing to testify if asked” and that the FBI may have “delay[ed] obtaining or executing the warrant until [he] arrived at the airport”); *id.* at 2087–88 (Ginsburg, J., concurring in the judgment) (pointing out that the affidavit submitted in support of the material witness warrant failed to reveal that al-Kidd’s “parents, wife, and children were all citizens and residents of the United States” and that al-Kidd “had cooperated with FBI agents each of the several times they had asked to interview him,” and also “misrepresented that al-Kidd was about to take a one-way flight to Saudi Arabia, with a first-class ticket costing approximately \$5,000 [when] in fact, al-Kidd had a round-trip, coach-class ticket that cost \$1,700”); *Greene v. Camreta*, 588 F.3d 1011, 1030 n.17 (9th Cir. 2009) (finding an absence of exigency given that the state officials waited to contact S.G. until three days after learning of her father’s release from jail and then sent her home following “the allegedly incriminating interview”), *vacated as moot*, 131 S. Ct. 2020 (2011).

<sup>88</sup> See, e.g., *Camreta*, 588 F.3d at 1030 (deeming “a court order permitting the seizure of a child” to be “the equivalent of a warrant”).

<sup>89</sup> See *supra* note 52 and accompanying text.

### III. “SPECIAL NEEDS” ADMINISTRATIVE SEARCHES

Since its 1967 decision in *Camara v. Municipal Court*,<sup>90</sup> the Supreme Court has recognized an exception to the traditional warrant requirement for administrative searches: regulatory inspections that have a “primary purpose” distinct from “the general interest in crime control,”<sup>91</sup> i.e., that serve “special needs, beyond the normal need for law enforcement.”<sup>92</sup> In order to pass constitutional scrutiny, these administrative searches must not only be motivated by a special need, but they must also survive a balancing test and must somehow limit the discretion of the individual inspectors. The Court’s opinions have fluctuated between treating discretion minimization as a separate hurdle that administrative inspections must clear or, instead, as one of the balancing factors considered in measuring the

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<sup>90</sup> *Camara v. Mun. Court*, 387 U.S. 523 (1967).

<sup>91</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

<sup>92</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)). The Court’s “special needs” construct has been subject to a good deal of criticism. *See, e.g.*, Clancy, *supra* note 27, at 1022 n.298 (calling the Court’s special needs doctrine “formless,” “more a facade for policy results than an analytical framework supporting reasoned decisionmaking”); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (concluding that “the term turns out to be no more than a label that indicates when a lax standard will apply”). Somewhat surprisingly, the *al-Kidd* majority referred to the “special-needs” and “administrative-search” cases as “[t]wo . . . ‘exceptions,’” and then went on to suggest that cases involving “vehicle checkpoints” may constitute yet another distinct analytical category. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080–82 (2011) (quoting *United States v. Knights*, 534 U.S. 112, 122 (2001)). The Court did not clearly define the difference it saw between administrative searches and special needs cases, though it may have viewed the former as searches and seizures “in execution of an administrative warrant,” and the latter as intrusions where “a judicial warrant and probable cause are not needed.” *Id.* at 2081. To be sure, *al-Kidd* was not the first opinion to suggest this distinction, although the Court has not shown much consistency here. *See Edmond*, 531 U.S. at 37 (mentioning the three types of cases separately); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 449–50 (1990) (rejecting applicability of special needs doctrine in a checkpoint case); Brooks Holland, *The Road ‘Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 297 n.20 (2006). *But cf. Edmond*, 531 U.S. at 45 (conflating the administrative search and special needs categories, and relying on both in evaluating a roadblock’s constitutionality). Moreover, the Court has used similar tools to test the constitutionality of these various intrusions, and it therefore seems artificial to separate them. *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION § 18.05[A], at 312 (5th ed. 2010) (noting that “there is little or no reason for [any] distinction”). *But cf. Eve Brensike Primus, Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 260–61 (2011) (arguing that “the first step toward developing a coherent approach to administrative searches” is to recognize the difference between “dragnet intrusions” and “special subpopulation searches”).

intrusiveness of the search or seizure.<sup>93</sup> Under either view, some restraint on discretion is a key consideration in special needs cases. Although most of the Fourth Amendment intrusions in this line of cases involve searches, the special needs doctrine also encompasses seizures.<sup>94</sup>

#### A. IDENTIFYING A SPECIAL NEED

As an initial matter, then, the special needs exception does not come into play if law enforcement is engaged in an activity “whose primary purpose [is] to detect evidence of ordinary criminal wrongdoing.”<sup>95</sup> Thus, in *City of Indianapolis v. Edmond*, the Court disapproved of roadblocks that had a “primary purpose of interdicting illegal narcotics.”<sup>96</sup> “When law

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<sup>93</sup> See, e.g., *Sitz*, 496 U.S. at 452–53 (observing that “the guidelines governing checkpoint operation minimize the discretion of the officers on the scene,” and the checkpoint’s intrusiveness is diminished because its location is “selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle”); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 622 (1989) (relying on “the standardized nature of the [drug] tests and the minimal discretion vested in those charged with administering the program”); *New York v. Burger*, 482 U.S. 691, 703 (1987) (premising the constitutionality of an administrative inspection on “a constitutionally adequate substitute for a warrant” so as to “limit the discretion of the inspecting officers” (quoting *Donovan v. Dewey*, 452 U.S. 594, 602–03 (1980))); *Colorado v. Bertine*, 479 U.S. 367, 374 n.6, 376 n.7 (1987) (noting that “[o]ur decisions have always adhered to the requirement that inventories be conducted according to standardized criteria” in order to “circumscribe the discretion of individual officers”); *Brown v. Texas*, 443 U.S. 47, 51 (1979) (calling the “assur[ance] that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field” a “central concern”); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (requiring a “substantial and objective standard or rule to govern the exercise of discretion,” and referring to “standardless and unconstrained discretion” as an “evil”); *Camara*, 387 U.S. at 532 (observing that a “disinterested party warrant” is needed for a housing inspection so as to avoid “leav[ing] the occupant subject to the discretion of the official in the field”).

<sup>94</sup> See *Illinois v. Lidster*, 540 U.S. 419, 422 (2004) (police set up a roadblock to inquire whether anyone had witnessed a recent hit-and-run and to distribute flyers seeking information about the accident).

<sup>95</sup> *Edmond*, 531 U.S. at 38. For criticism of the Court’s distinction between special needs and criminal law enforcement, see, e.g., Clancy, *supra* note 27, at 1025 (calling the line “illusory” and “unwise”); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 89 (referring to the distinction as “chimerical and irrelevant”). *But cf.* Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”*: *Suspicionless Searches, “Special Needs” and General Warrants*, 74 MISS. L.J. 501, 551 (2004) (linking the Court’s decision to take on a “judicial oversight” “role as an active ‘policy magistrate’” in these cases to “the concerns over general warrants that gave rise to the Fourth Amendment”).

<sup>96</sup> *Edmond*, 531 U.S. at 40; see also *id.* at 41 (distinguishing checkpoints “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety”).

enforcement authorities pursue primarily general crime control purposes at checkpoints,” the Court made clear, “stops can only be justified by some quantum of individualized suspicion.”<sup>97</sup> Likewise, in *Ferguson v. City of Charleston*, the Court struck down a program to drug test pregnant women suspected of using cocaine because its “immediate objective” was to “generate evidence for law enforcement purposes” and therefore it was not “divorced from the State’s general interest in law enforcement.”<sup>98</sup>

Seizing prospective witnesses for the purpose of conducting interviews or securing their testimony at trial is closely aligned with “the ordinary enterprise of investigating crimes,” and therefore seems to fall under *Edmond* and *Ferguson*.<sup>99</sup> Even though government officials may not suspect the particular individual they are seizing, they are “collect[ing] evidence for criminal law enforcement purposes.”<sup>100</sup> As a result, justifying these seizures under the “special needs” rubric appears problematic.

Nevertheless, in *Illinois v. Lidster*, the Court upheld the constitutionality of a “brief, information-seeking” roadblock aimed at uncovering information about a recent hit-and-run accident in the vicinity.<sup>101</sup> Distinguishing the drug interdiction checkpoint struck down in *Edmond*, the Court explained that the “primary law enforcement purpose” in *Lidster* was not to ascertain whether the “vehicle’s occupants were committing a crime,” but instead to ask them, “as members of the public, for their help in providing information about a crime in all likelihood committed by others.”<sup>102</sup> That reasoning is equally applicable to other witness seizures, and given *Lidster*’s related point that “the phrase ‘general interest in crime control’ does not refer to every ‘law enforcement’ objective,” the Court could conceivably consider the “special need”

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<sup>97</sup> *Id.* at 47.

<sup>98</sup> 532 U.S. 67, 83, 79 (2001); *see also* *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979) (concluding that “controlling automobile thefts” is not a special need).

<sup>99</sup> *Edmond*, 531 U.S. at 44; *see also id.* at 40 (requiring an interest “distinct from a general purpose of investigating crime”).

<sup>100</sup> *Ferguson*, 532 U.S. at 83 n.20.

<sup>101</sup> *Illinois v. Lidster*, 540 U.S. 419, 424 (2004).

<sup>102</sup> *Id.* at 423 (emphasis added); *see also id.* at 428 (Stevens, J., concurring in part and dissenting in part) (agreeing that “[t]here is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier”). *But cf.* *People v. Lidster*, 747 N.E.2d 419, 423 (Ill. App. Ct. 2001) (observing that the presence of a second police officer “on a side street, apparently to prevent drivers from evading the roadblock . . . tends to discredit the explanation that the police were merely seeking information”), *rev’d*, *Illinois v. Lidster*, 540 U.S. 419 (2004).

requirement satisfied in cases where witnesses were seized as part of an investigation into crimes “committed by others.”<sup>103</sup>

On the other hand, the *Lidster* Court expended a great deal of energy justifying its refusal to apply “an *Edmond*-type presumptive rule of unconstitutionality” by citing factors peculiarly characteristic of police efforts to “seek[] information from the public” as opposed to the targeted seizure of specific witnesses—the brevity of the seizure, the reduced expectation of privacy in automobiles, and the fact that “by definition, the concept of individualized suspicion has little role to play.”<sup>104</sup> None of these factors is a particularly apt description of the facts in *Camreta* or *al-Kidd*: even the seizure of S.G. lasted much longer than the ten- or fifteen-second stop in *Lidster*; the reduced expectation of privacy attached to vehicles was not implicated in either case; and the police were not casting a wide net but had zeroed in on S.G. and al-Kidd as potential witnesses.<sup>105</sup>

More importantly, support for restricting the reach of *Lidster* to law enforcement attempts “to obtain . . . information . . . from the *motoring* public” can be found in the Court’s comment that the exchange between police and drivers was “voluntary” after the initial “involuntary stop” at the checkpoint.<sup>106</sup> Noting that officials investigating a crime can typically ask “members of the public” for assistance because such interactions generally do not rise to the level of a Fourth Amendment “seizure,” the *Lidster* Court sought to avoid the “anomal[y]” of “ordinarily” permitting the police “freely to seek the voluntary cooperation of pedestrians” while “ordinarily” precluding them from “seek[ing] similar voluntary cooperation from motorists.”<sup>107</sup> But the practical reality constraining both the police and the Court in *Lidster*—that the only way to “‘approach[]” drivers and ask if

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<sup>103</sup> *Lidster*, 540 U.S. at 423–24 (quoting *Edmond*, 531 U.S. at 44 n.1). *But cf.* George M. Dery, III & Kevin Meehan, *Making the Roadblock a “Routine Part of American Life:” Illinois v. Lidster’s Extension of Police Checkpoint Power*, 32 AM. J. CRIM. L. 105, 118 (2004) (taking the position that the Court “stopped short” of finding a special need in *Lidster*).

<sup>104</sup> *Lidster*, 540 U.S. at 424, 426.

<sup>105</sup> It is possible that *Lidster*’s reference to “individualized suspicion” instead meant that the concept has no place when it comes to witnesses because there is no reason to believe they themselves committed a crime. That interpretation of *Lidster*, of course, undermines the *al-Kidd* majority’s suggestion that the term has a broader meaning. *See supra* notes 53–56 and accompanying text. For additional discussion of different varieties of individualized suspicion, see *infra* notes 179–84 and accompanying text.

<sup>106</sup> *Lidster*, 540 U.S. at 422, 425–26 (emphasis added); *see also id.* at 425 (noting that “citizens will often react positively when police simply ask for their help as ‘responsible citizen[s]’ to ‘give whatever information they may have to aid in law enforcement’” (quoting *Miranda v. Arizona*, 384 U.S. 436, 477–78 (1966))).

<sup>107</sup> *Id.* at 425, 426.



they are “willing to answer some questions” is to “seize” them—applies only in cases where witnesses are on the road.<sup>108</sup> Therefore, it requires an extension of *Lidster* to justify the involuntary detention of prospective witnesses like S.G. and al-Kidd, whose “voluntary cooperation” can be sought without seizing them. And even if the Court is willing to read *Lidster* broadly, of course, the special need recognized there arises only when police “expect[]” the seizure of the witness “to help them apprehend . . . other individuals,” not the witness herself.<sup>109</sup>

Cases like *Camreta*, where child witnesses are seized at school, can arguably be analogized to a different set of Supreme Court special needs decisions: those involving students. In *New Jersey v. T.L.O.*, the Court upheld the search of a student’s purse,<sup>110</sup> and *Board of Education v. Earls* and *Vernonia School District 47J v. Acton* allowed schools to drug test students involved in extracurricular activities.<sup>111</sup> But the “special need” found in those cases was tied—exclusively in *T.L.O.* and in part in the drug-testing cases—to the school’s interest in “maintain[ing] order,” “discipline,” and “a proper educational environment.”<sup>112</sup> Moreover, the searches in those cases were conducted exclusively by school personnel. Thus, in *T.L.O.* the Court pointed out that the search was not done “in

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<sup>108</sup> *Id.* at 425 (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)). For the definition of a Fourth Amendment “seizure,” see *supra* note 37 and accompanying text.

<sup>109</sup> *Lidster*, 540 U.S. at 423. If the Court is serious about separating roadblock cases from other special needs and administrative searches, of course *Lidster* is even more easily distinguished from *Camreta* and *al-Kidd*. See *supra* note 92.

<sup>110</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (allowing school officials to search a student based on a reasonable suspicion that “the search will turn up evidence” showing that the student violated “either the law or the rules of the school”); see also *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2637, 2643 (2009) (interpreting *T.L.O.* to allow a search of a thirteen-year-old student’s backpack and outer clothing, but not a strip search, where she was suspected of bringing “forbidden prescription and over-the-counter drugs” to school).

<sup>111</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (allowing drug testing of any student involved in “competitive extracurricular activities”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995) (approving drug testing of student athletes).

<sup>112</sup> *T.L.O.*, 469 U.S. at 341, 342 n.9; see also *Earls*, 536 U.S. at 828–29 (expressing concern about “unduly interfer[ing] with the maintenance of . . . swift and informal disciplinary procedures” (quoting *Acton*, 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 340–41))); *Acton*, 515 U.S. at 662 (observing that “the educational process is disrupted” at “a drug-infested school”); cf. Brief for the United States as Amicus Curiae Supporting Petitioners at 28, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478) (arguing that child abuse can “impede the ability of that child, or of other children, to participate in school activities”).

conjunction with or at the behest of law enforcement agencies.”<sup>113</sup> Likewise, the Court emphasized in both drug-testing opinions that the test results were not used for law enforcement purposes or disclosed to the police.<sup>114</sup> In each of those circumstances, the Court was therefore confidently able to state that the searches were “not in any way related to the conduct of criminal investigations.”<sup>115</sup> This conclusion does not follow as readily when a suspected victim of child abuse is seized, particularly where the police are involved and the interview occurs in connection with an ongoing criminal investigation.<sup>116</sup>

Although neither *Lidster* nor the school administrative search precedents are therefore controlling, a credible special need argument can nevertheless be made in both *Camreta* and *al-Kidd*. Child safety and welfare is obviously an important governmental interest, and the interview in *Camreta* was conducted by a child protective services caseworker, though he was accompanied by a deputy sheriff.<sup>117</sup> Likewise, in *al-Kidd*,

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<sup>113</sup> *T.L.O.*, 469 U.S. at 341 n.7 (making clear that the Court was leaving open “the appropriate standard for assessing the legality of searches” in such cases and was addressing “only searches carried out by school authorities acting alone and on their own authority”).

<sup>114</sup> See *Earls*, 536 U.S. at 833–34; *Acton*, 515 U.S. at 658 & n.2.

<sup>115</sup> *Earls*, 536 U.S. at 829.

<sup>116</sup> See *Greene v. Camreta*, 588 F.3d 1011, 1027 (9th Cir. 2009) (finding for this reason that “the presence of law enforcement objectives [was] evident”), *vacated as moot*, 131 S. Ct. 2020 (2011); see also *Gates v. Texas Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 424 (5th Cir. 2008) (rejecting a claim of special need because law enforcement officials participated in the search and its purpose was to investigate child abuse allegations); *Jones v. Hunt*, 410 F.3d 1221, 1228 (10th Cir. 2005) (limiting *T.L.O.* to seizures aimed at “preserv[ing] order on school property”); *Roe v. Texas Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002) (concluding that a social worker’s search was not justified by special need because child abuse investigations were “performed jointly with law enforcement agencies” and thus were “intimately intertwined with law enforcement”); *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993) (noting that a police officer’s “focus was not so much on the child as it was on the potential criminal culpability of her parents,” “the hallmark of a criminal investigation”). *But cf. Doe v. Bagan*, 41 F.3d 571, 575 n.3 (10th Cir. 1994) (applying *T.L.O.* in upholding a caseworker’s ten-minute school interview of a suspected child sex abuse victim); *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 372 (4th Cir. 1993) (per curiam) (applying *T.L.O.* to a search conducted by a deputy sheriff in a child neglect investigation given the “noncriminal nature of [the] visit”); *Darryl H. v. Coler*, 801 F.2d 893, 900–01 (7th Cir. 1986) (applying *T.L.O.* to a caseworker’s search in a child abuse and neglect case, and explaining that although criminal charges “may eventually result,” “the safety of the child” and “the stabilization of the home environment” are of “prime importance” to the caseworker).

<sup>117</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 757 (1982) (pointing out that “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance”). Child “health and safety” was also the predominant special need the Court relied on in the school drug-testing cases. *Earls*, 536 U.S. at 834; see also *id.* at 836–37 (“We know all too well that drug use carries a variety of health risks for children,

the government interest in keeping track of recalcitrant witnesses so as to protect the judicial process and facilitate accurate fact-finding at trial is arguably a goal distinct from ordinary criminal law enforcement.<sup>118</sup>

#### B. PRIMARY V. ULTIMATE PURPOSE

Nevertheless, the fact that the government's "ultimate" objective—to protect children or the judicial process—may be "benign rather than punitive" is insufficient by itself to satisfy the requirement of a "special need" distinct from ordinary criminal law enforcement.<sup>119</sup> As the Court noted in *Ferguson*, at some level all criminal law enforcement activity "serves some broader social purpose or objective."<sup>120</sup> It is therefore the "immediate," "primary," and "direct" goal that is of consequence, the Court cautioned, because otherwise "virtually any" police intrusion "could be immunized under the special needs doctrine."<sup>121</sup> The Court similarly concluded in *Edmond* that a "lawful secondary purpose" does not save a seizure primarily motivated by ordinary criminal law enforcement.<sup>122</sup> Thus,

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including death from overdose."); *Acton*, 515 U.S. at 661–62 (noting that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe" and that "the risk of immediate physical harm . . . is particularly high" for athletes).

<sup>118</sup> See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949, 990 (9th Cir. 2009) (Bea, J., concurring in part and dissenting in part) (arguing that material witness warrants serve "the need to assure the proper functioning of the judicial system"), *rev'd*, 131 S. Ct. 2074 (2011); Cochran, *supra* note 11, at 21 (observing that such warrants protect "the integrity of the criminal justice system"); Wesley MacNeil Oliver, *Material Witness Detentions After al-Kidd*, 100 Ky. L.J. 293, 322 (2012) (reasoning that "the goal of material witness arrests . . . must be viewed as unrelated to the ordinary enforcement of criminal law, if subpoenas can . . . be issued without judicial supervision").

<sup>119</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001); see also *id.* at 82–83 (acknowledging that the "ultimate goal" of the city's unconstitutional drug-testing program "may well have been to get the women in question into substance abuse treatment and off of drugs").

<sup>120</sup> *Id.* at 84; see also *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000) (likewise observing that "[t]he detection and punishment of almost any criminal offense serves broadly the safety of the community").

<sup>121</sup> *Ferguson*, 532 U.S. at 83–84; see also *Edmond*, 531 U.S. at 42 ("If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose."). *But cf. Ferguson*, 532 U.S. at 87 (Kennedy, J., concurring) (criticizing the majority's focus on immediate goals as contrary to the Court's special needs precedents because "[b]y very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence").

<sup>122</sup> *Edmond*, 531 U.S. at 46 (explaining that "[i]f this were the case . . . law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check"). *But see* David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, 15 U. PA. J. CON. L. (forthcoming

the fact that the government may secondarily be interested in protecting children or the integrity of the judicial process cannot justify a witness detention primarily animated by law enforcement concerns.<sup>123</sup>

But just as the government's ability to link an intrusion to some noncriminal policy goal is not sufficient to establish a special need, it is not dispositive that a witness detention can lead to criminal charges because that possibility can arise in virtually any of the regulatory search contexts, whether a sobriety checkpoint,<sup>124</sup> the inventory search of an automobile,<sup>125</sup> or even the housing inspection at issue in *Camara*.<sup>126</sup> Likewise, law enforcement involvement is not necessarily fatal to a special needs argument. The police staffed the sobriety and information-seeking roadblocks upheld in *Sitz* and *Lidster*,<sup>127</sup> and, even more telling, conducted the inspection of the automobile junkyard in *New York v. Burger*.<sup>128</sup> Nevertheless, the *Burger* Court ascribed "no constitutional significance" to the fact that the search was performed by the police instead of "'administrative' agents."<sup>129</sup> Reasoning that police officers often have "numerous duties in addition to those associated with traditional police work" and that some communities may lack "the resources to assign the enforcement of a particular administrative scheme to a specialized agency," the Court explained that the state had chosen to combat its "serious social

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2012) (manuscript at 25) (arguing that both *Ferguson* and *Edmond* were "single-motive cases involving single-purpose programs" and therefore that the Court's "'primary purpose' language is dicta"), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2043259](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2043259).

<sup>123</sup> These precedents therefore nicely counter one commentator's objection that it would have been "illogical" for the *al-Kidd* Court to make it "easier to arrest a bystander than a suspected terrorist." Oliver, *supra* note 118, at 326, 337. The government has a special needs justification for detaining both people assuming the primary purpose of the seizure is to secure their testimony at trial. But just as it is easier to defend the constitutionality of a roadblock designed to "ensur[e] roadway safety" than one aimed at "interdicting illegal drugs," so the administrative search exception more readily justifies the arrest of an "innocent" reluctant witness than one who is herself a suspected criminal. *Edmond*, 531 U.S. at 40–41. See also *infra* notes 206–07 and accompanying text (describing Supreme Court precedent rejecting the argument that the government's interest in investigating serious crimes triggers the special needs exception).

<sup>124</sup> See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding sobriety checkpoint).

<sup>125</sup> See *Colorado v. Bertine*, 479 U.S. 367 (1987) (upholding inventory search that led to discovery of contraband).

<sup>126</sup> See *Camara v. Mun. Court*, 387 U.S. 523, 531 (1967) ("Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes.").

<sup>127</sup> See *Illinois v. Lidster*, 540 U.S. 419, 422 (2004); *Sitz*, 496 U.S. at 447.

<sup>128</sup> See *New York v. Burger*, 482 U.S. 691 (1987).

<sup>129</sup> *Id.* at 717.

problem in automobile theft” on multiple fronts, using “different subsidiary purposes and . . . different methods of addressing the problem.”<sup>130</sup> The key, the Court thought, was whether the inspection of Burger’s property was “properly administrative”—i.e., whether the state was using the criminal laws to “punish[] [theft] or the possession of stolen property,” or instead was resorting to a separate “administrative,” “regulatory” scheme that was designed to “ensure that vehicle dismantlers are legitimate businesspersons,” to “mak[e] it unprofitable for persons to operate in the stolen car field,” and to enable the prompt identification of “stolen vehicles and vehicle parts passing through automobile junkyards.”<sup>131</sup> Likewise, in *Ferguson*, the Court was struck not by the mere involvement of the police in the drug-testing scheme, but by their “extensive” role “at every stage of the policy” and the fact that “the immediate objective of the searches was to generate evidence for law enforcement purposes.”<sup>132</sup>

It may well be that, in cases like *Camreta* and *al-Kidd*, government officials are interested both in protecting children or the judicial process and in obtaining evidence to be used in criminal prosecutions.<sup>133</sup> The Supreme Court has provided little guidance as to how courts are to untangle divergent motivations in these dual-purpose cases, and *Edmond* expressly left open the propriety of a checkpoint that was primarily designed to further a legitimate special need but also had “a secondary purpose of interdicting narcotics.”<sup>134</sup> In *Ferguson*, however, the Court instructed judges to make a “close review,” “consider[ing] all the available evidence,” in determining the primary purpose of a Fourth Amendment intrusion.<sup>135</sup> Although the Court has acknowledged “the challenges

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<sup>130</sup> *Id.* at 712, 713, 717.

<sup>131</sup> *Id.* at 713–14, 717 (quoting Letter of Stanley M. Gruss, Deputy Commissioner and Counsel, to Richard A. Brown, Counsel to the Governor (June 20, 1979), 1979 Bill Jacket); *see also id.* at 712–13 (“Administrative statutes and penal laws may have the same *ultimate* purpose of remedying [a] social problem, but . . . [a]n administrative statute . . . set[s] forth rules to guide an operator’s conduct of the business and allow[s] government officials to ensure that those rules are followed,” whereas “a major emphasis of [criminal laws] is the punishment of individuals for specific acts of behavior.”).

<sup>132</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001) (emphasis added); *see also id.* at 83 n.20 (“None of the [Court’s] special needs cases have . . . upheld the collection of evidence for criminal law enforcement purposes.”).

<sup>133</sup> *See Cochran*, *supra* note 11, at 14 (commenting on the “potential for significant overlap” between witnesses and suspects); *Coleman*, *supra* note 24, at 491–92 (pointing out that “the majority of child welfare programs” are “arguably true dual-purpose schemes”).

<sup>134</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 n.2 (2000).

<sup>135</sup> *Ferguson*, 532 U.S. at 81 (quoting *Chandler v. Miller*, 520 U.S. 305, 322 (1997)); *see also Edmond*, 531 U.S. at 46 (likewise pointing out that “we examine the available evidence to determine the primary purpose of the checkpoint program”).

inherent in a purpose inquiry,” it pointed out in *Edmond* that “courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful.”<sup>136</sup> The difficult judgment calls that arise in ascertaining motive are not confined to witness detention cases, or even to the special needs doctrine, and here, as elsewhere, courts have the tools to make them on a case-by-case basis.<sup>137</sup>

In fact, one source of “available evidence” that can shed light on an officer’s motives is objective evidence.<sup>138</sup> In cases where a material witness is arrested, for example, the length of the detention<sup>139</sup> and the government’s efforts to depose the detainee or take other steps to preserve her testimony<sup>140</sup> may help elucidate whether she is being held for the proper administrative purpose of securing her testimony or the impermissible law enforcement purpose of investigating her criminal culpability. Moreover, the facility in which the detainee is housed and the conditions under which she is confined may also be relevant (assuming the authorities have some

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<sup>136</sup> *Edmond*, 531 U.S. at 46–47.

<sup>137</sup> See, e.g., Coleman, *supra* note 24, at 490–501 (analyzing these questions in the context of child welfare investigations); Holland, *supra* note 92, at 299–327 (discussing similar issues that arise with roadblocks).

<sup>138</sup> Cf. *Michigan v. Tyler*, 436 U.S. 499, 507 (1978) (suggesting “relevant factors” to evaluate the permissibility of an entry to investigate a fire scene, including “[t]he number of prior entries, the scope of the search, the time of day when it is proposed to be made, [and] the lapse of time since the fire”).

<sup>139</sup> See Michael Greenberger, *Indefinite Material Witness Detention Without Probable Cause: Thinking Outside the Fourth Amendment*, in *AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES* 83, 107 (Thomas E. Baker & John F. Stack, Jr., eds. 2006) (finding a twenty-day detention under a material witness warrant “surprising[] and inexplicabl[e]”); cf. Holland, *supra* note 92, at 347 (noting that an “unreasonably extended sobriety inquiry” suggests that a DUI checkpoint “effectively has become a suspicionless criminal inquiry”).

<sup>140</sup> The federal material witness statute prohibits the arrest of a material witness on the grounds of “inability to comply with any condition of release” if her testimony “can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice,” and further provides that “release . . . may be delayed for a reasonable period of time until the deposition can be taken.” 18 U.S.C. § 3144 (2006). The Senate Report accompanying the 1984 amendments to the Bail Reform Act “stresse[d] that whenever possible, the deposition of such witnesses should be obtained so that they may be released from custody.” S. REP. NO. 98-225, at 28 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211. For the view that material witnesses should not be detained if the prosecution can depose them, see, e.g., Carlson, *supra* note 23, at 955; Cook, *supra* note 11, at 586–87. *But cf.* Oliver, *supra* note 118, at 336–37 (noting that the statute articulates “no criteria” for courts to use in evaluating “the government’s need for live as opposed to transcribed testimony”).

choice in these matters).<sup>141</sup> Finally, and most important, is the nature of the interrogation questions asked of her—whether they focus on her knowledge of crimes committed by others or her own suspected criminal activity.<sup>142</sup> Similarly, relevant objective factors in a case like *Camreta* are the location, tone, and length of the interview; the identities of the interrogator and others in the room; and the kinds of questions asked. This type of objective evidence can help alleviate the difficulties that arise in ascertaining the primary motive underlying a witness detention, especially in a dual-purpose case.

It remains to consider whose motive or purpose is dispositive in making these judgments. The next Section takes up that issue.

### C. PROGRAMMATIC V. INDIVIDUAL PURPOSE

The Supreme Court has admonished that “the purpose inquiry” in special needs cases should be “conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.”<sup>143</sup> Picking up on this language, Ashcroft argued in *al-Kidd* that the focus ought to be on Congress’s purpose in passing the federal material witness statute, not the allegedly pretextual intentions of the former Attorney General or the federal agents who obtained the material witness warrant authorizing al-Kidd’s arrest.<sup>144</sup> Similarly, the Ninth Circuit in

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<sup>141</sup> See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2089 (2011) (Ginsburg, J., concurring in the judgment) (noting that al-Kidd’s claims relating to “the brutal conditions of his confinement” had been settled, “[b]ut his ordeal is a grim reminder of the need to install safeguards against disrespect for human dignity”); *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) (observing that “when, as here, the government is empowered to detain those who are not charged with crimes, it is under an obligation not to treat them like criminals”), *rev’d*, 131 S. Ct. 2074 (2011); *Oliver*, *supra* note 118, at 315–16 (reporting that New York City built a “separate facility” in the mid-nineteenth century so that material witnesses “would not languish in the same condition as pre-trial detainees and convicted misdemeanants”); *cf.* *New York v. Burger*, 482 U.S. 691, 717 (1987) (pointing out that limited resources may constrain governments).

<sup>142</sup> *Cf.* *Holland*, *supra* note 92, at 346 (arguing that “[w]hether the police programmatically assigned disparate checkpoint resources to crime control inquiries . . . objectively may reveal whether the checkpoint was ‘primarily’ a sobriety checkpoint”).

<sup>143</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (citing *Whren v. United States*, 517 U.S. 806 (1996)); *see also* *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (observing that the “special needs” inquiry examines “the purpose behind the program” and “has nothing to do with” the intent of the individual officer who performed the search). For criticism of this distinction, see *Clancy*, *supra* note 27, at 1026 (calling the line drawn by the Court “ironic” given that the writs of assistance and general warrants animating the Fourth Amendment were “suspicionless intrusions approved of at the programmatic level”).

<sup>144</sup> Brief for Petitioner at 35, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98); *see also* *al-Kidd v. Ashcroft*, 580 F.3d 949, 990 (9th Cir. 2009) (Bea, J., concurring in part

*Camreta* undertook a “review of Oregon’s statutory scheme” in rejecting the state’s assertion of a special need in that case.<sup>145</sup>

This programmatic focus makes sense when a constitutional challenge is leveled at the administrative program as a whole—for example, cases attacking the federal material witness statute itself, the roadblocks set up in *Edmond*, *Lidster*, and *Sitz*, or the drug-testing policies at issue in *Ferguson* and the school cases. It even makes sense when one particular Fourth Amendment intrusion is challenged and the officials involved were following procedures established by those who set up the administrative scheme—if, for example, a suspected victim of child sexual abuse was questioned in conformity with state child welfare laws mandating that caseworkers and police officers interview children together as part of a multidisciplinary approach to child abuse.<sup>146</sup> In either of these circumstances, a finding that the program’s primary purpose was divorced from ordinary criminal law enforcement suffices to ensure that the intrusion in question was justified by a special need.<sup>147</sup>

On the other hand, when issues arise concerning the constitutionality of a particular search or seizure that was not dictated by regulatory procedures, when individual government actors are afforded discretion in implementing the administrative scheme, an evaluation of programmatic purpose is not sufficient to prevent criminal law enforcement intrusions masquerading as special needs searches or seizures. As the Court explained in *Michigan v. Tyler*, the constitutionality of an overall regulatory scheme, such as “routine building inspections,” can be assessed by examining

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and dissenting in part) (arguing that “the relevant inquiry is not into the motivations of individual officers who obtained and executed the particular warrant on which al-Kidd was detained, but into the ‘programmatic purpose’ that provides the constitutional justification for the material witness statute”), *rev’d*, 131 S. Ct. 2074 (2011). *But see id.* at 969 (majority opinion) (concluding that the focus should be on the “general policy, designed and implemented by Ashcroft, whose programmatic purpose was not to secure testimony, but to investigate those detained”).

<sup>145</sup> *Greene v. Camreta*, 588 F.3d 1011, 1028 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); *see also* Brief for Petitioner James Alford at 28–32, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (No. 09-1478) (engaging in a similar inquiry). *But see* Brief for Respondents at 70, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478) (disputing existence of special need by citing Deputy Sheriff Alford’s admission that his presence at S.G.’s interview was for law enforcement purposes).

<sup>146</sup> *See* *Coleman*, *supra* note 24, at 492–95 (describing such statutory schemes).

<sup>147</sup> *Cf.* *Holland*, *supra* note 92, at 300 (noting that “[s]uspicionless checkpoints are evaluated at a programmatic level because . . . the program, not individual officer discretion, controls the checkpoint’s execution” and therefore “the purpose inquiry properly is limited to the program itself”).



“broad legislative or administrative guidelines.”<sup>148</sup> By contrast, for administrative searches that “are not programmatic” but instead are “responsive to individual events,” such as the fire investigations at issue in *Tyler*, the Court cautioned that “a more particularized inquiry may be necessary” to “prevent[] harassment” and ensure that inspectors are not impermissibly “look[ing] for evidence of a crime.”<sup>149</sup> In the latter scenario, there is no real question surrounding any “program” per se, and the purposes of the “individual officers acting at the scene” must become an appropriate subject of scrutiny.<sup>150</sup> Otherwise, government officials are given an opportunity to circumvent the limitations on special needs intrusions and impermissibly use them for purposes of routine criminal law enforcement.

Admittedly, in discussing automobile inventory searches in *Colorado v. Bertine*, the Court indicated that an administrative regime may afford some discretion to individual police officers, “so long as that discretion is exercised according to standard criteria.”<sup>151</sup> But the Court cautioned that the officer’s actions must also be based on “something other than suspicion of evidence of criminal activity.”<sup>152</sup> Moreover, it took pains to point out that there was “no showing that the police chose to impound Bertine’s van in order to investigate suspected criminal activity,” thus confirming the importance of this individualistic focus when government officials have discretion to choose, for example, to inspect a fire scene, inventory a car, or detain a prospective witness.<sup>153</sup>

Support for the dichotomous approach proposed here can be found in the *Whren* line of cases as well as the Supreme Court’s special needs jurisprudence. The *Whren* opinion itself specifically discussed special needs precedents that analyzed the motives of the officials conducting the inspections to make sure they were not engaged in a pretextual search for evidence.<sup>154</sup> In explaining why an officer’s “ulterior motive” was relevant

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<sup>148</sup> *Michigan v. Tyler*, 436 U.S. 499, 507 (1978) (identifying “the purpose, frequency, scope, and manner of conducting the inspections” as relevant considerations).

<sup>149</sup> *Id.* at 507–08.

<sup>150</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

<sup>151</sup> 479 U.S. 367, 375 (1987).

<sup>152</sup> *Id.* at 375.

<sup>153</sup> *Id.* at 376; *see also id.* at 374 (finding that the “inventory procedures [were] administered in good faith”).

<sup>154</sup> *See Whren v. United States*, 517 U.S. 806, 811–12 (1996) (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990) (“[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.”); *Bertine*, 479 U.S. at 372 (“[T]here had been ‘no showing that the police, who were following standardized procedures [in inventorying a vehicle], acted in bad faith or for the sole purpose of investigation.’”); *New York v. Burger*,

in that context, the *Whren* Court reasoned—in language later echoed in *al-Kidd*<sup>155</sup>—that these opinions “simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.”<sup>156</sup> And in *al-Kidd* itself, the Court likewise pointed out that the special needs and administrative search exceptions “do not apply where *the officer’s purpose* is not to attend to the special needs or to the investigation for which the administrative inspection is justified.”<sup>157</sup>

As both *Whren* and *al-Kidd* confirmed, and as reflected in the discussion above of *Michigan v. Tyler* and *Colorado v. Bertine*, the Court’s special needs decisions have considered the motivations of individual government officials. For example, in rejecting the contention that the inspection of the junkyard in *New York v. Burger* “had no truly administrative purpose,” the Court first examined the statute’s general structure and concluded that the state legislature “had proper regulatory purposes for enacting the administrative scheme and was not using it as a ‘pretext’ to enable law enforcement authorities to gather evidence of penal law violations.”<sup>158</sup> But the Court then went on to make clear that the search of Burger’s property was conducted “solely pursuant to the administrative scheme,” such that there was “no reason to believe that *the instant inspection* was actually a ‘pretext’ for obtaining evidence” of a crime.<sup>159</sup>

Likewise, in *Lidster*, the Court observed that in setting up the roadblock, “[t]he police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals.”<sup>160</sup> But the Court also thought it important to point out that there was “no allegation here that the police acted in a discriminatory or otherwise unlawful manner *while questioning* motorists during stops.”<sup>161</sup> Most recently, in *City of Ontario v. Quon*, the Court concluded that the search of a city employee’s text messages was based on a permissible “noninvestigatory work-related purpose,” given the specific reasons why the chief of police “ordered the

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482 U.S. 691, 716–17 n.27 (1987) (“[T]he search did not appear to be ‘a “pretext” for obtaining evidence of . . . violation of . . . penal laws.’”).

<sup>155</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

<sup>156</sup> *Whren*, 517 U.S. at 811–12.

<sup>157</sup> *al-Kidd*, 131 S. Ct. at 2081 (emphasis added).

<sup>158</sup> *Burger*, 482 U.S. at 712.

<sup>159</sup> *Id.* at 716 n.27 (emphasis added).

<sup>160</sup> *Illinois v. Lidster*, 540 U.S. 419, 423 (2004).

<sup>161</sup> *Id.* at 428 (emphasis added).

search.”<sup>162</sup> Thus, the special needs decisions, and their treatment in the *Whren* line of cases, support consideration of the subjective motivations of individual government actors who are given discretion to choose to seize a prospective witness.

Once again, however, that “odd flyspeck of a case,” *Brigham City v. Stuart*, rears its head.<sup>163</sup> As discussed above, the Court’s cursory discussion of the emergency aid doctrine in that decision refused to recognize that police entries to help injured persons fall within the special needs realm.<sup>164</sup> In fact, the *Brigham City* Court distinguished the administrative search cases and found *Whren* controlling, concluding that “the individual officer’s state of mind” was “irrelevant” and therefore it did “not matter . . . whether the officers entered the kitchen to arrest . . . and gather evidence . . . or to assist the injured and prevent further violence.”<sup>165</sup> But entries to provide emergency aid, like entries to investigate the cause of a fire, are constitutional only when the officers’ “purpose is . . . to attend to the special needs,”<sup>166</sup> and not when they conduct “searches that are *not* made for those purposes,” such as searches for evidence.<sup>167</sup> Therefore, the Court erred in applying *Whren* and denying the relevance of a police officer’s subjective motivation in a special needs case like *Brigham City*. And to the extent the *Brigham City* Court was troubled by the difficulties involved in “neatly unravell[ing]” an individual official’s subjective purpose<sup>168</sup> or was sympathetic to the fear that allowing an inquiry into an individual officer’s

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<sup>162</sup> *City of Ontario v. Quon*, 130 S. Ct. 2619, 2631 (2010) (quoting *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987)) (explaining that the police chief “ordered the search in order to determine whether the character limit on the City’s contract with [the company that supplied its pagers] was sufficient to meet the City’s needs”); *see also Michigan v. Clifford*, 464 U.S. 287, 292 (1984) (plurality opinion) (observing that the constitutionality of a fire inspection turns on “whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity”).

<sup>163</sup> *Brigham City v. Stuart*, 547 U.S. 349, 407 (2006) (Stevens, J., concurring).

<sup>164</sup> *See supra* notes 80–86 and accompanying text.

<sup>165</sup> *Brigham City*, 547 U.S. at 404–05; *see also Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) (per curiam) (noting that the “‘emergency aid exception’ does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises,” but instead “requires only ‘an objectively reasonable basis for believing’ that ‘a person within [the house] is in need of immediate aid’” (quoting *Brigham City*, 547 U.S. at 404–05, 406; *Mincey v. Arizona*, 437 U.S. 385, 392 (1978))).

<sup>166</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011).

<sup>167</sup> *Whren v. United States*, 517 U.S. 806, 812 (1996).

<sup>168</sup> *Brigham City*, 547 U.S. at 405; *see also Cochran, supra* note 11, at 30–31 (predicting that “determin[ing] ‘pretext’ on a case-by-case basis” will be “extremely difficult” and “fraught with problematic possibilities” given that “it is highly unlikely that [a future] Attorney General will announce a department-wide policy of using the material witness statute to detain terrorist suspects”).

subjective motivation will eviscerate *Whren*,<sup>169</sup> relying on the objective evidence described above can help assuage those concerns.<sup>170</sup>

D. WARRANTS, INDIVIDUALIZED SUSPICION, AND OTHER DISCRETION-LIMITING DEVICES

In addition to distinguishing programmatic and individual purposes, *Brigham City* cited a second rationale in its attempt to avoid the purpose inquiry mandated by the administrative search cases, and it is one the Court picked up on in *al-Kidd*: that evaluations of motive are confined to “programmatic searches conducted without individualized suspicion.”<sup>171</sup> As noted above, the *al-Kidd* Court rightly acknowledged that a Fourth Amendment intrusion allegedly conducted for administrative purposes is invalid if actually motivated by an impermissible investigative purpose.<sup>172</sup> Nonetheless, *al-Kidd* found the special needs and administrative inspections cases—and therefore an “invalidating-purpose inquiry”—irrelevant in that case for two reasons: first, because the Government “seeks to justify [al-Kidd’s] arrest on the basis of a properly issued judicial warrant,” and, second, picking up where *Brigham City* left off, because that warrant was “based on individualized suspicion.”<sup>173</sup> Contrary to the Court’s suggestion, however, neither an administrative warrant nor individualized suspicion excuses the failure to require proof of a permissible purpose under the special needs doctrine.

It is not the warrant itself, of course, that immunizes a search from constitutional scrutiny. Even a traditional warrant can be lacking in probable cause or fail the particularity requirements.<sup>174</sup> More important, the existence of a warrant does not take a Fourth Amendment intrusion outside the administrative inspection doctrine. Some regulatory searches—like the housing inspections in *Camara* and the non-emergency fire investigations in *Tyler*—are based on warrants, though not, of course, a traditional search warrant based on individualized probable cause.<sup>175</sup> The critical

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<sup>169</sup> See Transcript of Oral Argument at 24, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98) (Chief Justice Roberts voices concern that “the allegation can so readily be made in every case under the material witness statute . . . that this is one of those bad intent cases, and the case has to proceed so that we can prove that”).

<sup>170</sup> See *supra* notes 138–42 and accompanying text.

<sup>171</sup> *Brigham City*, 547 U.S. at 405.

<sup>172</sup> *al-Kidd*, 131 S. Ct. at 2081, 2083.

<sup>173</sup> *Id.* at 2081, 2082.

<sup>174</sup> See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 557–58 (2004); *United States v. Leon*, 468 U.S. 897, 923 (1984).

<sup>175</sup> See *supra* note 52 and accompanying text.

constitutional inquiry in cases involving warrants—both traditional and administrative ones—is, as the *al-Kidd* Court recognized, whether the warrant was “properly issued.”<sup>176</sup> In the administrative search context, a warrant is “properly issued” only if it is justified by a special need distinct from ordinary criminal law enforcement. Thus, an administrative warrant to search the scene of a fire is “properly issued” only to investigate the cause of the fire and not to search for evidence of arson or some other crime.<sup>177</sup> Likewise, a material witness warrant can be “properly issued” only to secure the testimony of a witness and not to detain a suspect.<sup>178</sup> If the primary motivation underlying the arrest is the ordinary criminal law enforcement purpose of neutralizing a suspect, then the warrant is not properly issued under the special needs doctrine. Thus, the *al-Kidd* majority erred by suggesting that the material witness warrant obviated a purpose inquiry.

Echoing *Brigham City*, the *al-Kidd* Court additionally distinguished *Edmond* and *Ferguson* on the ground that at issue in each of those cases was “a general scheme of searches without individualized suspicion.”<sup>179</sup> But, as discussed above in Part II.A, under the traditional understanding of the term “individualized suspicion”—reason to believe a suspect committed a crime—such suspicion was absent in *al-Kidd* as well. Individualized suspicion of criminal activity justifies a stop or arrest, including, according

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<sup>176</sup> *al-Kidd*, 131 S. Ct. at 2081.

<sup>177</sup> See *Michigan v. Tyler*, 436 U.S. 499, 511–12 (1978).

<sup>178</sup> See, e.g., Bascuas, *supra* note 11, at 736 (decrying the “roundup of innocents” under material witness statutes); Carlson, *supra* note 23, at 971, 975 (arguing that material witness warrants should be not used as a “ruse” to seize and question suspects, and that government should not be permitted to do an “end-run around critical steps in criminal procedure simply by labeling the arrestee a ‘witness’”); Studnicki & Apol, *supra* note 65, at 486 (calling “investigatory detentions” of witnesses a “misuse” of material witness laws). *But cf.* Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J.L. & LIBERTY 727, 729 (2005) (finding that, “as a practical matter, the power to detain witnesses has never been used any other way”); Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681, 685 (2009) (concluding that suspects have been detained as material witnesses since the nineteenth century and the “dichotomy between innocent witness and the criminal suspect . . . rarely existed”).

<sup>179</sup> *al-Kidd*, 131 S. Ct. at 2081 n.1; see also *id.* at 2082 (“The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of not only our special-needs and administrative-search cases, but of *Edmond* as well.”); Oliver, *supra* note 118, at 312 (similarly reasoning that “[t]he ‘special needs’ cases . . . do not provide a ready analogy to the detention of material witnesses” because “[t]he witness’s seizure and detention is far from random”).

to *Edmond*, a stop at a narcotics checkpoint.<sup>180</sup> In such cases, however, as the Court made clear in *Edmond*, government officials are “pursu[ing] primarily general crime control purposes.”<sup>181</sup> They are not acting under the special needs doctrine, and it is for that reason that no inquiry into purpose is called for.

When officials act, however, based on other varieties of individualized suspicion—“reasonable grounds for suspecting” that a student is violating school rules,<sup>182</sup> or “reasonable suspicion that [a] driver is unlicensed or his vehicle unregistered”<sup>183</sup>—they are wearing their administrative hats and therefore must comply with the special needs doctrine. Cases like *al-Kidd*, where, as the Court put it, the FBI had “individualized reasons to believe that [al-Kidd] was a material witness and that he would soon disappear,” are no different.<sup>184</sup> Without individualized suspicion that al-Kidd himself had committed a crime, the government must rely on a special needs rationale to arrest him. At that point, the “purpose inquiry” becomes relevant, and it cannot be avoided by a showing of individualized suspicion (or even a warrant).

In administrative inspection cases, individualized suspicion or a warrant does a nice job of placing limits on the discretion of the officials conducting the search or seizure. But neither one replaces the separate requirement that the intrusion be justified by some government interest distinct from ordinary criminal law enforcement.<sup>185</sup> The special need finding ensures that the government interest suffices to bypass the traditional probable cause and warrant required in ordinary criminal law enforcement cases. Administrative warrants and individualized suspicion—

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<sup>180</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) (“When law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . , stops can only be justified by some quantum of individualized suspicion.”).

<sup>181</sup> *Id.*

<sup>182</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

<sup>183</sup> *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

<sup>184</sup> *al-Kidd*, 131 S. Ct. at 2082.

<sup>185</sup> See *New York v. Burger*, 482 U.S. 691, 702–03 (1987) (listing the separate hurdles that an administrative inspection must clear, and requiring both a “‘substantial’ government interest that informs the regulatory scheme” and “‘a constitutionally adequate substitute for a warrant’” (quoting *Donovan v. Dewey*, 452 U.S. 594, 602–03 (1980))). Conflating these two requirements, the dissenting Ninth Circuit opinion in *al-Kidd* thus erred in citing *Burger*’s reference to a “constitutionally adequate substitute for a warrant” to support the conclusion that the issuance of a material witness warrant for al-Kidd meant “there is simply no need to inquire into the government’s ‘programmatic purpose.’” *al-Kidd v. Ashcroft*, 580 F.3d 949, 986–87 (9th Cir. 2009) (Bea, J., concurring in part and dissenting in part), *rev’d*, 131 S. Ct. 2074 (2011); see also *supra* notes 90–93 and accompanying text (explaining the distinct requirements an administrative search must satisfy).

like other mechanisms used in the regulatory context to minimize the discretion exercised by government actors<sup>186</sup>—serve two additional functions. They protect against the arbitrary exercise of discretion,<sup>187</sup> and they reduce the intrusiveness of the search or seizure by reassuring the individual involved that the infringement on her privacy “is being made pursuant to the law and has a properly defined scope.”<sup>188</sup> Thus, the *al-Kidd* majority was wrong to suggest that either a material witness warrant or individualized suspicion directed at al-Kidd (but not tied to his own suspected wrongdoing) excused the Court from inquiring whether a material witness warrant was obtained in that case primarily to investigate al-Kidd’s suspected terrorist activities.

It is conceivable, however, that the *al-Kidd* Court would reach the same destination via a different route. Given the majority’s assumption that al-Kidd conceded the validity of the material witness warrant used to arrest him,<sup>189</sup> the Court did not evaluate whether the FBI had the requisite probable cause to believe that al-Kidd had “material” testimony to offer in “a criminal proceeding” and that it might “become impracticable to secure [his] presence . . . by subpoena.”<sup>190</sup> Four of the Justices—Justice Kennedy and the three who joined Justice Ginsburg’s separate opinion—did not seem

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<sup>186</sup> See *supra* note 93 and accompanying text.

<sup>187</sup> See *Burger*, 482 U.S. at 703 (observing that “‘a constitutionally adequate substitute for a warrant’ . . . must limit the discretion of the inspecting officers” (quoting *Donovan*, 452 U.S. at 603)); *Prouse*, 440 U.S. at 654–55 (noting that in the absence of “‘some quantum of individualized suspicion,’ other safeguards are generally relied upon to assure that the individual’s reasonable expectation of privacy is not ‘subject to the discretion of the official in the field’” (quoting *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967))).

<sup>188</sup> *Burger*, 482 U.S. at 703; see also *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 621–22 (1989) (noting that a warrant “protect[s] privacy interests by assuring citizens subject to a search or seizure . . . that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope”); *Camara*, 387 U.S. at 532 (requiring an administrative warrant for housing inspections because otherwise “the occupant has no way of knowing whether enforcement of the municipal code . . . requires inspection of his premises, no way of knowing the lawful limits of the inspector’s power to search, and no way of knowing whether the inspector himself is acting under proper authorization”).

<sup>189</sup> See *supra* note 19 and accompanying text.

<sup>190</sup> 18 U.S.C. § 3144 (2006). See *In re Bacon*, 449 F.2d 933, 943 (9th Cir. 1971) (interpreting the federal material witness statute to condition issuance of a warrant on “probable cause to believe (1) ‘that the testimony of a person is material’ and (2) ‘that it may become impracticable to secure his presence by subpoena’” (quoting an earlier version of the federal statute)); see also *Bascuas*, *supra* note 11, at 716, 703 (noting that *Bacon* has been “uncritically adopted” by other federal courts and cited by Congress as the “exclusive legal authority for the statute”).

confident that these requirements were met on the facts of *al-Kidd*,<sup>191</sup> and the Government conceded that the statutory prerequisites would not likely be satisfied in a case involving a witness prosecutors had no intention of calling.<sup>192</sup> But even if the Court's approach would eventually reach these questions in the context of assessing whether a warrant was supported by probable cause, its opinion in *al-Kidd* erred by conflating administrative and ordinary criminal law enforcement intrusions and by implying that a warrant and individualized suspicion take a case out of the special needs doctrine. Doctrinal consistency therefore calls for considering these issues as part of a special needs analysis, as proposed here.

#### E. SPECIAL NEEDS BALANCING

Finally, assuming a special need divorced from ordinary criminal law enforcement and some mechanism in place to cabin the discretion of the individual officials making the seizure, the detention of a witness will pass constitutional scrutiny under the Court's special needs cases only if it survives a balancing test that weighs "the need to [seize] against the invasion which the [seizure] entails."<sup>193</sup> The discussion of the Court's Fourth Amendment reasonableness balancing cases in Part IV also addresses the relevant countervailing interests, but it is important for our purposes here to highlight some of the considerations that have influenced the Court in other circumstances where it has applied a balancing test to administrative inspections.

In rejecting Fourth Amendment challenges in such cases, the Court has often been able to cite the reduced expectation of privacy enjoyed by the individuals subjected to the search or seizure—because, for example, they

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<sup>191</sup> See *supra* note 87; see also Transcript of Oral Argument, *supra* note 169, at 39 (Justice Kennedy suggests that claims of pretextual material witness arrests can "be resolved under the issue of materiality"); Oliver, *supra* note 118, at 295–96, 299 (describing the affidavit submitted in support of the warrant for al-Kidd's arrest as "remarkably short" and "conclusory," and concluding that "no federal judge should have issued such a warrant").

<sup>192</sup> See Transcript of Oral Argument, *supra* note 169, at 15 (admitting that a "prosecutor[s] subjective intent" not to call a witness "will almost always reflect the fact that materiality just objectively hasn't been met" in that case); Reply Brief for Petitioner at 15–16, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98) (acknowledging that "it would be likely that at least one of the objective requirements of the statute was not satisfied" if the prosecutor told the magistrate she did not intend to use a witness's testimony, although claiming that the prosecutor's "subjective intent . . . would not be relevant to the magistrate's inquiry").

<sup>193</sup> *Camara*, 387 U.S. at 536–37. Given this balancing inquiry, it is not obvious, as one commentator has asserted, that treating "the interest in securing witnesses . . . like other special needs" would allow "only a de minimis intrusion on a citizen's liberty." Oliver, *supra* note 118, at 314.



have chosen to operate a business in a “closely regulated” industry,<sup>194</sup> to take part in extracurricular activities,<sup>195</sup> or to accept a particular job.<sup>196</sup> Witnesses and victims cannot be said to have made any such choices, however. The Court has also indicated that children like S.G. have a diminished expectation of privacy at school,<sup>197</sup> but that argument may carry less weight when the Fourth Amendment intrusion does not involve a school-related matter.<sup>198</sup>

Another factor the Court has taken into account in measuring the severity of the privacy infringement in special needs cases is the intrusiveness of the government action, “[v]iewed [both] objectively” and “subjectively.”<sup>199</sup> Relevant considerations in assessing objective intrusiveness in witness detention cases are the length of the seizure<sup>200</sup> and the sensitivity of the information sought from the detainee,<sup>201</sup> as well as the use to which the information is put.<sup>202</sup> Subjective intrusiveness turns on the

<sup>194</sup> *New York v. Burger*, 482 U.S. 691, 700 (1987); *see also, e.g., United States v. Biswell*, 406 U.S. 311, 316 (1972) (“When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.”).

<sup>195</sup> *See Bd. of Educ. v. Earls*, 536 U.S. 822, 831–32 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

<sup>196</sup> *See Treasury Emps. v. Von Raab*, 489 U.S. 656, 671–72 (1989) (upholding drug testing of Customs Service employees who sought certain positions); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 624–25, 627 (1989) (allowing drug testing of railroad employees who were involved in a major accident or violated certain safety rules); *cf. Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (noting that the pregnant women tested there had the same high expectation of privacy “enjoyed by the typical patient”). *But cf. Schulhofer, supra* note 95, at 88 (finding it “bizarre” that under the administrative search doctrine, “the law-abiding public . . . fare[s] worse, than those whose criminal activities prompt traditional police searches and seizures”).

<sup>197</sup> *See Earls*, 536 U.S. at 830–31; *Acton*, 515 U.S. at 654–57.

<sup>198</sup> *See supra* note 116 and accompanying text.

<sup>199</sup> *Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004).

<sup>200</sup> *See id.* at 427 (noting that “[c]ontact with the police lasted only a few seconds”); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (referring to the checkpoint as a “brief stop”).

<sup>201</sup> *See Lidster*, 540 U.S. at 428 (observing that “[p]olice contact consisted simply of a request for information and the distribution of a flyer”); *see also, e.g., City of Ontario v. Quon*, 130 S. Ct. 2619, 2631 (2010) (explaining, in finding that a city’s review of text messages sent on an employee’s “employer-provided pager” was not overly intrusive, that there was a reduced “risk that the review would intrude on highly private details of [the employee’s] life”); *Acton*, 515 U.S. at 658–59 (deeming it “significant that the tests at issue here look only for drugs, and not for whether the student is . . . epileptic, pregnant, or diabetic,” and finding “some cause for concern” because students were required to disclose their prescription medications).

<sup>202</sup> *See Earls*, 536 U.S. at 833–34; *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); *Acton*, 515 U.S. at 658–59 & n.2.

extent to which the seizure generates “anxiety or alarm”<sup>203</sup> or involves singling out a particular individual, factors that seem to lean toward the detainee’s side of the scale in cases like *Camreta* and *al-Kidd*.<sup>204</sup>

In balancing the government interests on the other hand, no one can doubt the importance of terrorism and child sexual abuse investigations. By way of comparison, *Lidster* described the public interest at issue in a hit-and-run case as “grave” because the “crime had resulted in a human death.”<sup>205</sup> Nevertheless, the Court has also made clear that the special needs exception is not triggered simply by the “severe and intractable nature” of a particular social problem,<sup>206</sup> given that “the same can be said of various other illegal activities.”<sup>207</sup> Likewise, law enforcement officials obviously encounter obstacles in pursuing suspected terrorists and child molesters, but that is also true of other criminal investigations.<sup>208</sup> Despite the public interests implicated in witness seizure cases, therefore, the unavailability of a reduced expectation of privacy argument makes the government’s ability to prevail in a balancing test problematic, especially if the seizure is particularly intrusive.

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<sup>203</sup> *Lidster*, 540 U.S. at 428; see also *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2641 (2009) (relying on the “embarrassing, frightening, and humiliating” nature of a strip search, and pointing out that “adolescent vulnerability intensifies the patent intrusiveness of the exposure”); *Sitz*, 496 U.S. at 452 (weighing “the fear and surprise engendered in law-abiding motorists by the nature of the stop”); *Coleman*, *supra* note 24, at 488–89 (observing that the Court considers how “stigmatizing” and “demeaning” the government action was).

<sup>204</sup> See, e.g., *Lidster*, 540 U.S. at 428 (noting that there “[t]he police stopped all vehicles systematically”); *Acton*, 515 U.S. at 658 (pointing out that “the drugs for which the samples are screened are standard, and do not vary according to the identity of the student”); *Sitz*, 496 U.S. at 453 (taking into account that the sobriety checkpoints were “selected pursuant to the guidelines, and uniformed police officers stop[ped] every approaching vehicle”).

<sup>205</sup> *Lidster*, 540 U.S. at 427.

<sup>206</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (striking down drug checkpoints despite the fact that “traffic in illegal narcotics creates social harms of the first magnitude”); see also *Ferguson*, 532 U.S. at 86 (acknowledging that “drug abuse both was and is a serious problem,” but concluding that “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose” (quoting *Edmond*, 531 U.S. at 42)).

<sup>207</sup> *Edmond*, 531 U.S. at 42; see also *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (observing, in refusing to recognize a “murder scene exception” to the warrant requirement, that, while murder is an “extremely serious crime,” “the public interest in the investigation of other serious crimes is comparable”). *But cf.* *Cochran*, *supra* note 11, at 36 (calling for a “national security detention” exception to the probable cause requirement).

<sup>208</sup> *Edmond*, 531 U.S. at 42 (acknowledging that “the drug trade creates . . . daunting and complex” difficulties for law enforcement); see also *Mincey*, 437 U.S. at 393 (observing that “[t]he investigation of crime would always be simplified if warrants were unnecessary”).

In general, then, government officials encounter several hurdles in trying to justify witness detentions under the administrative search exception. First, the primary purpose of the seizure must be some special need divorced from ordinary criminal law enforcement. Where challenges are directed at a discretionary witness detention decision made by particular government actors, rather than at the administrative scheme as a whole, the subjective motivations of those individuals must be examined, although objective evidence can shed light on that inquiry. If the seizure's immediate goal is to collect evidence from a child abuse victim, or to investigate the witness herself rather than preserve her testimony, then government officials are not acting to serve a legitimate special need. Second, the administrative scheme must include some mechanism to cabin the discretion exercised by the government officials making these detention decisions—for example, a material witness warrant, a court order, or some form of “administrative” individualized suspicion.<sup>209</sup> Finally, the government interests served by the detention must outweigh the intrusion on the witness's privacy interests. As discussed further in the Part that follows, the outcome of this balancing test is likely to be subject to considerable debate on the facts of particular cases and will turn on the circumstances of the witness detention at issue.

#### IV. REASONABLENESS BALANCING

Although the Supreme Court has often balanced law enforcement interests against individual privacy interests in deciding whether to create exceptions to the warrant requirement,<sup>210</sup> two recent opinions—*United States v. Knights*<sup>211</sup> and *Samson v. California*<sup>212</sup>—deviated from the Court's Fourth Amendment jurisprudence and relied exclusively on this balancing test in finding that no constitutional violation occurred on the particular facts of the case. The Solicitor General's amicus brief in *Camreta* pointed to these two decisions in urging the Court that an intrusion “may be ‘otherwise reasonable within the meaning of the Fourth Amendment’ irrespective of whether it is deemed reasonable under a special-needs

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<sup>209</sup> For examples of this type of individualized suspicion, see *supra* notes 182–84 and accompanying text.

<sup>210</sup> See *Terry v. Ohio*, 392 U.S. 1, 20–21 (1966) (stop and frisk); see also, e.g., *Michigan v. Summers*, 452 U.S. 692, 701–03 (1981) (detention of occupant during execution of search warrant); *Coolidge v. New Hampshire*, 403 U.S. 443, 467–68 (1971) (plurality opinion) (plain view); *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967) (administrative inspections).

<sup>211</sup> *United States v. Knights*, 534 U.S. 112 (2001).

<sup>212</sup> *Samson v. California*, 547 U.S. 843 (2006).

analysis.”<sup>213</sup> Similarly, the dissenting Ninth Circuit judge in *al-Kidd* cited *Knights* as support for expanding the concept of probable cause to “any governmental interest . . . weighty enough to justify an intrusion into individual rights.”<sup>214</sup> Justice Kennedy’s concurring opinion in *al-Kidd* made reference to “the Fourth Amendment’s separate reasonableness requirement for seizures,” although he did not mention either of these cases.<sup>215</sup> Any extension of such a “freewheeling” balancing approach is unwise, however, and would leave government officials speculating as to when they were permitted to seize prospective witnesses.<sup>216</sup>

At issue in *Knights* and *Samson* were search conditions imposed on probationers and parolees in California. *Knights* agreed as a condition of probation that his person and property could be searched at any time, and the Court unanimously upheld a search of his residence based only on reasonable suspicion.<sup>217</sup> *Samson* went a step further, allowing even the “suspicionless search” of a parolee pursuant to a California statute requiring every parolee to agree to submit to a search or seizure at any time.<sup>218</sup> In both cases, the Court took the view that “[t]he touchstone of the Fourth Amendment is reasonableness” and concluded that the searches were reasonable under the “general Fourth Amendment approach of ‘examining the totality of the circumstances’”—i.e., by balancing “‘the degree to which [the search] intrudes upon an individual’s privacy’” against “‘the degree to which it is needed for the promotion of legitimate governmental interests.’”<sup>219</sup> The extension of *Knights* in *Samson* provoked three Justices

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<sup>213</sup> Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 112, at 25–26 (quoting *Knights*, 534 U.S. at 117–18); *see also* Brief for Petitioner James Alford, *supra* note 145, at 14, 37–38 (encouraging the Court to decide the case “according to a balancing of relevant public and private interests,” and citing *Knights* in support of the proposition that “the Court has found numerous widespread societal problems sufficiently grave to weigh in favor of searches or seizures conducted without a warrant, probable cause or in some cases individualized suspicion”).

<sup>214</sup> *al-Kidd v. Ashcroft*, 580 F.3d 949, 987 n.7 (9th Cir. 2009) (Bea, J., concurring in part and dissenting in part), *rev’d*, 131 S. Ct. 2074 (2011).

<sup>215</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring). For a discussion of Justice Kennedy’s concurrence, *see supra* notes 57–59 & 69–71 and accompanying text.

<sup>216</sup> Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994).

<sup>217</sup> *Knights*, 534 U.S. at 114, 122.

<sup>218</sup> *Samson v. California*, 547 U.S. 843, 846 (2006).

<sup>219</sup> *Knights*, 534 U.S. at 118–19 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *see also Samson*, 547 U.S. at 848; *Knights*, 534 U.S. at 122 (“[O]ur holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of the search.”).

to dissent, pointing out the “unprecedented” nature of holding that “a search supported by neither individualized suspicion nor ‘special needs’ is nonetheless ‘reasonable.’”<sup>220</sup> But the majority responded that “reasonableness, not individualized suspicion,” drives the Fourth Amendment and the Constitution “imposes no irreducible requirement of such suspicion.”<sup>221</sup>

The amorphous balancing test in evidence in *Knights* and *Samson* has deservedly been subject to academic criticism, on the grounds that it can easily be manipulated to justify any particular result and therefore provides no real guidance to law enforcement.<sup>222</sup> Fortunately, the Court does not seem ready to jettison its Fourth Amendment jurisprudence in favor of a general reasonableness approach. In fact, since *Knights* and *Samson*, it has been “business as usual” at the Court, with subsequent Fourth Amendment decisions paying lip service to the “reasonableness as ‘touchstone’” mantra but otherwise generally adhering to the warrant presumption model.<sup>223</sup>

Should the Court decide, however, to use this approach in assessing the constitutionality of seizing witnesses, it is impossible to predict how the Justices would balance the competing concerns.<sup>224</sup> Any criminal case involves important government interests, especially in terrorism and child

<sup>220</sup> *Samson*, 547 U.S. at 857–58 (Stevens, J., dissenting).

<sup>221</sup> *Id.* at 855–56 n.4 (majority opinion) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

<sup>222</sup> See, e.g., Anthony C. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393–94 (1974) (criticizing the “sliding scale approach” because it “converts” the law into “one immense Rorschach blot,” which can “only produce more slide than scale [and] means in practice . . . that appellate courts defer to trial courts and trial courts defer to the police”); Kaye, *supra* note 122, at 16 (arguing that the Court should not “do its own balancing” in cases that “merely enforce the criminal law,” but only in “exceptional cases” where “the interests differ . . . from the canonical ones for which warrants and probable cause are necessary”); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 544 (2003) (observing that “there is no original understanding of a ‘reasonable’ search, and that the Court has simply followed modern, relativistic usage in creating categories of searches that are, and are not, reasonable”). But see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 804 (1994) (advocating that we “[keep] our eyes fixed on reasonableness as the polestar of the Fourth Amendment”).

<sup>223</sup> Kaye, *supra* note 122, at 20 (calling the approach taken in *Knights* and *Samson* “an anomaly” seemingly limited to “the two P’s—probationers, and parolees”). For examples of recent Supreme Court opinions ignoring the reasoning used in *Knights* and *Samson*, see *supra* note 60.

<sup>224</sup> See Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 976 (2004) (pointing out that when there are “weighty loads on both sides of the scale, . . . straight-up balancing” is unlikely to provide “any meaningful insight”).

abuse investigations. On the other hand, the law enforcement interests at stake when someone is still only a suspect may not carry the same weight as the goal of combating recidivism implicated in *Knights* and *Samson*.<sup>225</sup>

Moreover, the privacy interests on the other side of the balance are obviously much stronger here, where the individual seized is merely a witness to a crime. Witnesses and victims have a greater expectation of privacy than the suspects who are typically the subject of Fourth Amendment intrusions<sup>226</sup>—and certainly when compared to probationers and parolees.<sup>227</sup> Finally, the other factors used in the special needs balancing context are relevant here as well, and here, as there, the results of the balancing test are likely to depend on the facts of the particular witness detention.<sup>228</sup>

## V. CONCLUSION

The Fourth Amendment is not triggered every time the police wish to interview a prospective witness. But when the authorities choose to “seize” a witness, they must comply with the dictates of that Amendment. Assuming they lack probable cause or reasonable suspicion of criminal wrongdoing on the part of the witness herself, law enforcement officials are wearing their administrative hats when they detain her and the special needs doctrine provides the only constitutional route for doing so.

Despite the Court’s reluctance to entertain questions of subjective motivation in Fourth Amendment litigation, it has repeatedly recognized an exception in special needs cases. For constitutional claims directed at a witness detention program as a whole, or a particular seizure mandated by the program, that purpose inquiry can be performed at the programmatic level. But when the constitutionality of a government actor’s discretionary decision to seize a witness is challenged, the motivations of the individual official must be evaluated. Otherwise, government officials have an opportunity to do an end run around the limitations on administrative

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<sup>225</sup> See *Samson*, 547 U.S. at 853 (citing statistics showing a recidivism rate among California parolees around 70%); *United States v. Knights*, 534 U.S. 114, 120 (2001) (noting that probationers are “more likely than the ordinary citizen to violate the law” and have “even more of an incentive to conceal their criminal activities . . . than the ordinary criminal” (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987))).

<sup>226</sup> See *supra* note 43 and accompanying text.

<sup>227</sup> See *Knights*, 534 U.S. at 121 (noting that probationers have “significantly diminished privacy interests”); *Samson*, 547 U.S. at 850 (observing that parolees have even “fewer expectations of privacy than probationers, because parole is more akin to imprisonment”).

<sup>228</sup> See *supra* notes 193–209 and accompanying text.

inspections and impermissibly use them for purposes of routine criminal law enforcement.

Therefore, the special needs doctrine cannot justify the detentions in *al-Kidd* and *Camreta* if government officials used the federal material witness statute pretextually to arrest al-Kidd in order to continue their investigation of him, or if the primary motivation for seizing S.G. was to collect evidence to be used in prosecuting the criminal charges pending against her father. Under those circumstances, the officials' immediate purpose was not "to attend to [any] special needs" distinct from ordinary criminal law enforcement.<sup>229</sup> Before the Supreme Court tackles any of the other constitutional questions that arise from witness detentions, hopefully it will correct the misstep it made in *al-Kidd* by indicating that the subjective motivations underlying the seizure of a witness are irrelevant to the Fourth Amendment analysis.

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<sup>229</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011).